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CITATIONS

CASES:

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

WILLIAM J. USERY, Secretary of Labor

No. 74-879

THE STATE OF CALIFORNIA, *Appellant*

v.

WILLIAM J. USERY, Secretary of Labor

On Appeals from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND FOR THE NATIONAL EDUCATION ASSOCIATION, AS AMICI CURIAE

ARGUMENT

The lone intervening legal event of significance to the decision of these cases since the elaborate opening briefs were filed is last Term's decision in *Fry* v. *United States*, 421 U.S. 542. In his supplemental brief for the Secretary, the Solicitor General shows that the "basic rationale" of *Fry* (which in turn was controlled by *Maryland* v. *Wirtz*, 392 U.S. 183) "supports the constitutionality of the 1974 Fair Labor Standards Act Amendments" (Gov't. Supp. Br. 12). We shall not elaborate on that argument, except to point out that in *Fry* the petitioner and the *amici curiae*

supporting him (including one of the present appellants, the State of California) made the same apocalyptic pronouncements which form the core of the briefs on appellants' side in the present cases. But we think it will be useful to discuss the dissenting opinion in *Fry* of Mr. Justice Rehnquist, because it is a frontal attack on *Maryland* v. *Wirtz,* and its precursors, most especially *United States* v. *California,* 297 U.S. 175. For, we readily acknowledge that while in our view those cases compel the conclusion that the 1974 FLSA Amendments are constitutional, those Amendments cannot survive if *Maryland* v. *Wirtz* and *California* are overruled.

I.

At the outset, Justice Rehnquist suggests that rejection of the state's claim in *California* was a by-product of the dramatic shift in the Court's interpretation of the Commerce Clause:

> "The case was decided in 1936, at the beginning of what might be called the present era of Commerce Clause law in this Court. The Court was in the process, later completed in cases such as *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), and *United States* v. *Darby,* 312 U.S. 100 (1941), of freeing both Congress and the States from the anachronistic and doctrinally unsound constructions of the Commerce Clause which had previously been used to deny both to the States and to Congress authority to regulate economic affairs. It is quite understandable in this context that the Court in *United States* v. *California* should have been inclined to give somewhat short shrift to a claim of 'states' rights,' even when invoked by the State itself against congressional authority under the Commerce Clause. The claim of 'states' rights'

> had so frequently been invoked in the past as a form of *ius tertii,* not by a State but by a business enterprise seeking to avoid congressional regulation, that the different tenor of the claim made by the State of California may not have impressed the Court." (421 U.S. at 551.)

We submit that *California* cannot be explained away as a manifestation of the *zeitgeist* because: a) when *California* was decided "the process * * * of freeing both Congress and the States from * * * anachronistic and doctrinally unsound constructions of the Commerce Clause" had not yet begun; b) *California* was a unanimous decision, whereas four Justices dissented in *Jones & Laughlin;* and c) *California* was not a case of first impression, it followed other decisions, most notably that of Justice Holmes, also for a unanimous Court, in *Sanitary District* v. *United States,* 266 U.S. 405. We now develop each of these points.

A. *California* was decided on February 3, 1936.[1] *Jones & Laughlin* was not decided until over a year later, on April 12, 1937. Three and a half months after *California,* and ten and a half months before *Jones & Laughlin,* the "anachronistic and doctrinally unsound" interpretation of the Commerce Clause was still in full flower when, on May 18, 1936, the Court decided *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (relied on here by Appellant California (Cal. Br. 30-32)). In short, there is no need to pinpoint the precise moment when the "process" of repudiating prior unsound constructions of the Commerce Clause began, for it is clear that when *California* was under consideration the old dispensation still held sway with the majority of the Court.

[1] Just four weeks before, on January 6, 1936, the Court had decided *United States* v. *Butler,* 297 U.S. 1.

B. The central issue in *Butler, Carter* and *Jones & Laughlin* was whether activities which are themselves local —most importantly "production"—are subject to regulation under the Commerce power. The issue in *California* was whether activities which would be subject to regulation under the Commerce power if undertaken by private parties are immune from such regulation because they are undertaken by the State in the exercise of a "power reserved to the states" be it in a "sovereign" or "private" capacity (297 U.S. at 183-184).

We cannot accept the proposition that this difference escaped the powerful minds—Hughes, C. J., Brandeis, Stone, Cardozo and Roberts, J. J.—who adopted the modern view of the Commerce Clause in *Jones & Laughlin.* And, it is utterly inconceivable that the four Justices who dissented vigorously in *Jones & Laughlin* against what they deemed to be an intolerable extension of national power could one year earlier in *California* have been so swept away by the trend of the majority's thinking as to give "short shrift to a claim of 'states' rights" (421 U.S. at 551). Surely, the concurrence in *California* of these four Justices—whose devotion to federalism has rarely been equalled in the history of this Court—is powerful testimony that the reasoning of that decision is in no wise inconsistent with the Constitutional limitations on national power.

In short, the conception that *California* was a *folie a neuf* on the road to *Jones & Laughlin* is as psychologically implausible as it is historically untenable.

C. After all, *California* did not declare new doctrine. Its principal holding was preordained by the unanimous decisions in *Sanitary District,* 266 U.S. 405, and *Board of*

Trustees v. *United States,* 289 U.S. 48. It is these decisions which support the basic holding of *California* that "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution" (297 U.S. at 184). See also *id.,* citing *Sanitary District* and *Board of Trustees* (together with two other cases in which the issue of constitutional power was not discussed) followed by the statement: "In each case the power of the state is subordinate to the constitutional exercise of the granted federal power."[2]

II.

The *Fry* dissent accepts the doctrine "that Congress may pre-empt state regulatory authority in areas where both bodies are otherwise competent to act" but finds it "difficult to understand how it supports the proposition that the States are without a constitutional counterweight which can limit Congress' exercise *against them* of its commerce power" (421 U.S. at 552, emphasis in original). The Supremacy Clause is surely the answer to this "difficult[y]." That clause extends to all "Laws of the United States which shall be made in Pursuance" of the Constitution, that is, in the exercise by Congress of one of the powers delegated to it. Mr. Justice Holmes therefore correctly disposed of the problem posed in the *Fry* dissent with his characteristically incisive observation in *Sanitary District:*

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[2] The *Shreveport Rate Cases,* 234 U.S. 342, discussed in the *Fry* dissent (421 U.S. at 551-552), dealt with the minor premise necessary to the result in *California* that the "power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interestate commerce" (297 U.S. at 184).

"This is not a controversy between equals. The United States is asserting its soverign power to regulate commerce * * *" (266 U.S. at 425).

Emotive force is obtained, but at the cost of analytic precision, by characterizing the federal law regulating wages paid by a state as a regulation "*against*" the state, or by describing this case as one in which Congress has regulated a state "as a state" (421 U.S. at 552).

A state acts *as a state* most clearly when it is enacting and enforcing its laws. But the precise office of the Supremacy Clause is to subordinate such state laws to federal laws enacted pursuant to a delegated power. That clause is not directed to enabling "federal regulation of persons and enterprises" (421 U.S. at 221). It establishes a hierarchy between the federal government, when exercising one of its enumerated powers, and the states. Thus, Chief Justice Marshall's seminal opinion in *McCulloch* v. *Maryland,* 4 Wheat. 316, 400, begins:

> "In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government."

It is precisely because the Supremacy Clause establishes that hierarchy that the preemptive effect of federal law can

not be characterized as the use of hostile force by the federal government against the states.

III.

We are therefore down to the point whether there exists "the inherent affirmative constitutional limitation on congressional power" which the *Fry* dissent "believe[s] the States possess" (421 U.S. at 553), and which the Court in *California* denied. We submit that the Court was right in *California,* as it was right in *Sanitary District* and in *Maryland* v. *Wirtz.* We shall not reiterate what was there said but we think it is significant to point out that the dissenting opinion in *Fry* does not identify any particular constitutional provision as the source of a limitation. While the favorable reference to the Tenth Amendment in Justice Douglas' dissent in *Maryland,* and in the majority opinion in *Fry,* are noted with approval (421 U.S. at 550, 552), the dissent says also:

> "As it was not the Eleventh Amendment by its terms which justified the result in *Hans* [v. *Louisiana,* 134 U.S. 1], it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees."
>
> "Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation" (*Id.* at 557).

The analogy with *Hans* is imperfect for two reasons. First, the Eleventh Amendment, unlike the Tenth, is a specific restriction on the powers of the federal government, rather than a mere reiteration that federal authority is limited by the terms of the grant in the original Articles of the Constitution. Second, the Court in *Hans* did not draw from the Eleventh Amendment any general rule of state sovereignty, but treated the enactment of that Amendment as a repudiation of the construction which the Court had given to Article III in *Chisholm* v. *Georgia,* 2 Dall. 419, and a return to what the *Hans* court deemed to be the original understanding of the scope of federal judicial power. Thus, *Hans* might support a contention that the Tenth Amendment points the way to a particular reading of the Commerce Clause, but the *Fry* dissent does not rely on any interpretation of that Clause to justify its conclusion.

Moreover, we do not see how the *Fry* dissent can be squared with Mr. Justice Douglas' distinction of the rule under the Eleventh Amendment and that under the Tenth in *Employees* v. *Missouri Public Health Dept.,* 411 U.S. 279, 284:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States."

Finally, it is significant that no prior decision is cited for the view that the Tenth Amendment has radiations beyond its own terms. That proposition is quite inconsistent with the repeated holding that the Tenth Amendment "states but a truism that all is retained which has not been surren-

dered." *United States* v. *Darby,* 312 U.S. 100, 124; *Case* v. *Bowles,* 327 U.S. 92, 102; *Sperry* v. *Florida Bar,* 373 U.S. 379, 403. Under these cases the Tenth Amendment has no independent force, either by virtue of its terms or, *a fortiori*, by implication. The "understanding of those who drafted and ratified the Constitution" which the Tenth Amendment reaffirms, is that the legislative powers of Congress are not all encompassing, but extend only to those delegated in the Constitution. Nothing in that Amendment, or the cases construing it decided to date, suggest a limitation on the preemptive effect of a federal law enacted pursuant to those delegated powers. Indeed, the plain language, and uniform understanding, of the Supremacy Clause belies any such suggestion.

The "significance of the Tenth Amendment" (*Fry,* 421 U.S. at 547, n. 7) is not that it grants this Court a license to "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because these enterprises happen to be run by the States for the benefit of their citizens" (*Maryland* v. *Wirtz,* 392 U.S. at 198-199), but that "the States' integrity [and] their ability to function effectively in a federal system must be preserved" (*Fry,* 421 U.S. at 547, n. 7). While, here again, the appellants and the *amici curiae* on their side make "extravagant claims on this score," the 1974 Amendments to the FLSA constitute "no such drastic invasion of state sovereignty" (*id.*).

On the contrary, those Amendments merely regulate the cash nexus between states and their employees. That economic relationship is "indistinguishable in [its] effect on commerce from [the employer-employee relationship in]

private businesses'' (*Maryland* v. *Wirtz,* 392 U.S. at 199). It has been understood since *United States* v. *Darby* that Congress has the Constitutional authority to regulate minimum wages and maximum hours in the private sector, and private enterprise's ''ability to function effectively'' has survived the past 30 years without harm. Neither the experience since *Maryland* v. *Wirtz* was decided, nor the facts in the record here, provide a basis for the conclusion that the 1974 FLSA amendments will undermine the states' ''ability to function effectively.'' And, under *Fry,* absent such a showing the states' reliance on the Tenth Amendment is unavailing.[3]

IV

In sum, it is the Supremacy Clause, not the Tenth Amendment or its penumbra, that defines the relationship between the federal government and the states. That relationship is the same whether, as in *McCulloch* v. *Maryland,* an Act of

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[3] One of the *amici curiae,* the National Institute of Municipal Law Officers, asserts that there is no nexus between state wage payments and interstate commerce; it purports to apply ''rudimentary economic realism in the style of the University of Chicago 'school' on economic analysis'' (NIMLO Br. 35-36). We suspect that these economists would blush at this economic analysis, and we are confident that they would be outraged at the irresponsible use of cost figures and other statistics by the appellants' side in these cases. We suppose also that while Professors Hayek, Friedman and Director undoubtedly regard the FLSA to be unwise as applied to *any* employer, they would shudder at any constitutional principle which, like the rule espoused by appellants here, would give public employers a competitive advantage over private employers, by relieving the former, but not the latter, from regulation under the federal minimum wage and maximum hour laws.

Congress is said to supersede a state law, or whether as here, and in *Maryland* v. *Wirtz,* it is said to supersede a state wage policy (which is also based ultimately on a state law). To subordinate an Act of Congress to the judgment of the state in either case would reverse the whole course of constitutional decision since *McCulloch*.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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