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David M. Lawrence
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Flow-Control Ordinances Held Unconstitutional: *C&A Carbone, Inc. v. Town of Clarkstown*

William A. Campbell

No issue in the field of solid waste management has generated as many lawsuits as flow control, the effort by a local government to direct where solid waste generated in its jurisdiction is to be transported or disposed of.[1] Local governments have sought to impose flow control to obtain secure financial support for disposal facilities and to ensure that solid waste is disposed of in an environmentally sound manner. Private solid waste management companies have opposed flow control because they view the local government restrictions as anticompetitive and harmful to their business interests. The central legal question in most of the lawsuits challenging flow control has been whether a flow-control ordinance—directing that all solid waste generated within a local government's boundaries be transported to or disposed of at a facility controlled by the local government—violates the commerce clause of the United States Constitution.[2] In *C&A Carbone, Inc. v. Town of Clarkstown* the U.S. Supreme Court held that flow-control ordinances do violate the commerce clause.[3]

I. *C&A Carbone, Inc. v. Town of Clarkstown*

A. Facts

In 1990 the town of Clarkstown, New York, built a transfer station to handle bulk solid waste. Solid waste was brought to the station, where recyclable materials were separated from nonrecyclable materials. Recyclable waste was baled for shipment to a recycling facility; nonrecyclable waste was transported to a landfill or incinerator for disposal. The cost of building the transfer station was $1.4 million. The town contracted with a private company to build the facility and operate it for five years. During the five years of the contract the town guaranteed a minimum waste flow to the facility of 120,000 tons a year. The private operator was authorized to charge a tipping fee of $81.00 a ton, which was higher than the fee for disposing of unsorted waste at facilities outside the town. If the transfer station received less than 120,000 tons a year, the town agreed to make up the tipping fee deficit (a "put-or-pay" contract that is common in the financing of solid waste facilities).

In an effort to meet the yearly 120,000-ton minimum, the town adopted a flow-control ordinance that required all nonhazardous solid waste generated in the town to be brought to the transfer station for separation and processing. Carbone, a private waste management firm operating in the town, was thus required to bring solid waste that it collected to the transfer station rather than haul it directly to a disposal facility, thereby incurring higher costs. Carbone bypassed the transfer station and shipped waste directly to out-of-town disposal facilities in violation of the flow-control ordinance, and the town obtained an injunction against Carbone requiring it to comply with the ordinance. The injunction against Carbone was upheld by the Appellate Division of the Supreme Court of New York.[4]

B. Majority Opinion

The Supreme Court, in an opinion by Justice Kennedy in which four justices joined, found Clarkstown's flow-control

1. For an extensive discussion of flow control and the cases leading up to the *Carbone* decision, see Anne Kim, *Legal Challenges to Solid-Waste Flow-Control Ordinances*, Special Series No. 12 (Chapel Hill: Institute of Government, 1993).

2. Article I, § 8, cl. 3.

3. 62 U.S.L.W. 4315 (U.S. May 16, 1994).

4. 182 A.D.2d 213, 587 N.Y.S.2d 681 (N.Y. App. Div. 2d Dept. 1992).

ordinance to be unconstitutional because it discriminated against interstate commerce. The Court rejected the town's argument that the ordinance regulated only waste generated in the town and was not an attempt to regulate interstate waste or exclude such waste from the town. In finding the ordinance to be in violation of the commerce clause, the Court relied primarily on cases that had struck down local ordinances or statutes that required some sort of local processing of material: *Dean Milk Co. v. Madison*[5] (ordinance requiring all milk sold in the city to be pasteurized within five miles of the city limits), *Minnesota v. Barber*[6] (statute requiring all meat sold in the state to be inspected by an inspector in the state), and *South-Central Timber Development, Inc. v. Wunnicke*[7] (regulation requiring all Alaska timber to be processed within the state prior to export). The reason for the invalidity of all ordinances of this sort, the Court held, is their discriminatory impact on out-of-state processors.

C. Justice O'Connor's Concurrence

Justice O'Connor agreed that the town's ordinance was unconstitutional, but she arrived at that conclusion by a different path. She disagreed with the majority that the ordinance discriminated against interstate commerce, because she found the majority's reliance on the processing cases misplaced. She noted an important difference between those cases and the ordinance under review, the difference being that Clarkstown's ordinance did not grant favored treatment to local solid waste firms but required all firms—both local and out-of-town—to bring waste collected in the town to the town's transfer station.

The approach taken by Justice O'Connor was to review the ordinance according to the test set forth in *Pike v. Bruce Church, Inc.*,[8] the test used when a local regulation appears to regulate even-handedly both local and interstate subjects but places a burden on interstate commerce. In that event, the Court uses a balancing test to ask whether the burdens on interstate commerce outweigh the local benefits conferred. Justice O'Connor saw the local benefits as being the town's ability to finance the transfer station, and these benefits could be secured, she said, by means with less of an impact on interstate commerce. Therefore she found the ordinance wanting under the *Pike* test.

D. Justice Souter's Dissent

Justice Souter, joined by Chief Justice Rehnquist and Justice Blackmun, found no violation of the commerce clause. Justice Souter distinguished the processing cases from *Carbone* in the same manner as did Justice O'Conner, but unlike her he found no improper burdens on interstate commerce. His dissent is the only one of the opinions to give the weight that should be given to a local government's interest in seeing that solid waste is disposed of at a reasonable cost in an enviromentally sound manner. His concluding paragraph summarizes his reasoning:

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

II. Possible Responses to *Carbone*

A. Action by Congress

As with all of the Supreme Court's decisions interpreting the dormant commerce clause, Congress may alter the result of the *Carbone* decision by enacting legislation that authorizes state and local governments to adopt flow-control ordinances in some or all circumstances. Although it is probably too early to speculate about what Congress may do, recent intelligence from Washington does not provide much hope for cities and counties interested in flow control. Before *Carbone* was decided, Representative Al Swift, of Washington, was reported as being interested in including a provision in the rewrite of the Resource Conservation and Recovery Act to allow flow control for facilities for which financial committments had been made before the effective date of the statute; but no flow control would be allowed after that date.[10] After the decision, however, the speculation was that the flow-control issue is now so complex that Congressional action during 1994 is unlikely.[11]

5. 340 U.S. 349 (1951).
6. 136 U.S. 313 (1890).
7. 467 U.S. 82 (1984).
8. 397 U.S. 137 (1970).
9. 62 U.S.L.W. 4315, 4329 (U.S. May 16, 1994).
10. *See Resource Recovery Report*, vol. XVIII, no. 6, p. 1 (April 1994, Frank McManus, ed.).
11. *Id.*, no. 8, p. 1.

B. General Fund Supplements to Finance Solid Waste Facilities

The major reason for flow control in most cases is to ensure that financial committments to fund a government-owned disposal facility are met, by directing solid waste to the facility to ensure a certain volume of waste. Flow control is necessary because the government-owned facility may be in competition with private facilities that charge a lower tipping fee. One means of ensuring an adequate volume of waste at the government facility (and one mentioned in the *Carbone* majority opinion) is for the local government owner to lower the tipping fee below that of competing private facilities and make up the difference in cost from General Fund revenues. Local governments have for many years financed some or all solid waste management costs from the property tax, sales tax, and available nontax revenue, so such a policy is nothing new. It does, however, run counter to the recent trend of financing an increasingly larger share of solid waste costs from user fees rather than from general revenues.

C. Monopolizing Solid Waste Collection

Another means by which a local government may ensure delivery of all solid waste generated within its jursidiction to its own facility is to monopolize the collection of that waste. Once the local government begins collecting all of the waste, it can dispose of the waste at any facility it chooses, including its own. North Carolina cities[12] and counties[13] have ample statutory authority to operate solid waste collection and disposal services. Moreover, Section 130A-294(b) of the General Statutes specifically provides that to the extent necessary to provide an efficient and environmentally sound system of solid waste management, "a unit of local government may displace competition with public service for solid waste management and disposal." And the North Carolina Supreme Court has held that a local government may take over solid waste collection without violating the constitutional rights of private firms engaged in the collection business.[14]

Until the *Carbone* decision, it seemed clear that no impediment existed under the U.S. Constitution to a local government's exercising a monoply on solid waste collection within its jurisdiction. Two early twentieth-century cases upheld grants of a municipal franchise for solid waste collection and disposal against due process challenges,[15] and there is no difference in principle between a grant of an exclusive franchise to a private firm and a local government's exercising the monopoly itself. The problem is that in footnote 10 of his dissenting opinion, Justice Souter characterized the ordinances challenged in these early cases as flow-control regulations, and he appears to be saying that the Court has overruled them, at least by implication. The majority opinion did not cite or discuss the two cases, and so their authority is not directly impaired; however, Justice Souter's footnote raises a question whether continued reliance on them is well placed.

As an alternative to establishing its own monopoly over collection services, a local government might attempt to achieve the same result by granting exclusive franchises, one of the conditions of which is disposal at the local government's own facility. Courts may view this alternative as flow control disguised and strike it down under the authority of *Carbone*. But it is in substance no different from a governmental monopoly. These issues are discussed at length on pages 16 and 17 of *Legal Challenges to Solid-Waste Flow-Control Ordinances* (Special Series No. 12), written by Anne Kim and published in November 1993 by the Institute of Government.

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12. N.C. GEN. STAT. §§ 160A-311 and -312.
13. N.C. GEN. STAT. §§ 153A-274 and -275.
14. Stillings v. Winston-Salem, 311 N.C. 689, 319 S.E.2d 233 (1984).
15. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905); Gardner v. Michigan, 199 U.S. 325 (1905).

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