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FEDERALISM IN THE U.S. SUPREME COURT

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You can lead a horse to water,
but you can't make him drink.
You can send a kid to college,
but you can't make him think.

-- B. B. King

DECIDED CASES (2006-07 Term)

I. PREEMPTION – STATE REGULATION OF "OPERATING SUBSIDIARIES" OF NATIONAL BANKS

A. **Watters v. Wachovia Bank**, 127 S.Ct. 1559 (April 17, 2007)

1. Issue – Whether the National Bank Act, 12 U.S.C. § 1 et seq. ("NBA"), and regulations issued by the federal Office of the Comptroller of the Currency ("OCC"), which regulates national banks, preempt state laws that regulate state-chartered "operating subsidiaries" of national banks.

a. Wachovia Bank, a national bank chartered and regulated by the OCC, conducts its mortgage business in several States through its state-chartered operated subsidiary, Wachovia Mortgage Corp.

b. The Michigan Banking Commissioner sought to regulate Wachovia Mortgage under state laws designed to combat mortgage-lending abuses. [**NB – It is NOT alleged that Wachovia Mortgage Corp. violated these laws.**]

c. Wachovia Mortgage declined to register with the State Banking Commissioner on the ground that those state laws are preempted by the NBA and related OCC regulations.

d. When Michigan informed Wachovia that it would not be authorized to conduct mortgage lending in the State, Wachovia sued in federal court for declaratory and injunctive relief, claiming that federal law preempts the state regulatory laws at issue as applied to operating subsidiaries of national banks.

e. The federal district court granted Wachovia the equitable relief it sought, and the Sixth Circuit affirmed.

2. Holding – Wachovia's mortgage business, whether conducted by Wachovia Bank or an operating subsidiary like Wachovia Mortgage, is subject to OCC regulation and not to state licensing, reporting or visitation requirements, which are preempted by the National Bank Act.

a. "A national bank has the power [under the NBA] to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the national bank itself; that power cannot be significantly impaired or impeded by state law."

b. "The NBA is thus properly read by OCC to protect from state hindrance a national bank's engagement in the 'business of banking' whether conducted by the bank itself or by an operating subsidiary, **empowered to do only what the bank itself could do**."

c. "The authority to engage in the business of mortgage lending comes from the NBA as does the authority to conduct business through an operating subsidiary."

d. "That Act vests visitorial oversight in OCC, not state regulators."

e. "State law (in this case, North Carolina law) . . . governs incorporation-related issues, such as the formation, dissolution, and internal governance of operating subsidiaries."

f. "But state regulators cannot interfere with the 'business of banking' by subjecting national banks or their OCC-licensed subsidiaries to multiple audits or surveillance under rival oversight regimes."

3. Dissent by Stevens, J., joined by **Roberts, C.J.**, and Scalia, J.

a. "Congress has enacted no legislation immunizing national bank subsidiaries from compliance with non-discriminatory state laws regulating the business activities of mortgage brokers and lenders."

b. The Court nonetheless "endorses [the OCC's] incorrect determination that **the laws of a sovereign State must yield to federal power**."

c. The Court's holding will have **a "significant impact" on the federal-state balance** and **the dual banking system**" that has hitherto existed in the United States.

d. The Michigan statutes held to be preempted do not conflict with federal banking laws; on the contrary, they were enacted "to protect consumers from mortgage lending abuses."

1) **Consumer protection "is quintessentially a field which the States have traditionally occupied."**

e. The Court's ruling thus "threatens the vitality of most state laws as applied to national banks – a result at odds with the long and unbroken history of dual state and federal authority over national banks, **not to mention our federal system of government**."

II. DORMANT COMMERCE CLAUSE/"FLOW CONTROL"

A. **United Haulers v. Oneida-Herkimer Solid Waste Mgmt. Authority**, 127 S.Ct. 1786 (April 30, 2007)

1. Issue-- Whether a county ordinance that requires that all solid waste generated **within the county** be delivered to a **county-owned** transfer station for processing violates the Dormant Commerce Clause prohibition on laws that discriminate against interstate commerce.

a. In the late 1980s, Oneida and Herkimer Counties, large and sparsely-populated jurisdictions in upstate New York took over waste disposal within their borders.

1) The Counties acted through a bi-county authority that took over all aspects of solid waste management except hauling, employing the best available technology and encouraging recycling and other progressive policies.

a) The Counties chose to act after a patchwork of public and private waste disposers within their borders caused severe environmental contamination and caused huge public and

private liability under federal and state environmental laws.

b. Among the state-of-the-art waste disposal facilities built by the Counties was a "transfer station" in Utica.

c. One of the methods used by the Counties to finance the transfer station, other county-owned waste-related facilities, and related programs such as recycling, was "flow control."

1) All waste haulers operating in Oneida and Herkimer Counties are required by county ordinance to deliver in-County waste to the Utica transfer station for processing.

2) The fee per ton charged at the Counties' transfer station is much higher than the cost of disposal at landfills outside New York State (e.g., Pennsylvania), although the trash haulers who haul the waste pass this extra cost on.

2. A consortium of New York State trash haulers challenged the Counties' flow-control ordinances as invalid under the dormant Commerce Clause, asserting that they discriminated against and/or burdened interstate commerce.

a. In C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1993), the Supreme Court **invalidated** a municipal flow-control ordinance that required that all trash be delivered to a **privately-owned** transfer station on the ground that it discriminated against interstate commerce.

1) The plaintiff in Carbone was a trash hauler that preferred to use lower-cost waste disposal facilities in nearby New Jersey.

2) The transfer station in Carbone was owned and operated by a **private company, not by the Town**.

3) Clarkstown's flow-control law applied to all waste brought into the town as well as all waste generated in the town.

3. In two separate opinions, the U.S. Court of Appeals held that the Oneida and Herkimer County flow control ordinances neither

burdened nor discriminated against interstate commerce and are therefore constitutional.

a. The court of appeals distinguished Carbone principally on the ground that Clarkstown's flow-control law required trash to be delivered to a privately-owned facility, whereas the Oneida-Herkimer facility is publicly owned.

4. Holding (5-1-3) **(Opinion for the Court by Roberts, C.J.)** – The judgment of the court of appeals is affirmed; the Oneida-Herkimer "flow control" laws do not violate the dormant Commerce Clause.

a. The Court essentially adopts the public/private distinction relied upon by the court of appeals:

1) It acknowledges that the Oneida-Herkimer flow control ordinances are "quite similar to the one invalidated in Carbone."

2) "The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by **a state-created public benefit corporation**."

3) "We find this difference constitutionally significant."

4) "The flow control ordinances . . . benefit a clearly public facility, while treating all private companies exactly the same."

5) "Compelling reasons justify treating these [flow-control] laws differently from laws [such as the one in Carbone] favoring particular private businesses over their competitors."

6) "States and municipalities are not private businesses – far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."

7) **"Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism."**

8) **"Laws favoring local government. . . may be directed toward any number of legitimate goals unrelated to protectionism."**

a) "Here the flow control ordinances enable the Counties to pursue particular policies with respect to the handling and treatment of waste generated in the Counties. . . ."

9) **"The contrary approach of treating public and private entities the same under the Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government."**

10) **"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."**

5. Alito, J., joined by Stevens and Kennedy, JJ., dissenting:

"Because the provisions challenged in this case are essentially identical to the ordinance invalidated in Carbone, I respectfully dissent."

III. LAW ENFORCEMENT/ HIGH-SPEED POLICE PURSUITS

A. **Scott v. Harris**, 127 S.Ct. 1769 (April 30, 2007)

1. Issue – Whether a police officer violates the Fourth Amendment by terminating a six-minute high speed pursuit by ramming the plaintiff's car.

a. The Fourth Amendment requires that police seizures of persons be "reasonable."

b. Victor Harris, aged 19, was clocked by a Coweta County (Ga.) Deputy Sheriff going 73 miles per hour in a 55 mile per hour zone at 10:30 p.m.; the Deputy began pursuit.

c. Harris steadily accelerated his speed and evaded a police road block set up by three officers, including defendant Timothy Scott, also a Coweta County Deputy Sheriff.

1) Harris hit Scott's stationary cruiser but continued his high-speed evasion of the police.

2) Scott took over the pursuit of Harris.

c. After a high-speed pursuit lasting more than six minutes and covering nine miles of urban and suburban roads, and after obtaining his supervisor's permission, Scott terminated the pursuit by hitting Harris's car from the rear while Harris was driving at high speed and visibly swerving back and forth along the road.

d. Harris lost control of his car and crashed. He experienced severe injuries that rendered him a quadriplegic.

2. Harris sued Scott and other county defendants under Section 1983, alleging that Scott's conduct was an "unreasonable" use of deadly force that violated the Fourth Amendment.

a. Scott and the other defendants moved for summary judgment, arguing that they had qualified immunity and that they had not violated Harris's rights.

b. The district court denied the defendants' motion, and they appealed to the 11th Circuit.

c. The court of appeals: (1) dismissed all defendants except Scott, and (2) ruled that Scott was not entitled to qualified immunity and that Harris's Fourth Amendment claim against him should go to trial so that a jury could decide whether Scott's use of force was "unreasonable."

3. Holding (8 - 1) **(Opinion of the Court by Scalia, J.)** – Because the car chase Harris initiated posed a substantial and immediate risk of serious physical injury to others, Deputy Scott's attempt to terminate the chase by forcing Harris off the road was reasonable and did not violate the Fourth Amendment.

a. Core issue in case:

"Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?"

b. This case comes to the Court on review of the **denial** by the lower courts of Deputy Scott's motion for summary judgment based on qualified immunity.

c. Ordinarily, a court of appeals reviewing the denial of a party's summary judgment motion must view the facts in the light most favorable to the non-moving party, in this case respondent Harris.

1) The court of appeals unquestionably did that here, adopting Harris's version of the highly disputed facts lock, stock, and barrel.

d. **"There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question."**

e. **"The videotape quite clearly contradicts the version of the story told by Harris and adopted by the court of appeals."**

1) On the videotape, "we see Harris's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up.

What we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."

2) **"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."**

3) "That was the case here. . . . We think it is quite clear that Deputy Scott did not violate the Fourth Amendment."

a) "In judging whether Scott's actions were reasonable we must consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the lives of any pedestrians who might have been present, to other civilians, and to the officers involved in the chase."

b) "We think it appropriate in this process to take into account not only the number of lives at risk, **but also their relative culpability." [Did Justice Scalia really write this???]**

f. In concluding, the Court articulates the following rule:

"A police officer's attempt to terminate a dangerous high speed chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."

PENDING CASES (2007-08 Term)

I. STATE TAXATION/DORMANT COMMERCE CLAUSE

A. **Kentucky Dept. of Revenue v. Davis**, No. 06-666 (to be argued 11/5/07)

1. Issue – Whether Kentucky's policy of exempting from state income tax interest derived from Kentucky state and local government bonds, while taxing interest derived from state and local government bonds of other jurisdictions, violates the dormant Commerce Clause.

2. Almost every State that has an income tax takes the same approach to the treatment of interest on "tax free" state and local government bonds.

3. Respondents are Kentucky residents who have paid state income tax on bonds issued by jurisdictions outside Kentucky.

a. They filed an action in state court seeking to have Kentucky's differential treatment of interest from in-state and out-of-state bonds declared unconstitutional and also seeking a refund of the taxes they have paid on out-of-state bond interest.

4. The Kentucky Court of Appeals invalidated the differential treatment of bond interest.

a. "Clearly, Kentucky's bond taxation system is facially unconstitutional" under the dormant Commerce Clause "as it obviously affords more favorable tax treatment to in-state bonds than it does to extraterritorially issued bonds."

5. The State appealed this ruling to the Kentucky Supreme Court, which **denied review** (this is not a joke).

6. Affirmance of the judgment below by the U.S. Supreme Court would likely have a very significant impact on state and local government finance.

II. PREEMPTION – STATE TOBACCO DELIVERY LAWS

Rowe v. New Hampshire Motor Transport Association, No. 06-457

A. Issue – Whether Maine's Tobacco Delivery Law, which requires internet cigarette retailers to use shippers that will verify the age of the recipient, is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), which regulates air and motor carriers.

1. The FAAAA's express preemption provision provides that States:

"may not enact or enforce a law . . . **related to** a price, route, or service of any motor carrier . . . with respect to the transportation of property."

a. The FAAAA expressly saved from preemption state laws on such matters as motor vehicle safety and insurance.

2. For 200 years the States have had primary responsibility for protecting the public health through their police power.

a. The Supreme Court has recognized and respected the States' reserved power to protect public health since for

almost 200 years. *See, e.g., Gibbons v. Ogden,* 22 U.S. 1 (1824) (Marshall, C.J.)

b. Obviously, a state health law that is unconstitutional under the Supremacy Clause or any other provision of the Constitution (e.g., dormant commerce clause) will be invalidated by the Courts; the States' police power to protect health does not trump constitutional rights.

c. But the Court has repeatedly upheld state health laws against constitutional challenge, reiterating that States "are vested with the responsibility of protecting the health, safety, and welfare of their citizens." *Gonzales* **[WHO?]** *v. Oregon,* 546 U.S. 243, 271 (2006).

3. One consequence of the Court's respect for the reservation to the States as the primary protectors of citizens' health is the strong presumption against preemption of state health laws, such as Maine's tobacco law.

a. Only a showing of a clear and manifest purpose of Congress to preempt state action will suffice to "overcome the presumption that state and local regulation of health and safety matters can constitutionally co-exist with federal regulation."

b. The court of appeals dismissed the presumption against preemption of state health laws in a footnote, stating that "the circumstances in which the presumption is to apply are not altogether clear," despite the existence of two centuries of Supreme Court case law applying the presumption.

1) The court's starting premise was that "a fundamental tenet of our federalist [sic] system is that constitutionally enacted federal law is supreme to state law."

2) *But see Gregory v. Ashcroft,* 501 U.S. 452, 457-58 (1991):

"The Constitution created a Federal Government of limited powers. . . . As James Madison put it, 'The powers delegated by the proposed Constitution to the federal government are few defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved

> to the . . . States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.'" (quoting Madison in The Federalist)

4. Most of the Supreme Court's preemption cases contain a very brief summary of preemption principles (invariably repeating the old formulas in a somnambular state) followed by a detailed discussion of Congress's intent whether or not to preempt in the particular case.

   a. It is conceivable that the Court will touch on the presumption against preemption of state health statutes in this case to a greater degree than is customary, but I wouldn't bet the ranch on it.

   b. In any event, the presumption **ought** to play a role in the decision in this case, given the importance of what Maine is trying to do to protect children, and the absence of strong indicia that Congress, in enacting the FAAA, intended to preempt state laws of this kind.

   c. But who knows??