

# Where *United Haulers* Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule

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*ABSTRACT: Fourteen years ago, in C & A Carbone, Inc. v. Town of Clarkstown, the U.S. Supreme Court held that a local government had unconstitutionally discriminated against interstate commerce when it forced its citizens to purchase all waste-transfer services from a single local private supplier. In a recent decision, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority, the Court refused to extend the principle of Carbone to a law that required citizens to purchase these same services from a local government-operated facility. The Court thereby engrafted on the dormant Commerce Clause a new state-self-promotion exception, which receives its first extended treatment in this Article. I begin by identifying the many contexts in which this exception may take hold, touching in the process on subjects as diverse as public/private joint ventures, utility regulation, the fixing of user fees, and state tax rules that are tied to government operations. I then explore the often subtle ways in which the state-self-promotion exception will interact with existing features of dormant Commerce Clause law and propose guiding principles for deciding difficult questions that the exception presents. Finally, I examine the spillover effects that this innovation may have on current debates over both the legitimacy and scope of the dormant Commerce Clause and the proper reach of Congress's power to regulate commercial matters. My analysis reveals that the state-self-promotion exception is not a constitutional sideshow. Rather, it is a major new doctrinal initiative that is destined to have a far-reaching—though now greatly underappreciated—impact.*

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## I. INTRODUCTION

The so-called “dormant Commerce Clause”<sup>1</sup> prohibits state action that “discriminates against or unduly burdens interstate commerce.”<sup>2</sup> By forging a “federal free trade unit,”<sup>3</sup> this constitutional restriction has bred a level of “material success” that ranks as “the most impressive in the history of commerce.”<sup>4</sup> It also has brought “solidarity,”<sup>5</sup> if not “salvation,”<sup>6</sup> to fifty diverse and potentially antagonistic states.<sup>7</sup>

The dormancy doctrine has spawned many controversies,<sup>8</sup> and one modern conundrum surfaced in *C & A Carbone, Inc. v. Town of Clarkstown*.<sup>9</sup> In that case, the Court detected unlawful discrimination against interstate commerce in an ordinance that mandated citizens to deliver all local trash to a single, in-state, privately owned waste-transfer station.<sup>10</sup> The difficulty with the law, according to the Court, was that it operated solely “for the benefit of the preferred processing facility,”<sup>11</sup> thereby “depriv[ing] out-of-state businesses of access to a local market.”<sup>12</sup> In its 2007 ruling in *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*,<sup>13</sup> the Court turned its attention to a closely related question—whether the principle of

1. Dep’t of Revenue v. Davis, 128 S. Ct. 1801, 1802 (2008).

2. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997).

3. H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949).

4. *Id.*

5. *Id.* at 535.

6. Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 523 (1935).

7. See *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm’n*, 341 U.S. 329, 340 (1951) (Frankfurter, J., dissenting) (noting that the dormant Commerce Clause has been beneficial). Justice Frankfurter stated:

It is easy to mock or minimize the significance of “free trade among the states,” which is the significance given to the Commerce Clause by a century and a half of adjudication in this Court. With all doubts as to what lessons history teaches, few seem clearer than the beneficial consequences which have flowed from this conception of the Commerce Clause.

*Id.* (citation omitted). For a treatment that emphasizes the dormant Commerce Clause’s nation-unifying role, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-5, at 1057 (3d ed. 2000).

8. See generally DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 209–46 (2004) (canvassing the Supreme Court’s treatment of the dormant Commerce Clause over nearly two centuries); TRIBE, *supra* note 7, §§ 6-3 to -23 (same).

9. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

10. The waste-transfer station received bulk solid waste and separated recyclable from nonrecyclable items. The waste-transfer station then baled recyclable waste for shipment to a processing facility and sent nonrecyclable waste to landfills or incinerators for disposal. *Id.* at 387.

11. *Id.* at 392.

12. *Id.* at 389.

13. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

*Carbone* applies when a local-processing requirement favors a public, rather than a private, waste-handling facility.<sup>14</sup> Effectively creating a new state-self-promotion exception to the antidiscrimination rule, the Court in *United Haulers* concluded that *Carbone* did not control.<sup>15</sup>

In *Department of Revenue v. Davis*,<sup>16</sup> the Court reaffirmed the principle of *United Haulers* and again upheld state action that impeded free interstate trade. The issue in *Davis* was whether Kentucky could enhance the salability of its own bonds by exempting interest earned on them from its income tax, even while fully taxing interest paid on all other bonds, including bonds issued by sister states.<sup>17</sup> In upholding Kentucky's action, the Court looked past the state's stark discrimination between intrastate and interstate commerce, reasoning that the "tax scheme parallels the ordinance upheld in *United Haulers*"<sup>18</sup> because it "benefit[s] a clearly public [issuer] . . . , while treating all private [issuers] exactly the same."<sup>19</sup> At least as a general rule, the Court proclaimed, no constitutionally cognizable discrimination inheres in laws aimed at "favoring . . . States and their subdivisions" since government entities have the distinctive mission of "provid[ing] public goods and services on their own."<sup>20</sup>

In this Article, I examine the doctrinal initiative launched in *United Haulers* and *Davis*. My analysis proceeds in four steps. In Part II, I survey the case law, noting along the way why the Court in *United Haulers* cabined its holding in *Carbone* and how the Court in *Davis* extended the reach of *United Haulers*. This analysis gives rise to two key conclusions. First, the Court's recent decisions put in place a significant new limit on longstanding dormant Commerce Clause protections. Second, this new doctrine has its roots in two justifications: (1) the view that constitutionally problematic "protectionism" seldom lurks in laws that benefit society-serving public institutions, rather than gain-seeking private entities, and (2) the predictive judgment that local political processes typically will safeguard the interests of nonresidents threatened by state-self-promoting programs, thus lessening the need for a judicial check on government overreaching in this context.

In Part III, I turn to the implications of *United Haulers* and *Davis*. I suggest in particular that the Court's new state-self-promotion principle will have wide-ranging effects in five major categories of cases: (1) cases (like

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14. *Id.* at 334.

15. The term "state-self-promotion exception" is one of my own creation. The academic literature has begun to produce other possible names for the principle developed in *United Haulers*. See, e.g., *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 282 (2008) (referring to the principle of *United Haulers* as the "government entity exemption").

16. *Dep't of Revenue v. Davis*, 128 S. Ct. 1801 (2008).

17. *Id.* at 1804–05.

18. *Id.* at 1811.

19. *Id.* (first and third alterations in original) (quoting *United Haulers*, 550 U.S. at 342).

20. *Id.* at 1809.

*United Haulers*) that involve local-processing requirements tied to traditional public programs that the state either runs itself or operates via a joint venture; (2) cases (much like *United Haulers*) that involve exclusive distribution rights accorded to so-called “utilities,” including monopoly providers of water, electricity, or natural gas; (3) cases (unlike both *United Haulers* and *Davis*) in which the state forces local citizens to make use of a government-provided service traditionally supplied through the private sector; (4) cases (like *Davis*) that involve state efforts to promote favored local interests by way of the taxing system; and (5) cases in which states seek to leverage the immunity afforded by *United Haulers* and *Davis* (thus going beyond what both of those precedents directly authorize) by either (a) channeling work that state-self-promoting monopolies generate exclusively to local, private-sector service providers or (b) coupling the operation of permissible state-self-promoting forced-use rules with user fees that far exceed charges reasonably calibrated to recapture program costs. As Part II shows, the Court’s recent decisions raise a sufficiently diverse range of issues such that there is no easy answer to the question: “Where will *United Haulers* take us?”

Part IV builds on the analysis of Parts II and III by suggesting that courts should bring to bear three overarching considerations as they evaluate future state-self-promotion cases. First, courts must understand how the state-self-promotion exception fits together with other elements of dormant Commerce Clause law. There are many subtle connections between the Court’s new state-self-promotion doctrine and preexisting features of the dormant Commerce Clause landscape. Courts must take care to consider these relationships as they apply the principles of *United Haulers* and *Davis*.

Second, the policies identified in Part II as having spurred creation of the state-self-promotion principle should guide judicial efforts to sort through that principle’s implications. Thus, any proper evaluation of concrete disputes must take account of (1) a private-gains-centered notion of state protectionism and (2) an evaluation of the underlying dynamics of the political processes that produced the challenged state law. As Part III illustrates, in many contexts—ranging from public/private joint ventures to state-issued private-activity bonds to “cradle to grave” waste-service programs to high-end state user fees—careful evaluation of these dual considerations should help point the way to sound results.

Third, courts must be ever-mindful that *United Haulers* and *Davis* reflect a doctrinal ambitiousness that the opinions in those cases tend to understate. Some might argue that the innovative nature of the state-self-promotion doctrine, and the Court’s unlabored endorsement of it, support its broad application going into the future. There is, however, a different—and I believe more proper—view to take. Given the deep roots of the dormant Commerce Clause rule and the vital service it has rendered to the nation, courts should hesitate to apply the principles of *United Haulers* and

*Davis* to validate discriminatory state programs absent powerful indications that the principle should control. At the least, courts should think long and hard before invoking the state-self-promotion exception to uphold programs that operate primarily to benefit private market actors rather than the state itself.

In Part V of this Article, I explore what *United Haulers* and *Davis* suggest about how the Roberts Court will approach the Commerce Clause in other settings. My conclusion is that these rulings may well lay the groundwork for additional constitutional innovations. In the dormant Commerce Clause context, key reforms could involve: (1) a retreat from the Court's use of so-called *Pike*-balancing analysis as a tool for scuttling commerce-impeding state laws; (2) a contraction of the market-participant exception to the dormant Commerce Clause rule; or (3) an overruling of important precedents, including *Carbone* itself. No less important, the underlying logic of *United Haulers* and *Davis* could lead to new protections of state autonomy as the Court measures the reach of not only the dormant Commerce Clause, but also Congress's enumerated powers. In particular, the Court's emphasis of the traditional character of the challenged state program in both *United Haulers* and *Davis* could lead the Court to abandon its landmark, Congress-empowering ruling in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>21</sup>

The analysis that follows showcases the breadth and complexity of the legal field touched by *United Haulers* and *Davis*. My hope is that the point-by-point assessment offered here will aid courts as they grapple with the now-still-nascent, but soon-to-be-much-litigated, state-self-promotion exception to the dormant Commerce Clause antidiscrimination rule.

## II. THE CASES

### A. CARBONE

The *Carbone* case grew out of a local government's effort to provide for the proper handling of solid waste. Citing health and environmental concerns, the government of Clarkstown, New York, made arrangements for a private firm to build and operate a local "transfer station" structured to help sort and package waste materials prior to their disposal or later retransfer as recyclables.<sup>22</sup> To ensure the continued operation of the facility, the town took two main steps. First, it authorized the firm to charge tipping fees that exceeded charges imposed by other waste-handling firms located both inside and outside the state.<sup>23</sup> Second, pursuant to a so-called "flow

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21. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (rejecting the use of the traditional-government-function test as a source of state immunity from federal regulation).

22. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387, 392–93 (1994).

23. *Id.* at 387.

control” ordinance, it mandated that all waste generated in Clarkstown be delivered to the new facility.<sup>24</sup>

The Court invalidated this program, reasoning that the locality’s scheme represented “just one more instance of local processing requirements that we long have held invalid.”<sup>25</sup> Because the Clarkstown ordinance conflicted with the core notion that a state may not “hoard a local resource,” it discriminated against interstate commerce and therefore triggered “rigorous scrutiny.”<sup>26</sup> Applying this standard, the Court determined that the town’s forced-use rule was not sustainable as a “financing measure” because the less restrictive alternative of government subsidization could effectively ensure the facility’s continued operation.<sup>27</sup> The Court also rejected the town’s argument that compelled use of a single plant would best facilitate proper waste handling. According to the Court, the town could address its goal through the less restrictive alternative of “uniform safety regulations” structured to “ensure that competitors . . . do not underprice the market by cutting corners.”<sup>28</sup>

Along the way, the majority in *Carbone* noted that a “private” entity operated the local transfer station.<sup>29</sup> In doing so, the Court (perhaps unwittingly) flagged the possibility that the principle of *Carbone* would not

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24. *Id.* In addition, the town guaranteed a minimum revenue stream to the facility. *Id.* As a practical matter, the forced-use rule thus served to ensure that this revenue stream would come from tipping fees that waste haulers and waste producers paid, rather than from make-up payments made by the town itself.

25. *Id.* at 391–92. The Court relied on cases such as *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (invalidating a rule that barred transit of shrimp from state unless the heads and hulls had first been removed there), and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (invalidating a municipal ordinance that required processing and bottling of all milk sold within the city at a plant located within five miles of the city’s central square). Justice Kennedy wrote the majority opinion, and Justices Stevens, Scalia, Thomas, and Ginsburg joined him. *Carbone*, 511 U.S. at 384. Justice O’Connor—who parted ways with the majority by relying on so-called *Pike*-balancing analysis, rather than the more exacting antidiscrimination requirement (see *infra* text accompanying notes 102–03)—filed an opinion concurring in the judgment. *Carbone*, 511 U.S. at 401 (O’Connor, J., concurring). Justice Souter wrote the sole dissenting opinion, which Chief Justice Rehnquist and Justice Blackmun joined. *Id.* at 410 (Souter, J., dissenting).

26. *Carbone*, 511 U.S. at 392. The Court in *Carbone* suggested that the “local resource” was solid waste, which the Court had identified as an article of commerce in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978) (noting, among other things, that “Congress has power to regulate the interstate movement of these wastes”). See *Carbone*, 511 U.S. at 392 (noting that the flow control ordinance “hoards solid waste”).

27. *Carbone*, 511 U.S. at 393–94.

28. *Id.* at 393.

29. *Id.* at 385.

carry over to facilities that the government owned and operated.<sup>30</sup> It was this question that came before the Justices in *United Haulers*.<sup>31</sup>

### B. UNITED HAULERS

In the wake of *Carbone*, lower courts encountered a spate of cases that involved state- and local-government efforts to force their residents to deal with designated local service providers.<sup>32</sup> The rule at issue in *United Haulers*

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30. See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 340 n.3 (2007) (noting that both sides in *United Haulers* made “much of the *Carbone* majority’s various descriptions of the facility”).

31. We will see in due course that it is subject to debate whether the government was, on the better view, “operating” the facility in *United Haulers*. See *infra* notes 127–32 and accompanying text. All members of the Court, however, proceeded on the understanding that it was. Notably, Justice Souter, in his dissent in *Carbone*, argued forcefully that: (1) the waste-transfer station involved in that case was more accurately characterized as public than private in nature; and (2) the dormant Commerce Clause presumption against local-processing requirements should not extend to services that the government provides. *Carbone*, 511 U.S. at 419–23 (Souter, J., dissenting). The majority in *Carbone* did not directly respond to either of these contentions.

32. See, e.g., *Nat'l Solid Wastes Mgmt. Ass'n v. Daviess County*, 434 F.3d 898, 902 (6th Cir. 2006) (finding that a county ordinance that required disposal of waste at the county’s landfill or transfer station was facially discriminatory against out-of-state interests), *vacated*, 550 U.S. 931, 931 (2007) (remanding for reconsideration in light of *United Haulers*); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1242 (9th Cir. 2001) (rejecting a challenge to city regulation that mandated delivery of waste to city-owned landfill where the plaintiff admitted it would have used another in-state landfill absent the restriction); *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 716 (6th Cir. 2000) (invalidating a county agreement that established an exclusive contractor for collecting and processing solid waste as a per se violation of the dormant Commerce Clause); *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1071–72 (8th Cir. 2000) (invalidating a flow-control ordinance that compelled in-state waste disposal after applying *Pike*-balancing analysis); *Houlton Citizen’s Coal. v. Town of Houlton*, 175 F.3d 178, 192 (1st Cir. 1999) (holding that a town’s award of exclusive waste-disposal contract obtained through a competitive bidding process did not violate the dormant Commerce Clause); *Waste Mgmt., Inc. v. Metro. Gov’t of Nashville & Davidson County*, 130 F.3d 731, 736 (6th Cir. 1997) (holding that the county’s waste-flow-control ordinance violated the Commerce Clause); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County*, 48 F.3d 701, 717–18 (3d Cir. 1995) (holding that the state’s flow-control ordinance, which required that residual waste from mixed loads be returned to designated facilities unless facility was compensated for lost revenue, violated the Commerce Clause; making no distinction between privately and publicly owned facilities); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 791 (3d Cir. 1995) (remanding to the district court to determine whether out-of-state sites or interests were accorded a level playing field when they competed for contracts under municipal-waste plans); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1295 (2d Cir. 1995) (upholding a town ordinance under which the town hired one private company to pick up all commercial garbage and another company to operate an incinerator); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 506 (2d Cir. 1995) (invalidating a flow-control ordinance that required garbage to be disposed of at an incinerator where town charged a tipping fee); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1382–83, 1388–89 (8th Cir. 1993) (invalidating a flow-control ordinance applicable to a county-owned facility without discussing special arguments applicable to such facilities); *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 651–52 (S.D. Miss. 2003) (striking down municipal flow-

stemmed from a program developed by a government authority created by Oneida and Herkimer Counties in central New York State. In an effort to deal with a “solid waste crisis,”<sup>33</sup> the authority “agreed to purchase and develop facilities” to process locally generated waste.<sup>34</sup> In addition, the counties allowed the authority to charge tipping fees that “significantly exceeded those charged for waste removal on the open market.”<sup>35</sup> In return, the authority agreed “to do more than the average private waste disposer” by “recycling . . . 33 kinds of materials” and providing for “composting, household hazardous waste disposal, and a number of other services.”<sup>36</sup> Most important, government officials mandated “that all solid waste generated within the Counties be delivered to the Authority’s processing sites.”<sup>37</sup> The resemblance between *United Haulers* and *Carbone* was hard to miss, and Chief Justice Roberts emphasized this fact in writing for the Court. As he observed:

In . . . *Carbone* . . . this Court struck down under the Commerce Clause a flow control ordinance that forced haulers to deliver waste to a particular *private* processing facility . . . . The only salient difference is that the laws at issue here require haulers to bring

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control ordinances that required delivery of local waste to publicly owned facilities), *rev'd in part, dismissed in part*, 389 F.3d 491 (5th Cir. 2004); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350, 1357 (S.D. Fla. 1999) (holding that a county ordinance, which restricted flow of waste generated in the county to two named facilities in the county, violated the Commerce Clause); *Randy’s Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017, 1031–32 (D. Minn. 1999) (holding that an intrastate flow-control ordinance violated the Commerce Clause); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 922 F. Supp. 1396, 1405 (D. Minn. 1996) (invalidating an ordinance requiring that all waste generated in the county be delivered to designated facility), *rev'd in part*, 115 F.3d 1372, 1376 (8th Cir. 1997) (holding that a flow-control ordinance violated the Commerce Clause as applied to waste otherwise destined for transport out-of-state, but constitutional as applied to waste otherwise destined to stay within the state); *Southcentral Pa. Waste Haulers Ass’n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935, 942–43 (M.D. Pa. 1994) (holding that a flow-control ordinance violated the Commerce Clause; rejecting publicly-owned/privately-owned distinction with limited analysis); *Waste Recycling, Inc. v. Se. Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566, 1569 (M.D. Ala. 1993) (invalidating flow-control ordinance that directed waste to publicly owned facility), *aff’d per curiam*, 29 F.3d 641 (11th Cir. 1994) (unpublished table decision); *Empire Sanitation Landfill, Inc. v. Commonwealth*, 684 A.2d 1047, 1057–58 (Pa. 1996) (holding a flow-control ordinance invalid under the dormant Commerce Clause); *Heier’s Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352, 358 (Wis. Ct. App. 1997) (upholding an order invalidating an ordinance that directed delivery of recyclables to a county-owned facility).

33. *United Haulers*, 550 U.S. at 334 (internal quotation marks omitted).

34. *Id.* at 335.

35. *Id.* at 336.

36. *Id.*

37. *Id.*

waste to facilities owned and operated by a state-created public benefit corporation.<sup>38</sup>

As the Justices pondered the proper result in *United Haulers*, there was reason to believe they would apply the rule of *Carbone* despite this potential basis for distinguishing the cases. Indeed, six separate indicators—each significant standing alone—pointed in this direction:

(1) The language of *Carbone* suggested that its rule should apply in *United Haulers*. To be sure, the Court in *Carbone* had referred to the Clarkstown facility as “private” in nature.<sup>39</sup> In doing so, however, the Court never signaled that this fact had any analytical significance—for example, by specifically reserving the public-entity question or by emphasizing the profit-seeking character of the favored entity. Instead, the *Carbone* majority declared in broad terms that the “essential vice” of the Clarkstown ordinance was that it “bar[red] the import of the processing service” by “depriv[ing] out-of-state businesses of access to a local market.”<sup>40</sup> Because the Oneida–Herkimer program created exactly the same conditions, it is not surprising that Justice Kennedy, the author of the *Carbone* opinion, dissented in *United Haulers*.<sup>41</sup>

(2) In addition, the core reasoning of *Carbone* gave rise to an a fortiori argument in *United Haulers*. In *Carbone*, the majority had viewed the dispositive issue as whether past forced-use-rule cases, each of which involved a law that protected a multiplicity of local operators, applied when only a single entity received the benefit of the challenged rule.<sup>42</sup> In rejecting this would-be distinction, the Court in *Carbone* observed:

The only conceivable distinction . . . is that [this] flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. In *Dean Milk*, the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to that market might have built a

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38. *United Haulers*, 550 U.S. at 334; see also *id.* at 357 (Alito, J., dissenting) (quoting this passage and endorsing the same conclusion).

39. See *supra* note 29 and accompanying text.

40. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392, 389 (1994). In addition, prior cases had given no indication that public ownership would make a difference in the local-processing context. *Id.* at 415–16 (Souter, J., dissenting) (acknowledging, even while advocating for a public/private distinction, that earlier local-processing cases spoke broadly of rejecting state and local efforts “to impose an artificial rigidity on the economic pattern of the industry” (quoting *Toomer v. Witsell*, 334 U.S. 385, 403–04 (1948))).

41. See Stanley E. Cox, *What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky as Case Study in the Waste Wars*, 83 Ky. L.J. 551, 616–17 (1995) (arguing, in the wake of *Carbone*, that the important feature of flow-control rules for dormant Commerce Clause purposes was the “shutting off [of] competition” and not the “nature of the facility” that receives the waste).

42. *Carbone*, 511 U.S. at 391–92.

pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.<sup>43</sup>

This reasoning placed an ace in the hand of the challengers of the program at issue in *United Haulers*. They could forcefully argue that, if exclusion of *all but one private processor* heightens the difficulties posed by local-processing rules, then exclusion of *all private processors with no exceptions whatsoever* presents even graver concerns. Put another way, a single, favored private processor at least might have out-of-state owners, affiliates, or sister operations. In contrast, a municipal facility necessarily involves none of these things because a municipality, by definition, is a subunit of the state itself.<sup>44</sup>

(3) Fairness-based concerns bolstered the argument for invalidating the program challenged in *United Haulers*. In applying the Contracts Clause, for example, the Court has held that judicial vigilance should rise when a state makes favorable adjustments to its own (as opposed to private citizens') preexisting contracts.<sup>45</sup> This rule reflects the commonsense notion that judicial "deference . . . is not appropriate [when] the State's self-interest is at stake."<sup>46</sup> Symmetry of logic suggested that *Carbone* should control in *United Haulers* because that case likewise involved a local government's self-dealing effort to promote its own financial undertaking.

(4) Instrumentalist considerations raised additional doubts about the advisability of embracing the public-facility/private-facility distinction put forward in *United Haulers*. The difficulty was apparent: If governments can effectuate flow-control programs only through the use of government facilities, then governments have an incentive to de-privatize important market operations. Justice Alito made much of this point in his *United*

43. *Id.* at 392.

44. One might respond (as my colleague Walter Hellerstein did when he read an earlier draft) that this argument is strained because states often act without the profit motive that drives the behavior of private entities. It is true, of course, that private entities do have profit motives, and that point (as we shall see) lies at the heart of the Court's justification of the result reached in *United Haulers*. See *infra* notes 62–71 and accompanying text. In my view, however, this difference between public and private entities does not limit the force of the observation made in the text. Regardless of profit motives, a municipality-favoring, forced-use rule more broadly precludes out-of-state participation in local markets than does the sort of private-entity-favoring rule struck down in *Carbone*. And that particular point favored application of the *Carbone* rule in *United Haulers*, even if other considerations (including profit motives) cut the other way.

45. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25–26 (1977); see also *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 815 n.4 (1989) (noting a special danger of discrimination when a "State acts to benefit itself and those in privity with it"); cf. *Wis. Dept. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 290 (1986) (noting that "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints").

46. *U.S. Trust Co.*, 431 U.S. at 26.

*Haulers* dissent, asserting that adoption of the private/public distinction would send “a bold and enticing message to local governments throughout the United States” that forced-use rules are “now permissible, so long as the enacting government excludes all private-sector participants from the affected local market.”<sup>47</sup> Especially within a Court that often seems eager to free up the operation of private markets, this consideration must have raised worries about upholding the Oneida–Herkimer program.<sup>48</sup>

(5) Pre-*Carbone* case law lent further support to the argument that the Court should find a constitutional violation in *United Haulers*. Of particular importance, an early dormant Commerce Clause case had invalidated a pre-Eighteenth Amendment state law that required all local buyers of alcoholic beverages to deal only with government-owned stores.<sup>49</sup> In addition, the Court’s prior local-processing decisions gave no hint that forced-use rules structured to advantage public entities differed for constitutional purposes from cases of favoritism shown to private market operators.<sup>50</sup> In short, past

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47. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 364 n.8 (2007) (Alito, J., dissenting). In his own separate opinion, concurring only in the judgment, Justice Thomas voiced the same concern. *Id.* at 354 (Thomas, J., concurring) (suggesting that the majority’s decision reflected a “policy-driven preference for government monopoly over privatization”).

48. In particular, recent decisions in the preemption context have—consistent with a view favoring the operation of free markets—displaced state regulatory authority in a wide variety of fields. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008) (holding that the Food and Drug Administration’s premarket approval requirements preempted the patient’s New York common-law claims of negligence, strict liability, and implied warranty against the manufacturer); *Rowe v. N.H. Motor Transp. Ass’n*, 128 S. Ct. 989, 993 (2008) (holding that the Federal Aviation Administration Authorization Act preempted certain provisions of Maine’s Tobacco Delivery Law). *See generally* Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 432, 462–63, 472 (2002) (noting the recent tendency of the Court to find federal preemption of state laws despite its ostensible commitment to state autonomy and suggesting this tendency may be attributable to “substantive conservatism” that favors unregulated markets).

49. *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 442–43 (1898); *see also* *Scott v. Donald*, 165 U.S. 58, 101 (1897) (holding invalid as a restriction of interstate commerce a state’s prohibition on sending intoxicating liquors into another state for personal use). *See generally* *Granholt v. Heald*, 544 U.S. 460, 517–18 (2005) (Thomas, J., dissenting) (describing holdings of the Court’s alcohol cases in the following terms: “State monopolies that did not permit direct shipments to consumers . . . were thought to discriminate against out-of-state wholesalers and retailers”). Not surprisingly, Justice Alito relied on *Vance* in his *United Haulers* dissent. *See United Haulers*, 550 U.S. at 361 (Alito, J., dissenting). In a footnote, Chief Justice Roberts replied to this argument by dismissing these cases as coming from a “bygone era” and involving application of only “the Court’s excruciatingly arcane pre-Prohibition precedents.” *Id.* at 341 n.5 (majority opinion). Even in doing so, however, the Chief Justice acknowledged that “[t]he *Vance* Court . . . struck down a regulation on direct shipments to consumers for personal use,” and nowhere explained why that result was out of line with the Court’s modern dormant Commerce Clause precedents. *Id.*

50. *United Haulers*, 550 U.S. at 362 (Alito, J., dissenting) (noting that nothing in the Court’s earlier decisions “ever suggested that discriminatory legislation favoring a state-owned enterprise is entitled to favorable treatment”); *see, e.g.*, *Toomer v. Witsell*, 334 U.S. 385, 403

authority suggested the Court would find *Carbone* controlling, rather than distinguishable, in *United Haulers*.<sup>51</sup>

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(1948) (invalidating an in-state processing requirement because its effect was “to divert to South Carolina employment and business which might otherwise go to [another state]”). Particularly significant in this regard was the Court’s ruling in *Minnesota v. Barber*, 136 U.S. 313 (1890), which (according to the majority in *United Haulers*) invalidated a “Minnesota law requiring any meat sold within the State to be examined by an in-state inspector.” *United Haulers*, 550 U.S. at 341 n.4. Contrary to the Court’s implication in *United Haulers*, no Minnesota meat inspector involved in this program operated as a “private enterprise” in any meaningful sense. Rather, inspectors were “appointed under the laws of the . . . State” to “hold their offices for one year,” thus gaining “authority and jurisdiction” that was “territorially co-extensive” with the locality making the appointment. *Barber*, 136 U.S. at 317–18. In addition, each inspector had two statutory powers: (1) to issue government-formulated certificates permitting slaughter and (2) to “order the immediate removal and destruction of . . . diseased animals.” *Id.* at 318–19. In short, these inspectors were more fairly characterized as public operators (and thus akin to the public operator involved in *United Haulers*) than as private operators (and thus not akin to the private business involved in *Carbone*). To be sure, *Barber* is a case of some complexity for two reasons. First, it appears that producers paid inspection fees directly to individual inspectors, rather than to the government itself. *Id.* at 318. Second, the Court seemed largely concerned in *Barber* with the law’s practical effect of causing out-of-state livestock producers to deal (in the wake of mandated local inspections) with local slaughtering houses, which were unquestionably private entities. *Id.* at 321. Neither of these concerns, however, seems to provide a compelling basis for distinguishing *Barber* from *United Haulers*. The Court never suggested that making payments to local inspectors had any significance, and lending dispositive effect to the direct (rather than passed-through the government) nature of payments to inspectors would seem to glorify form over substance, especially given the fact that fee levels were set by the government. *Barber*, 136 U.S. at 318. With respect to the indirect benefiting of local slaughterers, the decisive fact remains that the forced-use rule itself concerned local inspectors. That this forced-use rule had ripple effects that significantly helped local, private firms does not distinguish the case from *United Haulers* because there too, the requirement that local businesses had to use a state-owned transfer station had the inevitable consequence of channeling business to firms and individuals located in proximity to the government facility. In sum, from all appearances, *Barber* (which scholars recognize and widely cite as the Court’s very first local-processing decision) involved a rule that concerned forced use of public (rather than private) cattle inspectors, in much the same way that *United Haulers* involved a public (rather than a private) waste-transfer station.

51. One might try to read *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881), to support the result the Court reached in *United Haulers*. There, the Court upheld a municipal law that provided that any steamships landing in the town had to use a single, town-owned wharf, absent receipt of special permission. The principle of *Packet Co.*, however, falls far short of controlling the question *United Haulers* presented. To begin with, the Catlettsburg law posed far less of an impediment to interstate commerce because disgruntled ship operators could simply proceed past the town’s wharf without docking there at all, *Packet Co.*, 105 U.S. at 560, whereas haulers of waste originating in Oneida and Herkimer had no choice but to travel to, and deal with, the town-operated transfer station. *United Haulers*, 550 U.S. at 334. *Packet Co.* thus did not involve an unavoidable forced stop on an interstate journey or anything resembling a local-processing requirement; it involved instead, a preference for one in-town facility over another in-town facility for those who chose to come into the town to conduct their business. *Packet Co.*, 105 U.S. at 560. In addition, the Court in *Packet Co.* took pains to emphasize that “the necessity is obvious of the existence in each port, where vessels as large as steamboats land . . . of some authority to prescribe the places where this may be done,” particularly because of the need for “protection of the bank of a river on which a town is situated.” *Id.* at 562–63. Obviously, no such distinctive, geographically tied consideration was present in *United Haulers*. See generally *United Haulers*, 550

(6) Finally, those pre-*Carbone* cases that did exempt state operations from dormant Commerce Clause scrutiny rested on a principle of law that was inapplicable in *United Haulers*. In a string of modern decisions, the Court has embraced the “market-participant exception” to the dormant Commerce Clause.<sup>52</sup> Under this doctrine, a state may favor its own citizens when it selects its trading partners, even to the point of shunning out-of-staters altogether. In purchasing supplies or hiring workers, for example, a state may choose to deal exclusively with local residents without encountering dormant Commerce Clause difficulties.<sup>53</sup> *United Haulers*, however, did not involve only a program of local favoritism in the selection of potential state trading partners. Instead, it concerned the imposition of a legal mandate that the town enforced through fines and imprisonment, which meant trash producers and haulers had no choice but to deal with the government’s transfer station.<sup>54</sup> For this reason, the public entity in *United Haulers* was not merely a market participant; it was also a market regulator.<sup>55</sup> Many observers thus believed that the Court would invoke principles typically applied to state entities when they act as market regulators, including the strong presumption that they may not exclude out-of-state businesses from access to in-state trade.<sup>56</sup>

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U.S. 559; *see also* *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319–20 (1851) (justifying the requirement that ship operators use a local pilot in navigating the port of Philadelphia because of the intensely “local” nature of the regulated activity).

52. For extended treatments of the market-participant doctrine, *see generally* Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097 (1988); Paul S. Kline, *Publicly Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine*, 96 DICK. L. REV. 331 (1992); Jonathon D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981); Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980); Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469 (2008).

53. *See White v. Mass. Council for Constr. Employers, Inc.*, 460 U.S. 204, 214–15 (1983) (upholding a Boston rule that at least half of the workers on any publicly funded construction project be residents of the city); *Am. Yearbook Co. v. Askew*, 409 U.S. 904 (1972), *summarily aff’g* 339 F. Supp. 719, 725 (M.D. Fla. 1972) (upholding a Florida law requiring that all material printed for the state be produced within the state).

54. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 335–37 (2007).

55. Indeed, in light of these facts, Oneida and Herkimer Counties did not even try to argue that the market-participant rule sheltered their actions. *See id.* at 363 (Alito, J., dissenting) (noting that petitioners conceded that they were “not asserting a defense under the market-participant doctrine”).

56. In fact, Justice Alito’s *United Haulers* dissent forcefully advanced an argument along these lines. *Id.* at 362–63 (Alito, J., dissenting) (quoting *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984), in support of the proposition that dormant Commerce Clause immunity arises only when the state is “acting as a market participant, rather than as a market regulator” (emphasis omitted)).

These six reasons suggested that *Carbone* would control *United Haulers*.<sup>57</sup> Six members of the Court, however, took the opposite view. Justice Thomas declared that, despite his earlier vote to strike down the ordinance challenged in *Carbone*, he would no longer apply the dormant Commerce Clause principle to invalidate any state or local law, including the forced-use rule at work in central New York.<sup>58</sup> In keeping with his own less categorical repudiation of preexisting dormant Commerce Clause jurisprudence, Justice Scalia deemed the Oneida–Herkimer program permissible because it failed to qualify as “indistinguishable from [the] type of law previously held unconstitutional by [the] Court” under the dormancy doctrine.<sup>59</sup> Chief Justice Roberts authored the decisive opinion, which was joined in full by Justices Souter, Ginsburg, and Breyer, and in all but one part by Justice Scalia.<sup>60</sup> How could the Chief Justice navigate around the powerful arguments that *Carbone* spelled the end of the forced-use rule at issue in *United Haulers*? He did so by suggesting that two important considerations rendered *Carbone* distinguishable.<sup>61</sup>

The first proffered distinction had a definitional ring. In essence, Chief Justice Roberts declared that a local-processing requirement that favors the government itself does not ordinarily bear the earmarks of “protectionism,”

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57. See also Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 511 (2008) (critiquing the result in *United Haulers* and asserting, among other things, that “[t]he problem with the Court’s rationales is that many of them have been deemed irrelevant in past cases, would prove too much if adopted, are beyond the Court’s institutional competence, or some combination of all three”).

58. *United Haulers*, 550 U.S. at 349 (Thomas, J., concurring) (basing this approach on the view that “[t]he negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice”). Justice Thomas had previously staked out this position in *Camps Newfoundland/Ouatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

59. *United Haulers*, 550 U.S. at 348 (Scalia, J., concurring in part). For many years Justice Scalia has adhered to the position that the Court should not invoke the dormant Commerce Clause except “(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court.” *Id.* (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring)).

60. Justice Scalia joined Parts I and II.A–C of the Chief Justice’s opinion, but did not join Part II.D, in which the majority subjected the challenged law to so-called *Pike*-balancing analysis, a form of analysis that Justice Scalia has long eschewed. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 895–98 (1988) (Scalia, J., concurring) (“I would . . . abandon the ‘balancing’ approach to these negative Commerce Clause cases . . . adopted 18 years ago in *Pike v. Bruce Church, Inc.*”). In light of Justice Scalia’s action, all of the Chief Justice’s opinion that treats the basic antidiscrimination challenge and that in the process forges the state-self-promotion exception to the antidiscrimination rule constitutes the opinion of a majority of the Court. See *United Haulers*, 550 U.S. at 332. Put another way, only the portion of the Chief Justice’s opinion that applied *Pike*-balancing analysis to the challenged forced-use rule lacked five votes.

61. For an interesting discussion of the various legal briefs, oral argument, and written opinions in *United Haulers*, see generally Kenneth L. Karst, *From Carbone to United Haulers: The Advocates’ Tales*, 2007 SUP. CT. REV. 237 (2007) (analyzing *United Haulers* in depth).

which alone will trigger exacting dormant Commerce Clause review.<sup>62</sup> A measure of murkiness marked the Chief Justice's reasoning on this point, although he did emphasize that "[l]aws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism."<sup>63</sup> Chief Justice Roberts did not pause to consider that "any number of legitimate goals" could and did also underlie the private-facility-favoring program that the Court struck down in *Carbone*.<sup>64</sup> Even so, the operative thought was clear enough: Because the government's distinctive function is to pursue the public good, rather than to maximize profits, "favoring local government is by its nature different from favoring a particular private company."<sup>65</sup>

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62. *United Haulers*, 550 U.S. at 342–43. This no-protectionism rationale directly tracked the central rationale of Justice Souter's dissent in *Carbone*. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 420–21 (Souter, J., dissenting) ("An ordinance that favors a municipal facility . . . 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.'" (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985))). For criticism of this rationale and the public/private distinction advanced in *United Haulers*, see William J. Cantrell, *Cleaning Up the Mess: United Haulers, the Dormant Commerce Clause, and Transaction Costs Economics*, 34 COLUM. J. ENVTL. L. 149, 183–87 (2009) ("Contrary to the rationale of *United Haulers*, both public and private market participants have incentives to enact flow control regulations in their favor, irrespective of aggregate local benefits."); Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 459–60 (2008) (asserting that "there is just as much reason to believe that state or local governments are likely to act upon protectionist considerations when the benefited operation is owned by the government as when the benefited operation is privately held").

63. *United Haulers*, 550 U.S. at 342.

64. See *id.* at 353 (Thomas, J., concurring) (making a similar point in dismissing this attempted distinction of *United Haulers* from *Carbone* as "razor thin"); *id.* at 365 (Alito, J., dissenting) (agreeing that the majority's effort to distinguish *Carbone* was unpersuasive because "discrimination in favor of an in-state, privately owned facility may serve legitimate ends, such as the promotion of public health and safety"); see also Denning, *supra* note 57, at 511 ("[J]ust about any commercial regulation could also be characterized as an exercise of the police power—that much has been clear since the Marshall Court era."). Cf. Ethan Yale & Brian Galle, *Muni Bonds and the Commerce Clause After United Haulers*, 44 ST. TAX NOTES 877, 885 (2007) ("In the case of laws affecting public–public competition, however, the inference that the law serves some public good, other than entrenching the enacting officials outside competition, is rather weaker."); Adam Pekor, Note, Department of Revenue v. Davis: *Why the Supreme Court Should Strike Down the Differential Tax Treatment of In-State and Out-of-State Municipal Bonds*, 60 TAX LAW. 807, 815 (2007) (discussing *Davis*: "[T]he precise purpose of the differential treatment is to distort the market to provide a disincentive for the purchase of out-of-state bonds, a quintessentially protectionist goal.").

65. *United Haulers*, 550 U.S. at 339. Addressing petitioner's counsel, Justice Breyer made this same point during oral argument. As he stated:

[O]ne of the main purposes of the dormant Commerce Clause is to prevent protectionism. Protectionism is when a state favors its own producers . . . . [A] big argument in *Carbone* was, you aren't favoring your own producer[s]; well, we are at least favoring one. But now where the municipality is running it itself, no one is

The second distinction the Court suggested sprang from the sort of political-process-based analysis that has long figured in the Court's work with the dormant Commerce Clause principle.<sup>66</sup> Again, the Chief Justice's reasoning on this point might have profited from a sharper focus.<sup>67</sup> He hit

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favored. So I don't think it was an object of the Commerce Clause to prevent a state from favoring its own government.

Transcript of Oral Argument at 12, *United Haulers*, 550 U.S. 330 (No. 05-1345), 2006 WL 3877702; see also *id.* at 13 (Souter, J.) (emphasizing similarly that in *Carbone* "there was protectionism of the one licensee . . . that . . . was in it for the money" and that that licensee was in fact "protected handsomely"). The majority might have bolstered its no-protectionism logic by raising questions about the implications of a contrary ruling. Public entities, for example, routinely compel citizens to engage in certain activities with the government itself (for example, by recording deeds or filing legal documents) in facilities located within the state and operated by the government. Only the most out-of-the-box thinkers, however, would characterize such government practices as "protectionist." Cf. *Lefrancois v. State*, 669 F. Supp. 1204, 1212 (D.R.I. 1987) (refusing to distinguish a state's "monopoly in landfill services" from its "monopoly . . . in educational services, or in police and fire protection"). There exists one significant complication in viewing protectionism in terms of state promotion of "profit making" by local, private firms. See *United Haulers*, 550 U.S. at 344 (stating that New York favors "displacing competition with regulation or monopoly" in waste disposal); see also *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 416 (1994) (Souter, J., dissenting) (distinguishing the case as not involving "the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist"). The difficulty is that the Court has held that state discrimination with regard to the operations of private *nonprofit* organizations is fully subject to dormancy-doctrine restraints. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 583 (1997) (noting that, while not for profit, an organization's operations amounted to commerce and could be restrained by the dormant Commerce Clause). And, in doing so, the Court has rightly observed that "[w]e have already held that the dormant Commerce Clause is applicable to activities undertaken without the intention of earning a profit." *Id.* at 584. The proper answer to this criticism may be to say that the support of local "profit making" is just one unacceptable form of promoting the economic interests of local, private entities at the expense of outsiders. It violates the dormant Commerce Clause, for example, when the state hoards local resources for the benefit of private consumers, even though such hoarding does not involve "profit making" by favored local buyers, at least in the ordinary sense. See *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (discussing the consequences of hoarding such resources as iron, timber, cotton, and oil and the detrimental effect on profits if it occurred). Indeed, in *Camps Newfound/Owatonna, Inc.*, the Court invalidated a state law that operated in just this fashion by effectively channeling local camp services away from nonresidents to the advantage of local citizens. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 568–69. Put another way, the proper touchstone of protectionism, even after *United Haulers* and *Davis*, is not private entities' promotion of profit-making. Instead, the touchstone is more properly viewed as focusing on the state's advantaging of local, private economic interests—whether in the form of profit-making or otherwise. What is more, the promotion of local economic interests may include even the very general benefits that state residents accrue from the exclusion of would-be residents. See *Edwards v. California*, 314 U.S. 160, 173 (1941) (striking down as "an unconstitutional barrier to interstate commerce" a California law that prohibited transporting an indigent person into California).

66. See generally Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (discussing judicial displacement of legislative judgment as a means of judicial review).

67. In particular, the Chief Justice emphasized the proposition that "the most palpable harm imposed by the ordinances—more expensive trash removal—is likely to fall on the very people who voted for the laws," or, more precisely, "citizens and businesses of the Counties

close to the mark, however, when he observed that special considerations are at work with “laws favoring private industry” (including “private industry” that takes the form of a single industry member, as in *Carbone*) because those laws are “often the product” of special-interest-favoring legislation.<sup>68</sup> His aim proved even truer when he added that “[t]here is no reason to hand local businesses a victory they could not obtain through the political process.”<sup>69</sup> The key point is this: In *Carbone*, private firms (including out-of-state firms) threatened with harm by the proposed forced-use rule had to contend with the focused efforts of the self-interested waste-handling firm that stood on the brink of becoming a government-anointed monopoly provider of a much-needed service. In contrast, *United Haulers* presented a situation in which not even one private waste-handling firm had an interest in supporting the government’s plan because the essential purpose of that plan was to exclude each and every such firm from the local market.<sup>70</sup> For this reason it was easier—perhaps far easier—in *United Haulers* than in *Carbone* to justify judicial nonintervention. After all, if every possible private provider of waste-transfer services would logically oppose the government’s self-promoting monopolization of the field, it seems fair to conclude that private providers with a strong in-state presence (and resulting clout in local political circles) would provide sufficient protection against abuse of similarly situated nonresident business interests.<sup>71</sup>

Apart from laboring to distinguish *Carbone*, the Court in *United Haulers* wove into its analysis the idea that “[w]e should be particularly hesitant to interfere with the Counties’ efforts . . . because waste disposal is both typically and traditionally a local government function.”<sup>72</sup> This observation offered little help to the Court in its effort to sidestep *Carbone* because that case likewise involved a local government’s effort to deal with waste disposal. The Court’s focus on this point, however, raised a caution flag about overhyping the holding of *United Haulers*. By suggesting that the Court might

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[made subject to] the costs of the ordinances.” *United Haulers*, 550 U.S. at 345. Again, the Chief Justice did not pause to explain how this consideration distinguished *Carbone*, which involved precisely the same economic consequences for local waste producers. The Chief Justice also failed to deal with the reality that, in virtually all cases involving dormant Commerce Clause problems, including the problems posed by protective tariffs, local citizens are broadly disadvantaged. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-5 (2d ed. 1988).

68. *United Haulers*, 550 U.S. at 343.

69. *Id.* at 345.

70. One illustration of the distortive effect that even a single favored entity might exert is provided by the New York steamboat monopoly that the Court struck down in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). For an account of the political shenanigans that gave rise to that monopoly, see Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1407–10 (2004).

71. *United Haulers*, 550 U.S. at 345 n.7. For criticism of this political-process rationale, see Williams, *supra* note 62, at 463–64 (“Here, not only did the Court make no effort to determine whether local residents had served as surrogate representatives of the [out-of-state] waste processors, there was every reason to believe the residents hadn’t filled that role . . .”).

72. *United Haulers*, 550 U.S. at 354 (internal quotation marks omitted).

confine the state-self-promotion exception to “traditional” state activities, the Court moved to allay concerns that its ruling would encourage deeply problematic state takeovers of historically private businesses.<sup>73</sup> In other words, the Court signaled that an important limitation might well keep the newly minted state-self-promotion doctrine from spinning out of control.

### C. DAVIS

The first chance to measure how far the principle of *United Haulers* would reach came to the Court in *Davis*.<sup>74</sup> That case involved a practice followed in all but two of the forty-three states with income-taxing systems—namely, the granting of a tax exemption for interest earned on local public bonds but not on any other bonds, including bonds that other states issued.<sup>75</sup> In upholding Kentucky’s version of this exemption for a majority of the Court, Justice Souter explained:

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73. See *infra* notes 217–21 and accompanying text (discussing a state-hamburger-stand hypothetical).

74. *Davis* triggered the release of a wealth of scholarly analysis. Some of this analysis came before the decision. Linda M. Beale, *The Tax Exemption for Home State Bonds, Misguided Though It May Be, Should Not Be Considered to Violate the Dormant Commerce Clause*, 26 A.B.A. SEC. TAX’N NEWS Q. 11, 11–12 (2007) (discussing *Davis v. Dep’t of Revenue*, 197 S.W.3d 557 (Ky. Ct. App. 2006), *rev’d*, 128 S. Ct. 1801 (2008)); Robert J. Firestone, *Davis v. Kentucky: A Logical Application of the Market Participant Doctrine*, 46 ST. TAX NOTES 237 (2007); Brian D. Galle & Ethan Yale, *Can Discriminatory State Taxation of Municipal Bonds Be Justified?*, 46 ST. TAX NOTES 229 (2007); Bradley W. Joondeph, *Practical Consequences, Institutional Competence, and the Kentucky Bond Case*, 46 ST. TAX NOTES 267 (2007); Joel Michael, *Department of Revenue of Kentucky v. Davis: Implications for State Tax and Debt Policy and the Dormant Commerce Clause*, 45 ST. TAX NOTES 753 (2007); Pekor, *supra* note 64; Alan D. Viard, *The Dormant Commerce Clause and the Balkanization of the Municipal Bond Market*, 46 ST. TAX NOTES 241 (2007) [hereinafter Viard, *Balkanization of the Municipal Bond Market*]; Yale & Galle, *supra* note 64; Edward A. Zelinsky, *Davis v. Department of Revenue: The Incoherence of Dormant Commerce Clause Nondiscrimination*, 44 ST. TAX NOTES 941 (2007). Some came later. 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ¶ 4.14[3][e], at 4-137 to -140 (3d ed. 2000); Jennifer Carr & Cara Griffith, *Was Davis Outcome-Based Jurisprudence?*, 48 ST. TAX NOTES 663 (2008); Dolores Gregory, *A Contrarian’s View of the Holding in Kentucky v. Davis: Opening the Door to ‘Economic Balkanization’ in the States*, 15 MULTISTATE TAX REP. (BNA) 372 (2008) (interviewing Don Griswold, partner in Reed Smith LLP’s national tax practice, who argues the Court incorrectly decided *Davis*); Eugene W. Harper, Jr., Letter to the Editor, *Davis Redivivus: The Futility of Utility*, 119 TAX NOTES 1276 (2008); Steve R. Johnson, *What Davis Means for Constitutional and Statutory Interpretation*, 48 ST. TAX NOTES 877 (2008) (discussing the significance of *Davis* to future tax cases); Alan D. Viard, Letter to the Editor, *Selective Private Activity Bond Exemption Issue Still Unresolved*, 119 TAX NOTES 1017 (2008) [hereinafter Viard, *Selective Private Activity Bond*]; Alan D. Viard, *U.S. Supreme Court Upholds Balkanization for Some, but Not All Bonds*, 48 ST. TAX NOTES 889 (2008) [hereinafter Viard, *Supreme Court Upholds Balkanization*]; *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 15.

75. *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1807 n.7 (2008). In addition to the forty-one income-tax-imposing states that discriminate outright against out-of-state bonds, Utah exempts out-of-state bond interest only for bonds issued by states that do not tax Utah bonds. *Id.* Indiana is the sole state in the Union that exempts all state-issued-bond interest from income taxation. *Id.*

It follows *a fortiori* from *United Haulers* that Kentucky must prevail. In *United Haulers*, we explained that a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors. This logic applies with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function, with [a] venerable history . . . . Bond proceeds are thus the way to shoulder the cardinal civic responsibilities listed in *United Haulers*: protecting the health, safety, and welfare of citizens. It should go without saying that the apprehension in *United Haulers* about "unprecedented . . . interference" with a traditional government function is just as warranted here, where the Davises would have us invalidate a century-old taxing practice presently employed by 41 States and affirmatively supported by all of them.<sup>76</sup>

In short, according to Justice Souter: "There is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being 'substantially similar' to the other bond issuers in the market."<sup>77</sup>

The Court's confident reliance on *United Haulers* in *Davis* deflected attention from significant differences between the two cases. Indeed, the Court in *Davis* applied the *United Haulers* rule even though it might have distinguished that case on at least five grounds. First, the Court might have said that the state-favoring rule in *Davis* did discriminate against "substantially similar" market competitors because the entities that Kentucky primarily disadvantaged were (like Kentucky itself) *state* bond issuers, rather than (as in *United Haulers*) both in-state and out-of-state *private* waste-handling firms, which the City of Clarkston in *United Haulers* had treated identically.<sup>78</sup> Second, the Court might have reasoned that the state in *Davis*

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76. *Id.* at 1810–11 (citations omitted).

77. *Id.* at 1811. In applying the "substantially similar" test—and finding it unsatisfied in *Davis*—the Court drew on its earlier decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). The Court in *General Motors* refused to find discrimination when the state afforded different tax treatment to local utility sales of natural gas and non-utility sales of natural gas across state lines. *Gen. Motors*, 519 U.S. at 310. The Court reasoned that the case in effect involved different products that competed (at least primarily) in different markets. *Id.* at 298–99. The Court's application of the non-substantially similar rubric in *Davis* can be seen as an extension of *General Motors* on the basis that in-state and out-of-state public bonds do compete with each other for purchase and ownership.

78. See Yale & Galle, *supra* note 64, at 883; see also Brief for Respondents at 3, *Dep't of Revenue v. Davis*, 128 S. Ct. 1801 (2008) (No. 06-666), 2007 WL 2808463 (arguing that "Kentucky's municipal bonds are exactly like those issued by other states"); *id.* at 20 (describing Kentucky's argument that it "is not substantially similar to any other bond issuer" as "meritless"); *id.* at 20–25 (arguing that Kentucky's law does discriminate against similar entities); Brief of Alan D. Viard et al. as Amici Curiae Supporting Respondents at 24, *Davis*, 128 S. Ct. 1801 (No. 06-666), 2007 WL 2808465 ("By contrast, the selective municipal bond tax

had a weaker claim for special treatment because it had simply borrowed money and had not (as in *United Haulers*) constructed and paid for an elaborate facility to conduct day-to-day government functions commonly undertaken by way of monopoly.<sup>79</sup> Third, the *United Haulers* program may have provided a distinctively effective tool to “internalize . . . external . . . costs [in the form of environmental degradation] that private firms would otherwise often impose on the public”;<sup>80</sup> no similar externalities-based justification for the government action, or comparably focused public-policy goal, was present in *Davis*.<sup>81</sup> Fourth, the Court may have seen Kentucky’s stark tax-based discrimination against nonlocal bonds as distinctively problematic on the ground that it operated as a de facto protective tariff, the “paradigmatic example” of a dormant Commerce Clause violation.<sup>82</sup> Finally, the political-process justification for judicial intervention seemed far stronger in *Davis* than in *United Haulers*.<sup>83</sup> In *Davis*, after all, the disadvantaged public-bond issuers were non-voting out-of-state political entities. All those entities that imposed income taxes (except one) had a self-interest in protecting their own discriminatory bond-taxing programs, and

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exemption discriminates directly against interstate commerce alone, creating a tax exemption that applies only to within-state municipal bond holdings. *United Haulers* is inapposite.”); Pekor, *supra* note 64, at 814 (“Unlike *United Haulers*, in *Davis*, ‘substantially similar entities’ are concerned.”). The possibility of distinguishing the case from *United Haulers* on this ground was also on Chief Justice Roberts’s mind during oral argument. Transcript of Oral Argument at 10, *Davis*, 128 S. Ct. 1801 (No. 06-666), 2007 WL 3248725 (raising the question of whether *Davis* could be distinguished from *United Haulers* based on the fact that Kentucky was competing against not only private bonds but also other states’ bonds in the municipal-bond market). The term “state” is used here, and elsewhere as well, to embrace both the state itself and its political subdivisions. Virtually all “state and local” bonds are in fact bonds issued by political subdivisions of states—a fact that has led to their common characterization as “municipal bonds.”

79. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 444 (1980) (emphasizing the state’s innovative creation of a “costly physical plant” in applying the state-protective market-participant doctrine).

80. Michael, *supra* note 74, at 759.

81. See Brief for Respondents, *supra* note 78, at 31 (noting “pressing social problems” that were in play in *United Haulers*); see also *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995) (noting that state “police powers . . . are at their strongest in the health and safety area”).

82. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). The Davises repeatedly characterized the Kentucky tax scheme as a tariff. Brief for Respondents, *supra* note 78, at 1 (“Kentucky’s law operates as a tariff.”); *id.* at 8 (“[The tax scheme] operates as a tariff by burdening and exploiting the privately owned national municipal bond market.”); *id.* at 18 (describing the tax scheme as “an unconstitutional burden equivalent to a tariff”); see also Brief of Alan D. Viard et al. as Amici Curiae Supporting Respondents, *supra* note 78, at 12 (“[T]he selective municipal tax bond exemption operates as a discriminatory tariff.”); Viard, *Supreme Court Upholds Balkanization*, *supra* note 74, at 892 (characterizing the Kentucky system as a “trade-obstructing subsidy” coupled with a “trade-neutral tax,” resulting in a “trade-obstructing tariff on imported bonds”).

83. See *supra* notes 66–71 and accompanying text (discussing the political-process basis of dormant Commerce Clause review).

few local voters had any reason to lobby for removal of the discriminatory exemption because most of them held in-state bonds (which were tax-advantaged) rather than out-of-state bonds (which were not).<sup>84</sup>

The bottom line is that the Court could have decided *Davis* in ways that would have confined the operation of the state-self-promotion rule to cases that closely resembled *United Haulers* itself. The Court, however, eschewed this course of action, thus affording an extended reach to its recently created dormant Commerce Clause immunity.<sup>85</sup> At the same time, the Court in *Davis* followed the lead of *United Haulers* by emphasizing the existence of limits on the state-self-promotion doctrine.<sup>86</sup> This Article considers what those limits are.<sup>87</sup>

### III. THE CONTOURS OF THE STATE-SELF-PROMOTION DOCTRINE

Even standing by themselves, *United Haulers* and *Davis* evidence the rich variety of contexts in which the state-self-promotion rule will come into play. *United Haulers*, after all, involved a forced-use rule attached to two towns' operation of a highly localized waste-transfer station, whereas *Davis* involved a selective exemption that figures in more than forty states' income-taxing systems,<sup>88</sup> thus shaping the operation of a two-trillion-dollar industry.<sup>89</sup> The Court will wrestle with the implications of this new doctrine in at least five types of cases. Those cases involve:

(1) local-processing requirements connected with the delivery of traditional public services (including waste-handling services) that the government delivers on its own or in a collaborative public/private joint venture;

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84. See Brief for Respondents, *supra* note 78, at 33 (“[O]ut-of-state issuers and sellers bear the most palpable harm, and they have no voice in the Kentucky legislature.”); Yale & Galle, *supra* note 64, at 886 (“[O]ut-of-state municipal bond issuers have no concentrated, similarly burdened in-state constituency to make their case for them.”).

85. See Denning, *supra* note 57, at 512–13 (arguing that the “extension” of *United Haulers* in *Davis* was “not appropriate” and that “*Davis* was a hard case that the Court decided as if it were an easy one”); Yale & Galle, *supra* note 64, at 878–79 (arguing, in a pre-*Davis* article, that a decision for the state in the case would be a “significant extension” of *United Haulers*). But see *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 15, at 281 (“In *Davis*, the Court rightly identified the *United Haulers* holding as providing clear grounds for reversal.”).

86. See, e.g., Dep’t of Revenue v. *Davis*, 128 S. Ct. 1801, 1810 n.9 (2008) (reiterating the potential relevance of the “traditional” nature of public activity).

87. See *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 15, at 285 n.81 (“[B]ecause the Court has not explicitly defined the outer bounds of the [government entity] exemption’s scope, future application of the exemption will be complicated when the cases do not neatly align with *Davis* and *United Haulers*.”).

88. See *supra* note 75 and accompanying text.

89. See Michael, *supra* note 74, at 753 (noting, in a pre-*Davis* article, the impact the *Davis* decision would have “on the \$2 trillion municipal bond market”).

(2) the operation of natural gas, electric, or other “utilities”—whether run by the government or by private firms—that secure exclusive rights to deal with consumers located in a designated service area;

(3) rules that require local citizens to deal with the state as a purveyor of goods or services not traditionally supplied by the government;

(4) the imposition of tax rules designed to advantage in-state businesses connected with the state itself; and

(5) efforts to leverage the immunity that the state-self-promotion doctrine affords to states by either (a) discriminatorily channeling business conducted by a state monopoly to in-state private firms under the market-participant exception to the dormant Commerce Clause or (b) combining *United Haulers*’ forced-use rule with the imposition of user fees that far exceed the cost of the services for which they are imposed.

Each of these categories of cases will raise knotty questions, and I seek to answer some of them in the pages that follow. More important than any answers I offer, however, are the questions themselves. The large number of questions reveals the practical importance of the doctrine forged in *United Haulers* and *Davis*. And the difficulty of working through these questions highlights the rich mix of subtleties raised by the state-self-promotion rule.

#### A. LOCAL-PROCESSING REQUIREMENTS AND GOVERNMENT SERVICE PROVIDERS

Relying on *Carbone*, the plaintiffs in *United Haulers* challenged the Oneida–Herkimer forced-use rule as a presumptively invalid local-processing requirement. The Court, as we have seen, parried this thrust by declaring that the *Carbone* rule does not carry over to facilities owned and operated by state or local governments. But just how far does this principle extend? This question draws attention to two separate types of local-processing-requirement cases tied up with the discharge of traditionally public functions: (1) cases that involve such functions when discharged by the government itself and (2) cases that involve such functions when discharged by public/private joint ventures.

##### 1. Government Discharge of Traditional Public Functions

*United Haulers* clearly stands for the proposition that the “virtually per se” prohibition on “local processing requirements”<sup>90</sup> does not apply when the favored processor is the government itself.<sup>91</sup> As we have seen (and will

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90. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

91. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (noting that “[t]he flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same,” and holding that “such . . . ordinances do not discriminate against interstate commerce for purposes of the dormant Commerce Clause”). For the moment, we are putting to one side monopolization of the delivery of goods, a subject considered in Part III.B. See *infra* notes 166–83 and accompanying text.

soon consider further), an important limitation on this proposition may apply when the processing service involves a nontraditional government activity.<sup>92</sup> In traditional-function cases, however, the effect of *United Haulers* is clear.<sup>93</sup> If, for example, a local government owns and operates a fleet of garbage trucks and also requires that these trucks pick up all local waste, *United Haulers* will immunize the practice from a discrimination-based challenge mounted by out-of-state carriers.<sup>94</sup> In such a case, even if no local transfer station is in the picture, courts will say that the initial handling of trash is just the sort of activity that *United Haulers* permits local governments to monopolize to the exclusion of nonresident firms.<sup>95</sup>

As *Davis* reveals, the principle of *United Haulers* reaches beyond cases that involve waste disposal. Indeed, forced-use rules connected with any sort of government activity—at least so long as that activity qualifies as traditionally public in character—should find protection under the state-self-promotion principle. But just how encompassing is the protection that principle provides? Consider this case: A local government owns and operates a natural-gas utility.<sup>96</sup> It does not require all local buyers of natural gas to purchase product from it.<sup>97</sup> It does, however, require all private sellers of natural gas to route their product through its lines, for which service it charges a handsome fee. If an out-of-state direct seller (such as a seller with its own preexisting lines) were to challenge this mandate, a court might

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92. See *infra* notes 210–36 and accompanying text (describing the traditional/nontraditional test and the difficulty in developing a bright-line distinction in this area).

93. Indeed, two cases immediately illustrated the effect of *United Haulers* in traditional-function cases. See *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241, 249, 252 (3d Cir. 2008) (vacating and remanding the district court’s pre-*United Haulers* holding that flow-control ordinance, which benefited a publicly owned landfill, constituted facial discrimination in violation of the dormant Commerce Clause); *Quality Compliance Serv., Inc. v. Dougherty County*, 553 F. Supp. 2d 1374, 1379 (M.D. Ga. 2008) (deciding that under the “public-private distinction” adopted in *United Haulers*, “a state or municipality will not be subject to *per se* invalidity if the ordinance requires both local and out-of-state haulers to deliver all waste to a publically owned facility”).

94. Note that this rule may not impose a “local processing requirement” at all, because it does not require activity in the locality that might otherwise occur elsewhere. See *infra* notes 166–69 and accompanying text. The important point, however, is that even if the local-processing-requirement label applies (or this rule imposes an otherwise problematic forced-use rule), *United Haulers* will shelter the activity from constitutional attack.

95. Indeed, the rule of *United Haulers* would seem to apply a fortiori, because the actual pick-up of trash seems to fit the “traditional government function” label even more readily than the operation of a modern recycling-centered waste-transfer station. See *generally infra* notes 210–37 and accompanying text (discussing nontraditional-function cases).

96. In reality, the natural-gas industry is subject to an intricate web of federal controls. See, e.g., 10 C.F.R. §§ 580.01–90.505 (2008) (setting forth federal rules regulating the natural-gas industry). The discussion that follows ignores altogether this important statutory and regulatory overlay, so as to focus attention solely on governing dormant Commerce Clause principles.

97. What if a local government did require all local buyers to purchase its product? For an analysis of this question, see *infra* notes 161–82 and accompanying text.

sustain the out-of-state seller's discrimination-based attack by deeming *United Haulers* and *Davis* beside the point on the ground that the state's action is not "traditional" in character.<sup>98</sup> On the other hand, it might reject this result on the logic that the challenged rule in its nature involves no discrimination against interstate commerce, wholly apart from the operation of the state-self-promotion immunity.<sup>99</sup>

What if, however, the court eschews both of these approaches, finding that (1) the "traditional government activity" label applies (or that the "nontraditional" nature of the government activity is legally inconsequential),<sup>100</sup> and (2) there is discrimination against interstate commerce unless the state-self-promotion doctrine compels the opposite conclusion?<sup>101</sup> In these circumstances, the court would have little choice but to find that the doctrine does apply and thus precludes strict dormant Commerce Clause review. After all, if no discrimination exists when the state favors its own facility in moving along solid waste, it is hard to see how

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98. See *infra* notes 211–18 and accompanying text (discussing traditional public functions as defined by the Supreme Court).

99. This line of reasoning presents a matter of some complexity. At first blush, there appears to be no discrimination against interstate commerce because both in-state and out-of-state operators are equally subject to the forced-use rule. On the other hand, this same circumstance marks past local-processing requirement cases that the Court has placed in the discrimination camp. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389–91 (1994). In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), for example, the Court struck down an ordinance that required the pasteurization of all locally sold milk, whether produced inside or outside the state, within five miles of the city's center. See also *Minnesota v. Barber*, 136 U.S. 313, 328–29 (1890) (requiring local inspection of all beef cattle prior to butchering). There is, however, a potential distinction between *Dean Milk* and our hypothetical gas-line case: In *Dean Milk*, it was possible for the pasteurization to occur outside of Wisconsin, whereas the local delivery of natural gas by its nature requires the use of local pipelines. Thus, the latter case, in contrast to the former, does not "divert" business from an out-of-state to an in-state location. See *supra* note 50 (quoting language from the *Toomer* case); see also *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 715 (3d Cir. 1995) (holding that a franchise award to an electrical or natural gas utility "does not . . . discriminate against electricity and gas generated or produced out of state" so long as the award is open to both in-state and out-of-state firms and the franchisee is not "required to commit to producing its electricity or securing its natural gas supply within that area"). There is rhetoric in the cases, however, that raises questions as to whether this distinction is legally consequential. In *Carbone*, for example, the Court observed: "While the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." *Carbone*, 511 U.S. at 389. In similar fashion, our hypothetical you-must-use-our-pipes case presents a situation in which diversion into local pipes is certain to increase costs for cross-border transport and thereby have "economic effects [that] are interstate in reach." *Id.* In addition, an endorsement of the no-discrimination-because-local-delivery-must-occur argument would carry with it troubling regulatory implications. Indeed, according to the logic of that argument, the state could favor a local, private owner of in-state natural gas lines just as readily as it could favor itself.

100. For an argument that the Court may ultimately reject the traditional-activity/nontraditional-activity distinction, see *infra* notes 222–37 and accompanying text.

101. See *supra* note 94 and accompanying text.

discrimination can exist when the state favors its own facility in moving along natural gas.

But wait! This hypothetical brings into focus a key, though easily overlooked, limitation on the *United Haulers* rule: The Court did not declare the case to be over once it determined that the Oneida–Herkimer program involved no discrimination against interstate commerce. Rather, having found no discrimination, a controlling plurality of Justices went on to apply the “*Pike* balancing test,”<sup>102</sup> inquiring whether “‘the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’”<sup>103</sup> In the end, the program at issue in *United Haulers* passed muster under *Pike* for two reasons. First, in the plurality’s view, the burden that the program placed on private interstate operators was not great, particularly when compared to the burden imposed on similarly situated in-state operators.<sup>104</sup> Second, the handling of all waste at one municipally owned processing facility had salutary effects because it facilitated the sort of close monitoring that would best ensure the environmentally sensitive disposal of local waste.<sup>105</sup>

As this analysis indicates, *Pike*-based analysis is always fact-sensitive.<sup>106</sup> And our hypothetical natural-gas-pipes case might well produce a different set of weights to be placed on the *Pike*-balancing scales. The record in that case might reveal, for example, that not one private in-state firm sells natural gas directly to local users, so that only interstate operators bear the burden of the city’s you-must-use-our-pipes rule. The evidence might also show that use of the government’s pipes in no way mitigates environmental or other dangers because the private seller’s own pipes are newer, better, and safer than the publicly owned pipes through which the government seeks to route

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102. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 763 (1995) (setting forth the test that the Court established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

103. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (quoting *Pike*, 397 U.S. at 142).

104. *Id.* The Court noted in this regard: “After years of discovery, both the Magistrate Judge and the District Court could not detect *any* disparate impact on out-of-state as opposed to in-state businesses.” *Id.* This observation highlights a basic, but seldom noticed, question about how *Pike* balancing should work in the great run of cases to which it applies. In particular, what if the absolute impact of a state rule on interstate commerce is great but not “disparate”? In such a case is there any burden on interstate commerce for *Pike*-balancing purposes? A substantial burden? In *United Haulers* the Court sidestepped these complexities by finding “it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances.” *Id.*

105. *Id.* at 347.

106. The fact-sensitive nature of *Pike*-based analysis is reflected in the Third Circuit’s decision in *Lebanon Farms Disposal, Inc. v. County of Lebanon* to remand the case for the district court to “conduct the *Pike* balancing test and make findings of fact and conclusions of law for the record” even though the case was “indistinguishable from *United Haulers* in all material ways for the purpose of the facial discrimination analysis.” *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241, 252, 249 n.18 (3d Cir. 2008).

the out-of-state seller's gas. On these facts, even in the absence of discrimination against interstate commerce, the Court might well detect a dormant Commerce Clause violation under *Pike*.<sup>107</sup> What is more, this same possibility exists in all state-self-promotion cases, including cases that involve state supply of even the most traditional forms of government service. The key point is that the state-self-promotion "exception" provides an exception only to the antidiscrimination component of the dormant Commerce Clause analysis. It does not provide a wholesale exception that negates dormant Commerce Clause scrutiny altogether. Put another way, *United Haulers* itself established an important limit on the dormant Commerce Clause immunity it recognized: Whenever a court finds that a challenged regulation does not involve discrimination because of the state-self-promotion principle, it must nevertheless go on to inquire whether that regulation should fall victim to *Pike*-balancing review.<sup>108</sup>

But wait again! In *Davis*, the Court identified a new and potentially sweeping limitation on the operation of *Pike*-balancing analysis.<sup>109</sup> After finding an absence of discrimination under the *United Haulers* rule, the Court in *Davis* went on to declare that "the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden in this particular case."<sup>110</sup> In support of this conclusion, the Court first asserted that "weighing or quantifying" the burdens the Kentucky taxing scheme placed on interstate commerce "would be a very subtle exercise."<sup>111</sup> It next observed that "[t]he prospect for reliable *Pike* comparison dims even further"<sup>112</sup> upon considering the hard-to-measure advantages that Kentucky's taxing scheme engendered by creating "single-state markets serving smaller municipal borrowers" otherwise unable to sell bonds at all.<sup>113</sup> According to the Court:

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107. Of course, there may be other government interests in the picture—such as the desire to avoid the construction and maintenance of duplicative lines under city streets. If the seller has preexisting lines that are in good repair, however, this interest would seem to be weak.

108. See *United Haulers*, 550 U.S. at 345 (applying the *Pike* balancing test after determining that the ordinances at issue "do not 'discriminate against interstate commerce'"); see also *Lebanon Farms*, 538 F.3d at 251 n.20 (explaining why the *United Haulers* holding "dictates the application of the *Pike* balancing test to flow control ordinances that benefit a public facility"); *Quality Compliance Servs., Inc. v. Dougherty County*, 553 F. Supp. 2d 1374, 1379–82 (M.D. Ga. 2008) (conducting *Pike*-balancing analysis after finding local flow-control ordinances "do not discriminate against interstate commerce" under the *United Haulers* principle).

109. See Viard, *Supreme Court Upholds Balkanization*, *supra* note 74, at 893 (characterizing the *Pike* balancing performed in *Davis* as "no actual balancing at all"); *id.* at 894–95 (noting the Court's willingness in *Davis* "to dispense with *Pike* balancing in the normal sense").

110. *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1817 (2008).

111. *Id.* at 1818.

112. *Id.*

113. *Id.* at 1817.

What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.<sup>114</sup>

The Court concluded its analysis by observing that “the rule in *Pike* was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the *Davis*es request” by advocating application of “a federal rule to throw out the system of financing municipal improvements throughout most of the United States.”<sup>115</sup>

This is not the place to consider in detail the Court’s treatment of *Pike* balancing in the *Davis* case. Indeed, that treatment may portend such massive doctrinal upheaval that it is sure to trigger expansive, freestanding treatments in the scholarly literature.<sup>116</sup> For now it suffices to observe that: (1) from all appearances, the Court in *Davis* forged a new and highly indeterminate institutional-incompetence limitation on *Pike*-balancing review; and (2) whether or not the Court ultimately applies that limitation in all *Pike* balancing cases,<sup>117</sup> the limitation applies at least in the state-self-promotion context because that was the very context in which the Court decided *Davis*.

It is unclear what the future holds for the Court’s institutional-leeriness twist on the *Pike* methodology. Perhaps, in keeping with the longstanding counsel of Justice Scalia, the Court has inched closer to holding that intractable analytical problems warrant abandoning *Pike* balancing altogether.<sup>118</sup> Perhaps the Court, on reflection, will determine that its

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114. *Id.* at 1818.

115. *Davis*, 128 S. Ct. at 1819.

116. In an important piece of work, Professor Denning has already begun to explore these matters. See Denning, *supra* note 57, at 453–59 (discussing the breakdown of *Pike*-balancing analysis).

117. Cf. Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine* 22 n.67 (Benjamin N. Cardozo School of Law, Working Paper No. 255, 2009) (“Perhaps the *Davis* Court’s reservations about [*Pike*] balancing will blossom down the road.”).

118. See *Davis*, 128 S. Ct. at 1821 (Scalia, J., concurring in part) (“I would abandon the *Pike*-balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them.”); *Bendix Autolite Corp. v. Midwesco Enters. Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (pushing for the “abandon[ment] [of] the ‘balancing’ approach to . . . negative Commerce Clause cases”); Denning, *supra* note 57, at 455–56 (encapsulating critiques of Justices Scalia and Thomas directed at *Pike* balancing). Professor Denning has gone so far as to claim that, for all practical purposes, the Court already has abandoned *Pike* balancing. See *id.* at 493 (supporting the thesis of “sub silentio” abandonment). Going one step further, he also asserts that the Court’s rejection of the methodology is a good idea. *Id.* at 477, 493–94 (noting that he too “would abandon *Pike* balancing” and develop arguments against balancing). At the same time, Professor Denning

institutional-incompetence rhetoric in *Davis* did not alter its past approach to *Pike* at all.<sup>119</sup> Or perhaps the Court will move in the future to rein in its institutional-incompetence initiative by declaring it applicable (1) only in the state-self-promotion context, (2) only to state tax cases,<sup>120</sup> (3) only to distinctly high-stakes programs already in place “throughout most of the United States,”<sup>121</sup> or (4) only to cases involving some combination of these features. In the meantime, one thing is certain: In every state-self-promotion case, the government will defend the challenged practice against *Pike*-based attack by arguing that courts are “institutionally unsuited” to weigh the competing interests at stake.

The foregoing discussion gives rise to two key points: (1) the centerpiece of the state-self-promotion doctrine rests in its command that forced-use rules associated with the government’s delivery of services do not involve discrimination against interstate commerce; and (2) because the state-self-promotion doctrine provides an exception only to discrimination-based strict-scrutiny review, courts remain free to strike down such programs under the *Pike*-balancing test. To be sure, in time, courts may read *Davis* as placing new and important limits on the ability of courts to invoke *Pike* to invalidate state laws. For now, however, it remains open to lawyers to demonstrate why the burdens that state-self-promoting rules impose on interstate commerce are “clearly excessive” in comparison to their benefits.

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acknowledges the need for the Court to go beyond merely invalidating facially discriminatory statutes and to strike down laws that discriminate in purpose or effect. *Id.* at 500. What Professor Denning may fail to fully consider is the potential value of *Pike* balancing as a practical mechanism to “smoke out” problems of discrimination that lurk in superficially neutral statutes. *See id.* at 500, 502 (criticizing *Pike* analysis even while recognizing that “[p]olicing effects and purpose are necessary to ensure the operative proposition is optimally enforced—or at least not grossly underenforced because of the ease of evasion on the part of state and local governments”). In fact, *Pike* balancing is defensible on this ground. *See* COENEN, *supra* note 8, at 254 n.3. Two separate considerations suggest why it is not likely to be overutilized in this process. First, the test on its face permits judicial intervention only if burdens on interstate commerce “clearly” exceed the state’s justification for the challenged law. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Second, as Professor Denning himself highlights, “A majority of the Court has not struck down a state or local law using *Pike* balancing in over twenty-five years.” Denning, *supra* note 57, at 493. Under these circumstances, concerns about the ready abusability of *Pike* review seem—to say the least—greatly exaggerated.

119. For example, the Court might suggest that its reflections about institutional competence merely served to underscore why the national interests did not “clearly” outweigh the state’s identified justifications for its law. *Pike*, 397 U.S. at 142 (setting forth the general balancing inquiry).

120. *Cf. infra* note 244 and accompanying text (noting that *Pike* analysis seems inapplicable in the tax context).

121. *Davis*, 128 S. Ct. at 1819.

## 2. Public/Private Joint Arrangements in Discharging Traditional Government Functions

*Carbone* holds that a local government discriminates against interstate commerce when it forces local citizens to use a waste-transfer station that a private entity owns and operates.<sup>122</sup> *United Haulers* holds that a local government does not discriminate against interstate commerce when it forces local citizens to use a waste-transfer station that the local government owns and operates.<sup>123</sup> A key question these cases leave behind is whether a local government discriminates against interstate commerce when it forces local citizens to use a waste-transfer station owned and operated pursuant to a public/private joint-venture arrangement.<sup>124</sup>

As it turns out, the Court already has provided a partial answer to this question, even though it has not paused to address it in a direct and specific way. Why? Because both *Carbone* and *United Haulers* involved forms of public/private collaborations. In *Carbone*, the Court applied the antidiscrimination rule even though the local government instigated and oversaw the entire waste-transfer-station project, guaranteed a minimum revenue stream to the private operator, and held the right to purchase the facility for one dollar after five years of operation. Relying on these facts, the dissenters in *Carbone* argued that the challenged forced-use rule should escape dormant Commerce Clause scrutiny because the waste-transfer station was “essentially a municipal facility.”<sup>125</sup> The majority in *Carbone* never wrestled with this analysis. It did, however, characterize the advantaged program operator as “private” on its way to finding a dormant Commerce Clause violation.<sup>126</sup>

*United Haulers* also involved a public/private collaboration because the government owners of the waste facilities involved in that case did not alone oversee day-to-day operations. Rather, municipal officials contracted with a private company to operate the primary government-owned waste-transfer

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122. See *supra* notes 22–29 and accompanying text.

123. This was the majority holding in *United Haulers*. See *supra* notes 57–73 and accompanying text.

124. Notably, this question was very much on the Justices’ minds during oral argument in the *United Haulers* case. See, e.g., Transcript of Oral Argument, *supra* note 65, at 28, 52 (Roberts, C.J.) (questioning the impact of joint public/private ownership on proper constitutional analysis). The difficulty of the problem is highlighted by the different answers provided by counsel for the government with respect to whether the state-self-promotion principle would apply in the joint-venture context. Compare *id.* at 29 (suggesting that the distinction might turn on “when the government is actually in the transaction, . . . taking the risks, . . . spending public money, [and] providing a service directly to the people”), with *id.* at 53 (suggesting that the analysis may turn on the presence of “protectionist” motives).

125. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 419 (1994) (Souter, J., dissenting).

126. See *supra* note 29 and accompanying text (noting the *Carbone* decision hinged partly on the fact that the station was operated by a private entity).

facility to which waste flowed.<sup>127</sup> Notwithstanding this fact, the Court distinguished the case from *Carbone* on the theory that the government “owned and operated” the facility.<sup>128</sup> Indeed, the Court never even paused to consider whether the presence of an operating contract with a private firm might remove the case from the state-self-promotion rule’s coverage.<sup>129</sup>

Based on this history, it seems settled after *United Haulers* that a state’s hiring of a private firm to operate a facility that the government owns, finances, and generally oversees, as part of an overarching waste-handling program, does not suffice to bring the *Carbone* rule into play.<sup>130</sup> On the other hand, *Carbone* itself indicates that the *United Haulers* rule will not apply even when the target of the constitutional challenge can make a powerful claim of de facto government ownership of the favored facility due to (among other things) a near-term right to acquire the facility for a nominal sum.<sup>131</sup> Because government use of public/private joint arrangements is commonplace in the real world,<sup>132</sup> it is important to explore how courts will apply *United Haulers* and *Davis* to such cases in the future. Consider, for example, the following cases and the issues they present:

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127. The government itself oversaw the overall waste program and operated a recycling center, a waste-energy facility, and two other specialized waste-receiving centers. It did not, however, operate the primary facility at issue in the case. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 250 (2d Cir. 2001) (“The Authority owns all five designated facilities and operates all but the Utica Transfer Station.”), *aff’d*, 550 U.S. 330 (2007); Transcript of Oral Argument, *supra* note 65, at 52 (Ginsburg, J.) (noting that “these transfer stations are constructed and operated by a private company”). According to the petitioners’ brief, “the Authority contracted with private entit[ies]” to operate the transfer station. Brief for Petitioners at 4, *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (No. 05-1345).

128. *United Haulers*, 550 U.S. at 334.

129. Notably, the challengers—perhaps for tactical reasons—never argued that *Carbone* should control on the theory that the transfer station was privately operated; nor did the Court make note of this complicating circumstance on its way to upholding the Oneida-Herkimer flow-control rule. Notwithstanding these omissions, it is hard to believe that the Court will hereafter say that it wrongly decided *United Haulers* because no one noticed that, in that case, a private firm played a key role in operating the supposedly “public facility.” *Id.* at 342.

130. It follows a fortiori that many other forms of interaction with private enterprises will not preclude invocation of the *United Haulers* rule. Publicly operated transfer stations, for example, will routinely enter into contracts with private entities to provide them with construction, engineering, and legal services. And, at the very least, the government, in operating its facility, will contract with local employees who gain an advantage by way of the forced-use rule over workers employed (or potentially employed) by would-be waste-handling competitors in other states. *See id.* at 364 (Alito, J., dissenting) (“Discrimination in favor of an in-state government facility serves ‘local economic interests,’ inuring to the benefit of local residents who are employed at the facility, local businesses that supply the facility with goods and services, and local workers employed by such businesses.” (citations omitted)). Plainly, under the principle of *United Haulers*, these sorts of interactions do not strip a government-owned-and-operated facility of public status for purposes of the state-self-promotion rule.

131. *See supra* text accompanying note 125 (discussing the application of *Carbone*).

132. *See, e.g., Zelinsky, supra* note 117, at 25 (noting that “public agencies of the modern state are frequently intertwined in their activities with private firms”).

(1) By contract, a city and a private firm agree that the firm will pay for the building of a waste-handling facility, which the city will own in fee simple from day one. The firm will then operate the facility for five years and receive all tipping fees during that period as the means of paying for the firm's construction and operation of the facility. If the authority requires local citizens to send all waste to this facility, does *Carbone* or *United Haulers* control?<sup>133</sup>

(2) A local authority shares in the ownership and profits of a local transfer station on a 50–50 basis with a private waste-handling firm that oversees day-to-day facility operations. As part of this arrangement, the city requires the delivery of all local waste to the transfer station. On these facts, does the dormant Commerce Clause antidiscrimination rule apply?<sup>134</sup>

(3) A city owns and operates a waste-transfer facility, but also licenses a local, private firm that owns and operates its own trucks to handle waste pick-up from local residents in such a way that those residents must deal with that private firm and pay it city-approved charges. Can the government successfully argue that it is a joint-venturer in providing an “integrated package of waste-disposal services,”<sup>135</sup> so that its forced-use rule with regard to garbage pick-up can evade discrimination-based strict-scrutiny analysis under the state-self-promotion rule?<sup>136</sup>

These hypothetical cases represent only a small sampling of the instances in which governments can attach forced-use rules to business operations that combine public and private features. In assessing the constitutionality of these arrangements—both in the waste context and in other settings as well—much will turn on the precise facts of the case. Even so, there is reason to believe that in cases like the ones identified here, *Carbone*—and not *United Haulers*—should control.

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133. See Transcript of Oral Argument, *supra* note 65, at 13–14 (Souter, J.) (noting that the issue that would be present if the state owned the facility, but permitted private entities to operate and profit from the facility, was “a third case” and “not the question we have here”).

134. The difficulty in deciding whether protectionism is at work in this situation was on display during oral argument in the *United Haulers* case. Compare Transcript of Oral Argument, *supra* note 65, at 29 (setting forth the assertion of government counsel that a 50–50 venture would not be subject to the *Carbone* rule because the “government is actually in the transaction . . . it’s taking the risks . . . it’s spending public money,” while also conceding that “I don’t think the answer is automatic one way or the other”), with *id.* (Souter, J.) (suggesting that “the better answer” might be that “it’s protectionism” unless “the government’s going to do it the way the government’s doing it in your case”—namely, with a “100 percent government” operation). See also *id.* at 52 (setting forth statement of counsel for New York that the “50–50 facility” case presents “a hard question”).

135. *United Haulers*, 550 U.S. at 346.

136. In *United Haulers*, for example, state law “empowered” the government authority “to collect, process, and dispose of solid waste generated in the Counties.” *Id.* at 335. Such a law might be invoked to bolster the claim that the local waste business should be viewed as a unitary whole of which waste collection constitutes only one part.

Four separate considerations suggest why this is so. First, as we have seen, in *Carbone* the town of Clarkstown held an option to buy the facility for one dollar after five years.<sup>137</sup> In light of this fact, it was entirely plausible to say that the town in effect owned the facility and simply authorized the private operator to use the facility for a limited time.<sup>138</sup> The Court, however, declined to cast *Carbone* as a case that involved a public facility and focused solely on the role of the town's private co-venturer.<sup>139</sup> Against this backdrop, it would make little sense to view the *Carbone* rule as generally inapplicable in cases that involve such a high level of private-firm involvement that the private firm participates directly in program profits.<sup>140</sup>

Second, the language of *United Haulers* bolsters this conclusion. For example, the Court in *United Haulers* observed that the case involved a “clearly public facility.”<sup>141</sup> This label does not apply comfortably to cases that involve public/private collaborations in which the private entity plays a pivotal role. And the label seems especially inapt when a private enterprise participates extensively in day-to-day program operations and receives a share of project profits in return.<sup>142</sup>

137. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387 (1994).

138. *See United Haulers*, 550 U.S. at 358–59 (Alito, J., dissenting) (citing this fact and others to show that in *Carbone*, “the preferred facility was for all practical purposes owned by the municipality” and properly viewed as a “municipal facility” due to the local government’s role with respect to it); *see also Nat’l Solid Wastes Mgmt. Ass’n v. Daviess County*, 434 F.3d 898, 912 (6th Cir. 2006) (going so far as to conclude that the facility in *Carbone* was “quite clearly owned in fact by the municipality”), *vacated*, 550 U.S. 931 (2007); Denning, *supra* note 57, at 469. Denning argued:

[T]here is much less to this publicly/privately owned distinction than meets the eye . . . [because] the Clarkstown facility was built and initially operated by a private firm, but was to be ‘sold’ to the City for a nominal amount after a period of years during which the private firm would recoup its investment.

*Id.*

139. Indeed, the majority lent so much weight to the private nature of the co-venture that it never even considered the dissenters’ argument that the operation was public in nature. *See supra* notes 128–29 and accompanying text.

140. Indeed, the dissenting Justices in *Carbone* cited these same facts in specifically arguing that the waste-transfer station at issue in that case was “essentially a municipal facility” and that the Court should treat it that way for dormant Commerce Clause purposes. *Carbone*, 511 U.S. at 419 (Souter, J., dissenting). Notably, the majority in *United Haulers* read *Carbone* as rejecting this characterization, notwithstanding the significant participation of the government in its creation, ownership, operation, and success. *United Haulers*, 550 U.S. at 339–41 (asserting that the *Carbone* Court viewed its decision as applying only to private facilities).

141. *United Haulers*, 550 U.S. at 342 (emphasis added).

142. *See generally* *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (treating a heavily regulated utility as a private entity for dormant Commerce Clause purposes in applying the market-participant rule). *See also id.* at 338 n.6 (“This product is manufactured by a private corporation using privately owned facilities. Thus, New Hampshire’s reliance on *Reeves* . . . — holding that a state may confine to its residents the sale of products it *produces*—is misplaced.”).

Third, the reasoning of *United Haulers* points in the same direction. The Court in that case relied on the propositions that (1) favoring a public entity does not in its nature entail “protectionism” for dormant Commerce Clause purposes,<sup>143</sup> and (2) political-process concerns favor judicial nonintervention in public-entity cases because private pressures against establishment of government monopolies will tend to ensure they will not gain a foothold absent powerful justifications for their use.<sup>144</sup> Both of these considerations suggest that courts should take a skeptical view of forced-use rules that channel project profits to nongovernmental collaborators in public/private joint ventures. In any such case, after all, the private-party co-participant enjoys government “protection” precisely because the forced-use rule exempts it from the rigors of market competition. In addition, in all such cases, political-process considerations parallel those at work in *Carbone* and not those at work in *United Haulers*. This is true because any profit-sharing private entity is sure to seek to bend the local government’s decision-making process in its favor to establish or retain the monopoly program. Indeed, as we have seen, the perceived absence of such a private party in *United Haulers* and the consequent enhancement of likely surrogate representation of out-of-state interests provided—at least in the Court’s eyes—a powerful reason for deeming *Carbone* a distinguishable case.<sup>145</sup>

Finally, a general failure to subject joint-arrangement cases of this kind to the *Carbone* rule would present an open invitation for evasion. Consider *Carbone* itself. Could the local government have altered the result in that case simply by retaining title to the facility subject to the private operator’s five-year right of use, rather than contracting for an option to acquire title after five years for a one dollar payment?<sup>146</sup> Given the policies that drove *United Haulers*, as well as function-over-form concerns at the heart of modern dormant Commerce Clause jurisprudence,<sup>147</sup> such legalistic details in the structuring of the arrangement should not carry outcome-determinative weight.

In light of these considerations, Case #1 (which involves de facto private-firm ownership of the facility)<sup>148</sup> should trigger application of the

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143. See *supra* notes 62–65 and accompanying text.

144. See *supra* notes 66–71 and accompanying text.

145. See *supra* notes 66–71 and accompanying text.

146. See Ryan Tichenor, Note, *The Public Entity End Run: Government Actor’s Exception to Dormant Commerce Clause Considerations*, 15 MO. ENVTL. L. & POL’Y REV. 435, 449 (2008) (arguing the ordinance found unconstitutional in *Carbone* would now be permissible under the holding of *United Haulers* if the private operator “simply turned the title to the plant over to the town . . . in exchange for a note”).

147. See, e.g., *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (noting that “[t]hese decisions have considered not the formal language of the tax statute but rather its practical effect”); *id.* at 288 (observing that “a focus on that formalism merely obscures the question”).

148. See *supra* notes 133, 137–41 and accompanying text.

*Carbone* rule, rather than come within the carve-out to that rule that *United Haulers* put in place.<sup>149</sup> After all, as a functional matter, that case involves the same business transaction put before the Court in *Carbone* itself.<sup>150</sup> The only difference is that in Case #1, unlike in *Carbone*, the local government retained title to the facility. However, the government parted with management and operation of the facility—as well as program revenues—during the relevant five-year period. In an analogous setting, the Court has suggested that the mere location of title should not be determinative for dormant Commerce Clause purposes.<sup>151</sup> That same principle should control Case #1.

Case #2 (which involves the 50–50 arrangement) should also fall within the rule of *Carbone*, rather than the exception that *United Haulers* promulgates. Indeed, Case #2 may present an even stronger argument for invalidation than Case #1, because in it the private co-venturer is not merely a de facto owner of the favored facility; rather, the private entity owns the facility in the most literal sense. What is more, as in Case #1, the private entity in Case #2 stands in a position far removed from that of an ordinary private contractor because it is a direct participant in project profits. In these circumstances, the risk of protectionism is clearly present, and the relevant political-process dynamics parallel those present in *Carbone*. As a result, the waste-transfer station should fail to qualify as a “clearly public facility.”<sup>152</sup>

Case #3 provides the most compelling case of all for refusing to grant the local government the benefit of the state-self-promotion doctrine. Why? Because in Case #3, the private operator *alone* wholly owns *and* wholly operates the favored trash-collection business. To be sure, the government owns the local transfer station, but there is no reason why that fact should

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149. Indeed, it seems likely that the town in *Carbone* could have easily structured the legal relationship so that the private entity was a contractor, rather than an owner/operator, while providing that entity with essentially, if not exactly, the same level of control and compensation that the owner/operator actually secured. See *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 359 (2007) (Alito, J., dissenting) (“[B]arring any obstacle presented by state law, the transaction in *Carbone* could have been restructured to provide for the passage of title at the beginning, rather than the end, of the 5-year period.”).

150. See Brief of Amici Curiae National Solid Wastes Management Ass’n at 16, *United Haulers*, 550 U.S. 330 (No. 05-1345), 2006 WL 3350568 (positing, in discussing *Carbone*, that “it would have been a simple matter for Clarkstown to have assumed ownership of the transfer station at the onset (subject to a security interest) while contractually promising the entity that constructed and managed it the right to receive all tipping fees for five years”).

151. See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 n.11 (1984) (noting, in applying the market-participant exception to the dormant Commerce Clause, that “the State could [not] evade the [Court’s] reasoning . . . by merely including a provision in its contract that title does not pass until the processing is complete”). The Commerce Clause context is not the only setting in which location of title is not determinative. See, e.g., U.C.C. § 9-202 (2000) (deeming the location of title irrelevant for purposes of secured-transactions law).

152. See *supra* notes 141–45 and accompanying text.

matter in assessing the character of the separate private trash-pick-up company. Here—in direct contrast to *United Haulers*—the local-hauler-favoring flow-control rule does *not* “treat every private business, whether in-state or out-of-state, exactly the same”<sup>153</sup> by channeling all business to a favored governmental operator. Rather, just like in *Carbone*, the government treats the local private hauling business better than all would-be private competitors—whether local or non-local—because only it is granted the right to deal in all relevant ways with waste producers.<sup>154</sup>

As the foregoing analysis reveals, the practical effect of *United Haulers* is to set forth a “safe harbor” rule. Pursuant to that rule, state and local governments can enjoy the benefit of a monopoly position, despite the tension that monopoly position creates with the free-interstate-trade values that underlie the dormant Commerce Clause. To enjoy this benefit, however, the government must associate its forced-use rule with a service-providing operation that is genuinely owned and overseen by it, and not by a private firm that the government shelters from out-of-state competition. To be sure, this result may raise worries that governments will choose to provide key services to local citizens through wholly public entities, rather than by way of more efficient, partially privatized, service-providing mechanisms.<sup>155</sup> Two considerations suggest, however, that fears of this outcome are probably overstated. First, the same prophecies of doom arose when the Court propounded the market-participant exception to the dormancy doctrine some three decades ago.<sup>156</sup> In the intervening period, however, we have not seen a sudden rush toward state ownership of cement plants,<sup>157</sup> water-

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153. *United Haulers*, 550 U.S. at 334.

154. It bears emphasis that this discussion establishes only that the *United Haulers* rule is inapplicable on the facts presented. A separate question concerns whether the locality may favor the local waste hauler on the ground that it is a properly licensed service-providing utility. *See infra* notes 181–204 and accompanying text. Yet another separate question is whether the waste-pick-up hypothetical involves no discrimination (wholly apart from the state-self-promotion doctrine) because waste pick-up, by its nature, must occur within the state itself. *See supra* note 99 and accompanying text (noting that the delivery of natural gas requires the use of local pipelines). Given this fact, it may be that the waste-pick-up forced-use rule will not be viewed as a problematic local-processing requirement—at least in the absence of a stark form of discrimination against interstate operators, such as a franchising process that overtly favors locally incorporated firms over firms incorporated in other states. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) (looking askance at state action that favors businesses based on their local incorporation or other in-state characteristics).

155. *See supra* note 47 and accompanying text.

156. *Compare* Gergen, *supra* note 52, at 1142–43 (challenging the market-participant exception in part on the ground that it could lead to government displacement of private businesses), *with* Coenen, *supra* note 52, at 431–32 (responding to Professor Gergen’s concerns).

157. *See* *Reeves, Inc. v. Stake*, 447 U.S. 429, 446–47 (1980) (allowing South Dakota to discriminate in the sale of cement under the market-participant exception).

bottling facilities,<sup>158</sup> or hydroelectric power stations.<sup>159</sup> Second, as *Carbone* teaches, governments can effectively ensure the success of private waste-transfer and other operations even if the use of joint arrangements does not carry with it an ability to impose forced-use mandates. One option is to subsidize the private facility to permit it to reduce rates to the point that local residents have no reason to deal with anyone but the facility.<sup>160</sup> What is more, such subsidization carries with it the benefit of rendering highly visible the precise costs that a government's support of a private undertaking imposes on local taxpayers.<sup>161</sup>

The Court's safe-harbor methodology also puts in place what we might call a "half-a-loaf" approach to this field of law.<sup>162</sup> If *Carbone* and *United Haulers* teach us nothing else, they suggest that there is something to be said both for certain forms of forced-use rules and for the free-interstate-trade values that those rules tend to threaten. Against this backdrop, the Court has chosen to give something to each side. When the government itself owns and operates the relevant facility, forced-use mandates will stand as tolerable forms of state experimentation and self-definition. However, when private entities secure a profit-sharing position in the venture—thus triggering much-heightened risks of protectionism and government capture by self-interested private concerns—the value of free-interstate trade will take precedence. This practical accommodation of intensely competing interests lies at the heart of the Court's rulings in *Carbone*, *United Haulers*, and *Davis*.

#### B. THE STATE-SELF-PROMOTION DOCTRINE AND UTILITY REGULATION

During oral argument in *United Haulers*, Justice Breyer directed attention to electric and other utilities, pointedly asking why longstanding legal understanding with regard to such operations should not carry over to the Oneida-Herkimer waste-transfer-station program.<sup>163</sup> This line of

158. See *New York v. United States*, 326 U.S. 572, 581 (1946) (holding that New York was not immune from federal excise tax on sales of bottled mineral water taken from state-owned springs).

159. See *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (holding that New Hampshire could not restrict interstate transportation of hydroelectric power generated within the state).

160. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (noting that a workable alternative to the forced-use rule exists because "the town may subsidize the facility through general taxes or municipal bonds").

161. See Coenen, *supra* note 52, at 434–35 (emphasizing the political-process value of heightened visibility of direct payments).

162. Cf. Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 979 (1998) (noting that the half-a-loaf approach also marks the Court's distinction between tax breaks and subsidies).

163. Indeed, the very first question asked at oral argument, posed by Justice Breyer, focused on the assertion that "in many thousands of municipalities throughout the United States it's fairly common to have a locally owned electricity distribution company . . . or a gas distribution company"; for the "municipally owned pipeline, gas pipeline, or electricity distribution to say, if

questioning was hardly surprising. Utility regulation, after all, often involves state mandates that compel customers in a designated area to deal with, and deal only with, a single favored supplier of electricity, natural gas, or the like. Sometimes the service provider is a government entity. Sometimes the service provider is a private firm. In each of these settings, how will the state-self-promotion rule interact with the government's obstruction of interstate trade through its creation of a local monopoly?

### 1. Government-Owned Utilities

Consider the following case: A city operates its own reservoir and waterworks facility and also requires all local users to buy water only from it. It may be that, absent this rule, a large-volume industrial user, such as a coal-liquefaction plant, could secure water from an out-of-state supplier at rates far more favorable than those the government-owned utility imposes.<sup>164</sup> If so, can this user successfully invoke the dormant Commerce Clause antidiscrimination rule to sidestep the locality's mandate to use only its water, notwithstanding the exception to the antidiscrimination rule carved out in *United Haulers*? The answer is no.<sup>165</sup>

The industrial user might try to escape the principle of *United Haulers* by arguing that that case involved only a "local-processing requirement," whereas this case involves a wholesale ban on the importation of an out-of-state product.<sup>166</sup> In particular, the user might argue that such an absolute prohibition on importation involves an even greater restriction on interstate commerce than a protective tariff, which only discourages (and does not wholly bar) the local delivery of out-of-state goods.<sup>167</sup>

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you live in our town you've got to buy from us"; that "that's been going on for about 110 years"; and that "I've never seen anybody think or write . . . that that violated the Commerce Clause." Transcript of Oral Argument, *supra* note 65, at 4; *see also id.* at 17–18 (Souter, J.) (expressing concern that, if the Court were to find a constitutional wrong in *United Haulers*, "every municipal utility in the United States is going to fall"); *id.* at 21 (Kennedy, J.) (discussing difficulties presented by a "municipal electricity company"); *cf. id.* at 22–23 (Breyer, J.) (noting that "there could be distributors who are in fact regulated private companies").

164. *See, e.g.,* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 284 (1997) (addressing an analogous issue presented when an industrial purchaser was able to secure natural gas from an out-of-state supplier at a more attractive price than the price offered by the local utility).

165. It is noteworthy in this regard that the Court has devised a special and distinctively tolerant dormant Commerce Clause methodology that applies to some cases that involve the supply of water. *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982) (declining to apply the strictest level of scrutiny to facially discriminatory ban on the export of groundwater). In an effort to focus attention solely on the state-self-promotion rule, I place any special water-related rules to one side in considering the hypothetical set forth in the text. It is not apparent, in any event, that any such rule would apply to the utility-related question this Article identifies and discusses.

166. *See supra* notes 38–41 and accompanying text (discussing *United Haulers* and *Carbone*).

167. *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) (describing tariffs as the "paradigmatic example" of laws that violate the dormant Commerce Clause).

This argument should fail for reasons of both precedent and policy. The essential problem is that local-processing requirements have long been just as suspect as import bans under the dormancy doctrine.<sup>168</sup> And they should be. After all, the sort of local-processing requirements at issue in *Carbone* and *United Haulers* themselves constituted import bans as a functional matter. To be sure, those cases did not involve bans on importing a product. They did, however, involve a state ban on importing a service—namely, a valuable waste-handling service, which local parties buy just as surely as they buy widgets or windmills or water.<sup>169</sup> What is more, the modern Court has never distinguished between goods and services in applying the dormant Commerce Clause principle.<sup>170</sup> Nor should it. Particularly in light of the nature of the modern economy, protectionism with regard to the distribution of services is every bit as destructive of free-flowing interstate commerce as is protectionism with respect to goods.

*Davis* removes any doubt on this score. That case, after all, did not involve a local-processing rule. And it did involve an import restriction on property—namely, property in the form of municipal bonds. To be sure, the issue that *Davis* focused on was a discriminatory tax exemption, rather than a rule that mandated use of a local product. But that would-be distinction simply takes us back to *United Haulers*, in which the Court did not hesitate to

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168. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391–92 (1994) (describing the flow-control ordinance as “just one more instance of local processing requirements that we have long held invalid” and collecting earlier local-processing-requirement cases as well).

169. See *id.* at 390–91 (noting, in finding a dormant Commerce Clause violation, that “the article of commerce” involved in the case “is not so much the solid waste itself, but rather the service of processing and disposing of it”).

170. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572–73 (1997) (finding that the dormant Commerce Clause applied even though the case involved discrimination with regard to the delivery of recreational camp services); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980) (applying the dormant Commerce Clause to invalidate a state law that discriminated with respect to investment-advisory services). Notably, Justice Thomas seems to draw a stark line between laws that discriminate with respect to the delivery of goods and laws that discriminate with respect to the delivery of services, pursuant to his own distinctive views that (1) the Court should abandon the dormant Commerce Clause rule altogether and not apply it in any case; and (2) laws that the Court historically has evaluated under the dormant Commerce Clause (including laws that involve interstate, rather than international, commercial discrimination) should be evaluated solely under the Article I, Section 10 Import–Export Clause from now on. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 610 (Thomas, J., dissenting). It is beyond the scope of this Article to explore how Justice Thomas would deal with claims of discrimination against the delivery of out-of-state water, electricity, and the like. See generally Brannon P. Denning, *Justice Thomas, The Import–Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 U. COLO. L. REV. 155 (1999) (broadly examining the differences between the Court’s jurisprudence under the dormant Commerce Clause and Justice Thomas’s proposed Import–Export Clause approach, including the goods/services distinction).

apply the state-self-promotion exception to a forced-use rule.<sup>171</sup> The bottom line is that a government edict that compels the use of publicly supplied water must fare no worse than an edict that compels the use of publicly supplied waste services. The constitutional immunity arises equally in the two cases because in both of them the challenged rules “benefit a clearly public facility, while treating all private companies exactly the same.”<sup>172</sup>

Our waterworks example illustrates why *United Haulers* and *Davis* will have an impact on government programs that reaches well beyond state sales of waste services and municipal bonds. Public entities, after all, have long involved themselves in selling all sorts of things—ranging from water<sup>173</sup> to natural gas<sup>174</sup> to alcoholic beverages<sup>175</sup> to electricity<sup>176</sup> to telephone, transportation, and educational services.<sup>177</sup> In all of these contexts—and many others as well<sup>178</sup>—the government might well pair a forced-use rule with its entry into the market. Moreover, at least in the contexts identified here, the government is sure to argue that it is acting in an area of traditional government concern, so that the *United Haulers–Davis* doctrine immunizes its action.<sup>179</sup> This Article will soon examine government monopolies that involve more unconventional forms of government intervention and the difficulties posed in determining when the “traditional government function” shoe fits.<sup>180</sup> First, however, this Article will consider

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171. See *infra* notes 237–40 and accompanying text (noting that limits on “lesser” power to tax involve a logical extension of the “greater” power to ban).

172. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). Indeed, at oral argument in the *United Haulers* case, significant attention was given to government monopolies that provide electricity and natural gas. Transcript of Oral Argument, *supra* note 65, at 4–8. The Justices’ questions in this area assumed that protection of the state must apply equally in waste cases like *United Haulers* and cases like those involving electricity monopolies. It logically follows that—at least so long as the government monopoly is a “traditional” one—the Court will deem the *United Haulers* principle fully applicable to such utility operations.

173. See, e.g., *New York v. United States*, 326 U.S. 572, 573–75 (1946) (dealing with government involvement in the provision of bottled water).

174. See, e.g., *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 281–82 (1997) (dealing with public involvement in the sale of natural gas).

175. See, e.g., *South Carolina v. United States*, 199 U.S. 437, 463 (1905) (dealing with public involvement in the sale of alcoholic beverages); *supra* note 49 and accompanying text (same).

176. See generally *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 3–7 (1978) (dealing with public involvement in the provision of electricity); *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205, 206–10 (1964) (same).

177. See, e.g., *California v. Taylor*, 353 U.S. 553, 554 (1957) (dealing with a state-owned railroad).

178. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 431 n.1 (1980) (citing state involvement in providing hail insurance and setting up a state-owned coal mine and cement plant).

179. See *infra* notes 207–36 and accompanying text (discussing a potential traditional-activity/nontraditional-activity distinction).

180. See *infra* notes 210–38 and accompanying text (examining various government monopolies exercising nontraditional intervention).

the different, but related, problem of how the dormant Commerce Clause applies to traditional monopoly operations conducted by local, private firms that enjoy protection under state law from both in-state and out-of-state competition.

## 2. Privately Owned Utilities

Let us say that the government does not own and operate the local waterworks introduced in the preceding discussion. Instead, public officials have arranged for a private firm to provide water for a defined service area, established prices for water delivery, and required all water users in the area to secure supplies from the favored licensee. Under these conditions, is there a dormant Commerce Clause problem in applying the locality's forced-use rule to bar direct importation of out-of-state water by a large-scale user? Answering this question requires an untangling of different strands of modern dormant Commerce Clause case law.

The first question raised by this hypothetical concerns the application of the state-self-promotion doctrine itself. This private-monopoly water case—just like *Carbone* and *United Haulers*—involves an import ban.<sup>181</sup> Further, that ban now operates to protect a private business—rather than a state-owned-and-operated business—from out-of-state competition. For this reason, *United Haulers* is readily distinguishable, and *Carbone* would appear to control.<sup>182</sup> In trying to avoid this result, government lawyers might argue that the private water company is connected with the government in a special way because it is a “public utility.” They might support this assertion by noting that in *Davis* the Court described municipal bonds as including bonds issued for “utility” operations without distinguishing between private and public operations.<sup>183</sup> Government lawyers might also observe that the licensing of an intensely regulated, but privately owned, water monopoly reflects a “traditional” approach to government problem solving,<sup>184</sup> whereas *Carbone* involved the nontraditional operation of a distinctly modern waste-transfer station.<sup>185</sup>

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181. See *supra* notes 168–72 and accompanying text (discussing *Carbone* and *United Haulers* in detail).

182. See *supra* notes 29–31, 38–39 and accompanying text (explaining *Carbone*'s application to privately owned businesses).

183. *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1806 (2008) (noting that the bonds paid for government spending on “transportation, public safety, education, utilities, and environmental protection”).

184. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007); see *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (noting that “regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States”).

185. See *supra* notes 72–73 and accompanying text (discussing the Court's focus in *United Haulers* on the traditional nature of the regulated field); *infra* notes 210–15 and accompanying text (same).

There are at least two problems with this line of argument. First, it seeks to use the traditional/nontraditional distinction to expand, rather than to contract, the state-self-promotion exception to the antidiscrimination rule. In *United Haulers* and *Davis*, while the Court invited the conclusion that nontraditional government-run monopolies might fall *outside* the state-self-promotion doctrine, it did not suggest that non-government-run monopolies might fall *inside* that doctrine's protective reach because of their "traditional" nature. Put another way, invocation of the Court's "traditional public activity" logic in this context would take a concept put forward by the Court as a potential limit on its newly crafted state-self-promotion exception and turn it into an instrument for giving that innovation an even broader reach. The Court might be willing to take this step. If it does so, however, it will be moving well beyond the holdings and the reasoning of *United Haulers* and *Davis*.

The second problem with relying on the traditional/nontraditional distinction to bring our water-utility case within the state-self-promotion principle stems from *Carbone*. That case, after all, involved the operation of much the same sort of waste-transfer station that spawned the *United Haulers* litigation. The Court, however, had no difficulty affixing the "traditional" label to the waste-transfer operations involved in *United Haulers*, thus signaling that *Carbone* likewise involved a traditional government activity.<sup>186</sup> *United Haulers* and *Carbone*, when read together, thus seem to stand for the following proposition: Even when a traditional government undertaking is in the picture, the general rule of the dormant Commerce Clause—rather than the state-self-promotion exception—applies so long as the service provider is a private entity. It follows that the state-self-promotion exception is inapplicable in our waterworks case because all relevant services are provided by a private firm.<sup>187</sup>

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186. Indeed, from all appearances, the transfer station in *United Haulers* was even less "traditional" than the station involved in *Carbone* because it offered more numerous and more high-tech waste-treatment services. Compare *United Haulers*, 550 U.S. at 336 (noting that the facility in *United Haulers* was able to "provide recycling of 33 kinds of materials, as well as composting, household hazardous waste disposal, and a number of other services"), with *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387 (1994) (suggesting that the facility in *Carbone* merely "separate[d] recyclable from nonrecyclable items," after which the facility shipped both types of waste elsewhere).

187. Might it be argued that this line of reasoning is flawed because *Carbone* involved a nontraditional injection of a private service provider into the rendering of services traditionally supplied by the government itself, whereas our water hypothetical involves a traditional injection of a private service provider into an activity overseen (but not traditionally conducted) by the government itself? The proper answer to this question would seem to be "no" for at least two reasons. First, governments traditionally have arranged for private firms to help in handling waste materials just as surely as governments traditionally have arranged for private firms to deliver utility services. Second, the focus in *United Haulers* was on the traditional governmental responsibility for handling waste, not on whether the government traditionally discharged that responsibility through the use of public or private operators. Cf. *United Haulers*, 550 U.S. at 344

The preceding analysis suggests that the *state*-self-promotion exception will not protect a monopoly given to a *non-state* utility from dormant Commerce Clause attack. That conclusion, however, does not bring an end to proper dormant Commerce Clause analysis of our private-water-monopoly case because there may be *another* limitation on the dormancy doctrine that covers this sort of program. Indeed, in a case decided a full decade before *United Haulers*, Justice Scalia observed that the Court already had recognized “what might be called a ‘public utilities’ exception to the negative Commerce Clause.”<sup>188</sup>

In authoring these words, Justice Scalia pinned a shorthand label on a complex body of law. The main cases in this area have involved natural-gas regulation, and they suggest that no dormant Commerce Clause limitation prohibits states from barring direct natural-gas sales—including sales from out-of-state suppliers—into a service area where the state has awarded a privately owned utility a monopoly position.<sup>189</sup> In other words, to the extent

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(referring to waste disposal as “typically and traditionally a local government function” (quoting *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 264 (2d Cir. 2001) (Calabresi, J., concurring))). In any event, it seems questionable to assert that water services have traditionally been delivered by private (as opposed to public) entities. To be sure, local governments sometimes involve private entities in delivering water services. *See, e.g., In re Application of N. Jersey Dist. Water Supply Comm’n*, 417 A.2d 1095, 1117 (N.J. Super. Ct. App. Div. 1980) (allowing North Jersey to “increase its water supply through an agreement with a private water company”). Indeed, the twenty-eighth square on the Monopoly game board is a waterworks purchasable for cash. The important point, however, is that there is little reason to assume that governments more often involve private entities in supplying water than in supplying trash collection and disposal services.

188. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting). In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 391 (1983), the Court observed: “Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence.” In support of this proposition, the Court cited *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). The “public utility” involved in that case, however, “generate[d] and transmit[ted] electricity at wholesale,” *id.* at 333, and had long serviced out-of-state customers. *Id.* When New Hampshire ordered the generator to prefer in-state users, the Court invalidated the rule under a longstanding principle prohibiting any “exportation ban” directed at “privately owned articles of trade.” *Id.* at 338–39 (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928)). Thus, these precedents do not speak directly to the retail-market issue that this Article covers.

189. *See, e.g., Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) (upholding against a dormant Commerce Clause challenge a state tax scheme that exempted regulated local-gas utilities from a general sales and use tax on natural-gas sellers); *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm’n*, 341 U.S. 329, 336–37 (1951) (upholding the state requirement that an out-of-state seller of natural gas must “secure a certificate of public convenience and necessity before . . . enter[ing] a municipality already served by a public utility”); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 523–24 (1947) (noting that “states are not made powerless to regulate the [natural-gas] sales [made by an interstate pipeline carrier] by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control”); *see also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377–78 (1983) (detailing the Court’s historic treatment of natural gas under the dormant Commerce Clause and noting that “retail sale of gas [has

it exists, the Court's "public-utilities exception" signals that, notwithstanding the dormant Commerce Clause, states may favor intrastate sales over interstate sales so long as a closely regulated natural-gas provider makes the intrastate sales.

There is some tension between the Court's private natural-gas-monopoly cases and *Carbone*.<sup>190</sup> In that case, after all, the government licensed a heavily regulated private monopolist to provide waste-handling services in much the same way that governments have long licensed heavily regulated private monopolists to provide natural gas. The question thus becomes: How could the Court in *Carbone* not deem the waste-transfer station to be a "utility" and then apply the same "utilities exception" the Court seems to have embraced in the natural-gas context?<sup>191</sup>

Two possibilities suggest themselves.<sup>192</sup> First, the Court may have sensed that a local natural-gas utility (unlike a waste-transfer station) involves a

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been] subject to state regulation, even though the gas [may have been] brought from another state").

190. One aspect of this quandary concerns how cases like *Panhandle Eastern Pipe Line* (which seemed to generally validate utility monopolies) are reconcilable with *General Motors* (which explored at length whether tax discrimination that favored an in-state utility provider was permissible). After all, if the state had the "greater" power to prohibit altogether direct interstate gas sales, it would seem to follow that they would also have the "lesser" power to permit such sales and tax them more heavily than intrastate utility-made sales, as the state did in the *General Motors* case. One might view the Court's failure to engage in this simple greater-includes-the-lesser reasoning in *General Motors* as suggesting that the posited greater power simply does not exist. The key response to this line of reasoning is that the Court in *General Motors* could and did find a way to uphold the challenged Michigan program without having to investigate the greater-includes-the-lesser theory at all. As a result, it is not possible to conclude that the Court in *General Motors* in any way rejected the sort of public-utility exception posited in the text accompanying the preceding footnote.

191. Justice Breyer touched on this question during oral argument in the *United Haulers* case, although (not surprisingly, given the facts of the case) his inquiry focused more on governmental, than on private, monopolies. See *supra* note 163 and accompanying text (providing Justice Breyer's opinion that if municipality-controlled utility pipelines had been considered legal for over one hundred years prior to *United Haulers*, the Court should not rule that the practice violates the dormant Commerce Clause).

192. There is a third possibility. The Court might have viewed local-processing cases (such as *Carbone*) and utility cases (such as the *Panhandle Eastern Pipe Line* cases cited in note 189) as falling into entirely different categories. On this view, a case like *Carbone* involves a local-processing requirement because it entails rendition of a service—with respect to a good that is moving along the stream of commerce—that processors could render either inside or outside the state. In contrast, utility operations focus on the final delivery of a product that necessarily can occur only locally because the buyers of that product by definition reside in a particular locale. As a result, favoring one firm over another in the delivery of that product does not involve any discrimination (at least so long as both in-state-chartered and out-of-state-chartered firms are eligible for selection as the utility provider). See *supra* note 99 and accompanying text (arguing that under these conditions, the Court may decide that *United Haulers* and *Davis* are on point and dismiss a discrimination claim). There are a number of difficulties with this would-be distinction. First, utility operations do involve local processing in a very real sense (and in a sense not involved in the waste pick-up considered *supra* note 95) because they insert an extra (and entirely local) step into the interstate journey of products such as natural gas.

“natural monopoly,” particularly because it must make use of a sprawling web of fixed delivery lines.<sup>193</sup> Second, the Court might have reasoned that legislators may fairly conclude that reliance on free-market forces to distribute natural gas is too risky because supply failures raise “severe health risks”<sup>194</sup> so potentially grave that consumers might literally be “frozen out of their homes.”<sup>195</sup> To be sure, significant lapses in providing basic waste pick-up services may create risks to human health comparable to those posed by the nondelivery of natural gas.<sup>196</sup> *Carbone*, however, did not involve basic pick-up services. Instead, it involved modern waste-transfer-station services. Put another way, if we were building a mixed-metaphor trash heap, we might

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Second, utility operations involve *ipso facto* favoritism of locally owned products (i.e., the products owned by the local utility) over non-locally owned products (i.e., the products owned by the interstate seller). To be sure, utility operations may simultaneously disfavor both locally owned products and nonlocally owned products, so long as there are direct sellers (other than the utility) inside the state. But in many cases—including *Carbone*—the Court has found discrimination against interstate commerce even though the favoritism afforded to a local operator disfavors both in-state and out-of-state competitors. Finally, the states’ use of utility operations sometimes will favor in-state products over out-of-state products in a very pure sense—as our earlier-discussed water-reservoir-and-waterworks case (which involved favoring non-imported water over imported water) illustrates. There are indications that some Justices viewed the concept of discrimination as applying in like fashion to forced-use rules associated with traditional utilities and waste-transfer facilities. See *supra* note 165 (discussing the tolerant discrimination standard of *Sporhase v. Nebraska*). The ensuing discussion proceeds on the same assumption.

193. See, e.g., PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 522–25 (12th ed. 1985). On this view, the paradigmatic “public utility” involves fixed conduits of distribution—that is, power lines, telephone lines, pipelines, or the like—spread throughout the community to deliver a valued service to large numbers of local consumers. (For a helpful discussion of this subject in the natural-gas context, see *General Motors*, 519 U.S. at 289–90, 295–96.) For a pointed illustration of the possible importance of the presence of fixed delivery lines on the constitutionality of a forced-use rule, see *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 713–15 (3d Cir. 1995) (rejecting the defense of statewide flow-control local-facility-use requirements under a “public utility” theory; reviewing Supreme Court authorities and concluding that “public utilities regulation is not a special category for Commerce Clause purposes”; noting, however, that exclusive franchises for gas or electricity that require “a tangible distribution system” might well satisfy strict dormant Commerce Clause scrutiny).

194. *Gen. Motors*, 519 U.S. at 302 (quoting Adam D. Samuels, *Reliability of Natural Gas Service for Captive End-Users Under the Federal Energy Regulatory Commission’s Order No. 636*, 62 GEO. WASH. L. REV. 718, 749 (1994)).

195. *Id.* at 306.

196. See *infra* notes 198–202 and accompanying text; see also Brief for Respondents at 43, *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2006) (No. 05-1345), 2006 WL 3606273 (asserting that “[w]aste disposal service, like water, sewer, fire and police protection, lies at the foundation of civilized society”). Although the dissent in *Carbone* did not characterize the waste-transfer station as a “utility,” it did repeatedly describe it as a “monopoly” and “municipal monopoly” because such services are “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.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 428 (Souter, J., dissenting).

say that operating a modern transfer station involves waste-handling bells and whistles, while providing basic pick-up services involves waste-handling meat and potatoes (in much the same way that providing natural gas is essential to keep a community running like a well-oiled machine). The bottom line is this: The court in *Carbone* may have concluded that it was dealing with a service as to which a “dependable supply” was less necessary than in the natural-gas context. As a result, there was a lessened need for the creation of a closely regulated monopoly to provide the service, and thus, the “public utilities exception” did not apply.<sup>197</sup> How the Court deals with these possible distinctions will have significant implications. For example, our hypothetical water-utility case should fall easily within the universe of any “utility exception” to the dormant Commerce Clause—and thus be distinguishable from *Carbone*—because it involves both a maze of fixed lines and the delivery of a product essential for human survival.<sup>198</sup> These same considerations will operate in other cases, too. States, for example, sometimes award exclusive franchises to privately owned utilities to deliver electricity in specified locales. Such an arrangement again involves fixed lines and an essential product. Thus any dormant Commerce Clause “utility exception” would logically permit a state to block direct sales of imported power to safeguard the franchised local operator.

Other state-granted-monopoly cases will present more complex problems, and (as we have seen) results in those cases may well hinge on whether any special protections afforded to utilities are tied to: (1) the presence of elaborate line-based delivery systems (or other “natural monopoly” dynamics); (2) the indispensability of the service that the

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197. *Gen. Motors*, 519 U.S. at 306 (describing the need for monopoly regulation of natural gas due to the important health and safety concerns the utility creates). Yet another possible distinction rests on the idea that utilities necessarily serve large numbers of consumers. *See id.* at 303–10 (discussing the need for monopolization in gas utilities in order to meet the needs of consumers). According to this argument, *Carbone* did not involve a utility because the waste-transfer station involved in that case did not deal primarily with consumers, but instead dealt primarily with waste haulers (which had previously and separately made contractual arrangements with local consumers). One difficulty with this proposed distinction is that it overlooks the practical operation of the Clarkstown program, which effectively precluded local residents from dealing with anyone except the designated transfer station. *See supra* note 24 and accompanying text. Put another way, the Clarkstown program provided for the continued delivery of that station’s services by ensuring revenues to the private monopoly that (through the inevitable pass through of tipping-fee charges) come from payments made by large numbers of local residents themselves.

198. Indeed, in *Water District No. 1 v. Mission Hills Country Club*, 960 P.2d 239 (Kan. 1998), the Kansas Supreme Court sustained a municipal requirement that all residents in a particular district buy water from a “quasi-municipal corporation” that supplied water to the district. *Id.* at 248–49. An out-of-state firm that piped water in to supply a country club in the district challenged the ordinance, asserting it was invalid under *Carbone*. *Id.* at 240, 246. The court distinguished *Carbone* on the ground that the city was performing a “central function of local government,” emphasizing that “[w]ater is more than a convenience, it is essential to public health and for fire protection.” *Id.* at 243.

licensed provider delivers; or (3) both. Cable television, for example, involves a web of distribution lines but is not a service essential to human well-being (at least if one is not a Green Bay Packers fan). The provision of basic waste-handling services, on the other hand, may be no less essential to human health than the provision of natural gas, but the delivery of those services does not necessitate the upfront installation of an elaborate web of fixed distribution lines.<sup>199</sup> As a result, in each of these cases, application of the “utility” label will turn on the Court’s sense of what functional considerations have driven its natural-gas-law precedents.

How the Court will work through these sorts of cases remains unclear. It is clear, however, that, to the extent there exists a “utilities exception” to the dormant Commerce Clause, it differs in both origin and scope from the state-self-promotion exception recently recognized in *United Haulers* and *Davis*. What is more, the differing natures of the doctrines will have an important impact on the decision of concrete cases. For example:

(1) The state-self-promotion doctrine by its nature protects state favoritism of the state itself. Any utility exception, in contrast, will permit the state to favor private business operations.

(2) Whatever its proper scope, the constitutional principle developed in the Court’s natural-gas cases protects only “utilities,” while the *United Haulers* rule safeguards a more far-reaching range of state-self-promoting activities. This point is highlighted by the Court’s municipal-bond ruling in *Davis*, which on its face involved facts far removed from utility operations.

(3) The state-self-promotion rule may well be subject to an important limitation not applicable in utility-exception cases. In particular (and as we soon shall be reminded), it is doubtful whether the state-self-promotion doctrine will shelter discriminatory rules associated with nontraditional government activities. The Court, however, has never suggested that any “utility exception” should be subject to a similar nontraditional-functions limit.

(4) Even assuming that a utility exception permits states to use forced-use rules to favor some private, local businesses, the dormant Commerce Clause will restrict how the state can do so in ways that will be irrelevant in many cases that apply the *United Haulers* principle. The pivotal point is that there is only one state government. Thus, when the state favors only itself pursuant to the state-self-promotion exception, there is no need to choose among similarly situated competitors in selecting the favored monopolist. When the state selects a private company to operate a utility, however, it may well have to choose among competing firms, and the dormant Commerce Clause will impose restrictions on how states make such choices. The

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199. In addition, garbage trucks have a limited work life in comparison to a physical structure, are mobile by nature, and are thus readily adaptable to relocation and use in other locales.

dormancy doctrine, for example, would not permit a state to prefer one natural-gas supply company over another on the ground that it is incorporated in the state.<sup>200</sup> Put differently, the Commerce Clause will impose limitations on the state's choice of a favored private monopolist even though no comparable limitations operate when the state chooses simply to assign a monopoly to itself.<sup>201</sup>

(5) Finally, the state-self-promotion exception and the utility exception, even when fully applicable, may tolerate different levels of monopoly power. Under the state-self-promotion exception, for example, the state (as we have already seen) could assume a monopoly position as to both water delivery and water supply by servicing the local community exclusively through its own local reservoir. It is not certain, however, that a state could license a private firm to conduct operations in this same way.<sup>202</sup> The rub comes from *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*.<sup>203</sup> There the Court—even while suggesting that the state could bar direct retail sales from out-of-state suppliers to protect its in-state natural-gas-distributor licensees<sup>204</sup>—emphasized that “[t]here is no intimation that appellant cannot deliver and sell available gas to [the local utility] for resale to customers” and that for this reason no “absolute prohibition” on interstate shipments had taken hold.<sup>205</sup> It is unclear how the Court will deal with these

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200. See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 53 (1980) (invalidating a Florida statute that prohibited out-of-state banks, holding companies, and trust companies from owning or controlling any business within the state that sold investment-advisory services).

201. It bears emphasis that parallel limits on the state-self-promotion exception may arise when the state seeks to leverage promotion of its own activities to benefit the interests of local, private firms. This Article will later explore the nature of this potential limitation with respect to state efforts to favor private companies that operate landfills. See *infra* notes 306–18 and accompanying text. Similar limits will come into play in other contexts as well. Assume, for example, that the counties involved in *United Haulers*, as part of the contract with a private firm to operate the waste-transfer station, required that the firm buy all supplies only from local vendors. It is not clear how the Court would deal with such a restriction. It might be willing to draw on its market-participant jurisprudence to uphold this stark preference of intrastate over interstate commerce on the ground that the product purchases are “in effect” being made by the counties themselves. See *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 214–15 (1983) (holding that a city was a market participant when it “expended only its own funds in entering into construction contracts for public projects”). For two reasons, however, this result seems unlikely. First, it is problematic to transport government-protective rules developed in the market-participant context (which does not involve forced dealing with the government) to the state-self-promotion context (which does). Second, even assuming that market-participant-related rules do carry over, the Court might well conclude that products purchased by a private entity operating under a long-term services supply contract made with a public entity (as opposed to a single-project construction contract) are not “in effect” government made. See Coenen, *supra* note 52, at 471 (emphasizing the potentially narrow nature of the Court’s in-effect-working-for-the-city logic of *White*).

202. See *supra* notes 181–90 and accompanying text.

203. *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm’n*, 341 U.S. 329 (1951).

204. See *supra* notes 189–93 and accompanying text.

205. *Panhandle E. Pipe Line*, 341 U.S. at 336.

passages in future cases. Such language, however, provides a jumping-off point for arguing that any utility exception (in contrast to the now-operative state-self-promotion exception) does not give states authority to exclude out-of-state suppliers altogether from in-state markets. It should follow that out-of-state suppliers must at least have the chance to sell into the state at the wholesale level by way of contracts made with the local utility itself.<sup>206</sup>

This five-point listing suffices to make the key point: Within the theater of dormant Commerce Clause doctrine, any “public utilities exception” has a very different role to play than the state-self-promotion exception of *United Haulers* and *Davis*. In some cases, the two doctrines will have similar effects, but in others they will not. It is for this reason that courts that are required to grapple with the constitutionality of state monopoly programs must take care to let each of these doctrines do its own work.

### C. FORCED-USE RULES AND NONTRADITIONAL PUBLIC FUNCTIONS

As the prior two sections reveal, the state-self-promotion exception—whether courts apply it in the utility or non-utility context—will broadly protect state rules that discriminate in favor of the state’s own business operations, including those rules that force residents to deal only with local government purveyors of valuable goods and services. Does this principle safeguard all rules that discriminate against out-of-state operators in this way? One possible limit on the state-self-promotion exception focuses on the nature of the activity in which the government engages. In particular, both *United Haulers* and *Davis* left the door open for the Court to distinguish between state programs depending on whether they have a “traditional” or “nontraditional” pedigree.

Consider, for example, *Reeves, Inc. v. Stake*.<sup>207</sup> There, the Court upheld a South Dakota rule that limited sales from a state-owned cement plant to local residents.<sup>208</sup> The Court fended off the predictable challenge brought by a disgruntled out-of-state cement user by invoking the “market participant exception” to the dormant Commerce Clause rule.<sup>209</sup> In the post-*United Haulers* world, constitutional-law professors are sure to ask their students this question: What if South Dakota *required* state residents to buy all their cement from the state-owned plant? Or, more directly, if a state can force

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206. Even if a court adopted this argument, it would not necessarily follow that a local utility would have to deal with an out-of-state supplier under any circumstances regardless of pricing considerations. It merely would establish that the local utility would not have the same ability that the state itself would have to cut off out-of-state suppliers altogether without any regard to the antidiscrimination rule.

207. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

208. *Id.* at 446–47.

209. See TRIBE, *supra* note 7, at 1089–90 (describing the *Reeves* case); Coenen, *supra* note 52, at 401–02 (“The Court firmed up the market-participant rule in *Reeves, Inc. v. Stake*.”).

local residents to use its own waste-transfer station, why in the world can't it force local residents to use its own cement plant?

The predictable answer will be that operation of the transfer station, but not the cement plant, involves a "traditional public function."<sup>210</sup> In *United Haulers* after all, Chief Justice Roberts observed on five separate occasions that the case involved government intervention in an area of "traditional" public control.<sup>211</sup> Even more importantly, some of his opinion's most holding-like language indicated that the Court's carve-out from the *Carbone* rule is properly limited in this way. The proclamation in the very first paragraph was particularly suggestive: "Disposing of trash has been a traditional government activity for years, and laws that favor the government *in such areas*—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause."<sup>212</sup>

Much language in *Davis* points in the same direction. The majority in that case, for example, emphasized the "venerable history" of state bond sales and highlighted the "traditional local taxing practice" at issue in the case.<sup>213</sup> Perhaps of greatest importance, the Court undertook to explain (albeit in abbreviated fashion)<sup>214</sup> why a traditional-activity limit comports with the protectionism-based policy concerns that underlie the *United Haulers* principle.<sup>215</sup> All of this suggests that the Court, in the future, will apply the state-self-promotion exception to safeguard only those self-promoting rules that operate in areas of traditional state control.<sup>216</sup>

Other passages in the cases, however, cast doubt on this conclusion. Most significant is the Court's footnote seven in *United Haulers*, which focused squarely on the "nontraditional" activity problem. There, Chief Justice Roberts wrote:

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210. See *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1810 n.9 (2008) (describing "traditional public function[s]").

211. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344, 345 n.7, 347 (2007) (discussing "traditional government functions"); see also *id.* at 348 (Scalia, J., concurring in part) (noting that the trash disposal service at issue involved a "public entity performing a traditional local-government function").

212. *Id.* at 334 (emphasis added).

213. *Davis*, 128 S. Ct. at 1810, 1819.

214. See Zelinsky, *supra* note 117, at 39–40 (critiquing the Court's treatment as setting forth a "surprisingly casual justification").

215. *Davis*, 128 S. Ct. at 1810 n.9 ("The point of asking whether the challenged government preference operated to support a traditional public function . . . [was] to find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests . . .").

216. See Zelinsky, *supra* note 117, at 41 (concluding that "*Davis* . . . confirms that the 'traditional public function' category is now ensconced in the dormant Commerce Clause doctrine of the Roberts Court").

The Counties and their *amicus* were asked at oral argument if affirmance would lead to the “Oneida-Herkimer Hamburger Stand,” accompanied by a “flow control” law requiring citizens to purchase their burgers only from the state-owned producer. We doubt it. “The existence of major in-state interests adversely affected by [a law] is a powerful safeguard against legislative abuse.” Recognizing that local government may facilitate a customary and traditional government function such as waste disposal, without running afoul of the Commerce Clause, is hardly a prescription for state control of the economy. In any event, Congress retains authority under the Commerce Clause as written to regulate interstate commerce, whether engaged in by private or public entities. It can use this power, as it has in the past, to limit state use of exclusive franchises.<sup>217</sup>

These words hardly offer a ringing endorsement of a nontraditional-function limit on the state-self-promotion doctrine.<sup>218</sup> Particularly telling is the sequence in which the footnote’s observations unfold. Chief Justice Roberts begins the footnote by identifying the problematic hamburger-stand hypothetical. He does not, however, then simply declare that the hypothetical falls outside the *United Haulers* principle because it concerns a nontraditional field of government endeavor. Rather, he predicts that the ruling in *United Haulers* will not spawn widespread adoption of such programs because countervailing political forces will check any tendencies of that sort. It is only after dismissing worries that the Court’s ruling will broadly “lead to” the institution of newfangled state-run monopolies that the Chief Justice offers assurance that *United Haulers* “is hardly a prescription for state control of the economy.”<sup>219</sup> In context, the Chief Justice seems to be saying that the holding of *United Haulers*, even if applicable to all state businesses, is unlikely to result in state control of the economy, not that the dormant Commerce Clause would prohibit states from imposing forced-use rules for government-owned hamburger stands and the like. Most telling of all, the footnote concludes with the admonition that “Congress retains authority” to “limit state use of exclusive franchises.”<sup>220</sup> The implication is that *congressional* deployment of the commerce power rather than *judicial* invocation of the doctrine-confining distinction between traditional and nontraditional government activities provides the proper tool for dealing

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217. *United Haulers*, 550 U.S. at 345–46 n.7 (citations omitted).

218. See Tichenor, *supra* note 146, at 450–51 (describing Chief Justice Roberts’s words as a “drastic understatement” of the potential effects of the state-self-promotion doctrine, which “may have opened the door [to state-self-promotion claims] in such a way that it will not easily be closed”).

219. *United Haulers*, 550 U.S. at 345–46 n.7 (citations omitted).

220. *Id.* at 346.

with problems of forced-use rules associated with government-run businesses.<sup>221</sup>

In the end, the tea leaves left behind by *United Haulers* and *Davis* provide no clear signal about whether the Court will embrace a nontraditional-function limit on the state-self-promotion doctrine.<sup>222</sup> If it

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221. Another response to the hamburger-stand hypothetical might be that a forced-used rule, in this context, would not trigger strict scrutiny but probably would violate the *Pike*-balancing test because no sufficient justification for a government monopoly in this context would exist. See Transcript of Oral Argument, *supra* note 65, at 40 (suggesting that *Pike* sets forth a “good test” to deal with issues of this kind).

222. What is more, this lack of clarity may cut against judicial recognition of the distinction in light of an analytical principle Chief Justice Roberts suggested in *United Haulers*—namely, that “[a]n opinion which is to . . . establish a principle never before recognized, should be expressed in plain and explicit terms.” *United Haulers*, 550 U.S. at 341 (quoting *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693)). The case for applying such a notion to fend off recognition of any traditional/nontraditional distinction is bolstered by the fact that, in passages apart from footnote 7, Chief Justice Roberts chose his words with discretion, taking care not to anticipate the constitutionality of forced-use rules as applied to nontraditional government activities. At one juncture, for example, he observed that: “We should be particularly hesitant to interfere with the Counties’ efforts . . . because ‘[w]aste disposal is both typically and traditionally a local government function.’” *Id.* at 344 (quoting *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 265 (2d Cir. 2001) (Calabresi, J., concurring)). To say that the Court should be “particularly hesitant” to intervene on the facts of *United Haulers*, however, is not to say how the Court will later rule upon different facts. In particular, this sort of language leaves the Court free to announce later that, even though there was reason to be “particularly hesitant” in a traditional-government-function forced-use case, there is reason to be *sufficiently* hesitant to apply the same rule even when a nontraditional government function is at issue. A second passage reminded readers that the case concerned “an effort to address waste disposal, a typical and traditional concern of local government” before going on to criticize the plaintiffs in the case for inviting the Court “to rigorously scrutinize economic legislation passed under the auspices of the police power.” *Id.* at 347. This sentence, while potentially suggestive of a limiting principle, may merely highlight the especially obvious interference with state police powers presented in a traditional-function case. Particularly useful to future opponents of any traditional/nontraditional distinction will be the majority’s assertion in *United Haulers* that “[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.” *Id.* at 343. After all, if the traditional/nontraditional distinction were to take hold, federal courts would in fact be “license[d]” to say what “activities must be the province of market competition” due to their traditionally private-market character. *Id.* Making much the same point, Chief Justice Roberts also seemed to express discomfort with the traditional/nontraditional distinction at oral argument. After counsel for the government had suggested that courts might invalidate some, but not other, government-facility-favoring forced-use rules, Chief Justice Roberts responded:

So then, the Commerce Clause would become the vehicle by which we would develop federal law about what’s appropriate for municipal governments to do and what’s not appropriate? We could decide it may be appropriate to run waste facilities but not to run milk pasteurization. I don’t know how we could do that.

Transcript of Oral Argument, *supra* note 65, at 40. As a general matter at oral argument, counsel for the government appeared to assert that forced-use cases involving traditionally private activities—such as milk pasteurization or shrimp hulling—would in fact have come out

does, however, inevitable and long-recognized line-drawing challenges will arise. What if, for example, a state-run monopoly sells liquor, and state law requires residents to make all liquor purchases at state stores, thus precluding purchases from interstate mail-order sellers? Assuming the Twenty-first Amendment does not otherwise authorize this behavior, would the states' longstanding involvement in liquor regulation create the sort of tradition that shields the program from discrimination-based dormant Commerce Clause attack?<sup>223</sup> What if there is a longstanding tradition of liquor regulation, but not a longstanding tradition of state-operated liquor stores? What if there is a longstanding tradition of state-operated liquor stores, but not a longstanding tradition of the mandated use of those stores by local liquor purchasers?<sup>224</sup> What if there is a longstanding tradition of mandated use of government stores, but that tradition extends to only a small number of states or a small number of localities or only some forms of alcoholic beverages?<sup>225</sup>

Another set of questions will arise if Congress, in the future, permits state governments to determine the legality of marijuana use. In particular, if a state government forces local users to buy cannabis only from it, might

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differently if the favored operator was the government itself. *Id.* at 26 (asserting in response to a question about whether earlier local-processing cases “would have come [out] differently” that “they would be different”); *accord id.* at 33 (suggesting that “strict scrutiny test should not apply” when “public ownership” is present, including with regard to “selling hamburgers or renting videos”); *id.* at 39 (acknowledging that the law in *Dean Milk* would not involve “discrimina[tion] against interstate commerce” if all milk had “to be pasteurized at a facility owned and operated by the State of Wisconsin”). As previously noted, this line of argument stands in some tension with the Court’s seminal ruling in *Minnesota v. Barber*. See *supra* note 50.

223. Questions with regard to liquor may well raise special problems under the Twenty-First Amendment. See, e.g., *Granholm v. Heald*, 544 U.S. 460, 466 (2005) (noting “that the [State] discrimination [was] neither authorized nor permitted by the Twenty-first Amendment”); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 274–76 (1984) (holding that the state tax was “not supported by any clear concern of the Twenty-first Amendment” because its purpose “was to promote a local industry” and not temperance). The impact of that Amendment, however, falls outside the subject matter of this Article. Thus, the discussion in the text concerns the operation of the dormant Commerce Clause standing alone, without any regard to any special limits that might come into play due to that Amendment’s operation.

224. Justice Alito raised much the same question with respect to the waste-disposal context in arguing that it was “far from clear” that the forced-use operation at issue in *United Haulers* qualified as one “‘typically and traditionally’ performed by local governments.” *United Haulers*, 550 U.S. at 370 (Alito, J., dissenting).

225. In *United Haulers* itself, the Court noted that “each city, town, or village within [Oneida and Herkimer] Counties has been responsible for disposing of its own waste.” *Id.* at 334 (majority opinion). Would this fact standing alone suffice to establish the traditional character of the government action? The answer is almost surely no, particularly in light of a general agreement within the Court in 1980 that South Dakota’s operation of a cement plant—even for some fifty years—was a nontraditional venture due to the dearth of publicly operated cement plants in other locales. *Reeves, Inc. v. Stake*, 447 U.S. 429, 430, 442–43 n.16 (1980) (noting that, even though the state made plans for building a cement plant in 1919, its operation of a cement plant was “somewhat unusual or unorthodox”); see *supra* notes 207–12 and accompanying text (discussing *Reeves*).

past practice with respect to liquor regulation cause this form of marijuana regulation to qualify as “traditional”? Might the state successfully argue that the “greater” tradition of all-out prohibition of marijuana logically supports the state’s “lesser” regulatory regime of government-monopolized sales? On the other hand, might courts look askance at state-run marijuana monopolies by focusing on the historic practice of dispensing drugs through private pharmacies or cigarettes through local retail stores, thus concluding that courts should view state sales of marijuana as nontraditional?<sup>226</sup>

A traditional-government-function restriction on the state-self-promotion exception could also pose problems for judges who are trying to determine how to characterize the “government function” at issue. A case decided before *United Haulers* and *Davis*, for example, concerned a state law that required local lawyers to buy malpractice insurance only from the state itself.<sup>227</sup> Would this law be subject to an antidiscrimination challenge if the state-self-promotion exception applied only to “traditional” state behavior? The answer to this question will depend on the level of generality at which the court characterizes the relevant government activity. It is incontestable, for example, that states traditionally have overseen lawyers and required insurance for various purposes. But it is probably not the case that states traditionally have sold insurance or forced lawyers to buy state-issued malpractice policies. At which level of generality should the court characterize the relevant activity in determining whether the “traditional” or

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226. Another interesting question concerns to what extent Congress can participate in characterizing a particular activity as traditionally governmental or nontraditionally governmental in character. In *United Haulers*, for example, the majority noted, in the process of characterizing waste handling as a traditional government activity, that “Congress itself has recognized local government’s vital role in waste management, making clear that ‘collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.’” *United Haulers*, 550 U.S. at 344 (quoting Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (2000)). Should such congressional proclamations matter? How specific must they be? Does it help to say that “disposal of solid wastes should continue to be primarily the function of State . . . agencies” (as opposed to federal agencies) when the key question concerns not general state regulation of this subject, or even state operation of waste facilities, but adoption of coercive forced-use rules put in place to aid the state’s facility-operating efforts? A particularly interesting question concerns whether judicial attentiveness to such congressional announcements comports with the preexisting principle that Congress cannot authorize state activity otherwise violative of the dormant Commerce Clause except by making “an unmistakably clear statement” to that effect. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 139 (1986) (“[T]he court has exempted state statutes from the implied limitations of the [Commerce] Clause only when congressional direction to do so has been ‘unmistakeably clear.’” (quoting *S.-Cent. Timber Co. v. Wunnicke*, 467 U.S. 82, 91 (1984)); *S.-Cent. Timber Co.*, 467 U.S. at 91 (noting “the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear”).

227. *See Hass v. Or. State Bar*, 883 F.2d 1453, 1463 (9th Cir. 1989) (upholding a state law requiring Oregon lawyers to purchase malpractice insurance from the State Bar under the Commerce Clause because a state has a substantial interest in ensuring that its attorneys are insured).

“nontraditional” label applies.<sup>228</sup> Such questions highlight the difficulties of determining whether any given case involves a “traditional government function” within the meaning of this potential limitation on the state-self-promotion doctrine.

The difficulty of distinguishing between traditional and nontraditional practices supplies one strong reason to reject any nontraditional-activity limit on the state-self-promotion rule.<sup>229</sup> A key feature of the underlying logic of *United Haulers* and *Davis* supplies another. In those cases, after all, the Court acted to vindicate the federalism-based value of creative local problem solving.<sup>230</sup> Yet, if those decisions rest on the wisdom of encouraging state experimentation, it seems odd to take a harsher view of state programs on the ground that they are less traditional—and thus more experimental in nature—than other, more orthodox, governmental undertakings.<sup>231</sup> As we have seen, important passages in *United Haulers* and *Davis* suggest that the Court now leans toward recognizing a nontraditional-activity exception to the state-self-promotion principle.<sup>232</sup> The significant departure that these cases mark from *Carbone* may reinforce this inclination.<sup>233</sup> When push comes

228. Lurking in the background here is the question as to the level of generality at which the Court viewed the relevant tradition in *United Haulers* and *Davis*. In *Davis*, the Court in fact highlighted both the history of states issuing municipal bonds and the common practice of exempting bond interest from state income taxation. See *supra* note 213 and accompanying text. It may be of significance that the Court in *United Haulers* did not examine the history of government operation of waste-transfer stations. Instead, it focused, in more general fashion, on the government’s longstanding role in dealing with waste. See *supra* notes 210–12 and accompanying text.

229. See Zelinsky, *supra* note 117, at 24–40. Zelinsky discussed in detail the indeterminacy and unsatisfactoriness of the “traditional public function” test and observed, for example, that:

In the dormant Commerce Clause context, there are no convincing criteria for deciding when governmental activities are old enough to be “traditional” or public enough to be “public.” Every governmental function is traditional or becomes so. Justice Kennedy’s critique of the “traditional public function” category is thus quite sound as was the Court’s earlier abandonment of that category in *Garcia* . . .

*Id.* at 25; see also Williams, *supra* note 62, at 460–63 (criticizing the “traditional public function” test and arguing that “the fact that government has historically or traditionally performed such functions does not provide any justification for state or local efforts to insulate such government operations from out-of-state competition”). For a further enumeration of questions that courts will need to address in considering the “traditional government functions” question, see Johnson, *supra* note 74, at 881.

230. See *supra* note 222 (quoting relevant passages from *United Haulers*).

231. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545–46 (1985) (“The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society.”).

232. See *supra* notes 72–73, 211–16 and accompanying text (discussing passages in *United Haulers* that focus on whether an activity is a traditional or nontraditional function).

233. See *supra* notes 39–57, 78–85 and accompanying text (listing factors that indicated that *Carbone* should have controlled the issue in *United Haulers* and characterizing *Davis* as a significant extension of *United Haulers*).

to shove, however, the Court could break the other way and repudiate the traditional/nontraditional distinction in this setting.<sup>234</sup> To be sure, the Court has relied on this dividing line in the field of statutory interpretation.<sup>235</sup> In interpreting the Constitution, however, the modern Court has tended to criticize and eschew this distinction.<sup>236</sup> This latter line of authority is sure to give the Court pause as it considers whether to embrace in the future any nontraditional-activity limit on the state-self-promotion doctrine.

#### D. DISCRIMINATORY TAX-BASED FAVORITISM OF STATE OPERATIONS

*United Haulers* involved a government rule that forced citizens to deal with a business that the government operated. *Davis* built on *United Haulers* by recognizing that the principle of that case logically extends to other forms of state self-promotion, including self-promotion implemented through the state taxing system. In deciding how much further it will go in upholding discriminatory state tax laws under the state-self-promotion doctrine, the Court will likely consider two types of cases. First, the Court will review state laws that connect tax advantages with the state's own business activities. Second, the Court will examine state efforts to promote local private-business development, particularly by way of tax-advantaged municipal bonds.

##### 1. Tax Advantages That Benefit the Government's Own Operations

The Court in *Davis* concluded that in some cases discriminatory state tax laws should find constitutional shelter under the principle put forward in *United Haulers*. This view seems sensible. Consider the following case: State

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234. Denning, *supra* note 57, at 512 (viewing it as “strange that the Court would suggest . . . a wish to resurrect the ‘traditional government function’ test it abandoned as unworkable in *Garcia*”).

235. See, e.g., *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 209 (1991) (“[W]e have been wary of extending the effect of congressional enactments into areas traditionally governed by the States, unless Congress has directed us to do so by an unmistakably clear statement.”). See generally COENEN, *supra* note 8, at 173–77 (discussing tradition-based rules of statutory interpretation as a method for protecting federalism values); TRIBE, *supra* note 7, § 3-26, at 549–53 (discussing the clear-statement rule).

236. See, e.g., *Garcia*, 469 U.S. at 546–47 (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”); *infra* notes 398–400 and accompanying text (discussing repudiation of traditional/nontraditional dividing line in applying the market-participant doctrine); see also Dan T. Coenen, *Will the Court Overrule Garcia?*, GA. L. ADVOC., Fall 1995, at 28–29 (discussing the Court's disapproval of the traditional-government-functions test in tracing post-*Garcia* doctrinal developments). But cf. *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (“If Congress attempts th[e] extension [of the commerce power to activities that are not commercial in character], then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.”).

Zuma decides to deal with problems of waste disposal by building and operating, entirely on its own, ten landfill sites that meet the most exacting environmental standards. The project is costly, and Zuma needs to generate income to pay off the indebtedness incurred to put its program in place. Liberty-minded legislators are uncomfortable, however, with the idea of compelling state residents to use these facilities at high-priced tipping-fee rates. As a result, the Zuma assembly passes a law that imposes a five-dollar-per-ton tax on the production of all solid waste, but exempts from this levy all waste deposited in its ten new landfills. If the practical effect of this law is to steer a large percentage of the waste-disposal business away from out-of-state operators to these in-state facilities, does the program discriminate against interstate commerce in violation of the dormancy doctrine?

Simple logic suggests that this taxing scheme should withstand challenge under the principle of *United Haulers*, even without regard to *Davis*. Why? Because *United Haulers* held that the antidiscrimination rule does not impede a state's ability to favor its own waste facilities even with a full-fledged forced-use rule. And, the greater power to *mandate* delivery of waste to local facilities should carry with it a fortiori the lesser power to *encourage* use of the local facilities with the carrot of tax incentives.<sup>237</sup>

*Davis* reinforced this analysis because there the Court did not hesitate to apply the *United Haulers* principle to sustain a state taxing program. Indeed, the Court in *Davis* took a long step beyond merely endorsing the sort of program attributed to State Zuma. This is the case for a simple reason: Unlike the Zuma taxing program, the Kentucky taxing program in *Davis* was not readily subject to judicial endorsement on a greater-includes-the-lesser-power theory because it is not at all clear that a state can compel resident municipal-bond buyers to buy such bonds only from in-state issuers.<sup>238</sup> This aspect of *Davis* carries with it significant consequences for

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237. There is a conceivable argument to the contrary based on the theory that courts should be especially vigilant in policing tax discrimination because of the lack of strong political checks on tax-break legislation. In our hypothetical, however, the strength of such an argument is weakened by the fact that the problematic tax break is not enacted in isolation, but instead is put in place as part of a broad new taxing program that inevitably will encounter political resistance. See generally Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 MICH. L. REV. 2167, 2174, 2177, 2209–10 (1997) (distinguishing between operative political dynamics of tax breaks in these different contexts). In any event, regardless of political-process concerns, the greater-includes-the-lesser-power argument is so strong on functional economic grounds that it is difficult to believe the Court would not embrace it.

238. Despite the state-self-promotion rule, at least three serious problems would mark any state law that precluded state residents from buying or holding any non-local municipal bonds. First, such a rule (even if it were viewed as nondiscriminatory) might well run afoul of the *Pike*-balancing rule in light of the hard-to-justify and sweeping burden it would place on interstate activities. See *supra* notes 102–08 and accompanying text (describing *Pike* balancing). Second, the exotic nature of the rule would likely take it outside the state-self-promotion principle if the Court placed a nontraditional-activity limit on the principle. See *supra* notes 72–73, 211–19, 232

both litigators and legislative planners. The key point is that judicial application of the state-self-promotion principle will unfold in different ways, depending on whether the matter at hand involves a state forced-use rule or a discriminatory tax. In particular, courts may well uphold a discriminatory tax associated with a government program even if they cannot countenance a discriminatory forced-use rule associated with that very same program.

Consider state colleges and universities. Would it violate the Constitution if a state required all higher-education-seeking state residents to attend a state-run institution? Such a rule might well run afoul of the so-called substantive-due-process principle.<sup>239</sup> But what if a future Court abandoned that constraint or declared that it only applied to wholly irrational state laws?<sup>240</sup> Would such a state forced-use rule nonetheless run afoul of the dormant Commerce Clause because of its adverse effect on free cross-border trade? At least if the Court eschews special treatment of nontraditional state activities, such a forced-use rule would seem well-positioned to escape the clutches of antidiscrimination analysis under *United Haulers* because it promotes only the activities of the state itself.<sup>241</sup> Even if the Court embraced this analysis, however, it might strike down the rule pursuant to the *Pike*-balancing test.<sup>242</sup> Put simply, many of us will sense that any plausible principle of economic union cannot permit a state to compel local students to attend only local, state-run colleges and universities under

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and accompanying text (discussing the traditional/nontraditional-activity distinction in combination with the state-self-promotion principle). Finally, the practical operation of the rule—particularly as applied to multistate businesses that operate within the state—might be so severe as to trigger dormant Commerce Clause limits on extraterritorial regulation. See COENEN, *supra* note 8, at 220–22, 272–86 (discussing extraterritorial effects and the dormant Commerce Clause); TRIBE, *supra* note 7, § 6-8 (same).

239. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding unconstitutional on due-process grounds an Oregon law that required all children to attend public schools); see also *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding unconstitutional on due-process grounds a Nebraska law that prohibited the teaching of any subject in languages other than English). A court might also find that such a law violates either the First Amendment’s (1) free-speech principle or (2) its free-exercise principle to the extent that it shifts business away from religious institutions. The latter contention faces difficulties under the principle of *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Additionally, the free-speech rationale was conspicuously absent from the Court’s rationale in *Pierce*.

240. See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (noting that even if a law does not implicate a “fundamental liberty interest protected by the Due Process Clause” it must still be “rationally related to legitimate government interests”).

241. Moreover, a court might uphold this program even if a nontraditional-state-activities limitation on the state-self-promotion rule were in place, depending on the level of generality at which the court characterized the relevant activity. See *supra* notes 223–31 and accompanying text. There is, after all, a long tradition of state operation of public colleges and of state imposition of special rules regarding residents and nonresidents with respect to those institutions.

242. See *supra* notes 102–08 and accompanying text.

the threat of imprisonment. And, that is true even if the state-self-promotion doctrine shields such a rule from antidiscrimination attack.

What if, however, the state affords a special tax credit to all state residents (or all state taxpayers) who attend a state-run institution of higher education, while denying that same credit to persons who attend either in-state or out-of-state, privately run schools?<sup>243</sup> In fact, a court may well uphold this tax-based form of favoritism under an analysis that highlights a key difference between tax laws and non-tax laws for purposes of the state-self-promotion doctrine. This difference stems from the Court's longstanding understanding that different rules apply in dormant Commerce Clause tax cases and dormant Commerce Clause regulation cases—and, in particular, the understanding that “*Pike* balancing analysis” imposes a limitation only in the latter, and not the former, context.<sup>244</sup> Given this doctrinal backdrop, how would a court analyze a tax credit for in-state public-school attendance?

The Court would begin analyzing the tax credit by refusing to apply discrimination-based review, just as it refused to apply discrimination-based review to the forced-use rule involved in *United Haulers*, by relying on the extension of the *United Haulers* principle to tax-break cases in *Davis*. But, importantly, the discriminatory tax rule—unlike the discriminatory forced-use rule—could not be and would not be subject to invalidation under the *Pike*-balancing formula. This is so because (as we have seen), there is no basis for courts to engage in the sort of interest-balancing analysis properly and routinely applied to challenged state regulations under the traditional dormant Commerce Clause test applied to state taxes.<sup>245</sup> It is conceivable, of course, that the Court could construct a new rule that requires courts to apply *Pike* balancing in those tax cases that evade discrimination-based analysis under the state-self-promotion exception or, for that matter, in all state tax cases.<sup>246</sup> Assuming the Court does not take such a step, however,

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243. Justice Breyer posed such a hypothetical during the oral arguments in *Davis*. Transcript of Oral Argument, *supra* note 78, at 21.

244. See, e.g., Michael, *supra* note 74, at 759 n.46 (noting that “it seems unlikely that the Court would apply the *Pike* balancing test to a tax case”). This conclusion logically follows from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), in which the Court set forth the controlling test for evaluating state tax laws without incorporating into it the *Pike* test. See *id.* at 279 (requiring only that “the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State”).

245. See *infra* note 246 and accompanying text.

246. Indeed, *Davis* may provide a jumping-off point for recognizing such a rule because there the Court did apply *Pike*-balancing analysis (albeit a diluted form of such analysis) after invoking the state-self-promotion exception to fend off the initial discrimination-based challenge. *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1817–19 (2008). In doing so, however, the Court never paused to consider the broader landscape of the dormant Commerce Clause doctrine described in the text, including its longstanding embrace of different analytical traditions in state-tax and state-regulation cases. Nor did the Court have to consider that broader superstructure of governing rules in light of (1) both parties' willingness to litigate the

judicial examination of state-tax cases that trigger the state-self-promotion exception will end once the court decides that the exception applies. Put simply, existing doctrine suggests that state-self-promoting regulations must survive *both* antidiscrimination and *Pike*-balancing review, while state taxes must survive *only* antidiscrimination review.

There are other settings in which *United Haulers* and *Davis* might shelter discriminatory tax rules which would otherwise be vulnerable to dormant Commerce Clause attack. A state, for example, might exempt its own instrumentalities' property ownership and purchase and sales transactions from state taxation, while not exempting exactly the same activities when undertaken by out-of-state governmental entities.<sup>247</sup> There exists a strong argument that courts should bless this brand of discrimination regardless of *United Haulers* and *Davis*.<sup>248</sup> Any doubt on this score, however, should vanish in light of those precedents. In *Davis*, after all, the Court—following its earlier decision in *Bonaparte v. Tax Court*<sup>249</sup>—aligned foreign states with private entities to the extent that those states expose themselves to the taxing authority of the local jurisdiction.<sup>250</sup> In doing so, the Court reasoned that foreign states, just like private entities, lack “attributes of sovereignty”<sup>251</sup> to the extent they undertake activities such as owning or acquiring property

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*Pike*-balancing question, and (2) the Court's ultimate conclusion that the law at issue in *Davis* presented no *Pike*-balancing problem even assuming *Pike*-balancing analysis applied. *Id.* For these reasons, we should not read *Davis* as holding that courts must apply *Pike*-balancing analysis in future state-self-promotion tax cases, and we *certainly* should not read *Davis* as holding that *Pike*-balancing review is now a necessary step to undertake in every state tax case that concerns a dormant Commerce Clause attack.

247. See generally *Ex parte Hoover, Inc.*, 956 So. 2d 1149 (Ala. 2006) (striking down a tax exemption that extended to sales to Alabama government entities, but not government entities of other states, based on the finding that the state had not shown that non-discriminatory methods, such as exempting sales to all out-of-state governments, were insufficient or unreasonable methods to meet its goal of mitigating administrative costs); 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ¶ 4.14[3][o], at 4-177 to -179 (3d ed. 2000) (analyzing the *Hoover* decision and justifications for an exemption of this type; discussing further litigation of the issue in Alabama in the wake of *United Haulers*).

248. The gist of the argument is that it makes no sense for a taxing state to have to impose equal taxes on its own operations and on other states' operations when the state raises the tax money to fund the state itself. Put another way, imposing property and other taxes on in-state local governments goes a step beyond robbing Peter to pay Paul; in effect, it involves robbing Peter to pay Peter himself because local governments are merely arms of the state government. In contrast, imposing real-estate and other taxes on out-of-state governmental entities corresponds with basic taxing policy. For example, out-of-state government-property owners enjoy, to the exact same degree as private-property owners, the benefits of police protection, fire protection and all other local-government benefits for which tax dollars pay. For this reason, wholly apart from the state-self-promotion doctrine, it seems to make good sense to treat in-state and out-of-state public entities differently in assessing taxes of this kind.

249. *Bonaparte v. Tax Court*, 104 U.S. 592 (1881).

250. See *id.* at 594 (emphasizing, in applying the Privileges and Immunities Clause, that “[o]ne State cannot exempt property from taxation in another”).

251. *Id.* at 595.

outside their own borders. Under this logic, if “a foreign State is properly treated as a private entity with respect to state-issued bonds,” it would seem to follow that the same “foreign State is properly treated as a private entity” with respect to any other activity that gains a taxing situs in the tax-imposing jurisdiction.<sup>252</sup>

A more complicated state-self-promotion problem concerns state income-tax deductions for payments of property or sales taxes. In a thoughtful pre-*Davis* article, Joel Michael suggested that a ruling for Kentucky in that case “could . . . affect whether a state can limit personal deductions for real estate or other taxes to those paid to in-state governmental units.”<sup>253</sup> He put the question in starkly practical terms by asking: “[C]ould residents be allowed to deduct real estate taxes paid on in-state vacation homes, but not on out-of-state vacation homes” consistent with the dormant Commerce Clause rule?<sup>254</sup> As Michael went on to explain, the pro-government result that he anticipated in *Davis* provides a plausible argument for upholding this form of tax discrimination. According to that argument, this method of differential treatment is permissible because the tax-imposing state is not “similarly situated” vis à vis all other states because all other states lack the taxing jurisdiction’s “attributes of sovereignty,” which give rise to the taxing state’s ability to favor itself.<sup>255</sup> Thus, according to Michael’s argument, the taxing state does not have to treat real-estate taxes paid to it the same as real-estate taxes paid to a “foreign State,” just as surely as it does not have to treat bond-interest payments it makes the same as bond-interest payments that other jurisdictions make.<sup>256</sup> At least this is the case because both the imposition of real-estate taxes and the awarding of income-tax relief based on those payments involve “traditional” state practices.<sup>257</sup> Indeed, they involve the same “quintessentially public function” involved in *Davis* itself—namely, the function of raising money “to pay for public projects.”<sup>258</sup>

The difficulty with this analysis is that it rests on only snippets of language from *Davis* and pays little heed to that decision’s overarching logic. Unlike in *Davis*, when a state imposes a real-estate tax, it does not launch an “enterprise” or enter a “market.”<sup>259</sup> And when it affords an income-tax break

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252. Dep’t of Revenue v. *Davis*, 128 S. Ct. 1801, 1811 (2008).

253. Michael, *supra* note 74, at 761.

254. *Id.*

255. See *supra* note 251 and accompanying text (explaining that a foreign state cannot impose taxes on property within another state because the foreign state lacks sovereign attributes).

256. See *supra* note 254 and accompanying text (explaining Michael’s argument).

257. See *supra* notes 72–73, 211–19 and accompanying text (discussing the traditional-state-practice distinction).

258. Dep’t of Revenue v. *Davis*, 128 S. Ct. 1801, 1810 (2008).

259. *Id.* at 1811.

for prior property-tax payments, it does not favor itself with respect to its own production or transfer of services or property. Rather, the state has merely structured its taxing system in a way that steers private financial activity from outside to inside its borders.

This system runs afoul of a principle put forward in *Davis* itself—namely that “in the paradigm of unconstitutional [tax] discrimination the law chills interstate activity by creating a commercial advantage for goods or services marketed by local private actors.”<sup>260</sup> The creation of such a “commercial advantage” for in-state activity is precisely the effect of a taxing scheme that in and of itself favors the ownership of private property with in-state attributes over the ownership of private property with out-of-state attributes.<sup>261</sup> The trick in such a case is that the state’s discrimination arises through the joint operation of two separate taxing mechanisms. It is a settled proposition, however, that “[a] state tax must be assessed in light of its actual effects considered in conjunction with other provisions of the State’s tax scheme.”<sup>262</sup> In the end, a state’s provision of an income *tax* deduction afforded only for the payment of a local property *tax* does not involve anything like a “decision of the voters on whether the government or the private sector should provide [valuable] services.”<sup>263</sup> Instead, it involves just the sort of “differential treatment of in-state and out-of-state economic interests”<sup>264</sup> that offends the Commerce Clause because it induces local taxpayers to “direct their commerce to businesses within the State.”<sup>265</sup>

As these examples illustrate, *United Haulers* and *Davis* will take center stage in many cases that raise constitutional challenges to state taxing schemes. One challenge of this sort, however, stands out among all the others. In *Davis*, the Court reserved the question whether its ruling in that case should extend to so-called “private activity bonds”—a vehicle of state-engineered financing so significant that it is estimated to involve some \$500 billion in now-outstanding debt.<sup>266</sup> This Article next considers whether states may discriminate in taxing in-state and out-of-state private-activity-bond interest in the same fashion that *Davis* permits them to discriminate in taxing interest paid on genuinely public bonds.

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260. *Id.* at 1814.

261. *See, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 346 (1996) (invalidating intangible tax that favored ownership of stock in businesses with in-state operations over ownership of stock in businesses with out-of-state operations).

262. *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981).

263. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007).

264. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

265. *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 334–35 (1977).

266. *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1805 n.2 (2008).

## 2. *Davis* and Private-Activity Bonds

As we have seen, the Court in *Davis* applied the state-self-promotion principle to uphold state tax laws that discriminated in favor of bonds issued by in-state government entities.<sup>267</sup> *Davis*, however, did not afford constitutional protection to all bonds of this sort. Rather, in a textual footnote sure to touch off a wave of future litigation, the Court paused to bracket the question whether the state-self-promotion doctrine extends to so-called “private activity bonds.”<sup>268</sup> These bonds differ from the most longstanding forms of state-and-local-government bonds because they operate to finance activities undertaken by private individuals, business firms, or nonprofit entities.<sup>269</sup> Recent estimates indicate that about one-quarter of all state-issued bonds fall into this category.<sup>270</sup> The courts’ treatment of the issue in future cases, thus, will have far-reaching effects.

What courts will do when they encounter the private-activity-bond question is far from clear,<sup>271</sup> in part because there are many private-activity-bonding schemes and many types of projects and programs that these schemes might finance.<sup>272</sup> Put another way, the private-activity-bond “issue” in fact embraces a range of issues, and it is not possible to explore all those issues here.<sup>273</sup> A useful place to start in analyzing the question, however, may

267. See *supra* notes 75–77 and accompanying text.

268. *Davis*, 128 S. Ct. at 1805 n.2; see *Supreme Court, 2007 Term—Leading Cases, supra* note 15, at 277 (noting that *Davis* “does not rule on the tax treatment of an important form of municipal debt issuance—private activity bonds”). The issue was obviously on the Justices’ minds, however, as the first several questions during oral argument focused on private-activity bonds. See Transcript of Oral Argument, *supra* note 78, at 3–6 (asking, for example, “Is what you just said true about conduit bonds [a subset of private activity bonds]?”). Such concern is not surprising given the importance of the market in private-activity bonds. See *Supreme Court, 2007 Term—Leading Cases, supra* note 15, at 285 (“[T]he importance of private activity bonds in the U.S. economy and the current volatile market environment make the exclusion of private activity bonds noteworthy.”).

269. *Davis*, 128 S. Ct. at 1805 n.2 (noting that “‘private activity’ . . . bonds . . . [are] used to finance projects by private entities”). See David Hoffman, *Private-Activity Bonds in Court’s Cross Hairs*, INVESTMENT NEWS, Nov. 26, 2007, at 12 (“Private-activity bonds are municipal bonds issued by a state on behalf of a private entity with the idea that the entity serves some sort of public good. Such bonds include those issued on behalf of airports, hospitals, housing or economic development.”).

270. Viard, *Balkanization of the Municipal Bond Market, supra* note 74, at 242.

271. *Supreme Court, 2007 Term—Leading Cases, supra* note 15, at 285.

272. Michael, *supra* note 74, at 759–60 (listing typical projects financed by private-activity bonds); Hoffman, *supra* note 268, at 12 (same); Viard, *Supreme Court Upholds Balkanization, supra* note 74, at 898 (noting that some private-activity bonds have a “‘public’ flavor” while others have a more “‘private’ flavor”).

273. Greg Stohr, *Supreme Court Muni-Bond Delay Has Lawyers, Markets Puzzling*, FULTON COUNTY DAILY REP., Apr. 10, 2008, at 6–7 (noting comments of Leonard Weiser-Varon to the effect that distinguishing private-activity from public bonds “would be quite messy” because “[t]here’s gray as to what’s a private activity-bond”; noting that “[i]n some cases, states require that the bond issuer own the financed facility while leasing it out to a private entity”).

be with the traditional “industrial revenue bond” (“IRB”).<sup>274</sup> As one analyst explained: “[T]raditional industrial development revenue bonds . . . are, in all but name, corporate bonds: The proceeds are often used to finance privately owned business facilities, the bonds are secured by mortgages on the facilities, and the bonds’ principal and interest are paid by the benefiting businesses.”<sup>275</sup>

In short, IRBs involve borrowing by private entities to finance private activities as a practical matter. The government, however, must approve and participate in any such transaction, including by serving as the named issuer of the bonds.<sup>276</sup> Under the principle of *Davis*, one question that arises is whether a state can offer an income-tax exemption for in-state private-project-supporting IRBs, while denying the exemption for interest generated by IRBs sold to finance comparable private projects in other states. Three possible approaches to this question are available.

First, the court might apply *Davis* to authorize this form of discrimination. On this view, the critical inquiry is whether the tax exemption is a “preference [the state] grants itself when it engages in activities serving public objectives.”<sup>277</sup> Following this rhetoric, some might assert that tax breaks for in-state IRBs do afford a “preference” to the state “itself” because a government entity issues the bonds, acts as a key participant in assembling funds, and serves as the essential medium through which those funds flow to the private entity. In addition, the government “engages in activity serving public objectives” when it issues most modern tax-exempt bonds by funding, for example, hospitals, low-cost housing projects, transportation-related structures, and other public-supporting facilities.<sup>278</sup> (Moreover, even with traditional IRBs that supported private manufacturing, storage or other more quintessentially private business operations, the government could be said to be “serving public objectives” by expanding and diversifying the range of local businesses, building the

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274. See 26 U.S.C. § 141 (2002) (defining private-activity bonds and qualified-private-activity bonds); Viard, *Supreme Court Upholds Balkanization*, *supra* note 74, at 895 (discussing the classification of a municipal bond as a private-activity bond under § 141 and the federal tax treatment of such bonds). Industrial-revenue bonds are an attractive financing tool because bondholders may exclude the interest they earn on them from their gross income for federal-income-tax purposes.

275. Michael, *supra* note 74, at 760.

276. *Id.*

277. Dep’t of Revenue v. *Davis*, 128 S. Ct. 1801, 1815 (2008).

278. See *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 15, at 285 (“Arguably the ultimate purpose and benefit of private activity bonds—to develop projects that improve communities—very closely mirror that of municipal bonds issued by the government to fund public works.”).

local tax base, and stimulating local employment.<sup>279</sup>) The case for upholding local IRB tax preferences also gains support from the defensible propositions that (1) private-activity bonds and the selective state-tax breaks for these bonds seem to have “a long pedigree”;<sup>280</sup> and (2) invalidation of such tax preferences “could disrupt important projects that the States have deemed to have public purposes.”<sup>281</sup> In short, the state is the “issuer” of IRBs just as surely as it is the issuer of public-purpose bonds, and *Davis* teaches that “a public entity . . . does not have to treat itself as being ‘substantially similar’ to the other bond issuers in the market.”<sup>282</sup>

On the second view, state-tax breaks selectively associated with IRBs should not fall within *Davis*’s protective reach.<sup>283</sup> This is the case because *Davis* by its terms does not apply to government action that involves “favoring particular private businesses over their [out-of-state] competitors”—which is just what this sort of targeted tax preference entails.<sup>284</sup> Indeed, in *Davis*, Justice Souter distinguished the Court’s past tax-discrimination cases on the theory that “the . . . Commonwealth’s direct participation [in the bond market] favors, not local private entrepreneurs, but the Commonwealth and local governments.”<sup>285</sup> In selectively granting tax relief to only in-state IRBs, however, the government does *not* simply favor “the Commonwealth and local governments”; indeed, the whole point of issuing private-activity bonds is to support *private* undertakings. In *Davis*, Justice Souter took pains to emphasize that “governmental public preference is constitutionally different from commercial private

279. Cf. *Kelo v. City of New London*, 545 U.S. 469, 469 (2005) (viewing the condemnation of property for similar purposes as involving a “public use” under the Fifth Amendment’s Takings Clause).

280. *Davis*, 128 S. Ct. at 1806. See, e.g., Viard, *Supreme Court Upholds Balkanization*, *supra* note 74, at 897 (noting that the “long-established nature” of the exemption and support by the states might point towards upholding it in light of the Court’s “reluctance to strike down long-established tax systems . . . that are supported by all of the states”).

281. *Davis*, 128 S. Ct. at 1805 n.2. The possible effects on the bond market itself might also move the Court to uphold the private-activity-bond exemption. See *The Supreme Court, 2007 Term—Leading Cases*, *supra* note 15, at 286 (“[A]n upheaval in the private activities bond market would have far-reaching and detrimental economic consequences in an already volatile market environment.”).

282. *Davis*, 128 S. Ct. at 1811 (emphasis added).

283. Brief of Alan D. Viard et al. as Amici Curiae Supporting Respondents, *supra* note 78, at 26 (“With private-activity bonds . . . private parties are the actual borrowers, not state or local governments. The *United Haulers* exception should not apply in any event to this segment of the municipal bond market.”); Viard, *Selective Private Activity Bond*, *supra* note 74, at 1017 (arguing that the principle of *Davis* and *United Haulers* “cannot validate the selective tax exemption as it applies to private activity municipal bonds” because “such bonds fall on the private side of *United Haulers*’ private/governmental distinction”).

284. *Davis*, 128 S. Ct. at 1809 (quoting *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007)).

285. *Id.* at 1814.

preference.”<sup>286</sup> And the case is strong, if not overwhelming, that local-activity-promoting IRBs involve a “commercial private preference” for the simple reason that their proceeds fund local, private commercial activities.<sup>287</sup>

There is a third possible approach to the IRB problem. From this perspective, local-entity-favoring IRB programs fall within the realm of public/private joint ventures that courts must place on the “public” or “private” side of the constitutional line by consulting the policies that drove the different results in *United Haulers* and *Carbone*.<sup>288</sup> Adoption of this approach would not bode well for IRB taxing programs that selectively favor only in-state commercial activities. The economic benefits of those tax breaks, after all, go to private-entity borrowers in the form of reduced interest rates, and those borrowers seek this form of financing for their own purposes in conducting their own operations. Against this backdrop, the private entity benefited by an IRB tax break does not even remotely resemble the fixed-fee contractor involved in *United Haulers*, which the government had merely hired to help run a facility that it had opened, owned, and overseen.<sup>289</sup> Rather, the private beneficiary of the IRB program is the relevant economic actor in every real-world respect, while the government acts as only a “conduit” for that private entity’s capital-gathering efforts.<sup>290</sup>

Given these facts, it is hard to see how discrimination between in-state and out-of-state private-activity bonds, at least of the traditional IRB sort, does not involve untoward “protectionism” of local private concerns. Additionally, political-process considerations point strongly toward the conclusion that *Carbone*, rather than *United Haulers*, provides the controlling analogy in this context. Indeed, in *Carbone*, the Court detected a decisive danger of political distortion even when only a single private firm stood to profit from the government’s choice to inhibit free cross-border

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286. *Id.* at 1810 n.9.

287. Of particular significance, the Court has held that the operation of nonprofit entities is commercial in nature. *See supra* text accompanying note 65 (arguing that issues that arise under the dormant Commerce Clause inherently involve competitive state action). Because of this, there is no immediately apparent reason to distinguish private-activity bonds that favor profit-seeking entities from private-activity bonds that favor nonprofit entities.

288. *See supra* Part III.A.2 (discussing the public/private distinction applied in *United Haulers* and *Carbone*).

289. *See supra* notes 127–33 and accompanying text (exploring the potential implications of situations where governments seeking dormant Commerce Clause exemptions use private entities to do part of their work).

290. Michael, *supra* note 74, at 760 (noting that “[t]he business gets the lower interest rate that comes with the tax exemption” and that “[i]n many instances, the government does little more than put its name on the bonds (that is, issue them) to confer the tax benefits on the private beneficiaries”).

commerce.<sup>291</sup> By way of comparison, in the IRB context, thousands of local (or would-be local) firms stand to benefit from the discriminatory tax break. Thus, with respect to political-process considerations, *Carbone* would seem to control the IRB case a fortiori.

Let us say that the Court agrees with this analysis and deems the state-self-promotion principle inapplicable, at least as a general matter, to private-activity bonds. Would such a ruling mean that this form of discrimination violates the dormant Commerce Clause? This question directs attention to a key point that we have encountered before. The point is that the state-self-promotion exception does not stand alone, so that analysts must take care to work through how the doctrine relates to other elements of dormant Commerce Clause case law.<sup>292</sup>

What are the implications of considering the broader sweep of dormant Commerce Clause law in this area? One unsettled aspect of the dormancy doctrine concerns so-called “state business development incentives,”<sup>293</sup> and states are sure to argue that—wholly apart from the state-self-promotion doctrine—special rules applicable to such incentives rightly permit tax discrimination between local and non-local IRBs. As it turns out, most non-tax-based business-development programs are constitutionally uncontroversial; in particular, the Court has broadly suggested that states may seek to stimulate local business by channeling affirmative cash subsidies solely to local firms.<sup>294</sup> Tax-based incentives, however, have received more mixed reviews. Some scholars argue that almost all of these programs violate the antidiscrimination principle,<sup>295</sup> others argue that most or all of them do

291. See *supra* notes 66–71 and accompanying text (developing this point as a potential basis for distinguishing *Carbone* and *United Haulers*).

292. See *supra* notes 52–56, 187–91 and accompanying text (discussing relationship of the state-self-promotion doctrine to the market-participant exception and the potential-utilities exception).

293. See, e.g., Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413, 416 (1997) (“The Court’s treatment of state tax incentives suggests that the constitutional suspicion surrounding such measures is well justified.”); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 791–92 (1996) (noting that the constitutionality of these incentives highlights a “palpable tension in the Supreme Court’s decisions”); Paul V. McCord, *The Dormant Commerce Clause and the MBT Credit and Incentive Scheme: You Can’t Get There from Here*, 53 WAYNE L. REV. 1431, 1496 (2007) (citing “indeterminate state of the law with regard to state tax incentives for in-state investment”); Edward A. Zelinsky, *Are Tax “Benefits” Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 380–81 (1998) (“The Court . . . has equivocated, equating tax benefits and direct spending in some constitutional cases but not in others without indicating a rationale for such a seemingly inconsistent approach.”).

294. See *TRIBE, supra* note 7, § 6-11, at 1093–94 (discussing the constitutionality of direct subsidization of domestic industry); Coenen, *supra* note 162, at 977–1002 (discussing the constitutionality of ordinary business subsidies).

295. E.g., Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 380–81 (1996) (arguing that the

not,<sup>296</sup> and still others advocate a middle-ground approach that focuses attention on the coercive or noncoercive nature of the taxing scheme at issue.<sup>297</sup> Most important of all, the Supreme Court has not yet thoughtfully considered which of these approaches holds the greatest merit.<sup>298</sup>

While the constitutionality of tax-based business incentives lies beyond the scope of this Article, three points regarding IRB financing incentives merit attention. First, wholly apart from the state-self-promotion rule, special judicial treatment of business-development incentives may lead to validation of tax exemptions limited to interest earned only on in-state private-activity bonds. Second, there is an argument that courts should apply the state-self-promotion doctrine to exempt private-activity bonds from antidiscrimination attack, regardless of the constitutionality of tax-based development incentives as a general matter.<sup>299</sup> Third, although it is difficult to predict what lies down the road for IRB taxing programs, both the language and the logic of *Davis* suggest that courts will hesitate to apply the state-self-promotion doctrine to the taxation of bonds that discriminatorily assist private firms.<sup>300</sup> Thus, if the Court ultimately finds no constitutional problem with state favoritism of local IRBs, it is less likely to rely on the rule

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Commerce Clause should stand as a “restraint” against “the accelerating use of state tax incentives”).

296. *E.g.*, Denning, *supra* note 57, at 510 (“It is difficult to see how one state’s subsidy of a particular activity, whether it is through cash or some tax credit, if offered to in-state and out-of-state firms equally, would begin the cycle of discrimination and retaliation that would threaten interstate harmony.” (emphasis omitted)); Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 YALE L.J. 1186, 1243–44 (2006) (arguing that the Constitution should permit investment-credit incentives); Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 928 (1986) (arguing for future courts to narrowly read prior Court decisions that have struck down state tax incentives); Zelinsky, *supra* note 74, at 942–44 (arguing against the continued operation of the dormant Commerce Clause antidiscrimination rule in tax cases, including those involving business-development incentives).

297. Hellerstein & Coenen, *supra* note 293, at 806–13; *see also* Cuno v. DaimlerChrysler Corp., 386 F.3d 738, 746–48 (6th Cir. 2004) (applying this style of analysis), *vacated in part*, 547 U.S. 332 (2006).

298. The *DaimlerChrysler* case (*see supra* note 297) recently put these issues before the Supreme Court. After hearing argument, however, the Court concluded that jurisdictional difficulties precluded it from bringing greater clarity to this area of law. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 338 (2006). For a discussion of *DaimlerChrysler*, *see* Brannon P. Denning, *DaimlerChrysler Corp. v. Cuno*, *State Investment Incentives, and the Future of the Dormant Commerce Clause Doctrine*, 2006 CATO SUP. CT. REV. 173, 174–79 (2006); Symposium, *DaimlerChrysler v. Cuno and the Constitutionality of State Tax Incentives for Economic Development*, 4 GEO. J.L. & PUB. POL’Y 15 (2006). For a discussion of the current state of tax-incentive litigation, *see* Morgan L. Holcomb & Nicholas Allen Smith, *The Post-Cuno Litigation Landscape*, 58 CASE W. RES. L. REV. 1157 (2008).

299. *See supra* notes 277–82 and accompanying text.

300. *See supra* notes 283–87 and accompanying text.

of *United Haulers* and *Davis* than on other principles of dormant Commerce Clause law.

E. LEVERAGING THE STATE-SELF-PROMOTION EXCEPTION

As we now have seen, the *United Haulers–Davis* principle often permits states to force local residents to deal with the state itself, even if the effect of doing so is to disadvantage out-of-state service providers. Once the state exercises this power, what additional steps may it take? Having forced local residents to make use of a *public* business (for example, by forcing local residents to deliver garbage only to a state-run waste-transfer station), may the state then “bootstrap” or “pyramid” on this action by channeling work generated by its own operation solely to in-state *private* firms (for example, by choosing to have its waste-transfer station deal only with local landfills)? Or, having forced local residents to deal with a state-run business, may the state charge super-high user fees for the services it provides? We turn now to these important questions.

1. *United Haulers* and Cradle-to-Grave Waste-Handling Programs

In *United Haulers*, a local government required the delivery of all locally generated trash to a waste-transfer station that it owned and operated. Might the local government have taken the additional step of requiring that all disposable waste, once its station had processed it, go into a local landfill also subject to its own ownership and control? Such a cradle-to-grave waste-disposal scheme would impose a greater burden on interstate commerce than the scheme validated in *United Haulers* because the Oneida–Herkimer program in fact permitted final delivery of nonreusable waste to landfills located outside the state.<sup>301</sup> Thus, challengers of this sort of waste program might argue that it differs from the Oneida–Herkimer program in such a way that it should (unlike the Oneida–Herkimer program) trigger strict scrutiny under the dormant Commerce Clause antidiscrimination rule.

This argument would fail. Under the principle of *United Haulers*, after all, “flow control ordinances,” which treat in-state private business interests exactly the same as out-of-state ones, do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.<sup>302</sup> That principle applies fully to our posited cradle-to-grave waste-handling program because that program does treat “in-state private business interests exactly the same as out-of-state ones” in that both in-state, private waste-transfer stations and in-state landfills are disadvantaged no less greatly than their out-of-state

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301. Brief for Respondents, *supra* note 196, at 2–3 (noting that citizens disposed of nonrecyclable waste in landfills in Pennsylvania and New York that were chosen through a public competitive-bidding process).

302. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007).

competitors.<sup>303</sup> Simply put, the protectionism-does-not-exist-when-all-private-entities-are-treated-the-same principle applies to our cradle-to-grave case because, in it, all private entities *are* treated the same.

Some cradle-to-grave programs will raise more complicated Commerce Clause issues. What if, for example, the municipality that favors its own waste-transfer station does not own a landfill but nonetheless mandates that all waste it processes must flow only to landfills located in the state? If this program operates to channel waste only to in-state *public* landfills, out-of-state landfill operators—both public and private—should again be unable to mount a successful antidiscrimination-based attack. The difficulty they will face is that cities, counties, and authorities are merely arms of the state itself—a principle recognized in many of the Court’s decisions.<sup>304</sup> For this reason, courts are not likely to treat Municipality X’s decision to favor in-state public landfills (whether or not owned by Municipality X) any differently from State Q’s decision to favor landfills that it runs. Again, because the municipality’s restriction “treat[s] all *private* businesses the same,”<sup>305</sup> the sheltering principle of *United Haulers* should control even though the restriction advantages in-state public entities over their out-of-state public and private counterparts.<sup>306</sup>

On the other hand, the state-self-promotion rule (at least standing alone) will not shelter Municipality X’s challenged law if it favors in-state *private* landfill operators. In such a case, after all, in-state and out-of-state private operators are *not* treated “exactly the same” precisely because in-state landfills are favored over their out-of-state business rivals.<sup>307</sup> Even so, Municipality X is sure to argue that this arrangement should survive a constitutional attack. It will do so by relying on a two-step application of settled Commerce Clause doctrine. First, Municipality X will note that *United Haulers* now authorizes the forced delivery to it of all local waste for processing in its own local transfer station. Second, Municipality X will argue that, having secured possession of the waste in this fashion, it may freely contract with whomever it selects as a trading partner in arranging for the waste’s disposal pursuant to the market-participant exception to the dormant Commerce Clause.<sup>308</sup>

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303. *Id.* at 345. It bears mention in this regard that this scheme will survive discrimination-based attack even if turns out to disadvantage public, as well as private, out-of-state landfill competitors. It was this very distinction, after all, that the Court squarely rejected in the *Davis* case.

304. *See, e.g.,* *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 215 (1984) (observing that “a municipality is merely a political subdivision of the State from which its authority derives”).

305. *United Haulers*, 550 U.S. at 347 (emphasis added).

306. *See supra* note 302 and accompanying text.

307. *See supra* note 302 and accompanying text.

308. *See supra* notes 52–56 and accompanying text (discussing the market-participant rule). An analogous problem was presented in *Chance Management, Inc. v. South Dakota*, 97 F.3d 1107

Although this analysis might seem sound at first blush, it suffers from a potentially fatal flaw. The difficulty is that, when viewed as a unitary whole, this program does not satisfy the *United Haulers* requirement of “treating all private businesses the same.”<sup>309</sup> Instead, as in *Carbone*, this forced-use program operates to benefit in-state private business over out-of-state private business (with the favored businesses here being private landfills, whereas the favored business in *Carbone* was a private waste-handling station). Put another way, this type of cradle-to-grave waste program raises a question about the proper analytical lens through which to look at the case: Should the program be viewed as a whole, and thus discriminatory under *Carbone*, or should it be viewed as nondiscriminatory because each of its component parts, when viewed in isolation, is constitutionally unproblematic?

No case on point answers this question, but *West Lynn Creamery, Inc. v. Healy*<sup>310</sup> sheds useful light. That case arose out of a Massachusetts program under which all milk dealers had to pay a tax on milk they sold within the state, regardless of the milk’s state of origin. Massachusetts then placed all proceeds of this tax in a segregated fund out of which it made payments solely to in-state milk producers. Chief Justice Rehnquist and Justice Blackmun failed to perceive a constitutional problem in what Massachusetts had done. For them, the milk tax raised no Commerce Clause difficulties because the state imposed it in a nondiscriminatory fashion, and the payments made to in-state producers—though patently discriminatory—likewise presented no problem in light of the recognized “subsidy exception” to the dormancy doctrine.<sup>311</sup> A majority of the Court in *West Lynn Creamery*, however, rejected this divide-and-conquer approach. In its view, the proper course was to look at the actions of Massachusetts in an overarching way because “[i]t is the entire program—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of

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(8th Cir. 1996). There, South Dakota had given itself a monopoly in the lottery-video-gaming business, thus ensuring that anyone who engaged in that pastime (much like anyone who generated trash in Oneida or Herkimer Counties) had to deal with the state. South Dakota, however, then went a step further by also requiring that any licensee of its equipment (i.e., any retail purveyor of its services) have a majority of its ownership interest held by South Dakota residents. Although a majority of the circuit court panel upheld this arrangement under the market-participant rule, *id.* at 1111, Judge Lay in dissent found that the state’s double exertion of its monopoly position had produced an impermissibly discriminatory regulation. *Id.* at 1119 (Lay, J., dissenting). On the analysis suggested here, Judge Lay had the better side of the argument because, when viewed holistically, the South Dakota program in effect forced in-state private video gamers to deal only with in-state private licensees. Professor Williams—who recently offered his own, and very penetrating, analysis of the case—reached this same conclusion. Williams, *supra* note 52, at 508.

309. *United Haulers*, 550 U.S. at 347.

310. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

311. *Id.* at 213 (Rehnquist, C.J., dissenting); see also *supra* notes 292–99 and accompanying text (discussing subsidy exception).

local producers.”<sup>312</sup> According to the majority, “By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone.”<sup>313</sup> In particular, the monetary subsidy paid by the state worked in “practical operation” as a tax “rebate”<sup>314</sup> or “refund.”<sup>315</sup> And, because that rebate or refund went solely to in-state dairy farmers, the Massachusetts scheme contravened the basic Commerce Clause prohibition on tax-based discrimination.

*West Lynn Creamery* speaks to our favored-local-private-landfill cradle-to-grave case because it shows that the Court sometimes will view two-part programs in a one-part way that exposes them to an otherwise unavailable dormant Commerce Clause attack.<sup>316</sup> More particularly, the Court in *West Lynn Creamery* took this approach in a setting much like the one our hypothetical case presents—that is, where the state has coupled a discriminatory resource-distribution scheme (via the payment of milk-producer subsidies in *West Lynn Creamery* and via the payment of landfill tipping fees in our hypothetical case) with an otherwise permissible act of government coercion (by way of taxation in *West Lynn Creamery* and by way of a forced-use rule in our hypothetical case). In the end, the “practical operation” of this form of cradle-to-grave waste program is to steer waste business not only to the government itself but also to in-state private landfill operators. A blended reading of *United Haulers* and *West Lynn Creamery* leaves no doubt that this sort of program will raise constitutional red flags.

Another (and a quite different) type of cradle-to-grave waste-handling problem lies in the shadow of these precedents. Suppose that, despite the preceding analysis, courts find that a municipality may both (1) force delivery of all local trash to its own transfer station and then (2) send all waste passed along by that station for disposal to only in-state private landfills. Such a program pushes the edge of what the Commerce Clause will tolerate, but there is in fact an even more aggressive cradle-to-grave waste program that localities might seek to implement and defend. Under such a program, the government would require delivery of all waste within its jurisdiction to a *privately* owned local waste-transfer station and also require the deposit of all disposable waste sorted by that station in one or more *privately* owned local landfills. Would such a rule survive a dormant Commerce Clause attack? A straightforward application of *Carbone* suggests that it would not. Indeed, *Carbone* would appear to control in clear fashion because in the posited case, both a private in-state waste-transfer station and private in-state landfills would be gaining government protection, not just

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312. *W. Lynn Creamery*, 512 U.S. at 201.

313. *Id.* at 199–200.

314. *Id.* at 197.

315. *Id.* at 195 n.10.

316. See Coenen & Hellerstein, *supra* note 237, at 2196–203 (discussing factors relevant in assessing the constitutionality of such two-part plans).

(as in *Carbone*) the private transfer station (which remained free to deal with either in-state or out-of-state landfill service providers).

There is, however, a fly in the ointment. The complication is that even the discriminated-against waste handler in the *Carbone* case acknowledged the possibility that Clarkstown's local-processing rule would pass muster if all waste involved in the case "originate[d] in Clarkstown, and was . . . disposed of there."<sup>317</sup> The waste handler made this concession because the town argued that no discrimination against interstate commerce can exist when a local government effectively removes waste altogether from the stream of interstate trade.<sup>318</sup> In *Carbone*, the Court did not have to evaluate this proposition because the favored transfer station actually only served as a temporary stopping point as waste moved to both in-state and out-of-state final destinations. If the remove-all-waste-from-the-stream-of-commerce notion has legitimacy, however, it might well permit states to effectuate disposal schemes that employ local, private operators at every stage of the waste-handling process. Under such programs, after all, the handled waste never leaves the state.

Happily for challengers of flow-control ordinances, this removal-from-the-stream theory does not hold water. In case after case, the Court has declared that the dormant Commerce Clause outlaws "home embargoes" that block the shipment of goods outside the commerce-prohibiting state. In *Hughes v. Oklahoma*,<sup>319</sup> for example, the Court struck down a law that prohibited all exportation of locally seined minnows. In working its way to this result, the Court never even considered the possibility that such a flow-stanching regulation of interstate trade rendered the dormancy doctrine irrelevant. Instead, the Court declared in no uncertain terms that "when a wild animal 'becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another state.'"<sup>320</sup> One could carry on about why the same principle should apply when a private-firm-favoring, cradle-to-grave waste-disposal program blocks all movement of locally produced refuse beyond the state's borders. The key point, however, is that solid waste is an article of commerce, just like a wild

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317. Petitioners' Reply Brief at 9, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (No. 92-1402), 1993 WL 632349 (finding no need to address "the rule with respect to jurisdictions that merely collect local waste and dispose of it locally").

318. Brief for Respondent at 16, *Carbone*, 511 U.S. 383 (No. 92-1402), 1993 WL 433043; *see also* *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995) (finding no dormant Commerce Clause violation where the government "elected to occupy the entire field of garbage collection").

319. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

320. *Id.* at 339 (quoting *Gere v. Connecticut*, 161 U.S. 519, 538 (1896)); *see also* *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982) (making clear that the principle of *Hughes* and earlier cases applies whether the case involves "natural resources . . . or . . . the products derived therefrom").

animal brought to market for exchange.<sup>321</sup> It follows that any blockade on the movement of waste outside the regulating state should meet the same fate as a comparable ban on the movement of baitfish.

## 2. Forced-Use Rules and Exorbitant User Fees

In *United Haulers*, the public entity that enjoyed the benefit of the local-transfer-station monopoly charged fees that, although high, qualified as reasonable in light of overall program costs.<sup>322</sup> That entity, however, might have charged a great deal more, and this possibility prompted a telling exchange between Justice Kennedy and counsel for the counties at oral argument. That exchange went as follows:

Justice Kennedy: Suppose the user fee were ten times what it is?

Mr. Cahill: We can only charge something that's reasonably related to the cost of what, of the service that we provide.

Justice Kennedy: Why is that?

Mr. Cahill: In *Evansville Airport*, Your Honor, this Court held that . . . a user fee is constitutionally limited; there has to be a relationship between the cost of the service and the amount that's charged.<sup>323</sup>

This colloquy raises a nettlesome question: What if the authority in fact did charge user fees that were so high that they bore no reasonable relation to the value of the service provided in handling local waste? More to the point, was counsel correct in predicting that *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*<sup>324</sup> would render such price hiking unlawful under the Commerce Clause?

It is understandable why counsel read *Evansville-Vanderburgh* to support the answer he offered to Justice Kennedy. Indeed, the Court in that case reaffirmed that user-fee charges must not be "excessive in relation" to the state services with which they are associated.<sup>325</sup> No less important, the Court has broadly declared that the "user fee" label extends to any "charge imposed by the State for the use of state-owned or state-provided . . . facilities and services."<sup>326</sup> Read together, these pronouncements suggest—

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321. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (discussing how a scarce natural resource itself can be an article of commerce); see also *Petitioners' Reply Brief*, *supra* note 317, at 3, (listing numerous amicus briefs explaining the value of interstate trash).

322. Transcript of Oral Argument, *supra* note 65, at 27.

323. *Id.*

324. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

325. *Id.* at 719.

326. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 103 n.6 (1994) (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981)).

just as counsel suggested—that tipping-fee charges that wildly exceed program costs incurred in providing waste services will run afoul of the dormant Commerce Clause rule.<sup>327</sup>

Or will they? In reality, the Court’s jurisprudence on user fees is a muddle. Particularly perplexing is how one can reconcile *Evansville-Vanderburgh* (which seems to limit a state’s ability to fix the terms of its business contracts when those terms could disrupt the operation of interstate markets) with the market-participant rule (which seems to provide that states may freely set business contract terms for goods and services it supplies without regard to the operation of interstate markets).<sup>328</sup> I have elsewhere suggested that one way of reconciling the Court’s user-fee and market-participant precedents is to take a confined view of *Evansville-Vanderburgh* and cases like it. According to this theory, the principle of those cases only targets state rules that threaten disruption of access to the essential “infrastructure of interstate trade.”<sup>329</sup> If this reading of *Evansville-Vanderburgh* is right, counsel for the Authority was wrong in relying on that case in *United Haulers*. *United Haulers*, after all, involved user fees charged for state-provided waste-disposal services, and fees paid for those services bear no kinship to fees paid for the use of state-supplied “waterways, roads, and airports.”<sup>330</sup> As a result, in response to Justice Kennedy’s question, counsel might well have asserted that the Oneida–Herkimer authority could charge whatever fees it wished to charge for waste services under the market-participant rule.<sup>331</sup>

This analysis, however, also would have missed a key analytical point. The complication is that in the typical user-fee case—*Evansville-Vanderburgh* included—the state imposes a user fee as part of a transaction into which the private payor *voluntarily* chooses to enter. (Indeed it is precisely because of the voluntary nature of “user fee” transactions that the state-restricting rule of *Evansville-Vanderburgh* clashes so starkly with the market-participant doctrine.<sup>332</sup>) In a case like *United Haulers*, however, the government is not merely a market participant with which favored state residents may or may not choose to deal. Rather, because the state has put in place a forced-use

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327. Cf. Williams, *supra* note 52, at 498–99 (“[I]f the state imposes a system of discriminatory user fees (either with respect to exhaustible or inexhaustible goods and services), the court must ask whether the price charged non-residents reasonably corresponds to the actual cost of providing such good or service to the non-residents.”).

328. See *supra* notes 52–56 and accompanying text (discussing the market-participant exception).

329. Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795, 840 (1997).

330. *Id.* at 822.

331. *Id.* at 822–23.

332. See *supra* note 328 and accompanying text.

rule, it is also a market regulator.<sup>333</sup> And for this reason, the hypothetical Justice Kennedy presented at oral argument raised a novel question that is controlled neither by the Court's prior user-fee cases nor by its prior market-participant rulings. That question—which, quite properly, went unanswered in *United Haulers*—is whether a user fee tied to the provision of state-provided waste (or other) services that a local resident has no choice but to use must bear a reasonable relation to the value of the services rendered.<sup>334</sup>

This question is sufficiently important to merit treatment in an extended article of its own.<sup>335</sup> My preliminary appraisal suggests, however, that the dormant Commerce Clause should not block states from charging whatever fees they wish to impose when they conjoin forced-use rules with their own provision of waste-disposal services.<sup>336</sup> Three reasons support this conclusion. First, it is not clear how the charging of high-flying fees in this context will cause the sort of injury to free-flowing trade that the dormant Commerce Clause guards against. In *Evansville-Vanderburgh*, for example, exorbitant user fees posed a focused threat to the interstate movement of airplanes and air travelers by raising the cost of interstate air travel. In our

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333. See *supra* notes 54–55 and accompanying text (explaining that when a town imposed a mandate through fines and imprisonment, it was a market regulator and a market participant).

334. The Court rightly declined to answer the question in *United Haulers* because of the undisputed reasonableness of the amount of the fee. See *supra* notes 321–25 and accompanying text.

335. One question that such an article might profitably address is whether courts should characterize a user fee coupled with a forced-use rule as a tax, given the obviously coercive features that such a program entails. Under the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a tax must be “fairly related to the services provided” by the tax-imposing state. *Id.* at 279. In *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), however, a majority of the Court read this requirement in a way that seemed to strip it of all meaningful significance in the tax (as opposed to the user-fee) context. See *id.* at 278 (upholding an Iowa law that, in effect, taxed out-of-state businesses at a higher rate than Iowa businesses). The impact of the tax-related rules set forth in *Complete Auto Transit* and *Moorman* on the question considered in the text is beyond the scope of this Article.

336. One might argue this result runs counter to the Court's teachings in *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881). There the Court issued two rulings. First, it upheld a law that required steamships to use a town-owned wharf if they chose to dock within the town's borders. *Id.* at 563. Second, of importance for present purposes, the Court held that “if the sum demanded for that service is so far beyond a reasonable compensation for the use of the city's wharf as to be oppressive . . . the courts could in some way give appropriate relief.” *Id.* at 564. Scholars might say that recognition of a judicial power to police user fees in *Packet Co.* requires recognition of a similar power in cases like *United Haulers*. Indeed, scholars could argue that this result follows a fortiori given the greater level of monopoly power possessed on the facts of *United Haulers* than on the facts of *Packet Co.* See *supra* note 51 (discussing this point). There is, however, a flaw in this analysis. The difficulty is that *Packet Co.* falls squarely within the special category of cases in which state entities impose user fees in connection with the infrastructure of interstate trade. See *supra* notes 328–31 and accompanying text. The rule in such cases is that the state may not levy excessive charges. See *supra* notes 328–31 and accompanying text. From that rule it does not follow, however, that state entities must avoid the charging of fees which the judiciary deems excessive in non-infrastructure-of-trade contexts, including when dealing with waste disposal.

hypothetical waste-station case, however, it is not apparent how the charging of extravagant fees will impede interstate activity. Put another way, the essential threat that such a program poses to interstate commerce comes from the forced-use rule itself because it is that rule that cuts off transactions with out-of-state service providers. The essential threat does not come from the level of fee charged for the service that that rule compels local waste producers to pay.<sup>337</sup>

Second, airport user fees (and other fees like them) involve a special risk of cost-shifting from intrastate to interstate transactions. In particular, airport users typically move across state lines, and many of the persons who so move are nonresidents of the state in which the airport sits. Thus, the imposition of these sorts of transportation-related user fees provides states with a distinctive opportunity to shift the costs of state government that state residents themselves rightly bear (including costs wholly unrelated to the provision of air or other transportation services) onto the shoulders of nonresidents. Such a deflection of costs from in-staters to out-of-staters creates obvious tensions with dormant Commerce Clause values.<sup>338</sup> No comparable risk is present, however, when a locality simply charges its own residents high user fees to dispose of their own trash.

Finally, in the forced-use-rule/waste-user-fee context, the need for judicial policing seems weak because the ordinary operation of local political processes should counteract any serious threats that overreaching fees pose to free-flowing interstate trade. The cost of tipping fees, after all, will inescapably come to rest on the very trash-producing local voters who determine local elections and thereby guide local policymaking. To be sure, collective-action problems may arise when (as here) government program costs are spread among large numbers of persons, each of whom pays only a small amount of the state-imposed burden.<sup>339</sup> But it is hard to believe that

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337. There is a counterargument, which goes like this: Any raised charges will reduce the charged-for activity and a reduction of that activity will in turn reduce resulting interstate commerce. (In particular, higher tipping fees will reduce waste tipping which will reduce down-the-line waste hauling and waste burying, including in cross-border settings.) There is something to this point, but it misses an important distinction between our posited waste case and *Evansville-Vanderburgh*. There, after all, the burden on interstate commerce was immediate and direct because heightened fees for airport use obviously threatened movements that in their nature almost always have interstate dimensions. The raising of tipping fees, in contrast, concerns an intrinsically intrastate transaction precisely because those fees are associated with a transaction that the state has forced to occur within its borders. Again, the key point is that, in cases like *United Haulers*, the immediate burden on interstate commerce is imposed by the forced-use rule, not by the tipping fee.

338. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 686 (1981) (Brennan, J., concurring) (finding Iowa's efforts to deflect the burdens of highway use onto neighboring states to embody an example of "simple . . . protectionism" that is subject to "a virtual *per se* rule of invalidity" (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

339. See, e.g., *Yale & Galle*, *supra* note 64, at 885–86; see also *Cantrell*, *supra* note 62, at 184 ("[V]oter incentives to become well informed about non-private transaction decisions are weak

the costs that super-high tipping-fee schemes generate—which big businesses, small local businesses, and every member of both the “in” and the “out” political parties will have to pay—can survive for long unless there is a powerful justification for their imposition. For this reason, any out-of-state commercial interests that through-the-roof user fees harm should find “surrogate representation” among local voters because those voters will not nonchalantly bear the burden those fees impose on them.<sup>340</sup>

#### IV. THE STATE-SELF-PROMOTION DOCTRINE AND PRINCIPLES OF JUDICIAL DECISIONMAKING

Two key thematic ideas emerge from this Article’s treatment of *United Haulers* and *Davis*. First, significant complexity marks the state-self-promotion exception, and judges and lawyers must take care to locate that exception within the broader superstructure of dormant Commerce Clause doctrine. Second, even though state-self-promotion cases will inevitably present fact-specific questions, much help in resolving those questions should come from an attentiveness to the twin concerns—regarding (1) the nature of protectionism and (2) political-process-based reasoning—that drove the Court’s creation of the exception. As courts grapple with the state-self-promotion doctrine in the future, they would do well to bear both of these overarching ideas in mind.

##### A. COMPLEXITY AND CONTEXT

As Part III signals, the state-self-promotion doctrine will bring a truckload of tricky questions into the dormant Commerce Clause arena. That result should not be surprising because, as now should be clear, the Court unleashed a major doctrinal initiative in *United Haulers*. Any new constitutional doctrine of any significance will trigger difficult questions of application that courts must work through in a string of decisions that unwind pursuant to the common-law methodology.<sup>341</sup> So it is with the state-self-promotion principle.

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given their relative power to affect such outcomes . . . while individuals intrinsically attempt to maximize, groups may not.”).

340. TRIBE, *supra* note 7, § 6-5, at 1055; *see id.* at 1053 (“This theme of political representation is so potent that even regulations severely burdening interstate commerce have been tolerated when the interests adversely affected have been adequately represented in the regulating state’s own political process.”); Denning, *supra* note 57, at 507 (noting the Court’s hesitance to apply the Commerce Clause when “[a]ffected in-state residents could serve as virtual representatives for those from out-of-state”).

341. *See, e.g.*, THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob Cooke ed., 1961) (positing that a “considerable bulk” of precedent must be developed to deal with the “variety of controversies” that courts will encounter); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principles*, 112 YALE L.J. 1717, 1729 (2003) (“The common law approach is central to many of the most important areas of constitutional law . . .”).

Of particular importance, the Court should take care, as it moves forward with this doctrine, to consider how it fits together with pre-existing features of the dormant Commerce Clause landscape. So far, the Court has shown little attentiveness to this need.<sup>342</sup> In *Davis*, for example, the Court set out to explain how Kentucky's bond-tax rule posed no problem under *Pike*-balancing analysis without pausing to consider whether and why *Pike* balancing should even apply in a case that involved state taxation, rather than state regulation.<sup>343</sup> What is more, the Court went on to suggest, in cryptic fashion, that it will sometimes truncate or dilute application of the *Pike*-balancing formula when it determines that special concerns about judicial competence in applying that formula are present.<sup>344</sup> Will it do so in all cases? Only in tax cases? Only in state-self-promotion cases? And how does one determine whether special concerns about judicial competence are in the picture?

Critics of the dormant Commerce Clause principle—with Justices Scalia and Thomas leading the charge—are sure to latch onto these complexities in urging that the “unworkable” nature of the Court’s dormancy doctrine, now more than ever, justifies that principle’s abandonment.<sup>345</sup> Attentiveness to context, however, suggests that any such claim would be misplaced. To begin with, the line-drawing problems identified here do not concern the basic limits of the dormant Commerce Clause rule itself. Instead, they involve the limits that a new judicially crafted exception has superimposed upon that rule. If this exception produces a set of standards that are too blurry for courts to work with, baby-and-bathwater logic suggests that the proper course would be to jettison the new exception, rather than the foundational dormant Commerce Clause principle itself.<sup>346</sup> In any event, major legal principles inevitably involve gray areas, and “it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution.”<sup>347</sup> This concept, it might fairly be added, applies with special force to a bedrock constitutional doctrine that the courts have applied in hundreds of decisions handed down over a span of almost

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342. Cf. Denning, *supra* note 57, at 497 (describing *United Haulers* as creating “undertheorized exclusions and exemptions”).

343. See *supra* notes 242–48 and accompanying text (discussing state incentives granted to resident university students).

344. See *supra* notes 109–18 and accompanying text (commenting that courts are ill-suited to evaluate economic factors that influence state policymaking).

345. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610–11 (1997) (Thomas, J., dissenting) (criticizing the Court’s dormant Commerce Clause jurisprudence).

346. Cf. Timothy J. Slattery, *The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle*, 17 WM. & MARY BILL RTS. J. 1243, 1261 (encouraging the abandonment of the state-self-promotion doctrine in favor of a “more principled,” “uniform,” and “objective” strict-scrutiny approach in all dormant Commerce Clause cases).

347. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 679 (1970).

200 years.<sup>348</sup> It also gathers strength from the distinctive rule in this area of law that permits Congress to overturn what it perceives to be judicial errors in applying dormant Commerce Clause doctrine.<sup>349</sup> For these reasons, a decision to abandon the dormancy doctrine because of difficulties in applying the state-self-promotion rule would be ill-advised. Indeed, such a decision would make little more sense than would abandoning judicial enforcement of the First Amendment because its “public forum,”<sup>350</sup> “content discrimination,”<sup>351</sup> “public figure,”<sup>352</sup> “obscenity,”<sup>353</sup> or “prior restraint”<sup>354</sup> principles have stirred wide-ranging interpretive kerfuffles.<sup>355</sup>

The preceding analysis suggests that contextual considerations cut against relying on the complexities raised by *United Haulers* and *Davis* to reject the dormant Commerce Clause altogether. No less important, courts must attend to the overarching context created by past dormant Commerce Clause decisions as they apply the state-self-promotion exception to discrete cases. Indeed, Part III reveals that state-self-promotion cases may bring into play each of the following features of preexisting dormant Commerce Clause doctrine:

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348. Among the earliest dormancy-doctrine decisions was *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). For some of the broad treatments of the Court’s dormant Commerce Clause rulings since that time, see generally BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE (1999); FREDERICK H. COOKE, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION (1908); E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE (1898).

349. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (“No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.”); *Am. Trucking Ass’n v. Schneider*, 483 U.S. 266, 289 n.23 (1987) (“If Congress should disagree with this decision, it would, of course, have the power to authorize flat taxes of this kind.”).

350. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (establishing the trichotomy of fora in which the Court should contextually assess the constitutionality of speech).

351. *Virginia v. Black*, 538 U.S. 343, 361 (2003) (addressing the content neutrality of a statute); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (same).

352. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 134 (1967) (distinguishing public figures from public officials).

353. *Miller v. California*, 413 U.S. 15, 23–25 (1973) (attempting to define obscenity); *Roth v. United States*, 354 U.S. 476, 486–88 (1957) (same).

354. *Freedman v. Maryland*, 380 U.S. 51, 53 (1965).

355. A predictable response to this point is that we have no choice but to enforce the First Amendment because, unlike the dormant Commerce Clause, the drafters of the First Amendment explicitly included it in the Constitution. This supposed response, however, simply assumes the conclusion that the dormant Commerce Clause principle lacks a proper constitutional pedigree. *But see infra* note 395 and accompanying text. In the end, it is open to judges and scholars to argue that the dormant Commerce Clause is not embodied in the Constitution. That argument, however, is one that stands apart from an argument about the difficulties of applying the principle in practice.

(1) the specialized body of law that already deals with the constitutionality of monopoly grants accorded to both publicly and privately owned “utilities”;<sup>356</sup>

(2) the general principle that substance should hold sway over form in dormant Commerce Clause cases and the particular manifestation of that principle with respect to the location of title in *South-Central Timber Development, Inc. v. Wunnicke*;<sup>357</sup>

(3) the subsidy exception (and the role that exception should play, if any, in evaluating the applicability of the state-self-promotion exception to public/private joint-venture cases);<sup>358</sup>

(4) the distinctive treatment that the Court has long afforded to state tax and regulatory measures (including, in particular, with respect to the operation of *Pike*-balancing analysis);<sup>359</sup>

(5) the market-participant exception, particularly insofar as it affects the states’ ability to leverage the state-self-promotion exception to benefit in-state private businesses;<sup>360</sup>

(6) the Court’s rejection of a “traditional functions” limit on the market-participant exception (and the relevance of that action in deciding whether there ought to be a “traditional function” limit on the state-self-promotion doctrine);<sup>361</sup>

(7) the rule of *West Lynn Creamery, Inc. v. Healy* and its impact on viewing multiple features of state-self-promoting programs in a unitary way;<sup>362</sup> and

(8) the Court’s distinctive jurisprudence with respect to state-imposed user fees, including the limits that *Evansville-Vanderburgh* places on the excessiveness of charges a state imposes for services it provides.<sup>363</sup>

The length of this list highlights why lawyers and judges working with the state-self-promotion principle must keep their eyes fixed on the richness

356. See *supra* notes 188–93 and accompanying text (discussing the Court’s recognition of a “public utilities exception” to the negative Commerce Clause).

357. See *supra* note 151 and accompanying text (discussing the Court’s suggestion that the mere location of title should not be determinative for dormant Commerce Clause purposes).

358. See *supra* note 165 accompanying text (discussing the subsidy exception created in *United Haulers*).

359. See *supra* notes 109–17, 243–48 and accompanying text (discussing the Court’s reluctance to repeal state tax and regulatory measures).

360. See *supra* notes 52–56, 307–18 and accompanying text (discussing the Court’s reluctance to apply the dormant Commerce Clause to situations in which a state acts as a market participant).

361. See *supra* notes 156–62 and accompanying text (discussing the overblown nature of the effect of the state-self-promotion doctrine).

362. See *supra* notes 309–18 and accompanying text (discussing the Court’s refusal to isolate multiple related elements of a state program in applying the dormant Commerce Clause).

363. See *supra* notes 323–37 and accompanying text (discussing the Court’s rejection of user-fee charges disproportionate to corresponding state services under the dormant Commerce Clause).

of the Court's dormant Commerce Clause case law. Indeed, proper assessment of the reach of the state-self-promotion rule will require attentiveness to features of law that reach well beyond the dormant Commerce Clause. In deciding whether to recognize a "traditional functions" limit on the state-self-promotion doctrine, for example, courts will have to consider whether making such a move is permissible in light of the Court's past rejection of a "traditional functions" limit on Congress's ability to regulate "states qua states" under the affirmative grant of power made by the Commerce Clause.<sup>364</sup> In addition, if courts do recognize a "traditional functions" limit on the state-self-promotion doctrine, they will have to decide what state programs do and do not qualify as "traditional" in nature. In undertaking any such inquiry, courts would do well to consider the growing body of statutory-interpretation and preemption cases that grapple with whether particular programs involve "traditional" or "nontraditional" state interventions.<sup>365</sup>

In applying any legal rule to any particular case, the court must take account of the broader legal context in which that rule operates. Sometimes the relationship between rule and context is simple. Other times the relationship between rule and context is complex. Enough has been written here to show that the state-self-promotion doctrine merits the latter description. What is more, precisely because the state-self-promotion doctrine is new, its relationship with other elements of relevant doctrine will remain formative and indeterminate for some time. Resulting subtleties—and opportunities to engage in creative argument—should never be out of view for lawyers called on to handle state-self-promotion cases.

#### B. POLICY-DRIVEN ANALYSIS

As Part III demonstrates, there is no single formula that will provide a ready answer to every state-self-promotion issue that arises. Rather, in applying this principle, as in applying other principles, courts must draw on the common stock of analytical techniques they employ to decide constitutional cases. The analysis set forth in Part III bears out this idea. We see there, for example, that courts will be able to make effective use of a fortiori logic,<sup>366</sup> arguments centered on practical consequences,<sup>367</sup> and the invocation of analogies grounded in decisions from related areas of law.<sup>368</sup> As suggested in Part IV.A, pre-existing dormant Commerce Clause principles will also guide judicial application of the state-self-promotion rule.

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364. See *supra* note 236 and accompanying text (discussing *Garcia*).

365. See *supra* note 235 and accompanying text.

366. See *supra* notes 76, 237–38 and accompanying text.

367. See *supra* notes 137–47 and accompanying text (discussing the practical similarity of *Carbone* to many cases that involve joint government–private ventures).

368. See *supra* notes 310–16 and accompanying text.

Most important of all, the underlying policies identified in Part II as having propelled creation of the state-self-promotion doctrine should play a key role in sorting through the principle's implications.<sup>369</sup> As a result, any fair evaluation of concrete cases must take account of (1) a private-gains-centered notion of state protectionism and (2) an evaluation of the underlying dynamics of the political processes that produced the challenged state program. In many contexts—ranging from public/private joint ventures<sup>370</sup> to state-issued industrial-revenue bonds<sup>371</sup> to cradle-to-grave waste-service programs<sup>372</sup> to high-end state user fees<sup>373</sup>—careful evaluation of these dual considerations will point the way to sound results. No less important, the obvious helpfulness of policy-guided analysis in these settings suggests that that same form of analysis may well be of aid in other state-self-promotion cases as well.

There is a final and fundamental consideration, also identified in Part II, that courts should bear in mind as they work with the state-self-promotion doctrine: *United Haulers* and *Davis* reflect a doctrinal ambitiousness that the opinions in those cases tend to understate.<sup>374</sup> Some might argue that the innovative nature of the state-self-promotion doctrine, and the Court's unlabored endorsement of it, support a broad application of the doctrine going into the future. Following this logic, the Court might, for example, constrict the operation of the dormant Commerce Clause by deeming the exception applicable to discriminatory programs that involve public/private joint ventures, non-publicly-owned utilities, hybridized state-self-promotion/market-participant cases, and all forms of private-purpose municipal bonds.<sup>375</sup> Indeed, the Court might build on *United Haulers* and *Davis* to overrule its earlier decision in *Carbone* or to even abandon its longstanding condemnation of all forms of local-processing requirements.<sup>376</sup>

There is, however, a different—and, I believe, more proper—view to take. This position may be summarized as follows: Given the deep roots of the dormant Commerce Clause rule and the vital service it has rendered to

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369. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 174 (Oxford Univ. Press 2008) (“[T]he rule follows where its reason leads; where the reason stops, there stops the rule.”).

370. See *supra* notes 122–62 and accompanying text.

371. See *supra* notes 267–300 and accompanying text.

372. See *supra* notes 300–21 and accompanying text.

373. See *supra* notes 321–39 and accompanying text.

374. See *supra* notes 32–73 and accompanying text (discussing *United Haulers*); *supra* notes 74–87 and accompanying text (discussing *Davis*).

375. See *supra* notes 122–62, 181–206, 300–21, 267–99 and accompanying text.

376. See *supra* notes 40–59 and accompanying text (highlighting reasons why the Court could have equated *Carbone* and *United Haulers* for constitutional purposes); see also Denning, *supra* note 57, at 469–71 (arguing that a deep tension marks the Court's decisions in *Carbone* and *United Haulers*).

the nation,<sup>377</sup> courts should hesitate to apply the new *United Haulers–Davis* principle to validate starkly discriminatory state programs absent a strong indication that the principle controls the case at hand. At the very least, courts should think seriously before invoking the state-self-promotion doctrine to uphold programs—such as many of those involving public/private joint ventures—that serve to promote profit-making by local firms not operated by the state itself.<sup>378</sup>

#### V. STATE SELF-PROMOTION, THE ROBERTS COURT, AND THE FUTURE OF THE COMMERCE CLAUSE

The state-self-promotion doctrine is a distinctive creation of the Roberts Court. The doctrine, as we have seen, also operates as a new and important limit on the reach of the dormant Commerce Clause principle. *United Haulers* and *Davis* thus raise a question that ranges well beyond how the state-self-promotion doctrine will operate in future cases: Do *United Haulers* and *Davis* cast light on likely developments in other areas of dormant Commerce Clause doctrine or, for that matter, in entirely different fields of constitutional law? These questions invite a wide-ranging analysis, but for now, four observations will have to suffice.

First, the Court's state-self-promotion decisions on their face reflect an openness within the current Court—perhaps an openness of unprecedented dimensions—to reining in the dormancy doctrine. It is telling in this regard that all four members of the more nationally minded, “liberal” wing of the Court—Justices Stevens, Souter, Ginsburg and Breyer—joined the majority opinion in *Davis*, and that all of them except Justice Stevens also joined the majority in *United Haulers*.<sup>379</sup> Indeed, the only dissenters in both cases were Justice Kennedy (whose own overarching philosophy includes a healthy dose of concern for state autonomy)<sup>380</sup> and Justice Alito (who went so far in these cases as to reserve consideration of the question whether the dormancy doctrine should exist at all).<sup>381</sup> As surely as an anthem of the 1960s could

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377. See *supra* notes 1–7 and accompanying text (highlighting the far-reaching importance of the dormant Commerce Clause).

378. See *supra* notes 122–62, 267–99 and accompanying text (discussing problems involving joint ventures and private-activity bonds).

379. As in other settings, I have hesitated greatly before using the terms “liberal” and “nationally minded” to describe a complex set of Justices, each of whom holds a complex set of outlooks and beliefs. Given the restraints of space and time, however, I surrendered to the temptation here.

380. By way of example, Justice Kennedy provided the decisive state-protective vote in decisions such as *United States v. Morrison*, 529 U.S. 598 (2000), *Alden v. Maine*, 527 U.S. 706 (1999), *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *United States v. Lopez*, 514 U.S. 549 (1995).

381. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 356 (2007) (Alito, J., dissenting).

rightfully rue that Joltin' Joe DiMaggio had "left and gone away,"<sup>382</sup> modern dormant Commerce Clause enthusiasts might turn their lonely eyes to John Marshall Harlan,<sup>383</sup> Joseph Bradley,<sup>384</sup> Louis Brandeis,<sup>385</sup> Benjamin Nathan Cardozo,<sup>386</sup> Harlan Fiske Stone,<sup>387</sup> Robert Jackson,<sup>388</sup> William Brennan,<sup>389</sup> Potter Stewart,<sup>390</sup> Byron White,<sup>391</sup> and Lewis Powell<sup>392</sup> (as well as most of their contemporaries<sup>393</sup>)—all of whom showed little hesitation in scuttling state laws that fostered economic balkanization. To be sure, one must be careful about oversimplifying, if not caricaturing, the jurisprudential viewpoints of particular Justices based on votes in a limited number of cases. It is at least curious, however, that the four Justices who would seem most likely to protect nation-binding dormant Commerce Clause values came together in *United Haulers* and *Davis* to put in place a new and major exception to the antidiscrimination rule.

Second, if *United Haulers* and *Davis* evidence a modern drift away from judicial protection of the national marketplace, the question arises as to why this drift has occurred. One important development involves the work of

382. SIMON & GARFUNKEL, *Mrs. Robinson, on BOOKENDS* (Columbia 1968).

383. *E.g.*, *Guy v. Baltimore*, 100 U.S. 434, 443–44 (1879) (invalidating a discriminatory user fee for use of the wharf, even though the wharf was owned by a state instrumentality).

384. *E.g.*, *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 498–99 (1887) (applying the dormant Commerce Clause to a facially neutral law that had the practical effect of harming interstate trade).

385. *E.g.*, *Buck v. Kuykendall*, 267 U.S. 307, 315–17 (1925) (invalidating a Washington law that required common carriers engaged exclusively in interstate commerce to obtain the permission of the director of public works in order to operate in Washington).

386. *E.g.*, *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527–28 (1935) (emphasizing the importance of free-trade values in invalidating a facially neutral, minimum-price law).

387. *E.g.*, *S. Pac. Co. v. Arizona*, 325 U.S. 761, 783–84 (1945) (employing balancing methodology he pioneered earlier to strike down a facially neutral, train-length law).

388. *E.g.*, *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 545 (1949) (invalidating a milk-station licensing scheme in response to an as-applied challenge, while celebrating the importance of dormant Commerce Clause values).

389. *E.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979) (overturning a longstanding wild-animal exception to the dormant Commerce Clause rule).

390. *E.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (extending dormant Commerce Clause restraints to the waste context and refusing to apply the quarantine exception); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970) (invalidating a local-processing rule after setting forth a balancing test for assessing facially neutral state laws).

391. *E.g.*, *Bacchus Imps., Ltd., v. Dias*, 468 U.S. 263, 277 (1984) (invalidating a special tax preference for local alcohol producers and refusing to embrace the struggling-industry exception to the dormant Commerce Clause); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (declining to apply the market-participant exception and emphasizing the importance of restricting the operation of that exception to guard against so-called downstream restraints).

392. *E.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 662, 679 (1981) (plurality opinion) (applying *Pike*-balancing analysis to invalidate a facially neutral, truck-length rule).

393. *See, e.g.*, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1972) (engaging in balancing to invalidate a facially neutral restriction on apple-crate markings).

Justices Scalia and Thomas, who have advanced the position that the dormancy doctrine is fundamentally inconsistent with originalist thinking.<sup>394</sup> This outlook is subject to a robust challenge, but no member of the current Court has yet mounted the counteroffensive.<sup>395</sup> Perhaps in these circumstances the views of these two Justices have exerted a gravitational pull on the more centrist members of the Court. What is more, Chief Justice Roberts's view of the dormant Commerce Clause seems closely aligned with that of his statist mentor, Chief Justice Rehnquist.<sup>396</sup> As a result, there is reason to believe that three almost-sure votes for the state or locality will exist in most hard-fought dormancy-doctrine cases. Given this seeming stacking of the deck against dormant Commerce Clause claims, the Court's most nationally minded Justices may have decided (whether consciously or not) that this is not the area of constitutional law in which their limited judicial capital is most profitably expended.

Third, *United Haulers* and *Davis* may invite contractions of the dormant Commerce Clause by way of tampering with subdoctrines beyond the state-self-promotion exception. As we already have seen, *United Haulers* could lead to the demise of *Carbone* and other local-processing-rule precedents.<sup>397</sup> In similar fashion, *Davis* holds the potential to expand the market-participant exception and thereby lessen the dormancy doctrine's reach. This is the case because, in a portion of the *Davis* opinion that Justices Stevens and Breyer joined, Justice Souter argued that Kentucky's local-bond preference should skirt invalidation not only based on the state-self-promotion exception, but

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394. See *supra* notes 58–59 and accompanying text.

395. Among other things, one might note that Chief Justice Marshall (who served as a delegate to the Virginia Ratification Convention) believed that Congress's commerce power was exclusive and thus should, without congressional action, displace some state laws. See *New York v. Miln*, 36 U.S. (11 Pet.) 102, 158 (1837) (Story, J., dissenting) (noting that Chief Justice Marshall had considered and embraced this position). Justice Joseph Story trumpeted this same view in his great treatise on the Constitution. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 516–520, at 366–69 (1833). Justice William Johnson—who the great defender of state prerogatives, Thomas Jefferson, appointed to the Court—took the same view. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 236 (1824) (Johnson, J., concurring) (describing the Constitution as being “altogether in favour of the exclusive grants to Congress of power over commerce”). In the *Gibbons* case, Daniel Webster and William Wirt put forward an elaborate and vigorous argument that the Court should recognize the dormant Commerce Clause principle. No Justice voiced a dissent from Chief Justice Marshall's assertion in *Gibbons* that “[t]here is great force in this argument, and the Court is not satisfied it has been refuted.” *Id.* at 209. One would think that this all-star cast of early statesmen, who either participated in or worked close on the heels of the constitutional founding, would have a strong sense of originalist purposes and the textual justifiability of the dormant Commerce Clause. See also, e.g., *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949) (elaborating why the dormant Commerce Clause principle comports with core purposes of the founders).

396. For an overview of Chief Justice Rehnquist's statist orientation, see generally Robert E. Riggs & Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555 (1983). Chief Justice Roberts clerked for then-Justice Rehnquist in 1980–1981.

397. See *supra* note 376 and accompanying text.

also based on the market-participant doctrine. I have critiqued this analysis elsewhere.<sup>398</sup> For present purposes, however, the relevant point is simple enough: With just two more votes, the Court in *Davis* not only would have expanded the state-self-promotion exception to the antidiscrimination rule, but also would have significantly broadened the across-the-board exemption from dormancy-doctrine review applicable in market-participant cases.

Of particular importance with regard to future dormant Commerce Clause developments is the Court's treatment of *Pike*-balancing analysis in *Davis*. *Pike* analysis is a centerpiece of dormant Commerce Clause doctrine, and it has long provided the key basis for challenging facially neutral state laws. Even so, *Davis* may pave the way for a significant contraction of traditional *Pike*-balancing review, if not a wholesale repudiation of that methodology.<sup>399</sup> Here, as with the dormancy doctrine in general, Justices Scalia and Thomas's steady criticism of *Pike* balancing may explain the Court's developing tendency toward judicial passivity. For many years, those Justices have excoriated *Pike* analysis, relying largely on the same worries about institutional competence that found expression in Justice Souter's treatment of *Pike* balancing in *Davis*.<sup>400</sup> And perhaps their argument is now having an effect. Put simply, it does not bode well for *Pike* analysis that all four of the Court's "liberal" members joined the portion of *Davis* that spoke of an institutional-incapacity limit on the use of that analysis.<sup>401</sup>

Finally, the Court's state-self-promotion decisions might have spillover effects in other areas of Commerce Clause law. Of special significance in this regard is the Court's flirtation, in both *United Haulers* and *Davis*, with endorsing a nontraditional-functions limit on the state-self-promotion

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398. Dan T. Coenen, *The Municipal Bond Case and the Market-Participant Exception to the Dormant Commerce Clause*, 70 OHIO ST. L.J. (forthcoming 2010).

399. See *supra* notes 109–24 and accompanying text (noting that the Court's standard in *Davis* may significantly limit the scope of *Pike*). This point lies at the heart of Professor Denning's recent work. See *supra* note 118 (arguing that for all practical purposes the Court has already abandoned *Pike* balancing).

400. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters., Inc.* 486 U.S. 888, 897 (1988) (Scalia, J. concurring) (urging abandonment of the *Pike*-balancing test so as to "leave essentially legislative judgments to the Congress").

401. See *supra* notes 109–20 and accompanying text (noting how the Court's "liberal" members' shift likely threatens *Pike*'s future). On the other hand, it may be significant that, even while embracing the state-self-promotion immunity in *United Haulers*, the Court declared that the immunity preempted operation of only the antidiscrimination review and proceeded to apply *Pike* analysis to the challenged forced-use rule. See *supra* note 62 and accompanying text (discussing the Court's application of the *Pike* test to the challenged force-use rule). Then, in *Davis*, the Court went a step farther by applying *Pike* analysis to a state tax rule—that is, in just the sort of case as to which the Court has traditionally not applied *Pike*-balancing review at all. See *supra* notes 246–48 and accompanying text (highlighting the relatively novel manner in which the Court chose to apply the *Pike* test in *Davis*). Where all of this will take dormant Commerce Clause balancing analysis in the long term is not clear.

doctrine.<sup>402</sup> Again, the key point is hard to miss: If the Court draws a line of division between traditional activity and nontraditional activity in the state-self-promotion context, it may soon find its way to drawing that same line in other contexts as well.<sup>403</sup> In particular, an embrace of the traditional/nontraditional distinction in the state-self-promotion context might trigger the resurrection of a long-abandoned restriction on Congress's affirmative commerce power. In *National League of Cities v. Usery*,<sup>404</sup> a five-Justice majority concluded that important restrictions existed with respect to Congress's ability to wield that power in "areas of traditional governmental functions."<sup>405</sup> In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>406</sup> a different coalition of Justices overruled *National League of Cities* based on the notion that efforts to distinguish between traditional and nontraditional state activities were unworkable and unwise.<sup>407</sup> If the Court imposes a nontraditional-activity limit on the state-self-promotion rule, might the other shoe drop with an overruling of *Garcia*? There are strong reasons to suspect that the answer to this question is "no."<sup>408</sup> It is

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402. See *supra* notes 210–19 and accompanying text (discussing the Court's flirtation with establishing a nontraditional-functions limit on the state-self-promotion doctrine).

403. For example, in the South Dakota cement case, *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), four Justices stood ready to engraft a nontraditional-functions limit on the market-participant doctrine and, by so doing, to strike down the state's resident-preference sales rule. *Id.* at 449 (Powell, J., dissenting). Would an embrace of the traditional/nontraditional distinction in the state-self-promotion setting lead to an embrace of that same distinction in the market-participant setting with the consequence that *Reeves* is overruled? Such a result might well seem surprising, especially given the moves by the Court in *United Haulers* and *Davis* to contract—rather than to expand—the protections that the dormant Commerce Clause affords. Moreover, one distinction between the two lines of cases is available—namely, that an exception to the state-self-promotion rule is more justifiable because that rule (unlike the market-participant doctrine) goes so far as to safeguard government coercion. See *supra* notes 54–58 and accompanying text (discussing a distinction between the two lines of cases). *But cf. supra* notes 230–33 and accompanying text (noting that the traditional/nontraditional distinction seems inconsistent with the Court's overriding effort to encourage state experimentation). Even so, the Court's development of a nontraditional-function limit to contract the state-self-promotion doctrine will invite arguments that the Court should limit the market-participant exception in similar fashion.

404. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

405. *Id.* at 852.

406. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

407. *Id.* at 546–47.

408. Three considerations are particularly weighty in this regard. First, the present-day Court might find an overruling of *Garcia* to be highly unseemly, especially given that *National League of Cities* (which was overruled in *Garcia*) itself overruled the Court's earlier ruling in *Maryland v. Wirtz*, 392 U.S. 183 (1968). Second, the Court's recent development of alternative and significant limits on the congressional commerce power may have released any pressures—or at least the most serious pressures—for effectuating a retrenchment in this area. See Coenen, *supra* note 236, at 29 (identifying intervening state-supporting decisions that have reduced pressures to reinstate the *National League of Cities* rule). Finally, every member of the Court who joined the majority in *National League of Cities*—as well as Justice O'Connor who later joined her most states'-rights-minded colleagues in arguing passionately for revitalizing the rule of that

noteworthy, however, that the author of *National League of Cities* was then-Justice Rehnquist and that it was his protégé, Chief Justice Roberts, who, as the author of the *United Haulers* opinion, suggested that this distinction might operate in applying the state-self-promotion rule.<sup>409</sup>

## VI. CONCLUSION

Where might *United Haulers* take us? As this Article shows, the answer to this question is far from clear. In Part II we navigated our way through a study of the many analytical difficulties that the Court had to overcome in recognizing and applying the state-self-promotion rule in *United Haulers* and *Davis*. Part III of our journey took us through the practical complexities courts now will face in applying the state-self-promotion doctrine, including in cases involving joint ventures, utilities, nontraditional state undertakings, state tax laws, and the like. In Part IV, we stepped back from an analysis of discrete cases to reflect on what overarching considerations courts should take into account as they work with the state-self-promotion doctrine. Finally, in Part V, we turned to large questions about what impact the Court's state-self-promotion decisions may have in other areas of Commerce Clause law. All of this serves to highlight a key, but easily overlooked, fact: *United Haulers* and *Davis* did not involve the development of mere technical refinements of a pre-existing doctrine. Instead, these decisions launched a major doctrinal innovation that is destined to have wide-ranging effects in dormant Commerce Clause jurisprudence and perhaps in other areas of constitutional law as well.

In this Article I have offered a sneak preview of what some of those effects will be. Along the way, I have suggested that courts should approach state-self-promotion cases with an alertness to the twin considerations relied on by the Court in recognizing the doctrine—namely, (1) a private-gain-centered definition of protectionism and (2) a practical sense of local political dynamics. I also have suggested how courts might put these analytical touchstones to work in approaching important categories of state-self-promotion cases. In all of this, we should be careful not to lose the forest for the trees. For nearly two hundred years, the dormant Commerce Clause principle has stood as a bulwark against forces that inexorably push states to pursue short-term interests and thereby engender long-term divisions. Courts should keep their gaze fixed firmly on this reality as they grapple with the state-self-promotion exception to the dormant Commerce Clause antidiscrimination rule.

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case, *Garcia*, 469 U.S. at 580 (O'Connor, J., dissenting)—has since left the Court. See also Denning, *supra* note 57, at 512 (viewing it as “strange that the Court would suggest . . . a wish to resurrect the ‘traditional government function’ test it abandoned as unworkable in *Garcia*” and predicting that “the Court does not really intend to commit itself to [the traditional government function] doctrine’s exhumation either”).

409. See *supra* note 396 and accompanying text.