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Fair Labor Standards Act-1966 Amendments—Interstate Commerce—State Sovereignty.—Maryland v. Wirtz

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tions in matters involving federal taxes generally. *Freuler* and *Blair* may no longer be viable precedent insofar as they give binding recognition to the determination of property rights by state courts. The fact that the *Bosch* holding is expressly limited to estate tax controversies does not rule out this result because the Court could not reasonably have extended this holding beyond the area of federal taxation with which it was immediately concerned. It is not difficult to imagine that the Court, when faced with a case involving a federal income tax controversy, will point to the principles expressed in *Bosch*. It could well find that strict construction of the tax statute involved was necessary and could again refer to the finding that the *Erie* doctrine requires a federal court to look to state law as propounded by the state's highest court. The fact that both the *Blair* and *Freuler* decisions preceded the establishment of the *Erie* doctrine is significant in this regard.

It is submitted that when the implications and scope of the *Bosch* decision become clear, the *Freuler* and *Blair* cases will no longer be viable in any significant respect. The Court's clear rejection of the nonadversary or collusion test as evidenced by its express language and by its failure even to consider the guidance provided by the Treasury Regulations casts doubt upon the future validity of this test in any area of federal taxation. The elimination of this test would appear to leave no other reasonable ground on which to base a determination that a state trial court decision should or should not be given binding effect. The only alternatives, then, are to give state trial court decisions binding effect under all circumstances in all federal non-estate tax controversies, or, likewise, to preclude the binding effect of state trial court decisions under all circumstances. The *Bosch* decision would seem to demand the latter alternative.

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Fair Labor Standards Act—1966 Amendments—Interstate Commerce—State Sovereignty.—***Maryland v. Wirtz.***[1]—In 1966, Congress amended the Fair Labor Standards Act (FLSA).[2] The amendments extended the Act's minimum wage and overtime provisions to employees of certain enterprises, *whether public or private*, engaged in the operation of schools, hospitals, and related institutions, and employees of electric railway, trolley and motorbus systems.[3] States and their political subdivisions, insofar as they are employers

[1] 269 F. Supp. 826 (D. Md. 1967), prob. juris. noted, 88 S. Ct. 772 (1968).

[2] 29 U.S.C. §§ 201-19 (1964), as amended, 29 U.S.C. §§ 203-04, 206, 207, 213, 214, 216, 218 (Supp. II, 1965-66).

[3] It should be noted that not all employees engaged in these activities are covered because § 13 of the Act exempts persons employed in a bona fide executive capacity (including any employee employed in the capacity of academic, administrative personnel or teacher in elementary or secondary schools). 29 U.S.C. § 213 (1964), as amended, 29 U.S.C. § 213 (Supp. II, 1965-66). Also, the 1966 Amendments provide for an escalation of the minimum wage and overtime provisions over a five-year period for first-covered employees, i.e., they will receive $1.00 per hour for the first year with increases of 15 cents per hour each year until the wage reaches $1.60 per hour. Id. § 206. Overtime pay will be required for time worked over 44 hours per week the first year, over 42 hours per week the second, and for over 40 hours per week thereafter. Id. § 207.

engaged in the listed activities, were brought within the FLSA's coverage for the first time by an amendment to the Act's definition of "employer."[4]

The state of Maryland, with twenty-five states intervening, brought an action in a three-judge federal district court in Maryland for a declaratory judgment as to the constitutionality of the 1966 Amendments insofar as they apply to the states, their agencies and political subdivisions. In attacking the amendments, the plaintiff states specifically complained only of their application to public schools and hospitals. The states also sought to enjoin enforcement of the amendments against those institutions. Stipulations of fact were made in order to demonstrate the relation of state schools and hospitals to interstate commerce. As an example, in Maryland, which was accepted as representative of the other states, 87 percent of the medical supplies and equipment for the University of Maryland hospital and seven other state hospitals was purchased from outside the state.[5]

The primary contentions of the states were (1) that such activities, when conducted by a state and its subdivisions, do not constitute commerce within the meaning of the Constitution, (2) that state schools and hospitals are "ultimate consumers" and are thus excluded from coverage under the FLSA, and (3) that application of the FLSA to such activities is an unconstitutional infringement on state sovereignty contrary to the tenth amendment. Additionally, the states asserted the unconstitutionality of the "enterprise concept;" a concept incorporated into the Act by amendment in 1961 in order to provide for coverage of those employees not directly engaged in commerce or in the production of goods for commerce.[6] The district court HELD: The operation of schools and hospitals by the states and their subdivisions affects interstate commerce to a substantial degree, and the application of the *minimum wage provisions* of the FLSA to these institutions is (1) a valid exercise of the commerce power, (2) not an undue infringment upon state sovereignty, and (3) not rendered unconstitutional by use of the enterprise concept.[7] The court further stated, however, that the states would be free to challenge the *overtime* provisions of the Act, as applied to state employees, in future cases presenting specific situations.[8] This holding represents a synthesis of the individual and rather diverse opinions written by each of the three district court judges. Pending decision by the Supreme Court, enforcement of the FLSA against state supported schools and hospitals is restrained, under an order of the trial court, in all states which are parties to the suit.[9]

This decision marks a significant step in the ever-broadening use of the

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[4] 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school. . . .

29 U.S.C. § 203(d) (1964), as amended, (Supp. II, 1965-66).

[5] For facts demonstrating the relation of the state institutions to interstate commerce, see 269 F. Supp. at 833-34.

[6] See 29 U.S.C. §§ 203(r)-(s) (1964), as amended, (Supp. II, 1965-66).

[7] 269 F. Supp. at 831-32; see also id. at 847 (Thomsen, J., concurring in part).

[8] 269 F. Supp. at 852.

[9] 2 CCH Lab. L. Rep. ¶ 30,012 (Nov. 3, 1967).

commerce power by Congress in dealing with the economic and social needs of the nation. The 1966 Amendments represent a substantial interference by the federal government with the administration of public institutions by the states, and consequently, provoke consideration of the true constitutional relationship, in terms of political sovereignty, between the states and the federal government. More specifically, the instant case raises questions concerning (1) the constitutionality of the enterprise concept, (2) state schools and hospitals as "ultimate consumers" and thus as excluded from the ambit of the Act, and (3) the commerce power as limited by the concept of state sovereignty.

Prior to 1961, the FLSA had applied only to those employees who themselves engaged in commerce or in the production of goods for commerce. With the inclusion of the enterprise concept in the FLSA, an employee of an *enterprise* covered by the Act is entitled to the Act's benefits regardless of whether his particular activities constitute engagement in commerce or in the production of goods for commerce.[10] Thus, *all* employees of various enterprises are covered on the basis of the coverage status of their employer, rather than on the basis of the nature of the activities they personally perform. The anomalous situation possible prior to 1961, wherein employees worked side by side while only some were covered by the Act was, therefore, eliminated.[11]

Before enterprise coverage applies the employer must qualify as an enterprise engaged in commerce or in the production of goods for commerce.[12] Such an enterprise is one "which has *employees* engaged in commerce or in the production of goods for commerce . . ." (Emphasis added.) and, for purposes of the FLSA, includes "employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person . . . ."[13] Though the Act does not set forth the number of employees who must be so engaged before the enterprise itself qualifies, legislative history, which has been relied on by the courts, would indicate that the requirement is "two or more."[14]

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[10] See 29 U.S.C. § 203(s) (1964), as amended, (Supp. II, 1965-66). In amending the Act to include this concept, Congress was of the opinion that "[t]he fact that the minimum wage and overtime provisions of the present act extend only to some and not all employees of an employer engaged in commerce is due entirely to the restrictive wording of the statute . . ." S. Rep. No. 145, 87th Cong., 1st Sess. 4 (1961).

[11] The constitutionality of the enterprise concept has previously been unsuccessfully attacked. Wirtz v. Edisto Farms Dairy, 242 F. Supp. 1 (E.D.S.C. 1965); Goldberg v. Ed's Shopworth Supermarket, Inc., 214 F. Supp. 781 (W.D. La. 1963). For a brief discussion of the concept's side-by-side coverage, see 41 Notre Dame Law. 596, 606 (1966).

[12] 29 U.S.C. § 206(b) (1964), as amended, (Supp. II, 1965-66).

[13] Id. § 203(s). It is recognized that this definition is susceptible of the interpretation that an enterprise which *only* has employees handling, selling, or using goods *that have been moved* in commerce is covered by the Act. See Wirtz v. Edisto Farms Dairy, 242 F. Supp. 1 (E.D.S.C. 1965) and Rhude v. Jansen Constr. Co., 369 F.2d 806 (5th Cir. 1966). The more reasonable interpretation, however, requires that some employees actually be engaged in commerce or in the production of goods for commerce. Had the former interpretation been intended, the definition logically would have been phrased—*or* having employees handling, selling, etc. The latter interpretation, furthermore, is in keeping with the intent of Congress to continue to apply the "commerce" and "production for commerce" concepts of coverage. See H. Rep. No. 75, 87th Cong., 1st Sess. 7 (1961).

[14] H.R. Rep. No. 327, 87th Cong., 1st Sess. 16 (1961); See also Rhude v. Jansen

The enterprise concept was attacked in the present case as unconstitutional on the ground that it extends the commerce power to employees whose activities bear no relation to interstate commerce. In *Wickard v. Filburn*,[15] the Supreme Court indicated the broad reach of the commerce power in stating that even if the activity "be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."[16] In light of this statement constitutional objections to the enterprise concept of coverage would appear to be tenuous. If some *employees* of a given enterprise are engaged in commerce, it is at best inconsistent to contend that the activities performed by the remainder of the employees of that enterprise do not have an effect upon interstate commerce.

The validity of the enterprise concept would also appear to be supported by similar coverage provisions of the National Labor Relations Act (NLRA),[17] which was also enacted under the commerce power. Under that Act, the National Labor Relations Board has jurisdiction over any person engaging in any unfair labor practice *affecting* commerce.[18] This criterion of affecting commerce was applied by the Supreme Court in *NLRB v. Reliance Fuel Oil Corp.*,[19] wherein the only issue before the Court was "whether on the record before it the Board properly found that it had jurisdiction to enter an order against Reliance . . . ."[20] Reliance Fuel Oil Corporation was engaged in the local distribution of fuel oil, which it purchased within the state from Gulf Oil Corporation, a supplier engaged in interstate commerce. The Court reversed per curiam the court of appeals decision that jurisdiction of the Board had not been established. "That activities such as those of Reliance affect commerce and are within the constitutional reach of Congress is beyond doubt."[21] Once the jurisdiction of the Board is established, the Act's coverage is not limited to those employees who are themselves engaged in commerce or in the production of goods for commerce, but rather is extended to *all* of the employer's employees. The enterprise concept is designed to reach a like result in the application of the FLSA.

In order to understand the argument of the states, in the present case, that their institutions are "ultimate consumers" and thus excluded from coverage under the FLSA, the Act's definition of "goods" must be examined.

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects

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Constr. Co., 369 F.2d 806 (5th Cir. 1966); Donahue, Wage and Hour Law Developments—The Fair Labor Standards Act, N.Y.U. 15th Annual Conf. on Labor 137, 139-40 (1962).

15 317 U.S. 111 (1942).

16 Id. at 125.

17 29 U.S.C. §§ 151-168 (1964), as amended, 29 U.S.C. § 154 (Supp. II, 1965-66).

18 Id. § 160(a) (1964). "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." Id. § 152(7).

19 371 U.S. 224 (1962).

20 Id. at 225.

21 Id. at 226.

> of commerce of any character, or any part or ingredient thereof, *but does not include goods after their delivery into the actual physical possession of the ultimate consumer* thereof other than a producer, manufacturer, or processor thereof.[22] (Emphasis added.)

On the basis of the exclusionary clause in this definition, the states argued that their institutions did not qualify as an "enterprise" under the definition stated above.[23]

The proper interpretation of the operation of this "ultimate consumer" exclusionary clause was indicated by the Supreme Court in *Powell v. United States Cartridge Co.*[24] In that case an independent contractor which operated a government munitions plant was sued for overtime compensation as required by the FLSA. The title to the plant, equipment, work in progress, and finished munitions was in the Government, and the plant's output was shipped out of state on government bills of lading. In rejecting the contractor's argument that the Act did not apply because the Government was the ultimate consumer of the munitions, the Court stated that the purpose of the exclusionary clause is to protect ultimate consumers from prosecution for violation of the so-called "hot goods" provision of the Act.[25] Under this provision,[26] it is unlawful for any person to transport or ship in commerce any "goods" which were produced by persons employed in violation of the wage and overtime provisions of the Act. Therefore, if an ultimate consumer, after acquiring physical possession of goods made by persons employed in violation of the FLSA, sells or in any way moves those goods in commerce, he is protected from prosecution.

It is submitted that to construe the exclusionary clause to mean that state institutions are not engaged in commerce, because the goods they import lose their interstate character after they are in the institution's actual physical possession, is to give that clause a meaning wholly unrelated to its purpose and operation in the Act. Furthermore, the exclusionary clause takes effect only *after* the goods are in the actual physical possession of the ultimate consumer[27] and it in no way indicates that the activities of the ultimate consumer, prior to such possession, may not constitute engagement in commerce. As a practical matter, it would even appear questionable whether the institutions are the ultimate consumers of such goods as foodstuffs and drugs, which are respectively served to students and administered to patients.

Irrespective of the status of state institutions as ultimate consumers, other activities they perform may fulfill the requirement of enterprise coverage, i.e., that they have some employees engaged in commerce or in the

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[22] 29 U.S.C. § 203(i) (1964).

[23] This argument was not considered by the court, as it was considered "one of statutory construction, not of constitutional significance . . . ." The court indicated such an argument would best be asserted in a case challenging the application of the FLSA to a particular school or hospital. 269 F. Supp. at 831 n.12.

[24] 339 U.S. 497 (1950).

[25] Id. at 513-14 & 514 n.16; See also Gordon v. Paducah Ice Mfg. Co., 41 F. Supp. 980, 986 (W.D. Ky. 1941).

[26] 29 U.S.C. § 215(a)(i) (1964).

[27] See Gordon v. Paducah Ice Mfg. Co., 41 F. Supp. at 986.

production of goods for commerce. Each year billions of dollars are distributed to state and local schools and hospitals through federal programs and agencies. As a consequence of this movement of federal funds, the state institutions are required to prepare numerous documents, reports, and records for interstate transmission. In *Public Bldg. Authority v. Goldberg*,[28] the United States Court of Appeals for the Fifth Circuit concluded that Social Security Administration employees engaged in preparing benefit claims subsequently mailed throughout ten southeastern states were producing goods for commerce.[29] Employees in a branch office of a nationwide small loan organization have also been found to be engaged in commerce on the basis that they collected funds and prepared reports for out-of-state transmission.[30] These cases would appear to call for the conclusion that state employees who perform the services necessitated by the vast intergovernmental flow of funds and information to state schools and hospitals are engaged in commerce. This conclusion is also supported by the FLSA's broad definition of "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[31]

Assuming that state schools and hospitals have a substantial effect on interstate commerce, the most significant question presented to the court in the instant case concerns the conflict between federal use of the commerce power and state sovereignty. The question can be stated as whether the extension of the commerce power to state institutions, through imposition of the minimum wage and overtime provisions of the FLSA, is prohibited by the concept of dual sovereignty or federalism as embodied in our Constitution. That the 1966 Amendments to the FLSA do place a substantial burden on the states in areas involving essential state functions must be admitted. Illustrative of the burden imposed on the states is a projection of the cost of applying the Act to public institutions in the state of Texas, a plaintiff state. Expenditures of the Texas Youth Council will be increased by over $3,000,000 annually, those of the Department of Mental Health and Mental Retardation by $7,500,000 and one of the larger independent school districts in the state will require approximately $575,000 in additional annual revenue by 1971. The more than 1,300 other such districts in the state face proportionate increases.[32]

In light of this financial burden, the states contended that through the 1966 Amendments of the FLSA Congress is dictating the allocation of state revenues and, consequently, impugning the political sovereignty of the states. This issue was answered differently by each of the three district court judges. Judge Winter found the extension valid as to both the minimum wage and the overtime provisions. Judge Thomsen found the extension valid only with respect to the minimum wage provisions, and Judge Northrup found the

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[28] 298 F.2d 367 (5th Cir. 1962).

[29] Id. at 371.

[30] Beneficial Fin. Co. v. Wirtz, 346 F.2d 340, 341-42, 344 (7th Cir. 1965); see also Willmark Serv. Sys. Inc. v. Wirtz, 317 F.2d 486 (8th Cir.), cert. denied, 375 U.S. 897 (1963).

[31] 29 U.S.C. § 203(b) (1964).

[32] 269 F. Supp. at 851 n.15.

extension totally invalid. Such a diversity of opinion prompts an analysis of the cases and criteria employed by the judges in reaching their differing conclusions.

Judge Winter based his conclusion that the 1966 Amendments are constitutional on several cases which have upheld federal regulation of state functions and activities. In *Sanitary District v. United States*,[33] the Supreme Court was concerned with a federal-state dispute as to the rate at which water could be removed from Lake Michigan by the Sanitary District of Chicago for use in that city's sewage disposal operation. The Court sustained federal regulation of the removal rate, and concluded that "[p]robably the dangers to which the City of Chicago will be subjected if the decree is carried out are exaggerated, but in any event we are not at liberty to consider them here as against the edict of a paramount power."[34]

A later case, *Board of Trustees v. United States*,[35] involved a suit by the University of Illinois for the refund of customs duties paid on scientific apparatus imported for use in one of its educational departments. The University argued that the power over commerce could not constitutionally be exerted so as to substantially burden the States in their exercise of governmental activities. In denying the refund, the Court stated that there was "no encroachment on the power of the State as none exists with respect to the subject over which the federal power has been exerted."[36] Four years later the Court expressed a similar sentiment in a case where the question raised was whether the Safety Appliance Act applied to an intrastate railroad operated by the State of California to facilitate the commerce of a port.[37] The railroad and the larger part of the traffic it handled had its origin or destination outside the state. After finding that the Act applied to this railroad, the Court rejected the argument that state sovereignty was capable of limiting the scope of the commerce power, stating that the "state can no more deny the power if its exercise has been authorized by Congress than can an individual."[38]

From these decisions two principles may be extracted. First, the effect upon the states resulting from regulatory legislation is not relevant in the determination of the validity of that legislation as an exercise of the commerce power. Secondly, state sovereignty and the commerce power are theoretically precluded from coming into conflict, for a

> logical interpretation of the relevant provisions of the Constitution clearly and unavoidably forbids the idea that the reserved powers of the States comprise an independent limitation upon the delegated powers of the National Government. By the terms of the Tenth Amendment if a power is delegated to the United States by the Constitution, it is *not* reserved to the States . . . .[39]

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[33] 266 U.S. 405 (1925).

[34] Id. at 432; see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).

[35] 289 U.S. 48 (1932).

[36] Id. at 59.

[37] United States v. California, 297 U.S. 175 (1936).

[38] Id. at 185.

[39] E. Corwin, The Commerce Power versus States Rights 255-56 (1936).

Unless the instant case can be distinguished from the decisions giving rise to these principles, it would appear that the states' claim of unconstitutionality based on state sovereignty was properly denied by Judge Winter. It is submitted that no relevant distinction exists.

While the educational and health facilities involved in the instant case are "essential" to the welfare of the states' people, the problem of adequate sewage disposal in the *Sanitary District* case could also be categorized as involving an "essential" function of local government. The burden to be imposed upon the states by the FLSA is undoubtedly a heavy one. This does not appear to offer a valid distinction with respect to prior case law, however, in view of the Supreme Court's clear indication that such evidence is not relevant to the validity of an exercise of the commerce power.[40]

It could be argued that a distinction exists in the fact that the present case involves federal regulation of the wages of employees who in only the most indirect way affect interstate commerce. In *Wickard v. Filburn*,[41] however, distinctions based on directness of effect were denied constitutional effect. There the activity regulated by the commerce power was the production of wheat "not intended in any part for commerce but wholly for consumption on the farm."[42] The Court stated that an intrastate activity could "be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ." whether or not "such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "[43] The principles set down in *Wickard*, moreover, are not limited to private as opposed to public activity. Twenty-four years following that decision a case arose questioning the validity of federal regulation of wheat grown on state mental and penal farms.[44] The wheat was prevented from entering either interstate or intrastate commerce by a provision of the state constitution. The Court of Appeals, Sixth Circuit, held that such production was free from federal regulation, but the Supreme Court reversed per curiam citing *Wickard*.[45]

Judge Thomsen, who found the minimum wage provisions constitutional but felt that the overtime requirements of the Act probably went beyond the permissible limits, and Judge Northrup, who found both provisions of the Act invalid as applied to the states, employed a test which has been used by

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[40] See note 34 supra.

[41] 317 U.S. 111 (1942).

[42] Id. at 118.

[43] Id. at 125. It is submitted that other statements in *Wickard* apply to the state sovereignty claim of the states in the instant case.

> The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution . . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress . . . . *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119.

Id. at 124.

[44] United States v. Ohio, 354 F.2d 549 (6th Cir. 1965), rev'd per curiam, 385 U.S. 9 (1966).

[45] Id. For a comparison and analysis of *Wickard* and *Ohio*, see 19 Vand. L. Rev. 478 (1966).

the Court to determine the limits of the federal taxing power. This test is whether the federal legislation interferes unduly with the state's performance of its sovereign and indispensable functions of government. The rationale underlying this test was that an unlimited taxing power in the federal government posed a threat to the very existence of the states. Consequently, a constitutional immunity of state instrumentalities was established in order that the states would not be unduly burdened in the performance of their functions.[46]

It is obvious, in light of the 1966 Amendments to FLSA, that the commerce power is now also capable of burdening the states in the performance of these essential functions. Prior to applying the test of "undue interference" to the commerce power, however, one must determine whether that test, or the immunity doctrine which it delimits, is any longer accorded constitutional validity. The immunity doctrine reached its peak in *Collector v. Day*,[47] wherein the constitutionality of a federal tax on the salary of a state judge was questioned. In finding the tax invalid the Court pointed out that maintenance of a judicial department is a sovereign function of all states and should be left free and unimpaired. This principle has also been invoked by the Court to invalidate a federal excise tax on the manufacture and sale of a motorcycle to a municipal corporation for use in its police force.[48] However, the holding in *Day* was essentially overruled by *Helvering v. Gerhardt*,[49] wherein the salaries of employees of a state Port Authority were denied immunity. In recognizing that the theory behind state immunity was the continued existence of the state as a political entity, the Court stated that to "attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government."[50] The Court has further limited the immunity doctrine by sustaining the federal taxation of: proceeds from state sponsored athletic contests for the benefit of education;[51] profits from the sale of state bonds;[52] and profits from oil produced by lessees of state lands.[53]

Probably the most widely discussed example of immunity is that accorded the interest on state and municipal bonds.[54] Removal of this immunity would

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[46] See Collector v. Day, 78 U.S. (11 Wall.) 113 (1870); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159 (1819); 45 Yale L.J. 118 (1936).

[47] 78 U.S. (11 Wall.) 113 (1870).

[48] Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931). "Justice Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today." Legislative Ref. Serv., The Constitution of the United States of America, S. Doc. No. 39, 88th Cong., 1st Sess. 138 n.40 (1964).

[49] 304 U.S. 405 (1938).

[50] Id. at 421.

[51] Allen v. Regents, 304 U.S. 439 (1938).

[52] Willcuts v. Bunn, 282 U.S. 216 (1931).

[53] Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938). This case specifically overruled Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932), 303 U.S. at 387.

[54] See Willcuts v. Bunn, 282 U.S. 216 (1931); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

affect to a substantial degree every function of the state governments.[55] The conclusion has been expressed, however, that this immunity is a matter of congressional grace rather than constitutional requirement.[56] At any rate, in light of the extensive erosion of the doctrine of immunity in the area of the taxing power, it would appear questionable whether the test of undue interference, which defines the limits of that doctrine, should now for the first time be applied to the commerce power.

Practical considerations also would appear to warrant rejection of the undue interference test as the criterion for determining the validity of federal regulation of the character found in this case. In the operation of this test, the validity of the legislation in question is at least in part determined by the degree of interference with essential and indispensable state functions. If a state were paying its employees a wage far below that called for in the FLSA, then the *interference* resulting from the extension of coverage under the Act would be, in terms of financial burden, very great. On the other hand, if a state were paying its employees a wage only slightly lower than that required by the Act, then the *interference* resulting from the application of the Act's wage and hour standards would be much smaller. Thus, to the extent that the application of the test is affected by the degree of interference with essential state functions, the test encourages the anomalous result of invalidating legislation in those instances where the evil which prompted its passage is most prevalent. In the case of the FLSA, this result would appear to directly conflict with the Act's stated purpose of eliminating the "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . ."[57]

Recognition must be given to the fact that the 1966 Amendments do represent a manipulation of the internal affairs of the states by Congress. However, it is submitted that the objections to them are more properly based upon policy considerations than upon constitutionality. The Court has fostered legislation such as that found in the FLSA by construing the commerce power to be "as broad as the economic needs of the nation."[58] This power was expressly given to the federal government by the people, and the only restraints governing its exercise are the rapport which they maintain with the Congress, along with the influences they exert through the electoral process.[59]

THOMAS J. SEXTON

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[55] For fiscal years ending during calendar year 1959, all states and local governments paid out interest totalling $1,740 million. An additional $827 million would have had to have been paid were municipal bonds not tax exempt. Frank, Reciprocal Taxation of Governments, 40 Taxes 468, 484 (1962).

[56] Department of Justice, Taxation of Government Bondholders and Employees—The Immunity Rule and the 16th Amendment 32-62 (1938); 30 Ind. L.J. 341 (1955); Rottschaefer, Federal Taxation of State and Municipal Bond Interest, 20 N.C.L. Rev. 141 (1942).

[57] 29 U.S.C. § 202 (1964).

[58] American Power & Light Co. v. SEC, 329 U.S. 90, 103-04 (1946).

[59] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 86-87 (1824).