

Chief Justice Roberts, Justice Alito, and New Federalism Jurisprudence

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The Rehnquist Court returned power back to the states in rulings that scholars have dubbed “New Federalism.” The appointments of Chief Justice Roberts and Justice Alito invite speculation about the future direction of federalism cases in the Supreme Court. A survey of the Roberts Court’s federalism rulings discovers that the ideological pathways of new federalism depend upon Justice Kennedy’s swing vote and the effects the new appointments have on shaping voting coalitions in light of the vacancies they have filled. Although there is a reconfigured “States’ Rights Five” voting coalition, neither Roberts nor Alito endorses rigid viewpoints about federalism and it remains uncertain if the Court will return to the type of aggressive new federalism which arguably defined the legacy of the Rehnquist Court.

It is reasonable to think the appointments of Chief Justice John G. Roberts, Jr and Associate Justice Samuel Alito would continue the progress toward new federalism jurisprudence¹ in the “Roberts Court.” In spite of a series of rulings reaffirming federal regulation near the end of the Rehnquist Court (*Nevada Department of Human Resources v. Hibbs* [2003], *Tennessee v. Lane* [2004], *Gonzales v. Raich* [2005]), the Court’s sharp limits on Congress’s power to regulate state activities in *U.S. v. Lopez* (1995), *City of Boerne v. Flores* (1997), and *U.S. v. Morrison* (2000) are still very much intact. Although the Rehnquist Court’s singular impact in constraining the development of national public policy remains debatable (Clayton and Pickerill 2004), it is still renowned for its role in rearticulating states’ interests (Dinan 2004, 39). While early Roberts Court rulings demonstrated uneven support for states’ rights, the 2006–2007 term sheds more light on whether a conservative bloc will coalesce and aggressively protect the states in a manner reminiscent of the Rehnquist Court. In this light the change of personnel may also register another dynamic: Whether the justices purporting to favor the states are having trouble agreeing on basic anti-federalist principles, a tendency that increasingly typified later Rehnquist Court jurisprudence (Banks and Blakeman 2006).

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This essay surveys the Roberts Court's federalism and highlights judicial conflicts on the bench and resulting from the new appointments. The cases denote that the ideological pathways of new federalism frequently depend upon Justice Anthony Kennedy's swing vote, and that the new brethren are affecting precedents and internal coalitions in light of the vacancies they have filled. Chief Justice Roberts is a crucial replacement for Chief Justice Rehnquist, once described as the most important "judicial entrepreneur interested in pressing [the federalism] constitutional agenda" (Whittington 2001, 503), and who others hold responsible for igniting the "long fuse" for the state rights' revival (Tushnet 2006, 255; see also *Fry v. U.S.*[1975]). Justice Sandra Day O'Connor's absence is likewise critical because she was part of the five-justice coalition supporting states' rights; and she or Justice Kennedy often provided the decisive fourth or fifth votes in limiting federal power (Claeys 2005, 792). Justice O'Connor's minimalist judicial philosophy (Maveety 2003), along with her at times tepid support for the principles underlying new federalism (Tushnet 2003), are significant benchmarks to measure whether Justice Alito will follow her lead or, instead, drift further right and adapt the kind of rigorous originalism defining Justice Clarence Thomas's interest in protecting state sovereignty.

Although they are part of a reconfigured "States' Rights Five" voting bloc (Baker 2006, 205), the judicial record shows that neither Roberts nor Alito endorses rigid viewpoints about federalism. Thus, it is less predictable that the Court will return to the type of provocative new federalism jurisprudence epitomized by *Lopez* (1995) or *Morrison* (2000). After briefly touching upon Chief Justice Roberts's and Justice Alito's federalism viewpoints before joining the high court, key cases of the first two terms of the Roberts Court are analyzed, in order to detail their impact in solidifying the movement towards new federalism and the avid protection of state interests. The last section is an assessment of the impact of the new appointments in the Roberts Court.

Pre-Supreme Court Federalism Positions

The past judicial records, confirmation testimonies, and extra judicial writings of Chief Justice Roberts and Justice Alito reveal underlying patterns of judicial thought illustrating their approaches to federalism. At the core of each jurist's thinking is the advocacy of judicial restraint as a means to advance structural limitations on federal power in a "dual sovereignty" constitutional framework. In a National Public Radio interview with Nina Totenberg on June 24, 1999, Judge Roberts defined federalism in structural terms by describing rulings invigorating states' interests as "a healthy reminder that we're a country that was formed by States and that we still live under a Federal system... The cases remind us that

“the States, as co-equal sovereigns, have their own sovereign powers, and that includes, as everyone at the time of the Constitutional Convention understood, sovereign immunity” (Committee on the Judiciary, U.S. Senate 2003b, 267). Similarly, for Alito judges “should be careful not to usurp the rightful powers of the other branches of the federal government or those of the states and their subdivisions,” because one of the most important safeguards of freedom is “the separation and distribution of government powers” (Committee on the Judiciary, U.S. Senate 1990, 650).

At their confirmation hearings the chief justice and Justice Alito addressed the scope of congressional commerce regulation, but each expressed different levels of support for it. Although liberal critics argued that Roberts’s D.C. Circuit dissent in *Rancho Viejo LLC v. Norton*, (2003) reflected a narrow conception of commerce authority in environment cases (Fortenberry and Beck 2005, 76, 81–84), other evidence showed a healthy respect for limiting state sovereignty. In discussing *Gonzales v. Raich* (2005), he acknowledged the nearly conclusive weight of New Deal precedents under the commerce clause; but he also declared that *U.S. v. Lopez* (1995) and *U.S. v. Morrison* (2000) “did not junk all the cases that came before” (Lazarus 2006, 15). In contrast, when asked about *Raich* at his own hearings, Judge Alito interpreted *Lopez* differently by implying that it did not necessarily preserve the Court’s post-New Deal commerce clause precedents, perhaps because of his dissent as a Third Circuit judge in *U.S. v. Rybar* [1996] (Lazarus 2006, 29). In *Rybar*, Judge Alito dissented from the ruling that Congress could regulate intrastate possession of machine guns under the commerce clause. In disagreeing, Alito dismissed his colleagues’ ringing endorsement of federal power over intrastate conduct because it reduced the *Lopez* precedent to being “a constitutional freak” (*Rybar* 1996, 287).

Essential to Roberts’s and Alitos’ commerce clause analysis is the sufficiency of congressional findings, a judicial tendency that also colors their views of Section Five (of the Fourteenth Amendment), conditional spending, and sovereignty immunity cases. As a nominee, Judge Roberts accepted few constraints on congressional commerce power so long as there is proof that the activity under review is adequately connected to interstate commerce (Committee on the Judiciary, U.S. Senate 2005, 226, 260–264, 440; Fortenberry and Beck 2005, 80–84). As Roberts explained, if judges get to the “point of reweighing congressional findings, that starts to look more like a legislative function,” and courts must “make sure that they’re interpreting the law and not making it” (Committee on the Judiciary, U.S. Senate 2005, 219). Similarly, not only did Alito testify that the judiciary must have “great respect” for congressional fact-finding, he also went so far as to admit that he probably would not have dissented in *Rybar*, if Congress had compiled findings linking the intrastate possession of machine guns

to interstate commerce (Committee on the Judiciary, U.S. Senate 2006, 389). Although Judge Alito conceded that the machine gun statute might have withstood constitutional scrutiny, he further explained that:

... neither Congress, the Executive (in the form of government lawyers who briefed and argued the case), nor the majority has adduced any appreciable empirical proof. . . . I would view this case differently if Congress as a whole or even one of the responsible congressional committees had made a finding that intrastate machinegun possession . . . has a substantial effect on interstate commerce. But despite the resources at their command to investigate questions such as this, neither Congress nor any of its committees did so . . . [and] congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . [but] they are lacking here (*Rybar* [1996], 293, quoting *U.S. v. Lopez* [1995]).

Such commentary reveals that each justice gives great weight to empirical proof; but doing so can cut both ways and either advance or hinder state interests. Whereas heightened scrutiny of congressional fact-finding arguably protects individual rights in the states by imposing limits on legislative influence, it also may become the basis for trumping state claims to Eleventh Amendment sovereignty immunity or, alternatively, increasing federal enforcement against individual rights based on Section Five of the Fourteenth Amendment. In legal terms, if Congress expresses a clear and unequivocal intent to waive state immunity or, in Section Five cases, Congress can establish a congruence and proportionality between the exercise of federal power and the target of the regulation, the testimonies inferred that each jurist is likely to give preference to federal prerogatives.

The affinity to look for empirical facts is illustrated by Judge Roberts's confirmation discussion of Section Five abrogation of state immunity in cases alleging discrimination under the federal American with Disabilities Act, an issue in *Board of Trustees of the University of Alabama v. Garrett* (2001) and *Tennessee v. Lane* (2004). In *Garrett*, the Court insulated Alabama from a federal lawsuit by a discharged state employee and cancer victim alleging discrimination under the ADA's Title I. In *Lane*, federal power was extended to let a paraplegic plaintiff who was denied physical access to a court sue Tennessee under the public accommodations provision, or ADA's Title II. In spite of the different outcomes, Roberts asserted that in both cases the Court did not substitute its policy judgment for that of Congress. Instead, it engaged in principled decision-making by focusing on whether Congress established unequivocal factual findings that state governments transgressed federal disability law and which therefore justified a waiver of state sovereign immunity (Committee on the Judiciary, U.S. Senate 2005, 420–421).

Thus, for Roberts, Congress may remedy anti-discrimination practices in the states under Section Five in appropriate factual circumstances.

In like fashion, Judge Alito's Third Circuit record demonstrated that the judicial line between congressional power and state immunity was drawn on the sufficiency of empirical facts. In *Chittister v. Pennsylvania Department of Community and Economic Development* (2000), a case involving Congress' abrogation of Eleventh Amendment immunity under the Family Medical Leave Act (FMLA), Judge Alito looked to the Supreme Court's precedents in *Kimel v. Florida Board of Regents* (2000) and *City of Boerne v. Flores* (1997) to strike down the FMLA on the grounds that there were no congressional findings about the prevalence of gender discrimination in medical leave policies; hence the law was incongruent and disproportionate as a remedy of state violations (*Chittister* 2000, 228–229). Notably, *Chittister* did not apply the *Kimel* standard, under which congressional waivers of state immunity must be unmistakably clear in the statute's language; but the federal law failed *Boerne's* congruence and proportionality test, and Judge Alito's opinion relied heavily on the lack of legislative findings to discount Congress's reasons for waiving state immunity. As a result, Alito's opinion approximates his *Rybar* dissent because both depend a great deal on the absence of empirical proof to validate federal regulation.

Before their appointments, each judge accepted Congress's authority under the spending clause to compel states to waive their Eleventh Amendment immunity if they receive federal monies, provided there is a clear nexus between the federal law's purpose and state spending. Roberts and Alito supported Congress's spending power under *South Dakota v. Dole* (1987) to require states to fulfill conditions before they receive federal monies if it is built upon a firm foundation of congressional fact-finding (Committee on the Judiciary, U.S. Senate 2003b, 267). As a D.C. Circuit judge, Roberts endorsed *Barbour v. Washington Metropolitan Area Transit Authority* (2004), which held that a State entity could be sued in federal court because Congress statutorily declared its intent to condition the receipt of federal monies upon a waiver of state immunity. Although Alito's views of congressional spending power were not detailed in any cases or during his confirmation hearings, he acknowledged *Dole's* precedential value as giving Congress "very broad authority" over federal spending. Congress could, therefore, "attach all sorts of conditions to receipt of federal aid," provided they are clear and relevant to the purposes of funding (Committee on the Judiciary, U.S. Senate 2006, 621). Also, a different Third Circuit ruling, *New Jersey Payphone Association v. Town of West New York* (2002), provides hints as to Judge Alito's views on federal preemption. At issue was whether a municipality's grant of an exclusive pay phone franchise on public rights of way is preempted by the 1996 Telecommunications Act. Although the court held the local ordinance was preempted, Judge Alito declined to

reach the preemption question by reasoning it was unnecessary to do so. As he explained:

The rationales behind the doctrine of avoiding constitutional questions except as a last resort are grounded in fundamental constitutional principles—the ‘great gravity and delicacy’ of judicial review...and principles of federalism...Moreover, the federalism rationale is pertinent here because we have the option of avoiding invocation of federal supremacy over local laws. Therefore, resolving this case on state-law grounds does less violence to principles of federalism and dual sovereignty (*New Jersey Payphone Association* 2002, 249–50).

Thus, Judge Alito viewed preemption prudentially, and perhaps as a last resort when overarching federalism principles are at stake.

Whereas some of Alito’s views on preemption were disclosed, Roberts’s position is hard to discern. Yet, some of his off-the-bench writings have federalism overtones that are sensitive to states’ rights, and they infer he respects justiciability requirements. Of the eleven publications Judge Roberts listed in the Senate Judiciary Committee Questionnaire (Committee on the Judiciary, U.S. Senate 2005, 64), two law reviews speak to the protection of individual property rights in the states in the “takings” and “contract clause” context: He advocates against strict judicial construction of constitutional text because it would diminish those rights (Roberts 1978a, 1978b). In a *Wall Street Journal* article, Roberts analyzed President Clinton’s appointment of Drew Days as Solicitor General and suggested that the transfer of power from Solicitor Ken Starr may lead to fewer *amicus* brief filings that would otherwise protect over-burdened state governments from effectively fighting street crime, preventing abortion, and stopping affirmative action (Roberts 1993a). Also, Roberts defended the Supreme Court’s strict interpretation of the standing doctrine by “recognizing that Article III [and its ‘case and controversy’ requirement] is a constraint on Congress’s power to assign matters to the federal courts” (Roberts 1993b, 1229).

The pre-Supreme Court portraits of each jurist, moreover, may address ideological differences that they have with the justices they are replacing and with whom they are serving on the bench. For instance, Roberts has publicly distanced himself from endorsing an original or strict understanding of constitutional text (Committee on the Judiciary, U.S. Senate 2005, 298–299; Committee on the Judiciary, U.S. Senate 2003a, 57); if true, that sets him apart from Justices Scalia or Thomas. Similarly, but only if one overlooks the anti-nationalist position he took in *Rybar* in light of *Lopez*, Judge Alito’s later acknowledgement of Congress’s broad and evolutionary commerce power at his Supreme Court confirmation hearing (Committee on the Judiciary, U.S. Senate 2006, 628) tends to set him apart

from Justice Thomas's originalist reading of the interstate commerce clause (which makes a distinction between commerce and other forms of economic activity). Also, whereas Justice Alito's posture on the scope of Congress's spending authority is less clear, Chief Justice Roberts's inclination to defer to Congress in federal conditional spending cases may distinguish him from Justice Sandra Day O'Connor, who dissented in *Dole* (1987). Finally, on the question of whether the national political process can effectively safeguard the states' interests in structural terms, it is noteworthy that Justice Alito implied in *Rybar* that normative limits on federal power exist outside of the political process. As a result, Justice Alito arguably does not agree with the "political safeguards" argument and, accordingly, he offers continuity with Justice O'Connor's federalism jurisprudence in respect to the political safeguards approach (see Justice O'Connor's dissents in *Raich* [2005], or *Garcia v. San Antonio Metropolitan Transit Authority* [1985]; Huhn 2006).

Federalism in the Roberts Court

The vagaries of Chief Justice Roberts's and Justice Alito's pre-Supreme Court federalism views accentuate their potential in significantly affecting the doctrinal and ideological pathways of the Roberts Court's emerging new federalism jurisprudence. While the first two terms offer insight into the trend of several commerce clause, spending clause, and sovereign immunity cases, *Massachusetts v. Environmental Protection Agency* (2007) and *Watters v. Wachovia Bank* (2007) may be the most significant statements of the role that justiciability and preemption doctrines will play in delimiting federal power and state sovereignty. While *Gonzales v. Carhart* (2007) probably remains the Court's most important political decision regulating abortion, it also had a federalism dimension because it conspicuously left unanswered whether Congress can regulate abortions in the states under the commerce clause. After briefly discussing the *Massachusetts* and *Watters* rulings, the federalism implications of *Carhart* are addressed. Thereafter, the inroads made by the justices in the remaining areas of federalism doctrine are synthesized. Table 1 provides a summary of significant Roberts Court federalism decisions and voting alignments.

In the 5:4 ruling of *Massachusetts* (2007), the Court's liberal wing, plus Justice Kennedy, granted Massachusetts standing to contest the EPA's decision not to regulate the emission of greenhouse gases from new cars and possibly ease the problem of global warming. Justice John Paul Stevens's majority opinion reasoned that the Clean Air Act vested in Massachusetts a procedural right to challenge agency nonaction on behalf of its citizens. Chief Justice Roberts's dissent, joined by Justices Scalia, Thomas, and Alito, countered that the case was a nonjusticiable "case or controversy" under Article III. Because Massachusetts did not establish a link between its harm and the agency's failure to act, Chief Justice Roberts flatly

Table 1 Roberts Court Federalism Decisions (2006–2007)

Case	Federalism issue	Federalism implications	Voting alignments
<i>U.S. v. Georgia</i> 126 S. Ct. 877 (2006)	11th A. Sovereign Immunity; Sec. 5 of 14th A. Enforcement (not decided)	Title II of American Disabilities Act abrogates state sovereign immunity	9:0 Sc , St, OC, RBG, So, K, Br, Th, Ro ■ Con: St , RBG
<i>Gonzales v. Oregon</i> 546 U.S. 243 (2006)	Commerce Clause	U.S. Attorney General could not enforce Controlled Substances Act against physicians applying state assisted suicide law under commerce authority	6:3 K , St, OC, So, RBG, Br ■ Diss: Sc , Th, Ro ■ Diss: Th
<i>Central Va. Comm. College v. Katz</i> 546 U.S. 356 (2006)	11th A. Sovereign Immunity	Art. I Bankruptcy Clause abrogates state sovereign immunity	5:4 St , OC, RBG, So, Br ■ Diss: Th , Sc, K, Ro
<i>Northern Ins. Co. v. Chatham</i> 547 U.S. 189 (2006)	11th A. and Common Law Sovereign Immunity	State county could not claim 11th A. and Common Law Sovereign Immunity	9:0 Th , St, Sc, RBG, So, K, Br, Ro, Al
<i>Rapanos v. U.S. Army Corps of Engineers</i> 126 S. Ct. 2208 (2006)	Commerce Clause	Congress could not regulate wetlands on private land as navigable waters in interstate commerce under Clean Water Act	4:1:4 Sc , Th, Ro, Al ■ Con (in result): K ■ Diss: St , RBG, So, Br
<i>Arlington Central School Dist Bd. v. Murphy</i> 126 S. Ct. 2455 (2006)	Spending Clause	Federal Individuals with Disabilities Education Act did not allow recovery of expert fees by parents in legal action against school boards under Article I Spending Clause	6:3 Al , Sc, K, Th, Ro ■ Con/Diss (in part, in result): RBG ■ Diss: So ■ Diss: Br , St, So
<i>Massachusetts v. EPA</i> 127 S. Ct. 1438 (2007)	Standing of states asserting Quasi-Sovereign Interests	States asserting quasi-sovereign interests in protecting citizens against ill-effects of global warming have standing to sue EPA for its decision not to regulate greenhouse gas emissions of new cars	5:4 St , K, So, RBG, Br ■ Diss: Ro , Sc, Th, Al

continued

Table 1 Continued

Case	Federalism issue	Federalism implications	Voting alignments
<i>Watters v. Wachovia Bank</i> 127 S. Ct. 1559 (2007)	Preemption; 10th A.; Commerce Power	Federal National Bank Act preempts state mortgage lending laws pertaining to subsidiary of federally-licensed banking institution; and national banking regulation is within commerce authority and not barred by the Tenth Amendment	5:3 RBG , K, So, Br, Al ■ Diss: St , Sc, Ro ■ Th did not participate
<i>United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mangmt. Auth.</i> 127 S. Ct. 1786 (2007)	Dormant Commerce Clause	County ordinance does not violate dormant commerce clause by requiring private haulers to use local publicly-owned waste facilities	6:3 Ro , Sc, So, Th, RBG , Br ■ Con (in part): Sc ■ Con (in result): Th ■ Diss: Al , St, K
<i>Winkelman v. Parma City School Dist.</i> 127 S. Ct. 1994 (2007)	Spending Clause	Federal Individuals with Disabilities Education Act permits parents to proceed pro se in legal action against state school boards, independent of Congress's Article I Spending Clause	7:2 K , St, So, RBG , Br, Ro, A ■ Diss/Con (in part): Sc , Th

Note: Opinions for the Court, plurality opinions, concurring, and dissenting opinions are abbreviated, with its author identified in bold, are listed in far right column.

Key: Chief Justice John Roberts (Ro); Justice John Paul Stevens (St); Justice Antonin Scalia (Sc); Justice Anthony Kennedy (K); Justice David Souter (So); Justice Clarence Thomas (Th); Justice Stephen Breyer (Br); Justice Samuel Alito (Al); Justice Ruth Bader Ginsburg (RBG); Justice Sandra Day O'Connor (OC).

Source: Supreme Court of the U.S. homepage, at <http://www.supremecourtus.gov> (accessed October 9, 2007).

denied that states are entitled to a “special solicitude” in standing analysis simply because they assert a quasi-sovereign interest in protecting citizens against the specter of catastrophic rising sea levels. If anything, Roberts concluded, a State making that type of claim must satisfy a higher threshold of standing under the Court’s precedents, which require that citizens, as well as the State itself, suffer direct harm. In short, under federal law the states do not enjoy any “special rights or status” to request, as aggrieved litigants, judicial relief from the Environmental Protection Agency’s political decision to not regulate greenhouse gases (*Massachusetts* 2007, 1464).

Although Justice Alito’s Third Circuit *New Jersey Payphone* opinion may have inferred a lukewarm endorsement of the preemption doctrine, he joined most of the Court’s liberal wing (plus Justice Kennedy) to hold in *Watters v. Wachovia Bank* (2007) that a subsidiary of a federally chartered bank did not have to comply with registration and auditing requirements that were a part of state, but not federal, mortgage lending laws. In contrast to Justice Ruth Bader Ginsburg’s majority opinion declaring that the lending activities of federal subsidiaries were controlled by the National Banking Act, Chief Justice Roberts and Justice Scalia joined with Justice Stevens in dissent² to argue that nondiscriminatory state regulations, which do not impede federal law are immune from federal control. In that Congress did not express a “clear and manifest purpose” in its laws to regulate federally licensed affiliates, the dissent maintained the Court’s ruling showed less than “a healthy respect for state sovereignty” (*Watters* 2007, 1584) and diminished the “vital role state legislation plays in the dual banking system” (*Watters* 2007, 1574). Notably, in dicta, Chief Justice Roberts and Justice Scalia conceded the majority’s point that the Tenth Amendment did not constrain federal power as exercised under the commerce and elastic clauses; still, they took special note of it because it was “included in the Bill of Rights, [and that] should . . . remind the Court that its ruling affects the allocation of powers among sovereigns . . . [and] the reasons for adopting that Amendment are precisely those that undergird the well-established presumption against preemption” (*Watters* 2007 1585).

Prior to *Gonzales v. Carhart* (2007), which upheld, 5:4, the federal Partial-Birth Abortion Ban Act, court watchers speculated about whether the justices would answer if Congress’s commerce power extended to regulating abortions in the states (Devins 2007; Pushaw 2005). At first blush, the case squarely presented the issue because the ban was explicitly based on the commerce clause and, under *Gonzales v. Raich* (2005), the Court implied that Congress had sweeping power to regulate activities with an economic dimension if there was a rational basis to do so. Also, the commerce issue seemed ripe for resolution for other reasons. Anti-abortion critics typically argue that abortion regulation is a province of the states. A bevy of new federalism rulings, among them *U.S. v. Lopez* (1995) and *U. S. v. Morrison* (2000), and arguably *Gonzales v. Oregon* (2006), and *Rapanos v. U.S. Army Corps of Engineers* (2006) (but decided principally on statutory grounds, and discussed shortly),

appeared to limit commerce authority. Also, at least three justices, Justices Scalia, Thomas, and Alito, have gone on record opposing *Roe v. Wade* (1973). In spite of its legal ambiguity and political ramifications, the prospect of commerce clause regulation was only briefly raised at oral argument, and the legal issue was not briefed. Accordingly, Justice Kennedy's plurality opinion did not address it, presumably on prudential grounds. Even so, that did not stop Justice Thomas from specially observing in a brief concurrence joined by Justice Scalia that the commerce clause issue was not addressed in the briefs, a sign that those justices may want to revisit the issue but that the Chief Justice and Justice Alito might not.

Commerce Clause Interpretations

The Roberts Court made additional, and at times more definitive, statements about commerce clause federalism in *Gonzales v. Oregon* (2006), *Rapanos v. U.S. Army Corps of Engineers* (2006), and *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority* (2007). Without Justice Alito on the bench, in *Gonzales v. Oregon* (2006) Justices Anthony Kennedy and Sandra Day O'Connor joined the liberal bloc in a 6:3 decision to strike down the U.S. Attorney General's authority under the federal Controlled Substances Act (CSA) to prevent state doctors from using drugs that assisted in patient suicide under Oregon's Death with Dignity Act. The outcome was reached via statutory interpretation and purported to favor the states. Yet, all the justices agreed that Congress possessed commerce authority to prevent state-assisted suicide. Chief Justice Roberts, along with Justice Thomas, joined Scalia's dissent arguing the Attorney General acted within the bounds of the statute to regulate death-producing drugs; but only Justice Thomas, in a separate dissent, questioned the inconsistency of not allowing the CSA to be used to prevent intrastate suicides in Oregon, while permitting it to stop the intrastate use of medicinal marijuana in California under *Raich*. In his words, "The Court's reliance upon the constitutional principles that it rejected in *Raich*—albeit under the guise of statutory interpretation—is perplexing to say the least" (*Gonzales* 2006, 302).

With Justice Alito confirmed and on the bench, in *Rapanos v. U.S. Army Corps of Engineers* (2006) the Court fractured into three groups (4:1:4) in deciding whether the U.S. Army Corps of Engineers could assert jurisdiction over state wetlands under the Clean Water Act on the grounds that ditches or man-made drains emptied into federally controlled navigable waters. Contrary to the liberal bloc's preferences, Justice Scalia, plus Chief Justice Roberts, and Justices Thomas and Alito, denied federal jurisdiction. Justice Kennedy cast the deciding vote, but in a stand-alone concurrence did not fully embrace Scalia's plurality rationale or the dissent's deferential position, led by John Paul Stevens, and joined by Justices Souter, Ginsburg, and Breyer. What remained was a narrow construction of the

CWA and a jurisdictional rule requiring a “significant nexus” between the wetlands at issue and navigable waters (Adler 2006). The fragmented outcome produced a remand, and probably created little guidance for understanding the true limits of federalism in analogous water cases; although some maintain that Justice Kennedy’s test is significant in striking a pragmatic balance between federal and state interests (Harvard Law Review Association 2006, 358).

New insights—as well as additional disagreement across and between the political spectrums—came from the Court’s analysis of the so-called negative, or dormant, commerce clause in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority* (2007). There, in a 6:3 ruling by Chief Justice Roberts, federal commerce power did not void a county flow-control ordinance requiring private haulers to use local publicly owned waste facilities that charged higher “tipping” fees as compared to those found out-of-state. An unusual cohort of justices in the majority, namely the Chief Justice, Souter, Ginsburg, Breyer, Thomas, and Scalia, reasoned the ordinance did not discriminate against interstate commerce even though it favored local government at the expense of the private trash industry. The public interest in allowing the county flow ordinance to stand, the Court said, outweighed the interest private haulers had in minimizing their costs. For Roberts, not making a distinction between the public and private interests at stake encouraged judicial activism of the worse sort, giving the judiciary a “roving license” to create policies about waste regulation that ought to be decided by the democratic processes (*United Haulers* 2007, 1796).

Yet, in separate concurrences Justice Scalia and Thomas questioned the Court’s reliance on precedents supporting the negating effect of the commerce clause on state laws and the underlying politics producing them. Whereas Scalia called it “an unjustified judicial intervention” (*United Haulers* 2007, 1798), Thomas went further by saying he would “discard” it altogether as an “unworkable” set of guidelines unjustifiably permitting the Court to usurp economic policymaking of either Congress or state governments in regulating trash disposal (*United Haulers* 2007, 1799). In a dissent joined by Justices Stevens and Kennedy, Justice Alito accepted the Court’s role in developing its dormant commerce clause jurisprudence but argued that the precedents themselves did not justify “an exception for discrimination in favor of a state-owned entity” (*United Haulers* 2007, 1806). That is, the distinction the Court used to favor state interests amounted to a discriminatory form of economic protectionism that runs counter to the “usual dormant Commerce Clause standards” prohibiting different treatment (*United Haulers* 2007, 1809).

Although the shifting coalitions among the justices in commerce clause cases make it difficult to pin down their ideological preferences, some patterns nonetheless emerge. The dichotomous results in *Oregon* and *Rapanos*, with each going in contrary directions in accepting federal regulation over assisted suicides

and wetlands, are reconcilable as decisions based on statutory interpretation. In spite of the different outcomes, Chief Justice Roberts was aligned with Justices Scalia and Thomas in both cases, and Justice Alito joined that bloc in limiting federal power in *Rapanos* after he was confirmed. Still, the positions and signals expressed by Scalia and Thomas in all of the cases may set them apart from Roberts and Alito, for political and doctrinal reasons: (i) whereas in *Carhart* Scalia and Thomas hinted they might object to allowing Congress to use commerce authority to outlaw abortions, the Chief Justice and Alito chose not to speak on the issue; (ii) in *Rapanos*, all the justices except for Scalia and Thomas voiced support for the constitutional use of commerce power; and (iii) in *United Haulers*, only Scalia and Thomas questioned the underlying dormant commerce clause precedents.

Spending Clause Interpretations

The Individuals with Disabilities Education Act (IDEA) is legislation enacted under Congress's spending (and Section Five of Fourteenth Amendment) authority that conditions the receipt of federal dollars for states adopting federal guidelines, which control educational intervention and related services for children with special needs. Two cases, *Arlington Central School District Board v. Murphy* (2006) and *Winkelman v. Parma City School District* (2007), identified the limits of federalism by addressing, in *Arlington Central*, the recovery of expert fees by parents who prevailed in a civil suit against a school board; whereas, in *Winkelman*, the dispute concerned if parents, acting independently apart from their children's interests, could file an IDEA lawsuit without legal counsel. Justice Alito, writing on behalf of the Chief Justice and Justices Scalia, Kennedy, and Thomas, used *Arlington Central* to extract from a prior Spending Clause case, *Pennhurst State School and Hospital v. Halderman* (1981), a requirement that Congress must express "clear notice" that it intended to bind the States to the reimbursement of expert fees in setting conditions for the receipt of federal monies (*Arlington Central* 2006, 2459). That intent, he emphasized, was not "what a majority of the Members of both Houses intend," but rather consists of the states being "clearly told" about the "conditions that go along with the acceptance of those funds" (*Arlington Central* 2006, 2463). In contrast, Justices Ginsburg (in a separate concurrence in the result only) united with dissenting Justices Souter, Breyer, and Stevens in contesting the creation of a new limitation on Congress's spending power based on a clear intent rule (*Arlington Central* 2006, 2464, 2470).

Yet, in *Winkelman* (2007), all the justices except two agreed with Justice Kennedy's opinion holding that the "entire statutory scheme" underlying IDEA gave parents independent and enforceable rights relative to their children's education, including the option to sue *pro se* (*Winkelman* 2007, 2000). In doing so, the Court distinguished *Arlington Central* and rejected the school district's

argument that Congress, under the Spending Clause, failed to give clear notice that states could be sued by parents seeking to vindicate their own child's rights, even though "some rights repose in both the parent and the child" (*Winkelman* 2007, 2006). Justice Scalia, in a partial concurrence and dissent joined by Justice Thomas, did not address the Spending Clause argument; but they did write separately to state IDEA should not be interpreted to construct a general substantive parental right to education. Instead, for Scalia and Thomas it only let the parents proceed *pro se* in regards to asking for reimbursement of monies incurred in sending their kids to private school or to correct violations of their own procedural rights (*Winkelman* 2007, 2007).

In evaluating the judicial lines drawn in the two spending cases, it remains unclear whether the decision by Chief Justice Roberts and Justice Alito to align themselves with a contextual reading of IDEA in *Winkelman* also implies that the law, for them, carries the type of substantive connotation that the dissent rejected. Still, it may underscore two closely related points. It may be further evidence that like-minded conservative justices fundamentally disagree on issues of statutory construction, with Justices Kennedy, Roberts, and Alito accepting what most would consider a liberal view based on statutory context and purpose. Also, Justice Scalia and Thomas's *Winkelman* dissent did not address the spending clause issue—which perhaps may foreshadow they sponsor limits on Congress's spending authority in future cases because they did not join with the rest of the Court in distinguishing the legal application of *Arlington Central's* clear notice rule in *Winkelman*.

State Sovereign Immunity Interpretations

In *U.S. v. Georgia* (2006), a unanimous Court (without Justice Alito) construed Congress's Fourteenth Amendment Section Five power to permit the federal American with Disabilities Act to allow a paraplegic prisoner to sue a state prison for actual unconstitutional violations pertaining to his confinement. That enforcement power, Justice Scalia's majority opinion held, additionally abrogates state sovereign immunity under the Eleventh Amendment. In second case, predating Justice Alito's confirmation, state immunity was likewise upheld to be validly abolished by Congress in a federal bankruptcy proceeding by a 5:4 ruling in *Central Virginia Community College v. Katz* (2006). The justices divided bitterly over their readings of whether the history of bankruptcy clause vested in Congress the ability to subordinate state sovereignty in the interest of securing uniformity in debtor-creditor relations among the states. Justice Stevens' opinion, consisting of a bare majority of Justices O'Connor, Souter, Ginsburg, and Breyer, thought that it did, whereas the dissent, led by Justice Thomas and joined by Chief Justice Roberts, Scalia, and Kennedy, declared that it did not, adding that the result cannot "be justified by the text, structure, or history of our Constitution" (*Central Virginia*

Community College 2006, 379). The judicial conflict over the proper scope of state immunity eased with *Northern Insurance Co. v. Chatham County* (2006), a unanimous opinion by Justice Thomas (including Justice Alito) that held a county being sued for negligently operating a drawbridge could not assert sovereignty immunity because it was not “an arm of the state” when it controlled the bridge.

Georgia invariably complicates the judicial lines drawn in the series of earlier Section Five rulings that at first cut back (*U.S. v. Morrison* [2000], *Kimel v. Florida Board of Regents* [2000], *Board of Trustees of University of Alabama v. Garrett* [2001]), but then expanded federal power in later opinions construing the scope of federal disabilities law (*Nevada Department of Human Resources v. Hibbs* [2003], *Tennessee v. Lane* [2004]). Yet, the Court’s holding may best be viewed as confined to its facts and only pertaining to actually established constitutional violations under the Fourteenth Amendment. Even with Justice Alito participating, *Chatham’s* effect is probably similar because the Court’s precedents barring entities that are not deemed part of state operations consistently ban claims of immunity. In light of Justice O’Connor’s departure, the more interesting ambiguity concerns the effect Justice Alito will have in subsequent litigation testing the scope and limits of *Central Virginia* in federal bankruptcy or analogous economic regulation, especially in the context of claims made by states to sovereign immunity.

The Court’s 2007–2008 Term and Beyond

Early in the 2007–2008 term, the Roberts Court decided a federalism case involving the limits of state taxation policy, plus it ruled on three other preemption cases and it resolved a rather unique appeal relating to the confluence of presidential power, international law, and state criminal justice administration. It was also scheduled to settle at least one additional dormant commerce clause case (as applied to state taxation). The cases not only help clarify the judicial lines between the justices, they also accentuate the impact of the Chief Justice and Justice Alito on new federalism jurisprudence. What the cases will not ostensibly reveal, however, is another dynamic interposed by Justice Thomas and his interpretation of the First Amendment’s Establishment Clause in religion cases with federalism dimensions. In that some states have used Justice Thomas’s interpretation in litigation, his argument and its constitutional implications are briefly outlined following a discussion of the preemption, state taxation, and international law cases.

In *Riegel v. Medtronic, Inc.* (2008), the Court applied preemption to prohibit state common law claims challenging the safety or effectiveness of preapproved FDA medical devices. At issue was whether an injured heart patient could sue a catheter manufacturer under state tort law when the device failed in an operation in light of a federal law barring such claims. The Court, in an 8:1 ruling delivered over Justice Ginsburg’s dissent, held that the federal Medical Device Amendments (MDA)

of 1976 preempts state common law claims against the manufacturers of FDA-approved medical devices. Writing for the Court, Justice Scalia reasoned that Congress clearly meant to preempt all state regulations that interfered with federal safety oversight of medical devices; but “only to the extent” that they are dissimilar to federal law (*Riegel* 2008, 1011). Thus, the MDA allows state common law claims “premised on a violation of FDA regulations; the state duties in such a case ‘parallel’ . . . the federal requirement” (*Riegel* 2008, 1011). In dissent Justice Ginsburg disagreed, and she refused to read the MDA “as an automatic bar to state common law tort claims” (*Riegel* 2008, 1019). In her view, “the purpose of Congress is the ultimate touchstone of pre-emption analysis” and hence the “constriction of state authority . . . was not mandated by Congress and is at odds with the MDA’s central purpose: to protect consumer safety” (*Riegel* 2008, 1013, 1020). As a result, Congress did not intend “to effect a radical curtailment of state common law suits” (*Riegel* 2008, 1013). Notably, in a partial dissent and concurrence, Justice Stevens joined the majority’s conclusion that the text of federal law barred state-based tort claims when state requirements were different; but he agreed with Justice Ginsburg that Congress could not have silently foreclosed all judicial recourse for consumers hurt by FDA-approved devices, a position that the majority embraced in the part of the opinion that Justice Stevens refused to join.

In *Rowe v. New Hampshire Motor Transport Association* (2008), the State of Maine required licensed retailers that ship tobacco products to use a delivery service that verified recipients were of legal age to purchase tobacco. With Justices Ginsburg and Scalia filing separate concurrences, the Court held unanimously that the Federal Aviation Administration Authorization Act of 1994 (which regulates trucking companies, among other things) preempted Maine’s regulation. By interpreting precedent, which allowed for the preemption of state consumer-protection laws, Justice Breyer’s Opinion for the Court held Maine’s law interfered with Congress’ intent to deregulate the trucking industry and to favor free market competition. As well, the Court was unwilling to adopt, as per Maine’s argument, a public health exception that would allow a state to regulate tobacco deliveries as a step to protect public health. In construing congressional intent, the justices declared that the legislature clearly meant to further a national policy of deregulation; and Congress did not want to create “an implicit general ‘public health’ exception broad enough” to cover the delivery of tobacco that Maine sought to regulate (*Rowe* 2008, 997). As in *Riegel*, moreover, Justice Ginsburg’s separate concurrence understood that preemption’s application sometimes leads to harsh results. While she agreed with the Court, she wrote apart to express her doubt that Congress intended an outcome harming minors when it deregulated the trucking industry; and to signal Congress that it ought to “fill that gap” in national policy by creating legislation that would account for state laws designed to restrict minors’ access to tobacco (*Rowe* 2008, 998).

In a third preemption case, *Preston v. Ferrer* (2008), Justice Ginsburg joined her colleagues in deciding whether the Federal Arbitration Act (FAA) preempts state laws, which refer state law contract disputes to administrative agencies. The Court, with only Justice Thomas dissenting, ruled that “when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA” (*Preston* 2008, 981). Writing for the Court, Justice Ginsburg observed that the FAA established a “national policy favoring arbitration of claims that parties contract to settle in that manner,” and it “forecloses state legislative attempts to undercut the enforceability of arbitration agreements” (*Preston* 2008, 983). In a lone dissent, Justice Thomas simply reiterated his long-standing view that the Federal Arbitration Act does not apply to state court proceedings.

Although *Medtronic*, *Rowe*, and *Preston*, and do not necessarily denote a trend, they shed light on Chief Justice Roberts’s and Justice Alito’s approach to preemption cases. In brief, these cases suggest that Roberts and Alito are willing to follow in the path of conservative justices on the Rehnquist Court who often sided with the states in cases concerning the commerce clause, Tenth Amendment, Eleventh Amendment and Section Five of the Fourteenth Amendment, but were prone to uphold federal authority in preemption cases (Conlan and Dudley 2005). As noted previously, the Chief Justice’s preconfirmation views on preemption are hard to discern, but the preemption cases suggest that he might be willing to find that federal law preempts very basic (and traditional) state regulatory powers. Arguably, Chief Justice Roberts’ sensitivity to states’ rights—as inferred from his off-the-bench writings—may be softened in preemption cases. Further, Justice Alito’s preconfirmation views on preemption are mainly derived from his Third Circuit *New Jersey Payphone* decision—there, he asserted that preemption should be viewed prudentially. Yet, by joining the majority in *Rowe* and *Medtronic* Justice Alito might be indicating that he is shifting his position to less prudential view, and hence he might be more deferential to federal power in similar cases. Yet, *New Jersey Payphone* presented Alito with the option, as he saw it, to decide the case based on preemption or under state law, and significantly he based his decision on the state law claim. In addition, once a preemption case has been accepted by the Supreme Court, other avenues for decision have been most likely foreclosed; that is, the Court will only consider the preemption issue. Thus, in subsequent preemption cases Justice Alito will face a stark choice: either a state law is preempted by federal law, or it is not. In the end, it may be more difficult for Justice Alito to view preemption prudentially now that he is on the Supreme Court.

A few common threads in the three preemption cases are also apparent. In each case, the Court relied heavily on precedent interpreting the text of the relevant statutes, and using that approach the Court discovered clear congressional intent: such as, for example, in *Rowe* where Congress did not recognize a public health

exception to state trucking regulations affecting delivery services, or in *Preston* where Congress did intend to put in place a national arbitration policy. Finally, the Court reasoned in each case that state regulations directly interfered with national policy, as defined by Congress. Thus, although Chief Justice Roberts and Justice Alito, along with six other Justices in *Riegel* and *Preston*, and with all others in *Rowe*, held that federal preempted state laws regulating public health, contracts, and state common law, the Court is more likely to preempt contrary state law when Congress's intent is clearly expressed, clear Supreme Court precedent exists, and state action directly frustrates national policy.

The adherence to textual moorings and congressional intent was also evident in *CSX Transportation, Inc. v. Georgia State Board of Equalization* (2007). As with most of the preemption rationales, the Court found consensus in addressing whether a railroad may challenge, in light of anti-tax discrimination federal law designed to protect the railroad industry, a State's methodology in valuing CSX's railroad property at a higher tax than analogous commercial properties. For Chief Justice Roberts and a unanimous Court, the federal law, as expressed in the so-called "4-R" law (the Railroad Revitalization and Regulatory Reform Act of 1976), manifested a clear congressional purpose and intent to prevent Georgia from discriminating against CSX by imposing a higher levy. Notably, in so holding the Chief Justice dismissed the State's argument that "background principles of federalism" prevented courts from interfering with state tax policy decisions.

In *Medellin v. Texas* (2008), a preemption case with a unique foreign policy twist, the Court decided by a 6:3 vote, with Justices Breyer, Ginsburg, and Souter dissenting, that state criminal courts are not bound to follow a Presidential directive implementing an International Court of Justice decision and the President's interpretation of a treaty. In 2004, the International Court of Justice ruled in the *Avena Case* that the United States had violated the terms of the 1963 Vienna Convention on Consular Relations because Texas had not allowed Jose Medellin, a Mexican national, to contact his local consulate, as per the terms of the treaty, during his arrest and conviction for capital murder in the Texas criminal justice system. In response to the *Avena Case* decision President Bush issued a Memorandum providing that state courts give effect to the ICJ decision and comply with the Vienna Convention. Subsequently, the Texas Court of Criminal Appeals determined that the *Avena Case* and the Presidential Memorandum were not binding upon the states and therefore did not have to be followed in state criminal proceedings.

The Court ruled in favor of the State of Texas, and the majority decision authored by Chief Justice Roberts focused on the Court's role in interpreting international treaties. Using a strict textual analysis, the Court determined that treaties under which the United States accepts the International Court of Justice's jurisdiction is not self-executing and thus inapplicable to the states without

implementing congressional legislation. Consequently, ICJ decisions are not binding upon the states either. Chief Justice Roberts's opinion noted that the President "may not rely upon a non-self-executing treaty to establish binding rules of decision that preempt contrary state law" (*Medellin* 2008, 22). The Chief Justice's opinion also addressed the federal government's argument that the President has an independent source of authority to order states to comply with international law. Although the Court recognized several precedents that establish executive authority to settle claims with other sovereign states by executive agreement, it refused to stretch those cases to justify the president's directive to state courts to follow the *Avena Case* decision. And, applying the tripartite framework from Justice Robert Jackson's concurring opinion in the seminal case *Youngstown Sheet and Tube v. Sawyer* (1952), the Court determined that the president did not have the unilateral power to enforce state compliance with the *Avena Case* decision and Congress had not acquiesced in the president's asserted foreign policy authority over the states. Thus,

the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced to) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments (*Medellin* 2008, 24).

Justice Breyer's dissent, joined by Justices Souter and Ginsburg, argued more forcefully that the Supremacy Clause and "the extensive case law interpreting the Clause as applied to treaties" indicates that the ICJ decision is binding upon state courts (*Medellin* 2008, 42).

A few other cases, still pending, are likewise important in identifying the boundaries between state law and federal policy. In *Department of Revenue of Kentucky v. Davis* (2007), the Court will determine if the dormant commerce clause prohibits a state from exempting its state and local bonds from state taxation, while taxing government bonds issued outside of its borders. The Court's decision will greatly impact state policymaking. One brief, filed by attorneys general of forty-eight states (in addition to Kentucky), argues that states have long exempted their own bonds from taxation (while taxing bonds from other states), thereby preserving their sovereign interests in regulating finance and debt service. Briefs supporting Kentucky's tax policy also have been filed by interest groups that reflect the parochial interests of the National Governors Association and the National Conference of State Legislatures. If the Court applies the dormant commerce clause to strike down the tax policy, the ruling will directly repudiate the consensus of almost all states that operate under the principle that bond taxation policies are uniquely sovereign. In light of *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority* (2007), it is plausible that the justices will sustain Kentucky's bond tax policy, especially given the near-unanimous state consensus

underlying it. Also, the case invariably presents another opportunity for exacerbating judicial conflict, especially if the Chief Justice and Justice Alito opt to distance themselves from the jurisprudence of Justices Thomas and Scalia. In *United Haulers*, Thomas and Scalia voted with the majority to limit federal power, but they further questioned the legitimacy of the dormant commerce clause doctrine as well as its application to state economic policymaking. In contrast, dissenting Justice Alito (with Kennedy and Stevens) accepted the Court's role in shaping dormant commerce clause doctrine as it applies to state economic policymaking, and Chief Justice Roberts (joined by the three liberal justices Souter, Ginsburg, Breyer) agreed with dormant commerce clause precedents and limited federal power based on the facts of the case.

Finally, federalism cases litigated in the Roberts Court in subsequent terms may have to contend with arguments in litigant briefs adopting Justice Clarence Thomas's interpretation of the Establishment Clause "as a federalism provision" in religious freedom cases. Two recent First Amendment cases, with states as litigants and *amicus curiae*, have adopted Justice Thomas's federalism reading of the Establishment Clause. In *Cutter v. Wilkinson* (2005), which concerned the constitutionality of RLUIPA—the Religious Land Use and Institutionalized Persons Act—the State of Ohio argued that "the federalist aspect of the Establishment Clause is reflected in the basic constitutional framework"; and that State sovereigns, when acting within their "respective sphere[s]," such as in matters of religion, are "not subject to federal oversight" (*Brief of Respondent State of Ohio* 2005, 53). Ohio's position was echoed by other states as *amicus curiae* (*Brief of the Commonwealth of Virginia* 2005). Significantly, the states derived their rationales from Justice Thomas's concurrence in *Elk Grove School District v. Newdow* (2004). There, he argued that the Establishment Clause is a federalism provision that imposes jurisdictional barriers to federal oversight of state religious policymaking. In its *Cutter* brief, the federal government vehemently disagreed; and perhaps that influenced the Court to rule unanimously in favor of RLUIPA, especially because the justices failed to address the merits of Ohio's federalism arguments.³ Analogous federalism arguments resurfaced in the most recent church-state case of *Hein v. Freedom from Religion Foundation, Inc.* (2007), but this time in regards to whether a litigant had taxpayer standing to challenge the constitutionality of the White House's Faith Based Initiative's Office. Specifically, the State of Indiana, joined by eleven other states as *amicus curiae*, argued:

Permissive treatment of state-taxpayer lawsuits undermines our federalist structure by involving federal courts in the daily functioning of state bureaucracies. The Court has repeatedly emphasized that federal courts must respect principles of federalism when cases portend judicial regulation of state programs...these same concerns apply in Establishment Clause cases,

which increasingly threaten to put state-government bodies under federal-court supervision (*Brief of the State of Indiana and other States, as Amicus Curiae, Hein v. Freedom from Religion Foundation* 2007, 13).

As in *Cutter*, the Court ignored this federalism argument, and showed that, at least insofar as the other justices are concerned, a federalism reading of the Establishment Clause is unlikely to be adopted by the rest of the Court any time soon. Even so, the importance of this development is registered by the decision of several states to press that view on the Roberts Court, perhaps indicating that at least some of the states perceive federalism arguments as a viable, if not a fruitful, avenue to initiate change in constitutional doctrine affecting states' rights and church-state relations.

Conclusion

The appointments of Chief Justice Roberts and Justice Alito probably will not appreciably reverse the recent trend of "counter-revolutionary" new federalism cases that impose fewer limits on federal authority. Many of the seminal states' rights decisions were set by the Rehnquist Court, and the new Chief Justice and the addition of Justice Alito are probably not going to reconfigure the basic voting blocs and push the Court further to the right on key federalism issues. As a result, Chief Justice Roberts, as a replacement for his mentor, is likely to "stay the course" in new federalism cases, using minimalist principles of judicial restraint and the rule of law as pragmatic guideposts to adjudicate federalism disputes. It is an open question whether Justice Alito, in replacing Justice O'Connor, will be any more conservative than she was in those types of cases. In any event, the "States' Rights Five," although now consisting of Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito, are likely to remain intact as a solid bloc, Justice Kennedy—and not the Chief Justice or Justice Alito—will probably assume the role Justice O'Connor played as a swing vote in crafting limits on federal power.

It seems unlikely that Roberts and Alito will subscribe to the federalism of Thomas and Scalia, and their failure to do so—while not putting them in the same ideological camp as Justices Ginsburg, Breyer, and Souter—may well create a wider split among the conservatives on the Court. However, in this light the new justices will have a greater effect on the interpretative lines drawn by the five-justice coalition favoring state interests. Nothing in Chief Justice Roberts's or Justice Alito's records indicate they will fully adopt the ideological rigidity of Justice Thomas's originalism relative to new federalism; and, even if they did, Justices Scalia and Kennedy would have to go along in order to push the Court back toward a greater recognition of state sovereignty principles. While Justice Alito may prove to be more conservative than Justice O'Connor, he is likely to be

more liberal than Justice Thomas on federalism issues. Similarly, the new Chief Justice's decision-making is likely to resemble more that of Chief Justice Rehnquist, or Justice Scalia; and, perhaps, Justice O'Connor and Justice Thomas in certain cases. Aside from preemption cases, any constraints imposed on federal power will only develop in accordance with how well the coalition remains cohesive. In sum, the Court will continue to vindicate state power in federalism rulings but, in doing so, it remains uncertain if the justices are likely to speak with one voice in the most politically contentious cases.

Notes

1. Admittedly, there is little consensus about whether "new federalism" jurisprudence produced solid, or even new, support for states' rights, especially in the Rehnquist Court (Hannah 2007). Whereas Solberg and Lindquist (2006) find mixed support for correlating conservative values with judicial outcomes favoring state interests in the Rehnquist Court, Collins (2007) reports that conservative ideology explains judicial support for state and local policies. As used here, the term describes a series of decisions, epitomized by *U.S. v. Lopez* (1995), signaling the Court's willingness to place greater limits on congressional commerce authority and, concomitantly, reinvigorate state sovereignty in immunity, enforcement clause, and related federalism cases (Claeys 2005).
2. Justice Clarence Thomas recused himself and did not participate in the case.
3. The Solicitor General argued that "It is too late in the day to argue that the federal Constitution contains two different Establishment Clauses with varying levels of potency" depending on which level of policymaking—state or federal—was at issue. Also, calling a federalism reading of Establishment a "junior varsity" attempt to overturn the incorporation doctrine, General Paul Clement pointed out that the Court had been asked to adopt a similar federalism reading of the Establishment Clause two decades ago in *Lee v. Weisman* (1992) and it chose not to do so.

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