Constitutional Law

Supreme Trash

By Gideon Kracov

On April 30, the U.S. Supreme Court in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007), upheld by a vote of 6-3 a local government "flow control" law that required all solid waste to be delivered to a publicly owned and operated processing site. The court specifically distinguished the case from its earlier decision in *C & A Carbone v. Clarkstown*, 511 U.S. 383 (1994), which struck down flow-control laws directing trash to private facilities. Writing for a four-member plurality, Chief Justice John G. Roberts Jr. cited "compelling reasons" to treat regulations favoring government differently from laws favoring private businesses.

The ruling, with an unusual lineup of justices and four opinions, will be of great interest to Supreme Court watchers. It also has important implications for waste disposal in California, a state that generates 85 million tons of trash every year.

Flow Control

Flow-control ordinances require haulers to deliver solid waste to a particular processing facility. In *United Haulers*, three counties located in central New York passed flow-control laws that required private haulers to deliver all waste generated in those counties to processing facilities owned by a public entity, Oneida-Herkimer Solid Waste Management Authority. The counties enacted the laws to ensure, among other things, a revenue stream to pay for the financing of the facilities.

A local trade association of haulers challenged the law under the Dormant Commerce Clause of the U.S. Constitution (Article I, Section 8), which prohibits discrimination or an undue burden on interstate commerce. In this context, "discrimination" means differential treatment of in-state and out-of-state economic interests. The clause is deemed dormant because it has been used to invalidate state and local laws even when Congress has not exercised its power to regulate.

The chief justice's plurality included Justices Stephen G. Breyer, Ruth Bader Ginsberg and David H. Souter. The plurality found the flow-control laws at issue to be nondiscriminatory because they favored public facilities but treated "in-state private business interests exactly the same as out-of-state ones." The plurality held that government has responsibilities beyond those of private business and therefore subjecting "laws that favor local government to the same scrutiny as laws that favor in-state business over out-of-state competition" is not appropriate.

The chief justice distinguishes the case from the Rehnquist court's *Carbone* opinion based on the public-private distinction. In *Carbone*, the court, in a 6-3 vote, invalidated a flow-control law of a New York town near the New Jersey border that required local trash hauled to other states, as well as trash generated in those other states, to be redirected to a local private facility. Justice Anthony M. Kennedy wrote the opinion, ruling that the law failed strict scrutiny and was unconstitutionally discriminatory because it favored the local facility over out-of-state competitors. However, the *United Haulers* plurality found *Carbone* distinguishable because the facility in *Carbone* was privately owned and "it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism."

Court Voices

In a section of the *United Haulers* plurality opinion not joined by Roberts, the remaining plurality (Breyer, Ginsberg and Souter) invoked *Pike v. Bruce Church*, 397 U.S. 137 (1970), and argued that any "incidental" effects of the flow-control laws on interstate commerce were not excessive when weighed against the many local benefits. The record showed that the laws were directed to a number of legitimate goals unrelated to economic protectionism. The laws assist government's efforts to fund waste-disposal programs. Flow control increases recycling "in at least two ways, conferring significant health and environmental benefits upon the citizens of the counties," the plurality opinion said. The three justices go the extra mile, likening the opposing position to the disgraced *Lochner v. New York*, 198 U.S. 45 (1908), property rights decision. The justices reject any *Lochner*-era attempt "to rigorously scrutinize economic legislation passed under the auspices of the police power."

Justices Antonin Scalia and Clarence Thomas filed separate concurring opinions. Scalia concurred in part on the ground that "the so-called 'negative' Commerce Clause is an unjustified judicial intervention." He refused to join the section of the opinion he derided as "*Pike* balancing," noting with emphasis that "the balancing of various values is left to Congress — which is precisely what the Commerce Clause (the real Commerce Clause) envisions." Thomas filed a separate concurring opinion that the Dormant Commerce Clause "has no basis in the Constitution and has proved unworkable in practice." Thomas would "discard the Court's negative Commerce Clause jurisprudence."

Justice Samuel A. Alito Jr.'s detailed dissenting opinion, joined by Kennedy and Justice John Paul Stevens, would invalidate the flow-control ordinance. The dissent viewed the ordinances as "essentially identical" to *Carbone*. The majority's public-private distinction is "illusory," and public facilities have never been excepted. Alito disputed the majority's contention that regulations favoring public facilities are permissible in areas of traditional government function, such as waste disposal. He cited the 5-4 anti-federalism opinion of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and argued that "any standard 'that turns on a judicial appraisal of whether a particular government function is "integral" or "traditional" is unsound in principle and unworkable in practice.'"

New Rhythms

For Supreme Court observers, *United Haulers* shows that the Roberts court is developing its rhythms and allegiances. In *United Haulers*, the new chief performs a balancing act of his own. He musters a plurality along with three liberal justices but, in the end, cannot completely join his colleagues, who trade *Lochner* and *Garcia* barbs with the dissent. In the meantime, Scalia and Thomas march to the beat of their own drummer (although the chief often likes the music). Alito's dissent demonstrates that he won't hesitate to part ways with the chief justice in the appropriate case and that he is persuasive enough to attract other justices to his views. Kennedy, the court's swing vote in many cases, did not play that role in *United Haulers*. Stevens' dissent is consistent with his opposition to the conservative bent of the Roberts court.

United Haulers surely narrows the reach of the Dormant Commerce Clause. Three justices in the majority (Roberts, Scalia and Thomas) would limit it dramatically or declare that it does not exist. The other three justices in the majority (Breyer, Ginsberg and Souter) would rely on a less-than-exacting *Pike* balancing test when government discriminates in favor of itself. The case demonstrates that the Roberts court increasingly may refuse to second-guess local authorities' decisions on traditional police-power issues. In fact, *United Haulers* gives strong clues to the outcome of another closely watched Commerce Clause case on the Supreme Court's calendar, *Department of Revenue v. Davis*, in which bondholders say that the state of Kentucky should not be permitted to tax the interest earned on out-of-state municipal bonds.

Implications

The *United Haulers* opinion is a victory for local governments and municipal financing. The case clarifies that local government may use traditional police-power controls as a tool to achieve waste-management goals. Specifically, *United Haulers* contains the following important guidance for the California waste industry and practitioners:

1. **More public investment and public-private cooperation in waste management.** *United Haulers* upholds flow-control regulations that support publicly financed and operated recycling facilities. Local government's jurisdiction in waste management is reaffirmed. The ruling also should stimulate public partnerships with private industry. Public-private cooperation will be needed to address concerns about landfill greenhouse-gas emissions and more aggressive statewide recycling and diversion regulations.

2. **Flow-control laws may direct in-state waste to private firms.** In practice, *Carbone* has not prevented flow-control laws favoring private facilities. This is because flow-control laws that specifically exempt interstate waste or that, in practical effect, concern only in-state waste do not trigger the Dormant Commerce Clause. See *On the Green v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001) (a municipal waste law did not violate the Commerce Clause because there was no evidence that the waste was generated or destined out of state); *Waste Management v. Biagini*, 63 Cal.App.4th 1488 (1998) (an exclusive waste collection franchise is valid under the Commerce Clause because it "regulates only solid waste generated and processed entirely within the City" and therefore imposes "exclusively intrastate restriction"). Thus, private industry will continue to play a critical role in managing California's waste.

3. **Flow-control laws must be supported by strong findings on local benefits.** Under the test established by the *United Haulers* plurality, local government flow-control laws should be supported by well-reasoned findings on the local benefits of recycling, diversion, environmental health and safety and municipal financing. Further, local jurisdictions may rely on the traditional police-power and local-benefits doctrine invoked in *United Haulers* to control flow of discrete portions of their in-state recyclable waste stream (such as wood, metals, dirt, concrete or self-hauled materials) to private facilities in order to satisfy the state's waste-diversion requirements.

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