Federalism and Separation of Powers

The Different Approaches of Chief Justice Roberts and Justice Alito on the Scope of State Power

*By Dan Schweitzer**

In their first full term together on the Supreme Court, Chief Justice John Roberts and Justice Samuel Alito voted alike more than any other pair of Justices. According to *U.S. Law Week*, the pair disagreed in only 6% of the cases decided in the 2006 Term;[1] by my count, the two reached different conclusions only five times.[2] This overwhelming level of agreement between the two new Justices makes their disagreement in last term's federalism cases all the more striking.

The two cases were *Watters v. Wachovia Bank, N.A.*,[3] involving a preemption claim, and *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[4] involving a dormant Commerce Clause claim. In both cases, Chief Justice Roberts voted in favor of greater state power, while Justice Alito voted in favor of less. It is obviously too early to know whether these votes reflect the beginnings of distinct jurisprudences or will prove aberrational. But the tenor of the opinions—and the fact that Chief Justice Roberts and Justice Alito wrote the majority and dissenting opinions, respectively, in *United Haulers*—suggest that the two may hold very different views of the federal-state balance, at least outside the context of determining the limits on congressional power.

I. The Roberts Court's Federalism Docket: The Rise of Preemption and the Dormant Commerce Clause

Before turning to *Wachovia Bank* and *United Haulers*, a word on the Roberts Court's federalism docket is in order. The Rehnquist "Federalism Revolution" was marked by dramatic rulings that revived seemingly dormant constitutional limitations on federal power. Thus, in *United States v. Lopez*,[5] the Court revived the foundational principle that Congress possesses only enumerated powers; in *Printz v. United States*[6] and *New York v. United States*,[7] the Court revived the Tenth Amendment as the embodiment of certain inherent rights of states; and in *City of Boerne v. Flores*,[8] the Court made clear that Congress does not have plenary authority to regulate states under § 5 of the Fourteenth Amendment. Meanwhile, in a series of decisions,[9] the Rehnquist Court sharply limited the power of the federal government to abrogate the states' sovereign immunity—rulings based not only on the Eleventh Amendment, but on "postulates" that lie "[b]ehind the words of the constitutional provisions," and "which limit and control."[10]

The federalism docket of the Roberts Court has been quite different. In fact, "[s]ince Chief Justice Roberts has participated in the certiorari process, the Court has not agreed to hear a single case involving the constitutional federalism issues that formed the heart of the Rehnquist Court's Federalism Revolution."[11] The Roberts Court's cases addressing the federal-state balance have instead involved the issues of preemption and the dormant Commerce Clause.

To be sure, the Rehnquist Court addressed both those topics on multiple occasions. But, as many a critic has observed, no coherent doctrine emerged in either area.[12] For this reason, the Rehnquist Federalism Revolution is rightly perceived as having been about the issues discussed two paragraphs earlier and *not* about preemption and the dormant Commerce Clause. By contrast, so far, federalism in the Roberts Court (at least since Justice Alito's arrival) has involved *only* those two topics.

This is not to suggest that the early Roberts Court will not hear *any* cases assessing whether Congress acted outside the scope of its enumerated powers or wrongly trenched on state prerogatives. Surely it will. But whether it is because the Court successfully sent its message to Congress in *Lopez* and *Morrison* or because the Court has already worked its way through most of the federal statutes that purport to abrogate the states' sovereign immunity, few cases on the limits of Congress' power appear headed for the Court's docket.[13] For the time being, therefore, the vast run of federalism decisions likely to be issued by the Court will not be sweeping statements about the constitutional limits of federal power. Instead, they will address whether federal interests, reflected in statutes enacted by Congress or in the objectives of the dormant Commerce Clause, justify the displacement of state law.[14]

The nature of the Court's docket makes it far more difficult to assess where the new justices stand on federalism. Most of the cases comprising the Federalism Revolution were decided by 5-4 votes, with the "conservative" justices voting for more limited federal power, and the "liberal" justices voting for greater federal power. A justice took a position on the issue and stuck with it. (Once Justice O'Connor started drifting from the conservative position, in cases such as *Nevada Department of Human Resources v. Hibbs*,[15] *Tennessee v. Lane*,[16] and *Central Virginia Community College v. Katz*,[17] it signaled the end, or at least the dormancy, of the Revolution.)

This was not the case with respect to preemption and dormant Commerce Clause cases—which no doubt helps explain the muddled state of the doctrine in those two areas. Voting alignments in preemption cases were *ad hoc*, with justices often reversing the roles they took in the constitutional federalism cases, *i.e.*, with conservative justices voting for reduced state power and liberal justices voting for greater state power.[18] As to the dormant Commerce Clause, Justices Scalia and Thomas have taken the bold stance that the doctrine lacks any basis in the Constitution and should not be applied at all except (perhaps) in situations where the Court has already condemned the state conduct at issue as discriminating against interstate commerce.[19] No clear voting pattern emerged among the other justices, other than that Chief Justice Rehnquist

* *Dan Schweitzer is the Supreme Court Counsel for the National Association of Attorneys General. The views expressed here are his own.*

almost invariably voted to uphold state and local laws, while Justice O'Connor regularly voted to strike down state and local laws.[20]

All this leads to the need for a caveat. One should be wary before placing too much weight on how a justice votes in a preemption case or two, or a dormant Commerce Clause case or two. Decisions in these areas depend greatly on the nuances of the particular federal and state statutes at issue, as well as (with respect to preemption) a justice's approach to statutory construction.

Nonetheless, justices do have *tendencies* in these areas; and justices do adopt starting presumptions (explicit and implicit) that sweep across many cases. From what we have seen so far, Chief Justice Roberts and Justice Alito have very different inclinations with respect to preemption and the dormant Commerce Clause. Section II will discuss their differing approaches in the first preemption case they heard together on the Court; Section III will discuss their differing approaches in the first dormant Commerce Clause case they heard together.

II. Preemption: *Watters v. Wachovia National Bank*

A. Background

The basic issue in *Wachovia Bank* was the validity of regulations issued by the Comptroller of the Currency under the National Bank Act that purported to preempt the application of state laws to state-chartered operating subsidiaries of national banks. Three separate strands of the law lurked behind that issue.

First, even before the recent subprime mortgage crisis, state Attorneys General and state Banking Commissioners had been actively attacking "predatory lending" practices.[21] Inevitably, some of the alleged wrongdoers were national banks and their subsidiaries. And there, of course, lay the rub. If the National Bank Act preempted states from going after national banks and their subsidiaries, which were violating the states' consumer protection laws, there would be a virtual regulatory vacuum. For, as the Michigan Banking Commissioner and some of her amici later argued, the Office of the Comptroller of Currency (OCC) does not see itself as a consumer protection agency. It did not bring its first action to address unfair and deceptive practices under § 5 the Federal Trade Commission Act until the year 2000;[22] and it rarely acted against deceptive lenders thereafter.[23]

Second, the National Bank Act contains an express preemption provision. Under 12 U.S.C. § 484(a) of the Act, "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law…."[24] The disputed issue in Wachovia Bank (or at least one way of viewing it) was whether § 484(a)—which by its terms covers only "national banks"—reaches the operating subsidiaries of national banks. The case arose because Michigan was trying to enforce its registration and financial statement requirements upon Wachovia Mortgage Corporation, a North Carolina-chartered entity licensed as an operating subsidiary of Wachovia Bank, N.A. and engaged in real estate lending in Michigan and elsewhere.

In arguing that § 484(a) did not preempt application of its laws to Wachovia Mortgage, Michigan pointed to 12 U.S.C. § 481, which gives the Comptroller only limited authority to examine "affiliates" of national banks, and implicitly leaves to the states the power to engage in comprehensive examinations of such entities. And, critically, Congress broadly defined "affiliate" to "include any corporation, business trust, association, or similar organization" that a national bank, "directly or indirectly, owns or controls."[25] Wachovia did not dispute that operating subsidiaries of national banks are "affiliates" of national banks.

Third, lurking in the *Wachovia Bank* case was the very important question whether federal agencies are entitled to *Chevron* deference when they issue rules purporting to preempt state law. This issue cuts across many subjects, as more and more federal agencies have issued rules or guidelines purporting to displace state law.[26] And it mattered here because the OCC issued a regulation, 12 C.F.R. 7.4006, which declared that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[27] According to the United States, these preemptive regulations "do not rest on an interpretation of Section 484(a), but rather implement the Comptroller's authority to define the scope of a national bank's 'incidental powers,' 12 U.S.C. 24 Seventh, and to adopt rules governing real estate lending activity, 12 U.S.C. 371(a)."[28]

The United States' reliance on OCC regulations brought to a head (or so it seemed) the clash between the presumption against preemption and the doctrine of *Chevron* deference. Which prevails when an agency seeks to exercise its general rulemaking authority by declaring that, to best effectuate the objectives of the statute, state law is displaced? The United States (and Wachovia Bank) argued that *Fidelity Federal Savings & Loan Association v. De la Cuesta*[29] and its progeny hold that "[w]hen an agency concludes, in an exercise of delegated policymaking authority, that displacement of state law is warranted in furtherance of a federal statute that it is entrusted to administer, the agency is acting within the core of its expertise" and is therefore entitled to full-blown *Chevron* deference.[30] Michigan responded that the Court expressly left this issue open in its 1996 ruling in *Smiley v. Citibank (S.D.), N.A.*[31]—which is inconsistent with the United States' view that *De la Cuesta* already resolved the issue.[32] And Michigan pointed to federalism concerns and institutional reasons why the presumption against preemption should not yield to a presumption *in favor of* preemption whenever a federal agency concludes that preemption is warranted.[33]

B. The Wachovia Bank decision

As it turned out, the majority in *Wachovia Bank* did not reach the issue of how much deference, if any, an administrative agency should receive when it purports to preempt state law. Instead, to the surprise of most people who had followed the case, the Court ruled in favor of Wachovia Bank (and the OCC) based on the National Bank Act itself. The Court therefore called the agency deference issue "an academic question" that is "beside the point."[34] Justice Ginsburg wrote the majority opinion, and was joined by Justices Kennedy, Souter, Breyer, and Alito. Justice Stevens wrote the dissenting opinion, which was joined by Chief Justice Roberts and Justice Scalia. (Justice Thomas recused himself from the case.)

Driving the majority opinion was its view that the National Bank Act (NBA) created a zone of federal activity that is free from undue state interference. According to the Court, "[i]n the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation."[35] Therefore, "[s]tate laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business."[36] The only serious issue here, found the Court, was whether a different result should obtain when the lending is undertaken by a state-chartered operating subsidiary of the national bank. The Court held it should not.

The Court reasoned that, "in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercises of a national bank's *powers*, not on its corporate structure." [37] Because an operating subsidiary exercises a national bank's powers, it is equally entitled to "[s]ecurity against significant interference by state regulators."[38] The Court dismissed the relevance of 12 U.S.C. § 481 on the ground that Congress adopted that provision in 1864, yet banks were not authorized to use operating subsidiaries until 1966.

Finally, the Court turned to the state's argument that the OCC regulations are not entitled to deference. The Court concluded that "[t]his argument is beside the point, for under our interpretation of the statute, the level of deference owed to the regulation is an academic question. Section 7.4006 merely clarifies and confirms what the NBA already conveys…."[39] Whether or not the presumption against preemption trumps *Chevron* deference remains an open question.

C. The Dissent

Justice Stevens' dissent, joined in full by Chief Justice Roberts, is an impassioned defense of the states' role in our federalist system. The opening paragraph expresses concerns over the "significant impact of the Court's decision on the federal-state balance" and Justice Stevens amplifies that theme throughout the dissent's many pages.[40]

The first two parts of the dissent discussed the long history of state regulation of national banks, Congress' longstanding belief that state banks and national banks should stand in a position of "competitive equality," and the absence of any express congressional authorization for national banks to use state-chartered operating subsidiaries to perform their functions.[41] All this set the stage for the dissent's conclusion that Congress should have been taken at its word when, in § 484, it expressly preempted only state visitation of "national banks" themselves, while dealing extensively with "affiliates" (such as operating subsidiaries) in § 481.[42] According to the dissent, this alone tells us that Congress did not intend to preempt state regulation of operating subsidiaries. And "[e]ven were it appropriate to delve into the significant impairment question," the dissent found "[t]here is no evidence, and no reason to believe, that compliance with the Michigan statutes imposed any special burdens on Wachovia Mortgage's activities…."[43]

Having found that the NBA does not itself preempt Michigan's laws, the dissent stated that "the most pressing questions in this case are whether Congress has delegated to the Comptroller of the Currency the authority to preempt the laws of a sovereign State as they apply to operating subsidiaries, and if so, whether that authority was properly exercised here."[44] The dissent answered both questions with a resounding no.

The dissent first concluded that an agency does not have the power to preempt state laws merely on account of its being delegated the power to regulate conduct generally. According to the dissent, "there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation…. [T]he lesser power [to decide that national banks may use operating subsidiaries] does not imply the far greater power to immunize banks or their subsidiaries from state laws regulating the conduct of their competitors."[45]

The dissent next concluded that even if Congress had conferred preemptive authority on the OCC, and the OCC intended to exercise that power, "it would still not merit *Chevron* deference."[46]

> No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance. To be sure, expert agency opinions as to which state laws conflict with a federal statute may be entitled to "some weight," especially when "the subject matter is technical" and "the relevant history and background are complex and extensive." But "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad preemption ramifications for state law." For that reason, when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference.[47]

Finally, the dissent concluded with a final word about federalism. The Tenth Amendment should "remind the Court that its ruling affects the allocation of powers among sovereigns. Indeed, the reasons for adopting the Amendment are precisely those that undergird the well-established presumption against preemption."[48]

D. Analysis

The competing opinions in *Wachovia Bank* tell us more, I think, about Chief Justice Roberts' preemption jurisprudence than it does Justice Alito's. The relevance of federalism principles to preemption cases is far from being universally accepted. For example, Justice Scalia has specifically argued that—at least in cases involving express preemption provisions—the Court should engage in ordinary statutory construction, without distorting the analysis by applying a presumption against preemption.[49] And an increasing number of conservative commentators are contending that a strong belief in federalism principles should lead one to construe federal statutes as being *more* preemptive, not less.[50] It is therefore notable that Chief Justice Roberts fully joined an opinion that emphatically and unambiguously linked broad federalism considerations with preemption doctrine. (It is also notable that Justice Scalia joined the opinion in full, though that is a matter for another day.)

It is equally significant that Chief Justice Roberts agreed that "when an agency purports to decide the scope of federal preemption" it is not entitled to *Chevron* deference. As noted, this is an issue that cuts across a broad swath of substantive fields and rests at the intersection of two complex doctrines. The United States, Wachovia Bank, and several of its amici forcefully

argued that, as a matter of precedent and policy, agencies should receive *Chevron* deference in that situation.[51] By rejecting that argument, Chief Justice Roberts confirmed that he places a very high value on federalism and state sovereignty.

Less can be divined about Justice Alito's take on federalism and preemption. The majority opinion did not squarely respond to the federalism rhetoric contained in the dissent and did not address the *Chevron* deference issue. One reading of Justice Alito's decision to join the majority is that it was case-specific. He simply concluded that, given the nature, history, and structure of the national banking system, national banks—and their instrumentalities—should be free from undue state interference. Perhaps there is no reason to believe this signals anything about Justice Alito's general views about preemption.

On the other hand, the case was a close one, and the Court's reasoning was hardly compelled by the statute. Indeed, the United States did not even argue that the Michigan laws were preempted by the statute itself; it relied solely on the OCC regulations. So, in the first seriously-contested preemption case in Justice Alito's tenure, the Justice came down on the side of federal power (and the business community). That is not an auspicious beginning, from the perspective of state power. And when viewed in conjunction with his dissenting opinion in *United Haulers*, to which we will now turn, it suggests a readiness to limit state power in the interest of national uniformity.

III. The Dormant Commerce Clause: *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*

A. Background

Once again, waste disposal served as the crucible for the development of dormant Commerce Clause doctrine.[52] *United Haulers* was a follow-up of sorts to *C & A Carbone, Inc. v. Town of Clarkstown*,[53] which had been the Court's most recent waste disposal case. As the Court noted at the outset in *Carbone*, "[a]s solid waste output continues apace and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment."[54] The Town of Clarkstown attempted to address its solid waste situation by building a solid waste transfer station, which would receive waste, separate out the recyclable items, and then ship the recyclable and non-recylcable waste to appropriate facilities or landfills.[55] There was one problem, however: paying for the station.

The town arranged for a local private contractor to build the station and operate it for its first five years, after which the town would purchase it for $1. The facility would be financed by "tipping fees," that is, the fees the station would charge haulers for each ton of waste dropped off. But how could the town ensure a high enough volume of waste to cover the yearly costs—particularly when the $81 per ton tipping fee charged by the facility was higher than the market rate?[56] The answer was to enact a "flow control ordinance," "which require[d] all solid waste to be processed at [the] designated transfer station before leaving the municipality."[57] In *Carbone*, the Court held that this ordinance violated the dormant Commerce Clause by discriminating against out-of-state transfer station operators in favor of a preferred, "single local proprietor."[58]

The Town's core argument was that the ordinance treats all operators (apart from the favored facility) equally badly. *All* potential competitors, whether in or out of state, were out of luck. The Court rejected that line of reasoning, stating that "[t]he ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."[59] Either way, the ordinance is a protectionist measure benefiting a local enterprise.

Justice Souter's dissent emphasized a different point: that "Clarkstown's transfer station is essentially a municipal facility,"[60] and that the "Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist."[61] The majority in *Carbone* did not respond to Justice Souter's argument and wrote its opinion as though the transfer station in question were a run-of-the-mill private enterprise.

B. The United Haulers Decision

The stage was thus set for *United Haulers*, which also involved the constitutionality of a flow control ordinance requiring all solid waste to be processed at a designated local facility. There was only one "salient difference" between the ordinance at issue in *Carbone* and the one at issue in *United Haulers*: the ordinance at issue in *United Haulers* "require[d] haulers to bring waste to facilities owned and operated by a state-created public benefit corporation."[62] The Court concluded that the public ownership of the facility made all the difference, and upheld the ordinance. Chief Justice Roberts authored the majority opinion; Justice Scalia concurred in part of the opinion; Justice Thomas filed an opinion concurring in the judgment; and Justice Alito wrote the dissent, which was joined by Justices Stevens and Kennedy.

The first (and less interesting) part of Chief Justice Roberts' opinion held that the Court did not resolve this issue in *Carbone*.[63] That settled, he turned to the core question: whether the dormant Commerce Clause forbids a state or local government from favoring government-owned enterprises over competitors. He held it does not. "Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens…. Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism."[64] After observing that "[l]aws favoring local government... may be directed toward any number of legitimate goals unrelated to protectionism," Chief Justice Roberts added a very telling point:

> The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government. The 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.[65]

This is a powerful call for judicial restraint in this area of

the law. And it is made all the more powerful by its setting: a case where the Court is deferring to a local government's decision to remove an area of commerce from the private sector, a decision presumably unappealing to a conservative such as the Chief Justice. Yet he wrote, "[i]t is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services."[66]

After holding, with little difficulty, that the flow control ordinance satisfied the balancing test set forth in *Pike v. Bruce Church, Inc.*,[67] Chief Justice Roberts' opinion closed with a dramatic and noteworthy flourish. After observing that the petitioners sought to invalidate the ordinance under both the per se anti-discrimination rule and the *Pike* balancing test, he wrote:

> There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner* v. *New York*, 198 U.S. 45 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.[68]

This is a clarion call to the judiciary to apply the dormant Commerce Clause sparingly, at least when there is no obvious discrimination against interstate commerce. It bears adding that Justice Scalia, because of his disapproval of the *Pike* balancing test, did not join this part of Chief Justice Roberts' opinion, which therefore was merely a plurality opinion. But Justice Scalia's disapproval of *Pike*, as well as Justice Thomas' disapproval, means that at least six Justices agree with this call for a "weaker" dormant Commerce Clause. Justice Alito is not among them.

C. Justice Alito's Dissent

Justice Alito's dissent disagreed with Chief Justice Roberts' opinion on a variety of fronts. He concluded that *Carbone* already decided the issue adversely to the local governments, and that, in any event, there is no justification for permitting "discrimination in favor of a state-owned entity."[69] According to Justice Alito, "state-owned enterprises are accorded special status under the market-participation doctrine," but not where, as here, the state is "acting both as a market participant *and* as a market regulator."[70]

Justice Alito took a dim view of state-run businesses and an expansive view of the Court's ability to deal with the problem.

> Experience in other countries, where state ownership is more common than it is in this country, teaches that governments often discriminate in favor of state-owned businesses (by shielding them from international competition) precisely for the purpose of protecting those who derive economic benefits from those businesses, including their employees.[71]

In Justice Alito's view, discrimination in favor of local enterprises, whether publicly or privately owned, may serve both protectionist and legitimate ends. The Court must, therefore, look not at the legislative *ends* but rather at the legislative *means*. And when the means is to discriminate against interstate commerce, the law is subject to strict scrutiny.[72]

D. Analysis

Chief Justice Roberts' opinion is a powerful call for a less vigorous dormant Commerce Clause and, concomitantly, more powerful state governments. Based on both separation of powers and federalism principles, his opinion struck two blows for state power. First, it established the principle that, as a general matter, laws discriminating in favor of state and local governments themselves will be upheld. This result does not seem surprising. State and local monopolies—of services ranging from trash collection to electricity distribution—are not a novel concept. Whether or not they are wise public policy, it would seem far too late in the day to hold them invalid under the Commerce Clause. Still, the issue was an open one and Chief Justice Roberts wrote a forceful opinion in favor of the states.

Second, the opinion expressed deep skepticism of striking down laws under the *Pike* balancing test. Given the disdain with which *Lochner* is generally viewed in the legal community, Chief Justice Roberts' comparison of an aggressive use of the dormant Commerce Clause to that decision is striking. The opinion's condemnation of using the dormant Commerce Clause "to rigorously scrutinize economic legislation passed under the auspices of the police power" was part of a closing peroration that clearly sought to send a message to the legal community. Many dormant Commerce Clause cases are fact-specific and not of great jurisprudential import; this one was different. Chief Justice Roberts' opinion was a shot across the bow.

Justice Alito's dissent reflects a very different conception of the dormant Commerce Clause. To Justice Alito, the dormant Commerce Clause imposes on courts a responsibility to ensure a free market of goods and services across state lines. Courts should not shirk their obligation to strike down state disruptions of that market—even when the disruption takes the form of the state monopolizing a traditional government function. The federalism interest in ensuring a broad sphere of state autonomy to experiment and take innovative measures as local conditions necessitate apparently takes a back seat.

CONCLUSION

There is every reason to believe that Chief Justice Roberts and Justice Alito—as principled, conservative jurists—will be generally supportive of the Rehnquist Federalism Revolution. But under the broad label "federalism" lays myriad discrete doctrines covering an array of constitutional provisions and statutory disputes. It remained to be seen what particular form their respective federalism jurisprudences would take. So far, the evidence suggests that on the issues of preemption and the dormant Commerce Clause, Chief Justice Roberts will be far more supportive of state power than Justice Alito.

Earlier on, I issued the caveat that we should be wary of placing too much weight on just a couple of opinions—particularly in areas of the law as fact-dependent as preemption and the dormant Commerce Clause. That caveat has more strength with respect to gauging Justice Alito's jurisprudence than with respect to Chief Justice Robert's. The dormant Commerce Clause opinion written by Chief Justice Roberts and the preemption opinion he joined both espoused principles that go well beyond the facts of the two cases and the statutes

at issue. This does not mean, of course, that Chief Justice Roberts will rule for the states in every preemption and dormant Commerce Clause case. There will inevitably be cases where the states have a weak position and will not obtain his vote. But the *Wachovia Bank* and *United Haulers* opinions strongly suggest that Chief Justice Roberts will go into these cases with a deep understanding of the states' interests and an inclination to uphold state power where possible.

It is harder to gauge Justice Alito's jurisprudence because the opinions he wrote and joined were not as far-reaching and can more readily be attributed to the particular statutory schemes at issue. Perhaps *Wachovia Bank* will prove to be an aberration. Nonetheless, at this juncture, he appears to take a more free-market (business) friendly approach to preemption and dormant Commerce Clause cases than does his colleague at the center of the bench.

We should learn a great deal more about both justices' approaches this term. On the Court's docket are four preemption cases and one dormant Commerce Clause case.[73] Come July 2008, we will have much more data with which to assess their respective federalism jurisprudences.

Endnotes

1 76 U.S.L.W., *Supreme Court Today*, at 3055 (August 7, 2007).

2 Cunningham v. California, 127 S. Ct. 856 (2007); Limtiaco v. Camacho, 127 S. Ct. 1413 (2007); Zuni Public School Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007).

3 127 S. Ct. 1559 (2007).

4 127 S. Ct. 1786 (2007).

5 514 U.S. 549 (1995).

6 521 U.S. 98 (1997).

7 505 U.S. 144 (1992).

8 521 U.S. 507 (1997).

9 Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

10 *Seminole Tribe*, 517 U.S. at 68 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

11 Dan Schweitzer, *Federalism in the Roberts Court*, NAAGazette, Nov. 6, 2007, at 4. The Roberts Court did decide an Eleventh Amendment case and a Fourteenth Amendment case in early 2006 (just prior to Justice Alito's elevation to the Court), but the Court had already granted certiorari in both cases when Roberts joined the Court. *See* Central Virginia Community College v. Katz, 546 U.S. 356 (2006) (ruling that states have no sovereign immunity from proceedings brought pursuant to the Bankruptcy Clause); United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity with respect to conduct that actually violates the Fourteenth Amendment).

12 *See*, *e.g.*, Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 232 (2000) ("Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-14, at 1102 (3d ed. 2000) ("The Supreme Court's approach to Commerce Clause issues, despite such structuring devices as the emphasis on less restrictive or less discriminatory alternatives, often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles.").

13 United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked the power under the Commerce Clause to enact §13981 of the Violence Against Women Act).

14 In describing preemption and the dormant Commerce Clause this way, I am borrowing from Viet Dinh, who stated that the various types of preemption and the dormant Commerce Clause are all parts of a "rather smooth continuum" of "federal displacement of state law." Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2112 (2000).

15 538 U.S. 721 (2003).

16 541 U.S. 509 (2004).

17 546 U.S. 356 (2006).

18 Ernest A. Young, "Federal Preemption and State Autonomy," *in* Federal Preemption: States' Powers, National Interests 263 (Richard Epstein & Michael Greve, eds. 2007).

19 *See* Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 610-20 (1997) (Thomas, J., dissenting); General Motors Corp. v. Tracy, 519 U.S. 278, 312 (Scalia, J., concurring).

20 For example, Chief Justice Rehnquist dissented from 8-1 and 7-2 decisions that struck down state and local laws in West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994), Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance, 505 U.S. 71 (1992), and Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992). Meanwhile, between the 1993 Term (when Justice Ginsburg joined the Court) and the end of her tenure, Justice O'Connor ruled against state and local power in every 5-4, 6-3, or 7-2 case. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995); Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298 (1994); West Lynn Creamery; C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); and Oregon Waste Systems. I did not count Granholm v. Heald, 544 U.S. 460 (2005), which focused more on the meaning of the Twenty-First Amendment than the dormant Commerce Clause.

21 *See* Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2282-85 (2004).

22 Brief of AARP et al. as Amici Curiae in Support of Petitioner at 12, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

23 *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 352 (2004); Brief of Petitioner at 25-26 n.87, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

24 In *Wachovia Bank*, the Court quoted an earlier opinion as having defined "visitation" as "the act of a superior or intending officer, who visits a corporation to examine its manner of conducting business and enforce an observance of its laws and regulations." 127 S. Ct. at 1568 (quoting Guthrie v. Harkness, 199 U.S. 148, 158 (1905)) (internal quotation marks omitted by the Court).

25 12 U.S.C. § 221a(b).

26 *See* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 227 (2007) (citing examples from the Food and Drug Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration).

27 The regulation built upon earlier regulations which declared that operating subsidiaries of national banks operate subject to the same "terms and conditions" as their parent national banks. 12 C.F.R. 5.34(e)(3), 24a(g)(3)(A).

28 Brief for the United States as Amicus Curiae Supporting Respondents at 7-8, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

29 458 U.S. 141 (1982).

30 Brief for the United States as Amicus Curiae Supporting Respondents at 24, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

31 517 U.S. 735, 744 (1996).

32 Brief of Petitioner at 31, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

33 *Id*. at 31-34.

34 *Wachovia Bank*, 127 S. Ct. at 1572.

35 *Id*. at 1566-67.

36 *Id*. at 1568.

37 *Id*. at 1570 (internal citation omitted).

38 *Id*. at 1571.

39 *Id*. at 1572.

40 *Id*. at 1573 (Stevens, J., dissenting). The dissent, in its slip opinion form, was 24 pages—seven pages longer than the majority opinion.

41 *Id*. at 1573-78.

42 *Id*. at 1578-80.

43 *Id*. at 1580.

44 *Id*. at 1582.

45 *Id*. at 1583.

46 *Id*. at 1584.

47 *Id*. (internal citations omitted).

48 *Id*. at 1585.

49 *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 545-48 (1992) (Scalia, J., concurring).

50 *See* Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and its Limits*, in Federal Preemption: States' Powers, National Interests 309-12 (Richard Epstein & Michael Greve, eds. 2007) (arguing that "preemption doctrines should reduce the federalism risks that lie at the heart of the dormant Commerce Clause: state protectionism, balkanization, and... cost externalization"); Dinh, *supra* note 14, at 2092-97.

51 Brief for the United States as Amicus Curiae Supporting Respondents at 23-25, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342); Brief for the Respondents at 35-36, 39-44, *Watters*; Brief for Administrative Law Professors as Amici Curiae in Support of Affirmance at 4-27, *Watters*; Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents at 21-30, *Watters*.

52 *See also* Oregon Waste Sys., Inc. v. Dept. of Envt'l Quality, 511 U.S. 93 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources, 504 U.S. 353 (1992); Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

53 511 U.S. 383 (1994).

54 *Id*. at 385-86.

55 *Id*. at 387.

56 More precisely, "the town guaranteed a minimum waste flow of 120,000 tons per year.... If the station received less than 120,000 tons in a year, the town promised to make up the tipping fee deficit." *Id.*

57 *Id*. at 386.

58 *Id*. at 392.

59 *Id*. at 391.

60 *Id*. at 419.

61 *Id*. at 421.

62 United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1790 (2007).

63 *Id*. at 1794-95.

64 *Id*. at 1795.

65 *Id*. at 1796.

66 *Id*.

67 397 U.S. 137, 142 (1970).

68 *United Haulers*, 127 S. Ct. at 1798.

69 *Id*. at 1804-05, 1806 (Alito, J., dissenting).

70 *Id*. at 1806, 1807.

71 *Id*. at 1808.

72 *Id*. at 1808-09.

73 The preemption cases are Riegel v. Medtronic, Inc. (No. 06-179); Rowe v. N.H. Motor Transp. Ass'n (No. 06-457); Chamber of Commerce v. Brown (No. 06-939); and Warner-Lambert Co. v. Kent (No. 06-1498). The dormant Commerce Clause case is Kentucky Dep't of Revenue v. Davis (No. 06-666).