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

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WHERE UNITED HAULERS MIGHT TAKE US: THE FUTURE OF THE STATE-SELF-PROMOTION EXCEPTION TO THE DORMANT COMMERCE CLAUSE RULE

Dan T. Coenen∗

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

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INTRODUCTION

The so-called “dormant Commerce Clause”\(^1\) prohibits state action that “discriminates against or unduly burdens interstate commerce.”\(^2\) By forging a “federal free trade unit,”\(^3\) this constitutional restriction has bred a level of “material success” that ranks as “the most impressive in the history of commerce.”\(^4\) It also has served to bring “solidarity,”\(^5\) if not “salvation,”\(^6\) to 50 diverse and potentially antagonistic states.\(^7\)

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\(^1\) Dep’t of Revenue v. Davis, 128 S. Ct. 1801, 1802 (2008).
\(^2\) Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997).
\(^4\) Id.
\(^5\) Id. at 535.
\(^7\) See Panhandle E. Pipeline Co. v. Mich. Pub. Serv. Comm’n, 341 U.S. 329, 340 (1951) (Frankfurter, J., dissenting) (“It is easy to mock or minimize the significance of ‘free trade
The dormancy doctrine has spawned many controversies, and one modern conundrum surfaced in *C & A Carbone, Inc. v. Town of Clarkstown*. In that case, the Court detected unlawful discrimination against interstate commerce in an ordinance that mandated delivery of all local trash to a single, in-state, privately owned waste transfer station. The difficulty with the law, according to the Court, was that it operated solely “for the benefit of the preferred processing facility,” thereby “depriv[ing] out-of-state businesses of access to a local market.” In its 2007 ruling in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, the Court turned its attention to a closely related question – whether the principle of *Carbone* applies when a local processing requirement favors a public, rather than a private, waste-handling facility. Effectively creating a new state-self-promotion exception to the antidiscrimination rule, the Court in *United Haulers* concluded that *Carbone* did not control.

In *Department of Revenue v. Davis*, the Court reaffirmed the principle of *United Haulers* and again invoked it to uphold state action that impeded free interstate trade. The issue in *Davis* was whether Kentucky could among the states, which is the significance given to the Commerce Clause by a century and a half of adjudication in this Court. With all doubts as to what lessons history teaches, few seem clearer than the beneficial consequences which have flowed from this conception of the Commerce Clause.” (citations omitted). For a treatment that emphasizes the nation-unifying role played by the dormant Commerce Clause, see Laurence H. Tribe, *American Constitutional Law* § 6-5 at 1057 (3d ed. 2000).

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8 See generally Dan T. Coenen, *Constitutional Law: The Commerce Clause* 209-342 (2003) (canvassing Supreme Court’s treatment of the dormant Commerce Clause over nearly two centuries); Tribe, supra note 7, at §§ 6-3 to 6-23 (same).
10 The waste transfer station received bulk solid waste and separated recyclable from nonrecyclable items. Recyclable waste was baled for shipment to a processing facility and nonrecyclable waste was sent off to landfills or incinerators for disposal. Id. at 387.
11 Id. at 392.
12 Id. at 389.
14 Id. at 1790.
15 The term “state-self-promotion exception” is one of my own creation. The academic literature has begun to produce other possible names for the principle developed in *United Haulers*. See, e.g., Leading Cases, *Dormant Commerce Clause – State Taxation of Municipal Bonds*, 122 Harv. L. Rev. 276, 282 (2008) (referring to the principle of *United Haulers* as the “government entity exemption”). In informal writing, I had previously advanced the term “government monopoly exception.” The Supreme Court’s later application of the principle in a non-monopoly setting in the *Davis* case (see infra notes 16-20 and accompanying text), however, rendered that term plainly inapt. The term “state-self-promotion exception” is designed to reach across the *United Haulers* and *Davis* cases in a way that captures their essential logic and holdings. See infra notes 63-78 and accompanying text.
enhance the salability of its own bonds by exempting interest earned on them from its income tax, even while fully taxing interest paid on all other bonds, including bonds issued by sister states.\textsuperscript{17} In upholding Kentucky’s action, the Court looked past the state’s stark discrimination between intrastate and interstate commerce, reasoning that the “tax scheme parallels the ordinance upheld in United Haulers”\textsuperscript{18} because it “‘benefit[s] a clearly public [issuer . . .,] while treating all private [issuers] exactly the same.’”\textsuperscript{19} At least as a general rule, the Court proclaimed, no constitutionally cognizable discrimination inheres in laws aimed at “favoring States and their subdivisions” as they “provide public goods and services on their own.”\textsuperscript{20}

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

In Part II, I turn to the implications of United Haulers and Davis. I suggest in particular that the Court’s new state-self-promotion principle will have wide-ranging effects in five major categories of cases: (1) cases (like United Haulers) that involve local processing requirements tied to traditional public programs run either by the state itself or by way of a joint venture in which the state participates; (2) cases (much like United Haulers) that involve exclusive distribution rights accorded to so-called “utilities,” including monopoly providers of water, electricity or natural gas; (3) cases (unlike both United Haulers and Davis) in which the state forces local citizens to make use of a government-provided service traditionally supplied through the private sector; (4) cases (like Davis) that involve state efforts to promote favored local interests by way of the taxing system; and (5) cases in which states seek to leverage the immunity afforded by United Haulers and

\textsuperscript{17} Id. at 1804-05.
\textsuperscript{18} Id. at 1811.
\textsuperscript{19} Id. (quoting United Haulers, 127 S. Ct. at 1795) (brackets in original).
\textsuperscript{20} Id. at 1809.
*Davis* (thus going beyond what both of those precedents directly authorize) by either (a) channeling work generated by state-self-promoting monopolies exclusively to local private-sector service providers or (b) coupling the operation of permissible state-self-promoting forced-use rules with user fees that far exceed charges reasonably calibrated to recapture program costs. As Part II shows, the range of issues raised by the Court’s recent decisions is sufficiently diverse that there can be no easy answer to the question: “Where will *United Haulers* take us?”

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

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

Third, courts must be ever-mindful that *United Haulers* and *Davis* reflect a doctrinal ambitiousness that the opinions in those cases tend to understate. Some might argue that the innovative nature of the state-self-promotion doctrine, and the Court’s unlabored endorsement of it, support its broad application going into the future. There is, however, a different – and, I believe, more proper – view to take. Given the deep roots of the dormant Commerce Clause rule and the vital service it has rendered to the nation, courts should hesitate to apply the *United Haulers*/*Davis* principle to validate discriminatory state programs absent powerful indications that the principle should control. At the least, courts should think long and hard before invoking that principle to uphold programs that operate primarily to benefit private market actors, rather than the state itself.

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

The analysis that follows showcases the breadth and complexity of the legal field touched by *United Haulers* and *Davis*. It also highlights the resulting need for judges to bring heightened care to their work in this area. In *United Haulers* and *Davis*, the Supreme Court itself did not wholly succeed in this regard, and one purpose of this article is to shed some follow-up light. My hope is that a point-by-point assessment will aid courts as they grapple with the now-still-nascent, but soon-to-be-much-litigated, state-self-promotion exception to the dormant Commerce Clause antidiscrimination rule.

I. THE CASES

A. Carbone

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

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23 Id. at 387.
control” ordinance, it mandated that all waste generated within Clarkstown be delivered to the new facility.\(^{24}\) The Court invalidated this program.\(^{25}\) Citing precedents such as *Foster-Fountain Packing Co. v. Haydel*\(^{26}\) and *Dean Milk Co. v. City of Madison*,\(^{27}\) the majority reasoned that the locality’s scheme represented “just one more instance of local processing requirements that we long have held invalid.”\(^{28}\) Because the Clarkstown ordinance conflicted with the core notion that states may not “hoard a local resource,” it discriminated against interstate commerce and therefore triggered “rigorous scrutiny.”\(^{29}\) Applying this standard, the Court determined that the town’s forced-use rule was not sustainable as a “financing measure” because the less restrictive alternative of government subsidization could effectively ensure the facility’s continued operation.\(^{30}\) The Court also rejected the town’s argument that compelled use of a single plant would best facilitate proper waste handling. According to the Court, that goal could be addressed through the less restrictive alternative of “uniform safety regulations” structured to “ensure that competitors . . . do not underprice the market by cutting corners.”\(^{31}\)

Along the way, the majority in *Carbone* noted that the local transfer station was operated by a “private” entity.\(^{32}\) In doing so, the Court (perhaps unwittingly) flagged the possibility that the principle of *Carbone* would not

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

\(^{25}\) *Id.* at 386. The majority opinion was written by Justice Kennedy and joined by Justices Stevens, Scalia, Thomas, and Ginsburg. *Id.* at 384. Justice O’Connor – who parted ways with the majority by relying on so-called *Pike* balancing analysis, rather than the more exacting antidiscrimination requirement (see infra text accompanying notes 103-104) – filed an opinion concurring in the judgment. *Id.* at 401 (O’Connor, J., concurring in the judgment). Justice Souter wrote the sole dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Blackmun. *Id.* at 410 (Souter, J., dissenting).

\(^{26}\) 278 U.S. 1 (1928) (invalidating rule that barred transit of shrimp from state unless heads and hulls had first been removed there).

\(^{27}\) 340 U.S. 349 (1950) (invalidating municipal ordinance that required processing and bottling of all milk sold within the city at a plant located within five miles of the city’s central square).

\(^{28}\) *Carbone*, 511 U.S. at 391-92.

\(^{29}\) *Id.* at 392. The Court in *Carbone* suggested that the “local resource” was solid waste, which the Court had identified as an article of commerce in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978) (noting, among other things, that “Congress has power to regulate the interstate movement of these wastes”). See *Carbone* 511 U.S. at 392.

\(^{30}\) *Carbone*, 511 U.S. at 393-94.

\(^{31}\) *Id.* at 393.

\(^{32}\) *Id.* at 385.
carry over to facilities owned and operated by the government itself.\textsuperscript{33} It was this question that came before the Justices in \textit{United Haulers}.\textsuperscript{34}

\textbf{B. United Haulers}

In the wake of \textit{Carbone}, lower courts encountered a spate of cases that involved efforts by state and local governments to force their residents to deal with designated local service providers.\textsuperscript{35} The rule at issue in \textit{United

\textsuperscript{33} See United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1794 n.3 (2007) (noting that both sides in \textit{United Haulers} made “much of the \textit{Carbone} majority’s various descriptions of the facility”).

\textsuperscript{34} We will see in due course that it is subject to debate whether the facility in \textit{United Haulers} was, on the better view, “operated” by the government itself. See infra notes 127-129 and accompanying text. All members of the Court, however, proceeded on the understanding that it was. Notably, Justice Souter in his dissent in \textit{Carbone} argued forcefully that: (1) the waste-transfer station involved in that case was more accurately characterized as public than private in nature; and (2) the dormant Commerce Clause presumption against local-processing requirements should not extend to services provided by the government itself. \textit{Carbone}, 511 U.S. at 419-23 (Souter, J., dissenting). The majority in \textit{Carbone} did not directly respond to either of these contentions.

\textsuperscript{35} See, e.g., Nat’l Solid Wastes Mgmt. Ass’n v. Daviess County, 434 F.3d 898 (6th Cir. 2006) (finding that county ordinance that required disposal of waste at the county’s landfill or transfer station was facially discriminatory against out-of-state interests), vacated, 127 S. Ct. 2294 (2007) (remanding for reconsideration in light of \textit{United Haulers}); On the Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001) (rejecting challenge to city regulation that mandated delivery of waste to city-owned landfill where plaintiff admitted it would have used other in-state landfill absent the restriction); Huish Detergents, Inc. v. Warren County, 214 F.3d 707 (6th Cir. 2000) (invalidating county agreement that established an exclusive contractor for collecting and processing solid waste as a per se violation of the dormant Commerce Clause); U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir. 2000) (invalidating flow control ordinance that compelled in-state waste disposal after applying \textit{Pike}-balancing analysis); Houlton Citizen’s Coal v. Town of Houlton, 175 F.3d 178 (1st Cir. 1999) (holding that town’s award of exclusive waste disposal contract obtained through a competitive bidding process did not violate the dormant Commerce Clause); Waste Mgmt., Inc. v. Metro. Gov’t of Nashville and Davidson County, 130 F.3d 731 (6th Cir. 1997) (holding that county’s waste flow control ordinance violated the Commerce Clause); Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County, 48 F.3d 701 (3d Cir. 1995) (holding that state’s flow control ordinance, which required that residual waste from mixed loads be returned to designated facilities unless facility was compensated for lost revenue, violated Commerce Clause; making no distinction between privately and publicly owned facilities); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995) (upholding town ordinance under which one private company was hired to pick up all commercial garbage and another company was hired to operate an incinerator); Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995) (remanding to the district court to determine whether out-of-state sites or interests were accorded a level playing field when they competed for contracts under municipal waste plans); SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) (invalidating flow control ordinance that required garbage to be disposed of at an incinerator where town charged a tipping fee); Waste Sys. Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993)
Haulers stemmed from a program developed by a government authority created by Oneida and Herkimer Counties in central New York State. In an effort to deal with a "solid waste crisis," the authority "agreed to purchase and develop facilities" for the processing of locally generated waste. In addition, the authority secured the counties’ approval to charge tipping fees that “significantly exceeded those charged for waste removal on the open market” and in return agreed “to do more than the average private waste disposer” by providing for the “recycling of 33 kinds of materials, as well as composting, household hazardous waste disposal, and a number of other services.” Most important, government officials mandated “that all solid waste generated within the Counties be delivered to the Authority’s processing sites.” The resemblance between United Haulers and Carbone was hard to miss, and Chief Justice Roberts emphasized this fact in writing for the Court. As he observed:

In … Carbone … this Court struck down under the Commerce Clause a flow control ordinance that forced haulers to deliver waste to a particular private processing

(namespace)

(invalidating flow control ordinance applicable to county-owned facility without discussing special arguments applicable to such facilities); Nat’l Solid Waste Mgmt. Ass’n v. Pine Belt Solid Waste Mgmt. Auth., 261 F. Supp. 2d 644 (S.D. Miss. 2003) (striking down municipal flow control ordinances that required delivery of local waste to publicly owned facilities), rev’d in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004); Coastal Carting Ltd. v. Broward County, 75 F. Supp. 2d 1350 (S.D. Fla. 1999) (holding that county ordinance, which restricted flow of waste generated in county to two named facilities in county, violated Commerce Clause); Randy’s Sanitation, Inc. v. Wright County, 65 F. Supp. 2d 1017 (D. Minn. 1999) (holding intrastate flow control ordinance violative of Commerce Clause); Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 922 F. Supp. 1396 (D. Minn. 1996) (invalidating ordinance requiring that all waste generated in county be delivered to designated facility), rev’d in part, 115 F.3d 1372 (8th Cir. 1997) (holding flow control ordinance violative of the Commerce Clause as applied to waste otherwise destined for transport out-of-state, but constitutional as applied to waste otherwise destined to stay within the state); Southcentral Penn. Waste Haulers Ass’n v. Bedford-Fulton-Huntingdon Solid Waste Auth., 877 F. Supp. 935, 942-43 (M.D. Pa. 1994) (holding that flow control ordinance violated Commerce Clause; rejecting publicly-owned/privately-owned distinction with limited analysis); Waste Recycling, Inc. v. Se. Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993) (invalidating flow-control ordinance that directed waste to publicly owned facility), aff’d per curiam, 29 F.3d 641 (11th Cir. 1994); Empire Sanitation Landfill, Inc. v. Pennsylvania, 684 A.2d 1047 (Pa. 1996) (holding flow control ordinance invalid under dormant Commerce Clause); Heier’s Trucking, Inc. v. Waupaca County, 569 N.W.2d 352 (Wis. Ct. App. 1997) (upholding order invalidating ordinance that directed delivery of recyclables to county-owned facility).

36 United Haulers, 127 S. Ct. at 1790.
37 Id. at 1791.
38 Id.
39 Id.
facility…. The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation.\textsuperscript{40}

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

1. The language of \textit{Carbone} suggested that its rule should apply in \textit{United Haulers}. To be sure, the Court in \textit{Carbone} had referred to the Clarkstown facility as “private” in nature.\textsuperscript{41} In doing so, however, the Court never signaled that this fact carried with it analytical significance – for example, by specifically reserving the public-entity question or by emphasizing the profit-seeking character of the favored entity. Instead, the \textit{Carbone} majority declared in broad terms that the “essential vice” of the Clarkstown ordinance was that it “bar[red] the import of the processing service” by “depriv[ing] out-of-state businesses of access to the local market.”\textsuperscript{42} Because the Oneida/Herkimer program created exactly the same conditions, it is not surprising that Justice Kennedy, who had authored the \textit{Carbone} opinion, found himself dissenting in \textit{United Haulers}.\textsuperscript{43}

2. In addition, the core reasoning of \textit{Carbone} gave rise to an \textit{a fortiori} argument in the \textit{United Haulers} case. In \textit{Carbone}, the majority had viewed the dispositive issue as whether past forced-use-rule cases, each of which involved a law that protected a multiplicity of local operators, applied when only a single entity received the benefit of the challenged rule.\textsuperscript{44} In rejecting this would-be distinction, the Court in \textit{Carbone} observed:

\begin{quote}
The only conceivable distinction . . . is that [this] flow control ordinance favors a single local proprietor. But this
\end{quote}

\begin{thebibliography}{99}
\bibitem{40} \textit{Id.} at 1790. \textit{See also id.} at 1804 (Alito, J., dissenting) (quoting this passage and endorsing the same conclusion).
\bibitem{41} \textit{See supra note} 32 and accompanying text.
\bibitem{42} \textit{C & A Carbone, Inc. v. Town of Clarkstown}, 511 U.S. 383, 392, 389 (1994). In addition, prior cases had given no indication that public ownership would make a difference in the local-processing context. \textit{Id.} at 415-16 (Souter, J., dissenting) (acknowledging, even while advocating public/private distinction, that earlier local-processing cases spoke broadly of rejecting state and local efforts “to impose an artificial rigidity on the economic pattern of the industry”).
\bibitem{43} \textit{See Stanley E. Cox, What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky as Case Study in the Waste Wars, 83 Ky. L. J.} 551, 616-17 (1995) (arguing, in the wake of \textit{Carbone}, that the important feature of flow control rules for dormant Commerce Clause purposes was the “shutting off [of] competition” and not the “nature of the facility” that receives the waste).
\bibitem{44} \textit{Carbone}, 511 U.S. at 391-92.
\end{thebibliography}
difference just makes the protectionist effect of the ordinance more acute. In Dean Milk, the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to the market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.45

This reasoning placed an ace in the hand of the challengers of the program at issue in United Haulers. They could forcefully argue that, if exclusion of all but one private processor heightens the difficulties posed by local-processing rules, then exclusion of all private processors with no exceptions whatsoever presents even graver concerns. Put another way, a single favored private processor at least might have out-of-state owners, affiliates, or sister operations. In contrast, a municipal facility necessarily involves none of these things because a municipality by definition is a subunit of the state itself.46

3. Fairness-based concerns bolstered the argument for invalidating the program challenged in United Haulers. In applying the Contracts Clause, for example, the Court has held that judicial vigilance should rise when a state makes favorable adjustments to its own (as opposed to private citizens’) preexisting contracts.47 This rule reflects the commonsense notion that judicial “deference . . . is not appropriate [when] the State’s self-interest is at stake.”48 Symmetry of logic suggested that Carbone should control in

45 Id. at 392.
46 One might respond (as my colleague Walter Hellerstein did when he read an earlier draft) that this argument is strained because states often act without the profit motive that drives the behavior of private entities. It is true, of course, that private entities do have profit motives, and that point (as we shall see) lies at the heart of the Court’s justification of the result reached in United Haulers. See infra notes 63-72 and accompanying text. In my view, however, this difference between public and private entities does not limit the force of the observation made in the text. Regardless of profit motives, a municipality-favoring forced-use rule more broadly precludes out-of-state participation in local markets than does the sort of private-entity-favoring rule struck down in Carbone. And that particular point favored application of the Carbone rule in United Haulers, even if other considerations (including with regard to profit motives) cut the other way.
United Haulers because that case likewise involved a local government’s self-dealing effort to promote its own financial undertaking.

4. Instrumentalist considerations raised additional doubts about the advisability of embracing the public-facility/private-facility distinction put forward in United Haulers. The difficulty was apparent: If governments can effectuate flow control programs only through the use of government facilities, an incentive to de-privatize important market operations is created. Justice Alito made much of this point in his United Haulers dissent, asserting that adoption of the private/public distinction would send “a bold and enticing message to local governments throughout the United States” that forced-use rules are “now permissible, so long as the enacting government excludes all private-sector participants from the local market.”

Especially within a Court that often seems eager to free up the operation of private markets, this consideration must have raised worries about upholding the Oneida/Herkimer program.

5. Pre-Carbone case law lent further support to the argument that the Court should find a constitutional violation in United Haulers. Of particular importance, an early dormant Commerce Clause case had invalidated a pre-Eighteenth-Amendment state law that required all local buyers of alcoholic beverages to deal only with government-owned stores. In addition, the

49 United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1808 (2007) (Alito, J., dissenting). In his own separate opinion, concurring only in the judgment, Justice Thomas voiced the same concern. Id. at 1802 (Thomas, J., concurring in the judgment) (suggesting that majority’s decision reflected a “policy-driven preference for government monopoly over privatization”).


51 See Vance v. W.A. Vandercook Co., 170 U.S. 438, 442-43 (1898); see also Scott v. Donald, 165 U.S. 58, 101 (1897). See generally Granholm v. Heald, 544 U.S. 460, 517-18 (2005) (Thomas, J., dissenting) (describing holdings of the Court’s alcohol cases in the following terms: “State monopolies that did not permit direct shipments to consumers... were thought to discriminate against out-of-state wholesalers and retailers”). Not surprisingly, Justice Alito relied on Vance in his United Haulers dissent. See United Haulers, 127 U.S. at 1806 (Alito, J., dissenting). In a footnote, Chief Justice Roberts replied to this argument by dismissing these cases as coming from a “bygone era” and involving application of only “the Court’s excruciatingly arcane pre-Prohibition precedents.” United Haulers, 127
Court’s prior local-processing decisions gave no hint that forced-use rules structured to advantage public entities differed for constitutional purposes from cases of favoritism shown to private market operators. In short, past

S. Ct. at 1795 n.5. Even in doing so, however, the Chief Justice acknowledged that “[t]he Vance Court … struck down a regulation on direct shipments to consumers for personal use,” id., and nowhere explained why that result was out of line with the Court’s modern dormant Commerce Clause precedents.

52 Accord United Haulers, 127 S. Ct. at 1806 (Alito, J., dissenting) (noting that nothing in the Court’s earlier decisions “ever suggested that discriminatory legislation favoring a state-owned enterprise is entitled to favorable treatment”). See e.g., Toomer v. Witsell, 334 U.S. 385, 403 (1948) (invalidating in-state processing requirement because its effect “is to divert to South Carolina employment and business which might otherwise go to [another state]”). Particularly significant in this regard was the Court’s ruling in Minnesota v. Barber, 136 U.S. 313 (1890), which (according to the majority in United Haulers) invalidated a “Minnesota law requiring any meat sold within the State to be examined by an in-state inspector.” United Haulers, 127 S. Ct. at 1794 n.4. Contrary to the implication of the Court in United Haulers, no Minnesota meat inspector involved in this program operated as a “private enterprise” in any meaningful sense. Rather, inspectors were “appointed under the laws of the . . . state” to “hold their offices for one year,” thus gaining “authority and jurisdiction” that was “territorially co-extensive” with the locality making the appointment. Barber, 136 U.S. at 317-18. In addition, each inspector had statutory powers both (1) to issue government-formulated certificates permitting slaughter and (2) to “order the immediate removal and destruction of . . . diseased animals.” Id. at 318-19. In short, these inspectors were more fairly characterized as “public” operators (and thus akin to the public operator involved in United Haulers) than as “private” operators (and thus akin to the private business involved in Carbone). In practical effect, the inspectors provided the enforcement arm of a government-run public health program, with which providers of livestock had to deal just as surely as providers of waste hauling services had to deal with the public transfer station established by Oneida and Herkimer Counties. And, for these reasons, the strong private/public distinction for local processing requirements developed in United Haulers is not easy to square with Barber. To be sure, Barber is a case of some complexity for two reasons. First, it appears that inspection fees were paid directly to individual inspectors, rather than to the government itself. Second, the Court seemed largely concerned in Barber with the law’s practical effect of causing out-of-state livestock producers to deal (in the wake of mandated local inspections) with local slaughtering houses, which were unquestionably private (rather than public) entities. Neither of these concerns, however, seems to provide a compelling basis for distinguishing Barber from United Haulers. With respect to the making of payments to local inspectors, the Court never suggested that this fact had any significance, and lending dispositive effect to the direct (rather than passed-through) nature of payments to inspectors would seem to glorify form over substance (especially given the fact that fee levels were set by the government). Barber, 136 U.S. at 318. With respect to the indirect benefiting of local slaughterers, the decisive fact remains that the forced-use rule itself concerned local inspectors. That this forced-use rule had ripple effects that significantly helped local private firms does not distinguish the case from United Haulers because there too the requirement that local businesses had to use a state-owned transfer station likewise had the inevitable consequence of channeling business to firms and individuals located in proximity to the government facility. In sum, from all appearances, Barber (which is well recognized and widely cited as the Court’s very first local-processing decision) involved a rule that concerned forced use of public (rather than private) cattle inspectors. Thus the holding of that case, perhaps even more so than the Court’s liquor monopoly case, which “had been
authority lent support to the idea of finding Carbone dispositive, rather than distinguishable, in United Haulers.\textsuperscript{53}

6. Finally, those pre-Carbone cases that did exempt state operations from dormant Commerce Clause scrutiny rested on a principle of law that was inapplicable in the United Haulers case. In a string of modern decisions, the Court has embraced the so-called “market-participant exception” to the dormant Commerce Clause.\textsuperscript{54} Under this doctrine, a state may favor its own citizens when it selects its own trading partners, even to the point of shunning out-of-staters altogether. In purchasing supplies or

cited by this Court in only two cases in the past 60 years,” United Haulers, 127 S. Ct. at 1786 n.5, cast a long shadow over the local governments’ effort to sell the public/private distinction in United Haulers.

\textsuperscript{53} One might try to read Packet Co. v. Catlettsburg, 105 U.S. (15 Otto) 559 (1881), to support the result reached in United Haulers. There, the Court upheld a municipal law that provided that any steamships landing in the town had to use a single, town-owned wharf, absent receipt of special permission. The principle of Packet Co., however, falls far short of controlling the question presented in United Haulers. To begin with, the Catlettsburg law posed far less of an impediment to interstate commerce because disgruntled ship operators could simply proceed past the town’s wharf without docking there at all (whereas haulers of waste generated in Oneida and Herkimer had no choice but to travel to, and deal with, the town-operated transfer station). Packet Co. thus did not involve an unavoidable forced stop on an interstate journey or anything resembling a local processing requirement; it involved instead a preference for one in-town facility over another in-town facility for those who chose to come into the town to conduct their business. In addition, the Court in Packet Co. took pains to emphasize that “the necessity is obvious of the existence in each port, where vessels as large as steamboats land ... of some authority to prescribe the places where this may be done,” particularly because of the need for “protection of the bank of a river on which a town is situated.” Id. at 562-63. Obviously, no such distinctive geographically tied consideration was present in United Haulers. See also Cooley v. Bd. of Wardens, 53 U.S (12 How.) 299, 319-20 (1851) (justifying requirement that ship operators use local pilot in navigating the port of Philadelphia because of intensely “local” nature of regulated activity).

hiring workers, for example, a state may choose to deal exclusively with local residents without encountering dormant Commerce Clause difficulties.\textsuperscript{55} United Haulers, however, did not involve only a program of local favoritism in the selection of potential state trading partners. Instead, it concerned the imposition of a legal mandate enforceable by way of fines and imprisonment under which trash producers and haulers had no choice but to deal with the government’s transfer station.\textsuperscript{56} For this reason, the public entity involved in United Haulers was not merely a market participant; it was also a market regulator.\textsuperscript{57} Many observers thus believed that the Court in that case would invoke principles typically applied to state entities when they act as market regulators, including the strong presumption that they may not exclude out-of-state businesses from access to in-state trade.\textsuperscript{58}

These six reasons suggested that Carbone would control United Haulers.\textsuperscript{59} Six members of the Court, however, took the opposite route. Justice Thomas declared that, despite his earlier vote to strike down the ordinance challenged in Carbone, he would no longer apply the dormant Commerce Clause principle to invalidate any state or local law, including the forced-use rule at work in central New York.\textsuperscript{60} In keeping with his own less categorical repudiation of preexisting dormant Commerce Clause


\textsuperscript{56} United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1791-92 (2007).

\textsuperscript{57} Indeed, in light of these facts, Oneida and Herkimer Counties did not even try to argue that their actions were sheltered by the market-participant rule. See United Haulers, 127 S. Ct. at 1807 (Alito, J., dissenting) (noting that petitioners conceded that they were “not asserting a defense under the market participant doctrine”).

\textsuperscript{58} In fact, an argument along these lines was forcefully advanced in Justice Alito’s United Haulers dissent. 127 S. Ct. at 1806-07 (Alito, J., dissenting) (quoting earlier decision in South-Central Timber Development, Inc. v. Wunicke, 467 U.S. 82, 93 (1984), in support of the proposition that dormant Commerce Clause immunity arises only when the state is “‘acting as a market participant, rather than as a market regulator’”).

\textsuperscript{59} See also Brannon P. Denning, Reconstructing the Dormant Commerce Clause Doctrine, 50 WM. & MARY L. REV. 417, 511 (2008) (critiquing result in United Haulers; asserting, among other things, that “[t]he problem with the Court’s rationales is that many of them have been deemed irrelevant in past cases, would prove too much if adopted, are beyond the Court’s institutional competence, or some combination of all three”).

\textsuperscript{60} United Haulers, 127 S. Ct. at 1799 (Thomas, J., concurring in the judgment) (basing this approach on the view that “[t]he negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice”). Justice Thomas had previously staked out this position in Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).
jurisprudence, Justice Scalia deemed the Oneida/Herkimer program permissible because it failed to qualify as “indistinguishable from [the] type of law previously held unconstitutional by the Court” under the dormancy doctrine. 61 The decisive opinion was authored by Chief Justice Roberts and joined in full by Justices Souter, Ginsburg and Breyer and in all but one part by Justice Scalia. 62 How could the Chief Justice navigate around the powerful arguments that Carbone spelled the end of the forced-use rule at issue in United Haulers? He did so by suggesting that two important considerations rendered Carbone distinguishable.

The first proffered distinction had a definitional ring. In essence, Chief Justice Roberts declared that a local processing requirement that favors the government itself does not (at least ordinarily) bear the earmarks of “protectionism,” which alone will trigger exacting dormant Commerce Clause review. 63 A measure of murkiness marked the Chief Justice’s reasoning on this point, although he did emphasize that “[l]aws favoring local government … may be directed toward any number of legitimate goals unrelated to protectionism.” 64 Chief Justice Roberts did not pause to consider that “any number of legitimate goals” could and did also underlie the private-facility-favoring program struck down in Carbone. 65 Even so,

61 United Haulers, 127 S. Ct. at 1798 (Scalia, J., concurring in part). For many years Justice Scalia has adhered to the position that the Court should not invoke the dormant Commerce Clause except “(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court.” Id. (quoting West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring in the judgment)).

62 Justice Scalia joined Parts I and Part II-A through Part II-C of the Chief Justice’s opinion, but did not join Part II-D, in which the majority subjected the challenged law to so-called Pike balancing analysis, a form of analysis that Justice Scalia has long eschewed. See, e.g., Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 895-98 (1988). In light of Justice Scalia’s action, all of the Chief Justice’s opinion that applies Pike balancing analysis to the challenged forced-use rule lacked five votes.

63 United Haulers, 127 S. Ct. at 1795-96. This no-protectionism rationale tracked directly the central rationale of Justice Souter’s dissent in Carbone. See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 420-21 (Souter, J., dissenting).

64 United Haulers, 127 S. Ct. at 1796. Even so,
the operative thought was clear enough: Because the government’s distinctive function is to pursue the public good, rather than to maximize profits, “favoring local government is by its nature different from favoring a particular private company.”

St. Tax Notes 877, 885 (2007) (“In the case of laws affecting public-public competition, however, the inference that the law serves some public good, other than entrenching the enacting officials from outside competition, is rather weaker.”); Adam Pekor, Note, Department of Revenue v. Davis: Why the Supreme Court Should Strike Down the Differential Tax Treatment of In-state and Out-of-state Municipal Bonds, 60 Tax Law. 807, 815 (2007) (discussing Davis: “[T]he precise purpose of the differential treatment is to distort the market to provide a disincentive for the purchase of out-of-state bonds, a quintessentially protectionist goal.”).

United Haulers, 127 S. Ct. at 1793. Addressing petitioner’s counsel, Justice Breyer made this same point during oral argument. As he stated: “[O]ne of the main purposes of the dormant Commerce Clause is to prevent protectionism. Protectionism is when a state favors its own producers . . . . [A] big argument in Carbone was, you aren’t favoring your own producers; well, we are at least favoring one. But now where the municipality is running it itself, no one is favored. So I don’t think it was an object of the Commerce Clause to prevent a state from favoring its own government.” Transcript of Oral Argument at 12, United Haulers, 127 S. Ct. 1786 (No. 05-1345). See also id. at 13 (Souter, J.) (similarly emphasizing that in Carbone “there was protectionism of the one licensee . . . that . . . was in it for the money” and that that licensee was in fact “protected handsomely”). The majority might have bolstered its no-protectionism logic by raising questions about the implications of a contrary ruling. Public entities, for example, routinely compel citizens to engage in certain activities with the government itself (for example, by recording deeds or filing legal documents) in facilities located within the state and operated by the government itself. Only the most out-of-the-box thinkers, however, would characterize such government practices as “protectionist.” Cf. Lefrancois v. Rhode Island, 669 F. Supp. 1204, 1212 (D.R.I. 1987) (refusing to distinguish state’s “monopoly in landfill services” from its “monopoly…in educational services, or in police and fire protection”). There exists one significant complication in viewing protectionism in terms of state promotion of “profit making” by local private firms. United Haulers, 127 S. Ct. 1795-96. See also C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 416 (1994) (Souter, J., dissenting) (distinguishing case as not involving “the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist”). The difficulty is that the Court has held that state discrimination with regard to the operations of private nonprofit organizations is fully subject to dormancy doctrine restraints. See Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 583 (1997). And, in doing so, the Court has rightly observed that “[w]e have already held that the dormant Commerce Clause is applicable to activities undertaken without the intention of earning a profit.” Id. at 581. The proper answer to this criticism may be to say that the support of local “profit making” is just one unacceptable form for promoting the economic interests of local private entities at the expense of outsiders. It violates the dormant Commerce Clause, for example, when the state hoards local resources for the benefit of private consumers, even though such hoarding does not involve “profit making” by favored local buyers, at least in the ordinary sense. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949). Indeed, in Camps Newfound/Owatonna, the Court invalidated a state law that operated in just this fashion by effectively channeling local camp services away from nonresidents to the advantage of local citizens. Put another way, the proper touchstone of protectionism, even after United Haulers and Davis, is not the promotion of profit-making by
The second distinction suggested by the Court sprang from the sort of political-process-based analysis that has long figured in the Court's work with the dormant Commerce Clause principle. Again, the Chief Justice's reasoning on this point might have profited from a sharper focus. He hit close to the mark, however, when he observed that special considerations are at work with "laws favoring private industry" (including "private industry" that takes the form of a single industry member, as in Carbone) because those laws are "often the product" of special-interest-favoring legislation. His aim proved even truer when he added that "[t]here is no reason to hand local businesses a victory they could not obtain through the political process." The key point is this: In Carbone, private firms (including out-of-state firms) threatened with harm by the proposed forced-use rule had to contend with the focused efforts of the self-interested waste-handling firm that stood on the brink of becoming a government-anointed monopoly provider of a much-needed service. In contrast, United Haulers presented a situation in which not even one private waste-handling firm had an interest in supporting the government’s plan, because the essential purpose of that plan was to exclude each and every such firm from the local market. For this reason it was easier – perhaps far easier – in United Haulers than in Carbone to justify judicial nonintervention. After all, if every possible private provider of waste transfer services would logically

private entities. Instead, that touchstone is more properly (and more broadly) viewed as focusing on the state’s advantaging of local private economic interests – whether in the form of profit-making or otherwise. What is more, the promotion of local economic interests may be viewed to include (for example) even the very general benefits that accrue to state residents from the exclusion of would-be residents. See Edwards v. California, 314 U.S. 160, 166 (1941) (striking down as "an unconstitutional barrier to interstate commerce" a California law that prohibited transporting an indigent person into California). In particular, the Chief Justice emphasized the proposition that "the most palpable harm imposed by the ordinances – more expensive trash removal – is likely to fall on the very people who voted for the laws," or, more precisely, "citizens and businesses of the Counties [made subject to] the costs of the ordinances." United Haulers, 127 S. Ct. at 1797. Again, the Chief Justice did not pause to explain how this consideration distinguished Carbone, which involved precisely the same economic consequences for local waste producers. The Chief Justice also failed to deal with the reality that, in virtually all cases involving dormant Commerce Clause problems, including the problems posed by protective tariffs, local citizens are broadly disadvantaged. See Laurence H. Tribe, American Constitutional Law § 6-5 (2d ed. 1988).

One illustration of the distortive effect that even a single favored entity might exert is provided by the New York steamboat monopoly struck down in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). For an account of the political shenanigans that gave rise to that monopoly, see Norman R. Williams, Gibbons, 79 N.Y.U. L. Rev. 1398, 1407-10 (2004).
oppose the government’s self-promoting monopolization of the field, it seems fair to conclude that private providers with a strong in-state presence (and resulting clout in local political circles) would provide an adequate “safeguard against . . . abuse” of similarly situated nonresident business interests.\footnote{United Haulers, 127 S. Ct. at 1797 n.7.}

Apart from laboring to distinguish \textit{Carbone}, the Court in \textit{United Haulers} wove into its analysis the idea that “[w]e should be particularly hesitant to interfere with the Counties’ efforts . . . because ‘waste disposal is both typically and traditionally a local government function.”\footnote{Id. at 1796.} This observation offered little help to the Court in its effort to sidestep \textit{Carbone} because that case likewise had involved a local government’s effort to deal with waste disposal. The Court’s focus on this point, however, raised a caution flag about over-hyping the holding of \textit{United Haulers}. By suggesting that the Court might confine the state-self-promotion exception to “traditional” state activities, the Court moved to allay concerns that its ruling would encourage deeply problematic state takeovers of historically private businesses.\footnote{See infra notes 215-217 and accompanying text (discussing state-hamburger-stand hypothetical).} In other words, the Court signaled that an important limitation might well keep the newly minted state-self-promotion doctrine from spinning out of control.

C. Davis

followed in all but two of the 43 states with income taxing systems – namely, the granting of a tax exemption for interest earned on local public bonds but not on any other bonds, including bonds issued by other states.\textsuperscript{76} In upholding Kentucky’s version of this exemption for a majority of the Court, Justice Souter explained:

It follows \textit{a fortiori} from \textit{United Haulers} that Kentucky must prevail. In \textit{United Haulers}, we explained that a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors. This logic applies with even greater force to laws favoring a State’s municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function, with [a] venerable history . . . . Bond proceeds are the way to shoulder the cardinal civic responsibilities listed in \textit{United Haulers}: protecting the health, safety, and welfare of citizens. It should go without saying that the apprehension in \textit{United Haulers} about ‘unprecedented … interference’ with a traditional government function is just as warranted here, where the Davises would have us invalidate a century-old taxing practice presently employed by 41 States and affirmatively supported by all of them.\textsuperscript{77}

In short, according to Justice Souter: “There is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being ‘substantially similar’ to the other bond issuers in the market.”\textsuperscript{78}

\textsuperscript{76} \textit{Dep’t of Revenue v. Davis}, 128 S. Ct. 1801, 1807 n.7 (2008). In addition, to the 41 income-tax-imposing states that discriminate outright against out-of-state bonds, Utah exempts out-of-state bond interest only for bonds issued by states that do not tax Utah bonds. \textit{Id}. Indiana is the sole state in the Union that exempts all state-issued-bond interest from income taxation. \textit{Id}.

\textsuperscript{77} \textit{Id}. at 1810-11 (citations omitted).

\textsuperscript{78} \textit{Id}. at 1811.
The Court’s confident reliance on *United Haulers* in *Davis* deflected attention from significant differences between the two cases. Indeed, the Court in *Davis* applied the *United Haulers* rule even though it might have distinguished that case on at least five grounds. First, the Court might have said that the state-favoring rule in *Davis* did discriminate against “substantially similar” market competitors because the entities primarily disadvantaged by Kentucky were (like Kentucky itself) state bond issuers, rather than (as in *United Haulers*) both in-state and out-of-state private waste-handling firms, which had been treated identically. Second, the Court might have reasoned that the state in *Davis* had a weaker claim for special treatment because it had simply borrowed money and had not (as in *United Haulers*) constructed and paid for an elaborate facility to conduct day-to-day government functions commonly undertaken by way of monopoly. Third, the *United Haulers* program may have provided a distinctively effective tool to “internalize external . . . costs [in the form of environmental degradation] that private firms would otherwise often impose on the public”; no similar externalities-based justification for the government action, or comparably focused public policy goal, was present in the *Davis* case. Fourth, Kentucky’s stark tax-based discrimination against nonlocal bonds might have been seen as distinctively problematic on the ground that it operated as a *de facto* protective tariff, the “paradigmatic

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79 See Yale & Galle, *supra* note 65, at 883; see also Brief for Respondents at 3, *Davis*, 128 S. Ct. 1801 (No. 06-666) (arguing that “Kentucky’s municipal bonds are exactly like those issued by other states”); *id.* at 20 (describing Kentucky’s argument that it “is not substantially similar to any other bond issuer” as “meritless’); *id.* at 20-25 (arguing that Kentucky’s law does discriminate against similar entities); Brief of Alan D. Viard et al. as Amici Curiae Supporting Respondents, *Davis*, 128 S. Ct. 1801 (No. 06-666) (“By contrast, the selective municipal bond tax exemption discriminates directly against interstate commerce alone, creating a tax exemption that applies only to within-state municipal bond holdings. *United Haulers* is inapposite.”); Pekor, *supra* note 65, at 814 (“Unlike *United Haulers*, in *Davis*, ‘substantially similar entities’ are concerned.”). The possibility of distinguishing the case from *United Haulers* on this ground was also on Chief Justice Roberts’s mind during oral argument. Transcript of Oral Argument at 10, *Davis*, 128 S. Ct. 1801 (No. 06-666) (raising question whether *Davis* could be distinguished from *United Haulers* based on the fact that Kentucky was competing against not only private bonds but also other states’ bonds in the municipal bond market). The term “state” is used here, and elsewhere as well, to embrace both the state itself and its political subdivisions. Virtually all “state and local” bonds are in fact bonds issued by political subdivisions of states – a fact that has led to their common characterization as “municipal bonds.”


81 See Brief for Respondents, *supra* note 79, at 31 (noting “pressing social problems” that were in play in *United Haulers*); see also Harvey & Harvey, Inc. v. County of Westchester, 68 F.3d 788, 803 (3d Cir. 1995) (noting that state “police powers … are at their strongest in the health and safety area”).
example” of a dormant Commerce Clause violation. Finally, the political-process justification for judicial intervention seemed far stronger in Davis than in United Haulers. In Davis, after all, the disadvantaged public bond issuers were non-voting out-of-state political entities; all those entities that imposed income taxes (except one) had a self-interest in protecting their own discriminatory bond-taxing programs; and few local voters had any reason to lobby for removal of the discriminatory exemption because most of them held in-state bonds that were tax-advantaged, rather than out-of-state bonds that were not.

The bottom line is that the Court could have decided Davis in ways that would have confined the operation of the state-self-promotion rule to cases that closely resembled United Haulers itself. The Court, however, eschewed this course of action, thus affording to its recently created dormant Commerce Clause immunity an extended reach. At the same time, the Court in Davis followed the lead of United Haulers by emphasizing the existence of limits on the state-self-promotion doctrine. The central question left behind by these decisions concerns what those limits are.

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83 West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994). The Davises repeatedly characterized the Kentucky tax scheme as a tariff. Brief for Respondents, supra note 79, at 1 (“Kentucky’s law operates as a tariff.”); id. at 8 (“[T]he tax scheme operates as a tariff by burdening and exploiting the privately owned national municipal bond market.”); id. at 18 (describing the tax scheme as “an unconstitutional burden equivalent to a tariff”). See also Brief of Alan D. Viard, supra note 79, at 12 (“[T]he selective municipal tax bond exemption operates as a discriminatory tariff.”); Viard, Supreme Court Upholds Balkanization, supra note 75, at 892 (characterizing the Kentucky system as a “trade-obstructing subsidy” coupled with a “trade-neutral tax,” resulting in a “trade-obstructing tariff on imported bonds”).

84 See generally supra notes 67-72 and accompanying text (discussing political process basis of dormant Commerce Clause review).

85 See Brief for Respondents, supra note 79, at 33 (noting that “out-of-state issuers and sellers bear the most palpable harm” and “have no voice in the Kentucky legislature”); Yale & Galle, supra note 65, at 886 (suggesting that “out-of-state municipal bond issuers have no concentrated, similarly burdened in-state constituency to make their case for them”).

86 See Demning, supra note 59, at 512-13 (arguing that “extension” of United Haulers in Davis was “inappropriate” and that “Davis was a hard case that the Court decided as if it were an easy one”); Yale & Galle, supra note 65, at 878-79 (arguing, in a pre-Davis article, that a decision for the state in the case would be a “significant extension” of United Haulers). But see Leading Cases, supra note 15, at 281 (“In Davis, the Court rightly identified the United Haulers holding as providing clear grounds for reversal.”).

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

88 See Leading Cases, supra note 15, at 285 n.81 (2008) (“[B]ecause the Court has not explicitly defined the outer bounds of the [government entity] exemption’s scope, future application of the exemption will be complicated when the cases do not neatly align with Davis and United Haulers.”).
II. THE CONTOURS OF THE STATE-Self-PROMOTION DOCTRINE

Even standing by themselves, United Haulers and Davis evidence the rich variety of contexts in which the state-self-promotion rule will come into play. United Haulers, after all, involved a forced-use rule attached to two towns’ operation of a highly localized waste transfer station, whereas Davis involved a selective exemption that figures in more than 40 states’ income taxing systems, thus shaping the operation of a $2 trillion industry. Are there other legal contexts in which the state-self-promotion exception will rear its head? The answer to this question is an emphatic “yes”; indeed, there are at least five types of cases in which courts will have to wrestle with the implications of the Court’s new doctrine. Those cases involve:

1. local processing requirements connected up with the delivery of traditional public services (including waste-handling services) delivered either by the government itself or by way of collaborative public/private joint ventures;
2. the operation of natural gas, electric, or other “utilities” – whether run by the government or by private firms – that secure exclusive rights to deal with consumers located in a designated service area;
3. rules that require local citizens to deal with the state as a purveyor of goods or services ordinarily supplied by the private sector;
4. the imposition of tax rules designed to advantage in-state business operations connected up with the state itself; and
5. efforts to leverage the immunity afforded to states by the state-self-promotion doctrine by either (a) discriminatorily channeling business conducted by a state monopoly to in-state private firms under the market-participant exception to the dormant Commerce Clause, or (b) combining with a forced-use rule authorized by United Haulers the imposition of user fees in amounts far beyond what are needed to recapture program costs.

Each of these categories of cases will raise knotty questions, and I seek to answer some of those questions in the pages that follow. More important than any answers I offer, however, are the questions themselves. The large number of those questions reveals the practical importance of the doctrine forged in United Haulers and Davis. And the difficulty of working through those questions highlights the rich mix of subtleties to which that doctrine has given rise. We turn now to the nature of those subtleties, including the many ways in which the state-self-promotion exception will interact with pre-existing features of the dormant Commerce Clause landscape.

89 See supra note 76 and accompanying text.
90 See Michael, supra note 75, at 753.
A. Local Processing Requirements and Government Service Providers

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

1. Traditional Public Undertakings. United Haulers stands unmistakably for one proposition: The “virtually per se” prohibition on “local processing requirements”91 does not apply when the favored processor is the government itself.92 As we have seen (and will soon consider further), an important limitation on this proposition may apply when the processing service involves a nontraditional government activity.93 In traditional-function cases, however, the effect of United Haulers is clear. If, for example, a local government owns and operates a fleet of garbage trucks, and also requires that all local waste must be picked up by them, United Haulers will immunize the practice from a discrimination-based challenge mounted by out-of-state carriers.94 In such a case, even if no local transfer station is in the picture, courts will say that the initial handling of trash is just the sort of activity that United Haulers permits local governments to monopolize to the exclusion of nonresident firms.95

Are there other waste-related contexts in which United Haulers and Davis will shelter forced-use rules from Commerce Clause attack? One possibility involves liquid waste. A local government, for example, might

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92 For the moment, we are putting to one side monopolization of the delivery of goods, a subject considered in Part II.B below. See infra notes 161-178 and accompanying text.
93 See infra notes 208-232 and accompanying text.
94 Note that this rule may not impose a “local processing requirement” at all, because it does not require activity in the locality that might otherwise occur elsewhere; see infra note 100; the important point, however, is that even if the local processing requirement label applies (or this rule imposes an otherwise problematic forced-use rule), United Haulers will shelter it from constitutional attack.
95 Indeed, the rule of United Haulers would seem to apply a fortiori, because the actual pickup of trash seems to fit the “traditional government function label” even more readily than the operation of a modern recycling-centered waste-transfer station. See generally infra notes 208-232 and accompanying notes (discussing nontraditional function cases).
require the delivery of environmentally problematic liquids – such as phosphates or delactosed whey – to a publicly owned local sewage treatment facility even though more attractive processing prices are offered by out-of-state firms. There is no reason why United Haulers will not apply in this context. Because liquid waste is not functionally different from solid waste for Commerce Clause purposes, the state-self-promotion doctrine should safeguard the rule from discrimination-based constitutional attack.

As Davis reveals, the principle of United Haulers reaches beyond cases that involve waste disposal. Indeed, forced-use rules connected up with any sort of government activity – at least so long as that activity qualifies as traditionally public in character – should find protection under the state-self-promotion principle. But just how encompassing is the protection that principle provides? Consider this case: A local government owns and operates a natural gas utility. It does not require all local buyers of natural gas to purchase product from it. It does, however, require all private sellers of natural gas to route their product through its lines, for which service it charges a handsome fee. If an out-of-state direct seller (such as a seller with its own preexisting lines) were to challenge this mandate, how would a court analyze the case? It might sustain the out-of-state seller’s discrimination-based attack by deeming United Haulers and Davis beside the point on the ground that the state's action is not “traditional” in character. On the other hand, it might reject this result on the logic that the challenged rule in its nature involves no discrimination against interstate commerce, wholly apart from the operation of the state-self-promotion immunity.

97 In reality, the natural-gas industry is subject to an intricate web of federal controls. See, e.g., 10 C.F.R. § 580.01 et seq. (2008) (setting forth federal rules regulating natural gas industry). The discussion that follows ignores altogether this important statutory and regulatory overlay, so as to focus attention solely on governing dormant Commerce Clause principles.
98 What if it did? For an analysis of this question, see infra notes 161-178 and accompanying text.
99 See infra notes 209-214 and accompanying text.
100 This line of reasoning presents a matter of some complexity. At first blush, there appears to be no discrimination against interstate commerce because both in-state and out-of-state operators are equally subject to the forced-use rule. On the other hand, this same circumstance marks past local-processing requirement cases that the Court has placed in the discrimination camp. See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389-91 (1994). In Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), for example, the Court struck down an ordinance that required the pasteurization of all locally sold milk, whether produced inside or outside the state, within five miles of the city’s center. See also Minnesota v. Barber, 136 U.S. 313 (1890) (requiring local inspection of all beef cattle prior to butchering). There is, however, a potential distinction between Dean Milk and our
What if, however, the court eschews both of these approaches, finding that (1) the “traditional government activity” label applies (or that the “nontraditional” nature of the government activity is legally inconsequential)\textsuperscript{101} and (2) there is discrimination against interstate commerce unless the state-self-promotion doctrine compels the opposite conclusion?\textsuperscript{102} In these circumstances, the court would have little choice but to find that that doctrine does apply and thus precludes strict dormant Commerce Clause review. After all, if no discrimination exists when the state favors its own facility in moving along solid waste, it is hard to see how discrimination can exist when the state favors its own facility in moving along natural gas.

But wait! This hypothetical brings into focus a key, though easily overlooked, limitation on the \textit{United Haulers} rule. The salient point is that the Court did not declare the case to be over once it determined that the Oneida-Herkimer program involved no discrimination against interstate commerce. Rather, having found no discrimination, a controlling plurality of Justices went on to apply the “\textit{Pike} balancing test,”\textsuperscript{103} inquiring whether “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”\textsuperscript{104} In the end, the program at issue in

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{101}]  
\item For an argument that the Court may ultimately reject the traditional-activity/nontraditional-activity distinction, see infra notes 218-232 and accompanying text.
\item See supra note 94 and accompanying text.
\item United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1797 (2007) (quoting \textit{Pike} case).
\end{enumerate}
\end{footnotesize}
United Haulers passed muster under Pike for two reasons. First, in the plurality’s view, the burden that the program placed on private interstate operators was not great, particularly when compared to the burden imposed on similarly situated in-staters.\(^\text{105}\) Second, the handling of all waste at one municipally owned processing facility had salutary effects because it facilitated the sort of close monitoring that would best ensure the environmentally sensitive disposal of local waste.\(^\text{106}\)

As this analysis indicates, Pike-based analysis is always fact-sensitive. And our hypothetical natural-gas-pipes case might well produce a different set of weights to be placed on the Pike-balancing scales. The record in that case might reveal, for example, that not one private in-state firm sells natural gas directly to local users, so that only interstate operators bear the burden of the city’s you-must-use-our-pipes rule. The evidence might also show that use of the government’s pipes in no way mitigates environmental or other dangers because the private seller’s own pipes are newer, better and safer than the publicly owned pipes through which the government seeks to route the out-of-state seller’s gas. On these facts, even in the absence of discrimination against interstate commerce, the Court might well detect a dormant Commerce Clause violation under Pike.\(^\text{107}\) What is more, this same possibility exists in all state-self-promotion cases, including cases that involve state supply of even the most traditional forms of government service. The key point is that the state-self-promotion “exception” provides an exception only to the antidiscrimination component of the dormant Commerce Clause analysis. It does not provide a wholesale exception that negates dormant Commerce Clause scrutiny altogether. Put another way, United Haulers itself established an important limit on the dormant Commerce Clause immunity it recognized: Whenever a court finds that a challenged regulation does not involve discrimination under the state-self-

\(^{105}\) Id. The Court noted in this regard that: “After years of discovery, both the Magistrate Judge and the District Court could not detect any disparate impact on out-of-state as opposed to in-state businesses.” Id. This observation highlights a basic, but seldom noticed, question about how Pike balancing should work in the great run of cases to which it applies. In particular, what if the absolute impact of a state rule on interstate commerce is great but not “disparate”? In such a case is there any burden on interstate commerce for Pike balancing purposes? A substantial burden? In United Haulers the Court sidestepped these complexities by finding “it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinance.” Id.

\(^{106}\) Id. at 1798.

\(^{107}\) Of course, there may be other government interests in the picture – such as the desire to avoid the construction and maintenance of duplicative lines under city streets. If the seller has preexisting lines that are in good repair, however, this interest would seem to be weak.
promotion principle, it must nevertheless go on to inquire whether that regulation should fall victim to *Pike* balancing review.\textsuperscript{108}

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

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

The Court concluded its analysis by observing that “the rule in *Pike* was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the Davises request” by advocating application of “a federal rule to throw out the system of financing municipal improvements throughout most of the United States.”\textsuperscript{115}

This is not the place to consider in detail the Court’s treatment of the *Pike*-balancing in the *Davis* case. Indeed, that analysis may portend such massive doctrinal upheaval that it is sure to trigger expansive freestanding

\textsuperscript{108} See *United Haulers*, 127 S. Ct. at 1797 (applying *Pike* balancing test after determining that the ordinances at issue “do not discriminate against interstate commerce”).

\textsuperscript{109} See *Viard*, *Supreme Court Upholds Balkanization*, supra note 75, at 893 (characterizing the *Pike* balancing performed in *Davis* as “no actual balancing at all”); *id.* at 894-95 (noting Court’s willingness in *Davis* “to dispense with *Pike* balancing in the normal sense”).

\textsuperscript{110} *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1817 (2008).

\textsuperscript{111} *Id.* at 1818.

\textsuperscript{112} *Id.*

\textsuperscript{113} *Id.* at 1817.

\textsuperscript{114} *Id.* at 1818.

\textsuperscript{115} *Id.* at 1819.
treatments in the scholarly literature. For now it suffices to observe that: (1) from all appearances, the Court in Davis forged a new and highly indeterminate institutional-incompetence limitation on Pike-balancing review; and (2) although that limitation may ultimately be read to cut across all Pike balancing cases, it applies at least in the state-self-promotion context, because that was the very context that Davis itself involved. It is unclear what the future holds for the Court's institutional-leeriness twist on the Pike methodology. Perhaps, in keeping with the longstanding counsel of Justice Scalia, the Court has inched closer to holding that intractable analytical problems warrant abandoning Pike balancing altogether. Perhaps the Court, on reflection, will determine that its institutional-incompetence rhetoric in Davis did not in actuality alter its past approach to

\[\text{116} \text{ In an important piece of work, Professor Denning has already begun to explore these matters. See Denning, supra note 59, at 453-59 (discussing the breakdown of Pike balancing analysis).} \]


\[\text{118} \text{ See Dep’t of Revenue v. Davis, 128 S. Ct. 1801, 1821 (2008) (Scalia, J., concurring in part) (“I would abandon the Pike-balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them.”); Bendix Autolite Corp. v. Midwesco Enters. Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (pushing for the “abandon[ment] [of] the ‘balancing’ approach to . . . negative Commerce Clause cases”); Denning, supra note 59, at 455-56 (encapsulating critiques of Justices Scalia and Thomas directed at Pike balancing). Professor Denning has gone so far as to claim that, for all practical purposes, the Court already has abandoned Pike balancing. See id. at 493 (supporting thesis of “sub silentio” abandonment). Going one step further, he also asserts that the Court’s rejection of the methodology is a good idea. Id. at 477, 493-94 (noting that he too “would abandon Pike balancing”); id. at 493-94 (developing arguments against balancing). At the same time, Professor Denning acknowledges the need for the Court to go beyond merely invalidating facially discriminatory statutes and to strike down laws that discriminate in purpose or effect. Id. at 500. What Professor Denning may fail to fully consider is the potential value of Pike balancing as a practical mechanism to “smoke out” problems of discrimination, see id. at 502, that lurk in superficially neutral statutes. See id. at 500 (criticizing Pike analysis even while recognizing that “[p]olicing effects and purpose are necessary to ensure the operative proposition is optimally enforced – or at least not grossly underenforced because of the ease of evasion on the part of state and local governments”). In fact, Pike balancing is defensible on this ground, see CORNEN, supra note 8, at 254 n.3, and two separate considerations suggest why it is not likely to be over-utilized in this process. First, the test on its face permits judicial intervention only if burdens on interstate commerce “clearly” exceed the state’s justification for the challenged law. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Second, as Professor Denning himself highlights, “[a] majority of the Court has not struck down a state or local law using Pike balancing in over twenty-five years.” Denning, supra note 59, at 493. Under these circumstances, concerns about the ready abusability of Pike review seem – to say the least – greatly exaggerated.} \]
Pike at all.\textsuperscript{119} Or perhaps the Court will move in the future to rein in its institutional-incompetence initiative by declaring it applicable (1) only in the state-self-promotion context, (2) only to state tax cases,\textsuperscript{120} (3) only to distinctly high-stakes programs already in place “throughout most of the United States,”\textsuperscript{121} or (4) only to cases involving some combination of these features. In the meantime, one thing is certain. In every dormant Commerce Clause state-self-promotion case, the government will defend the challenged practice against Pike-based attack by arguing that courts are “institutionally unsuited” to weigh the competing interests at stake.

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

2. Public/Private Joint Arrangements. Carbone holds that a local government discriminates against interstate commerce when it forces local citizens to use a waste transfer station owned and operated by a private entity.\textsuperscript{122} United Haulers holds that a local government does not discriminate against interstate commerce when it forces local citizens to use a waste transfer station owned and operated by it.\textsuperscript{123} A key question left behind by the cases concerns 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.\textsuperscript{124}

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

\textsuperscript{120} Cf. infra note 240 and accompanying text (noting that Pike analysis seems inapplicable in the tax context).

\textsuperscript{121} Davis, 128 S. Ct. at 1819.

\textsuperscript{122} See supra notes 25-32 and accompanying text.

\textsuperscript{123} See supra notes 59-74 and accompanying text.

\textsuperscript{124} Notably, this question was very much on the Justices' minds during oral argument in the United Haulers case. See, e.g., Transcript of Oral Argument, supra note 66, at 28, 52 (Chief Justice Roberts) (questioning the impact of joint public/private ownership on proper
As it turns out, the Court already has provided a partial answer to this question, even though it has not paused to address it in a direct and specific way. Why? Because both Carbone and United Haulers themselves involved particular forms of public/private collaborations. In Carbone, the Court applied the antidiscrimination rule even though the local government was the instigator and overseer of the entire waste-transfer-station project, even though it guaranteed a minimum revenue stream to the private operator, and even though it held the right to purchase the facility for $1 after five years of operation. Relying on these facts, the dissenters in Carbone argued that the waste transfer station was “essentially a municipal facility” and that the challenged forced-use rule should escape dormant Commerce Clause scrutiny for that reason.\(^{125}\) The majority in Carbone never wrestled with this analysis. It did, however, characterize the advantaged program operator as “private” on its way to finding a dormant Commerce Clause violation.\(^{126}\)

United Haulers also involved a public/private collaboration because in that case government owners of the waste facilities did not alone oversee their day-to-day operations. Rather, municipal officials arranged by contract for a private company to provide operational services at the primary government-owned waste transfer facility to which waste had to flow.\(^{127}\) Notwithstanding this fact, the Court distinguished the case from Carbone on the ground that the facility was “owned and operated” by the government.\(^{128}\)


\(^{126}\) See supra note 32 and accompanying text.

\(^{127}\) The government itself oversaw the overall waste program and operated a recycling center, a waste-energy facility, and two other specialized waste-receiving centers. It did not, however, operate the primary facility at issue in the case. Petition for Writ of Certiorari at 5, United Haulers, 127 S. Ct. 1786 (No. 05-1345) (noting that “the Authority contracted with a private entity . . .  for the design, construction, and operation of a transfer station” while also describing other Authority facilities, including “an incinerator, a recycling facility, an ash landfill, [and] a green waste compost facility”); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 250 (2d Cir. 2001) (“The Authority owns all five designated facilities and operates all but the Utica Transfer Station.”), aff’d, 550 U.S. 330 (2007); Transcript of Oral Argument, supra note 66, at 52 (Ginsburg, J., noting that “these transfer stations are constructed and operated by a private company”). According to the petitioners’ brief, “the Authority contracted with private entities” to operate the transfer station. Brief for Petitioners at 4 n.1, United Haulers, 127 S. Ct. 1786 (No. 05-1345).

\(^{128}\) United Haulers, 127 S. Ct. at 1790.
Indeed, the Court never even paused to consider whether the presence of an operating contract with a private firm might remove the case from coverage by the state-self-promotion rule.\textsuperscript{129}

Based on this history, it seems settled after United Haulers that the hiring of a private firm to operate a facility that is owned, financed and generally overseen by the government, as part of an overarching waste-handling program, does not suffice to bring the Carbone rule into play.\textsuperscript{130}

On the other hand, Carbone itself indicates that the United Haulers rule will not apply even when the target of the constitutional challenge can make a powerful claim of \textit{de facto} government ownership of the favored facility due to (among other things) a near-term right to acquire the facility for a nominal sum.\textsuperscript{131} The question thus arises: Where does all of this leave us?

Answering this question is of great importance because the use of public/private joint arrangements is commonplace in the real world.\textsuperscript{132}

Consider, for example, the following cases and the issues they present:

(1) By contract, a city and a private firm agree as follows: The firm at its own expense will build a waste-handling facility that the city will own in fee simple from day one. The firm will operate the facility for five years and receive all tipping fees generated during that period as the means of paying for the firm's construction and operations work. If the authority

\textsuperscript{129} Notably, the challengers – perhaps for tactical reasons – never argued that Carbone should control on the theory that the transfer station was privately, and not publicly, operated; nor did the Court make note of this complicating circumstance on its way to upholding the Oneida-Herkimer flow control rule. Notwithstanding these omissions, it is hard to believe that the Court will hereafter say that United Haulers was wrongly decided because no one noticed that, in that case, a private firm played a key role in operating the supposedly “public facility.” \textit{Id.} at 1795.

\textsuperscript{130} It follows \textit{a fortiori} that many other forms of interaction with private enterprises will not preclude invocation of the United Haulers rule. Publicly operated transfer stations, for example, will routinely enter into contracts with private entities to provide it with construction, engineering, and legal services. And, at the very least, the government, in operating its facility, will contract with local employees who gain an advantage by way of the forced-use rule over workers employed (or potentially employed) by would-be waste-handling competitors in other states. See United Haulers, 127 S. Ct. at 1807 (Alito, J., dissenting) (“Discrimination in favor of an in-state government facility serves ‘local economic interests,’ inuring to the benefit of local residents who are employed by the facility, local businesses that supply the facility with goods and services, and local workers employed by such businesses.” (citations omitted)). Plainly, under the principle of United Haulers, these sorts of interactions do not strip a facility owned and operated by the government of public status for purposes of the state-self-promotion rule.

\textsuperscript{131} See supra note 125 and accompanying text.

\textsuperscript{132} See, e.g., Zelinsky, supra note 117, at 25 (noting that “public agencies of the modern state are frequently intertwined in their activities with private firms”).
requires local citizens to send all waste to this facility, does Carbone or United Haulers control?\footnote{See Transcript of Oral Argument, supra note 66, at 13-14 (Souter, J.) (noting that issue presented if state owned the facility, but permitted private entity to operate and profit from it, was “a third case” and “not the question we have here”).}

(2) A local authority shares ownership of a local transfer station, and the benefit of the profits it generates, on a 50-50 basis with a private waste-handling firm that oversees day-to-day facility operations. As part of this arrangement, the city requires the delivery of all local waste to the transfer station. On these facts, does the dormant Commerce Clause antidiscrimination rule apply?\footnote{The difficulty in deciding whether protectionism is at work in this situation was on display during oral argument in the United Haulers case. Compare Transcript of Oral Argument, supra note 66, at 29 (setting forth assertion of government counsel that a 50-50 venture would not be subject to the Carbone rule because the “government is actually in the transaction … it’s taking risks … it’s spending public money,” while also conceding that “I don’t think the answer is automatic one way or the other”), with id. (Souter, J., suggesting that “the better answer” might be that “it’s protectionism” unless “the government’s going to do it the way the government’s doing it in your case” – namely, with a “100 percent government” operation); see also id. at 52 (setting forth statement of counsel for New York that the “50-50 facility” case presents “a hard question”).}

(3) A city owns and operates a waste transfer facility, but also licenses a local private firm that owns and operates its own trucks to handle waste pick-up from local residents in such a way that those residents must deal with that private firm and pay it city-approved charges. Can the government successfully argue that it is a joint-venturer in providing “an integrated package of waste disposal services,”\footnote{United Haulers, 127 S. Ct. at 1798.} so that its forced-use rule with regard to garbage pick-up can evade discrimination-based strict-scrutiny analysis under the state-self-promotion rule?\footnote{In United Haulers, for example, under state law, the government authority was “empowered to collect, process, and dispose of solid waste generated in the Counties.” Id. at 1791. The existence of such a law might be invoked to bolster the claim that the local waste business should be viewed as a unitary whole of which waste collection constitutes only one part.}

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

Four separate considerations suggest why this is so. First, as we have seen, in Carbone itself the town of Clarkstown (among other things) held an
option to buy the facility for $1 after five years.\textsuperscript{137} In light of this fact, it was entirely plausible to say that the town owned the facility for functional purposes, while authorizing its use by the private operator for a limited time.\textsuperscript{138} The Court, however, declined to cast \textit{Carbone} as a case that involved a public facility and in effect focused solely on the role of the town’s private co-venturer.\textsuperscript{139} Against this backdrop, it would make little sense to view the \textit{Carbone} rule as generally inapplicable in cases that involve such a high level of private firm involvement that the private firm participates directly in program profits.\textsuperscript{140}

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

Third, the reasoning of \textit{United Haulers} points in the same direction. The Court in that case relied on the propositions that (1) favoring a public (as

\textsuperscript{138} See \textit{United Haulers}, 127 S. Ct. at 1804-05 (Alito, J., dissenting) (citing this fact and others to show that in \textit{Carbone} “the preferred facility was for all practical purposes owned by the municipality” and properly viewed as a “municipal facility” due to the local government’s role with respect to it). \textit{See also} Nat’l Solid Wastes Mgmt. Ass’n v. Daviess County, 434 F.3d 898, 912 (6th Cir. 2006) (going so far as to conclude that facility in \textit{Carbone} was “quite clearly owned in fact by the municipality”), \textit{vacated and remanded}, 127 S. Ct. 2294 (2007); Denning, \textit{supra} note 59, at 469 (“[T]here is much less to this publicly/privately owned distinction than meets the eye [because] the Clarkstown facility was built and initially operated by a private firm, but was to be ‘sold’ to the City for a nominal amount after a period of years during which the private firm would recoup its investment.”).
\textsuperscript{139} Indeed, the majority lent so much weight to the private nature of the co-venturer that it never even considered the dissenters’ argument that the operation was public in nature. \textit{See supra} notes 125-126 and accompanying text.
\textsuperscript{140} Indeed, the dissenting Justices in \textit{Carbone} cited these same facts in specifically arguing that the waste transfer station at issue in that case was “essentially a municipal facility” and should be so treated for dormant Commerce Clause purposes. \textit{Carbone}, 511 U.S. at 419 (Souter, J., dissenting). Notably, the majority in \textit{United Haulers} read \textit{Carbone} as rejecting this characterization, notwithstanding the significant participation of the government in its creation, ownership, operation and success. \textit{United Haulers}, 127 S. Ct. at 1793-95 (asserting that the \textit{Carbone} Court viewed its decision as applying only to private facilities).
\textsuperscript{141} \textit{United Haulers}, 127 S. Ct. at 1795 (emphasis added).
\textsuperscript{142} \textit{See} New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (treating heavily regulated utility as a private entity for dormant Commerce Clause purposes in applying the market-participant rule); \textit{id.} at 338 n.6 (“This product is manufactured by a private corporation using privately owned facilities. Thus, New Hampshire’s reliance on \textit{Reeves} ... – holding that a state may confine to its residents the sale of products it \textit{produces} – is misplaced.” (emphasis in original)).
opposed to a private) entity does not in its nature entail “protectionism” for dormant Commerce Clause purposes\textsuperscript{143} and (2) political-process concerns favor judicial nonintervention in public-entity cases because private pressures against establishment of government monopolies will tend to ensure they will not gain a foothold absent powerful justifications for their use.\textsuperscript{144} Both of these considerations suggest that courts should look askance at forced-use rules that channel project profits to nongovernmental collaborators in public/private joint ventures. In any such case, after all, the private-party co-participant enjoys government “protection” precisely because the forced-use rule exempts it from the rigors of market competition. In addition, in all such cases, political-process considerations parallel those at work in \textit{Carbone}, and not those at work in \textit{United Haulers}. This is true because any profit-sharing private entity is sure to seek to bend the local government’s decisionmaking process in its favor to establish and/or retain the monopoly program. Indeed, as we have seen, the perceived absence of such a private party in \textit{United Haulers} and consequent enhancement of likely surrogate representation of out-of-state interests provided – at least in the Court’s eyes – a powerful reason for deeming \textit{Carbone} a distinguishable case.\textsuperscript{145}

Finally, a failure generally to subject joint-arrangement cases of this kind to the \textit{Carbone} rule would present an open invitation for evasion. Consider \textit{Carbone} itself. Could the local government have altered the result in that case simply by retaining title to the facility subject to the private operator’s five-year right of use, rather than contracting for an option to acquire title after five years for a $1 payment? Given the policies that drove \textit{United Haulers}, as well as function-over-form concerns at the heart of modern dormant Commerce Clause jurisprudence,\textsuperscript{146} such legalistic details in the structuring of the arrangement should not carry outcome-determinative weight.

In light of these considerations, Case #1 (which involves \textit{de facto} private-firm ownership of the facility)\textsuperscript{147} should trigger application of the \textit{Carbone} rule, rather than the exception to that rule recognized in \textit{United Haulers}.\textsuperscript{148} After all, as a functional matter, that case involves the same

\textsuperscript{143} See supra notes 63-66 and accompanying text.
\textsuperscript{144} See supra notes 67-72 and accompanying text.
\textsuperscript{145} See id.
\textsuperscript{146} See, e.g., Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (noting that “these decisions have considered not the formal language of the tax statute but rather its practical effect . . . .”); id. at 288 (observing that “a focus on that formalism merely obscures the question”).
\textsuperscript{147} See supra notes 133, 137-138 and accompanying text.
\textsuperscript{148} Indeed, it seems likely that the town in \textit{Carbone} could have easily structured the legal relationship so that the private entity was a contractor, rather than an owner/operator, while
business transaction put before the Court in Carbone itself.\textsuperscript{149} The only difference is that in Case #1, unlike in Carbone, the local government retained title to the facility as a technical matter. Even while it did so, however, the government parted with management and operation of the facility – as well as program revenues – during the relevant five-year period. In an analogous setting the Court has suggested that the mere location of title should not be determinative for dormant Commerce Clause purposes.\textsuperscript{150} That same principle should control Case #1.

Case #2 (which involves the 50-50 arrangement) also should fall within the rule of Carbone, rather than the exception to it promulgated in United Haulers. Indeed, Case #2 may present an even stronger argument for invalidation than Case #1, because in it the private co-venturer is not merely a \textit{de facto} owner of the favored facility; rather, the private entity owns the facility in the most literal sense. What is more, as in Case #1, the private entity in Case #2 stands in a position far removed from that of an ordinary private contractor because it is a direct participant in project profits. In these circumstances, the risk of protectionism is emphatically present, and the political process dynamics parallel those present in Carbone. As a result, the waste transfer station should fail to qualify as a “clearly public facility.”\textsuperscript{151}

Case #3 provides the most compelling case of all for refusing to wrap a challenged program in the protective mantle of United Haulers. Why? Because in Case #3 the private operator \textit{alone} wholly owns and wholly operates the favored trash-collection business. To be sure, the government owns the local transfer station, but there is no reason why that fact should matter in assessing the character of the separate private trash-pick-up

\textsuperscript{149} See Brief of Amici Curiae National Solid Wastes Management Ass’n at 16, United Haulers, 128 S. Ct. 1786 (No. 05-1345) (positing, in discussing Carbone, that “it would have been a simple matter for Clarkstown to have assumed ownership of the transfer station at the onset (subject to a security interest) while contractually promising the entity that constructed and managed it the right to receive all tipping fees for five years”).

\textsuperscript{150} See supra notes 141-142 and accompanying text.
company. Here — in direct contrast to United Haulers — the local-hauler-favoring flow control rule does not “treat every private business, whether in-state or out-of-state, exactly the same” by channeling all business to a favored governmental operator. Rather, just like in Carbone, the government treats the local private hauling business better than all would-be private competitors — whether local or non-local in nature — because it, and only it, is granted the right to deal in all relevant ways with waste producers.\footnote{152}

As the foregoing analysis reveals, the practical effect of United Haulers is to set forth a “safe harbor” rule. Pursuant to that rule, state and local governments can enjoy the benefit of a monopoly position, despite the tension that monopoly position raises with the free-interstate-trade values that underlie the dormant Commerce Clause. To enjoy this benefit, however, the government must associate its forced-use rule with a service-providing operation genuinely owned and overseen by it, and not by a private firm sheltered from out-of-state competition. To be sure, this result may raise worries that governments will choose to provide key services to local citizens through wholly public entities, rather than by way of more efficient, partially privatized, service-providing mechanisms.\footnote{153} Two considerations suggest, however, that fears of this outcome are probably overstated. First, the same prophecies of doom arose when the Court propounded the market-participant exception to the dormancy doctrine some three decades ago.\footnote{154} In the intervening period, however, we have not seen a sudden rush toward state ownership of cement plants,\footnote{155} water bottling facilities,\footnote{156} or hydroelectric power stations.\footnote{157} Second, as Carbone teaches, it bears emphasis that this discussion establishes only that the United Haulers rule is inapplicable on the facts presented. A separate question concerns whether the locality may favor the local waste hauler on the ground that it is a properly licensed service-providing utility. See infra notes 179-204 and accompanying text. Yet another separate question is whether the waste-pick-up hypothetical involves no discrimination (wholly apart from the state-self-promotion doctrine) because waste pick up in its nature must occur in the state itself. See supra note 100 and accompanying text. Given this fact, it may be that the waste-pick-up forced-use rule will not be viewed as a problematic local processing requirement, at least in the absence of a stark form of discrimination against interstate operators — such as a franchising process that overtly favors locally incorporated firms over firms incorporated in other states. See, e.g., Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (looking askance at state action that favors businesses based on their local incorporation or other in-state characteristics).

\footnote{152} It bears emphasis that this discussion establishes only that the United Haulers rule is inapplicable on the facts presented. A separate question concerns whether the locality may favor the local waste hauler on the ground that it is a properly licensed service-providing utility. See infra notes 179-204 and accompanying text. Yet another separate question is whether the waste-pick-up hypothetical involves no discrimination (wholly apart from the state-self-promotion doctrine) because waste pick up in its nature must occur in the state itself. See supra note 100 and accompanying text. Given this fact, it may be that the waste-pick-up forced-use rule will not be viewed as a problematic local processing requirement, at least in the absence of a stark form of discrimination against interstate operators — such as a franchising process that overtly favors locally incorporated firms over firms incorporated in other states. See supra note 100 and accompanying text.

\footnote{153} See supra note 49 and accompanying text.

\footnote{154} Compare Gergen, supra note 54, at 1142-43 (challenging market-participant exception in part on the ground that it could lead to government displacement of private businesses), with Coenen, supra note 54, at 431-32 (responding to Professor Gergen’s concerns).


governments can effectively ensure the success of private waste-transfer and
other operations even if the use of joint arrangements does not carry with it
an ability to impose forced-use mandates. One option is to subsidize the
private facility in such a way as to permit it to reduce rates to the point that
local residents have no reason to deal with anyone but it.\footnote{158} What is more,
such subsidization carries with it the benefit of rendering highly visible the
precise costs imposed on local taxpayers by their government’s support of
the private undertaking.\footnote{159}

The Court’s safe harbor methodology also puts in place what we might
call a “half a loaf” approach to this field of law.\footnote{160} If \textit{Carbone} and \textit{United
Haulers} teach us nothing else, they suggest that there is something to be said
both for certain forms of forced-use rules and for the free-interstate-trade
values that those rules tend to threaten. Against this backdrop, the Court has
chosen to give something to each side. When the government itself owns
and operates the relevant facility, forced-use mandates will stand as
tolerable forms of state experimentation and self-definition. However, when
private entities secure a profit-sharing position in the venture – thus
triggering much-heightened risks of protectionism and government capture
by self-interested private concerns – the value of free interstate trade will
take precedence. This practical accommodation of intensely competing
interests lies at the heart of the Court’s rulings in \textit{Carbone}, \textit{United Haulers}
and \textit{Davis}.

\textbf{B. The State-Self-Promotion Doctrine and Utility Regulation}

During oral argument in \textit{United Haulers}, Justice Breyer directed
attention to longstanding state practices with regard to electric utilities and
similar operations.\footnote{161} This line of questioning was hardly surprising. Utility

\footnote{158 C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 394 (1994) (noting that a
workable alternative to the forced-use rule exists because “the town may subsidize the facility
through general taxes or municipal bonds”).}
\footnote{159 See Coenen, supra note 54, at 434-35 (emphasizing political-process value of heightened
visibility of direct payments).}
\footnote{160 Cf. Dan T. Coenen, \textit{Business Subsidies and the Dormant Commerce Clause}, 107 YALE
L.J. 965, 979 (1998) (noting that half-a-loaf approach also marks the Court’s distinction
between tax breaks and subsidies).}
\footnote{161 Indeed the very first question asked at oral argument, posed by Justice Breyer, focused on
the assertion that “in many thousands of municipalities throughout the United States it’s
fairly common to have a locally owned electricity distribution company … or a gas
distribution company”; for the “municipally owned pipeline, gas pipeline, or electricity
distribution to say, if you live in our town you’ve got to buy from us”; that “that’s been going
on for about 110 years”; and that “I’ve never seen anybody think or write … that that violated
the Commerce Clause.” Transcript of Oral Argument, supra note 66, at 4. See also id. at 17-}
regulation, after all, often involves state mandates that compel customers in a designated area to deal with, and deal only with, a single favored supplier of electricity, natural-gas or the like. Sometimes the service provider is a government entity. Sometimes the service provider is a private firm. In each of these settings, how will the state-self-promotion rule interact with the government’s obstruction of interstate trade through creation of a local monopoly?

1. **Government Owned Utilities.** Consider the following case: A city operates its own reservoir and waterworks facility and also requires all local users to buy water only from it. It may be that, absent this rule, a large-volume industrial user, such as a coal liquefaction plant, could secure water from an out-of-state supplier at rates far more favorable than those imposed by the local publicly owned and operated utility.\(^{162}\) If so, can this user successfully invoke the dormant Commerce Clause antidiscrimination rule to sidestep the locality’s mandate to use only its water, notwithstanding the exception to the antidiscrimination rule carved out in *United Haulers*? The answer is no.\(^{163}\)

The industrial user might try to escape the principle of *United Haulers* by arguing that that case involved only a “local processing requirement,” whereas this case involves a ban on the importation of an out-of-state product.\(^{164}\) In particular, the user might argue that such an absolute prohibition on importation involves an even greater restriction on interstate commerce than a protective tariff, which only discourages and does not wholly bar the local delivery of out-of-state goods.\(^{165}\)

This argument should fail for reasons of both precedent and policy. The essential problem is that local processing requirements have long been just

\(^{18}\) (Souter, J.) (expressing concern that, if Court were to find a constitutional wrong in *United Haulers*, “every municipal utility in the United States is going to fall”); \(^{162}\) *id.* at 21 (discussing difficulties presented by a “municipal electricity company”); \(^{163}\) *id.* at 22-23 (Breyer, J.) (noting “there could be distributors who are in fact regulated private companies”).\(^{164}\) See, e.g., *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 284 (1997) (addressing analogous issue presented when an industrial purchaser was able to secure natural gas from out-of-state supplier at a more attractive price than the price offered by the local utility).\(^{165}\) It is noteworthy in this regard that the Court has devised a special and distinctively tolerant dormant Commerce Clause methodology that applies to some cases that involve the supply of water. See *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (declining to apply strictest level of scrutiny to facially discriminatory ban on export of groundwater). In an effort to focus attention solely on the state-self-promotion rule, I place any special water-related rules to one side in considering the hypothetical set forth in the text. It is not apparent, in any event, that any such rule would apply to the utility-related question identified and discussed here.

\(^{164}\) See *supra* notes 39-40 and accompanying text.

\(^{165}\) *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (describing tariffs as “paradigmatic example” of laws that violate the dormant Commerce Clause).
as suspect as import bans under the dormancy doctrine.\textsuperscript{166} And they should be. After all, the sort of local processing requirements at issue in \textit{Carbone} and \textit{United Haulers} themselves constituted import bans as a functional matter. To be sure, those cases did not involve bans on importing a product. They did, however, involve a ban on importing a service – namely, a valuable waste-handling service, which local parties buy just as surely as they buy widgets or wombats or water.\textsuperscript{167} What is more, the modern Court has never distinguished between goods and services in applying the dormant Commerce Clause principle.\textsuperscript{168} Nor should it. Particularly in light of the nature of the modern economy, protectionism with regard to the distribution of services is every bit as destructive of free-flowing interstate commerce as is protectionism with respect to goods.

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

\textsuperscript{166} See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391-92 (1994) (describing the flow control ordinance as “just one more instance of local processing requirements that we have long held invalid” and collecting earlier local processing requirement cases as well).

\textsuperscript{167} See id. at 390-91 (noting, in finding a dormant Commerce Clause violation, that “the article of commerce” involved in the case “is not so much the solid waste itself, but rather the service of processing and disposing of it”).

\textsuperscript{168} See, e.g., \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison}, 520 U.S. 564, 572-73 (1997) (finding that dormant Commerce Clause applied even though the case involved discrimination with regard to the delivery of recreational camp services); \textit{Lewis v. BT Inv. Managers, Inc.}, 447 U.S. 27 (1980); (applying dormant Commerce Clause to invalidate state law that discriminated with respect to investment advisory services). Notably, Justice Thomas seems to draw a stark line between laws that discriminate with respect to the delivery of goods and laws that involve the delivery of services, pursuant to his own distinctive views that (1) the dormant Commerce Clause rule should be abandoned altogether and not applied in any case; and (2) laws that the Court historically has evaluated under the dormant Commerce Clause (including laws that involve interstate, rather than international, commercial discrimination) should be evaluated solely under the Article I, Section 10 Import/Export Clause from now on. \textit{Camps Newfound/Owatonna}, 520 U.S. at 610 (Thomas, J., dissenting). It is beyond the scope of this article to explore how Justice Thomas would deal with claims of discrimination against the delivery of out-of-state water, electricity and the like. See generally Brannon P. Denning, \textit{Justice Thomas, The Import-Export Clause and State Law}, 70 U. COLO. L. REV. 155 (1999) (broadly examining differences between Court’s jurisprudence under the dormant Commerce Clause and Justice Thomas’s proposed Import/Export Clause approach, including the goods/services distinction).
to apply the state-self-promotion exception to a forced-use rule. The bottom line is that a government edict that compels the use of publicly supplied water must fare no worse than an edict that compels the use of publicly supplied waste services. The constitutional immunity arises equally in the two cases because in both of them the challenged rules “benefit a clearly public facility, while treating all private companies exactly the same.”

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

See also infra notes 233-234 and accompanying text (noting that limits on “lesser” power to tax involve a logical extension of the “greater” power to ban).

United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1795 (2007). Indeed, at oral argument in the United Haulers case, significant attention was given to government monopolies that provide electricity and natural gas. Transcript of Oral Argument, supra note 66, at 4-8. The Justices’ questions in this area assumed that protection of the state must apply equally in waste cases like United Haulers and cases like those involving electricity monopolies. It logically follows that – at least so long as the government monopoly is a “traditional” one – the Court will deem the United Haulers principle fully applicable to such utility operations.


See, e.g., South Carolina v. United States, 199 U.S. 437 (1905) (dealing with public involvement in sale of alcoholic beverages); supra note 51 and accompanying text (same).


See infra notes 205-232 and accompanying text (discussing potential traditional-activity/nontraditional-activity distinction).

See infra notes 205-232 and accompanying text.
different, but related problem: How does the dormant Commerce Clause apply to traditional monopoly operations conducted not by the government itself, but by local private firms protected by state regulation from both in-state and out-of-state competition?

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

The first question raised by this hypothetical concerns application of the state-self-promotion doctrine itself. This private-monopoly water case – just like Carbone and United Haulers – involves an import ban.\(^{179}\) What is more, that ban now operates to protect a private business, rather than a state-owned-and-operated business, from out-of-state competition. For this reason, United Haulers is readily distinguishable, and Carbone would appear to control.\(^{180}\) In trying to avoid this result, government lawyers might argue that the private water company is connected up with the government in a special way because it is a “public utility.” They might support this assertion by noting that in Davis the Court described municipal bonds as including bonds issued for “utility” operations without distinguishing between private and public operations.\(^{181}\) They might also observe that the licensing of an intensely regulated, but privately owned, water monopoly reflects a “traditional” approach to government problem solving,\(^{182}\) whereas Carbone involved the non-traditional operation of a distinctly modern waste transfer station.\(^{183}\)

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179 See supra notes 166-168 and accompanying text.
180 See supra notes 32-34, 40-41 and accompanying text.
183 See generally supra notes 73-74 and accompanying text (discussing Court’s focus in United Haulers on the traditional nature of the regulated field); infra notes 208-210 and accompanying text (same).
There are at least two problems with this line of argument. First, it seeks to use the traditional/nontraditional distinction to expand, rather than to contract, the state-self-promotion exception to the antidiscrimination rule. In *United Haulers* and *Davis*, the Court invited the conclusion that nontraditional government-run monopolies might fall *outside* the state-self-promotion doctrine; it did not suggest that non-government-run monopolies – whether traditional or nontraditional in nature – might fall *inside* that doctrine’s protective reach. Put another way, invocation of the Court’s “traditional public activity” logic in this context would take a concept put forward by the Court as a potential limit on its newly crafted state-self-promotion exception and turn it into an instrument for giving that innovation an even broader reach. The Court might be willing to take this step. If it does so, however, it will be moving well beyond the holdings and the reasoning of *United Haulers* and *Davis*.

The second problem with relying on the traditional/nontraditional distinction to bring our water-utility case within the state-self-promotion principle stems from *Carbone*. That case, after all, involved the operation of much the same sort of waste transfer station that spawned the *United Haulers* litigation. The Court, however, had no difficulty affixing the “traditional” label to the waste transfer operations involved in *United Haulers*, thus signaling that *Carbone* likewise involved a traditional government activity. 184 *United Haulers* and *Carbone*, when read together, thus seem to stand for the following proposition: Even when a traditional government undertaking is in the picture, the general rule of the dormant Commerce Clause – rather than the state-self-promotion exception – applies so long as the service provider itself is a private entity. It follows that the state-self-promotion exception is inapplicable in our waterworks case because all relevant services are provided by a private firm. 185

184 Indeed, from all appearances, the transfer station in *United Haulers* was even less “traditional” than the station involved in *Carbone* because it offered more numerous and more high-tech waste-treatment services. Compare *United Haulers*, 127 S. Ct. at 1791 (noting that facility in *United Haulers* was able to “provide recycling of 33 kinds of materials, as well as composting, household hazardous waste disposal, and a number of other services”), with C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 387 (1994) (suggesting that facility in *Carbone* merely “separate[d] recyclable from nonrecyclable items,” after which both types of waste were shipped elsewhere).

185 Might it be argued that this line of reasoning is flawed because *Carbone* involved a nontraditional injection of a private service provider into the rendering of services traditionally supplied by the government itself, whereas our water hypothetical involves a traditional injection of a private service provider into an activity overseen (but not traditionally conducted by) the government itself? The proper answer to this question would seem to be “no” for at least two reasons. First, governments traditionally have arranged for private firms to help in handling waste materials just as surely as governments traditionally have arranged for private firms to deliver utility services. Second, the focus in *United
The forgoing analysis suggests that the state-self-promotion exception will not protect a monopoly given to a non-state utility from dormant Commerce Clause attack. That conclusion, however, hardly brings an end to proper dormant Commerce Clause analysis of our private-water-monopoly case because there may be another limitation on the dormancy doctrine that covers this sort of program. Indeed, in a case decided a full decade before United Haulers, Justice Scalia observed that the Court already had recognized “what might be called a ‘public utilities exception’ to the negative Commerce Clause.”

In authoring these words, Justice Scalia pinned a shorthand label on a complex body of law. The main cases in this area have involved natural gas regulation, and (to make a long story very short) they suggest that no dormant Commerce Clause limitation forecloses states from barring direct natural gas sales—including from out-of-state suppliers—into a service area to which a privately owned utility has been awarded a monopoly position. In other words, to the extent it exists, the Court’s “public utility
exception” signals that, notwithstanding the dormant Commerce Clause, states may favor intrastate sales over interstate sales so long as the intrastate sales are made by a closely regulated natural gas provider.

One quandary posed by the Court’s private natural-gas-monopoly cases concerns how, if at all, they are reconcilable with Carbone.188 In that case, after all, the government licensed a heavily regulated private monopolist to provide waste-handling services, in much the same way that governments long have licensed heavily regulated private monopolists to provide natural gas. The question thus becomes: How could the Court in Carbone not deem the waste transfer station to be a “utility” and apply to it the same “utilities exception” the Court seems to have embraced in the natural gas context?189 Two possibilities suggest themselves.190 First, the Court may
have sensed that a local natural gas utility (unlike a waste-transfer station) involves a “natural monopoly,” particularly because it must make use of a sprawling web of fixed delivery lines.\(^\text{191}\) Second, the Court might have reasoned that legislators may fairly conclude that reliance on free market forces to distribute natural gas is too risky because supply failures raise “severe health risks”\(^\text{192}\) so potentially grave that consumers might even be “frozen out of their homes.”\(^\text{193}\) To be sure, it may be that significant lapses in providing basic waste pick-up services will create risks to human health comparable to those posed by the nondelivery of natural gas.\(^\text{194}\) \textit{Carbone}, however, did not involve basic pick-up services. Instead, it involved

such as natural gas. Second, utility operations involve \textit{ipso facto} favoritism of locally owned products (i.e., the products owned by the local utility) over non-locally owned products (i.e., the products owned by the interstate seller). To be sure, utility operations may simultaneously disfavor both locally owned products and non-locally owned products, so long as there are direct sellers (other than the utility) inside the state. But in many cases – including \textit{Carbone} – the Court has found discrimination against interstate commerce even though the favoritism afforded to a local operator disfavors both in-state and out-of-state competitors. Finally, the states’ use of utility operations sometimes will favor in-state products over out-of-state products in a very pure sense – as our earlier-discussed water-reservoir-and-waterworks case (which involved favoring non-imported water over imported water) illustrates. There are indications that some Justices viewed the concept of discrimination as applying in like fashion to forced-use rules associated with traditional utilities and waste transfer facilities. \textit{See supra} note 160. The ensuing discussion proceeds on the same assumption.

\(^{191}\) \textit{See}, e.g., \textsc{Paul A. Samuelson \& William D. Nordhaus}, \textit{Economics} 522-25 (12th ed. 1985). On this view, the paradigmatic “public utility” involves fixed conduits of distribution – that is, power lines, telephone lines, pipelines or the like – spread throughout the community to deliver a valued service to large numbers of local consumers. (For a helpful discussion of this subject in the natural-gas context, see \textit{Gen. Motors}, 519 U.S. at 289-90, 295-96.) For a pointed illustration of the possible importance of the presence of fixed delivery lines on the constitutionality of a forced-use rule, see \textit{Atlantic Coast Demolition \& Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County}, 48 F.3d 701, 713-715 (3d Cir. 1995) (rejecting defense of state-wide flow-control local-facility-use requirements on “public utility” theory; reviewing Supreme Court authorities and concluding that “public utilities regulation is not a special category for Commerce Clause purposes”; noting, however, that exclusive franchises for gas or electricity that require “a tangible distribution system” might well satisfy strict dormant Commerce Clause scrutiny).

\(^{192}\) \textit{Gen. Motors}, 519 U.S. at 302.

\(^{193}\) \textit{Id.} at 306.

\(^{194}\) \textit{See infra} notes 196-197 and accompanying text. \textit{See also} Brief for Respondents at 43, \textsc{United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.}, 127 S. Ct. 1786 (2006) (No. 05-1345) (asserting that “[w]aste disposal service, like water, sewer, fire and police protection, lies at the foundation of civilized society”). Although the dissent in \textit{Carbone} did not characterize the waste-transfer station as a “utility,” it did repeatedly describe it as a “monopoly” and “municipal monopoly” put in place because such services are “imperative whether or not the private market sees fit to serve this need at an affordable price and to continue doing so dependably into the future.” \textsc{C \& A Carbone, Inc. v. Town of Clarkstown}, 511 U.S. 383, 428 (Souter, J., dissenting).
modern waste-transfer-station services. Put another way, if we were building a mixed-metaphor trash heap, we might say that operating a modern transfer station involves waste-handling bells and whistles, while providing basic pick-up services involves waste-handling meat and potatoes (in much the same way that providing natural gas is essential to keep a community running like a well-oiled machine). The bottom line is this: The Court in Carbone may have concluded that it was dealing with a service as to which a “dependable supply” was less necessary and thus less in need of monopoly-centered regulation than was the case in the natural-gas context.\textsuperscript{195}

How the Court deals with these possible distinctions will have significant implications as dormant Commerce Clause doctrine unfolds in the future. For example, our hypothetical water utility case should fall easily within the universe of any “utility exception” – and thus be distinguishable from Carbone – because it involves both a maze of fixed lines and the delivery of a product essential for human survival.\textsuperscript{196} These same considerations will operate in other cases, too. States, for example, sometimes award exclusive franchises to privately owned utilities to deliver electricity in specified locales. Such an arrangement again involves fixed lines and an essential product. Thus any dormant Commerce Clause “utility exception” would logically permit a state to block direct sales of imported power to safeguard the franchised local operator.

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

\textsuperscript{195} Gen. Motors, 519 U.S. at 306. Yet another possible distinction rests on the idea that utilities necessarily serve large numbers of consumers. See id. at 298. According to this argument, Carbone did not involve a utility because the waste transfer station involved in that case did not deal primarily with consumers, but instead dealt primarily with waste haulers (which had previously and separately made contractual arrangements with local consumers). One difficulty with this proposed distinction is that it overlooks the practical operation of the Clarkstown program, which effectively precluded local residents from dealing with anyone except the designated transfer station. Put another way, the Clarkstown program provided for the continued delivery of that station’s services by ensuring revenues to the private monopoly that (through the inevitable pass through of tipping fee charges) were paid as a practical matter by large numbers of local residents themselves.

\textsuperscript{196} Indeed, in Water District No. 1 v. Mission Hills Country Club, 960 P.2d 239 (Kan. 1998), the Kansas Supreme Court sustained a municipal requirement that all residents in a particular district buy water from a “quasi-municipal corporation” that supplied water to the district. An out-of-state firm that piped water in to supply a country club in the district challenged the ordinance, asserting its invalidity under Carbone. Id. at 240. The court distinguished Carbone on the ground that the city was performing a “central function of local government,” emphasizing that “[w]ater is more than a convenience, it is essential to public health and for fire protection.” Id. at 243.
dynamics); (2) the indispensability of the service that is being delivered; or (3) both. Cable television, for example, involves a web of distribution lines but not a matter essential to human well-being (at least if one is not a Green Bay Packers fan). The provision of basic waste handling services, on the other hand, may be no less essential to human health than the provision of natural gas, but the delivery of those services does not necessitate the upfront installation of an elaborate web of fixed distribution lines. As a result, in each of these cases, application of the “utility” label will turn on the Court’s sense of what functional considerations have driven its natural-gas-law precedents.

How the Court will work through these sorts of cases remains for now unclear. One point, however, is not unclear at all: To the extent there exists a “utilities exception” to the dormant Commerce Clause, it differs in both origin and scope from the state-self-promotion exception recently recognized in United Haulers and Davis. What is more, the differing natures of the doctrines will have an important impact on the decision of concrete cases. By way of example:

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

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

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

(4) Even assuming a utility exception permits states to favor some private local businesses with forced-use rules, the dormant Commerce Clause will restrict how the state can do so in ways that will be beside the point in cases that apply the principle of United Haulers. The pivotal point is that there is only one state government. Thus when the state favors itself pursuant to the state-self-promotion exception there is no need to choose among similarly situated competitors in selecting the favored monopolist.

197 In addition, garbage trucks have a limited work life in comparison to a physical structure, are mobile by nature, and are thus readily adaptable to relocation and use in other locales.
When the state selects a private company to operate a utility, however, it may well have to choose among competing firms, and the dormant Commerce Clause will impose restrictions on how such choices are made. The dormancy doctrine, for example, would not permit a state to prefer one natural gas supply company over another on the ground that it is incorporated in the state.\textsuperscript{198} Put differently, the Commerce Clause will impose limitations on the state's choice of a favored private monopolist even though no comparable limitations operate when the state chooses simply to assign a monopoly to itself.\textsuperscript{199}

(5) Finally, the state-self-promotion exception and the utility exception, even when fully applicable, may tolerate different levels of monopoly power. Under the state-self-promotion exception, for example, the state (as we already have seen) could assume a monopoly position as to both water delivery and water supply by servicing the local community exclusively through its own local reservoir. It is not certain, however, that a state could license a private firm to conduct operations in this same way.\textsuperscript{200} The rub comes from \textit{Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission}.\textsuperscript{201} There the Court – even while suggesting that the state could bar direct retail sales from out-of-state suppliers to protect its in-state natural-gas-distributor licensees\textsuperscript{202} – emphasized that “[t]here is no

\textsuperscript{198} \textit{See}, e.g., Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (invalidating Florida statute that prohibited out-of-state banks, holding companies, and trust companies from owning or controlling any business within the state that sold investment advisory services).

\textsuperscript{199} It bears emphasis that parallel limits on the state-self-promotion exception may arise when the state seeks to leverage promotion of its own activities to benefit the interests of local private firms. The nature of this potential limitation with respect to state efforts to favor private companies that operate landfills is explored \textit{infra} notes 303-312 and accompanying text. Similar limits will come into play in other contexts as well. Assume, for example, that the counties involved in \textit{United Haulers}, as part of the contract with a private firm to operate the waste transfer station, required that that firm buy all supplies only from local vendors. It is not clear how the Court would deal with such a restriction. It might be willing to draw on its market-participant jurisprudence to uphold this stark preference of intrastate over interstate commerce on the ground that the product purchases are “in effect” being made by the counties themselves. \textit{White v. Mass. Council of Constr. Employers, Inc.}, 460 U.S. 204, 214-15 (1983). For two reasons, however, this result seems unlikely. First, it is problematic to transport government-protective rules developed in the market-participant context (which does not involve forced dealing with the government) to the state-self-promotion context (which does). Second, even assuming that market-participant-related rules do carry over, the Court might well conclude that products purchased by a private entity operating under a long-term services supply contract made with a public entity (as opposed to a single-project construction contract) are not “in effect” made by the government itself. \textit{See Coenen, supra note} 54, at 471 (emphasizing potentially narrow nature of Court’s in-effect-working-for-the-city logic of \textit{White}).

\textsuperscript{200} \textit{See supra notes} 179-185 and accompanying text.

\textsuperscript{201} 341 U.S. 329 (1951).

\textsuperscript{202} \textit{See supra} notes 187-188 and accompanying text.
intimation that appellant cannot deliver and sell available gas to [the local utility] for resale to customers” and that for this reason no “absolute prohibition” on interstate shipments had taken hold. What the Court will do with these passages in future cases remains to be seen. Such language, however, provides a jumping off point for arguing that any utility exception (in contrast to the now-operative state-self-promotion exception) gives states no authority to exclude out-of-state suppliers altogether from in-state markets. It should follow, so the argument goes, that out-of-state suppliers must at least have the chance to sell into the state at the wholesale level by way of contracts made with the local utility itself.

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

C. Forced Use Rules and Nontraditional Public Functions

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

Consider, for example, Reeves, Inc. v. Stake. There, the Court upheld a South Dakota rule that limited sales from a state-owned cement plant to local residents. The Court fended off the predictable challenge brought by a disgruntled out-of-state cement user by invoking the “market

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203 Panhandle Eastern, 341 U.S. at 336.
204 Even if a court adopted this argument, it would not necessarily follow that a local utility would have to deal with an out-of-state supplier under any circumstances and (in particular) regardless of pricing considerations. It merely would establish that the local utility would not have the same ability that the state itself would have to cut off out-of-state suppliers altogether without any regard to the antidiscrimination rule.
206 Id. at 446-47.
participant exception” to the dormant Commerce Clause rule.207 In the post-
United Haulers world, constitutional law professors are sure to ask their
students this question: What if South Dakota required state residents to buy
all their cement from the state-owned plant? Or (should those professors
choose to employ a more in-your-face, leading-question style of
interrogation): If a state can force local residents to use its own waste
transfer station, why in the world can’t it force local residents to use its own
cement plant?

The predictable answer to this question will be that operation of the
transfer station, but not the cement plant, involves a “traditional public
function.”208 Indeed, at first blush, an embrace of this distinction seems all
but compelled by the Chief Justice’s opinion in United Haulers. There, he
observed on five separate occasions that the case involved government
intervention in an area of “traditional” public control.209 Even more
important, some of the opinion’s most holding-like language indicated that
the Court’s carve-out from the Carbone rule is properly limited in this way.
Particularly suggestive was the proclamation, in the very first paragraph,
that: “Disposing of trash has been a traditional government activity for
years, and laws that favor the government in such areas – but treat every
private business, whether in-state or out-of-state, exactly the same – do not
discriminate against interstate commerce for purposes of the Commerce
Clause.”210

Much language in Davis points in the same direction. The majority in
that case, for example, emphasized the “venerable history” of state bond
sales and highlighted the “traditional local taxing practice” at issue in the
case.211 Perhaps of greatest importance, the Court undertook to explain
(albeit in abbreviated fashion)212 why a traditional-activity limit comports
with the protectionism-based policy concerns that underlie the United
Haulers principle.213 All of this suggests that the Court, in the future, will

207 See Tribe, supra note 7, § 6-11 at 1089-90; Coenen, supra note 54, at 401-02.
208 Dep’t of Revenue v. Davis, 128 S. Ct. 1801, 1811 n.9 (2001).
209 United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786,
1790, 1796, 1797 n.7, 1798 (2007); see also id. at 1798 (Scalia, J., concurring in part)
(noting that trash disposal service at issue involved a “public entity performing a traditional
local-government function”).
210 Id. at 1790 (majority opinion) (emphasis added).
211 Davis, 128 S. Ct. at 1810, 1819.
212 See Zelinsky, supra note 117, at 39-40 (critiquing Court’s treatment as setting forth a
“surprisingly casual justification”).
213 Davis, 128 S. Ct. at 1810 n.9.
apply the state-self-promotion exception to safeguard only those self-promoting rules that operate in areas of traditional state control.\footnote{See Zelinsky, supra note 117 at 40 (concluding that “Davis … confirms that the ‘traditional public function’ category is now ensconced in the dormant Commerce Clause doctrine of the Roberts Court”).}

There are also passages in the cases, however, that cast doubt on this conclusion. Most significant is the Court’s footnote 7 in United Haulers, which focused squarely on the “nontraditional” activity problem. There, Chief Justice Roberts wrote:

The Counties and their amicus were asked at oral argument if affirmance would lead to the “Oneida-Herkimer Hamburger Stand,” accompanied by a “flow control” law requiring citizens to purchase their burgers only from the state-owned producer. We doubt it. “The existence of major in-state interests adversely affected by [a law] is a powerful safeguard against legislative abuse.” Recognizing that local government may facilitate a customary and traditional government function such as waste disposal, without running afoul of the Commerce Clause, is hardly a prescription for state control of the economy. In any event, Congress retains authority under the Commerce Clause as written to regulate interstate commerce, whether engaged in by private or public entities. It can use this power, as it has in the past, to limit state use of exclusive franchises.\footnote{United Haulers, 127 S. Ct. at 1797 n.7 (citations omitted).}

These words hardly offer a ringing endorsement of a nontraditional-function limit on the state-self-promotion doctrine. Particularly telling is the sequence in which the footnote’s observations unfold. Chief Justice Roberts begins the footnote by identifying the problematic hamburger-stand hypothetical. He does not, however, then simply declare that the hypothetical falls outside the United Haulers principle because it concerns a nontraditional field of government endeavor. Rather, he predicts that the ruling in United Haulers will not spawn widespread adoption of such programs because countervailing political forces will check any tendencies of that sort. It is only after thus dismissing worries that the Court's ruling will broadly “lead to” the institution of newfangled state-run monopolies that the Chief Justice offers assurance that United Haulers “is hardly a prescription for state control of the economy.” In context this phrasing thus logically seems to mean “is hardly a holding likely to produce state control of the economy,” rather than “is hardly a legal authorization of such
practices as state-owned hamburger-stand forced-use rules.” Most telling of all, the footnote concludes with the admonition that “Congress retains authority” to “limit state use of exclusive franchises.” The implication is that any problems of associating forced-use rules with government-run businesses – whatever their nature – may be dealt with through congressional deployment of the commerce power, rather than through judicial invocation of a doctrine-confining distinction between traditional and nontraditional government activities.

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

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216 *Id.*

217 Another response to the hamburger stand case might be that a forced-used rule, in this context, would not trigger strict scrutiny, but probably would violate the *Pike* balancing test because no sufficient justification for a government monopoly in this context would exist. See Transcript of Oral Argument, *supra* note 66 at 40 (statement of government counsel; suggesting that *Pike* sets forth a “good test” to deal with issues of this kind).

218 What is more, this lack of clarity may cut against judicial recognition of the distinction in light of an analytical principle suggested by Chief Justice Roberts in *United Haulers* itself – namely, that “[a]n opinion which is to . . . establish a principle never before recognized, should be expressed in plain and explicit terms.” *United Haulers*, 127 S. Ct. at 1794 (quoting United States v. Burr, 25 F. Cas. 55, 165 (C.C. Va. 1807) (No. 14,693) (Marshall, C.J.)). The case for applying such a notion to fend off recognition of any traditional/nontraditional distinction is bolstered by the fact that, in passages apart from footnote 7, Chief Justice Roberts chose his words with discretion, taking care not to anticipate the constitutionality of forced-use rules as applied to nontraditional government activities. At one juncture, for example, he observed that: “We should be particularly hesitant to interfere with the Counties’ efforts . . . because '[w]aste disposal is both typically and traditionally a local government function.’” *United Haulers*, 127 S. Ct. at 1796. To say that the Court should be “particularly hesitant” to intervene on the facts of *United Haulers*, however, is not to say how the Court will later rule when different facts come before it. In particular, this sort of language leaves the Court free later to announce that, even though there was reason to be “particularly hesitant” in a traditional-government-function forced-use case, there is reason to be *sufficiently* hesitant to apply the same rule even when a nontraditional government function is at issue. A second passage reminded readers that the case concerned “an effort to address waste disposal, a typical and traditional concern of local government” before going on to criticize the plaintiffs in the case for inviting the Court “to rigorously scrutinize economic legislation passed under the auspices of the police power.” *Id.* at 1798. This sentence, while potentially suggestive of a limiting principle, may merely highlight the especially obvious interference with state police powers presented in a traditional-function case. It should not be forgotten, in this regard, that nontraditional as well as traditional actions of state government emanate from the police power. Particularly useful to future opponents of any traditional/nontraditional distinction will be the majority’s assertion in *United Haulers* that “[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.” *Id.* at 1796. After all, if the traditional/nontraditional distinction were to take hold, federal courts would in fact be “license[d]” to say what “activities must be province of market competition” due to their
does, however, inevitable and long-recognized line-drawing challenges will arise. What if, for example, a state-run monopoly sells liquor, and state law requires residents to make all liquor purchases at state stores, thus precluding (for example) purchases from interstate mail-order sellers? Assuming the Twenty-First Amendment does not otherwise authorize this behavior, would the states’ longstanding involvement in liquor regulation create the sort of tradition that shields the program from discrimination-based dormant Commerce Clause attack? What if there is a longstanding tradition of liquor regulation, but not a longstanding tradition of state-operated liquor stores? What if there is a longstanding tradition of state-operated liquor stores, but not a longstanding tradition of the mandated use of those stores by local liquor purchasers? What if there is a longstanding tradition of mandated use of government stores, but that tradition extends to only a small number of states or a small number of localities or only some forms of alcoholic beverages?

traditionally private-market character. Id. Making much the same point, Chief Justice Roberts also seemed to express discomfort with the traditional/nontraditional distinction at oral argument. After counsel for the government had suggested that courts might invalidate some, but not other, government-facility-favoring forced-use rules, Chief Justice Roberts responded: “So then, the Commerce Clause would become the vehicle by which we would develop federal law about what’s appropriate for municipal governments to do and what’s not appropriate? We could decide it may be appropriate to run waste facilities but not to run milk pasteurization. I don’t know how we could do that.” Transcript of Oral Argument, supra note 66, at 40. As a general matter at oral argument, counsel for the government appeared to assert that forced-use cases involving traditionally private activities – such as milk pasteurization or shrimp hulling – would in fact have come out differently if the favored operator was the government itself. Id. at 26 (asserting in response to question about whether earlier local-processing cases “would have come [out] differently” that “they would be different”). Accord id. at 33 (suggesting that “strict scrutiny test should not apply” when “public ownership” is present, including with regard to “selling hamburgers or renting videos”); id. at 39 (acknowledging that the law in Dean Milk would not involve “discriminat[ion] against interstate commerce” if all milk had “to be pasteurized at a facility owned and operated by the State of Wisconsin”). As previously noted, this line of argument stands in some (though perhaps not irreconcilable) tension with the Court’s seminal ruling in Minnesota v. Barber. See supra note 52.

Questions with regard to liquor may well raise special problems under the Twenty-First Amendment. See, e.g., Granholm v. Heald, 544 U.S. 460, 466 (2005); Bacchus Imps. v. Dias, 468 U.S. 263, 274-76 (1984). The impact of that amendment, however, falls outside the subject matter of this article, so that the discussion in the text concerns the operation of the dormant Commerce Clause standing alone, without any regard to any special limits that might come into play due to that Amendment’s operation.

Justice Alito raised much the same question with respect to the waste-disposal context in arguing that it was “far from clear” that the forced-use operation at issue in United Haulers qualified as one “‘typically and traditionally’ performed by local governments.” United Haulers, 127 S. Ct. at 1811 (Alito, J., dissenting) (citations omitted).

In United Haulers itself, the Court noted that “each city, town, or village within [Oneida and Herkimer Counties has been responsible for disposing of its own waste.” Id. at 1790
Another set of questions will arise if Congress in the future permits state governments to determine the legality of marijuana use. In particular, if a state government forces local users to buy cannabis only from it, might past practice with respect to liquor regulation cause this form of marijuana regulation to qualify as “traditional”? Might the state successfully argue that the “greater” tradition of all-out prohibition of marijuana logically supports the state’s “lesser” regulatory regime of government monopolized sales? On the other hand, might courts look askance at state-run marijuana monopolies by focusing on the historic practice of dispensing drugs through private pharmacies or cigarettes through local retail stores?222

A case decided prior to United Haulers and Davis concerned a state law that required local lawyers to buy malpractice insurance only from the state itself.223 Would this law be subject to antidiscrimination challenge if the state-self-promotion exception applied only to “traditional” state behavior? The answer to this question will depend on the level of generality at which the court characterizes the relevant government activity. It is incontestable, for example, that states traditionally have overseen lawyers and required insurance for various purposes. But it probably is not the case that states traditionally have sold insurance or forced lawyers to buy state-issued malpractice policies. At which level of generality should the court

(majority opinion). Would this fact standing alone suffice to establish the traditional character of the government action? The answer is almost surely no, particularly in light of a general agreement within the Court in 1980 that South Dakota’s operation of a cement plant – even for some fifty years – was a nontraditional venture due to the dearth of publicly operated cement plants in other locales. Reeves, Inc. v. Stake, 447 U.S. 429, 430, 442 n.16 (1980) (noting that, even though state made plans for building cement plant in 1919, its operation of a cement plant was “somewhat unusual or unorthodox”); see supra notes 205-207 and accompanying text (discussing Reeves).

222 Another interesting question concerns to what extent Congress can participate in characterizing a particular activity as traditionally governmental or nontraditionally governmental in character. In United Haulers, for example, the majority noted, in the process of characterizing waste handling as a traditional government activity, that “Congress itself has recognized local government’s vital role in waste management, making clear that ‘collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.’” United Haulers, 127 S. Ct. at 1796. Should such congressional proclamations matter? How specific must they be? Does it advance the ball to say that “disposal of solid wastes should continue to be primarily the function of State … agencies” (as opposed to federal agencies) when the key question concerns not general state regulation of this subject, or even state operation of waste facilities, but adoption of coercive forced-use rules put in place to aid the state’s facility-operating efforts? A particularly interesting question concerns whether judicial attentiveness to such congressional announcements comports with the preexisting principle that Congress cannot authorize state activity otherwise violative of the dormant Commerce Clause except by making “an unmistakably clear statement” to that effect. See, e.g., Maine v. Taylor, 477 U.S. 131, 139 (1986); South-Central Timber Co. v. Wunnick, 467 U.S. 82, 91 (1984).

223 See Hass v. Or. State Bar, 883 F.2d 1453 (9th Cir. 1989).
characterize the relevant activity in determining whether the “traditional” or “nontraditional” label applies? Such questions highlight the difficulties of determining whether any given case involves a “traditional government function” within the meaning of this potential limitation on the state-self-promotion doctrine.

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

The significant departure that these cases mark from Carbone may reinforce this inclination. When push comes to shove, however, the Court could break the other way and repudiate the traditional/nontraditional distinction

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224 Lurking in the background here is the question as to the level of generality at which the Court viewed the relevant tradition in United Haulers and Davis. In Davis, the Court in fact highlighted both the history of states issuing municipal bonds and the common practice of exempting bond interest from state income taxation. See supra note 211 and accompanying text. It may be of significance that the Court in United Haulers did not examine the history of government operation of waste transfer stations. Instead it focused, in more general fashion, on the government’s longstanding role in dealing with waste. See supra notes 209-210 and accompanying text.

225 See Zelinsky, supra note 117, at 24-40 (discussing in detail the indeterminacy and unsatisfactoriness of the “traditional public function” test; observing, for example: “In the dormant Commerce Clause context, there are no convincing criteria for deciding when governmental activities are old enough to be ‘traditional’ or public enough to be ‘public.’ Every governmental function is traditional or becomes so. Justice Kennedy’s critique of the ‘traditional public function’ category is thus quite sound as was the Court’s earlier abandonment of that category in Garcia...”. Id. at 24.). For a further enumeration of questions that will need to be addressed in considering the “traditional government functions” question, see Johnson, supra note 75, at 881.

226 See supra note 216 (quoting relevant passage from United Haulers).

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

228 See supra notes 73-74, 209-214 and accompanying text.

229 See supra notes 41-53, 79-86 and accompanying text (listing factors which indicated that Carbone should have controlled the issue in United Haulers and characterizing Davis as a significant extension of United Haulers).
in this setting. To be sure, the Court has relied on this dividing line in the field of statutory interpretation. In interpreting the Constitution, however, the modern Court has tended to criticize and eschew this very distinction. This latter line of authority is sure to give the Court pause as it considers whether to embrace in the future any nontraditional-activity limit on the state-self-promotion doctrine.

D. Discriminatory Tax-Based Favoritism of State Operations

United Haulers concerned a government rule that forced citizens to deal with a business operated by the government itself. Davis built on United Haulers by recognizing that the principle of that case logically extends to other forms of state self-promotion, including self-promotion implemented through the state taxing system. How far will the Court go in upholding discriminatory state tax laws under the state-self-promotion doctrine? I consider this question in two steps: first, by looking at state laws that connect up tax advantages with the state’s own business activities and, second, by examining state efforts to promote local private business development by way of tax-advantaged municipal bonds.

1. Tax Advantages That Benefit the Government’s Own Operations.
The Court in Davis concluded that in some cases discriminatory state tax laws should find constitutional shelter under the principle put forward in United Haulers. This view seems sensible. Consider the following case: State Zuma decides to deal with problems of waste disposal by building and operating, entirely on its own, ten landfill sites that meet the most exacting environmental standards. The project is costly, and Zuma needs to generate

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230 Denning, supra note 59, at 512 (viewing it as “strange that the Court would suggest . . . a wish to resurrect the ‘traditional government function’ test it abandoned as unworkable in Garcia”).

231 See, e.g., Hilton v. S.C. Pub. Ry. Comm’n, 502 U.S. 197, 209 (1991) (“[W]e have been wary of extending the effect of congressional enactments into areas traditionally governed by the States, unless Congress has directed us to do so by an unmistakably clear statement.”); see generally COHEN, supra note 8, at 173-78 (2004) (discussing tradition-based rules of statutory interpretation as a method for protecting federalism values); Tribe, supra note 7, § 3-26, at 549-53 (discussing clear statement rule).

232 See, e.g., Garcia v. San Antonio Metro. Transp. Auth., 469 U.S. 528, 546-47 (1985) (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”); infra notes 392-393 and accompanying text (discussing repudiation of traditional/nontraditional dividing line in applying market-participant doctrine); see also Dan T. Coenen, Will the Court Overrule Garcia?, GEORGIA LAW ADVOCATE, Fall 1995, at 28. But cf. United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (“If Congress attempts the extension of the commerce power to activities that are not commercial in character, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.”).
income to pay off the indebtedness incurred to put its program in place. Liberty-minded legislators are uncomfortable, however, with the idea of compelling state residents to use these facilities at high-priced tipping fee rates. As a result, the Zuma assembly passes a law that imposes a $5-per-ton tax on the production of all solid waste, but exempts from this levy all waste deposited in its ten new landfills. If the practical effect of this law is to steer a large percentage of the waste-disposal business away from out-of-state operators to these in-state facilities, does the program discriminate against interstate commerce in violation of the dormancy doctrine?

Simple logic suggests that this taxing scheme should withstand challenge under the principle of United Haulers, even without regard to Davis. Why? Because United Haulers held that the antidiscrimination rule does not impede a state’s ability to favor its own waste facilities even with a full-fledged forced-use rule. And, a fortiori the greater power to mandate delivery of waste to local facilities should carry with it the lesser power to encourage use of the local facilities with the carrot of tax incentives. 233

Davis reinforced this analysis because there the Court did not hesitate to apply the United Haulers principle to sustain a state taxing program. Indeed, the Court in Davis took a long step beyond merely endorsing the sort of program attributed to State Zuma. This is the case for a simple reason: Unlike the Zuma taxing program, the Kentucky taxing program was not readily subject to judicial endorsement on a greater-includes-the-lesser-power theory because it is not at all clear that a state can compel resident municipal bond buyers to buy such bonds only from in-state issuers. 234 This

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

234 Despite the state-self-promotion rule, at least three serious problems would mark any state law that precluded state residents from buying or holding any non-local municipal bonds. First, such a rule (even if it were viewed as nondiscriminatory) might well run afoul of the Pike balancing rule in light of the hard-to-justify and sweeping burden it would place on interstate activities. See supra notes 103-106 and accompanying text. Second, the exotic nature of the rule would likely take it outside the state-self-promotion principle if a nontraditional-activity limit on that principle were recognized. See supra notes 73-74, 209-214, 228 and accompanying text. Finally, the practical operation of the rule – particularly as applied to multistate businesses that operate within in the state – might be so severe as to
aspect of *Davis* carries with it significant consequences for both litigators and legislative planners. The key point is that judicial application of the state-self-promotion principle will unfold in different ways, depending on whether the matter at hand involves a state forced-use rule or a discriminatory tax. In particular, courts may well uphold a discriminatory tax associated with a government program even if they cannot countenance a discriminatory forced-use rule associated with that very same program.

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

trigger dormant Commerce Clause limits on extraterritorial regulation. *See generally Coenen, supra* note 8, at 220-22, 272-86 (2004) (discussing extraterritorial effects and dormant Commerce Clause); *Tribe, supra* note 7, § 6-8 (same).

235 *See Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (holding unconstitutional on due process grounds an Oregon law that required all children to attend public schools); *see also Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding unconstitutional on due process grounds a Nebraska law that prohibited the teaching of any subject in languages other than English). A court might also find that such a law violates either (1) the First Amendment free speech principle or (2) the free exercise principle to the extent that it shifts business away from religious institutions. The latter contention faces difficulties under the principle of *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990). And the free speech rationale was conspicuously absent from the Court’s rationale in *Pierce*.

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

237 Moreover, a court might uphold this program even if a nontraditional-state-activities limitation on the state-self-promotion rule were in place, depending on the level of generality at which the court characterized the relevant activity. *See supra* notes 219-225 and accompanying text. There is, after all, a long tradition of state operation of public colleges and of state imposition of special rules regarding residents and nonresidents with respect to those institutions.

238 *See supra* notes 103-108 and accompanying text.
the threat of imprisonment. And that is true even if the state-self-promotion doctrine shields such a rule from antidiscrimination attack.

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

To begin with, the court would refuse to apply discrimination-based review to the tax credit, just as it refused to apply discrimination-based review to the forced-use rule involved in United Haulers, by relying on the extension of the United Haulers principle to tax-break cases in Davis. But (and this is a critical “But”), the discriminatory tax rule – unlike the discriminatory forced-use rule – could not be and would not be subject to invalidation under the Pike balancing formula. Why not? Because, as we have seen, under the traditional dormant Commerce Clause test applied to state taxes, there is no basis for courts to engage in the sort of interest-balancing analysis properly and routinely applied to challenged state regulations. It is conceivable, of course, that the Court could construct a new rule that requires courts to apply Pike balancing in those tax cases that evade discrimination-based analysis under the state-self-promotion exception or, for that matter, in all state tax cases. Assuming the Court

239 Such a hypothetical was posed by Justice Breyer during the oral arguments in Davis. Transcript of Oral Argument, supra note 79, at 21.

240 See, e.g., Michael, supra note 75, at 759 n.46 (noting that “it seems unlikely that the Court would apply the Pike balancing test to a tax case”). This conclusion logically follows from Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), in which the Court set forth the controlling test for evaluating state tax laws without incorporating into it the Pike test. See id. at 279 (requiring only that “the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State”).

241 See supra note 240 and accompanying text.

242 Indeed, Davis may provide a jumping off point for recognizing such a rule because there the Court did apply Pike balancing analysis (albeit a diluted form of such analysis) after invoking the state-self-promotion exception to fend off the initial discrimination-based challenge. Dep’t of Revenue v. Davis, 128 S. Ct. 1801, 1817-19 (2008). In doing so, however, the Court never paused to consider the broader landscape of dormant Commerce
does not take such an unusual step, however, judicial examination of state tax cases that trigger the state-self-promotion exception will end once the court decides that the exception applies. Put simply, longstanding doctrine suggests that state-self-promoting regulations must survive both antidiscrimination and *Pike* balancing review, while state taxes must survive only antidiscrimination review. And state tax rules that promote only the government’s own operations by definition do not discriminate under the principle of *Davis*.

There are other settings in which *United Haulers* and *Davis* might shelter discriminatory tax rules otherwise vulnerable to dormant *Commerce Clause* attack. A state, for example, might exempt its own instrumentalities’ property ownership and purchase and sales transactions from state taxation, while not exempting exactly the same activities when undertaken by out-of-state governmental entities. There exists a strong argument that courts should bless this brand of discrimination regardless of *United Haulers* and *Davis*. Any doubt on this score, however, should vanish in light of those precedents. In *Davis*, after all, the Court – following its earlier decision in

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Clause doctrine described in the text, including its longstanding embrace of different analytical traditions in state-tax and state-regulation cases. Nor did the Court have to consider that broader superstructure of governing rules in light of (1) both parties’ willingness to litigate the *Pike* balancing question, and (2) the Court’s ultimate conclusion that the law at issue in *Davis* presented no *Pike* balancing problem even assuming *Pike* balancing analysis applied. *Id.* For these reasons, *Davis* should not be read to hold that courts must apply *Pike* balancing analysis in future state-self-promotion tax cases, far less that *Pike* balancing review now is a necessary step to undertake in every state tax case that concerns a dormant *Commerce Clause* attack.

243 *See Ex parte* Hoover, Inc., 956 So. 2d 1149 (Ala. 2006) (striking down tax exemption that extended to sales to Alabama government entities, but not government entities of other states, based on finding that the state had not shown that non-discriminatory methods, such as exempting sales to all out-of-state governments, were insufficient or unreasonable methods to meet its goal of mitigating administrative costs). *See generally* 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶4.13[2][k][xii], at S4-54 to S4-56 (3d ed. 2000 & Cum. Supp. 2008) (analyzing the Hoover decision and justifications for an exemption of this type; discussing further litigation of the issue in Alabama in the wake of *United Haulers*).

244 The gist of the argument is that it makes no sense for a taxing state to have to impose equal taxes on its own operations and on other states’ operations when the tax money is being raised to fund the state itself. Put another way, imposing property and other taxes on in-state local governments goes a step beyond robbing Peter to pay Paul; in effect it involves robbing Peter to pay Peter himself because local governments are merely arms of the state government. In contrast, imposing real estate and other taxes on out-of-state governmental entities corresponds with basic taxing policy. For example, out-of-state government property owners enjoy, to the exact same degree as private property owners, the benefits of police protection, fire protection and all other local government benefits for which tax dollars pay. For this reason, wholly apart from the state-self-promotion doctrine, it seems to make good sense to treat in-state and out-of-state public entities differently in assessing taxes of this kind.
Bonaparte v. Tax Court245 – aligned foreign states with private entities to the extent that those states expose themselves to the taxing authority of the local jurisdiction.246 In doing so, the Court reasoned that foreign states, just like private entities, lack “attributes of sovereignty”247 to the extent they undertake activities such as owning or acquiring property outside their own borders. Under this logic, if “a foreign state is properly treated as a private entity with respect to state issued bonds,” it would seem to follow that the same “foreign state is properly treated as a private entity” with respect to any other activity that gains a taxing situs in the tax-imposing jurisdiction.248

A more complicated state-self-promotion problem concerns state income tax deductions afforded for past payments of property or sales taxes by private individuals and business firms. In a thoughtful pre-Davis article, Joel Michael suggested that a ruling for Kentucky in that case “could … affect whether a state can limit personal deductions for real estate or other taxes to those paid to in-state governmental units.”249 He put the question in starkly practical terms by asking: “[C]ould residents be allowed to deduct real estate taxes paid on in-state vacation homes, but not on out-of-state vacation homes” consistent with the dormant Commerce Clause rule?250 As Mr. Michael went on to explain, the pro-government result that he anticipated in Davis provides a plausible argument for upholding this form of tax discrimination. According to that argument, this method of differential treatment is permissible because the tax-imposing state is not “similarly situated” to all other states because all other states lack the taxing jurisdiction’s “attributes of sovereignty,” which give rise to the taxing state’s ability to favor itself.251 Thus (so the argument continues) the taxing state does not have to treat real estate taxes paid to it the same as real estate taxes paid to a “foreign State,” just as surely as it does not have to treat bond-interest payments made by it the same as bond-interest payments made by other jurisdictions.252 At least this is the case because both the imposition of real estate taxes and the awarding of income tax relief based on those payments involve “traditional” state practices.253 Indeed they involve the

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245 104 (14 Otto) U.S. 592 (1881).
246 See id. at 594 (emphasizing, in applying the Privileges and Immunities Clause, that “[o]ne State cannot exempt property from taxation in another”).
247 Id. at 595.
249 Michael, supra note 75, at 761.
250 Id.
251 See supra note 247 and accompanying text (quoting Davis and Bonaparte cases).
252 See supra note 248 and accompanying text (quoting Davis).
253 See supra notes 73-74, 209-214 and accompanying text (discussing traditional state practice distinction).
same “quintessentially public function” involved in *Davis* itself – namely, the function of raising money “to pay for public projects.”

The difficulty with this analysis is that it rests on only snippets of language from *Davis* and pays little heed to that decision’s overarching logic. Unlike in *Davis*, when a state imposes a real estate tax, it does not launch an “enterprise” or enter a “market.” And when it affords an income tax break for prior property tax payments, it does not favor itself with respect to its own production, ownership or transfer of services or property. Rather, the state has merely structured its taxing system in a way that steers private financial activity (including with regard to the buying and owning of vacation homes) from outside to inside its borders.

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

As these examples illustrate, *United Haulers* and *Davis* will take center stage in many cases that raise constitutional challenges to state taxing

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255 Id. at 1811.
256 Id. at 1814.
259 United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1796 (2007).
schemes. One challenge of this sort, however, stands out among all the others. In *Davis* the Court reserved the question whether its ruling in that case should extend to so-called “private activity bonds” – a vehicle of state-engineered financing so significant that it is estimated to involve some $500 billion in now-outstanding debt.\(^{262}\) May states discriminate in taxing in-state and out-of-state private-activity-bond interest in the same fashion that *Davis* permits them to discriminate in taxing interest paid on genuinely public bonds? We turn now to that question.

2. *Davis* and Private Activity Bonds. As we have seen, the Court in *Davis* applied the state-self-promotion principle to uphold state tax laws that discriminate in favor of bonds issued by in-state government entities.\(^{263}\) *Davis*, however, did not afford constitutional protection to all bonds of this sort. Rather, in a textual footnote sure to touch off a wave of future litigation, the Court paused to bracket the question whether the state-self-promotion doctrine extends to so-called “private activity bonds.”\(^{264}\) These bonds differ from the most longstanding forms of state-and-local-government bonds because they operate to finance activities undertaken by private individuals, business firms or non-profit entities.\(^{265}\) Recent estimates indicate that about one-quarter of all state-issued bonds fall into this category.\(^{266}\) The courts’ treatment of the issue in future cases thus will have far-reaching effects.

What will the courts do when they encounter the private-activity-bond question? The answer is far from clear,\(^{267}\) in part because there are many private-activity bonding schemes and many types of projects and programs that these schemes might finance.\(^{268}\) Put another way, the private-activity-

\(^{262}\) Dep’t of Revenue v. Davis, 128 S. Ct. 1801, 1805 n.2 (2008).

\(^{263}\) See supra notes 76-78 and accompanying text.

\(^{264}\) *Davis*, 128 S. Ct. at 1805 n.2. See Leading Cases, supra note 15, at 277 (noting that *Davis* “does not rule on the tax treatment of an important form of municipal debt issuance – private activity bonds”). The issue was obviously on the Justices’ minds, however, as the first several questions during oral argument focused on private activity bonds. See Transcript of Oral Argument, supra note 79, at 3-6. Such concern is not surprising given the importance of the market in private activity bonds. See Leading Cases, supra, at 285 (“[T]he importance of private activity bonds in the U.S. economy and the current volatile market environment make the exclusion of private activity bonds noteworthy.”).

\(^{265}\) *Davis*, 128 S. Ct. at 1805 n.2 (noting that “‘private activity’ bonds [are] used to finance projects by private entities”). See David Hoffman, *Private-Activity Bonds in Court’s Cross Hairs*, INVESTMENT NEWS, Nov. 26, 2007, at 12 (“Private-activity bonds are municipal bonds issued by a state on behalf of a private entity with the idea that the entity serves some sort of public good. Such bonds include those issued on behalf of airports, hospitals, housing or economic development.”).

\(^{266}\) Viard, *Balkanization of the Municipal Bond Market*, supra note 75, at 242.

\(^{267}\) Accord, Leading Cases, supra note 15, at 285.

\(^{268}\) Michael, supra note 75, at 759-60 (listing typical projects financed by private-activity bonds); Hoffman, supra note 265, at 12 (same); Viard, *Supreme Court Upholds*
bond “issue” in fact embraces a range of issues, and it is not possible to explore all those issues here. A useful place to start in analyzing the question, however, may be with the traditional “industrial revenue bond” (or “IRB”). As one analyst has explained:

[T]raditional industrial revenue bonds … are, in all but name, corporate bonds: The proceeds are often used to finance privately owned business facilities, the bonds are secured by mortgages on the facilities, and the bonds’ principal and interest are paid by the benefiting business.

In short, as a practical matter, IRBs involve borrowing by private entities, and not borrowing by the government itself, to finance private, and not public, activities. The government, however, must approve and participate in any such transaction, including by serving as the named issuer of the bonds. Under the principle of Davis, an obvious question thus arises: can a state offer an income tax exemption for in-state private-project-supporting IRBs, while denying the exemption for interest generated by IRBs sold to finance comparable private projects in other states? Three possible approaches to this question seem available.

First, the court might apply Davis to authorize this form of discrimination. On this view, the critical inquiry is whether the tax exemption is a “preference [the state] grants itself when it engages in activities serving public objectives.” Following this rhetoric, tax breaks for in-state IRBs may be seen as affording a “preference” to the state “itself” because a government entity issues the bonds, acts as a key participant in assembling funds, and serves as the essential medium through which those

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Balkanization, supra note 75, at 898 (noting that some private activity bonds have a “‘public’ flavor” while others have a more “‘private’ flavor”).

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

210 See 26 U.S.C. § 141 (2002) (defining private activity bonds and qualified private activity bonds); Viard, Supreme Court Upholds Balkanization, supra note 75, at 895 (discussing the classification of a municipal bond as a private activity bond under § 141 and the federal tax treatment of such bonds). Industrial revenue bonds are an attractive financing tool because interest earned on them may be excluded from the bondholder’s gross income for federal income tax purposes.

211 Michael, supra note 75, at 760.

212 Id.

213 Davis, 128 S. Ct. at 1815.
funds flow to the private entity. In addition, in issuing most modern tax-exempt bonds, the government “engages in activity serving public objectives” by, for example, funding hospitals, low-cost housing projects, transportation-related structures and other public-supporting facilities.\textsuperscript{274} (Moreover, even with traditional IRBs that supported private manufacturing, storage or other more quintessentially private business operations, the government could be said to be “serving public objectives” by expanding and diversifying the range of local businesses, building the local tax base, and stimulating local employment.\textsuperscript{275}) The case for upholding local IRB tax preferences also gains support from the defensible propositions that (1) private activity bonds and selective state tax breaks for them seem to have “a long pedigree”;\textsuperscript{276} and (2) invalidation of such tax preferences “could disrupt important projects that the States have deemed to have public purposes,”\textsuperscript{277} In short, the state is the “issuer” of IRBs just as surely as it is the issuer of public purpose bonds, and \textit{Davis} teaches that “a public entity … does not have to treat itself as being ‘substantially similar’ to the other bond issuers in the market.”\textsuperscript{278}

On the second view, state tax breaks selectively associated with IRBs should not fall within the protective reach of \textit{Davis}.\textsuperscript{279} This is the case because \textit{Davis} by its terms does not apply to government action that involves “favoring particular private businesses over their [out-of-state] competitors” – which is just what this sort of targeted tax preference entails.\textsuperscript{280} Indeed, in \textit{Davis}, Justice Souter distinguished the Court’s past

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\item \textsuperscript{274} See Leading Cases, supra note 15, at 285 (“Arguably the ultimate purpose and benefit of private activity bonds – to develop projects that improve communities – very closely mirror that of municipal bonds issued by the government to fund public works.”).
\item \textsuperscript{275} Cf. Kelo v. City of New London, 545 U.S. 469 (2005) (viewing condemnation of property for similar purposes as involving a “public use” under the Fifth Amendment Takings Clause).
\item \textsuperscript{276} Davis, 128 S. Ct. at 1806. See, e.g., Viard, \textit{Supreme Court Upholds Balkanization}, supra note 75, at 897 (noting that the “long-established nature” of the exemption and support by the states might point towards upholding it in light of the Court’s “reluctance to strike down long-established tax systems … that are supported by all of the states”).
\item \textsuperscript{277} Davis, 128 S. Ct. at 1805 n.2. The possible effects on the bond market itself might also move the Court to uphold the private activity bond exemption. See Leading Cases, supra note 15, at 286 (“[A]n upheaval in the private activities bond market would have far-reaching and detrimental economic consequences in an already volatile market environment.”).
\item \textsuperscript{278} Davis, 128 S. Ct. at 1812 (emphasis added).
\item \textsuperscript{279} Brief of Alan D. Viard, supra note 79, at 26 (“With private-activity bonds … private parties are the actual borrowers, not state or local governments. The \textit{United Haulers} exception should not apply in any event to this segment of the municipal bond market.”); Viard, \textit{Selective Private Activity Bond}, supra note 75, at 1017 (arguing that the principle of \textit{Davis} and \textit{United Haulers} “cannot validate the selective tax exemption as it applies to private activity municipal bonds” because “such bonds fall on the private side of \textit{United Haulers’} private/governmental distinction”).
\item \textsuperscript{280} Davis, 128 S. Ct. at 1801.
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tax-discrimination cases on the theory that “the ... Commonwealth's direct participation [in the bond market] favors, not local private entrepreneurs, but the Commonwealth and local governments.” In selectively granting tax relief to only in-state IRBs, however, the government does not simply favor “the Commonwealth and local governments”; indeed the whole point of issuing private-activity bonds is to support private undertakings. In Davis, Justice Souter took pains to emphasize that “governmental public preference is constitutionally different from commercial private preference.” And the case is strong, if not overwhelming, that local-activity-promoting IRBs involve a “commercial private preference” for the simple reason that their proceeds fund local, private commercial activities.

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

Given these facts, it is hard to see how discrimination between in-state and out-of-state private activity bonds, at least of the traditional IRB sort,

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281 Id. at 1814.
282 Id. at 1805 n.9.
283 Of particular significance, the Court has held that the operation of nonprofit entities is commercial in nature. See supra note 66. For this reason, there is no immediately apparent reason to distinguish private activity bonds that favor profit-seeking entities from private activity bonds that favor nonprofit entities.
284 See supra notes 122-131 and accompanying text (discussing public/private distinction applied in United Haulers and Carbone).
285 See supra notes 127-130 and accompanying text.
286 Michael, supra note 75, at 761 (noting that “[t]he business gets the lower interest rate that comes with the tax exemption” and that “[i]n many instances, the government does little more than put its name on the bonds (that is, issue them) to confer the tax benefits on the private beneficiaries”).
does not involve untoward “protectionism” of local private concerns. What is more, political-process considerations point strongly toward the conclusion that Carbone, rather than United Haulers, provides the controlling analogy in this context. Indeed, in Carbone, the Court detected a decisive danger of political distortion even when only a single private firm stood to profit from the government’s choice to inhibit free cross-border commerce. By way of comparison, in the IRB context, thousands of local (or would-be local) firms stand to benefit from the discriminatory tax break. Thus, with respect to political process considerations, Carbone would seem to control the IRB case a fortiori.

Let us say that the Court agrees with this analysis and thus deems the state-self-promotion principle inapplicable, at least as a general matter, to private activity bonds. Would such a ruling mean that this form of discrimination violates the dormant Commerce Clause? This question directs attention to a key point that we have encountered before. The point is that the state-self-promotion exception does not stand alone, and, for this reason, analysts must take care to work through how the doctrine relates to other elements of dormant Commerce Clause case law.287

One unsettled aspect of the dormancy doctrine concerns so-called “state business development incentives,”288 and states are sure to argue that – wholly apart from the state-self-promotion doctrine – special rules applicable to such incentives rightly permit tax discrimination between local and non-local IRBs. As it turns out, most non-tax-based business development programs are constitutionally uncontroversial; in particular, the Court has broadly suggested that states may seek to stimulate local business by channeling affirmative cash subsidies solely to local firms.289 Tax-based

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287 See supra notes 54-58, 186-187 and accompanying text (discussing relationship of state-self-promotion doctrine to market-participant exception and potential utilities exception).


289 See TRIBE, supra note 7, § 6-11, at 1093-94 (discussing constitutionality of direct subsidization of domestic industry); Coenen, supra note 160, at 977-1002 (1998) (discussing constitutionality of ordinary business subsidies).
incentives, however, have received more mixed reviews. Some scholars argue that almost all of these programs violate the antidiscrimination principle; others argue that most or all of them do not; and still others advocate a middle-ground approach that focuses attention on the coercive or noncoercive nature of the taxing scheme at issue. Most important of all, the Supreme Court has not yet thoughtfully considered which of these approaches holds the greatest merit.

Consideration of the constitutionality of tax-based business incentives lies beyond the scope of this article. With regard to IRB-financing, however, three points about such incentives merit attention. First, wholly apart from the state-self-promotion rule, special judicial treatment of business development incentives may lead to validation of tax exemptions limited to interest earned on only in-state private activity bonds. Second, an argument is available that courts should apply the state-self-promotion doctrine to exempt private activity bonds from antidiscrimination attack, regardless of the constitutionality of tax-based development incentives as a general matter. Third, although it is difficult to predict what lies down the

290 E.g., Peter D. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 377, 380-81 (1996) (arguing that the Commerce Clause should stand as a “restraint” against “the accelerating use of state tax incentives”).

291 E.g., Denning, supra note 59, at 510 (“It is difficult to see how one state’s subsidy of a particular activity, whether it is through cash or some tax credit, if offered to in-state and out-of-state firms equally, would begin the cycle of discrimination and retaliation that would threaten interstate harmony.”); Michael J. Graetz & Alvin C. Warren, Jr., Income Tax Discrimination and the Political and Economic Integration of Europe, 115 YALE L.J. 1186, 1243-44 (2006) (arguing that investment credit incentives should be permitted); Philip M. Tatarowicz & Rebecca F. Mims-Velarde, An Analytical Approach to State Tax Discrimination Under the Commerce Clause, 39 VAND. L. REV. 879, 928 (1986) (arguing for narrow reading of prior Court decisions that have struck down state tax incentives); Zelinsky, supra note 75, at 942-44 (arguing against continued operation of the dormant Commerce Clause antidiscrimination rule in tax cases, including those involving business development incentives).


294 See supra notes 273-278 and accompanying text.
road for IRB-taxing programs, both the language and the logic of *Davis* suggest that courts will hesitate to apply the state-self-promotion doctrine to the taxation of bonds that discriminatorily assist private firms. Thus, if the Court ultimately finds no constitutional problem with state favoritism of local IRBs, it is less likely to rely on the rule of *United Haulers* and *Davis* than on other principles of dormant Commerce Clause law.

**E. Leveraging the State-Self-Promotion Exception**

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

Working through these questions once again requires close attention to how the state-self-promotion doctrine relates to preexisting elements of dormant Commerce Clause doctrine, particularly the market-participant exception to the dormant Commerce Clause rule. We turn now to how these and other components of the dormancy doctrine interact with the state-self-promotion rule in two important settings of far-reaching practical importance.

1. **United Haulers and Cradle-to-Grave Waste-Handling Programs.** In *United Haulers*, a local government required the delivery of all locally generated trash to a waste transfer station owned and operated by it. Might the local government have taken the additional step of also insisting that all disposable waste, once processed by its station, had to go into a local landfill also subject to its own ownership and control? Such a waste disposal scheme would impose a greater burden on interstate commerce than the scheme validated in *United Haulers* because the Oneida-Herkimer program in fact permitted final delivery of non-reusable waste to landfills located outside the state. Challengers of this sort of waste program thus might

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295 *See supra* notes 279-282 and accompanying text.
296 *See supra* notes 54-58 and accompanying text.
297 Brief for the Respondent, *supra* note 194, at 2-3 (noting that non-recyclable waste was disposed of in landfills in Pennsylvania and New York that were chosen through a public competitive bidding process).
argue that it differs from the Oneida/Herkimer program in such a way that it should (unlike the Oneida/Herkimer program) trigger strict scrutiny under the dormant Commerce Clause antidiscrimination rule.

This argument would fail. Under the principle of *United Haulers*, after all, “flow control ordinances, which treat in-state private interests exactly the same as out-of-state ones, do not ‘discriminate against interstate commerce’ for purposes of the dormant Commerce Clause.”298 And that principle applies fully to our posited “cradle-to-grave” waste-handling program because that program does treat “in-state private business interests exactly the same as out-of-state ones” in that both in-state private waste transfer stations and in-state landfills are disadvantaged no less greatly than their out-of-state competitors.299 Simply put, the no-protectionism-when-private-entities-are-all-treated-the-same principle applies to our cradle-to-grave case because, in it, all private entities are treated the same.

Some cradle-to-grave programs will raise more complicated dormant Commerce Clause issues. What if, for example, the municipality that favors its own waste transfer station does not own a landfill but nonetheless mandates that all waste it processes must flow only to landfills located in the state? If this program operates to channel waste only to in-state *public* landfills, out-of-state landfill operators – both public and private – should again find themselves unable to mount a successful antidiscrimination-based attack. The difficulty they will face is that local cities, counties and authorities are merely arms of the state itself – a principle recognized in many decisions of the Court.300 For this reason, courts are not likely to treat a decision by Municipality X to favor in-state public landfills (whether or not owned by Municipality X) any differently from a decision by State Q to favor landfills run by it. Again, because the municipality’s restriction “treat[s] all private businesses the same,”301 the sheltering principle of *United Haulers* should control even though in-state public entities are advantaged vis-a-vis their out-of-state public and private counterparts.302

On the other hand, the state-self-promotion rule (at least standing alone) will not shelter the challenged Municipality X rule if it favors in-state

298 *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1797 (2007).
299 *Id.*. It bears mention in this regard that this scheme will survive discrimination-based attack even if turns out to disadvantage public, as well as private, out-of-state landfill competitors. It was this very distinction, after all, that the Court squarely rejected in the *Davis* case.
300 *See*, e.g., United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 215 (1984) (observing that “a municipality is merely a political subdivision of the State from which its authority derives”).
301 *United Haulers*, 127 S. Ct. at 1798 (emphasis added).
302 *See supra* note 299 and accompanying text.
private landfill operators. In such a case, after all, in-state and out-of-state private operators are not treated “exactly the same” precisely because in-state landfills are favored over their out-of-state business rivals. Even so, Municipality X is sure to argue that this arrangement should survive constitutional attack. It will do so by relying on a two-step application of settled Commerce Clause doctrine. First, Municipality X will note that United Haulers now authorizes the forced delivery to it of all local waste for processing in its own local transfer station. Second, Municipality X will argue that, having secured possession of the waste in this fashion, it may freely contract with whomever it selects as a trading partner in arranging for the waste’s disposal pursuant to the market-participant exception to the dormant Commerce Clause.

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

303 See id.
304 See supra notes 54-58 and accompanying text (discussing market-participant rule). An analogous problem was presented in Chance Management, Inc. v. South Dakota, 97 F.3d 1107 (8th Cir. 1996). There, South Dakota had given itself a monopoly in the lottery-video-gaming business, thus ensuring that anyone who engaged in that pastime (much like anyone who generated trash in Oneida or Herkimer Counties) had to deal with the state. South Dakota, however, then went a step further by also requiring that any licensee of its equipment (i.e., any retail purveyor of its services) have a majority of its ownership interest held by South Dakota residents. Although a majority of the Circuit Court panel upheld this arrangement under the market-participant rule, id. at 1111, Judge Lay in dissent found in the state’s double exertion of its monopoly position an impermissibly discriminatory regulation. Id. at 1119 (Lay, J., dissenting). On the analysis suggested here, Judge Lay had the better side of the argument because, when viewed holistically, the South Dakota program in effect forced in-state private video gamers to deal only with in-state private licensees. Professor Williams – who recently offered his own, and very penetrating, analysis of the case – reached this same conclusion. Williams, supra note 54, at 508.
305 United Haulers, 127 S. Ct. at 1798.
No case on point answers this question, but *West Lynn Creamery, Inc. v. Healy*\(^{306}\) sheds useful light. That case arose out of Massachusetts’s establishment of a program under which all milk dealers had to pay a tax on milk sold by them within the state regardless of the milk’s state of origin. Massachusetts then placed all proceeds of this tax in a segregated fund out of which it made payments solely to in-state milk producers. Chief Justice Rehnquist and Justice Blackmun saw no constitutional problem in what Massachusetts had done. For them, the milk tax raised no Commerce Clause difficulties because it was imposed in a nondiscriminatory fashion, and the payments made to in-state producers – though patently discriminatory – likewise presented no problem in light of the recognized “subsidy exception” to the dormancy doctrine.\(^{307}\) A majority of the Court in *West Lynn Creamery*, however, squarely rejected this divide-and-conquer approach. In its view, the proper course was to look at the actions of Massachusetts in an overarching way because “[i]t is the entire program – not just the contributions to the fund or the distributions from that fund – that simultaneously burdens interstate commerce and discriminates in favor of local producers.”\(^{308}\) According to the majority, “[b]y conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone.”\(^{309}\) In particular, the monetary subsidy paid by the state worked in “practical operation” as a tax “rebate” or “refund.”\(^{310}\) And because that rebate or refund went solely to in-state dairy farmers, the Massachusetts scheme contravened the basic Commerce Clause prohibition on tax-based discrimination.

What does *West Lynn Creamery* teach us about our favored-local-private-landfill cradle-to-grave case? The key point is that the Court sometimes will view two-part programs in a one-part way that exposes them to an otherwise-unavailable dormant Commerce Clause attack.\(^{312}\) More particularly, the Court in *West Lynn Creamery* took this approach in a setting much like the one presented by our hypothetical case – that is, where the state coupled a discriminatory resource distribution scheme (via the payment of milk-producer subsidies in *West Lynn Creamery* and via the payment of landfill tipping fees in our hypothetical case) with an otherwise permissible act of government coercion (by way of taxation in *West Lynn Creamery*).

\(^{306}\) 512 U.S. 186 (1994).

\(^{307}\) Id. at 213 (Rehnquist, C.J., dissenting); see also supra notes 288-293 and accompanying text (discussing subsidy exception).

\(^{308}\) West Lynn Creamery, 512 U.S. at 201.

\(^{309}\) Id. at 199-200.

\(^{310}\) Id. at 197.

\(^{311}\) Id. at 195 n.10.

\(^{312}\) See Coenen & Hellerstein, supra note 233, at 2196-2203 (discussing factors relevant in assessing constitutionality of such two-part plans).
Creamery and by way of a forced-use rule in our hypothetical case). In the end, the “practical operation” of this form of cradle-to-grave waste program is to steer waste business not only to the government itself but also to in-state private landfill operators. A blended reading of United Haulers and West Lynn Creamery leaves no doubt that this sort of program will raise constitutional red flags.

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

There is, however, a fly in the ointment. The complication is that even the discriminated-against waste handler in the Carbone case acknowledged the possibility that Clarkstown’s local processing rule would pass muster if all waste involved in the case “originate[d] in Clarkstown, and was … disposed of there.”

Why would the challenger of the program in Carbone make such a concession? The reason is that the town had argued that no discrimination against interstate commerce can exist when a local government effectively removes waste altogether from the stream of interstate trade. In Carbone, the Court did not have to evaluate this proposition because the favored transfer station in actuality served as only a stopping point as waste moved to both in-state and out-of-state final

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313 Reply Brief for Petitioners at 9, C & A Carbone, Inc. v, Town of Clarkstown, 511 U.S. 383 (1994) (No. 92-1402) (finding no need to address “the rule with respect to jurisdictions that merely collect local waste and dispose of it locally”).
314 Brief for Respondent at 16, Carbone, 511 U.S. 383 (No. 92-1402). See also USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1282 (2d Cir. 1995) (finding no dormant Commerce Clause violation where government “elected to occupy the entire field of garbage collection”).
destinations. If the remove-all-waste-from-the-stream-of-commerce notion has legitimacy, however, it might well permit states to effectuate disposal schemes that employ local private operators at every stage of the waste-handling process. Under such programs, after all, the handled waste never leaves the state.

Happily for challengers of flow control ordinances, this removal-from-the-stream theory does not hold water. In case after case, the Court has declared that the dormant Commerce Clause outlaws “home embargoes” that block the shipment of goods outside the commerce-prohibiting state. In *Hughes v. Oklahoma*,\(^\text{315}\) for example, the Court struck down a law that prohibited all exportation of locally seined minnows. In working its way to this result, the Court never even considered the possibility that such a flow-stanching regulation of interstate trade rendered the dormancy doctrine irrelevant. Instead the Court declared in no uncertain terms that “when a wild animal ‘becomes an article of commerce … its use cannot be limited to the citizens of one State to the exclusion of citizens of another state.’”\(^\text{316}\) One could carry on about why the same principle should apply when a private-firm-favoring cradle-to-grave waste disposal program blocks all movement of locally produced refuse beyond the state's borders. The key point, however, is that solid waste is an article of commerce, just as surely as is a wild animal brought to market for exchange.\(^\text{317}\) It follows that any blockade on the movement of waste outside the regulating state should meet the same fate as a comparable ban on the movement of baitfish.

2. Forced-Use Rules and Exorbitant User Fees. In *United Haulers*, the public entity that enjoyed the benefit of the local transfer station monopoly charged fees that, although high, qualified as reasonable in light of overall program costs.\(^\text{318}\) That entity, however, might have charged a great deal more, and this possibility prompted a telling exchange between Justice Kennedy and counsel for the counties at oral argument. That exchange went as follows:

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

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\(^\text{315}\) 441 U.S. 322 (1979).

\(^\text{316}\) Id. at 399; *see also* New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982) (making clear that principle of *Hughes* and earlier cases applies whether case involves “natural resources … or … the products derived therefrom”).


\(^\text{318}\) Transcript of Oral Argument, *supra* note 66, at 27.
Mr. Cahill: We can only charge something that’s reasonably related to the cost of what, of the service that we provide.

Justice Kennedy: Why is that?

Mr. Cahill: In Evansville Airport, Your Honor, this Court held that … a user fee is constitutionally limited; there has to be a relationship between the cost of the service and the amount that’s charged.\textsuperscript{319}

This colloquy raises a nettlesome question: What if the authority in fact did charge user fees that were so high that they bore no reasonable relation to the value of the service provided in handling local waste? More to the point, was counsel correct in predicting that Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.\textsuperscript{320} would render such price hiking unlawful under the Commerce Clause?

It is understandable why counsel read Evansville-Vanderburgh to support the answer he offered to Justice Kennedy. Indeed, the Court in that case reaffirmed that user fee charges must not be “excessive in relation” to the state services with which they are associated.\textsuperscript{321} No less important, the Court has broadly (and rightly) declared that the “user fee” label extends to any “charge imposed by the State for the use of state-owned or state-provided services or facilities.”\textsuperscript{322} Read together, these pronouncements suggest – just as counsel suggested – that tipping fee charges that wildly exceed program costs incurred in providing waste services will run afoul of the dormant Commerce Clause rule.\textsuperscript{323}

Or will they? In reality, the Court’s jurisprudence on user fees is a muddle. Particularly perplexing is how one can reconcile Evansville-Vanderburgh (which seems to limit a state’s ability to fix the terms of its business contracts when those terms could disrupt the operation of interstate markets) with the market-participant rule (which seems to provide that states may freely set business contract terms for goods and services it supplies without regard to the operation of interstate markets).\textsuperscript{324} I have elsewhere suggested that one way of reconciling the Court’s user-fee and market-participant precedents is to take a confined view of Evansville-Vanderburgh

\textsuperscript{319} Id.

\textsuperscript{320} 405 U.S. 707 (1972).

\textsuperscript{321} Id. at 719.

\textsuperscript{322} Or. Waste Systems, Inc. v. Dep’t of Env. Quality, 511 U.S. 93, 103 n.6 (1994).

\textsuperscript{323} Cf. Williams, supra note 54, at 498-99 (broadly suggesting that “if the state imposes a system of discriminatory user fees (either with respect to exhaustible or inexhaustible goods and services), the court must ask whether the price charged non-residents reasonably corresponds to the actual cost of providing such good or service to the non-residents”).

\textsuperscript{324} See supra notes 54-58 and accompanying text (discussing market-participant exception).
and cases like it. According to this theory, the principle of those cases targets – and targets only – state rules that threaten disruption of access to the essential “infrastructure of interstate trade.” If this reading of Evansville-Vanderburgh is right, counsel for the Authority was wrong in relying on that case in United Haulers. United Haulers, after all, involved user fees charged for state-provided waste disposal services, and fees paid for those services bear no kinship to fees paid for the use of state-supplied “waterways, roads and airports.” As a result, in response to Justice Kennedy’s question, counsel might well have asserted that the Oneida/Herkimer authority could charge whatever fees it wished to charge for waste services under the market-participant rule.

This analysis, however, also would have missed a key analytical point. The complication is that in the usual user fee case – Evansville-Vanderburgh included – the state imposes a user fee as part of a transaction into which the private payor voluntarily chooses to enter. (Indeed it is precisely because of the voluntary nature of “user fee” transactions that the state-restricting rule of Evansville-Vanderburgh clashes so starkly with the market-participant doctrine.) In a case like United Haulers, however, the government is not merely a market participant with which favored state residents may or may not choose to deal. Rather, because the state has put in place a forced-use rule, it is also a market regulator. And for this reason, the hypothetical presented by Justice Kennedy at oral argument presented a novel question that is controlled neither by the Court’s prior user-fee cases nor by its prior market-participant rulings. That question – which, quite properly, went unanswered in United Haulers – is whether a user fee tied to the provision of state-provided waste (or other) services, which a local resident has no choice but to use, must bear a reasonable relation to the value of the services rendered.

This question is sufficiently important to merit treatment in an extended article of its own. My preliminary appraisal suggests, however, that the

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326 Id. at 822.
327 Id. at 822-823.
328 See supra note 320 and accompanying text.
329 See supra notes 56-57 and accompanying text.
330 The question rightly went unanswered in United Haulers because of the undisputed reasonableness of the amount of the fee. See supra notes 318-319 and accompanying text.
331 One question that such an article might profitably address is whether courts should characterize a user fee coupled with a forced-use rule as a tax, given the obviously coercive features that such a program entails. Under the test set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), a tax must be “fairly related to the services provided” by the tax-imposing state. Id. at 279. In Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), however, a majority of the Court read this requirement in a way that seemed to strip it of all meaningful
dormant Commerce Clause should not block states from charging whatever fees they wish to impose when they conjoin forced-use rules with their own provision of waste-disposal services. Three reasons support this conclusion. First, it is not clear how the charging of high-flying fees in this context will cause the sort of injury to free-flowing trade that the dormant Commerce Clause guards against. In Evansville-Vanderburgh, for example, exorbitant user fees posed a focused threat to the interstate movement of airplanes and air travelers by raising the cost of interstate air travel itself. In our hypothetical waste station case, however, it is not apparent how the charging of extravagant fees will impede interstate activity. Put another way, the essential threat that such a program poses to interstate commerce comes from the forced-use rule itself because it is that rule that cuts off transactions with out-of-state service providers. The essential threat does not come from the level of fee charged for the service that that rule compels local waste producers to pay.

significance in the tax (as opposed to the user fee) context. See id. at 278. The impact of the tax-related rules set forth in Complete Auto Transit and Moorman on the question considered in the text is beyond the scope of this article.

One might argue this result runs counter to the Court’s teachings in Packet Co. v. Catlettsburg, 105 U.S. (15 Otto) 559 (1881). There the Court issued two rulings. First, it upheld a law that required steamships to use a town-owned wharf if they chose to dock within the town’s borders. Id. at 563. Second, of importance for present purposes, the Court held that “if the sum demanded for that service is so far beyond a reasonable compensation for the use of the city’s wharf as to be oppressive … the courts could in some way give appropriate relief.” Id. at 564. Recognition of a judicial power to police user fees in Packet Co. might be said to require recognition of a similar power in cases like United Haulers. Indeed, it might be argued that this result follows a fortiori given the greater level of monopoly power possessed on the facts of United Haulers than on the facts of Packet Co. See supra note 53 (discussing this point). There is, however, a flaw in this analysis. The difficulty is that Packet Co. falls squarely within the special category of cases in which state entities impose user fees in connection with the infrastructure of interstate trade. See supra notes 325-326 and accompanying text. The rule in such cases is that the state may not levy excessive charges. From that rule it does not follow, however, that state entities must avoid the charging of fees deemed excessive by the judiciary in non-infrastructure-of-trade contexts, including when dealing with waste disposal.

There is a counterargument, which goes like this: Any raised charges will reduce the charged-for activity and a reduction of that activity will in turn reduce resulting interstate commerce. (In particular, higher tipping fees will reduce waste tipping which will reduce down-the-line waste hauling and waste-burying, including in cross-border settings.) There is something to the point, but it misses an important distinction between our posited waste case and Evansville-Vanderburgh. There, after all, the burden on interstate commerce was immediate and direct because heightened fees for airport use obviously threatened movements that in their nature almost always have interstate dimensions. The raising of tipping fees, in contrast, concerns an intrinsically intrastate transaction precisely because those fees are associated with a transaction that the state has forced to occur within its borders. Again the key point is that, in cases like United Haulers, the immediate burden on interstate commerce is imposed by the forced use rule, not by the tipping fee.
Second, airport user fees (and other fees like them) involve a special risk of cost-shifting from intrastate to interstate transactions. In particular, airport users typically move across state lines, and many of the persons who so move are nonresidents of the state in which the airport sits. Thus, the imposition of these sorts of transportation-related user fees provides states with a distinctive opportunity to shift the costs of state government rightly borne by state residents themselves (including costs wholly unrelated to the provision of air or other transportation services) onto the shoulders of nonresidents. Such a deflection of costs from in-staters to out-of-staters creates obvious tensions with dormant Commerce Clause values. 334 No comparable risk is present, however, when a locality simply charges its own residents high user fees to dispose of their own trash.

Finally (and relatedly), in the forced-use-rule/waste-user-fee context, the need for judicial policing seems weak because the ordinary operation of local political processes should counteract any serious threats that overreaching fees pose to free-flowing interstate trade. The cost of tipping fees, after all, will inescapably come to rest on the very trash-producing local voters who determine local elections and thereby guide local policymaking. To be sure, collective action problems may arise when (as here) government program costs are spread among large numbers of persons, each of whom pays only a small amount of the state-imposed burden. 335 But it is hard to believe that the costs generated by super-high tipping fee schemes—which will be paid on a regular basis by both big and small local businesses and by every individual member of both the “in” and the “out” political parties—will long survive unless there exists a powerful justification for their imposition. For this reason, any out-of-state commercial interests harmed by through-the-roof user fees should find “surrogate representation” among local voters because those voters will not nonchalantly bear the burden those fees impose on them. 336

334 See, e.g., Kassel v. Consol. Freightways Corp., 450 U.S. 662, 686 (1981) (Brennan, J., concurring in the judgment) (finding Iowa’s efforts to deflect the burdens of highway use onto neighboring states to embody an example of “‘simple . . . protectionism’” that is subject to “‘a virtual per se rule of invalidity’”).
335 See, e.g., Yale & Galle, supra note 65, at 885-86.
336 Tribe, supra note 7, § 6-5, at 1055. See id. at 1053 (“This theme of political representation is so potent that even regulations severely burdening interstate commerce have been tolerated when the interests adversely affected have been adequately represented in the regulating state’s own political process.”); Denning, supra note 59, at 507 (noting Court’s hesitance to apply Commerce Clause when “[a]ffected in-state residents could serve as virtual representatives for those from out-of-state”).
III. THE STATE-Self-PROMOTION DOCTRINE AND PRINCIPLES OF JUDICIAL DECISIONMAKING

What guidance for working with state-self-promotion cases emerges from the treatment of United Haulers and Davis offered in the preceding pages? Two key ideas have prominence. First, significant complexity marks the state-self-promotion exception, and judges and lawyers must take care to locate that exception within the broader superstructure of dormant Commerce Clause doctrine. Second, while state-self-promotion cases will inevitably present fact-specific questions, much help in resolving those questions should come from an attentiveness to the twin concerns – regarding (1) the nature of protectionism and (2) political-process-based reasoning – that drove the Court’s creation of the exception in the first place. As courts grapple with the state-self-promotion doctrine in the future, they would do well to bear both of these overarching ideas in mind.

A. Complexity and Context

As Part II signals, the state-self-promotion doctrine will bring a truckload of tricky questions into the dormant Commerce Clause arena. That result should not be surprising. Why? Because – as now should be clear – the Court unleashed a major doctrinal initiative in United Haulers. Any new constitutional doctrine of any significance will trigger difficult questions of application that courts must work through in a string of decisions that unwind pursuant to the common law methodology.337 So it is with the state-self-promotion principle.

Of particular importance, the Court should take care as it moves forward with this doctrine to consider how it fits together with pre-existing features of the dormant Commerce Clause terrain. So far, the Court has shown little attentiveness to this need.338 In Davis, for example, the Court set about to explain how Kentucky’s bond tax rule posed no problem under Pike balancing analysis without pausing to consider whether and why Pike balancing even should apply in a case that involved state taxation, rather than state regulation.339 What is more, the Court went on to suggest in cryptic fashion that it will sometimes truncate or dilute application of the

337 See, e.g., THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob Cooke ed., 1961) (posing that a “considerable bulk” of precedent must be developed to deal with the “variety of controversies” that courts will encounter); David A. Strauss, Common Law, Common Ground, and Jefferson’s Principles, 112 YALE L.J. 1717, 1729 (2003) (“The common law approach is central to many of the most important areas of constitutional law . . . .”).
338 Cf. Denning, supra note 59, at 497 (describing United Haulers as creating “undertheorized exclusions and exemptions”).
339 See supra notes 236-242 and accompanying text.
Pike balancing formula when it determines that special concerns about judicial competence in applying that formula are present. 340 Will it do so in all cases? Only in tax cases? Only in state-self-promotion cases? And how does one determine whether special concerns about judicial competence are in the picture?

Critics of the dormant Commerce Clause principle – with Justices Scalia and Thomas leading the charge – are sure to latch onto these complexities in urging that the “unworkable” nature of the Court’s dormancy doctrine, now more than ever, justifies that principle’s abandonment. 341 Attentiveness to context, however, suggests that any such claim would be misplaced. To begin with, the line-drawing problems identified here do not concern the basic limits of the dormant Commerce Clause rule itself. Instead, they involve the limits that a new judicially crafted exception has superimposed upon that rule. If this exception produces a set of standards that are too blurry for courts to work with, baby-and-bathwater logic suggests that the proper course would be to jettison the new exception, rather than the foundational dormant Commerce Clause principle itself. In any event, major legal principles inevitably involve gray areas, and “it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution.” 342 This concept, it might fairly be added, applies with special force to a bedrock constitutional doctrine that the courts have applied in hundreds of decisions handed down over a span of almost 200 years. 343 It also gathers strength from the distinctive rule in this area of law that permits Congress to overturn what it perceives to be judicial errors in applying dormant Commerce Clause doctrine. 344 For these reasons, a decision to abandon judicial enforcement of the dormant Commerce Clause because of difficulties in applying the state self-promotion rule would be ill-advised. Indeed, such a decision would make little more sense than would

340 See supra notes 109-115 and accompanying text.
343 Among the earliest dormancy doctrine decisions was Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). For some of the broad treatments of the Court’s dormant Commerce Clause rulings since that time, see generally Boris I. Bittker, Bittker on the Regulation of Interstate and Foreign Commerce (1999); Frederick H. Cooke, The Commerce Clause of the Federal Constitution (1908); and E. Parmalee Prentice & John G. Egan, The Commerce Clause (1898).
344 See, e.g., Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992) (“No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.”); Am. Trucking Ass’ns v. Schneider, 483 U.S. 266, 289 n.23 (1987) (“If Congress should disagree with this decision, it would, of course, have the power to authorize flat taxes of this kind.”).
abandoning judicial enforcement of the First Amendment because its "public forum,"345 "content discrimination,"346 "public figure,"347 "obscenity"348 or "prior restraint"349 principles have stirred wide-ranging interpretive kerfuffles.350

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

1. the specialized body of doctrine that already deals with the constitutionality of monopoly grants accorded to both publicly and privately owned "utilities";351
2. the general principle that substance should hold sway over form in dormant Commerce Clause cases, and the particular manifestation of that principle with respect to the location of title in South-Central Timber Development, Inc. v. Wunnike;352
3. the subsidy exception to the dormant Commerce Clause (and the role that exception should play, if any, in evaluating the applicability of the state-self-promotion exception to public/private joint-venture cases);353
4. the distinctive treatment that the Court long has afforded to state

345 Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-46 (1983) (establishing trichotomy of fora in which constitutionality of speech should be assessed contextually).
350 A predictable response to this point is that we have no choice but to enforce the First Amendment because it – unlike the dormant Commerce Clause – is set forth in the Constitution. This supposed response, however, simply assumes the conclusion that the dormant Commerce Clause principle lacks a proper constitutional pedigree. But see infra note 391 and accompanying text. And the Court has embraced and enforced the dormant Commerce Clause principle for far longer than it has worked with the First Amendment. In the end, it is open to judges and scholars to argue that the dormant Commerce Clause is not embodied in the Constitution. That argument, however, is one that stands apart from an argument about the difficulties of applying the principle in practice.
351 See supra notes 186-188 and accompanying text.
352 See supra note 150 and accompanying text.
353 See supra note 160 accompanying text.
regulatory measures and state taxing measures under the dormant Commerce Clause (including, in particular, with respect to the operation of *Pike* balancing analysis);\(^{354}\)

5. the market-participant exception to the dormancy doctrine, particularly insofar as it affects the states’ ability to leverage the state-self-promotion exception to benefit in-state private businesses;\(^{355}\)

6. the Court’s rejection of a “traditional functions” limit on the market-participant exception (and the relevance of that action in deciding whether there ought to be a “traditional function” limit on the state-self-promotion doctrine);\(^{356}\)

7. the rule of *West Lynn Creamery, Inc. v. Healy*, and its impact on viewing in a unitary way multiple features of state-self-promoting programs;\(^{357}\) and

8. the Court’s distinctive jurisprudence with respect to state-imposed user fees, including the limits placed by *Evansville-Vanderburgh* on the excessiveness of charges imposed by the state for services it provides.\(^{358}\)

The length of this list highlights why lawyers and judges called on to work with the state-self-promotion principle must keep their eyes fixed on the full richness of the Court’s dormant Commerce Clause case law. Indeed, proper assessment of the reach of the state-self-promotion rule will require attentiveness to features of law that reach well beyond the dormant Commerce Clause. In deciding whether to recognize a “traditional functions” limit on the state-self-promotion doctrine, for example, courts will have to consider whether making such a move is permissible in light of the Court’s past rejection of a “traditional functions” limit on Congress’s ability to regulate “states qua states” under the affirmative grant of power made by the Commerce Clause.\(^{359}\) In addition, if courts do recognize a “traditional functions” limit on the state-self-promotion doctrine, they will have to decide what state programs do and do not qualify as “traditional” in nature. In undertaking any such inquiry, courts would do well to consider the growing body of statutory-interpretation and preemption cases that grapple with whether particular programs involve “traditional” or “nontraditional” state interventions.

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

B. Policy-Driven Analysis

As Part II demonstrates, there is no single formula that will provide a ready answer to every state-self-promotion issue that comes down the constitutional pike. Rather, in applying this principle, as in applying other principles, courts must draw on the common stock of analytical techniques employed in deciding constitutional cases. The analysis set forth in Part II bears out this idea. We see there, for example, that courts will be able to make effective use of a fortiori logic, arguments centered on practical consequences,362 and the invocation of analogies grounded in decisions from related areas of law.363 As suggested in Part III.A, judicial application of the state-self-promotion principle will also be guided by pre-existing dormant Commerce Clause principles.

Most important of all, the underlying policies identified in Part I as having propelled creation of the state-self-promotion doctrine should figure in efforts to sort through the principle’s implications.364 As a result, any fair evaluation of concrete cases must take account of (1) a private-gains-centered notion of state protectionism and (2) an evaluation of the underlying dynamics of the political processes that produced the challenged state program. In many contexts – ranging from public/private joint ventures365 to state-issued industrial revenue bonds366 to “cradle to grave” waste service programs367 to high-end state user fees368 – careful evaluation of these dual considerations will point the way to sound results. No less important, the obvious helpfulness of policy-guided analysis in these settings suggests that policy-guided analysis may well be of aid in other

361 See supra notes 77, 233-234 and accompanying text.
362 See supra notes 137-146 and accompanying text.
363 See supra notes 306-312 and accompanying text.
364 See Karl N. Llewellyn, THE BRAMBLE BUSH 174 (Oxford Press 2008) (“[T]he rule follows where its reason leads; where the reason stops, there stops the rule.”).
365 See supra notes 122-160 and accompanying text.
366 See supra notes 263-295 and accompanying text.
367 See supra notes 297-317 and accompanying text.
368 See supra notes 318-335 and accompanying text.
There is a final and fundamental consideration, also identified in Part I, that courts should bear in mind as they work with the state-self-promotion doctrine. That consideration is this: United Haulers and Davis reflect a doctrinal ambitiousness that the opinions in those cases tend to understated.369 Some might argue that the innovative nature of the state-self-promotion doctrine, and the Court’s unlabored endorsement of it, support a broad application of the doctrine going into the future. Following this logic, the Court might, for example, constrict the operation of the dormant Commerce Clause by deeming the exception applicable to discriminatory programs that involve public/private joint ventures, non-publicly-owned utilities, hybridized state-self-promotion/market-participant cases, and all forms of private-purpose municipal bonds.370 Indeed, the Court might build on United Haulers and Davis to overrule its earlier ruling in Carbone, or even to abandon its longstanding condemnation of all forms of local processing requirements.371

There is, however, a different – and, I believe, more proper – view to take. This position may be summarized as follows: Given the deep roots of the dormant Commerce Clause rule and the vital service it has rendered to the nation,372 courts should hesitate to apply the new United Haulers/Davis principle to validate starkly discriminatory state programs absent a strong indication that the principle controls the case at hand. At the very least, courts should think long and hard before invoking the state-self-promotion doctrine to uphold programs – such as many of those involving public/private joint ventures – that serve to promote profit-making by local firms not operated by the state itself.373

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

The state-self-promotion doctrine embodies a distinctive creation of the Roberts Court. The doctrine, as we have seen, also operates as a new and

369 See supra notes 35-74 and accompanying text (discussing United Haulers) and supra notes 75-88 and accompanying text (discussing Davis).
371 See supra notes 40-59 and accompanying text (highlighting reasons why Court could have equated Carbone and United Haulers for constitutional purposes); see also Denning, supra note 59, at 469-71 (arguing that a deep tension marks the Court’s decisions in Carbone and United Haulers).
372 See supra notes 1-7 and accompanying text (highlighting the far-reaching importance of the dormant Commerce Clause).
important limit on the reach of the dormant Commerce Clause principle. *United Haulers* and *Davis* thus raise a question that ranges well beyond how the state-self-promotion doctrine will operate in future cases. That question is this: Do *United Haulers* and *Davis* cast light on likely developments in other areas of dormant Commerce Clause doctrine or, for that matter, in entirely different fields of constitutional law? These questions invite a wide-ranging analysis, but for now four observations will have to suffice.

First, the Court’s state-self-promotion decisions on their face reflect an openness within the current Court – perhaps an openness of unprecedented dimensions – to reining in the dormancy doctrine. It is telling in this regard that all four members of the more nationally minded “liberal” wing of the Court – Justices Stevens, Souter, Ginsburg and Breyer – joined the majority opinion in *Davis*, and that all of them except Justice Stevens also joined *United Haulers*. Indeed, the only dissenters in both cases were Justice Kennedy (whose own overarching philosophy includes a healthy dose of solicitude for state autonomy) and Justice Alito (who went so far in these cases as to reserve consideration of the question whether the dormancy doctrine should exist at all). As surely as an anthem of the 60s could rightfully rue that Joltin’ Joe DiMaggio had “left and gone away,” modern dormant Commerce Clause enthusiasts might turn their lonely eyes to John Marshall Harlan, Joseph Bradley, Louis Brandeis, Benjamin Nathan Cardozo, Harlan Fiske Stone, Robert Jackson, William Brennan, 

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


377 *Simon & Garfunkel, Mrs. Robinson, on Bookends* (Columbia 1968).

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

379 *E.g.*, Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887) (applying dormant Commerce Clause to facially neutral law that had practical effect of harming interstate trade).

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


382 *E.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (employing balancing methodology, earlier pioneered by him, to strike down facially neutral train-length law).
Potter Stewart, 385 Byron White, 386 and Lewis Powell 387 (as well as most of their contemporaries 388) – all of whom showed no hesitation in scuttling state laws that fostered economic balkanization. To be sure, one must be careful about oversimplifying, if not caricaturing, the jurisprudential viewpoints of particular Justices based on votes in a limited number of cases. It is at least curious, however, that the four Justices who would seem most likely to protect nation-binding dormant Commerce Clause values joined together in United Haulers and Davis to put in place a new and major exception to the antidiscrimination rule.

Second, if United Haulers and Davis evidence a modern drift away from judicial protection of the national marketplace, the question arises as to why this drift has occurred. One important development involves the work of Justices Scalia and Thomas, who have advanced the position that the dormancy doctrine is fundamentally inconsistent with originalist thinking. 389 This outlook (at least in my view) is subject to a robust challenge, but no member of the current Court has yet to mount the counteroffensive. 390

384 E.g., Hughes v. Oklahoma, 441 U.S. 322 (1979) (overturning longstanding wild animal exception to the dormant Commerce Clause rule).
386 E.g., Bacchus Imps., Ltd., v. Dias, 468 U.S. 263 (1984) (invalidating special tax preference for local alcohol producers, and refusing to embrace struggling-industry exception to the dormant Commerce Clause); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (declining to apply market-participant exception and emphasizing importance of restricting operation of that exception to guard against so-called downstream restraints).
389 See supra notes 60-61 and accompanying text.
390 Among other things, it might be noted that Chief Justice Marshall (who served as a delegate to the Virginia Ratification Convention) believed that Congress’s commerce power was exclusive and thus should, without congressional action, displace some state laws. See New York v. Miln, 36 U.S. (11 Pet.) 102, 158 (1837) (Story, J., dissenting) (noting that Chief Justice Marshall had considered and embraced this position). Justice Joseph Story trumpeted this same view in his great treatise on the Constitution. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 516-520, at 366-69 (1833). Justice William Johnson – who was appointed to the Court by the great defender of state prerogatives, Thomas Jefferson – took the same view. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 236 (1824) (Johnson, J., concurring) (describing the Constitution as being “altogether in favour of the exclusive grants to Congress of power over commerce”). In the Gibbons case, Daniel
Perhaps in these circumstances the views of these two Justices have exerted a gravitational pull on the more centrist members of the Court. What is more, Chief Justice Roberts’s view of the dormant Commerce Clause seems (at least for now) closely aligned with that of his statist mentor, Chief Justice Rehnquist. As a result, there is reason to believe that three almost-sure votes for the state or locality will exist in most hard-fought dormancy doctrine cases. Given this seeming stacking of the deck against dormant Commerce Clause claims, the Court’s most nationally minded Justices may have decided (whether consciously or not) that this is not the area of constitutional law in which their limited judicial capital is most profitably expended.

Third, United Haulers and Davis may invite contractions of the dormant Commerce Clause by way of tampering with subdoctrines apart from the state-self-promotion exception itself. As we already have seen, for example, United Haulers could lead in time to the demise of Carbone and other local-processing-rule precedents. In similar fashion, Davis holds the potential to expand the market-participant exception and thereby lessen the dormancy doctrine's reach. This is the case because, in a portion of the Davis opinion joined by Justices Stevens and Breyer, Justice Souter argued that Kentucky’s local-bond preference should skirt invalidation not only based on the state-self-promotion exception, but also based on the market-participant doctrine. I have critiqued this analysis elsewhere. For present purposes, however, the relevant point is simple enough: With just two more votes, the Court in Davis not only would have expanded the state-self-promotion exception to the antidiscrimination rule, but also would have significantly broadened the across-the-board exemption from dormancy doctrine review applicable in market-participant cases.

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

Finally, the Court's state-self-promotion decisions might have spillover effects in other areas of Commerce Clause law. Of special significance in this regard is the Court's flirtation, in both United Haulers and Davis, with endorsing a nontraditional-functions limit on the state-self-promotion doctrine. Again, the key point is hard to miss: If the Court draws a traditional-activity/nontraditional-activity line of division in the state-self-promotion context, it may soon find its way to drawing that same line in other contexts as well.

In particular, an embrace of the

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394 See supra notes 109-121 and accompanying text. This point lays at the heart of Professor Denning's recent work. See supra note 118.
395 See, e.g., Bendix Autolite Corp. v. Midweco Enters., Inc. 486 U.S. 888, 897 (1988) (Scalia, J. concurring) (urging abandonment of the Pike balancing test so as to "leave essentially legislative judgments to the Congress").
396 See supra notes 109-117 and accompanying text. On the other hand, it may be significant that, even while embracing the state-self-promotion immunity in United Haulers, the Court declared that the immunity preempted operation of only the antidiscrimination review and proceeded to apply Pike analysis to the challenged force-use rule. See supra note 62 and accompanying text. Then in Davis the Court went a step farther, by applying Pike analysis to a state tax rule — that is, in just the sort of case as to which Pike balancing review has traditionally not applied at all. See supra notes 240-242 and accompanying text. Where all of this will take dormant Commerce Clause balancing analysis in the long term is not clear.
397 See supra notes 208-214 and accompanying text.
398 For example, in the South Dakota cement case, Reeves, Inc. v. Stake, 447 U.S. 429 (1980), four Justices stood ready to engraft a nontraditional-functions limit on the market-participant doctrine and, by so doing, to strike down the state's resident-preference sales rule. Id. at 449 (Powell, J., dissenting). Would an embrace of the traditional/nontraditional distinction in the state-self-promotion setting lead to an embrace of that same distinction in the market-participant setting with the consequence that Reeves is overruled? Such a result might well seem surprising, especially given the moves by the Court in United Haulers and Davis to contract — rather than to expand — the protections afforded by the dormant Commerce Clause. Moreover, one distinction between the two lines of cases is available — namely, that an
traditional/nontraditional distinction in the state-self-promotion context might trigger the resurrection of a long-abandoned restriction on Congress’s affirmative commerce power. In *National League of Cities v. Usery*, a five-Justice majority concluded that important restrictions existed with respect to Congress’s ability to wield that power in “areas of traditional governmental functions.” In *Garcia v. San Antonio Metropolitan Transit Authority*, a different coalition of Justices overruled *National League of Cities* based on the notion that efforts to distinguish between traditional and nontraditional state activities were unworkable and unwise. If the Court were to impose a nontraditional-activity limit on the state-self-promotion rule, might the other shoe drop with an overruling of *Garcia*? There are strong reasons to suspect that the answer to this question is “no.” It is noteworthy, however, that the author of *National League of Cities* was then-Justice Rehnquist and that it was his protégé, Chief Justice Roberts, who – as the author of the opinion in *United Haulers* – suggested that this distinction might operate in applying the state-self-promotion rule.

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exception to the state-self-promotion rule is more justifiable because that rule (unlike the market-participant doctrine) goes so far as to safeguard government coercion. See *supra* notes 54-58 and accompanying text. But cf. *supra* notes 226-227 and accompanying text (noting that traditional/nontraditional distinction seems inconsistent with Court’s overriding effort to encourage state experimentation). Even so, development of a nontraditional-function limit to contract the state-self-promotion doctrine will invite arguments that the Court should recognize a limit to contract in similar fashion the market-participant exception as well.

404 See *supra* note 391 and accompanying text.
CONCLUSION

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

In this article I have offered a sneak preview of what some of those effects will be. Along the way, I have suggested that the courts should approach state-self-promotion cases with an alertness to the twin considerations relied on by the Court in recognizing the doctrine – namely, (1) a private-gain-centered definition of protectionism and (2) a practical sense of local political dynamics. I also have suggested how courts might put these analytical touchstones to work in approaching important categories of state-self-promotion cases. In all of this, we should be careful not to lose the forest for the trees. For nearly 200 years, the dormant Commerce Clause principle has stood as a bulwark against forces that inexorably push states to pursue short-term interests and thereby engender long-term divisions. Courts should keep their gaze fixed firmly on this reality as they grapple with the state-self-promotion exception to the dormant Commerce Clause antidiscrimination rule.