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Constitutional Law—Commerce Clause—Federal Wage and Hour Regulation of State Operated Facilities Within Power Granted to Congress in the Commerce Clause

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—FEDERAL WAGE AND HOUR REGULATION OF STATE OPERATED FACILITIES WITHIN POWER GRANTED TO CONGRESS IN THE COMMERCE CLAUSE

The State of Maryland, appellant in this action, originally brought suit in a federal district court[1] in an attempt to enjoin the application of the 1966 amendments to the Fair Labor Standards Act.[2] The 1966 amendments sought to include the employees of state-operated schools and hospitals within the framework of the Fair Labor Standards Act, that set down provisions for minimum wages, maximum hours, and overtime considerations. Prior to these amendments all such employees were specifically excluded from coverage under the Act. Maryland's contention was that these amendments were unconstitutional as applied to state employees engaged in public schools and hospitals because it was beyond the power granted to Congress in the commerce clause[3] and that it controverted the provisions of the tenth amendment.[4] Judgment was granted for the Secretary of Labor, by a 2-1 majority, three separate opinions being written. Maryland then appealed to the United States Supreme Court, raising the question, whether congressional regulation of minimum wages and maximum hours, in the manner of the 1966 amendment to the Fair Labor Standards Act, controverts the principles of federalism inherent in the Constitution.

The Supreme Court affirmed the district court's decision by a 6-2 vote, Mr. Justice Marshall not sitting and declined to issue an injunction or the declaratory judgment that was requested by Maryland and the other parties plaintiff.[5] *Held,* The 1966 amendments to the Fair Labor Standards Act are constitutional as applied to state operated schools and hospitals, inasmuch as Congress has the power to regulate those intrastate activities that substantially effect interstate commerce. *Maryland v. Wirtz,* 392 U.S. 183 (1968).

The Fair Labor Standards Act enacted in 1938 was part of the New Deal legislation issued in order to curb the effects of the economic depression that gripped the country at that time. Like other legislation of that era it found its roots in the commerce clause within the enumerated powers in the Constitution. The commerce power of Congress has had a long and erratic history due to the vacillations in its interpretation by the Supreme Court. Under Chief Justice Marshall, in *Gibbons v. Ogden,*[6] the Court laid the groundwork for a very broad application of Congress' power under the commerce clause. In fact

1. State of Maryland v. Wirtz, 269 F. Supp. 826 (D. Md. 1967); *see* Note, 27 Maryland L. Rev. 416 (1968).
2. 29 U.S.C. § 203 (r), (s), 80 Stat. 830.
3. U.S. Const. art. I, § 8, [3]. To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.
4. U.S. Const. amend. X. 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.
5. Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Vermont, Virginia, Wyoming.
6. 22 U.S. (9 Wheat.) 1 (1824).

the Court said, in the words of Chief Justice Marshall, that, "[t]his power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges *no limitations, other than are prescribed in the constitution.*"[7] [Emphasis added.] Marshall hedged on this broad interpretation of the commerce powers when he warned that the power does not reach those internal concerns . . . "which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[8] It has been this judicially interpreted limitation which has precipitated most of the problems in determining whether a particular activity is or is not within the scope of the commerce power. Whether an activity is exclusively within a state's province of regulation, whether it is capable of concurrent regulation by both the state and federal government, or whether it falls within the plenary power of Congress, are the issues that most often confront the courts when determining whether a specific piece of federal legislation is within the constitutional powers of Congress.

As the national government becomes more pervasive the court's permissive attitude in allowing Congressional legislation to stand increases. Thus Congress was allowed to regulate the sale of lottery tickets,[9] obscene material,[10] white slave traffic,[11] and impure foods or drugs.[12] Congressional regulation of intrastate rates of an interstate carrier was upheld in the famous *Shreveport Rate case*[13] because such rates were said to have "such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, ..."[14] But as the commerce power expanded to meet these new challenges the Court began to retreat. None of the previous results were specifically overruled; rather they were either ignored or were factually distinguished. In a rather rapid reversal the Court nullified a congressional attempt to regulate child labor[15] and then some years later struck down, in quick succession, congressional acts setting codes of fair competition in the poultry industry,[16] regulating wages and hours in the mining industry,[17] and reducing farm surplus by regulating acreage and production.[18]

This judicial retreat ended as hastily as it began in 1937 when the decision in *NLRB v. Jones & Laughlin Steel Corp.*[19] was handed down. There the Court

7. *Id.* at 196.
8. *Id.* at 195.
9. Champion v. Ames, 188 U.S. 321 (1903).
10. United States v. Popper, 98 F.423 (N.D. Cal. 1899).
11. Hoke v. United States, 227 U.S. 308 (1913).
12. Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).
13. Houston & Texas Ry v. United States, 234 U.S. 342 (1914).
14. *Id.* at 351.
15. Hammer v. Dagenhart, 247 U.S. 251 (1918).
16. Schechter Corp. v. United States, 295 U.S. 495 (1935).
17. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
18. United States v. Butler, 297 U.S. 1 (1936).
19. 301 U.S. 1 (1937).

validated the National Labor Relations Act in its application to a large steel corporation's discriminatory firings of employees for alleged union activity. The fact that this discriminatory activity occurred in a local plant did not deter the Court from viewing the nature of the business in question, i.e., a large interstate corporation which "affects commerce" under the meaning of the Act.[20] Thus the Court reached the conclusion that was implicit in the reasoning of *Gibbons v. Ogden,* that intrastate activities which substantially affect the flow of interstate commerce are within the sphere of power given to Congress by the Constitution.

In 1941 the Fair Labor Standards Act was judicially sanctioned in *U.S. v. Darby.*[21] With *NLRB v. Jones & Laughlin Steel* already decided the Court had little trouble in finding sufficient reasons to uphold the Act, the purpose of which was to prohibit the shipment in interstate commerce and to prevent the production of goods that were purchased under conditions detrimental to health, safety, welfare, and morals.[22] The Court no longer felt the necessity to distinguish cases like *Hammer v. Dagenhart,* instead it specifically overruled it and asserted that its existence was a "departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision. . . ."[23] In order to eliminate the detrimental conditions that existed in the production of goods for interstate commerce Congress enacted the Fair Labor Standards Act minimum hourly wage, maximum hours, and overtime provisions.[24]

Thus Congress and the Supreme Court moved forward to protect those employees who (themselves) worked on goods that were intended for interstate commerce. All such employees were not covered by this act however, since there was a specific provision in the Act that excluded states and their political subdivisions from the definition of employers,[25] as well as those employees who were employed in administrative or executive positions.[26] The breakthrough

20. National Labor Relations Act, 29 U.S.C. § 152 (7), 49 Stat. 450. The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. 22 U.S. 1 (1824).

21. 312 U.S. 100 (1941).

22. Fair Labor Standards Act, 29 U.S.C. § 202 (a) (1964) recites the Congressional findings and declarations of policy ". . . that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor condition detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

23. 312 U.S. 100 at 116, 117.

24. Fair Labor Standards Act, 29 U.S.C. § 206, 207 (1964).

25. *Id. at* § 203 (d). "Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall *not include the U.S. or a State or political subdivision of a State. . . .*" (emphasis added).

26. *Id.* at § 213 (a) (1). The Statute exempts specifically—"any employee employed in a bona fide executive, administrative, or professional capacity. . . ."

was apparent. What was once in the complete control of state authority had now come within the scope of congressional legislation under the sanctioning of the Supreme Court's broad interpretation of the commerce powers. Thus the question no longer involved the issue of whether Congress could act—but rather the question was, to what extent could it act?

Thus the question of state sovereignty with respect to the tenth amendment became the common issue in almost all the cases dealing with the commerce clause, including invalidating a state statute that clashed with the Constitution[27] and federal legislation that seemed to control local state activity.[28] The Fair Labor Standards Act did not invoke the wrath of the state governments until the 1966 amendments were passed. The Act was amended seven times prior to 1966 but there was never any significant change in the definition of "employers."[29] The only significant variation that enlarged the coverage of the 1938 Act occurred in 1961 when the "enterprise" concept was adopted.[30] Under this provision it was no longer necessary for an individual employee to prove that he was personally engaged in the production of goods for commerce or their shipment in commerce, rather, in order to be protected by the minimum wage and maximum hour provisions all he had to show was that the company (enterprise) employing him was engaged in such activities. In order that an enterprise be so considered it had to meet certain annual gross volume of sales tests.[31] Thus any employee was now covered even though his specific function was essentially local in nature as long as the enterprise met the statutory tests. Eventually such unlikely employees as janitors[32] and night watchmen[33] were brought under the coverage of the statute.

In 1966 the scope of the Act was enlarged further to include public and non-profit hospitals, schools, and other related institutions. Whereas in the prior amendments the state-operated institutions were specifically exempt,[34] the new amendments specifically ended these exemptions and public institutions were treated the same as private ones.[35] The twenty-six states who brought

27. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

28. Houston & Texas Ry. v. United States, 234 U.S. 342.

29. The amendments to the Fair Labor Standards Act on the whole merely changed the wage and hour provisions of the Act to bring them into accord with the standard rates and hours of labor generally. The amendments were passed in the following years; 1947, 1949, 1955, 1956, 1957, 1961, 1963.

30. Fair Labor Standards Act, 29 U.S.C. § 203 (r) (1964). "Enterprise means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizations. . . ."

31. Fair Labor Standards Act, 29 U.S.C. § 203 (s) (1) *as amended* (1961) decreased minimum requirements for gross volume of sales (less excise taxes) from $1,000,000 to $500,000 and maintained the $250,000 minimum for interestate commerce.

32. Milhaus v. Joseph Greenspon's Son Pipe Co., 237 Mo. App. 112, 164 S.W.2d 180 (1942).

33. A. B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942). *But see* Hart v. Gregory, 220 N.C. 180, 16 S.E.2d 837 (1941), for state court contrary ruling.

34. Fair Labor Standards Act, 29 U.S.C. § 213 (a) (1).

35. *Id.* at § 203(d). The amendment now excluded the employees of States and their

this action claimed that this provision was a direct subversion of their individual sovereignty as guaranteed by the tenth amendment.[36] This problem has been a recurrent one in many cases involving federal legislation of matters which are seemingly of local concern. The Supreme Court has taken a rather hard line in upholding most federal legislation since *NLRB v. Jones & Laughlin Steel.* In forcing a state-owned railroad in California to abide by the federal regulation of the Safety Appliance Act the Court said "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."[37] However, the Court had limited itself to those state agencies "created to effect a public purpose" when they maintained that such agencies are subject to the control and regulation by Congress within the meaning of the commerce clause.[38] In a more recent decision with a factual basis similar to *U.S. v. California,* the Supreme Court said that states surrendered a portion of their sovereignty when they granted the power to Congress to regulate commerce.[39]

The appellants based their argument on four contentions:

First, that the expansion of coverage through the "Enterprise Concept" was beyond the powers of Congress under the commerce clause, second, that Congressional coverage of state operated hospitals and schools was also beyond the Congress' powers, third, that the remedial provisions in the Act, if applied to the states would conflict with the eleventh amendment, and fourth, that if the constitutional arguments were rejected, the Court should declare that schools and hospitals as enterprises do not have statutorily required relationship to interstate commerce.

In reaching their conclusion the Court had to overcome two major roadblocks—first, that the regulation of state operated hospitals and public schools is beyond the power of Congress and impinges on the state's sovereignty and second, that the application of the regulation to "enterprises" is beyond the reach of the commerce power.

The first problem was easy for the court to resolve since precedent existed upholding federal legislation that was seemingly contrary to a state's interest.[40] In fact, the problem of infringing upon a state's sovereignty in the area of regulating interstate commerce has become almost moot since the decision in *U.S. v. Darby* when Justice Stone dismissed the whole problem by simply stating that the tenth amendment is nothing but a "truism,"[41] meaning, that which is

political subdivisions except for those employed in "(1) a hospital, institution, or school; (2) operation of a railway or corporation, or labor organization. . . ."

36. Maryland v. Wirtz, 269 F. Supp. 826 (D. Md. 1967).

37. United States v. California, 297 U.S. 175 at 184 (1936).

38. United States v. California, 297 U.S. 175 (1936); Sanitary District v. United States, 266 U.S. 405 (1925); New York v. United States, 326 U.S. 572 (1946); Board of Trustees v. United States, 289 U.S. 48 (1933).

39. Parden v. Terminal Ry. Co., 377 U.S. 184 (1964).

40. United States v. California, 297 U.S. 175 (1936); United States v. Ohio, 385 U.S. 9 (1966); *rev'g* 354 F.2d 549 (1965).

41. United States v. Darby, 312 U.S. 100 at 124.

not regulated by the federal government is reserved to the state but that which is regulated by the federal government within their constitutional powers cannot possibly, by definition, infringe on a state's sovereignty since such sovereignty only arises in the absence of federal legislation. Thus, all the Court had to show was that this legislation by Congress was within its constitutional powers. In order to do this the Court had to pass on the Enterprise concept as well. The "Rational Basis" test was the Court's mode for accomplishing this result,[42] i.e., did Congress have a "rational basis" for passing this legislation in order to maintain its control over interstate commerce?

The Court found two rational bases for the need for such legislation. The first was that wages and hours affect a company's "*competitive*" position and their price structures thus affecting commerce.[43] The logical inference from this theory is that an unfair competitive advantage will exist unless all the employees of the organization are subject to the legislation rather than only those employees engaged in the interstate commerce or in the production of goods for interstate commerce. Thus the Court felt there was a rational basis for making all the employees of the enterprise subject to the Act. The fact that these activities may be local in nature is of insufficient moment since the commerce power is not confined in its exercise to the regulation of commerce only among the states, but rather it extends to those intrastate activities which affect interstate commerce and to those acts which in a substantial way interfere with or obstruct the exercise of the granted powers.[44] As long as the activities in question exert a "substantial economic effect" on interstate commerce it is immaterial whether such activities exert this effect directly or indirectly.[45]

The second rational basis the court found was that the legislation was needed for the protection against possible "*labor strife*" which also could have great detrimental affect upon interstate commerce. This was the basis for the passage of the NLRA and it would be completely inconsistent for the Court to assert at this time that Congress does not have a rational basis for prescribing minimum labor standards for schools and hospitals as well as for other importing enterprises. The volume of interstate importation of goods was significant,[46] thus coming within the bounds of the minimum amounts necessary for compliance with the Fair Labor Standards Act.[47] Thus since a private person would be bound by such legislation, it is untenable to exclude a state acting in the capacity of a private person simply because it is a state.[48]

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42. Maryland v. Wirtz, 393 U.S. 183 (1968).
43. NLRB v. Reliance Fuel, 371 U.S. 224 at 226 (1962).
44. United States v. Wrightwood Dairy, 315 U.S. 110 at 119 (1942).
45. Wickard v. Filburn, 317 U.S. 111 at 123 (1942).
46. For instance Maryland stipulated that it spent $8,000,000 for school supplies in the year 1965, 87% of which was through interstate commerce. These figures were said to be indicative of the other states as well. 269 F. Supp. at 833.
47. Fair Labor Standards Act, 29 U.S.C. § 203 (a)(1) *as amended* (1961).
48. United States v. California, 297 U.S. 175 (1936); Board of Trustees v. United States, 289 U.S. 48 (1932); Case v. Bowles, 327 U.S. 92 (1945).

Besides these two major contentions made by the petitioner that the court dealt with, two other arguments were presented that were not passed on by either the district court or the Supreme Court. The only response elicited by the Court in this context was that they would be met when future appropriate cases come fourth. The first contention was that the remedial provisions of the Act[49] violate the State's sovereign immunity granted by the eleventh amendment and the other was that the hospitals and schools do not have the statutorily required relations to interstate commerce to come under the Fair Labor Standards Act. Here the court said that "whether particular institutions have employees handling goods in commerce may be considered as the occasion arises."[50] Thus the Court eliminated from discussion those areas that were not directly in dispute and countered those contentions of the states that fell squarely on the issue at bar.

The holding of the Court, accepting the 1966 amendments and their application to the states was inevitable, but nevertheless, surprising, considering the ease with which the Court reached its result. The Court rejected outright the state's contention that the operation of state public schools and hospitals is a governmental function and thus should be free from federal wage and hour legislation. By using the rational basis test the Court did not have to confront the issue of a possible federal takeover of a state's sovereign functions but such a concern was manifested in the dissent of Justices Douglas and Stewart. The Court looked at the effect of such enterprises upon interstate commerce and their significant use of such commerce and refused to shut its eyes to this effect simply because such effect was state operated rather than resulting from the private sector. From a realistic appraisal of the situation there can be little doubt that these enterprises play a significant part in the movement of interstate commerce and thus their incorporation into the scope of the Fair Labor Standards Act was necessary. But the problem lies in the possible future emasculation of state sovereignty.

Legislation like the Fair Labor Standards Act was passed originally for the protection of employees within the private sector. If such legislation can be expanded to curtail a state's operation of its governmental functions then we may lose the fundamental separation of powers between state government and federal government. The rationale for expansion in the present situation is that states are acting in the capacity of private individuals and thus should be subject to the same legislation as private citizens. The problem with this approach is that there is no clear boundary line that delimits a state's functions from a private citizen's functions. Some such limitation will be needed if the fundamental dual nature of our government is to survive. Justice Douglas' dissent intimates the possible outcome of such overlapping of sovereignties. While such

49. Fair Labor Standards Act, 29 U.S.C. § 216 (a)(b)(c), § 217.
50. Maryland v. Wirtz, 392 U.S. 183 (1968).

a threat is probably premature at this time, there is a necessity for a more solid framework if the possible emasculation of the state's sovereignty is to be forever eliminated.

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CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT —CONVICTION OF A CHRONIC ALCOHOLIC FOR PUBLIC INTOXICATION NOT VIOLATIVE OF EIGHTH AMENDMENT PROSCRIPTION OF CRUEL AND UNUSUAL PUNISHMENT

On December 19, 1966, a police officer observed appellant Leroy Powell in an intoxicated condition in the 2000 block of Hamilton Street in Austin, Texas, and placed him under arrest for public intoxication. Appearing in the Corporation Court of Austin, appellant was found guilty of violating Article 477 of the Texas Penal Code[1] and fined $20.00. He appealed the conviction to the County Court of Law No. 1 of Travis County, Texas, where a trial *de novo* was conducted. At the time of his trial, appellant was 66 years old. His life history indicated that he had a severe drinking problem.[2] The primary testimony at

1. Vernon's Penal Code, Art. 477, Vol. 1, 497 (1925).

2. "Appellant is 66 years old. He is married and has one child, a daughter. Although appellant sometimes spends nights at home, he usually sleeps in public places, such as the sidewalk, when he gets drunk. He does not support his wife or child.

Appellant worked as a laborer for the City of Austin until he injured his back in 1955. Since then he has been unable to do heavy work. Beginning in 1956 or 1957 he has worked in a tavern shining shoes. He currently earns about $12 per week, which he uses to buy wine.

Appellant began drinking alcoholic beverages in about 1925. His Austin Police Department arrest record shows that he was first arrested there for public drunkenness in 1949, and that he has been arrested for drunkenness at least once every year since 1952. He has been arrested for drunkenness on some 25 other occasions outside Travis County, primarily in Bastrop County.

The fine customarily imposed for drunkenness in Travis County is $20 and in Bastrop County $25. Appellant is usually unable to pay the fine when he is arrested, and therefore is required to work it off in jail. The record does not disclose how many months he has spent in jail in lieu of paying fines.

Appellant's arrest record is only illustrative of his drinking problem. He testified that he has been 'pretty lucky' in not being arrested when he is drunk. The record shows that he drinks wine every day and becomes so drunk he passes out about once a week. The only limitation on his consumption of alcohol is his megar income. Appellant took four or five drinks the night before his trial, and another drink at 8 a.m. the morning before his trial. The money for his morning drink was given to him, and he would have had more to drink at the time if he had been given more money.

As a result of constant drinking and intoxication, appellant has been unable to find employment anywhere but at the tavern. He applied for jobs both in the Austin Independent School District and at the State Office Building but was turned down because of his drinking problem.

Appellant's drinking, however, has not threatened harm to any member of the public. Officer Mauldin testified that he was not engaged in loud or boisterous conduct, was not fighting, and did not resist arrest. Apart from a single arrest for disorderly conduct in 1951, all of appellant's arrests have been for public drunkenness.

Alcoholism has impaired appellant's perception and memory. He testified that he does not always know where he is after he starts drinking. Indeed he was unable to recall anything about his arrest for drunkenness which gave rise to the present conviction. Whole episodes