

DORMANT COMMERCE CLAUSE REVIEW OF PUBLIC-PRIVATE
PARTNERSHIPS AFTER *UNITED HAULERS*: A COMPETITIVE
BIDDING SOLUTION

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INTRODUCTION

In *C & A Carbone, Inc. v. Town of Clarkstown*,¹ the Supreme Court struck down a “flow control” ordinance, which mandated that all of the town’s solid waste be processed at a particular private facility, as a violation of the dormant Commerce Clause. Thirteen years later, in *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,² the Supreme Court upheld a nearly identical flow control law because it directed waste to a public, rather than a private, processing facility. Likewise, in *Department of Revenue of Kentucky v. Davis*,³ the Court upheld a Kentucky tax scheme that exempted interest on bonds issued by Kentucky from state income taxes, but not on bonds issued by other states. The Supreme Court has thus crafted a “public entities exception,” under which laws that benefit such entities are immune from rigorous dormant Commerce Clause scrutiny. The problem is that the Court has not defined the term “public entity,” thus leaving lower courts, state and municipal governments, and commentators to speculate as to whether this new exception will apply to a myriad of quasi-public entities.

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¹ 511 U.S. 383 (1994).

² 550 U.S. 330 (2007).

³ 553 U.S. 328 (2008).

This Article argues that the public entities exception should apply to state-owned firms that contract-out portions of their operations (even significant portions) to private firms, so long as these entities contract-out via a competitive bidding process that does not discriminate between in-state and out-of-state firms. This conclusion follows from the equality rule that underlies the public entities exception, and from the political process theory that serves as the rationale for the equality rule. Moreover, this Article's interpretation of the public entities exception (1) avoids the potential for manipulation that would follow from defining "public entities" by reference to formalities such as title, (2) allows state-owned firms to take full advantage of opportunities to engage in efficient partnerships with private companies, (3) is clear and administrable, and (4) reconciles the facts of *United Haulers* and *Carbone*, all while still providing an adequate check against protectionism.

This Article proceeds as follows: Section II provides the context in which the public entities exception arose; Section III reviews the academic commentary on *United Haulers* and the public entities exception; Section IV traces the "political process theory," which underlies much of the Supreme Court's dormant Commerce Clause jurisprudence, and which was the impetus for the public entities exception; Section V develops and defends this Article's competitive-bidding interpretation of the public entities exception; and Section VI explains how this Article's approach also applies to the *Davis* plurality's expanded interpretation of the market-participation exception to the dormant Commerce Clause.

I. BACKGROUND

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁴ Although the clause does not explicitly limit the power of the states to regulate commerce, the Supreme Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute."⁵ Indeed, recognition of the so-called "dormant" Commerce Clause goes all the way back to the celebrated case of *Gibbons v.*

⁴ U.S. CONST. art. I, § 8, cl. 3.

⁵ *United Haulers*, 550 U.S. at 338 (citing *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279 (1872), and *Cooley v. Bd. of Wardens of Port of Phila. ex rel. Soc. for Relief of Distressed Pilots*, 53 U.S. (12 How.) 299, 318 (1851)); see also *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 509 (2d Cir. 1995) ("[F]ederal courts have for more than 150 years invoked the Commerce Clause to scrutinize state regulations affecting interstate commerce.").

Ogden.⁶ There, Daniel Webster forcefully advocated for what is now known as the dormant Commerce Clause, prompting Chief Justice John Marshall to admit that “[t]here is great force in this argument, and the Court is not satisfied that it has been refuted.”⁷

The “dormant Commerce Clause is driven by concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”⁸ “The point is to ‘effectuat[e] the Framers’ purpose to prevent a State from retreating into [the] economic isolation,’ ‘that had plagued relations among the Colonies and later among the States under the Articles of Confederation.’”⁹ As Justice Robert Jackson put it, “[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, [and] that no home embargoes will withhold his export.”¹⁰ There is venerable authority for the proposition that the dormant Commerce Clause has served the country well. Indeed, Justice Felix Frankfurter once insisted, “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.”¹¹ Likewise, Justice Jackson boasted that “[t]he material success that has come to inhabitants of the states which make up this federal free trade unit,” which was forged in part by the dormant Commerce Clause, “has been the most impressive in the history of commerce.”¹²

⁶ 22 U.S. (9 Wheat.) 1 (1824).

⁷ *Id.* at 209; *see also id.* at 227 (Johnson, J., concurring) (“[S]ince the power to prescribe the limits to [the state’s] freedom [of commerce], necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive.”).

⁸ *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274 (1988)).

⁹ *Id.* at 338 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (internal quotation marks omitted) and *Hughes v. Oklahoma*, 441 U.S. 322, 325–326 (1979)).

¹⁰ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.” (citing *THE FEDERALIST NO. 22*, at 143–45 (Alexander Hamilton) (C. Rossiter ed. 1961), and James Madison, *Vices of the Political System of the United States*, in 2 *WRITINGS OF JAMES MADISON* 362–363 (G. Hunt ed. 1901))).

¹¹ *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm’n*, 341 U.S. 329, 340 (1951) (Frankfurter, J., dissenting).

¹² *H.P. Hood & Sons*, 336 U.S. at 538.

Courts have developed a two-prong test to review regulations under the dormant Commerce Clause. First, a court must ask whether the regulation affects interstate commerce.¹³ It is “well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.”¹⁴ Where a regulation “deprives out-of-state businesses of access to a local market,” the reallocating “economic effects are more than enough to bring the [regulation] within the purview of the Commerce Clause.”¹⁵ The Supreme Court applies the same lenient test to determine whether a regulation “affects interstate commerce,” regardless of whether it is evaluating a congressional statute under the Commerce Clause, or a local ordinance under the dormant Commerce Clause.¹⁶ Thus, this first prong is rarely a stumbling block for plaintiffs challenging state or local actions under the Commerce Clause; indeed, many cases skip it altogether.¹⁷

While regulations routinely *affect* interstate commerce, they only draw significant Commerce Clause scrutiny in the comparatively rare case where they *discriminate against* interstate commerce.¹⁸ Whether a regulation discriminates against interstate commerce is thus typically the

¹³ *Carbone*, 511 U.S. at 389.

¹⁴ *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937)).

¹⁵ *Id.*

¹⁶ *See Philadelphia v. New Jersey*, 437 U.S. 617, 621–23 (1978) (rejecting the New Jersey Supreme Court’s holding that different definitions of “commerce” apply when analyzing a state law as opposed to a congressional statute, and noting that “[j]ust as Congress has power to regulate the interstate movement of . . . wastes, States are not free from constitutional scrutiny when they restrict that movement”).

¹⁷ *See, e.g., Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008); *Maine v. Taylor*, 477 U.S. 131 (1986); *Philadelphia*, 437 U.S. at 617.

¹⁸ *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306–07 & n.15 (1997) (noting that “the Commerce Clause . . . was ‘never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country,’” but “if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal.” (quoting *Sherlock v. Alling*, 93 U.S. 99, 103, (1876))); *see also Davis*, 553 U.S. at 338 (“[F]or dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce.”); *Taylor*, 477 U.S. at 138 (“In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions.”).

“real question” in dormant Commerce Clause cases.¹⁹ In this context, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”²⁰ “Discriminatory laws motivated by ‘simple economic protectionism’ are subject to a ‘virtually per se rule of invalidity,’ which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.”²¹ But, “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”²²

“The clearest example” of discriminatory legislation that violates the Commerce Clause “is a law that overtly blocks the flow of interstate commerce at a State’s borders.”²³ For instance, in *Welton v. Missouri*,²⁴ the Supreme Court struck down a Missouri statute that declared anyone who sold products not grown or produced in Missouri a “peddler,” and required that he or she pay to obtain a peddler’s license.²⁵ Similarly, the Supreme Court has long struck down so-called “local-processing” requirements, which mandate that certain services be performed in state, because they prohibit the importation of such services. For example, states cannot require all meat sold within the state to be inspected in that state.²⁶ Nor can states mandate that, prior to being exported from the state, the heads and hulls of shrimp be removed,²⁷ or cantaloupe be packaged,²⁸ or timber be processed.²⁹ “The essential vice in laws of this

¹⁹ See *Carbone*, 511 at 389 (“The real question is whether the flow control ordinance is valid despite its undoubted effect on interstate commerce.”).

²⁰ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal quotation marks omitted).

²¹ *Id.* at 338–39 (quoting *Philadelphia*, 437 U.S. at 624 and *Taylor*, 477 U.S. at 138).

²² *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

²³ *Philadelphia*, 437 U.S. at 624.

²⁴ 91 U.S. 275 (1875).

²⁵ *Id.* at 275.

²⁶ See *Minnesota v. Barber*, 136 U.S. 313 (1890) (striking down a Minnesota statute that required any meat sold within the State to be examined by an inspector within the State).

²⁷ See *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *cf.* *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking down a South Carolina statute that required shrimp fishermen to unload, pack, and stamp their catch before shipping it to another State); *Johnson v. Haydel*, 278 U.S. 16 (1928) (striking down an analogous Louisiana statute for oysters).

²⁸ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970) (striking down an Arizona statute that required all Arizona-grown cantaloupes to be packaged within Arizona prior to export).

sort,” the Supreme Court has explained, “is that they bar the import of the processing service,” depriving “out-of-state meat inspectors, or shrimp hullers, or milk pasteurizers” of the “local demand for their services.”³⁰

It is against this background that the Court decided *C & A Carbone, Inc. v. Town of Clarkstown*.³¹ In 1989, Clarkstown decided to build a new solid waste transfer station.³² The station would receive bulk solid waste and separate recyclable from non-recyclable items.³³ Recyclable waste would be baled for shipment to a recycling facility; non-recyclable waste, to a suitable landfill or incinerator.³⁴ The cost of building the transfer station was estimated at \$1.4 million.³⁵ A private contractor agreed to construct the facility at no charge, operate it for five years, and then “sell” it to the town for one dollar.³⁶ In return, the town guaranteed that, during those five years, the contractor would receive a minimum waste flow of 120,000 tons per year, for which it could charge the hauler a “tipping” fee of \$81 per ton.³⁷ In order to make good on that guarantee, Clarkstown adopted a “flow control” ordinance, which required all nonhazardous solid waste within the town to be deposited at the facility built by the private contractor.³⁸

C & A Carbone was the contractor’s chief competitor.³⁹ It too operated a recycling center in Clarkstown, where it would receive solid waste, sort and bale it, and then ship it to other processing facilities.⁴⁰ While the flow control ordinance permitted companies like Carbone to continue receiving solid waste, it required them to bring all non-recyclable residue from that waste to the town’s favored private contractor.⁴¹ It thus forbade Carbone from shipping the non-recyclable

²⁹ See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking down an Alaska regulation that required all Alaska timber to be processed within the State prior to export).

³⁰ See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

³¹ *Id.* at 383.

³² *Id.* at 387.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 386.

³⁸ *Id.*

³⁹ *Id.* at 388.

⁴⁰ *Id.* at 387–88.

⁴¹ *Id.*

waste itself, and required Carbone to pay a tipping fee to the private contractor on trash Carbone had already sorted.⁴²

Carbone and others brought suit in federal court claiming that the flow control ordinance violated the dormant Commerce Clause.⁴³ The Supreme Court agreed and invalidated the ordinance.⁴⁴ The Court found that the ordinance “hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.”⁴⁵ The law thus “discriminate[d] against interstate commerce,” by prohibiting out-of-state waste-processing companies from competing for Clarkstown waste.⁴⁶ Therefore, the Court concluded, “the flow control ordinance is just one more instance of local processing requirements that we long have held invalid.”⁴⁷ The Court also noted that the “only conceivable distinction from the [other local processing cases] is that the flow control ordinance favors a single local proprietor.”⁴⁸ The Court insisted, however, that “this difference just makes the protectionist effect of the ordinance more acute.”⁴⁹

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 394–95.

⁴⁵ *Id.* at 392.

⁴⁶ *Id.* at 390. The *Carbone* Court also found that the flow control law affected interstate commerce because it “deprive[d] out-of-state” waste-processors “of access to a local market,” and thus had “economic effects” that were “interstate in reach,” even though “the immediate effect of the ordinance [was] to direct local transport of solid waste to a designated site within the local jurisdiction.” *Id.* at 389; see also *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255 (2d Cir. 2001), *aff’d*, 550 U.S. 330 (2007) (“The Supreme Court has left no doubt that flow control regulation affects interstate commerce.”). Moreover, the *Carbone* Court was clear that a flow control ordinance would affect interstate commerce even if it only applied to locally-produced waste. See *Carbone*, 511 U.S. at 389 (“[E]ven as to waste originating in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause.”); see also *United Haulers*, 261 F.3d at 258 (“In *SSC Corp.*, we struck down a flow control ordinance as ‘indistinguishable’ from the ordinance in *Carbone*, even though the challenged law, unlike *Carbone*, applied only to waste originating within the town.” (citing *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514 (2d Cir. 1995))).

⁴⁷ See *Carbone*, 511 U.S. at 391.

⁴⁸ *Id.* at 392.

⁴⁹ *Id.*; see also *id.* at 391 (“The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”). In the years that followed, federal courts heard numerous challenges to flow control

But, in *United Haulers*, the Court upheld flow control ordinances “quite similar to the one invalidated in *Carbone*.”⁵⁰ In fact, “[t]he only salient difference is that the laws at issue [in *United Haulers*] require[d] haulers to bring waste to facilities owned and operated by a state-created public benefit corporation,” rather than to a “private processing facility.”⁵¹ The Court reasoned that because “[t]he flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same,” they “do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.”⁵² The following year, in *Department of Revenue of Kentucky v. Davis*,⁵³ the Court rejected a dormant Commerce Clause challenge to a Kentucky tax scheme that exempted from state income taxes interest on bonds issued by Kentucky, but not on bonds issued by private entities or by other states. The Court explained that the law fell under the *United Haulers* exception because it favored a public, rather than a private, entity.⁵⁴

ordinances. See, e.g., *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *SSC Corp.*, 66 F.3d at 505; Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 156 (1997) (noting that garbage cases lie “on the cutting edge of dormant Commerce Clause theory”); Colin A. Fieman, *The Second Circuit Upholds Waste Management Systems in the Wake of Carbone v. Clarkstown: The Decisions in USA Recycling, Inc. v. Town of Babylon and SSC Corp. v. Smithtown*, 23 FORDHAM URB. L.J. 767, 769 (1996) (“[A]lthough the Second Circuit has made considerable progress in clarifying the law in this area, it has left questions about the constitutionality of flow control unanswered.”). The flood of post-*Carbone* garbage cases prompted the Second Circuit to note that “the federal docket was ‘clogged with—of all things—garbage.’” *United Haulers*, 261 F.3d at 252–53 (quoting *SSC Corp.*, 66 F.3d at 505).

⁵⁰ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007).

⁵¹ *Id.*

⁵² *Id.* at 342; see also *id.* at 345 n.6 (“Our opinion simply recognizes that a law favoring a public entity and treating all private entities the same does not discriminate against interstate commerce as does a law favoring local business over all others.”).

⁵³ *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008).

⁵⁴ *Id.* at 343 (“*United Haulers* provides a firm basis for reversal. Just like the ordinances upheld there, Kentucky’s tax exemption favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests. This type of law does ‘not discriminate against interstate commerce for purposes of the dormant Commerce Clause.’” (quoting *United Haulers*, 553 U.S. at 345) (internal quotation marks omitted)).

II. QUESTIONS AFTER *UNITED HAULERS* AND *DAVIS*

United Haulers did not define what constitutes a “public facility.”⁵⁵ According to Professors Williams and Denning, this reflects a “fundamental[] fail[ure] to appreciate the extent to which government and private operations are and can be comingled”⁵⁶ For instance, state and local governments often possess substantial, but not complete, ownership of private companies.⁵⁷ Likewise, joint-ventures between public and private entities to build facilities and provide services can cause confusion as to whether the resulting entity is public or private.⁵⁸

⁵⁵ See Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 570 (2010) (“A key question [*Carbone* and *United Haulers*] 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.”); Gillian E. Metzger, *Remarks of Gillian E. Metzger*, 64 N.Y.U. ANN. SURV. AM. L. 459, 464 (2009) (“Suppose a county has a publicly owned facility, but wants to contract-out its management. Is that going to fall on the *United Haulers* side, or is that going to fall on the *Carbone* side?”); Norman R. Williams & Brannon P. Denning, *The “New Protectionism” and the American Common Market*, 85 NOTRE DAME L. REV. 247, 282 (2009) (“[A]s to these ‘mixed’ entities, the Court itself has offered no guidance regarding the applicability of the public-entities exception, and, therefore, lower courts will find themselves embroiled in the difficult task of determining whether particular entities favored by the state . . . qualify as public entities for purposes of this exception to the antidiscrimination principle.”); *The Supreme Court 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 286 n.81 (2008) (“[B]ecause the Court has not explicitly defined the outer bounds of the [public entity] exemption’s scope, future application of the exemption will be complicated when the cases do not neatly align with *Davis* and *United Haulers*.”).

⁵⁶ Williams & Denning, *supra* note 55, at 282.

⁵⁷ See *id.* at 282–83 (“[S]tate and local governments often possess a substantial ownership interest in private companies. . . . [S]tate and local governments typically own substantial shareholdings through their public pension funds. In particular, there are over 2600 state and local government pension funds, which collectively control almost \$2.9 trillion in assets. Although much of these funds are invested in fixed-income debt securities (e.g., government and corporate bonds), state and local government pension funds own over \$1.1 trillion of shares of private companies. Several of the pension funds are truly huge, even by national standards. The California state pension system for example has, as of July 31, 2009, over \$190 billion in funds under management, \$119 billion of which is invested in the stock of private companies.” (internal citations omitted)).

⁵⁸ See, e.g., *id.* at 284–85 (“Suppose that a municipality leases public land to a company, which builds and operates a plant to produce, say, ethanol. Is the facility ‘owned’ by the municipality, such that the municipality can adopt regulatory or tax measures to favor ethanol produced by the company? Must the

Carbone itself is a perfect example of such a murky joint-venture. Recall that, in *Carbone*, a private company built the facility for the town under a contract which specified that the private company would “own” and operate the facility for five years, and then “sell” it to the town for one dollar.⁵⁹ This prompted Justice Alito, in his dissent from *United Haulers*, to suggest that the result of *Carbone* could be changed simply by restructuring the contract between Clarkstown and the private company “to provide for the passage of title at the beginning, rather than the end, of the 5-year period.”⁶⁰ Finally, “state and local governments often contract with private companies to render services to state and local residents.”⁶¹ In the context of a trash-processing facility in particular, a county might contract with private businesses to build the facility, to operate it, or to maintain it.

Indeed, a recently-filed lawsuit illustrates perfectly the type of quasi-public entities that will seek protection under *United Haulers*. C & A Carbone, the same waste-processing company that was the plaintiff in *Carbone*, has sued Clarkstown, Rockland County, and the Clarkstown Recycling Center, Inc. (“CRC, Inc.”).⁶² (CRC, Inc. is the private company that contracted with the town in *Carbone*.) According to the complaint, Rockland, the county in which Clarkstown is located, adopted a “2008 Flow Control Law” in the wake of *United Haulers*.⁶³ The law requires all solid waste generated within the county to be processed at one of the facilities designed by the Rockland Solid Waste Management

municipality also own the building or the machinery in it in order for the ethanol to qualify for municipal tax or regulatory favoritism? Must the workers at the facility be public employees, or can they be the employees of the private contractor? At what point is the facility ‘municipally owned’ within the meaning of *United Haulers*?”).

⁵⁹ C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 387 (1994).

⁶⁰ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 359 (2007) (Alito, J., dissenting). Indeed, the quasi-public nature of the facility at issue in *Carbone* provoked a spirited debate between the majority and the dissenters in *United Haulers* as to whether the *Carbone* facility was public or private. See *infra* note 167.

⁶¹ Williams & Denning, *supra* note 55, at 283; see also Janna J. Hansen, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L.J. 2465, 2465 (2003) (“Government contracts with private providers for the supply of goods and services have grown in number and magnitude over the last several decades.”); cf. *United Haulers*, 550 U.S. at 364 (Alito, J., dissenting) (noting that “[d]iscrimination in favor of an in-state government facility” benefits “local business that supply the facility with goods and services”).

⁶² See Amended Complaint, C & A Carbone v. Cnty. of Rockland (*Carbone II*), No. 08-CV-6459 (S.D.N.Y. Nov. 11, 2008). This case has not yet produced an opinion on the constitutionality of the flow control ordinances.

⁶³ *Id.* ¶ 41.

Authority (“the Authority”).⁶⁴ The Authority appears to have unfettered discretion to decide which waste-processing stations to “designate,” and thereby award a monopoly.⁶⁵ Indeed, in choosing a facility to purchase or designate, the Authority does not employ a bidding process, evaluative criteria, or award standards.⁶⁶

Since *Carbone* was decided, title to the facility in question passed from CRC, Inc. to the town. However, Clarkstown has contracted with CRC, Inc. to operate the facility. That facility (the “Clarkstown facility”) was “designated” by the Authority, allegedly as the result of a deal entered into during November 2008 between several defendants: the Authority, Clarkstown, and CRC, Inc.⁶⁷ In this deal, the Authority allegedly agreed to purchase the waste-processing facility from Clarkstown, presumably for the purpose of “designating” the facility.⁶⁸ Clarkstown, in turn, contracted with CRC, Inc. to continue to operate the Clarkstown facility for a five-year term, renewable every five years for twenty-five years.⁶⁹ Upon the sale of the Clarkstown facility from Clarkstown to the Authority, the Authority apparently will honor this operation contract with CRC, Inc.⁷⁰ The result of the November 2008 deal is that the 2008 Flow Control Law, as applied, will monopolize the trash-processing industry in favor of a facility that is governmentally-owned, but operated by a private company pursuant to a twenty-five year, no-bid contract.⁷¹ This case, “*Carbone II*,” illustrates the type of hybrid facilities that courts applying *United Haulers* will confront, as well as the way in which municipalities might restructure their operations in order to take advantage of *United Haulers*’ public entities exception.

Despite widespread recognition of the Court’s failure to define a “public entity,” few scholars have suggested how it should be or is likely to be defined.⁷² For instance, Professors Williams and Denning provide an excellent discussion of the various ways governments interact with private business,⁷³ and note that “lower courts (and ultimately the Court itself) will be forced to address the precise scope of the public-entities exception and its applicability to nominally private companies that

⁶⁴ *Id.* ¶¶ 41–48.

⁶⁵ *Id.* ¶ 60.

⁶⁶ *Id.*

⁶⁷ *Id.* ¶¶ 56–60, 101.

⁶⁸ *Id.* ¶¶ 60, 68.

⁶⁹ *Id.* ¶ 68.

⁷⁰ *Id.* ¶ 70, 72.

⁷¹ *Id.* ¶¶ 69, 71.

⁷² See, e.g., Metzger, *supra* note 55, at 464 (asking whether a county that contracts out the management of a waste-processing facility is protected by *United Haulers*, but not attempting to answer that question).

⁷³ Williams & Denning, *supra* note 55, at 282–92.

interact with the government in ways that muddle the difference between the two.”⁷⁴ But, rather than offer a principled way to cabin the *United Haulers* exception, Professors Williams and Denning recommend that “the Court should confine *United Haulers* and *Davis* to their facts and announce that it will not extend its endorsement of public protectionism beyond the particular contexts of those cases.”⁷⁵ The authors admit that “the Court would undoubtedly draw criticism for acting in an unprincipled fashion,” if it were to follow their advice, but maintain that the cost of enduring such criticism “is far less than the cost to the nation of allowing public protectionism to run rampant.”⁷⁶ Alternatively, the authors urge Congress to overrule *United Haulers* and *Davis* by statute.⁷⁷ Other commentators think that whether a facility is “public” under *United Haulers* depends wholly on who has title to it.⁷⁸

The most comprehensive effort to define the contours of the *United Haulers* exception is offered by Professor Daniel Coenen.⁷⁹ His solution appears to withhold *United Haulers*’ shelter from any venture in which a private contractor is a “direct participant in project profits.”⁸⁰ That is, to

⁷⁴ *Id.* at 288; *see also id.* (“[T]he questions that *United Haulers* and *Davis* necessarily raise—and they raise more questions than they answer—are truly difficult ones.”).

⁷⁵ Williams & Denning, *supra* note 55, at 310.

⁷⁶ *Id.* at 311.

⁷⁷ *See id.* Because the dormant Commerce Clause is a presumption in the absence of congressional action, Congress can overrule the Supreme Court’s dormant Commerce Clause decisions by statute. *See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 n.7 (2007) (“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.” (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824))); *cf. S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (noting that Congress can “affirmatively contemplate otherwise invalid state legislation”).

⁷⁸ *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 that 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”).

⁷⁹ *See* Coenen, *supra* note 55.

⁸⁰ *Id.* at 575. By contrast, if a private firm profits only indirectly from doing business with a public facility, that facility may still claim *United Haulers* immunity under Professor Coenen’s theory. *See id.* at 571 n.130 (“[M]any 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. . . . Plainly, under the principle of

enjoy the benefit of *United Haulers*, Professor Coenen insists that “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.”⁸¹ To illuminate his position, Professor Coenen analyzes three hypothetical waste-processing stations that benefit from flow control laws:

- (1) “Carbone Restructured”: 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.
- (2) “50-50”: 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.
- (3) “Contracting-Out”: A city owns and operates a waste-transfer facility, but also licenses a local, private firm. The firm 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.⁸²

Under Professor Coenen’s theory, none of these cases would qualify for the *United Haulers* exception.⁸³ He explains that the *Carbone Restructured* case, “as a functional matter, . . . involves the same business transaction put before the Court in *Carbone* itself,” except that now the government takes title to the facility immediately.⁸⁴ The facility should not fall under *United Haulers*, Professor Coenen asserts, because “the

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.” (internal citations omitted).

⁸¹ *Id.* at 576; *see also id.* at 577 (“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.”).

⁸² *See Coenen, supra* note 55, at 572.

⁸³ *See id.* at 572 (“[T]here is reason to believe that in cases like the ones identified here, *Carbone*—and not *United Haulers*—should control.”).

⁸⁴ *Id.* at 575.

government parted with management and operation of the facility—as well as program revenues—during the relevant five-year period,” and “the mere location of title should not be determinative for dormant Commerce Clause purposes.”⁸⁵ Similarly, the 50-50 case would be governed by *Carbone* rather than *United Haulers* because “the private entity owns the facility in the most literal sense,” and, therefore, “stands in a position far removed from that of an ordinary private contractor because it is a direct participant in project profits.”⁸⁶ Professor Coenen finds the *Contracting-Out* case most offensive,⁸⁷ because “the private operator alone wholly owns and wholly operates the favored trash-collection business.”⁸⁸ The problem is that the flow control law does not just benefit the city-owned transfer station; it also helps the private trash collection service by “channeling [trash-collection] business” to it.⁸⁹ Thus, the “flow-control rule does not ‘treat every private business, whether in-state or out-of-state, exactly the same.’”⁹⁰ Instead, “just like in *Carbone*, the government treats the local private hauling business better than all would-be private competitors.”⁹¹ Finally, although Professor Coenen did not discuss *Carbone II*, he did assert that 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.”⁹² Professor Coenen would thus apparently rule for the town in *Carbone II*, so long as it “generally oversees” the privately-operated facility.

There is much to like about Professor Coenen’s theory, especially the fact that his strict definition of “public facility” generally prevents the *United Haulers* exception from swallowing the *Carbone* rule. But, by preventing public facilities that wish to take advantage of *United Haulers* from working with the private sector to any significant degree, Professor Coenen’s approach overreads *United Haulers*. Instead, courts should apply the public entities exception to public-private cooperatives, so long as the state or local government picks its private-sector partner by means of a fair and competitive bidding process that does not discriminate between in-state and out-of-state firms. This rule, unlike any proposed in the literature, (1) fits the rationale of *United Haulers*, and the dormant

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.* (“Case #3 provides the most compelling case of all for refusing to grant the local government the benefit of the state-self-promotion doctrine.”).

⁸⁸ *Id.*

⁸⁹ *Id.* at 576.

⁹⁰ *Id.* (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007)).

⁹¹ *Id.*

⁹² *Id.* at 571.

Commerce Clause doctrine more generally; (2) reconciles the facts of *Carbone* and *United Haulers*; (3) avoids unnecessarily preventing states from engaging in efficient relationships with private firms; and (4) is clear and administrable. In order to support this thesis, however, it is first necessary to examine in more detail the *United Haulers* decision, and the dormant Commerce Clause doctrine that gave rise to it.

III. THE POLITICAL PROCESS THEORY UNDERLYING THE DORMANT COMMERCE CLAUSE AND THE PUBLIC ENTITIES EXCEPTION

The *United Haulers* Court emphasized repeatedly that the challenged ordinances did not “discriminate against interstate commerce” since they merely privileged “a clearly public facility, while treating all private companies *exactly the same*.”⁹³ Indeed, in the first paragraph of the opinion, Chief Justice Roberts stated that “[t]he only salient difference [between *United Haulers* and *Carbone*] is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation.”⁹⁴ Because the Court found this difference constitutionally significant, it held that “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.”⁹⁵ Likewise, post-*United Haulers*, the Court still states the *United Haulers* holding in

⁹³ *United Haulers*, 550 U.S. at 342 (emphasis added); see also *id.* (stating that the Court is “justif[ied] [in] treating these laws differently from laws favoring particular private businesses over their competitors” because “[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities” (internal quotation marks omitted)); *id.* at 343 (“[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.”); *id.* at 345 (“We hold that the Counties’ 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.” (internal quotation marks omitted)); *id.* at 345 n.6 (“Our opinion simply recognizes that a law favoring a public entity and treating all private entities the same does not discriminate against interstate commerce as does a law favoring local business over all others.”); *id.* at 347 (“The haulers nevertheless ask us to hold that laws favoring public entities while treating all private businesses the same are subject to an almost per se rule of invalidity, because of asserted discrimination.”); *id.* at 348 (Scalia, J., concurring) (voting to uphold the ordinances because they “benefit[] a public entity performing a traditional local-government function and treat[] all private entities precisely the same way”) (emphasis omitted)).

⁹⁴ *Id.* at 334.

⁹⁵ *Id.*

a manner that suggests the public entity exception does not apply to laws favoring one private entity over another.⁹⁶

The *United Haulers* Court explained that “[c]ompelling reasons justify treating these laws [that favor the government over all private industry] differently from laws favoring particular private businesses over their competitors.”⁹⁷ Chief among these compelling reasons was the Court’s belief that “laws favoring local government” were less likely to be motivated by protectionism than “laws favoring private industry.”⁹⁸ At first blush, this seems like an odd assumption. And, indeed, it has been criticized.⁹⁹ Why is it, one might ask, that a state or local legislature presumably acts with protectionist intent when it shields a local, privately owned facility from out-of-state competition, but presumably acts with pure, public-regarding motives when it shields its own facility from out-of-state competition?

The answer, the *United Haulers* Court asserted, is that the political pressures exerted upon the legislature are likely to be different in the two situations. This is because “the most palpable harm,” of a law that favors a government entity but treats all private businesses equally, “is likely to fall upon the very people who voted for [it].”¹⁰⁰ “[D]ormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States,” the Court continued, “because when ‘the burden of state regulation falls on interests outside the state, it is unlikely

⁹⁶ See *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 340 n.8 (2008) (noting that *United Haulers* distinguished *Carbone* on that ground that “[t]he *Carbone* ordinance . . . benefited a private processing facility”); *id.* at 341 n.9 (explaining that, under *United Haulers*, the critical question is “whether the preference was for the benefit of a government . . . or for the benefit of private interests,” because “governmental public preference is constitutionally different from commercial private preference”); *id.* at 343 (upholding the tax benefit at issue because it “parallels the ordinance upheld in *United Haulers*: it ‘benefit[s] a clearly public [issuer, that is, Kentucky], while treating all private [issuers] exactly the same’” (quoting *United Haulers*, 550 U.S. at 342)).

⁹⁷ *United Haulers*, 550 U.S. at 342.

⁹⁸ *Id.* at 343; see also *id.* (“[W]hen a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of simple economic protectionism. Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism.” (quotation marks and internal citations omitted)); *Davis*, 553 U.S. at 341 (“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.” (citations omitted)).

⁹⁹ See *United Haulers*, 550 U.S. at 365–66 (Alito, J., dissenting); Williams & Denning, *supra* note 55, at 266–67.

¹⁰⁰ *United Haulers*, 550 U.S. at 345.

to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”¹⁰¹ But, since *all* private firms were harmed by the ordinances in *United Haulers*, “the citizens and businesses of the Counties [that passed the ordinances] bore the costs of the ordinances.”¹⁰² One would thus expect that local business interests, typically well-represented in the political process,¹⁰³ were united in their opposition to the ordinances. Since these businesses lost a fair fight over whether the government should take over waste management, the *United Haulers* Court found “no reason to step in and hand local businesses a victory they could not obtain through the political process.”¹⁰⁴

¹⁰¹ *Id.* (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68 n.2 (1945)).

¹⁰² *Id.*

¹⁰³ In relying on local business interests to check excessive government monopolization, *United Haulers* implicitly invoked “public choice theory,” which posits that small groups with narrow, intense interests enjoy a systematic political advantage over large, dispersed, and relatively apathetic groups. *See generally* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971). Thus, “the general consumer interest is at a systematic disadvantage in legislative combat against organized groups,” since “[c]onsumers are dispersed and, because of the problem of free riders, are difficult to organize.” Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 133. Recognizing this, it is local business interests that *United Haulers* trusted to prevent protectionism. This focus on business interests, rather than consumers, as a check on protectionism has shown up in the Court’s dormant Commerce Clause jurisprudence before. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), the Supreme Court invalidated a Massachusetts scheme that taxed all milk sold within the state, regardless of the milk’s state of origin, and then used the proceeds of the tax to pay a subsidy to in-state milk producers. *Id.* at 190–91. The Court explained, “when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State’s political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.” *Id.* at 200. In so holding, the Court rejected the argument that Massachusetts consumers could adequately check such protectionism, noting that “[a]s the Governor’s Special Commission Relative to the Establishment of a Dairy Stabilization Fund realized, consumers would be unlikely to organize effectively to oppose the pricing order,” because “the estimated two cent increase per quart of milk would not be noticed by the consuming public,” since “the price of milk varies so often and for so many reasons that consumers would be unlikely to feel the price increases or to attribute them to the pricing order.” *Id.* at 201 n.18 (internal quotation marks and citation omitted). Thus, the Court did not believe that Massachusetts consumers were sufficiently informed, organized, and interested to combat the dairy farmers’ desire for protectionist legislation.

¹⁰⁴ *Id.*

Moreover, because the *United Haulers* rule would only safeguard regulations sure to be universally opposed by local businesses, the Court was confident that its rule would not lead to widespread government monopolization of private industry. At oral argument in *United Haulers*, Justice Alito suggested that, if the Court exempted laws favoring publicly owned industries from Commerce Clause scrutiny, there would be nothing to stop the defendant counties, Oneida and Herkimer, from running their own hamburger business and passing ordinances mandating that their residents purchase only county-made hamburgers.¹⁰⁵ In its opinion, the *United Haulers* majority countered that its rule “would [not] 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,” because “[t]he existence of major in-state interests adversely affected by [such laws] is a powerful safeguard against legislative abuse.”¹⁰⁶ The Second Circuit’s *United Haulers* opinion employed the same rationale. It noted that “ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business, either as owners, employees or investors.”¹⁰⁷ By contrast, “[w]here the local legislation benefits local industry to the detriment of its competition, . . . this check is inadequate.”¹⁰⁸

This “political process theory” of the dormant Commerce Clause has a long history, far pre-dating *United Haulers*. Indeed, in 1938, Justice Harlan Stone stated that:

Underlying the [dormant Commerce Clause] has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those

¹⁰⁵ Transcript of Oral Argument at *33–*34, *United Haulers*, 550 U.S. 330 (No. 05-1345), 2006 WL 3877702.

¹⁰⁶ 550 U.S. at 345 n.7 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, n.17 (1981)); see also Bradford Mank, *The Supreme Court’s New Public-Private Distinction Under the Dormant Commerce Clause*, 37 HASTINGS CONTS. L.Q. 1, 37–38 (noting that *United Haulers* suggested that the dormant Commerce Clause was “designed to prevent local governments from imposing burdens on non-citizens who cannot rely on the political process to oppose protectionist measures” and that, because of the political process rationale, “it is very unlikely a ‘hamburger’ law could be passed” since “so many restaurants and grocers would oppose such legislation”).

¹⁰⁷ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 261 (2d Cir. 2001), *aff’d*, 550 U.S. 330 (2007).

¹⁰⁸ *Id.*

political restraints which are normally exerted on legislation where it affects adversely some interests within the state.¹⁰⁹

The Court has repeated this conception of the dormant Commerce Clause again and again,¹¹⁰ and it has employed similar reasoning in interpreting related constitutional provisions.¹¹¹

¹⁰⁹ S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938).

¹¹⁰ See, e.g., S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91-92 (1984) (noting that “[t]he requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine,” because “[u]nrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States,” but, “when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others”); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 & n.17 (1981) (rejecting a dormant Commerce Clause challenge to a Minnesota law because “there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms” and therefore “[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse”); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (“[W]here . . . regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States’ economic interests, thus insuring that a State’s own political processes will serve as a check against unduly burdensome regulations.”); Int’l Harvester Co. v. Wis. Dep’t of Taxation, 322 U.S. 435, 444 n.2 (1944) (“The Wisconsin Privilege Dividend Tax does not discriminate against non-residents or foreign corporations, or place an undue burden on them without a corresponding burden on residents or domestic corporations. Hence this is not a case where legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.” (internal quotation marks omitted)); Edwards v. California, 314 U.S. 160, 174 (1941) (striking down a California statute in part because “the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy”); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45 n.2 (1940) (“Lying back of these [dormant Commerce Clause] decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.”).

¹¹¹ For instance, in *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009), the Court noted that the Tonnage Clause’s restriction on taxation of vessels “does not apply to taxation of vessels as property in the same manner as other personal property owned by citizens of the State.” *Id.* at 2285 (internal quotation marks and citations omitted). But, the Court explained, “where vessels are not

The political process theory of the dormant Commerce Clause goes something like this: the dormant Commerce Clause aims to prevent protectionism, i.e., the preference for local industries simply because they are local. But the danger, confronted acutely in *United Haulers*, is interfering with policy choices not motivated by localism. The Court has struck a balance by skeptically reviewing legislation that treats local firms better than out-of-state firms. These laws are intensely reviewed because it is thought likely that local firms obtained the favorable legislation via the political advantage they enjoy over their out-of-state counterparts. By contrast, the Court is deferential to laws that treat in-state and out-of-state businesses the same because, there, in-state firms are forced to represent the interests of their out-of-state competitors. As John Hart Ely put it, the dormant Commerce Clause protects nonresidents “by what amounts to a system of virtual representation: by constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after.”¹¹² For example, by forbidding states from taxing out-of-state products at higher levels than local products, the dormant Commerce Clause “bind[s] the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature”¹¹³ In this way, Professor Ely explained, the dormant Commerce Clause “provides political insurance that the taxes imposed on [out-of-state products] would not rise to a prohibitive or even an unreasonable level.”¹¹⁴

taxed in the same manner as the other property of the citizens,” the Tonnage Clause applies. *Id.* (internal quotation marks and citations omitted). “[T]his qualification is important,” the Court insisted, when “[v]iewed in terms of the purpose of the [Tonnage] Clause,” because “[i]t means that, in order to fund services by taxing ships, a State must also impose similar taxes upon other businesses.” *Id.* “And that fact may well operate as a check upon a State’s ability to impose a tax on ships at rates that reflect an effort to take economic advantage of the port’s geographically based position.” *Id.* Therefore, “the presence of other businesses subject to the tax, particularly businesses owned and operated by state residents, threatens political concern and a potential ballot-box issue, were rates, say, to get out of hand.” *Id.* (citing Justice Stone’s articulation of the political process theory of the dormant Commerce Clause, *S.C. Highway Dep’t*, 303 U.S. at 185 n.2). Stepping back, the Court noted that it has “consistently interpreted the language of the [Tonnage] Clause in light of its purpose, a purpose that mirrors the intent of other constitutional provisions which . . . seek to ‘restrai[n] the states themselves from the exercise’ of the taxing power ‘injuriously to the interests of each other.’” *Id.* at 2282 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 497, at 354 (1833) (abridged version)).

¹¹² JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 83 (1980).

¹¹³ *Id.* at 84 (citing *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827)).

¹¹⁴ *Id.*

Similarly, Mark Tushnet has noted that the dormant Commerce Clause's aversion to discrimination is rooted in the desire to make state and local lawmakers take account of the interests of out-of-staters to whom they are not accountable at the polls. The dormant Commerce Clause is implicated where a "restriction allocates resources in favor of local" interests, wrote Professor Tushnet, because "[s]uch allocation mechanisms are . . . likely to result from the kind of distorted political process that should be supervised by the courts."¹¹⁵ By contrast, where "resources are restricted evenhandedly between local and foreign buyers, there [is] no distortion of the political process," and courts need not and should not closely supervise state and local legislatures.¹¹⁶

The political process theory of the dormant Commerce Clause explains the local-processing cases.¹¹⁷ There may be good public health reasons, for instance, to require that the heads and hulls of shrimp be removed before they are transported.¹¹⁸ Normally, it is for the legislature to strike the proper balance between government safety regulation and free-market efficiency. But, because mandating that shrimp be hulled locally discriminates against out-of-state shrimp hullers,¹¹⁹ courts must strictly scrutinize the provision to determine whether the legislature made an even-handed policy choice, or a naked payment to parochial interests.¹²⁰ Of course, if the state can show that its local-hulling requirement was the only practical way of ensuring safe shrimp, then it will survive this harsh review.¹²¹ Otherwise, courts will assume that

¹¹⁵ Tushnet, *supra* note 103, at 164.

¹¹⁶ *Id.*

¹¹⁷ See *supra* notes 26–30 and accompanying text.

¹¹⁸ *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13 (1928) (holding that Louisiana's purported shrimp conservation law was, in fact, an effort "to favor the canning of the meat and manufacture of [shrimp] bran in Louisiana by withholding raw or unshelled shrimp from [Mississippi] plans"); *Johnson v. Haydel*, 278 U.S. 16 (1928) (striking down an analogous Louisiana statute for oysters); cf. *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking down a South Carolina statute that required shrimp fishermen to unload, pack, and stamp their catch before shipping it to another State).

¹¹⁹ See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) ("The essential vice in laws of this sort is that they bar the import of the processing service . . . [thus depriving] out-of-state meat inspectors, or shrimp hullers, or milk pasteurizers . . . [of the] local demand for their services.").

¹²⁰ When the Court applies strict scrutiny in the dormant Commerce Clause context, "the burden falls on [the enacting government] to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

¹²¹ See, e.g., *Taylor*, 477 U.S. 131 (upholding Maine's ban on the import of baitfish because Maine had no other way to prevent the spread of parasites and the adulteration of its native fish species).

protectionism is afoot, and act to protect the unrepresented out-of-state shrimp hullers.¹²² As the Second Circuit put it, “[w]here the local legislation benefits local industry to the detriment of its competition, as in all of the local processing cases, [the political] check,” which the dormant Commerce Clause seeks to guarantee, “is inadequate.”¹²³

Suppose, though, that rather than just forbidding out-of-state firms from hulling local shrimp, a state forbade all firms, local and foreign, from hauling its shrimp, except for one privileged local firm. This is the dynamic of flow control laws, like the one at issue in *Carbone*, which require that all local trash be processed at one favored local firm. The political process theory suggests that these laws should be treated as discriminating against out-of-state firms, and strictly scrutinized. This is because the one local firm receiving the benefit from discriminatory legislation is almost certainly the most politically powerful firm (otherwise, how did it procure the special legislation?). Since that politically powerful firm received preferential treatment, it had no incentive to support the interests of its out-of-state competitors. In Professor Ely’s terms, “the fate of outsiders” is no longer constitutionally tied “to the fate of those possessing political power.”¹²⁴ To be sure, the interest of out-of-state firms will still be represented by the disfavored local firms, but that provides little defense against protectionism, because the disfavored firms likely do not wield much political influence. Thus, the political check is inadequate.

What *United Haulers* recognized was that the political check on protectionism *is* adequate where a law “benefit[s] a clearly public facility, while treating all private companies exactly the same.”¹²⁵ As Professor Coenen explained, “*United Haulers* presented a situation in which not even one private waste-handling firm had an interest in supporting the government’s plan.”¹²⁶ It was thus easier “in *United Haulers* than in *Carbone* to justify judicial nonintervention,” because “if every possible private provider of waste-transfer services would logically oppose the government’s self-promoting monopolization of the field,” then “private providers with a strong in-state presence (and resulting

¹²² See *Carbone*, 511 U.S. at 391–92 (noting that the Court has consistently struck down “local processing requirements” because they “hoard a local resource . . . for the benefit of local businesses”).

¹²³ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 261 (2d Cir. 2001), *aff’d*, 550 U.S. 330 (2007).

¹²⁴ Ely, *supra* note 112, at 83.

¹²⁵ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007).

¹²⁶ Coenen, *supra* note 55, at 558.

clout in local political circles) would provide sufficient protection against abuse of similarly situated nonresident business interests.”¹²⁷

Indeed, the political process theory is necessary to reconcile *Carbone* and *United Haulers*, as the latter Court appeared to appreciate.¹²⁸ The defendants in *Carbone* insisted that the regulation there was not discriminatory because, unlike the regulations at issue in the local-processing cases, the *Carbone* ordinance barred both out-of-state firms and local firms, save for one, from processing Clarkstown waste.¹²⁹ The Court gave this argument short shrift, simply noting that “this difference just makes the protectionist effect of the ordinance more acute.”¹³⁰ This explanation implies that the dormant Commerce Clause grants businesses a substantive right to access the markets of every state.¹³¹ Otherwise,

¹²⁷ *Id.*

¹²⁸ See *supra* notes 97–108 and accompanying text (tracing *United Haulers*’ reliance on political process reasoning to distinguish that case from *Carbone*).

¹²⁹ *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

¹³⁰ *Id.* at 392; see also *id.* at 391 (“The [flow-control] ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”).

¹³¹ Indeed, after *Carbone*, some commentators accused the Court of adopting just such a view of the dormant Commerce Clause. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 354–55 (1997) (“Undoubtedly Congress could decide in favor of an entirely free market, but it has not done so, and the Court’s limited antidiscrimination and antiprotectionism decisions do not justify the result in *Carbone*.”); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 230–31, 268–70 (comparing *Carbone* to *Lochner* in its effort to promote free markets); Mank, *supra* note 106, at 14 (“The [*Carbone*] Court went beyond its traditional test of whether a local law discriminated against out-of-state firms compared to in-state firms and instead interpreted the [dormant Commerce Clause] as prohibiting all local laws that interfere with free market access to a local market, unless a community can demonstrate there is no alternative method of achieving important health and safety goals.”); Bradford C. Mank, *Are Public Facilities Different From Private Ones?: Adopting a New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157, 176–78 (2007) (criticizing *Carbone* “for going beyond the prevention of discrimination against out-of-state competitors, a core value of the [dormant Commerce Clause], to a promotion of free-market competition”); C.M.A. McCauliff, *The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645, 661–64, 673–85 (1995) (criticizing *Carbone*’s market-based discrimination test); Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 578–82 (1997) (same); *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 153 (1994) (“In striking down the flow control law, the [*Carbone*] Court mistook the Commerce Clause’s prohibition against discrimination by a state within an open market for a requirement that states maintain open markets.”). Indeed, in his

why would the fact that Clarkstown also barred local firms from processing its waste worsen the Commerce Clause problem? It is thus understandable that Justice Alito, in his dissent from *United Haulers*, found it “strange for the Court to attach any significance to the fact that the flow-control laws at issue here apply to in-state and out-of-state competitors alike.”¹³² Indeed, if barring all private firms but one from the local market is worse than barring just out-of-state firms, then isn’t barring all private firms worse than barring all but one?

The answer is that out-of-state interests do not have a substantive right to local markets, contrary to that line in *Carbone*, but only a procedural right to be adequately represented in the political process. Thus, under *United Haulers*, barring all private firms from the local market is far better than barring all but one. This is because, in the Court’s eyes, a blanket ban on private firms will create a political check on protectionism that is sufficiently potent to render any further judicial interference unjustifiable.¹³³

dissent from *Carbone*, Justice Souter compared the case to *Lochner* in its endorsement of free market principles over a more interventionist approach. *See Carbone*, 511 U.S. at 430 (Souter, J., dissenting) (“The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect.”); *see also id.* at 424–25 (“No more than the Fourteenth Amendment, the Commerce Clause ‘does not enact Mr. Herbert Spencer’s Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.’” (citing *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting))).

¹³² *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 370 (2007) (Alito, J., dissenting).

¹³³ This conception of *United Haulers* also answers the related criticism that, even where a state favors public rather than private enterprise, there is still a risk of protectionism because, for instance, the law will benefit local residents who work for the protected public facility. *See United Haulers*, 550 U.S. at 364 (Alito, J., dissenting) (“I see no basis for the Court’s assumption that discrimination in favor of an in-state facility owned by the government is likely to serve legitimate goals unrelated to protectionism. Discrimination in favor of an in-state government facility serves local economic interests, 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. It is therefore surprising to read in the opinion of the Court that state discrimination in favor of a state-owned business is not likely to be motivated by economic protectionism.” (internal citations and quotation marks omitted)); Williams & Denning, *supra* note 55, at 266–67 (“A state’s preferential treatment of its own operations inevitably benefits local interests, such as state employees,

This leads to the flip side of the political process theory: the fear that, unless courts limit themselves to guaranteeing that out-of-state interests are adequately represented in the political process, they will become entangled in endless questions of municipal policy. This fear was on display in *United Haulers*. There, the Court worried aloud that if the Commerce Clause was applied to a state's favoritism of its own enterprises, it would become 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

program beneficiaries (as the Court expressly and approvingly noted in *Davis*), local governments, or some combination thereof. Meanwhile, much of the economic burden of such favoritism falls on unrepresented out-of-state interests, such as other states' taxpayers or widely dispersed shareholders. As a consequence, for the same reason that state and local governments are prone to adopt protectionist measures to favor local businesses at the expense of out-of-state competitors, they are predisposed to enact protectionist measures to favor their own operations at the expense of other states or private competitors."). These criticisms take *United Haulers* as suggesting that there is no risk of protectionism where a law favors a state-run facility. But, as outlined above, *United Haulers* is better read as finding that the risk of protectionism is lessened to the point that it is outweighed by the ever-present concern of upsetting legislative policy decisions. Thus, even though the criticisms are correct in noting that some local interests benefit from public protectionism, *United Haulers*' response is that local businesses, which are typically small, intensely interested, and well organized and financed, will serve as formidable opponents to such protectionism. See *supra* notes 97–108 and accompanying text. Of course, Professors Williams and Denning are correct that case-by-case scrutiny of laws favoring state enterprises would better root out protectionism than the *United Haulers* rule, which completely bars review. See Williams & Denning, *supra* note 55, at 267 ("[E]ven if the [*United Haulers*] Court's assessment of the probable reasons for governmental favoritism were true (or even true most of the time), it would not justify a categorical rule deeming such measures as per se nondiscriminatory and thereby exempting them from the very judicial scrutiny that is necessary to determine the bona fides of the government's motives."). But, the simple response is that *United Haulers* favors a regime that errs more on the side of false negatives than false positives. That is, it gives up the hope of perfect enforcement of the dormant Commerce Clause's ban on protectionism in order to avoid excessive judicial interference with intrastate policy disputes. See *United Haulers*, 550 U.S. at 343 (predicting that strictly scrutinizing laws that favor public enterprises would cause "unprecedented and unbounded interference by the courts with state and local government"); cf. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276 (2006) (noting that "a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978) (same).

competition,”¹³⁴ thus leading to “unprecedented and unbounded interference by the courts with state and local government.”¹³⁵ *United Haulers* stands for the proposition that the dormant Commerce Clause does not control intrastate policy decisions regarding the size and scope of government,¹³⁶ so long as out-of-state interests are fairly considered in making such decisions.¹³⁷ Precisely how the Court intends to thread that needle remains to be seen. The next section offers a recommendation.

IV. DEFINING “PUBLIC ENTITIES”

The political process rationale underlying *United Haulers* counsels singleness in interpreting the case’s requirement that laws seeking its

¹³⁴ *United Haulers*, 550 U.S. at 343.

¹³⁵ *Id.* Indeed, the Court even went so far as to invoke the ghost of *Lochner*. *See id.* at 347 (“There is a common thread to the [plaintiffs’ and dissenters’] arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.” (citing *Lochner v. New York*, 198 U.S. 45 (1905))).

¹³⁶ *United Haulers*, 550 U.S. at 344 (“[I]t was also open to [the citizens of the defendant counties] to vest responsibility [for waste-processing] with their government, and to adopt flow control ordinances to support the government effort. It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services. ‘The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.’” (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986))). The Court also cited *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978), for the proposition that the “Commerce Clause does not protect the particular structure or method of operation of a market.” *United Haulers*, 550 U.S. at 344 (internal quotation marks omitted). As the size of government has become perhaps the most explosive political issue of the day, one cannot help but sympathize with the Court’s desire to avoid weighing in on that policy debate.

¹³⁷ *United Haulers*, 550 U.S. at 345 (noting that, because “the citizens and businesses of the Counties [that passed the ordinances] bear the costs of the ordinances,” there was “no reason to step in and hand local businesses a victory they could not obtain through the political process”); *see also* *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 262 (2d Cir. 2001) (“‘The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect.’” (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 430 (1994) (Souter, J., dissenting))), *aff’d*, 550 U.S. 330 (2007).

shelter must “benefit a clearly public facility, while treating all private companies exactly the same.”¹³⁸ Specifically, it mandates that a state or locality cannot invoke the *United Haulers* exception simply because it owns a facility. Otherwise, localities could bypass *United Haulers*’ political restraints against protectionism in two simple steps: first, pass a law which on its face equally harms all private industry, and second, buy off politically powerful local firms by funneling the benefits of the government monopoly to them in the form of no-bid contracts for things like constructing, managing, and operating a state-owned facility.¹³⁹ This could result in widespread protectionism, in violation of the core purpose of the dormant Commerce Clause. Critics of *United Haulers* feared that massive protectionism would follow from that decision.¹⁴⁰ As noted, the Court responded that this was unlikely because “major in-state interests adversely affected by [government monopolization will serve as] a powerful safeguard against legislative abuse.”¹⁴¹ But, again, this protection is worthless if localities can turn major in-state opponents of government monopolization into proponents via no-bid contracts.

This reasoning parallels that of *West Lynn Creamery, Inc. v. Healy*,¹⁴² in which the Supreme Court rejected a similar end-run around the political restraints of the dormant Commerce Clause. There, the Court invalidated a Massachusetts scheme which taxed all milk sold within the state, regardless of the milk’s state of origin, and then used the proceeds of the tax to pay a subsidy to in-state milk producers.¹⁴³ The Court explained that “[n]ondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld . . . in part because the existence of

¹³⁸ *United Haulers*, 550 U.S. at 342.

¹³⁹ See Coenen, *supra* note 55, at 574 (taking “a skeptical view of forced-use rules that channel project profits to nongovernmental collaborators in public/private joint ventures,” because the preferred private-entity will favor the monopoly program, and “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”).

¹⁴⁰ See *United Haulers*, 550 U.S. at 345 n.7 (noting the concern that “affirmance would lead” to widespread protectionism, and that there would be nothing to prevent the establishment of a “‘Oneida-Herkimer Hamburger Stand,’ accompanied by a ‘flow control’ law requiring citizens to purchase their burgers only from the state-owned producer”); Williams & Denning, *supra* note 55, at 281 (“For every state or municipally owned facility, *United Haulers* and *Davis* ostensibly license the adoption of taxes and regulations to protect such facilities from competition.”).

¹⁴¹ *United Haulers*, 550 U.S. at 345 n.7 (quotation marks omitted).

¹⁴² 512 U.S. 186 (1994).

¹⁴³ *Id.* at 190–91.

major in-state interests adversely affected is a powerful safeguard against legislative abuse.”¹⁴⁴ But, the Court continued,

when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State’s political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.¹⁴⁵

Indeed, in *West Lynn Creamery*, the Massachusetts dairy farmers, “one of the most powerful” groups that “one would ordinarily have expected . . . to lobby against the tax[,] . . . were in fact [one of] its primary supporters.”¹⁴⁶ Likewise, if all laws favoring state-owned facilities are excepted from rigorous Commerce Clause review, states could easily turn powerful local business interests into proponents of government monopolization simply by promising them a piece of the action.¹⁴⁷

By focusing on the political process rationale that drove *United Haulers*, rather than on the technical location of title, this Article avoids that disturbing result. This approach is also in line with the law’s general preference for substantive rather than formalistic distinctions,¹⁴⁸ and its

¹⁴⁴ *Id.* at 200 (internal quotation marks and ellipsis omitted).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 200–01.

¹⁴⁷ Indeed, a number of commentators have worried that *United Haulers* could be abused in this way. See Coenen, *supra* note 55, at 574 (“[A] general failure to subject joint-arrangement cases [involving joint-ventures between the government and private companies] to the *Carbone* rule would present an open invitation for evasion.”); Williams & Denning, *supra* note 55, at 251 (“[T]he public-entities exception . . . opens the door to governmental efforts to protect private enterprises from out-of-state competition through cleverly constructed public-private partnerships. . . . [This] could—with just a little push—lead to the elimination of the dormant Commerce Clause itself.”); *id.* at 290 (“[A]s the courts struggle to identify the contours of the public-entities exception, state and local governments will no doubt actively seek to exploit the ambiguities in the doctrine.”).

¹⁴⁸ See *Passenger Cases*, 48 U.S. (7 How.) 283, 458 (1849) (“It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly.”); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (noting that dormant Commerce Clause cases regarding taxes “have considered not the formal language of the tax statute but rather its practical effect”).

specific refusal to give dispositive weight to factors as malleable as title.¹⁴⁹

Accordingly, this Article would look skeptically at each of the examples of quasi-public entities discussed in section 0. While each hypothetical flow control law favors an entity owned (at least in part) by the public, each also funnels the law's benefit to a private entity.¹⁵⁰ Thus, in each case there is the potential that the private entity is a politically influential local firm, and that the government is doing business with the private firm in order to gain its support for a measure that the private firm would otherwise oppose. If *United Haulers'* political process rationale is to be taken seriously, more is necessary to invoke the public entities exception.¹⁵¹

This is not to say that *United Haulers* should never apply to a state-owned facility that partners with a private firm. Instead, public

¹⁴⁹ See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 n.11 (1984) (“[T]he State [cannot] evade the reasoning of this opinion by merely including a provision in its contract that title does not pass until the processing is complete. It is the substance of the transaction, rather than the label attached to it, that governs Commerce Clause analysis.”); U.C.C. § 9-202 (2006) (stating that, generally, “the provisions of this article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor”); Lary Lawrence, *Anderson on the Uniform Commercial Code* § 9-202:4 (3d. ed. 2008) (“Article 9 makes title ownership irrelevant to the creation of a security interest in order to avoid evasions of its requirements by manipulation of the location of the title to the collateral.”).

¹⁵⁰ In *Carbone Restructured*, the private firm receives what amounts to a five-year lease of a government-supported monopoly. In *50-50*, the private firm receives a fifty percent ownership interest in a government-supported monopoly. In *Contracting-Out*, a private trucking agency receives a lucrative contract to handle all the trucking business generated by a government-supported monopoly. And, in *Carbone II*, a private firm receives a contract to operate a government-supported monopoly for up to twenty-five years.

¹⁵¹ Justice Alito made a similar point in his dissent from *United Haulers*. He noted that the preferred facility in *Carbone* was only “nominally owned by a private contractor” since the private contractor was contractually required to “sell” the facility to Clarkstown for one dollar after five years. See *United Haulers*, 550 U.S. at 358 (Alito, J., dissenting). Therefore, he asserted, “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.” *Id.* at 359. Justice Alito believed that the *United Haulers* exception was bankrupt because, in his view, it turned on title, and thus allowed the mere restructuring of a deal to yield a different result. *Id.* Any approach that relies purely on title would serve as a striking vindication of Justice Alito’s criticism, because it would apply the *United Haulers* exception to cases like *Carbone Restructured* and *Carbone II*, and thus allow the very same defendants who lost in *Carbone* to achieve the same monopolization in favor of the same preferred local firm.

enterprises should be able to interact with private firms in any number of ways, and still avoid skeptical Commerce Clause review, so long as they allow all private firms, whether in-state or out-of-state, to bid for the chance to work with the government enterprise. In such cases, the state “treats all private companies exactly the same,”¹⁵² because each has an equal opportunity to compete for the benefit of the government monopoly.¹⁵³ Moreover, extending the *United Haulers* exception to public facilities that employ competitive bids would not lead to a massive government takeover of private industries because the “existence of major in-state interests” would still serve as “a powerful safeguard against legislative abuse.”¹⁵⁴ This is because, when competitive bidding is required, state and local governments cannot purchase the support of influential in-state businesses by the promise, or the assumption, that they will profit from the proposed government monopolies.¹⁵⁵

¹⁵² *United Haulers*, 550 U.S. at 342.

¹⁵³ See *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 188–89 (1st Cir. 1999) (“[W]hen the Commerce Clause inquiry focuses on a state or local plan that culminates in an award of an exclusive contract to one of several aspirants (actual or potential), the process by which the contractor is chosen assumes great importance in determining the plan’s constitutionality *vel non*. After all, in-state interests are not unduly pampered, nor out-of-state competitors unduly burdened, when a municipality awards an exclusive contract to a low bidder (from whatever state or region) after a fair and open bidding process. In such circumstances, unrestricted access to the bidding process constitutes unrestricted access to the relevant market.” (citation omitted)); *Harvey & Harvey, Inc. v. Cnty. of Chester*, 68 F.3d 788, 802 (3d Cir. 1995) (“[I]n interpreting *Carbone*, this Court has focused on the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen. That a flow control ordinance requires all waste to be processed or deposited in state . . . [A] local authority could choose a single provider—without impermissibly discriminating against inter-state commerce—so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses.” (citation omitted)); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. Cnty.*, 48 F.3d 701, 715 (3d Cir. 1995) (noting that a “gas or electric utility [is often] granted a franchise,” for which “both in-state and out-of-state interests may . . . compete equally,” and, for that reason, “the franchise award and the creation of a captive consumer base does not . . . discriminate against electricity and gas generated or produced out of state”). *But see* *Lebanon Farms Disposal, Inc. v. Cnty. of Lebanon*, 538 F.3d 241, 249 (2d Cir. 2008) (noting that *United Haulers* “overrul[ed] *Harvey* to the extent it supports the application of strict scrutiny to publicly operated waste disposal sites”).

¹⁵⁴ See *United Haulers*, 550 U.S. at 345 n.7 (internal quotation marks omitted).

¹⁵⁵ Of course, it may so happen in some cases that a powerful local business will support state monopolization because it is confident that it will be victorious in a competitive bidding process for the operation contract. While this policy choice

Beyond fitting the rule and rationale of *United Haulers*, allowing state-favored public entities to partner with private industry, so long as they take competitive bids, has a number of advantages over more rigid regimes, like Professor Coenen's, that would prevent such facilities from contracting out any significant aspects of their operations.¹⁵⁶

First, this Article's approach allows state-owned facilities to take full advantage of opportunities to engage in efficient partnerships with private firms. Government agencies at all levels rely heavily on such partnerships,¹⁵⁷ presumably because they deem them useful. If a municipality believes that a private firm can do a better job constructing, managing, or operating its facility,¹⁵⁸ it is not clear why the Commerce Clause should prevent them from doing so, so long as they employ a bidding process that gives both in-state and out-of-state firms a fair chance to win the government contract. Moreover, given the prevalence of public-private partnerships, the alternative approach would present many municipal governments with the Hobson's Choice of either restructuring their relationships with the private sector or facing lawsuits

might disadvantage a less efficient out-of-state business whose bid is rejected, the policy choice is uninfected by regional bias and therefore does not violate the dormant Commerce Clause. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (“[The] dormant Commerce Clause is driven by concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274 (1988))).

¹⁵⁶ *See supra* notes 79–91 and accompanying text.

¹⁵⁷ JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 11 (6th ed. 2009) (noting that, beginning in the 1990s, “practitioners and theorists of public administration started to talk about the ‘new public administration,’ a set of theories and practices that emphasize,” among other things, “contracting-out” traditionally government-provided services to private contractors, and that federal administrators have seemed “preoccupied” with “shifting functions to private or state and local actors”); Donald G. Featherstun et al., *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 644 (2001) (“Every facet of governmental function has been touched by privatization.”); Janna J. Hansen, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L.J. 2465, 2465 (2003) (“Government contracts with private providers for the supply of goods and services have grown in number and magnitude over the last several decades.”); Williams & Denning, *supra* note 55, at 283 (“[S]tate and local governments often contract with private companies to render services to state and local residents.”).

¹⁵⁸ Metzger, *supra* note 55, at 464 (“[T]here are costs attached to rejecting the funding mechanism of having a private facility build and run the waste authority facility for a few years, recoup a profit, and then turn it over to the county. A county may not be as efficient a manager in getting such a facility off the ground.”).

from angry businesses that lost out on government contracts.¹⁵⁹ Such an interpretation of *United Haulers* flies in the face of that case's disdain for Commerce Clause rules that would allow 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,"¹⁶⁰ and for rules that could lead to "unprecedented and unbounded interference by the courts with state and local government."¹⁶¹ Further, to the extent the dissenters in *United Haulers* worried that the case would discourage states and localities from

¹⁵⁹ Indeed, Professor Coenen admitted that discouraging public facilities from employing efficient partnerships with private firms is a weakness of his theory. See Coenen, *supra* note 55, at 551 ("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."); *id.* at 576 ("To be sure, [my theory] 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."). Professor Coenen did note, however, that "fears of this outcome are probably overstated," because similar prophecies in a related context have proven overblown and "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." *Id.* at 576–77.

¹⁶⁰ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007).

¹⁶¹ *Id.* Indeed, such an intrusive interpretation of *United Haulers* is likely to be rejected by the current Supreme Court, which has grown skeptical of the very idea of a dormant Commerce Clause. See *United Haulers*, 550 U.S. at 348 (Scalia, J., concurring) ("I write separately to reaffirm my view that 'the so-called "negative" Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain.'" (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring))); *id.* at 349 (Thomas, J., concurring) ("The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence." (internal citations omitted)); see also *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 259–65 (1987) (Scalia, J., concurring in part and dissenting in part). Even the four Justices in the *United Haulers* majority who did not believe the dormant Commerce Clause to be a naked judicial power grab were very skeptical of broad interpretations of that doctrine, and compared such interpretations of the dormant Commerce Clause to *Lochner*. See *United Haulers*, 550 U.S. at 355 (Thomas, J., concurring) ("[T]he Court's analogy to *Lochner* suggests that the Court should reject the negative Commerce Clause, rather than tweak it." (internal citations omitted)).

partnering with private firms,¹⁶² this Article's interpretation of *United Haulers* might help placate that concern.

Second, this Article's approach reconciles the somewhat-complicated facts of *United Haulers* and *Carbone*. One of the county-owned facilities that benefited from the flow control law in *United Haulers* was operated by a private company.¹⁶³ Conversely, the transfer station that benefited from the flow control law in *Carbone* was by no means a purely private entity.¹⁶⁴ Recall that, in exchange for the contractor's promise to build the facility and then "sell" it to Clarkstown five years later for one dollar, Clarkstown guaranteed that, during the first five years of the facility's existence, the contractor would receive "a minimum waste flow of 120,000 tons per year" and that the contractor could charge an above-market tipping fee.¹⁶⁵ To meet this guarantee, Clarkstown passed the disputed flow control ordinance.¹⁶⁶ "In other words," the *Carbone* Court explained, "the flow control ordinance [wa]s a financing measure," for what was destined to become the town's transfer station.¹⁶⁷ This

¹⁶² Indeed, the *United Haulers* dissenters noted the pro-government incentive structure which the case might create. See *United Haulers*, 550 U.S. at 364 n.3 (Alito, J., dissenting) (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"); *id.* at 354 (Thomas, J., concurring) (suggesting that the majority's decision reflected a "policy-driven preference for government monopoly over privatization").

¹⁶³ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Co.*, 261 F.3d 245, 250 (2d Cir. 2001), *aff'd*, 550 U.S. 330 (2007); see also Williams & Denning, *supra* note 55, at 284 ("What is often overlooked [about *United Haulers*] is that one of the favored processing facilities was actually operated and managed by a private company . . ."). The *United Haulers* Court appears to have ignored this complicating fact. See *United Haulers*, 550 U.S. at 334 ("The only salient difference [between this case and *Carbone*] is that the laws at issue here require haulers to bring waste to facilities owned *and operated* by a state-created public benefit corporation. We find this difference constitutionally significant." (emphasis added)); *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339–40 (2008) ("*United Haulers* . . . upheld a 'flow control' ordinance requiring trash haulers to deliver solid waste to a processing plant owned and operated by a public authority in New York State.>").

¹⁶⁴ *United Haulers*, 550 U.S. at 358 (Alito, J., dissenting) ("The preferred facility in *Carbone* was, to be sure, nominally owned by a private contractor who had built the facility on the town's behalf, but it would be misleading to describe the facility as private.>").

¹⁶⁵ See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387 (1994).

¹⁶⁶ See *id.*

¹⁶⁷ *Id.* at 393. The quasi-public nature of the facility in *Carbone* led to a spirited debate in *United Haulers* as to whether the *Carbone* Court regarded the *Carbone* facility as "public." The *United Haulers* dissenters noted that the *Carbone*

arrangement led to a spirited debate in *United Haulers* as to whether the transfer station in *Carbone* was in fact public or private.¹⁶⁸

Thus, any theory that will not extend the public entities exception to a state-owned facility simply because it partners with a private firm will have difficulty explaining the facts of *United Haulers*. Conversely, any theory that deems any degree of state involvement sufficient to invoke *United Haulers* will have real problems distinguishing *Carbone* because of the quasi-public nature of that case's facility.¹⁶⁹

This Article's focus on fair bidding reconciles the two cases. By describing at length the competitive bidding process by which the private operator in *United Haulers* was chosen, the Second Circuit hinted at the relevance of that fact.¹⁷⁰ It was perhaps only because of this bidding process that the Second Circuit was able to assert that the ordinances in *United Haulers*, as opposed to "local legislation [that] benefits local industry to the detriment of its competition," were "equipped with a built-in [political] check."¹⁷¹ Accordingly, the private participation in the

dissenters characterized the *Carbone* facility as "essentially a municipal facility," and that the *Carbone* Court did not dispute that characterization. *United Haulers*, 550 U.S. at 359 (Alito, J., dissenting) (quoting *Carbone*, 511 U.S. at 419 (Souter, J., dissenting)). The *United Haulers* dissenters further noted that the *Carbone* Court "repeatedly referred to the transfer station in terms suggesting that the transfer station did in fact belong to the town." *Id.* (citing *Carbone*, 511 U.S. at 387 (explaining that "[t]he town would finance its new facility with the income generated by the tipping fees" (emphasis added)); *id.* at 393 (observing that the challenged flow-control ordinance was designed to "ensur[e] that the town-sponsored facility will be profitable"); *id.* at 394 (concluding that, "having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State" (emphasis added))). The *United Haulers* majority, however, dismissed those statements as "at best inconclusive," 550 U.S. at 340 n.3, and found that "*Carbone* cannot be regarded as having decided the public-private question," *id.* at 341.

¹⁶⁸ See *supra* note 151.

¹⁶⁹ Indeed, as Justice Alito noted, "[T]he 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." *United Haulers*, 550 U.S. at 359 (Alito, J., dissenting).

¹⁷⁰ See *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Co.*, 261 F.3d 245, 250 (2d Cir. 2001) (emphasizing that defendants twice conducted a competitive bidding process that was "open to all private waste disposal companies, in-state and out-of-state," and that, following one such solicitation, it "received four bids, all from out-of-state businesses"), *aff'd*, 550 U.S. 330 (2007).

¹⁷¹ *Id.* at 261. While *Carbone* itself did not mention whether or not Clarkstown took bids before choosing with whom it would deal, it seems unlikely that it did,

United Haulers waste-management facility was excused because the town employed a fair bidding process consistent with the dormant Commerce Clause's requirement that states treat local and foreign firms equally.

By contrast, Professor Coenen's theory struggles to make sense of the facts of *United Haulers*. Because one of the facilities in *United Haulers* was privately operated, Professor Coenen believes that it is "settled" that a state or local government may hire "a private company to operate [its] facility" and still avoid rigorous Commerce Clause review, so long as "the government owns, finances, and generally oversees" the facility.¹⁷² But why, then, did Professor Coenen find the *Contracting-Out* case so offensive?¹⁷³ He found it objectionable for a public waste-processing facility to contract with a trucking company in such a way that town residents would be forced to use that company for their waste-transportation needs. The problem with that, Professor Coenen explained, was that the "flow-control rule does not 'treat every private business, whether in-state or out-of-state, exactly the same.'"¹⁷⁴ Instead, "just like in *Carbone*, the government treats the local private hauling business

at least according to court papers filed in subsequent suits. The complaint in *Carbone II* alleges a twenty-year cozy relationship between Clarkstown and Clarkstown Recycling Center, Inc. ("CRC, Inc."), the company which benefited from the flow control ordinances at issue in both *Carbone I* and *Carbone II*. Specifically, it contends that in 2008, Clarkstown conspired with Rockland County officials to steer the operation contract for a county waste-processing facility, which benefited from a flow control law, to CRC, Inc. Amended Complaint, C & A Carbone v. Cnty. of Rockland, No. 08-CV-6459, ¶ 60 (S.D.N.Y. Nov. 11, 2008). In choosing a private firm to operate the county facility, Clarkstown and Rockland allegedly did not employ a bidding process, evaluative criteria, or award standards. *Id.* They purportedly did not solicit proposals from facilities which might be interested in being an Authority-designated facility. *Id.* Nor, allegedly, did they investigate such facilities or analyze their environmental record. *Id.* ¶ 59. Moreover, the amended complaint asserts that, over the past fifteen years, Clarkstown has repeatedly favored CRC, Inc. over its rival Carbone by, for instance, selectively enforcing safety regulations against the latter. *Id.* ¶¶ 30–39. At any rate, the county in *Carbone* never claimed, as a defense, that it held a fair and open bidding process. This fact explains why the flow control law there at issue is unconstitutional under this Article's theory.

¹⁷² Coenen, *supra* note 55, at 570–71.

¹⁷³ *See id.* at 575 ("Case #3 provides the most compelling case of all for refusing to grant the local government the benefit of the state-self-promotion doctrine."). Recall that, in the *Contracting-Out* hypothetical, a city owns and operates a waste-transfer facility, but also licenses a local, private firm 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.

¹⁷⁴ *Id.* at 576 (quoting *United Haulers*, 550 U.S. at 334).

better than all would-be private competitors.”¹⁷⁵ It is hard to understand, however, why a state can contract-out a waste-processing company’s operation, but not its trash collection. This Article’s approach allows the government to do either, so long as it allows all firms to compete for the government’s business.

Third, this Article’s bidding rule solves the administrability problems that could otherwise plague the *United Haulers* exception. As noted, public facilities interact with private firms in a myriad of ways that blur the line between “public” and “private.”¹⁷⁶ Trying to determine how much private participation is too much for *United Haulers* purposes could be a nightmare, undermining one of that case’s chief goals of avoiding excessive federal court involvement in fights over how municipal services should be provided.¹⁷⁷ Indeed, efforts to define which entities qualify as part of “the state” have plagued courts in other contexts.¹⁷⁸ With respect to both the Eleventh Amendment and the Foreign Intelligence Surveillance Act (FISA), for instance, courts have been forced to adopt confusing, multi-factor tests to determine whether an entity is an “arm of the state”¹⁷⁹ or an “organ of a foreign state,”¹⁸⁰

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* notes 56–61 and accompanying text.

¹⁷⁷ Williams & Denning, *supra* note 55, at 271–72 (noting that there is no clear amount of public involvement with a firm that is sufficient to ensure enough “native opposition” to “substitute for judicial review,” and concluding that, despite the *United Haulers* Court’s “professed concern for respecting state and local political processes, [its] rationale actually would embroil the Court in difficult and politically charged tasks far beyond the Court’s traditional competence”).

¹⁷⁸ *Id.* at 289–90.

¹⁷⁹ See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429–31 (1997); *Pastrana-Torres v. Corporacion de P.R. Para la Difusion Publica*, 460 F.3d 124, 126–27 (1st Cir. 2006); *Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899, 901 (9th Cir. 2003) (“In the Eleventh Amendment context, we employ a five-factor test to determine whether an entity is an arm of the state: (1) ‘whether a money judgment would be satisfied out of state funds,’ (2) ‘whether the entity performs central governmental functions,’ (3) ‘whether the entity may sue or be sued,’ (4) ‘whether the entity has the power to take property in its own name or only the name of the state’ and (5) ‘the corporate status of the entity.’” (quoting *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1989))).

¹⁸⁰ See, e.g., *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007) (noting that determining whether an entity is an “organ of a foreign state” requires analysis of the following factors: “(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law” (quoting *Filler v. Hanvitt Bank*,

respectively. These tests have produced seemingly contradictory results,¹⁸¹ leaving courts and commentators alike yearning for a more predictable approach.¹⁸²

Professor Coenen's proposed test illustrates the confusion that could result in trying to decide which entities are "public" for the purposes of *United Haulers*. For an entity to be considered "public" under that test, the government must "own[], finance[], and generally oversee[]" the entity.¹⁸³ Elsewhere, Professor Coenen suggests that it would also matter whether a private firm is "a direct participant in project profits."¹⁸⁴ So long as these conditions are met, it appears that Coenen would apply the *United Haulers* exception to entities that contract with private companies for any number of services, including management, operation, construction, and engineering services.¹⁸⁵

Beyond the fact that allowing public entities to dish out such no-bid contracts could undermine the political process rationale of *United Haulers*,¹⁸⁶ courts could have difficulty determining whether a firm is "generally overseen" by the government, or when a private company is a "direct participant in project profits." Take *Carbone II*, for instance, where a private firm received a lucrative contract to operate a publicly-owned waste-management company for up to twenty-five years.¹⁸⁷ How would a court determine whether there is enough government oversight, or too much private participation in public profits, to apply *United Haulers*? At the very least, these determinations would require extensive discovery to determine precisely how the particular entity operated.

378 F.3d 213, 217 (2d Cir. 2004)); see also *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000) (noting that, while these factors "provide a helpful framework, we will not apply them mechanically or require that all five support an organ-determination").

¹⁸¹ Compare *Pastrana-Torres*, 460 F.3d at 128 (holding that the Public Broadcast Corporation of Puerto Rico is not an arm of Puerto Rico, despite substantial governmental control), with *Villegas Davila v. Pascual*, 631 F. Supp. 919, 921–22 (D.P.R. 1986) (holding that a corporation was an organ of a foreign state, despite a state statute expressly providing that the corporation was distinct from the state and that debts of the corporation were not that of the state).

¹⁸² See, e.g., *Kelly*, 213 F.3d at 847; Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RES. 57, 65 (2001).

¹⁸³ Coenen, *supra* note 55, at 571.

¹⁸⁴ *Id.* at 575.

¹⁸⁵ *Id.* at 571 & n.130.

¹⁸⁶ See *supra* notes 138–151 and accompanying text.

¹⁸⁷ See *supra* text accompanying notes 62–71.

Instead of focusing on the metaphysical question of when an entity is “public,” this Article’s approach looks to the non-discrimination rule underlying *United Haulers* and the dormant Commerce Clause, and asks whether the state-owned entity “treat[s] all private companies exactly the same.”¹⁸⁸ Thus, this Article would apply *United Haulers* so long as a governmentally-owned entity employs a non-discriminatory bidding process for contracting with the private sector.

Even before *United Haulers*, some courts held that a fair bidding process saves an otherwise-doomed flow control law.¹⁸⁹ These courts have already sketched out a relatively straightforward framework for determining whether an ostensibly open bidding process discriminates against out-of-state firms.¹⁹⁰ In *Harvey & Harvey, Inc. v. County of Chester*, for instance, the Third Circuit noted that “a number of things can demonstrate that [a bidding] process impermissibly favored in-state interests/bidders, . . . [including] direct evidence of favoritism . . . or corrupt payments.”¹⁹¹ “Or,” the court continued, “a seemingly neutral bid specification with an entirely legitimate purpose, such as a specified proximity requirement, may have the effect of giving in-state interests an advantage.”¹⁹² Similarly, “governmental defendants can rebut a putative showing of discrimination by presenting evidence demonstrating that the designation process was open, fair, and competitive, i.e., determined by objective criteria which do not have the effect of favoring in-state interests.”¹⁹³ While this test will occasionally give rise to fact-intensive disputes, it will not foster disputes beyond the competence of courts. Indeed, federal courts routinely determine whether a decision-making process was even-handed or discriminatory, and rely on well-established tests for doing so.¹⁹⁴

¹⁸⁸ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007).

¹⁸⁹ *See Houlton Citizens’ Coal. v. Town of Houlton*, 175 F.3d 178, 188–89 (1st Cir. 1999); *Harvey & Harvey, Inc. v. Cnty. of Chester*, 68 F.3d 788, 802 (3d Cir. 1995); *Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atlantic Cnty.*, 48 F.3d 701, 715 (3d Cir. 1995); *see also supra* note 153.

¹⁹⁰ *Harvey & Harvey*, 68 F.3d at 802–04; *Houlton Citizens’ Coal.*, 175 F.3d at 189–90.

¹⁹¹ 68 F.3d at 802.

¹⁹² *Id.*

¹⁹³ *Id.* at 802–03.

¹⁹⁴ For instance, when an employee sues for race, gender, or age discrimination, courts apply the burden-shifting model set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804 (1973). Under the *McDonnell Douglas* framework, the plaintiff carries the initial burden of proving a prima facie case of discrimination. *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466

Moreover, a careful municipality can protect itself from litigation by conducting a bidding-process pursuant to a few simple guidelines. The town of Houlton, Maine serves as a model.¹⁹⁵ The First Circuit upheld its bidding process because (1) “the Town issued a detailed [Request For Proposals (“RFP”)] after holding a widely publicized meeting, open to all prospective bidders”; (2) “[t]he record contain[ed] no hint that the Town restricted the bid protocol to a particular class of bidders, shaped it to favor in-state operators, or slanted it in any way against out-of-state purveyors”; (3) “[t]he RFP itself include[d] no terms that either g[a]ve in-state operators a leg up or disadvantage[d] their out-of-state rivals”; (4) the RFP did not “lock bidders into using a particular transfer station; on the contrary, its terms permit[ted] the successful bidder to contract with whomever the bidder [chose] (in-state or out-of-state) to process the garbage and effectuate disposal at any lawful site within or without the state”; (5) “the RFP specifically note[d] that bidders may request deviations or file alternative proposals”; (6) “the Town received multiple bids”; and (7) the Town “awarded the contract to . . . the low bidder.”¹⁹⁶ Following the Houlton model, cautious state and local governments should be able to contract-out services with minimal fear of messy litigation.

(2d Cir. 2001). To establish a prima facie case, a plaintiff must show that (1) she was a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Id.* The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 468. If the defendant can do so, the burden shifts back to the plaintiff to present sufficient evidence to permit a rational finder of fact to infer that the defendant’s proffered reason is a pretext and that race, gender, or age “was the ‘but-for’ cause of the challenged adverse employment action.” *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009).

¹⁹⁵ See *Houlton Citizens’ Coal.*, 175 F.3d at 189 (finding that the private contractor “did not become the Town’s contractor in a backroom deal, cutting potential competitors off at the pass, but, rather, earned the . . . contract through its successful completion of a well-advertised, fully competitive bidding process that was accessible to all who coveted the business”).

¹⁹⁶ *Id.* Of course, this is not to say that towns must always choose the low-bidder. Towns rejecting the low-bid should not be presumed discriminatory so long as they provide a persuasive reason for choosing a higher bidder, such as a superior health and safety record. See *Harvey & Harvey*, 68 F.3d at 803 (“Municipalities that have adopted flow control schemes would also be wise to demonstrate that the goals of the designation process included capacity assurance and the protection of the public health and safety.”).

V. MARKET PARTICIPATION EXCEPTION

This Article's approach to the public entities exception applies equally to a similar innovation in dormant Commerce Clause jurisprudence that occurred (or, almost occurred) in *Department of Revenue of Kentucky v. Davis*.¹⁹⁷ There, four Justices would have expanded the "market-participation" exception to the dormant Commerce Clause to allow states to discriminate against interstate commerce when they participate in a market, even if they simultaneously act as that market's regulator.¹⁹⁸ While this threatened doctrinal-shift has confused and worried some commentators,¹⁹⁹ it actually poses the same puzzle as the *United Haulers* exception (i.e., what constitutes a "public entity"), and should be resolved in the same way. Some background is required.

The Commerce Clause only grants to Congress—and correspondingly only withholds from the states—the power to “regulate Commerce.”²⁰⁰ Because the power conferred by the Constitution is the power to “regulate,” the dormant Commerce Clause is not activated unless a state action constitutes “regulation.” Thus, at the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between “regulation” of, and “participation” in, a market. “When a state engages in mere market ‘participation’—that is, when it enters the open market as a buyer or seller on the same footing as private parties—there is less danger that the state’s activity will interfere with Congress’ plenary power to regulate the market.”²⁰¹ Accordingly, to the

¹⁹⁷ 553 U.S. 328 (2008).

¹⁹⁸ *Id.* at 344–49 (plurality opinion). Chief Justice Roberts and Justice Scalia, who voted with the majority in *Davis*, did not join the market participation portion of the opinion because they believed that the case was fully resolved by application of *United Haulers*' public entities exception. *See id.* at 359 (Roberts, C.J., concurring) (“[T]he case is readily resolved by last Term’s decision in *United Haulers* That being the case, I see no need to proceed to the alternative analysis in Part III-B.”); *id.* at 360 (Scalia, J., concurring) (“I do not join Part III-B of the opinion of the Court because I think Part III-A adequately resolves the issue.”).

¹⁹⁹ *See id.* at 375 (Kennedy, J., dissenting) (“This expansion of the market-participant exception, if it were unleashed by a majority of the Court, would be an open invitation to enact these kinds of discriminatory laws—laws that, until today, the Court has not upheld in even a single instance.”); Williams & Denning, *supra* note 55, at 253 (arguing that if the *Davis* plurality’s expansive view of the market participation exception is “ultimately adopted by the Court, . . . the market-participant doctrine will no longer be an exception to the dormant Commerce Clause, but will swallow that doctrine completely”).

²⁰⁰ U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

²⁰¹ *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (2d Cir. 2002); *see also Wis. Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282,

extent a state acts as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals, just as if it were a private party.

Traditionally, however, the market participation exception applies only if the state or locality acts “as a market participant, rather than as a market regulator.”²⁰² In *Wyoming v. Oklahoma*,²⁰³ for instance, the Court struck down an Oklahoma statute requiring all in-state electrical utilities (both private and public) to use at least ten percent Oklahoma-mined coal to fuel their power plants. The Court acknowledged that with respect to state-owned utilities, Oklahoma was participating as a purchaser in the coal market and therefore could decide to purchase only local coal. But simply because Oklahoma was in one respect a “participant” in the coal market did not mean that in all respects its activity affecting the coal market constituted “market participation.” A state’s actions constitute “market participation” only if a private party could have engaged in the same actions. For this reason, the *Wyoming* Court invalidated as “regulation” Oklahoma’s imposition of a local-purchasing requirement on private market participants, even though it found the state otherwise to be a “participant” in the local coal market.²⁰⁴ Similarly, in its *United Haulers* opinion, the Second Circuit found that, under the traditional notion of the market participation exception, that exception did not apply:

The dormant Commerce Clause restricts certain state regulation of interstate commerce. It does not prohibit a state from participating in the free market if it acts like a private enterprise. In general, a state regulates

289 (1986) (“[T]he Commerce Clause restricts ‘state taxes and regulatory measures impeding free private trade in the national marketplace,’ but ‘[there] is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.’” (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980))).

²⁰² *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984); *see also Reeves*, 447 U.S. at 438–39 (noting that, under the market participation exception, states enjoy “the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal” (internal quotation marks omitted)); *Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atlantic Cnty.*, 48 F.3d 701, 717 (3d Cir. 1995) (“When a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market.”).

²⁰³ 502 U.S. 437 (1992).

²⁰⁴ *See id.* at 455–57.

when it exercises governmental powers that are unavailable to private parties. Classic hallmarks of government regulation include the threatened imposition of fines and/or jail terms to compel behavior. The Counties' flow control laws require private haulers to obtain a permit from the Counties and to deliver all waste to Authority designated facilities. Failure to do either exposes the private hauler to fines, revocation of its permit to pick up solid waste, and imprisonment. Therefore, the Counties have availed themselves of the unique powers or special leverage they enjoy by virtue of their status as sovereigns, and, thus, are regulating the market for waste collection and disposal.²⁰⁵

In *Davis*, the Supreme Court considered a dormant Commerce Clause challenge to a Kentucky tax scheme that exempted from state income taxes interest on bonds issued by Kentucky or its political subdivisions, but not on bonds issued by other states and their subdivisions. The Court upheld the law under *United Haulers* because it favored a public, rather than a private, entity.²⁰⁶

However, a four-Justice plurality would have also upheld the scheme under the market participation exception, thus endorsing a notion of that exception far broader than the traditional notion outlined above. The plurality would have held that the market participation exception does not just allow the state-as-market-participant to favor its own citizens, but also allows the state-as-market-regulator to favor the state-as-market-participant. The plurality explained that "our cases on market regulation without market participation prescribe standard dormant Commerce Clause analysis; our cases on market participation joined with regulation

²⁰⁵ *United Hauler Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255 (2d Cir. 2001), *aff'd*, 550 U.S. 330 (2007) (citations and internal quotation marks omitted); *see also SSC Corp.*, 66 F.3d at 512 (holding that "[t]o the extent that the flow control ordinance threatens garbage haulers with criminal fines and jail terms if they fail to do business with Smithtown at the Huntington incinerator, the town is engaging in market regulation, not market participation," because "[n]o private company in the open market could force others to buy its services under pain of criminal penalties").

²⁰⁶ *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 343 (2008) ("*United Haulers* provides a firm basis for reversal. Just like the ordinances upheld there, Kentucky's tax exemption favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests. This type of law does 'not discriminate against interstate commerce for purposes of the dormant Commerce Clause.'" (quoting *United Haulers*, 550 U.S. at 345)).

. . . prescribe exceptional treatment for this direct governmental activity in commercial markets for the public's benefit."²⁰⁷ For instance, "[s]tates that regulated the price of milk did not keep herds of cows or compete against dairy producers for the dollars of milk drinkers," and therefore would not be able to invoke the market participation exception.²⁰⁸ "But when Kentucky exempts its bond interest, it is competing in the market for limited investment dollars, alongside private bond issuers and its sister States, and its tax structure is one of the tools of competition."²⁰⁹ Thus, while Kentucky presumably could not tax the revenue generated by out-of-state bonds at a higher level than the revenue generated by the bonds of private Kentucky issuers, *Davis* held that Kentucky can exempt from taxation the revenue generated by its own, state-issued bonds.

The *Davis* plurality's expansion of the market participation exception has produced considerable anxiety.²¹⁰ But it is really no different from *United Haulers*' public entity exception: both prescribe deferential review for regulations that favor public, rather than private, entities. Indeed, the *Davis* plurality made this point itself, noting that "*United Haulers*, though not placed under the market participant umbrella, may be seen as another example" of it.²¹¹ The plurality explained that in *United Haulers* "[w]e upheld the government's decision to shut down the old market for trash processing only because it created a new one all by itself, and thereby became a participant in a market with just one supplier of a necessary service."²¹² And, critical for the purposes of this Article, the plurality was clear that its expanded market participation exception did not go any further than the *United Haulers* exception, because both applied only to regulations that favored public, rather than private, entities.²¹³

²⁰⁷ *Id.* at 347–48.

²⁰⁸ *Id.* at 345.

²⁰⁹ *Id.*

²¹⁰ *See supra* note 199.

²¹¹ *Davis*, 553 U.S. at 346.

²¹² *Id.* at 346–47.

²¹³ *Id.* at 346 (noting that "the dispositive fact [in *United Haulers*] was the government's own activity in processing trash" and that "[w]e upheld the government's decision to shut down the old market for trash processing only because it created a new one *all by itself*" (emphasis added)); *id.* at 347 ("If instead the government had created a monopoly in favor of a private hauler, we would have struck down the law just as we did in [*Carbone*]."); *id.* at 347–48 (noting that the market participation exception applies "for this direct governmental activity in commercial markets for the public's benefit"); *id.* at 348 (noting that the market participation exception applies because the regulation at issue "favors, not local private entrepreneurs, but the Commonwealth and local governments").

Likewise, the rationale for treating favoritism of public entities differently from favoritism of private entities appears to be the same in both cases. The *Davis* plurality asserted that laws favoring public entities are entitled to more deferential review because “the public object of the [state’s] foray into the market [is] understood to give the regulation a civic objective different from the discrimination traditionally held to be unlawful.”²¹⁴ This phrase gestures to *United Haulers*’ assertion that “laws favoring local government” were less likely to be motivated by protectionism than “laws favoring private industry.”²¹⁵ The rationale of the public/private distinction in both cases is an instance of the public process theory that has driven the Court’s dormant Commerce Clause doctrine for many years.²¹⁶ Both the *United Haulers*’ public entities exception and the *Davis* plurality’s expanded market participation exception, therefore, turn on the same phrase (i.e., “public entity”) and are supported by the same political process rationale. Accordingly, the two exceptions are coextensive, and this Article’s theory applies to both: state-owned entities that partner with private companies should be able to invoke both, if and only if they do so via a bidding process that does not discriminate between local and out-of-state firms.

VI. CONCLUSION

For all the concern generated by *United Haulers*, that case is simply an extension of the political process theory that has long driven the Supreme Court’s dormant Commerce Clause jurisprudence. The political process theory should continue to guide courts when determining whether to apply *United Haulers*’ “public entities” exception in specific cases. This should lead courts to deny *United Haulers* protection to state-owned entities that dish out contracts to local firms without giving out-of-state firms a fair chance to compete. So long as courts uphold this basic equality rule, protectionism will be adequately checked, efficient and non-discriminatory public-private partnerships will be encouraged, and the *United Haulers* exception will not swallow the *Carbone* rule.

²¹⁴ *Id.* at 347.

²¹⁵ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007); *see also id.* (“[W]hen a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of simple economic protectionism. Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism.” (internal citations and quotation marks omitted)); *Davis*, 553 U.S. at 341 (“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.”).

²¹⁶ *See supra* notes 109–136 and accompanying text.