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Opinion No. 09-131

Scope of Federal Power to Tax and Regulate Products Made, Sold, and Used Only in Tennessee

QUESTIONS

1. In light of the Ninth and Tenth Amendments to the United States Constitution, by what authority can the United States government tax or regulate products that are made, grown, and/or manufactured in Tennessee as well as bought, sold, used and/or consumed exclusively within Tennessee?

2. Are products made, sold and used exclusively in Tennessee items in interstate commerce?

3. Could Tennessee manufacturers lawfully stop paying federal taxes or abiding by federal regulations on items that are made, bought, sold, and used exclusively in Tennessee?

4. If Tennessee-made products could be limited to in-state sales, use, or consumption, would the Tennessee manufacturers thereof only be subject to regulation by the State of Tennessee?

5. For Tennessee manufacturers whose products are sold both within and without Tennessee, may such manufacturers pay federally-imposed taxes and abide by federal regulations on a basis proportional to the amount of their products that are sold outside Tennessee?

6. If federal taxes or regulations are collected, implemented, or enforced improperly, could the manufacturers sue the federal government for improper tax or regulation?

7. Could the State of Tennessee impose taxation and regulations at the state level for those products grown, made, sold, used or consumed in Tennessee to closely mirror the current federal taxes and laws?

OPINIONS

1. Under the Commerce Clause, the federal government can regulate economic activity that has a substantial effect on interstate commerce which includes the making, growing, or manufacturing in Tennessee of products that are also bought, sold, used or consumed exclusively within Tennessee. Additionally, under the Taxation Clause, the federal government can levy taxes on such activities.

2. While products made, sold and used exclusively in Tennessee themselves are not necessarily in interstate commerce, Congress has the power to regulate commercial activities surrounding such products if those activities in the aggregate exert a substantial effect on interstate commerce.

3. No. Congress possesses clear authority to tax and regulate products made, bought, sold, and used exclusively in Tennessee.

4. No. As stated in response to the third question above, Congress possesses clear authority to tax and regulate products made, bought, sold, and used exclusively in Tennessee.

5. No. Congress possesses clear authority to tax and regulate products made, bought, sold, and used exclusively in Tennessee and is not restricted by any principle of geographic proportionality.

6. In accordance with longstanding policy, this Office declines to opine about issues of federal tax law, including the procedures for litigating disputes under those laws.

7. Whether Tennessee may impose taxes and regulations that mirror current federal taxes and laws does not turn on whether those federal taxes and regulations are constitutional. The Tennessee General Assembly may impose similar taxes consistent with its own powers and the federal Commerce Clause and may enact similar regulations unless preempted by federal statutes or regulations.

ANALYSIS

1. You have asked, in light of the Ninth and Tenth Amendments to the United States Constitution, by what authority the United States government can tax or regulate products that are made, grown, and/or manufactured in Tennessee as well as bought, sold, used and/or consumed exclusively within Tennessee.

The Ninth Amendment of the United States Constitution provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

> [T]he ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law. The ninth amendment "was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio*

> *alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution."

Gibson v. Matthews, 926 F.2d 532 (6th Cir. 1991) (*quoting Charles v. Brown*, 495 F.Supp. 862, 863-64 (N.D.Ala.1980)). The United States Supreme Court has never held that any substantive right is particularly conferred by the Ninth Amendment.[1]

The Tenth Amendment provides that "[t]he 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." "[T]he Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government.'" *Case v. Bowles*, 327 U.S. 92, 102 (1946) (citations omitted).

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

United States v. Darby, 312 U.S. 100, 124 (1941). The Tenth Amendment is, essentially, a "tautology." *New York v. United States*, 505 U.S. 144, 157 (1992). "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id*., 505 U.S. at 156; *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007). Thus, those powers not affirmatively granted to the federal government in the federal Constitution are reserved, as a matter of federalism, to the states.

"[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail." *United Public Workers or America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947); *see also Ashwander v. Tennessee Valley Auth*., 297 U.S. 288, 331 (1936). The Ninth and Tenth Amendments consequently have no particular bearing upon the scope of the federal government's authority to tax or regulate products that are made, grown, and/or manufactured in Tennessee as well as bought, sold, used and/or consumed exclusively within Tennessee. If the federal government possesses this authority, it will be found in the affirmative grants of power to that government within the United States Constitution.

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[1] The Court has included the Ninth Amendment among a fabric of constitutional provisions on which it relies to find certain rights (such as a right to privacy), but it has never been the particular and unique source of such rights. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

(a) The Commerce Clause.

The first question posited will turn on whether the Commerce Clause grants Congress the power to regulate the manner of commerce described.[2] The Commerce Clause provides that Congress has the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." United States Const., Art. I, § 8, ¶ 3. If Congress has a rational basis for determining whether activities such as those mentioned in this request, "taken in the aggregate, substantially affect interstate commerce," then its exercise of regulatory authority under the Commerce Clause will pass constitutional muster. *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005).

Under the Commerce Clause, the Supreme Court has identified

> three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.

Raich, 545 U.S. at 16-17 (internal citations omitted). The commerce posited in this request would not appear to implicate the first two categories and so, as in *Raich*, "[o]nly the third category is implicated" here.[3]

The *Raich* Court noted that the Supreme Court's "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id*., 545 U.S. at 17. The *Raich* Court found *Wickard v. Filburn*, 317 U.S. 111 (1942), to be of particular relevance. *Wickard* concerned the enforcement of a "marketing penalty" against the plaintiff under the Agricultural Adjustment Act of 1938. *Wickard*, 317 U.S. at 113. The "general scheme" of this Act was to "control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce." *Id*., 317 U.S. at 115. The plaintiff owned a small farm from which he sold milk, poultry, and eggs. *Id*., 317 U.S. at 114. The farmer grew "a small acreage of winter wheat" that he used to feed his livestock and make flour for home use, and he sold at least part of the remainder. *Id*. The Act provided the farmer with an allotment of 11.1 acres and a yield of 20.1

[2] Congress' power to levy taxes derives from different constitutional authority and is addressed below.

[3] *Raich* addressed an enforcement action of the federal Drug Enforcement Agency ("DEA") in which federal agents seized and destroyed cannabis plants being grown by a patient for her own medical use in a manner admittedly in compliance with a California statute exempting from criminal prosecution physicians, patients, and primary caregivers "who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician." *Raich*, 545 U.S. at 6-7. The plaintiffs "argue[d] that the CSA's [Controlled Substance Act] categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeded Congress' authority under the Commerce Clause." *Id*., 545 U.S. at 15.

bushels per acre. *Id*. Though provided notice of this, the farmer harvested 239 bushels from 11.9 acres (slightly less than 20.1 bushels per acre) which amounted to a "marketing excess" subject to penalty. *Id*., 317 U.S. at 114-15.

The Supreme Court heard *Wickard* in order to address the question of whether the Commerce Clause empowers Congress to regulate "production not intended in any part for commerce but wholly for consumption on the farm." *See Wickard*, 317 U.S. at 118. The Court reiterated that

> [t]he commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . 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. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Id., 317 U.S. at 124 (*quoting United States v. Wrightwood Dairy Co*., 315 U.S. 110, 119 (1942)). The *Wickard* Court pronounced that even if "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, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id*., 317 U.S. at 125. The Court found that "[t]he effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop." *Id*., 317 U.S. at 128. The purpose of the Act was to "increase the market price of wheat" and it could "hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id*. Consequently, the Court had no doubt "that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." *Id*., 317 U.S. at 128-29. As a result, the Act was constitutional under the Commerce Clause though it resulted in the regulation of wheat that was produced and consumed but never marketed.

The Supreme Court found the similarities of *Raich* to *Wickard* "striking." *Raich*, 545 U.S. at 18. It found in *Raich* that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Id*., 545 U.S. at 19. Specifically, given "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere … and concerns about diversion into illicit channels," the Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and

possession of marijuana would leave a gaping hole in the CSA." *Raich*, 545 U.S. at 22.[4] Even though the regulation necessarily "ensnare[d] some purely intrastate activity," this was of "no moment;" the Court "refuse[d] to excise individual components of [a] larger scheme." *Id*. "[W]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id*., 545 U.S. 23 (citations omitted).

Although decisions like *Wickard* and *Raich* establish that Congress's power to regulate interstate commerce under the "substantial effect' category is broad, it is not without limit. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court invalidated the Gun-Free School Zones Act of 1990 on Commerce Clause grounds. Under that Act, it was a federal offense "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Lopez*, 514 U.S. at 551 (quoting statute). The *Lopez* Court acknowledged that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained," but found the Act in question to be

> a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id., 514 U.S. at 561. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court addressed a federal statute providing that "[a] person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured." *Morrison*, 529 U.S. at 605 (quoting statute). The Court found this statute similar to that invalidated in *Lopez*, reasoning that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." The Court concluded that "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.*, 529 U.S. at 613. The statutes in *Lopez* and *Morrison* also both suffered from the lack of "a jurisdictional element" that "would lend support to the argument" that the statutes were "sufficiently tied to interstate commerce" to justify the regulation. *Id*.

Congress has broad power to regulate activities that it has a rational basis to believe, in the aggregate, substantially affect interstate commerce. Under *Lopez* and *Morrison*, however, it is clear that such activities must be economic in nature and there must be some means of demonstrating a nexus between the activity to be regulated and interstate commerce. *See Lopez*, 514 U.S. at 562.

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[4] The Court described the CSA as "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" *Raich*, 545 U.S. at 24.

The activities posited in this request – the buying, selling, and use in Tennessee of products manufactured and grown in Tennessee – are within the power of Congress to regulate. Taken in the aggregate, such activity would substantially affect interstate commerce in the same way as the wheat grown in *Wickard* and the marijuana grown in *Raich*. It is that economic characteristic that supports the exercise of Congress's regulatory power under the Commerce Clause.

(b) The Taxation Clause.

In addition to its authority to regulate interstate commerce, Congress possesses the power to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." United States Const., Art. I, § 8, ¶ 1. "The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity.[5] Thus limited, and thus only, it reaches every subject, and may be exercised at discretion." *United States v. Stillhammer*, 706 F.2d 1072, 1077 (10th Cir., 1983) (*quoting The License Tax Cases*, 72 U.S. 462, 471 (1866)).[6] "Congressional power to tax … embraces all conceivable powers of taxation including the power to lay and collect income taxes." *Id.* "Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *United States v. Kahriger*, 345 U.S. 22, 31 (1953).[7]

Therefore, with respect to products that are made, grown, and/or manufactured in Tennessee as well as bought, sold, used and/or consumed exclusively within Tennessee, the federal government is empowered to levy any excise taxes that it deems appropriate as long as the tax is not accompanied by "extraneous" provisions serving no revenue purpose and is uniform throughout the United States.

2. While products made, sold and used exclusively in Tennessee are not "in interstate commerce" in the sense that they are in "the channels of interstate commerce" and may

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[5] The bar for demonstrating a lack of uniformity is high. In *United States v. Ptasynski*, 462 U.S. 74, 82 (1983), the Court analyzed the Crude Oil Windfall Profit Tax Act of 1980, which exempted "certain classes of oil from the tax, one of which is 'exempt Alaskan oil.'" *Ptasynski*, 462 U.S. at 77 (internal citation omitted). The Court held that "[t]he Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems" and, in upholding the classification as constitutional, gave great deference to Congress's determination that the "ample evidence of the disproportionate costs and difficulties … associated with extracting oil from this region" justified the classification and did not "grant Alaska an undue preference at the expense of other oil-producing States." *Id.*, 462 U.S. at 84-85.

[6] Note that the apportionment limitation was removed with respect to income taxation by the Sixteenth Amendment. *See Stillhammer*, 706 F.2d at 1077.

[7] In addition to challenging the taxing statute at issue in *Kahriger* as a regulation outside of Congress's taxing authority, the plaintiff there also alleged that the statute violated the Fifth Amendment privilege against self-incrimination. This argument was unsuccessful in *Kahriger*, but the Court later revisited the question and overruled that aspect of the case. *See Marchetti v. United States*, 390 U.S. 39, 41-42 (1968). However, *Marchetti* did not otherwise express any reservation about the scope of the taxing power as perceived in *Kahriger*.

not be conveyed by "instrumentalities of interstate commerce" – the first two categories of regulation identified in *Raich* – such products *are* amenable to federal regulation under the Commerce Clause because, taken in the aggregate, these activities can have a substantial effect on interstate commerce as described in response to the first question in this request.

3. Validly enacted federal taxes and regulations may not simply be disregarded even if a manufacturer subject to such an enactment has a good faith reason to believe that the law is unconstitutional.

4. As indicated in response to the first question in this request, the geographic scope of the regulated activity is not controlling for purposes of Congress's power to regulate under the Commerce Clause. Whether activity wholly contained within the geographic boundaries of the State of Tennessee is beyond the power of Congress to regulate under the Commerce Clause will be determined under the same analysis described in response to the first question.

5. You have asked whether, for Tennessee manufacturers whose products are sold both within and without Tennessee, such manufacturers may pay federally-imposed taxes and abide by federal regulations on a basis proportional to the amount of their products that are sold outside Tennessee. As discussed in response to the first question, Congress possesses clear authority to tax and regulate products made, bought, sold, and used exclusively in Tennessee. The concept of proportional compliance on a geographic basis is thus not implicated.

The idea of carving out judicial exceptions from universal federal regulatory schemes was addressed in *Raich*. The plaintiffs there urged that "their activities were not 'an essential part of a larger regulatory scheme' because they had been 'isolated by the State of California, and [are] policed by the State of California,' and thus remain 'entirely separated from the market.'" *Raich*, 545 U.S. at 30. The Court, however, concluded that the "notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected." *Id*. Thus, if a constitutionally valid Congressional regulation reaches in-state activity that has a substantial effect on interstate commerce, then the in-state character of the activity will not render full compliance unnecessary.

6. In accordance with longstanding policy, this Office declines to opine about issues of federal tax law, including the procedures for litigating disputes arising under those laws.

7. Whether the State of Tennessee may impose taxation and regulations at the state level for those products grown, made, sold, used or consumed in Tennessee to closely mirror the current federal taxes and laws does not necessarily turn on whether those federal taxes and regulations are unconstitutional or otherwise invalid. Based upon the foregoing discussion of Congress's taxing and regulatory powers, this Office has no reason to conclude, as a general matter, that any such federal tax or regulation is invalid.

With respect to taxation, the Tennessee General Assembly's authority to levy taxes is derived from Article II, § 28 of the Tennessee Constitution. If authority for any tax is found

there, the State may enact the tax provided that it does not run afoul of the negative implications of the Commerce Clause:

> Although the text of the Commerce Clause contains only an affirmative grant of authority to Congress to regulate interstate commerce, the Court has long interpreted it to include an implied limitation on the power of the states to do the same. The implied limitation on state regulatory power even in the absence of congressional action is known as the "negative" or "dormant" aspect of the Commerce Clause. It is well established that the dormant aspect of the Commerce Clause applies to the states' power to tax.

Arco Bldg. Sys., Inc. v. Chumley, 209 S.W.3d 63 (Tenn. Ct. Ap. 2006) (internal citations omitted).[8] Within those boundaries, the General Assembly is free to levy those taxes that it sees fit.

With respect to regulations, the State possesses a broad, general police power. "[T]he police power of the State embraces all matters reasonably expedient for the safety, health, morals, comfort and general well-being of its people, as a unit." *Livesay v. Board of Examiners in Watchmaking*, 322 S.W.2d 209, 211, 204 Tenn. 500, 504 (1959). Attempts to mirror current federal regulation would, in many respects,[9] be sustainable under this general police power unless such regulations were preempted by federal law:

> It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

[8] A state tax will be "upheld against challenges under the dormant Commerce Clause as long as: (1) the tax [is] applied to an activity that had a 'substantial nexus' with the taxing state; (2) the tax [is] 'fairly apportioned;' (3) the tax [does] not 'discriminate against interstate commerce;' and (4) the tax [is] 'fairly related' to the services provided by the taxing state." *Arco*, 209 S.W.3d at 69 (citing *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977).

[9] The broad variety and scope of federal regulations that currently apply to products grown, made, sold, used or consumed in Tennessee precludes analyzing, even at a general level, the question of whether the State of Tennessee might mirror specific regulations.

Pacific Gas & Elec. Co. v. State Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983). Therefore, within the constraints of its own police power and the doctrine of federal preemption, the State of Tennessee might attempt to mirror federal regulation.

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