

Supreme Court Conservatives and Big Government

The current term of the United States Supreme Court has generated lots of interest in cases addressing abortion, speech and religion. The changes in the court brought about by the retirement of Justice O'Connor are beginning to reverberate around the country. However, the conservatives who now control the court are not all of the same mindset, and a recent opinion which received very little publicity demonstrates the fluidity of law and politics at the highest court levels.

On its face, the decision in *United Haulers Association v. Oneida-Herkimer*, 127 S.Ct. 1786 (2007) would make good bedtime reading for the worst insomniac. Only law students and those into self-flagellation can honestly claim to enjoy reading case law with respect to the "dormant" Commerce Clause. Nevertheless, the opinion in *United Haulers Association* can be utilized to justify socialism or the need for less government, depending upon how you define "conservative."

United Haulers Association concerned a "flow control" ordinance requiring trash haulers to deliver solid waste to a particular waste processing facility. What made this case different from its predecessors is that the processing facility was owned by a local municipality. The Court found a constitutional difference between cases that required haulers to use a public facility as opposed to a private facility. Chief Justice Roberts, writing for the majority, held that the ordinance should be upheld against constitutional attack since disposing of trash has been a traditional government activity for years and laws that favor the government in such areas "do not discriminate against interstate commerce for purposes of the Commerce Clause."

The Commerce Clause provides Congress the power to regulate commerce with foreign nations among the several states. The Constitution does not limit the power of states to regulate commerce, but the Supreme Court has interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute. That authority goes back to 1852, or even before.

The Supreme Court of the United States has invalidated flow control statutes that required use of a private facility. This was said to discriminate against out-of-state facilities. However, the court found that laws favoring local government may be directed toward any number of legitimate goals, regardless of the affect upon private parties. In reading United States Supreme Court opinions, it is often difficult to understand the scope of a statement by the majority without reading the concurring and dissenting opinions. Mr. Justice Thomas, often thought to be the most conservative member of the current court, concurred in the judgment, meaning that he agreed with the conclusion of the case but not the reasoning. Thomas felt that the "powerful rhetoric" of the majority opinion is "completely undermined by the doctrine it applies." Thomas apparently feels that the court should **never** invalidate state action applying the so-called "negative" Commerce Clause. There was a time when the court struck down laws regulating sweat shops because they were said to violate the Commerce Clause. Now, the courts threaten to strike down local regulation which may inhibit competition. Justice Thomas'

view is that the court should not choose between economic protectionism and the free market. The legislative choice is up to legislatures which make the laws, and not the courts.

Yet another conservative, Justice Alito, dissented from the majority opinion, noting that local requirements that a particular facility be used will always interfere with the free flow of commerce. A state-owned enterprise is not entitled to favorable treatment, according to Justice Alito.

The fact that three conservatives cannot agree as to whether the government should be able to control commerce any way it sees fit, as opposed to those who think the government's ability to control interstate commerce, even incidentally, should be strictly circumscribed demonstrates the danger of labels. Is a true conservative one who feels that the individual has very little power as opposed to government regulators, or is a true conservative one who believes in the unbridled power of business in a world of limited government? The answer is not as easily given as one might think.

While in civil liberties areas the court seems to be clearly split, that is not the case in the field of economic regulation which may filter down to even more people and businesses than other high profile decisions.

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