**Constitutional Law I**

**Professor Mike Ramsey**

**Spring 2022**

**Supplemental Reading #7 (*Gregory* and *Bond*)**

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### SUPREME COURT OF THE UNITED STATES

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### **GREGORY**,**** et al., *Petitioners*, *v.* ASHCROFT, GOVERNOR OF MISSOURI, *Respondent*

#### certiorari to the united states court of appeals for the eighth circuit

No. 90-50.

Argued March 18, 1991 — Decided June 20, 1991[[1]](#footnote-1)

*Justice O'Connor* delivered the opinion of the Court.

Article V, 26 of the Missouri Constitution provides that “[a]ll judges other than municipal judges shall retire at the age of seventy years.” We consider whether this mandatory retirement provision violates the federal Age Discrimination in Employment Act of 1967 (ADEA). . .[[2]](#footnote-2)

…

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. … The Constitution created a Federal Government of limited powers. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U. S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several 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.” The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogen[e]ous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. …

Perhaps the principal benefit of the federalist system is a check on abuses of government power. “The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’” *Atascadero State Hospital* v. *Scanlon*, [473 U.S. 234](http://www.law.cornell.edu/supct-cgi/get-us-cite?473+234), 242 (1985), quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, [469 U.S. 528](http://www.law.cornell.edu/supct-cgi/get-us-cite?469+528), 572 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely “the attempts of the government to establish a tyranny”:

“[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.” The Federalist No. 28, pp. 180-181 (A. Hamilton).

James Madison made much the same point:

“In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.” The Federalist No. 51, p. 323 (J. Madison).

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this “double security” is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U. S. Const., Art. VI. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. “It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.” *Taylor* v. *Beckham*, [178 U.S. 548](http://www.law.cornell.edu/supct-cgi/get-us-cite?178+548), 570-571 (1900). …

Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, “it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides” this balance. *Atascadero*, *supra*, at 243. … [I]f Congress intends to alter the “usual constitutional balance between the States and the Federal Government,” it must make its intention to do so “unmistakably clear in the language of the statute.” *Atascadero State Hospital* v. *Scanlon*, [473 U.S. 234](http://www.law.cornell.edu/supct-cgi/get-us-cite?473+234), 242 (1985); … *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention “clear and manifest” if it intends to pre-empt the historic powers of the States, *Rice* v. *Santa Fe Elevator Corp.*, [331 U.S. 218](http://www.law.cornell.edu/supct-cgi/get-us-cite?331+218), 230 (1947) . . . .

This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

…

“Just as ‘the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,’ *Oregon* v. *Mitchell*, [400 U.S. 112](http://www.law.cornell.edu/supct-cgi/get-us-cite?400+112), 124-125 (1970) (footnote omitted) (opinion of Black, J.); … “[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” *Boyd* v. *Thayer*, [143 U.S. 135](http://www.law.cornell.edu/supct-cgi/get-us-cite?143+135), 161 (1892). … And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective and important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.

…[T]he authority of the people of the States to determine the qualifications of their most important government officials … is an authority that lies at the heart of representative government. It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, 4. …

The authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit. … Here, we must decide what Congress did in extending the ADEA to the States, pursuant to its powers under the Commerce Clause. See *EEOC* v. *Wyoming*, [460 U.S. 226](http://www.law.cornell.edu/supct-cgi/get-us-cite?460+226) (1983) (the extension of the ADEA to employment by state and local governments was a valid exercise of Congress’ powers under the Commerce Clause). As against Congress’ powers “[t]o regulate Commerce . . . among the several States,” U. S. Const., Art. I, 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

We are constrained in our ability to consider the limits that the state-federal balance places on Congress’ powers under the Commerce Clause. See *Garcia* v. *San Antonio Metropolitan Transit Authority,* [469 U.S. 528](http://www.law.cornell.edu/supct-cgi/get-us-cite?469+528) (1985) (declining to review limitations placed on Congress’ Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. “[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states’ interests.” L. Tribe, American Constitutional Law 6-25, p. 480 (2d ed. 1988).

[Justice O’Connor found that the ADEA did not unambiguously cover state judges because it had an exception for “appointee[s] on the policymaking level,” which might be interpreted to include judges. Thus the “clear statement rule” announced above required that the ADEA not cover state judges. The decision in favor of Governor Ashcroft was affirmed. Chief Justice Rehnquist and Justices Scalia, Kennedy and Souter joined Justice O’Connor’s opinion. Justices White and Stevens concurred on the ground that the ADEA, given its ordinary meaning, did not cover state judges, but they rejected the majority’s clear statement rule as contrary to *Garcia*; Justices Blackmun and Marshall dissented.]

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**Note**: In *Bond v. United States*, 572 U.S. 844 (2014), the Court somewhat extended *Gregory* and related cases in a situation that did not involve direct regulation of the state itself. The federal Chemical Weapons Implementation Act appeared on its face to criminalize all uses of harmful chemicals, other than for “peaceful purposes.” Congress enacted the statute to implement the Chemical Weapons Convention, an international treaty principally intended to suppress the use of chemicals in warfare or as weapons of mass destruction (but containing very broad language regarding the punishment of non-“peaceful” uses which the federal statute tracked very closely).

Invoking the Act, the federal government prosecuted Bond, a woman in Pennsylvania who had used small amounts of a caustic chemical to slightly injure another woman who had been involved in a romantic relationship with Bond’s husband. Bond challenged the Act, as applied to her, as beyond Congress’ power. After the lower courts affirmed her conviction, the Supreme Court reversed.

Chief Justice Roberts, writing for six Justices, held that the scope of the statute was ambiguous (given its primary goal of suppressing chemical weapons in wartime). His opinion next stated (some citations omitted):

Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution. It has long been settled, for example, that we presume federal statutes do not abrogate state sovereign immunity, impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, or preempt state law.

Closely related to these is the well-established principle that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the "usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).  If the Federal Government would radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit about it. Or as explained by Justice Marshall, when legislation "affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." [*United States v. Bass,* 404 U.S. 336, 349 (1971)].

We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility. See *Gregory*, supra, at 460. Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. *United States v. Morrison*, 529 U.S. 598, 618 (2000). Thus, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S., at 349.

Thus, because the statute did not unambiguously extend to Bond’s conduct, the Court held that it could not be so extended.

Justices Scalia, Thomas, and Alito concurred in the judgment. They would have found the statute unambiguous but unconstitutional as beyond Congress’ enumerated powers.

1. [Editor’s note: This opinion has been edited for purposes of space and readability. Deletions are indicated by ellipses; alterations are indicated by square brackets. Material deletions are accompanied by explanatory notes. Citations and footnotes have generally been shortened or omitted without notation.] [↑](#footnote-ref-1)
2. [Petitioners in the case were Missouri state judges; respondent Ashcroft was then the governor of Missouri (later U.S. Attorney General under George W. Bush). –ed.] [↑](#footnote-ref-2)