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A State Sovereignty Limitation on the Commerce Power

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A STATE SOVEREIGNTY LIMITATION ON THE COMMERCE POWER

The National League of Cities and individual cities and states[1] sued the Secretary of Labor testing the validity of the 1974 amendments[2] to the Fair Labor Standards Act,[3] which extended the FLSA minimum wage and maximum hour provisions to most state and local employees. The United States Supreme Court *held* that the amendments were unconstitutional as a violation of state sovereignty protected by the tenth amendment.[4] *The National League of Cities v. Usery*, 96 S. Ct. 2465 (1976).

The congressional commerce power,[5] historically the subject of great controversy,[6] has been given an increasingly broad interpretation since the 1930's.[7] For example, in *Maryland v. Wirtz*,[8] the Supreme Court upheld the 1961 amendments[9] to the FLSA, which extended the Act's minimum

1. The instant case represents two suits which were consolidated on appeal. The plaintiffs in the original suits included the National League of Cities, the National Governors' Conference, 19 states and four municipal governments.

2. 29 U.S.C. §§ 202-08, 210, 212-14, 216, 255, 260, 621, 630, 633a, 634 (Supp. IV 1974).

3. *Id.* §§ 201 *et seq.* (1970 & Supp. IV 1974).

4. Justice Rehnquist wrote the majority opinion which was joined by four other Justices. Justice Blackmun joined this opinion but also wrote a separate concurrence. Justice Brennan wrote a dissent for himself and Justices White and Marshall. Justice Stevens dissented separately.

5. U.S. CONST. art. 1, § 8, cl. 3.

6. The controversy surrounding the commerce clause has arisen from attempts to place some meaningful limit on the congressional power to regulate commerce. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall's opinion would seem to give an extremely liberal scope to the commerce power. *See* F. FRANKFURTER, THE COMMERCE CLAUSE 15-40 (1937). This expansive reading of the commerce clause was not always followed by the Court in the early 1900's. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

7. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. California, 297 U.S. 175 (1936); Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 284 (1973); Stern, *The Commerce Clause and the National Economy, 1933-1946, Part Two*, 59 HARV. L. REV. 883, 947 (1946). The commerce clause has been given an expanded intepretation in other areas as well. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (civil rights); Wickard v. Filburn, 317 U.S. 111 (1942) (agriculture).

8. 392 U.S. 183 (1968).

9. Pub. L. No. 87-30, 75 Stat. 65 (codified in scattered sections of Titles 8 and 29 of the U.S.C.).

wage and maximum hour limitations to all employees of an "enterprise" engaged in interstate commerce even where an individual employee's job has no direct connection with interstate commerce.[10] The 1974 amendments extended the crucial "enterprise" coverage to include the activities of states and their political subdivisions,[11] and specifically included "public agency" in the definition of "employer."[12]

Congressional assertions of the commerce power that encroached on areas traditionally regulated or controlled by the states have occasionally been challenged for violating state sovereignty.[13] The imposition of environmental regulations on the states is a recent example.[14] In *District of Columbia v. Train*,[15] the Clean Air Act Amendments of 1970 were successfully attacked;[16] the District of Columbia Circuit found that forcing the states to adhere to the congressional regulations infringed on their position in the federal system.[17]

However, such "state sovereignty" attacks on the exercise of congressional power are rarely successful.[18] An exception to this general rule once existed in the area of taxation. Beginning shortly after the Civil War, a number of cases acknowledged a fairly broad state immunity from any form of federal taxation;[19] state employees were even immune from

10. "Enterprise" is defined in FLSA § 203 (r) (1974) as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose."

11. 29 U.S.C. § 203 (s) (5) (1974).

12. *Id.* § 203 (d).

13. See note 6, *supra*.

14. *See* The Clean Air Amendments of 1970, 42 U.S.C. §§ 1857 *et seq.* (1970).

15. 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (Nos. 75-1050 and 75-1055), *noted in* 29 VAND. L. REV. 276 (1976).

16. Although the court upheld those portions of the statute which required the states to provide "bus lanes" and to create bicycle paths, etc., it struck down the portions of the statute which went beyond "regulation" and coerced the states into enacting the regulations approved by the EPA Administrator. See note 17, *infra*.

17. The court found that the EPA Administrator "cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator. For example, the attempt to require the state to 'establish' each of the retrofit programs and to 'evaluate and approve devices for use in this program' . . ., is an impermissible encroachment on state sovereignty." 521 F.2d 971, 992 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976). *But see* Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974) (where an almost identical argument was rejected).

18. See note 7, *supra*.

19. Although Chief Justice Marshall, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), intimated that state governments would *not* be entitled to a reciprocal immunity from federal taxation, later cases did in fact acknowledge

federal income tax.[20] More recent cases found an immunity from federal taxation only for the states' traditional governmental functions.[21] When a state engaged in "private" or "proprietary" activities, such as selling liquor[22] or bottling mineral water,[23] it waived its immunity. Even this limited immunity is now uncertain, however, because the distinction between governmental and proprietary activities of a state has been largely discredited.[24] In the taxation area, therefore, the concept of state sovereignty provides immunity only, if at all, when the state is engaged in essential governmental functions.

Cases in which state sovereignty has been used to limit the taxing power, the commerce power, or other express or implied congressional powers, have generally relied on either the Constitution's scheme of granted and reserved powers[25] or the eleventh amendment.[26] Article 1, Section 8, which prohibits Congress from acting outside of its enumerated powers, has provided the most important limitation on the exercise of

such an immunity. *See, e.g.*, Texas v. White, 74 U.S. (7 Wall.) 700 (1869). *See generally* Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945).

20. *See* Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). *But see* Helvering v. Gerhardt, 304 U.S. 405 (1938) (specifically disallowing the state employees' immunity from federal income tax).

21. *See, e.g.*, South Carolina v. United States, 199 U.S. 437 (1905). *See generally* Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757 (1945).

22. South Carolina v. United States, 199 U.S. 437 (1905).

23. New York v. United States, 326 U.S. 572 (1946).

24. *See id.* (Justice Frankfurter's separate opinion would uphold any tax on state activities which does not actually discriminate against the state). *Accord*, United States *ex rel.* TVA v. Welch, 327 U.S. 546, 552 (1946); Case v. Bowles, 327 U.S. 92, 101 (1945). *But cf.* United States v. Kahriger, 345 U.S. 22, 30-31 (1953); Helvering v. Gerhardt, 304 U.S. 405 (1938) (both of which seem to retain the distinction).

25. U.S. CONST. art. I, § 8.

26. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The eleventh amendment has been argued as a limitation on the commerce power in several recent cases. *See, e.g.*, Employees of the Dep't of Pub. Health and Welfare v. Missouri, 411 U.S. 279 (1973); Parden v. Terminal Ry., 377 U.S. 184 (1964). In *Parden*, however, the state was deemed to have waived its immunity from suit in federal court by operating a "private" railway. *See* Note, 17 VILL. L. REV. 713 (1972). *See generally* Nowak, *The Scope of Congressional Power to Create Causes of Action Against the State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

congressional power. Such cases as *United States v. Butler*[27] and *Carter v. Carter Coal Co.*[28] invalidated federal enactments because they failed to come within the scope of the congressional commerce power, *not* because the legislation violated state sovereignty. Besides these more traditional restrictions of federal power, the tenth amendment has in recent years been acknowledged as a further constitutional expression of state sovereignty.[29]

The tenth amendment has been generally ignored or belittled since its adoption in 1791.[30] When in 1937 the Supreme Court dismissed the amendment as merely a "truism," it seemed clear that it would never have a significant role in limiting the exercise of federal power.[31] However, recent cases have evidenced a new respect for the tenth amendment. For example, the Court noted in *Fry v. United States*:[32]

> While the Tenth Amendment has been characterized as a 'truism' . . ., it is not without significance. The Amendment expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function in a federal system.[33]

In the instant case there was no serious contention that the commerce clause could not reach the activity sought to be regulated by the 1974 amendments to the FLSA,[34] but the Supreme Court nevertheless struck down the amendments as a violation of the sovereignty of individual states. The concept of state sovereignty that the Court found embodied in the tenth amendment operates as an affirmative bar to even a valid exercise of the commerce clause. In reaching this conclusion, the Court analogized the tenth amendment concept of state sovereignty to the sixth amendment right to trial and the due process clause of the fifth amendment, both of which have previously been used to limit the commerce power.[35]

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27. 297 U.S. 1 (1936).

28. 298 U.S. 238 (1936).

29. "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

30. *But see* Coyle v. Smith, 221 U.S. 559 (1911) (where an affirmative state sovereignty argument did provide the rule of decision).

31. United States v. Darby, 312 U.S. 100, 124 (1937).

32. 421 U.S. 542 (1975).

33. *Id.* at 547.

34. Although the instant case overrules *Maryland v. Wirtz*, 392 U.S. 183 (1968), it is clear that the Court did not intend to limit the enterprise coverage of the FLSA insofar as it affected the private sector. See the text at notes 8-12, *supra*.

35. *See* Leary v. United States, 395 U.S. 6 (1969); United States v. Jackson, 390 U.S. 570 (1968).

Much of the majority opinion discussed the extent of the intrusion into state activities which would result if the amendments were enforced. The Court emphasized that the amendments would not only require great expenditure of state funds but would also force a reduction of state services in a number of important areas.[36] The majority asserted that the states' power to decide how much will be paid to employees carrying out governmental functions is essential to the states' "separate and independent existence."[37] As a result, the amendments were held to be such a radical curtailment of integral state activities that their enforcement would upset the federal system.

The underlying theme of Justice Rehnquist's majority opinion seems to be that *at some point* federal intrusion into the affairs of state governments violates the sovereignty of the individual states, the concept of a federal system, and the spirit of the constitutional scheme. If some such limitation on the exercise of federal power is to be enforced by the judiciary, it is important to determine the point at which congressional intrusion into the affairs of state governments violates their sovereignty.

In attempting to define this point, the Court in the instant case offered no conclusive rule. The only guide suggested by the majority opinion, a test derived from the taxation cases, is that state sovereignty will be a defense against congressional power which impinges on "functions essential to [a state's] separate and independent existence."[38] Such a test arguably reinstates the questionable distinction made in the taxation cases between "governmental" and "proprietary" state activities;[39] and, as in the taxation cases, the difficulty of determining what constitutes an "essential governmental function" and what constitutes merely a state-owned business seems unavoidable.[40]

36. For example, the majority found that California and several municipalities would be forced to reduce their police training programs in order to comply with the minimum wage provisions. 96 S. Ct. 2465, 2472 (1976).

37. *Id.* at 2471.

38. Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869).

39. The distinction between governmental and proprietary activities is most clearly expressed in *South Carolina v. United States*, 199 U.S. 437 (1905). The same distinction has also been important in some recent eleventh amendment cases. *See* Parden v. Terminal Ry., 377 U.S. 184 (1964) (where the state-owned railroad was not a traditional governmental activity and was therefore not immune from suit in federal court).

40. *E.g.*, Case v. Bowles, 327 U.S. 92, 101 (1945): "[T]he petitioner's argument is that the extent of [congressional war] power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the constitutional power of Congress to tax has

A determination that the regulated state activity is an "essential governmental function" does not necessarily mean, however, that the sovereignty of the state has been sufficiently offended to invalidate the federal regulation. A further inquiry must be made into the extent of the federal intrusion. This is clear from the Court's discussion of *Fry v. United States*,[41] which upheld the Economic Stabilization Act [42] and authorized the imposition of wage "freezes" on state employees. Clearly the congressional action in *Fry* affected the very same "essential governmental functions" that were involved in the instant case. Nevertheless *Fry* was distinguished because it was an "emergency measure"[43] and the means of control were so drafted as to minimize interference with state functions.[44] Thus, although the same state functions were affected, the *extent* of federal intrusion was different.[45]

The instant case also raises questions basic to the federal system. The Court's opinion does not merely limit the breadth of a granted congressional power, but rather recognizes an affirmative bar, in favor of the states, to the exercise of what would otherwise be a valid power. Assuming that it is desirable to restrain national intervention into state activities, is the federal judiciary the proper institution to enforce this restraint?[46] Once Congress has enacted legislation under a valid power should not the Court acquiesce to its political judgment?[47] The dissent in the instant case

proven to be unworkable, and we reject it as a guide in the field here involved." See also the cases cited in note 24, *supra*.

41. 421 U.S. 542 (1975).

42. 12 U.S.C. § 1904 (1970). The Act authorizes the President to stablize or "freeze" wages and salaries of employees in either the private or public sector.

43. 96 S. Ct. at 2474-75.

44. Justice Rehnquist points out that the wage freeze was in force for only a "very limited, specific period of time," and it required no affirmative state action. *Id.* at 2474.

45. In light of the Court's discussion of *Fry*, it seems clear that Congress could still enact legislation which significantly affects essential functions of state governments *provided* that the legislation was enacted in response to some serious and pressing national problem and its interference with state governments was limited. Congress might thus be able to achieve the same legislative goals sought to be implemented in the 1974 amendments to the FLSA if the substandard wages paid to state employees were found to constitute a serious national dilemma and if the requirements imposed on the states were to expire after a limited period of time.

46. *See* THE FEDERALIST Nos. 45 and 46 (J. Madison); Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561 (1954).

47. *See* A. MACMAHON, FEDERALISM: MATURE AND EMERGENT 137-56, 177-232 (1955); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. Rev. 543 (1954).

was highly critical of what it considered a "restructuring" of the federal system.[48] Justice Brennan's opinion asserts that the states have ample political power to guard against intrusion by the federal government.

In *The National League of Cities v. Usery* the Supreme Court declared unconstitutional an exercise of the congressional commerce power because, in the Court's judgment, the legislation offended the sovereignty of the states. If, in future cases, the Court strikes down congressional legislation in the name of protecting the federal system, then the tenth amendment may emerge as a hurdle for any congressional enactment which would restrict or coerce state action.[49] Any such decisions should define with greater clarity the character and extent of the tenth amendment limitation.

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DUE PROCESS AND THE UNIVERSITY STUDENT: THE ACADEMIC/DISCIPLINARY DICHOTOMY

Because of the unique status of the university student, expulsion from a university raises serious constitutional problems; the courts in this area face the difficult task of affording the student certain basic constitutional guarantees without excessively intruding into academic affairs. The flurry of student activism in the last decade produced increased demands for constitutional protection in the expulsion process, and the courts have as a result gradually expanded the student's claim to substantive and procedural due process. This note will attempt to outline the current posture of due process in the university-student relationship as a realistic compromise between the often competing interests of traditional judicial respect for academic wisdom and evolving social attitudes.

48. 96 S. Ct. at 2485 (Brennan, J., dissenting).

49. The future application of the instant case may, however, be quite limited. In footnote 17 of the majority opinion Justice Rehnquist specifically reserves decision as to whether other congressional powers affecting the essential functions of state governments will be subject to the tenth amendment limitation. *Id.* at 2474 n.17. Justice Blackmun, the "swing" vote in the instant case, expressed similar reservations in his concurrence: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater." *Id.* at 2476.