ECONLOG PERMANENT LINK | OCTOBER 23, 2010

The Supremacy Clause

David Henderson

In which our economist attempts legal scholarship

Some opponents of California's Proposition 19, which **I posted about earlier**, claim that if it passes, California's state law will conflict with federal law on marijuana. Then, they argue, because of the **supremacy clause** of the U.S. Constitution, federal law will dominate. Cato Institute's **Tim Lynch** has dealt nicely with the issue. He points out that even with the current understanding of the supremacy clause, there would be no conflict between state and federal law. By passing Proposition 19, Californians will simply be saying that the state repeals certain state laws on marijuana. This is key because currently, many local and state officials go around cooperating with the feds on busting marijuana operations. By not providing these resources, the state and local governments will substantially reduce anti-marijuana enforcement in California, even if the feds go ahead and do their enforcement. Nothing in Proposition 19 prevents the feds from being as oppressive on marijuana as they wish to be.

But I don't think Tim Lynch went far enough. I admit freely that he has interpreted the supremacy clause the same way mainstream legal scholars interpret it. But that's not how I read the Constitution. I go to what it actually says. And here's what the U.S. Constitution says:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Notice the conditional. The clause does not say that the laws of the United States shall be the supreme law of the land. It says that laws made *in pursuance of the Constitution* shall be the supreme law of the land. So show me in the Constitution, which, remember, enumerates powers to the feds and gives all other powers to the states and the people, where the Constitution gives the government the power to regulate marijuana. And remember that in 1919 virtually everyone understood that the Constitution gave the feds no power to ban alcohol. That's why they needed an Amendment to the Constitution to do so.

Jeremy, Alabama writes:

This seems like the opposite of the Arizona illegal immigration law, where Arizona basically says they want their cops to be able to enforce existing Federal law. The Feds said "no, thanks".

Therefore, it seems appropriate if California tells the feds to enforce their drug laws on their own ...

Posted October 23, 2010 11:31 AM

Hyena writes:

That changed over time and the Commerce Clause became much more expansive in its coverage. You can blame that both on regulatory ideology and mid-century nationalism. But the fact is that the argument makes perfect sense: anything I do impacts interstate commerce, if only in a Brazilian butterfly way.

It's a defect not just of ideology, but of a particular technical way of understanding law which proceeds from word rather than principles. There is a deep formalist urge in English legal thought, though it seems to be slowly waning. **Recent developments in plea bargaining** and changing composition of the Supreme Court suggest there may be growing pragmatic pressure on this urge. Even the UK has a growing movement of animating principle in the form of more assertive reference to a "constitution" as a matter of long public sentiment about the power of Parliament rather than a written document.

Posted October 23, 2010 12:10 PM

S. Schweizer writes:

David: Now, now, we can't let the text get in the way of conlaw, can we?

To answer your question, though, check out the Commerce Clause, as interpreted in Gonzales v. Raich. Links below:

http://en.wikipedia.org/wiki/Gonzales_v._Raich

http://scholar.google.com/scholar_case?case=15647611274064109718&q=gonzales+v.+raich&hl=en&as_sdt=400002

It might also be helpful to read some post-New Deal cases such as **Wickard v. Filburn** and **Heart of Atlanta.**

See? Title VII was passed pursuant to the Commerce Clause, too, so if you don't think the government has the power to regulate marijuana, even if it is grown interstate and solely for personal consumption, *you believe in turning back Title VII and you are a racist!*

Welcome to conlaw studies :)

Posted October 23, 2010 12:13 PM

D. F. Linton writes:

It is an interesting question, whether given the Supreme Court's current Commerce Clause interpretations, Congress could ban alcohol nationwide without an amendment. Given the odds that

simply being alive without health insurance will soon be illegal, it probably a very good bet.

Posted October 23, 2010 12:48 PM

Alex Nowrasteh writes:

Jeremy,

The Arizona immigration law you are referring to, SB 1070, went far beyond Federal immigration law.

http://online.wsj.com/article/SB10001424052748704684604575381561053396180.html

Alex

Posted October 23, 2010 1:02 PM

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another canadian david writes:

A very Canadian way of looking at things - federal laws are only valid if they fall within a constitutionally legitimate area of federal authority.

Posted October 23, 2010 1:22 PM

Zubon writes:

As they say, Commerce Clause. Once it was Supreme Court precedent that subsistence farming counted as "interstate commerce," there stopped being Constitutional limits except for those explicitly mentioned.

Posted October 23, 2010 2:08 PM

Carl The EconGuy writes:

David, you need a lesson in how the constitution is applied. There are three methods: what the original text says, what SCOTUS case law has said over the years (which esp. wrt to the Commerce Clause differs significantly from the original text), and what the current nine yokels on the court will do if they see a case -- which may be different again from the first two.
The marijuana issue has already been dealt with, and you lose, even if we all were to agree that the original intent might have been to let States let their citizens grow marijuana under the Supremacy Clause, as you suggest. But it's not a supremacy issue at all, because, as someone stated above, it has already been decided under the Commerce Clause. Even the private growing of marijuana for medical purposes has been determined to "significantly affect interstate commerce", and therefore Congress has reached in and forbidden it, and this has been upheld by SCOTUS. The case is Gonzalez v. Raich, 545 U.S. 1 (2005). If you're interested in a libertarian view of the development of the interpretation of how economic liberties ought to be protected, read this paper by Tim Sandefur, PRIVILEGES, IMMUNITIES, AND
SUBSTANTIVE DUE PROCESS, available at SSRN-id1516667.pdf -- bring lots of hankies, it's a sad, sad tale for us libertarians. We've lost the battle of the Constitution long ago, at least when it comes to economic liberties.

Posted October 23, 2010 2:29 PM

Johan writes:

You are surely right as a matter of original intent. Just do not think it would matter for drug policy if your position was adopted by the courts. Congress has the constitutional power to enact excise and income taxes. So all they need to get around the unconstitutionality of the current law is to tax the production and sale of drugs at an exorbitant rate and then make evading these taxes a serious crime.

Posted October 23, 2010 2:33 PM

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gabriel rossman writes:

the real practical issue is not whether the feds can force state and local police to enforce particular laws, but whether enforcement of federal laws will make key provisions of 19 a dead letter. specifically, 19 is being sold politically as a revenue raiser, but this is untenable since paying local taxes on marijuana would be admission of a federal felony. all the feds have to do is routinely subpoena the records of CA tax and regulatory agencies and then RICO marijuana businesses. that is, it is entirely feasible for the state to simply rescind (non-"medical") marijuana prohibition entirely without a federalism fight, but it's not possible to switch from a prohibition to a tax and regulate regime without a major fight with the feds.

Posted October 23, 2010 3:30 PM

Rick Stewart writes:

One issue is constitutional, on that side we have lost.

Another is political, on that side we have also lost, although tiny leaks in the dike are appearing, e.g., medical marijuana, reduction of sentencing disparities, etc.

Finally, however, there is the power of the people. When we finally get angry at seeing our children arrested, our neighbors' children lose their college scholarships, and our friends' children get shot by Taliban bullets bought with drug prohibition profits, we will speak loudly and clearly - this insanity has got to stop!

At that time politicians will begin scrambling, to pretend to lead us.

Posted October 23, 2010 6:17 PM

Daniel Klein writes:

Neat post. Thanks.

Posted October 23, 2010 7:26 PM

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frankcross writes:

I'd stick to economics

Posted October 23, 2010 9:47 PM

David R. Henderson writes:

@frankcross,
Please feel free to stick to economics.
Best,
David

Posted October 23, 2010 9:53 PM

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j... writes:

Come on, David. The only way you are right here is if you think it is best to ignore 70 years of con law history, including a very recent, very on point case that rejected your theory.

I suppose it is fine to think that courts should ignore precedent (or nearly a century of precedent) when you don't agree with the interpretation if you have some theory as to why. However, I'd think that if you were interested in scholarship and ideas rather than sound bites and politics, you'd write out an *argument* as to why the court should ignore its long history. But, you don't do that, and it seems that ignorance of this history is the only reason for that.

Rather than respond with "you know, I was wrong" or even "you know, I could have written this more clearly, as what I meant was I think the past 70+ years of history should be reversed now [and it will or won't?]," you ignore that and instead snip back at Frank's post.

A bit disappointing overall. Poorly done.

Posted October 24, 2010 3:22 PM

Boehmer writes:

...rather quaint to be concerned over conditional clauses in the Constitution, at this late date.

The issue of Federal supremacy and unlimited powers of the American national government... was settled by force in 1865. The written Constitution was an interesting idea in 1789, but that experiment in limited government failed dramatically in practice.

State governments long ago lost their sovereignty to Washington D.C.

DEA bureaucrats will tell you all you need to know about Constitutional text & practice -- at gunpoint.

Posted October 24, 2010 4:29 PM

David R. Henderson writes:

@j...
I gather that you're a lawyer and so is frankcross, I think. I *did* make an argument. You might think it's a bad argument, but I notice that neither you nor frankcross said why. Thus the snippiness of my response to frankcross. He seemed to be focusing on defending a lawyer's monopoly rather than making an argument. I was certainly not making a prediction of future court decisions. You might have noticed that in my post, I said explicitly that "I admit freely that he has interpreted the supremacy clause the same way mainstream legal scholars interpret it." So, no, I'm not predicting that the Supreme Court will reverse 70 years of its decisions.

Posted October 24, 2010 7:44 PM

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another canadian david writes:

j.... said:

"I suppose it is fine to think that courts should ignore precedent (or nearly a century of precedent)

when you don't agree with the interpretation if you have some theory as to why."

Actually, I think David was wondering why, once upon a time, the Court decided to ignore the Constitution. Your argument seems to be that, since they've been wrong for a really long time, they should continue to be wrong because after all we must respect precedent above all (but. oddly, not the Constitution).

Posted October 24, 2010 9:17 PM

MikeP writes:

It took about 150 years, starting with a Bill of Rights that reserved to the states and the people all powers not explicitly delegated to the federal government, to produce a Supreme Court willing to rule that growing corn to feed to your own hogs is interstate commerce and can therefore be regulated by Congress. ... As Murray Rothbard is supposed to have said, the idea of a limited government that stays limited is truly utopian. Anarchy at least might work; limited government has been tried.

David Friedman, *The Machinery of Freedom*

Posted October 25, 2010 5:12 AM

Return to top
