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Constitutional Law-Limitation on Commerce Power Precludes Application of Federal Wage and Hour Standards to State Employees

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CONSTITUTIONAL LAW—LIMITATION ON COMMERCE POWER PRECLUDES APPLICATION OF FEDERAL WAGE AND HOUR STANDARDS TO STATE EMPLOYEES

National League of Cities v. Usery[1]

The 1974 amendments to the Fair Labor Standards Act[2] extended the coverage of the federal minimum wage and maximum hour law[3] to include nearly all public employees of the states and their political subdivisions,[4] The National League of Cities, and individual cities and states,[5] brought an action in the District Court for the District of Columbia to challenge the validity of the 1974 amendments as they apply to state and local governments as employers.[6] Their contention was that federal wage and hour regulation applied directly to the states is prohibited by principles of federalism inherent in the Constitution. It was asserted that the sovereign states, in contrast to a private individual, have a unique position in the federal system. In order to maintain that position, the states require an immunity from federal regulation under the commerce power, when the exercise of that power threatens state sovereignty. The district court considered these contentions "substantial," but found for the Secretary of Labor and denied injunctive and declaratory relief.[7]

The Supreme Court reversed the district court by a 5-4 vote. The 1974 amendments were held to be unconstitutional insofar as their direct applica-

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1. 96 S. Ct. 2465 (1976).

2. Pub. L. No. 93-259, 88 Stat. 55, *amending* 29 U.S.C. §§ 203, 207 (Supp. V, 1975) *amending* 52 Stat. 1060, 29 U.S.C. §§ 203, 207 (1970).

3. Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201, *et seq.* (1970).

4. Prior to 1974, the only public employees covered by the Fair Labor Standards Act were non-professional employees of public hospitals, schools, or institutions.

5. Appellants include the National Governors' Conference; the States of Arizona, California, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, and Washington; the Metropolitan Government of Nashville and Davidson County, Tenn.; and the cities of Cape Girardeau, Mo., Lompac, Cal., and Salt Lake City, Utah.

6. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974).

7. The district court based its decision on the precedent of Maryland v. Wirtz, 392 U.S. 183 (1968), but noted:

> We are troubled by these [Petitioners' contentions] and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz* . . . .

Id. at 828.

tion to the states would operate to interfere with independent state decision-making concerning "integral operations in areas of traditional governmental functions." The Court found that the federalism limitation on the grant of power to Congress in the commerce clause precludes direct federal control of a state's wage and hour policy towards its own employees.

The power to regulate interstate commerce is one of Congress' constitutionally enumerated powers.[8] Based on an initial broad interpretation of the commerce clause,[9] the Court has found the commerce power to be one of the most expansive possessed by the Congress. Two theories have been used by the Court to justify Congressional regulation under the commerce power. The first, based on the power to control interstate transportation, provides that Congress can regulate anything that moves in interstate commerce,[10] even if non-commercial in nature. The "movement" theory has been used to justify the exercise of a broad national police power.[11] The second theory requires the commerce clause to be read in conjunction with the necessary and proper clause[12] and permits Congress to regulate those activities that *affect* interstate commerce. Thus, the scope of Congress' power extends to intrastate activities[13] provided there is a "close and substantial" relationship to interstate commerce.[14] The Court has indicated that if an activity has an effect on interstate commerce, that activity is subject to federal regulation, notwithstanding the insignificance of any specific instance of the activity.[15] Therefore, Congress has been held to have the power to reach almost any economic activity.

In 1938, Congress passed the Fair Labor Standards Act, prohibiting interstate transportation of goods produced under substandard labor conditions. The Act included provisions for a minimum wage,[16] for maximum hours and overtime payments,[17] and for the prohibition of "oppressive child labor."[18] In *United States v. Darby,* a unanimous Court held the Act to be a legitimate exercise of the commerce power.[19] Substandard labor conditions had an adverse effect on interstate commerce and regulations to eliminate such conditions were within the broad scope of Congressional authority established in previous "commerce clause" cases. The Act as originally passed was limited in its coverage. Excluded were workers not actually

8. U.S. CONST. art. I, § 8, cl. 3. "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
9. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
10. Champion v. Ames, 188 U.S. 321 (1903).
11. Hoke v. United States, 227 U.S. 308 (1913).
12. U.S. CONST. art. I, § 8, cl. 18. "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."
13. Houston & Texas Ry. v. United States, 234 U.S. 342 (1914).
14. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
15. Wickard v. Filburn, 317 U.S. 111 (1942).
16. 29 U.S.C. § 206 (1970).
17. *Id.* § 207.
18. *Id.* § 212.
19. 312 U.S. 100 (1941).

engaged in production or transportation of goods,[20] as well as administrative and executive employees.[21] Public employees also were excluded because the states and their political subdivisions were specifically excluded from the Act's definition of "employer."[22]

The Act has been amended several times with the effect of increasing the number of protected employees.[23] Public employees were first brought under the Act in 1966. The definition of "employer" was amended to include a state or a political subdivision thereof with respect to employees of a public hospital, institution, or school.[24] This extension was approved in *Maryland v. Wirtz*.[25] The institutions involved were found to be within the reach of the commerce power, and the fact that they were owned and operated by a state or municipal government was held not to restrain Congressional regulation. The question of a "state sovereignty" limitation on the commerce power was dismissed, applying *United States v. California*[26] where the Federal Safety Appliance Act was enforced against a state-operated railroad. The Court in *Wirtz* said that if a state engaged in an activity validly regulated when performed by private persons, federal regulation of that activity was no less valid because a state was involved.[27] The question considered in *Wirtz* was whether Congress had a "rational basis" to consider the Act necessary for the regulation of interstate commerce. Once the "rational basis" had been identified, the Court said its work was finished, notwithstanding the application of this "commerce clause" case directly to the states. In a strong dissent, Mr. Justice Douglas considered that "constitutional principles of federalism" imposed a limit on the federal commerce power concerning activities of the states. He drew an analogy between the "federalism" limitation on the commerce power and the limit placed on the federal power to tax the states by the doctrine of intergovernmental immunity. Both of these limitations arise from the protection of state sovereignty afforded by the Constitution.[28]

The 1974 amendments[29] removed the exemption previously afforded

20. Fair Labor Standards Act of 1938, ch. 676, § 3(j), 52 Stat. 1060 (codified at 29 U.S.C. § 203(j) (1949)).

21. 29 U.S.C. § 213(a)(1) (1970).

22. Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060 (codified at 29 U.S.C. § 203(d) (1949)).

23. *E.g.*, Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65, *amending* 29 U.S.C. §§ 203, 206, 207 (codified at 29 U.S.C. §§ 203(r), 203(s), 206(b), 207(a)(2) (1964 ed.)). The "enterprise" concept extended coverage to every employee of an "enterprise engaged in commerce," even though the individual employee was not personally involved in the production or transportation of goods.

24. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, *amending* 29 U.S.C. § 203 (codified at 29 U.S.C. § 203(d), 203(r), 203(s) (1970)).

25. 392 U.S. 183 (1968).

26. 297 U.S. 175 (1936).

27. 392 U.S. at 197.

28. *Id.* at 204 (Douglas, J., dissenting).

29. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, *amending* 29 U.S.C. §§ 203, 207.

the states and extended coverage to nearly all public employees.[30] Activities of public agencies were defined to be those of an "enterprise engaged in commerce,"[31] which brought all employees of public agencies within the scope of the Act. The exclusion of administrative, executive, and professional employees was retained,[32] and some new exceptions adopted to meet the special job situations of some public employees.[33]

Appellants in *National League of Cities* did not contend that wage and hour regulation touching state employees was beyond the scope of the federal commerce power, rather that the exercise of that power is limited by constitutional principles of federalism. In dealing with this proposition, the Court did not treat *National League of Cities* as one in the long line of cases dealing with the "breadth of authority granted Congress with the commerce powers." The attention of the Court was not concerned with "breadth of authority," but with the identification of an affirmative limitation on the exercise of that broad authority. It has been recognized since *Gibbons v. Ogden* that the Constitution places limits on Congress' commerce power. The Court in *National League of Cities* offered examples of those limitations in the guarantees of the Bill of Rights: the right to trial by jury[34] and the right to due process of law.[35] The Court's decision did not narrow the scope of the commerce power, as suggested by Mr. Justice Brennan in his dissent.[36] The Court found, rather, that there is an implicit "federalism" limitation on Congress' commerce power, operating in like fashion as the express Bill of Rights limitations.

The Court grounded this limitation on the essential role of the states in the federal system. The federal union is composed of "indestructible" component parts[37] whose existence is guaranteed in the Constitution.[38] The limitation was not found in the Tenth Amendment, as has often been argued.[39] The Court did, however, offer the Tenth Amendment as an "express declaration" of what the limitation means: "that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function in a federal system."[40] The protection of the states' ability to

30. 29 U.S.C. § 203(d) (Supp. V, 1975). The definition of "employer" was amended to specifically include public agencies.

31. *Id.* § 203(s)(5).

32. 29 U.S.C. § 213(a)(1) (1970).

33. 29 U.S.C. § 203(e)(2)(C)(ii) (Supp. V, 1975). Public elective office holders and certain staff members were excepted. 29 U.S.C. § 207(k) (Supp. V, 1975). There were special maximum hours and overtime provisions for employees in fire and police services.

34. United States v. Jackson, 390 U.S. 570 (1968).

35. Leary v. United States, 395 U.S. 6 (1969).

36. National League of Cities v. Usery, 96 S. Ct. 2465, 2482 (1976) (Brennan, J., dissenting).

37. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869).

38. *See* D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 40 (1966).

39. *E.g.*, United States v. Darby, 312 U.S. 100 (1941).

40. 96 S. Ct. at 2470, *quoting from* Fry v. United States, 421 U.S. 542, 547 (1975).

function provided by the "federalism" limitation on the commerce power was linked by the Court to the implied limitation on another power delegated to Congress, that of taxation. The Court quoted from *New York v. United States*[41] to illustrate, by analogy with the doctrine of intergovernmental immunity from taxation, the proposition that the standing of a sovereign state is quite different from that of a private individual. In reply to Mr. Justice Brennan's dissent that *New York* was concerned not with a state sovereignty limitation on the commerce power but with the principle of implied intergovernmental immunity, the Court stated that, "the asserted distinction . . . escapes us." Although not expressly stated, it is evident that the limitation on the commerce power arises from the same principles of constitutional federalism as the doctrine of intergovernmental tax immunity.[42] Congress has the authority to tax the income of a private person, but not the revenues of a sovereign state. The Court held that there is a similar limitation on the exercise of the commerce power. There are some elements of state sovereignty which may not be impaired by Congress, even through the exercise of the plenary power to regulate commerce. The task of the Court was to decide whether state determinations of wage and hour policies for public employees were "functions essential to separate and independent existence," and thus protected from federal interference.

The power to make wage and hour decisions concerning a state's own employees is an "undoubted" attribute of sovereignty. Appellants argued that restrictions placed on the states' freedom of action in this area would have a serious impact on the position of the states within the federal system. The Court found that the 1974 amendments interfered with the "integral governmental functions" of state and local governments to an impermissible degree. State and local governments would be compelled to bear increased costs. Local governments, with state constitutional limitations on tax increases and prohibitions against deficit financing, might be forced into an impossible position.[43] This fiscal squeeze would cause the curtailment of some services. The Court also found that the Act as amended would force the restructuring of many of the traditional methods that state and local governments have chosen to deliver services and enforce the law. Of special concern was the effect that the minimum wage provisions would have on the utilization of volunteer services, and the effect the overtime provisions would have on such services as police and fire protection. Although there was some question as to the actual magnitude of the impact of federal regulation, the Court found it "significant" in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation.[44] The ability of the states to maintain their position in the federal system was based on the freedom to independently organize these "integral operations in

41. 326 U.S. 572, 587 (1946).

42. National League of Cities v. Usery, 96 S. Ct. 2465, 2470 (1976); Maryland v. Wirtz, 392 U.S. 183, 204 (1968) (Douglas, J., dissenting).

43. Brief for Appellants at 33.

44. 96 S. Ct. at 2474.

areas of traditional governmental functions." Insofar as the 1974 amendments impaired that freedom, they were disapproved.

The Court then dealt with precedent, *Fry v. United States*[45] and *Wirtz*, of prior approval of direct federal regulation of the same employment relationships protected in *National League of Cities*. *Fry* was distinguished. The intrusion of the Economic Stabilization Act on the states' freedom to structure wage and hour policies was characterized as a temporary emergency measure limited to a specific time period.[46] The wage freeze locked in state-structured wage scales rather than compelling a restructure. Pressure on state budgets was reduced rather than increased. *Wirtz*, on the other hand, was overruled. Dicta from *United States v. California*,[47] relied on in *Wirtz* and equating the regulation of state activities under the commerce power with regulation of the activities of private individuals, was pronounced "simply wrong." The Court's reasoning in *National League of Cities* was based on the proposition that the position of a State is quite different from that of a private individual. The schools and hospitals at issue in *Wirtz* were also found to be within the category of "traditional government functions" circumscribed by this ruling.[48]

The Court has held that the states are not immune from all federal regulation under the authority granted in the commerce clause.[49] This means that a line must be drawn somewhere. It had been previously suggested that opposing categories of "governmental" and "proprietary" activities or "traditional" and "non-traditional" activities might be used to help draw that line.[50] The majority in *National League of Cities* drew the line at "integral operations" in areas of traditional governmental activity. Employer-employee relations in areas of state activities such as police and fire protection services, sanitation, public health, hospitals, and schools are clearly on the protected side of the line; the operation of a state-owned railroad, as in *United States v. California*, clearly is not.[51] Further clarification of the "integral function" of state and local governments remains for the courts.

National League of Cities will have an effect on federal regulation in areas of public sector labor relations other than wage and hour policies. Applica-

45. 421 U.S. 542 (1975).

46. Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 8, 27 Stat. 27 (codified at 12 U.S.C. § 1904 (Supp. III, 1973)). The authority contained in the Act to impose mandatory wage controls expired April 30, 1974.

47. 297 U.S. 175, 185 (1936).

48. 96 S. Ct. at 2476. The holding in *California* was distinguished in that the operation of a railroad was found not to be an integral function in an area of traditional governmental activity.

49. *E.g.*, Fry v. United States, 421 U.S. 542 (1975).

50. *Id.* at 558, n.2 (Rehnquist, J., dissenting). *Contra*, United States v. California, 297 U.S. 175, 185 (1936).

51. Parden v. Terminal Ry., 377 U.S. 184 (1964); United States v. California, 297 U.S. 175, 185 (1936).

tion of federal pension regulations[52] to now-exempt government retirement plans for public employees[53] may violate the federalism limitation. Government pensions can be considered a significant part of the compensation package offered to state employees, including those engaged in the "integral operations" of government. It is arguable that the structuring of a pension plan is a "fundamental employment decision." If so, state government retirement plans are within the protected area. The same argument might urge the invalidity of future legislation compelling state and public employee participation in programs under the Social Security Act.[54] It is possible that compulsory Social Security coverage for state employees would be a more serious violation since the Act fixes the amounts and terms of the employer's contribution, removing those decisions from state policy-making bodies. On the other hand, it also could be argued that pension plans and disability and old age insurance coverage constitute a very minor part of the labor contract and certainly are not as basic to state employment policy as are wages and hours. Perhaps of greater significance, the decision in *National League of Cities* could stifle proposals for federal legislation requiring the states to engage in compulsory collective bargaining with labor unions representing public employees.[55] The Court struck down the 1974 amendments because their application would "significantly alter or displace the States' abilities to structure employer-employee relationships." Arguments against compulsory public sector collective bargaining[56] make a strong case for intervention of the federalism limitation as a bar to any such legislation. Usurpation of the legislative function of state government in the area of employer-employee relations by federally required collective bargaining could be considered to be most damaging to state sovereignty and therefore constitutionally prohibited.

In striking down the 1974 amendments, the Court expressed no view as to the result if Congress sought to affect "integral operations" of state governments under constitutional authority other than the commerce clause.[57] It is not unlikely that, subject to the same political pressures that brought about the 1974 amendments, Congress will attempt to do indirectly what it could not do directly. In exercise of the spending power, Congress might condition the receipt of federal revenue sharing funds on state compliance with minimum wage and hour standards. As the spending power is limited in scope only by "the general welfare," it may be broader

52. The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (Supp. V, 1975).

53. *Id.* §§ 1003(b)(1), 1321(b)(2).

54. 42 U.S.C. § 410(a)(7) (1970).

55. H.R. 77, 94th Cong., 1st Sess. (1975); H.R. 8677, 93d Cong., 1st Sess. (1973).

56. *See* Petro, *Sovereignty and Compulsory Public Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974).

57. 96 S. Ct. at 2474 n.17.