CLnn9-5-06

1. Assignment

How far we go today, at least in 2014, look at new 15. Then P. 9.

204 - 11 § 2.4 160 part 121, ls 1.5 S. 3 607. 24


3. Apology.

4. Sum:

Difficult works. Gibbons, Then later in the 19th C., early 20th. Industrialization. Congressional action. Ct. Strikes down. Various arguments that not within Congress power under the Comm Cl. Then reversal of course in the 1930s after the collapse of the economy and FDR's court packing plan. Jones and Laughlin, Darby and Wickard.

Continued so until 1995 with U.S. v. Lopez when the Ct. found that Congress exceeded its power in the GFSZA. That trend was carried forward in U.S. v. Morrison and VAWA. 2000. In those cases, the maj., led by CJ Rehnquist limited Congress' power. It did so by its interpretation of the Comm. Cl, Art. 1, § 8. Among its interpretive techniques was to emphasize certain interpretive elements of the preceding cases, certain arguments. Thus, Wickard, e.g., the case of Farmer Filburn and his wheat, said that commerce would be interstate commerce reachable by Congress if it had a substantial effect on interstate. The Rehnquist Ct. maj. emphasized the "substantial" effect and downplayed the fact that Wickard had allowed a showing of substantiality by aggregating effects.

But then upheld Congressional act: CSA. Gonzales v. Raich. Supp 1 (2005)

Rehnquist federalism appeared to have an uncertain future. The old minority of Stevens, Souter, Ginsburg, and Breyer was joined by the swing vote of Justice Kennedy. And even Justice Scalia concurred:

Upheld CSA., power to regulate medicinal use of marijuana, even though not sold and grown strictly within the state. Bears careful reading and thought. Basic: bottom 2-bottom of 3 at 2 X **. Also Scalia 5-6 at ** (incl. N&P Clause) O'C dissent. Structural 7
States as laboratories and Brandeis. No fault car insurance. California and emissions controls. ND and socialist experiment.

Even more recent = Rapanos supp. 11, last term. Clean Water Act prohibits certain discharges into navigable waters. COE interprets navigable waters as including wetlands adjacent to such waters even if only intermittently wet.

Scalia, Thomas, Roberts and Alito: Corps exceeded authority under the state. Corps not congress reached too far into state jurisdiction. Exceeded Commerce clause power. Waters must be permanent or flowing waters. 4 votes. Remand 4 dissents: Stevens, Souter, Ginsburg, and Breyer found Corps reasonable. Kennedy deciding vote. Remand. His definition. P. 12 1/3 **

Future: more of the same close votes and a number of arguments available.
"Issues," arguments. What jot down?
What order
How arrange in answer - exam, theory of the case
How start
Not repeat history or class notes
What else need to know and why

1. Wickard: (Raich, Rapanos)
   Substantial effects - aggregate
   Rational

2. Rehnquist:
   Channels of Comm.
   Instruments of Comm, things in commerce (stream or current)
   Subst. Effects:
   economics (Raich?)
   Not aggregate (Raich?) (Distinguish: comprehensive)
   Findings? (Morrison)
   Jurisdictional nexus?

3. Random
   Commerce prohibiting
   S/O/R
   Gibbons

4. Structure
   Rehnquist "new federalism"?
   Role of Ct.
   Role of states.
Constitutional Law

As part of a general program to promote highway safety, Congress enacted a statute requiring states to make a thorough safety evaluation of their roads (roadside hazards, road surface conditions, etc.) and to collect and report the data. States proved reluctant to collect and report data that might increase their liability for hazards. Congress then amended the act so as to exclude from evidence in state and federal courts the states' highway safety data/material. A plaintiff injured in a car wreck sought to discover and then use at trial, if needed, the state's relevant safety data regarding the accident site. The state refused to produce the information and cited the federal statute. The plaintiff's attorney, in addition to other steps, challenged the constitutionality of the statute. What do you think is the best argument that the statute is constitutional? The best that it is not? What is your opinion about the statute's constitutionality?

A state collects personal data when it citizens apply for drivers’ licenses. It then compiles this data and, for a fee transfers it to in-state and out-of-state businesses for use in mass marketing. It also makes it available free to scholars engaged in bona fide non-commercial research. Congress enacts a law that prohibits any state from making any transfer of such personal data. What reasonable arguments can you make that the statute is constitutional?
IV. External Limits on Congress’ Commerce Power

We have been talking about limits imposed on Congress by the commerce clause itself, by judicial interpretation of what “commerce” means and what “among” the states means. What the people delegated to Congress and what they were left to the states. We can refer to these limits as internal. They are internal to Art. 1 Sec 8, internal to Court construction of that section, come from within the Com. Cl.

But from the beginning we have also noted along the way that the Ct. Has found external limits, limits drawn from outside the Com. Cl, drawn from the 10th Amend perhaps or the 11th. Or from the structure of the reality created by the Constitution. Think back for example to Marshall’s structural argument in McCulloch. And discussed in a variety of forms: the role of the people, federal-state relationship, interbranch relations as federal-state relations. We are, after all, members of two sovereigns, and those who are Native American tribal members are members of three. We have dual and even treble sovereigns.

And we also caught glimpses of such arguments in the cases we’ve already studied, talk of the role of the states. And we saw it re-emerging in the Rehnquist Court’s talk of “our federalism” and of “state autonomy.” And it is an important subject, critical subject in places like Iraq, the Balkans, some areas of Asia.

CB 178,179ff:.

1. Coyle v. Oklahoma (1911) 178. Location of a state capital is a decision that belongs exclusively to the state, acting as a sovereign, and not to the federal government.

2. But claims to state sovereign immunity were denied later: In U.S. v. Cal. (1936) 179. The Ct. upheld a federal Penalty imposed on Cal. in its capacity as owner of a rr. Not a traditional function of a state to run a rr. Compare state capital location.


**NLC v. Ussery (1976) 180 bottom ff:**

Continued to act in similar vein until the 1976 case of NLC v. Ussery, 180 bottom. Overturned extension of FLSA wage and hour regulations to state and local governmental employees. FLSA was within the Commerce power delegated by the states, but not applied to the states as employers. Rehn for the Ct: 181 1/3 and 2/3 at ** States as States. How argue? What is a state as a state? Location of capital, ok. But?
Strong dissent. Brennan. Only limit on Cong.’s power is political process and not the federal courts. Blackmun, hesitant concurrence with the maj. Soon changed sides. Soon overrule in Garcia. Blackmun joins NLC v. Ussery dissenters and writes the opinion.

Meantime:


Marshall provides a 3-part test. 1. A showing that the statute regulates states as states, 2. Showing that it is aimed at indisputable attributes of state sovereignty, and 3. Obedience to statute must directly impair a state’s ability to structure integral operations in traditional government functions.

N.B.: Statute did not “commandeer the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program.” 182 1/4 ** commandeer. Fed. Regulation of land use: strip mining coal. An environmental other cases 182.


_But see Kimel, further down 182 3/4. Not bring an ADEA suit for money damages in federal courts. [could bring in state ct? Enjoin?]_ (Not 182 1/2 because a state not federal government)

_Garcia_ (1985) bottom

Overrules NLC. Blackmun changes his mind.

1. Facts. FLSA applied to municipal transit authority.

2. Blackmun

   A. What is a traditional governmental function is an unworkable standard that invites federal judges to favor only the policies they agree with. Best left to structure of the federal government and the political process.

   3 such safeguards 182 3/4 at ***

   As evidence that works: 183 bottom ***

3. Powell plus 3 184 1/3 ff.
A. Blackmun not so. Modern developments have made Congress less representative of state and local interests.
B. State and local autonomy are important to democratic self-government. More response and responsible to voters.

4. O'Connor
A. States as states have legitimate interests, and Courts have responsibility to see that Cong respects them.
B. 185 1/4 *** read

5. Rehn. 185 1/2
Just wait. He'll get the five votes. 00

His time came in N.Y. v. U.S.


1. Facts?
A. Could impose a surcharge on incoming out-of-state waste. Part of $ be distributed to states reaching milestones in waste site development. Normally states not discriminate against IC.
B. Could increase costs of access and eventually deny access to states which fail to meet U.S. standards for nuclear waste disposal.
C. A state that failed to provide for proper disposal of instate waste by a time certain would be required to take title to and possession of that waste and become liable for damages to the generator/owner suffered by state's failure.

2. NY argued that the stat. exceeded Cong. Commerce power and vs. 10th Amend.

3. Court strikes down the 3rd.


1) Dances around the distinction between internal-external limits on Cong. power. If 10th Amend forbids, not included in Art. 1 Sec. 8. If included in the latter, not included in former. So 10th = truism and can resolve the matter by interpreting the CC.
ii) Sets off most precedent by describing Cong. Move here as singular. Not subjecting states to a general regulation applicable also to private parties. See FLSA. Rather it is aimed at the states and directs them to carry out U.S. Instructions. Hodel cannot commandeer the states’ legislative process. Among reasons why not: a kind of McCulloch structural argument.

iii) First two o.k. One is a monetary incentive. If you do that, then we will give you this. States have a choice. Familiar technique under Spending Power. See later.

The other, authorizing states to raise costs of or deny access to waste disposal only authorizes, does not compel. Gives states and state voters a voice.

iv) Spells out objection to the third incentive, that commandeers the state legislative process.

A state that failed to provide for proper disposal of instate waste by a time certain would be required to take title to and possession of that waste and become liable for damages to the generator/owner suffered by state’s failure.

“Forced transfer of radioactive waste and liability from generators to state Commandeer. 190 1/3

v) Stevens counter argument to this one p. 192 bottom.

vi) U.S. argued that Cong. only giving effect to a bargain achieved by the states. 190 bottom: Sate sovereignty not an end in itself: federalism secures to citizens liberties derived from diffusion of sovereign power.

vii) White’s argument to this one. Not vs. federalism 191 3/4

viii) White vs. result. But Cong has ample power to do same thing through other means, e.g. spending power.

1. A. Can't compel state legislatures to legislate. (N.Y. v. U.S)
   B. Can compel state judges to enforce constitutionally valid national laws.
   C. Can Cong. Compel state executives to act.

2. Q. What did the Brady Act do? P. 193. Go thru
   Interim provisions till put permanent in place. in place.
   CLEO Chief Law Enforcement Officer
   Must / not require

3. Issue: Is the "must" constitutional?

4. Me. Scalia for the Ct. What does he argue?
   A. No constitutional text for answer.
   B. Instead: historical understanding, structure, precedent.
      1) History. Only example is the Fugitive Slave Act 194 3/4 Fed.
         Absence of others contrary examples + some indication that not permitted. 194 last
         full parag.
         Little about Legisl compelling executive officers.
      ii) Q. Structure 196 1/2
         States' "residuary, inviolable sovereignty" (Fed) which has some reflection in
         const. 196 2/3
         Cong. bypassing Pres. 197 top.
      iii) Precedent. 197 1/3
         a) NY v. U.S. 197 1/2
            [Complex argument. Gov.: distinguish NY v. U.S 197 1/2 + Making/enforcing]
            Distinguishes Testa v. Katt last 3 lines of 197, 198
         b) NY v. U.S. 198 top.
            [not diminish accountability of state/federal officers]
            Gov.: 198 2d full paragraph.

         Conclusion: Last par. Of opinion 198.

5. O'C Hesitant. Wants the curb possibilities. 198 bottom

6. 4 Dissenters. Stevens 199
A. History: Founders and Federalist. Early nat'l government 199-200
C. Precedent: Testa v. Katt. 201 top
D. Sum: Brady like requiring local police tom report id of missing children.

7. Souter: Federalist, 201 ½ ff


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Unanimous.


2. Commerce Cl. Apply? (NB middle parag. 203) What add. How analyze as a Com Cl problem?

3. 204 other S.C. argument.

4. How distinguish NY and Printz? 204 1/3 go back to 203 2/3+

5. What is the law?

6. Hypos:

A. As part of its overhaul of the nation’s response to terrorism, Cong. Provides that when the nation goes on red alert, in the interest of speed, efficiency and coordination, state and local police shall be subject to the direction of the U.S. Director of Homeland Security and the Secretary of Defense.

B. State and Local police shall have the authority tom enforce federal anti-terrorist laws.