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Constitutional Law: Fair Labor Standards Act: Maryland v. Wirtz

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tressed by an opinion containing thorough and convincing reasoning.[27] Manipulation of "traditional words" is no replacement for critical analysis. The *Dillon* majority's avoidance of cogent policy considerations is a principal weakness and the decision may very likely be of little aid to future plaintiffs in similar factual circumstances.

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Constitutional Law: Fair Labor Standards Act: Maryland v. Wirtz—In *Maryland v. Wirtz*,[1] the State of Maryland was joined by twenty-seven other states and one school district in bringing an action to enjoin the Secretary of Labor from enforcing the 1961 and 1966 amendments to the Fair Labor Standards Act of 1938.[2] The Act was passed to impose, *inter alia*, minimum wage and maximum hour working conditions for employees engaged in interstate commerce. The Congress, under the power of the Commerce Clause of the Constitution,[3] extended coverage of the Act to all employees "engaged in commerce or in the production of goods for commerce."[4] At the time the 1938 Act was passed Congress excluded from the definition of interstate commerce employer, "the United States or any State or political subdivision of a State."[5] In 1966 the Act was amended and coverage was extended to all employees of any "enterprise" engaged in commerce or the production of goods for commerce.[6] This new feature of the Act became known as the "enterprise concept." In *Wirtz v. First State Abstract & Insurance Co.*,[7] the Supreme Court classified employees as being subject to the "enterprise concept" if their activities were "directly and vitally related to interstate commerce."[8] In *Wirtz v. Charleston Coca-Cola Bottling Co.*,[9] enterprise was defined as:

> [T]he 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

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[27] The majority in *Dillon* declared that contributory negligence of the injured daughter would have defeated the mother's claim. Was the majority declaring that contributory negligence can be imputed from a child to its mother? If so, this is a revolutionary change in tort law—especially so, since the court little discussed its merits. Alternatively, was the majority stating that the mother's injury was a part of the child's cause of action? The opinion provides little in the way of a correct interpretation.

[1] 392 U.S. 183 (1968).
[2] Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1964).
[3] U.S. CONST. art. I, § 8.
[4] Fair Labor Standards Act, U.S.C. § 203(s) (1964).
[5] *Id.* § 203(d).
[6] Fair Labor Standards Act, 29 U.S.C. § 206(a) (1964), *as amended*, (Supp. II, 1966).
[7] 362 F.2d 83 (8th Cir. 1966).
[8] *Id.* at 87.
[9] 237 F. Supp. 857 (E.D. S.C. 1965), *rev'd* 356 F.2d 428 (4th Cir. 1966).

> corporate or other organizational units, including departments of an establishment operated through leasing arrangements.[10]

In 1966 Congress again amended the 1938 Act and eliminated some of the exclusions provided for in the original Act. After these amendments the Act applied to enterprises:

> [E]ngaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).[11]

A further amendment in 1966 abrogated the Act's exclusion of the "United States . . . States . . . or political subdivision of a state."[12]

The effect of the 1961 and 1966 amendments to the Act was to (1) enlarge the category of employees covered but not to affect the employers by enlarging that category, and (2) place state hospitals, schools, and institutions under coverage of the Act via the "enterprise concept." It was these particular extensions which the petitioner in *Maryland v. Wirtz* sought to prevent on the constitutional ground that the "enterprise concept" is not within the power of Congress under the Commerce Clause. Coverage of state institutions was also felt to be beyond the power of Congress. The petitioner claimed that the remedies provided by the Act are in conflict with the Eleventh Amendment to the Constitution,[13] and that hospitals and schools do not bear the necessary relationship to interstate commerce to warrant federal jurisdiction. A three-judge district court decided that Congress did have the power to institute the "enterprise concept" and extend coverage of the Act to state institutions. The district court failed to decide if an Eleventh Amendment conflict had resulted from the extended coverage, nor did the district court address itself to the argument that state institutions do not bear the necessary relationship to interstate commerce to warrant federal jurisdiction.[14]

The basis for the constitutional approval of the "enterprise concept" and the extended coverage to state employees under the amended Fair Labor Standards Act was the same as the basis used to validate the original act. The Supreme Court of the United States in *United*

[10] 237 F. Supp. at 864.
[11] Fair Labor Standards Act, 29 U.S.C. § 203(s)(4) (1964), *as amended,* (Supp. II, 1966).
[12] Fair Labor Standards Act, 29 U.S.C. § 203 (1964).
[13] "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.
[14] Maryland v. Wirtz, 269 F. Supp. 826 (D. Md. 1967).

States v. Darby[15] approved the 1938 Act on the basis of the authority given Congress by the Commerce Clause. The Court stated that Congress had the power to regulate activities which have a "substantial effect" on commerce.[16] The test of whether Congress has power to legislate in a particular area was defined in *Katzenbach v. McClung*[17] where the Court enunciated the doctrine that if Congress has a "rational basis" for regulation the Supreme Court's duty of investigation is at an end. Just as the "substantial effect" and "rational basis" standards were made by the original Act, said the Court, so were they met by the amendments.[18]

The passage of the original Act resulted from Congress' realization that substandard working conditions lead to labor disputes, strife and disruption within the enterprise itself. The particular enterprises which Congress was trying to protect by the amendments (*i.e.*, hospitals and schools) are necessary and vital to the community. On the "rational basis" of the protection of the general welfare through use of the police power given Congress by the Commerce Clause, it seems the prevention of disruption of these operations of the state would justify the congressional action taken. The consequential impairment to commerce due to labor strife is a "substantial effect." Work stoppage will inhibit sales and purchases of goods such as drugs, books and other materials made and shipped through interstate commerce. Prevention of this situation was approved in *NLRB v. Jones & Laughlin Steel Corp.*[19]

The Act and the amendments were passed to foster free and fair competition. It was decided in *Darby* that if substandard working conditions, wages and excess hours were to exist in one enterprise and not in another, a cost differential between the two enterprises would result. Subsequent price cuts would attract buyers to one state's industry and drive business away from another state's industry which observed a higher and costlier standard. Setting a uniform labor cost standard would help promote fair competition by nullifying the ability of a state and its industry to avoid minimum labor standards.

The application of this argument to the amendments seems inappropriate due to the local nature of the hospitals and schools covered in the Act. The element of competition is lacking in these areas, at least so far as public institutions are concerned. The public does not usually enter the market to select, on a cost basis, which institutions they will patronize for medical care, nor do they decide on a price basis to which public school they will send their children.

[15] 312 U.S. 100 (1941).
[16] *Id.* at 119.
[17] 379 U.S. 294, 303-04 (1964).
[18] *Id.* at 303-04.
[19] 301 U.S. 1 (1937).

It seems that extension of the Act is also justified by Congress' interest in protecting the safety, health and morals of the employees involved. The Court in *West Coast Hotel Co. v. Parrish*[20] upheld a Washington statute authorizing the setting of minimum wages for women employees. The Court stated that:

> In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.[21]

In addition to the traditional grounds for approval, newer grounds were presented to back up the validity of the amendments. In *Wirtz v. Edisto Farms Dairy*,[22] the Court pointed out that the "enterprise concept" did not mean that if a few employees handled goods in interstate commerce, all employees of that enterprise would be engaged in interstate commerce. Accordingly, the 1961 amendment merely states that *"an enterprise is engaged in interstate commerce,* if it has any persons handling, selling, or otherwise working on goods that have been moved in or produced for interstate commerce."[23] As seen by the Court, Congress has enlarged the category of employ*ees* but not the category of employ*ers*. Therefore the "enterprise concept" does not change the meaning of interstate commerce nor expand congressional power beyond its constitutional boundary.

The additional coverage of the employees is a practical and useful extension of the original Act. In the Act's amended form the chances of labor strife and disruption are further reduced. The definition of interstate commerce has not been tampered with nor has Congress' power been expanded due to passage of the amendments.

The Court admits that the application of the Fair Labor Standards Act to state institutions is an interference with state functions but stresses that interference will not be as broad as anticipated by the dissent.[24] The Act continues to exempt "any employee employed in a bona fide executive, administrative, or professional capacity" (including any employee employed as academic administrative personnel or as a teacher in elementary or secondary schools).[25] The Court justifies extension of the Act to non-administrative personnel, not contained in the above exception, by emphasizing the fact that the vital policy-making functions of the state will not be impinged upon by the federal

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[20] 300 U.S. 379 (1937).
[21] *Id.* at 393.
[22] 242 F. Supp. 1 (E.D. S.C. 1965).
[23] *Id.* at 5.
[24] 392 U.S. at 201 (dissenting opinion).
[25] Fair Labor Standards Act, 29 U.S.C. § 213(1) (1964).

government due to continuing exclusion of administrative personnel from coverage under the Act. It seems, however, that coverage of the non-administrative personnel could be justified on the "rational basis" or "substantial effect" theories if the danger of unfair competition and labor strife arose between the state and these employees.

At present there is much agitation on the part of teachers and other municipal and state employees to secure the right to bargain collectively with school boards and other officials. To date, a few states including Wisconsin and Michigan[26] have protected this right by statute. If the remainder of the states do not respond by granting collective rights, the philosophy of this case serves notice that Congress could become interested in the granting of the right. The possibility of this happening may influence more states to make their own laws regulating collective bargaining.

Justice Douglas in his dissent joined in by Justice Stewart favors Maryland's argument that the United States is interfering with the states' sovereign power. He feels that the impact of the amended Act is "pervasive" and strikes at all levels of state government. Justice Douglas agrees with the tests used by the Court but feels the Court should go beyond the tests and balance the federal government's need for regulation against the need for uninterrupted maintenance of states' institutions and fiscal stability.[27] There is no doubt that the states' fiscal policies will be somewhat disrupted by the increased wages required by the Act. Justice Douglas feels that when this disruption is weighed against the "rational basis" concept for regulation, the result will be the protection of sovereignty of the states as reserved by the Tenth Amendment to the Constitution.[28]

The Court has recognized the right of Congress to regulate state proprietary functions.[29] The Court has also sustained the regulation of essential and traditional state government services. In *Sanitary Dist. of Chicago v. United States*,[30] in which the issue was the District's right to divert water from Lake Michigan in quantities greater than allowed by the federal law, the Court stated:

> There is no question that this power [to remove obstructions to interstate and foreign commerce] is superior to that of the States to provide for the welfare or necessities of their inhabitants.[31]

[26] WIS. STAT. § 111.70 (1967); MICH. COMP. LAWS ANN. § 423.215 (1969).
[27] 392 U.S. at 201-05 (dissenting opinion).
[28] "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. amend. X.
[29] New York v. United States, 326 U.S. 572 (1946); United States v. California, 297 U.S. 175 (1936); Board of Trustees of Univ. of Illinois v. United States, 289 U.S. 48 (1933).
[30] 266 U.S. 405 (1925).
[31] *Id.* at 426.

It is apparent from this statement that the Court will not consider resulting interruption of the fiscal activities of the state in validating federal law regulating interstate commerce. The fact that fiscal disruption will occur if the state is forced to meet the wage and hour requirements of the Act is in no way different from the fiscal disruption suffered by the Sanitary District in disposing of sewage in a different and probably more expensive manner.

Failure to comply with the Fair Labor Standards Act subjects employers, including the states in the areas covered by the Act, to suit by the employee and by the Secretary of Labor.[32] This raises problems concerning state immunity from suit but the Court declined to discuss the impact of the Act on the doctrine of state sovereignty and stated it would not overturn the amendment to the Act on the basis of future contingencies. The amendments, if found to be invalid by the Court in relation to regulation of state institutions, will not be totally void due to a separability clause attached to the Act which makes all parts of the Act not specifically declared unconstitutional valid and in force.[33]

The "picture" painted by the Supreme Court in supporting the meeting of the "rational basis" and "substantial effect" tests is tainted by the application of the "enterprise concept" to basically non-competitive entities operated by the state and long recognized as within the sovereign sphere of the state. Although federal regulation has been extended to proprietary and other similar functions of the state, the regulations have never come quite so close to the heart of state government itself. This does not mean that the door will be open to federal regulation of all state government activities under the guise of the "enterprise concept" as Justice Douglas predicts. Neither the Congress nor the Court ever intimated that this would be the result.

For the present, the application of the "enterprise concept" and the extensions of coverage to the state as an employer are amply supported by the superiority of the federal regulation on behalf of the general welfare of the people through the commerce power. The state as a sovereign has only that power which has not been given to the federal government. In this case the power of Congress to control activities which "substantially affect" commerce is one delegated to the federal government and is superior to the interests of the state.

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[32] Fair Labor Standards Act, 29 U.S.C. § 216(b) (1964).

[33] "If any provision of this chapter or the application of such provision to any person or circumstances is held invalid, the remainder of this chapter and the application of such provision to other persons and circumstances shall not be affected thereby." Fair Labor Standards Act, 29 U.S.C. § 219 (1964).