CLI 9/12/06 (Tues.) (No Mon. class. Tues-Thurs. instead)

1. Assignments posted.

2. Exploring S. Ct interpretation of the Commerce Clause (and with it, the Necessary and Proper Clause), beginning with Gibbons, which the Ct. continues to cite. Saw the various ways of arguing and analyzing the cases, most of which the Ct also continues to draw on.

The first great change 1930's and the Roosevelt era. Increasing latitude given to Congress: Jones and Laughlin, Darby, Wickard v. Filburn. Primary limit is political. Judicial limit: Cong. must act rationally and the activity sought to be regulated must have a substantial effect upon IC, with the possibility of substantiating substantiality by aggregating smaller effects.

We then got a taste of CJ Rehnquist and the Rehnquist Ct’s return to limits on Cong. power in cases like Lopez and Morrison. Close and hotly contested. Then Gonzales v. Raich, the 2005 case about Cal medicinal marijuana, upholding the federal CSA. By a 5 vote maj including Kennedy. Cong can regulate local activities if failure to regulate would undercut control of an interstate market, here part of a comprehensive plan to eliminate a clearly interstate market in illegal drugs.

Variety of arguments and concerns. And counting of votes. Wickard has a remarkable capacity to survive in one form or another. The most recent case, Rapanos, indicates that the newly constituted Ct will continue the recent history of close votes and multiple varieties of argument. With Justice Kennedy as the presently decisive swing voter.

Basically interpretation of Art 1 sec. 8. But saw other arguments along the way: 10th Amend and also structural concerns – const-structural. Such arguments brought on for separate attention by the casebook and are referred to as external arguments, external to the Com Ct. Again uncertainty, hotly contested, and changing positions.

Rehnquist Ct’s federalism in NLC v. Ussery (1976) affirming judicially protected state autonomy. Overruled 10 years later in Garcia. 1 vote shift: Blackmun. Ct reasoning had been that Cong. could not intrude upon “traditional government functions.” Blackmun: unworkable, subjective standard.

But in 1992 in NY v. US – the case about disposal of radioactive waste – the Ct. Struck down one element of the statute on the ground that it “commandeered the state legislative process.”
Similar argument in Printz – the Brady Gun Act case. Just as cannot compel a state legislature to legislate, Cong cannot compel a state executive officer to enforce federal law. Arguments drawn from our federalism

Can compel a state court to enforce federal law (Sup Clause refers to state judges).

Divided Ct / vigorously contested decisions.

Reno (2000) 203

1. Cong limits states’ sales of personal data about motorist that states have gathered.

2. Rehnquist:
   A. Permitted by Com Cl Why? N.B. 203
      i) Data = thing in IC
      ii) Purchasers engaged in IC
      iii) Used in stream of IC

3. OK Com Cl. Federalism/state autonomy/ 10th Amend? Rehnquist: 203 bottom - last 3 lines

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Hypo (attached)

What more you need to know? Why?
Permitted under Com Cl? Federalism? [not war power]
Other limit? Sate autonomy. Printz. Scalia esp 197 top.
Part A? Part B?
How cure: Role to Gov cure?

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From State autonomy to state Sov. Immunity 204.

Started Com. Cl. with Gibbons: expansive reading in Gibbons. CC and N&P clause. Necessary to young government. Failure of a weak central gove under the Art. of Confed, our first gove.

Then developed limits end of 19th C. Well into 20th. Then 1930’s collapse of our
economy. And expansive reading again. And then again limitations of Rehnquist Ct.
Limits of Comm Clause itself. Then external limits 10th Amend? Structure of federalism?
Now to state sov. immunity. Drawn from 11th Amend,
Read 204 ½ +. 11th response to S Ct taking original jurisdiction of a case in which
a S.Car creditor sued Ga.
Well before Rehnquist Court, the Court had qualified the 11th Amend – limited its
reach in 4 ways:
I. In 1908 Ex Parte Young, 204 bottom, held that a U.S. Ct could enjoin a state
official from enforcing state law that violated the U.S. Const.
A. Enjoin, not sue for damages
B. State official – a state official is an official, not a state.

Go to yellow foolscap p. 2-3
1. Same day as Alden. Fla. Prepaid cases. 209 bottom. Struck down 2 statutes
governing patent and trademark infringement. Suit vs. states; Forbidden if Art. 1 and no
justified as 14th Amend sec. 5 cases. Casebook largely Breyer's dissent. Read 210 at **.

14th. Close vote, energetic dissent.


Crawled up 2 flights of stairs to appear in Court to answer charges. 14th sec. 5.
Abrogation of State immunity. Access to courts.

power to abrogate not affected by the 11th Amend. 14th later.

6) Note bottom of 211-212, Complexities and problems for effacement vs. states.
Possibilities sum Bottom of p 211 — last 4 lines and 1st 2, p. 212. Injunctions 212
1/3 at ***

from judicial proceedings to Federal agency proceedings. Justice Thomas essay on Dual
Sov.

Another 4-vote dissent. No anchor in 11th Amnd. 11th aimed at judicial proceedings
and this isn't one. Contests historical interpretation of Thomas.

proceed vs. state. Within 14 Amend power.

Family Medical Leave act. 6-3. Rehn writes the maj. Op. 215 ½ +

Cong to abrogate state law. 5-4 O'C as switch vote. Based on contemporary history,
including acts of first Cong.

Thomas dissent. Joined by Scalia, Kennedy, and Roberts. Alito not yet confirmed
and sworn in. Next time 5?
Where we are: Finished first take on Cong. Com power and then the limits on that power imposed by St. Interpretation of Art 1 sec. 8.

Then the limits on that power developed by the Court interpreting the 10th Amend, and then by its arguments from constitutional structure, our federalism.

Lastly limits on Cong. Com power as developed by interpretation of 11th Amend and State sovereign immunity. Complexities and shifts.

Now we take up again the subject of federalism but now federalism as a constraint on Cong. powers other than that of regulating commerce. Nice interlude before we shortly return to Commerce. Not hard. 1st taxing power.

Taxing Power 216