The Seventh Circuit held the City's justification in this case – that limiting the hours of these establishments to those specified in the ordinance would limit armed robberies – was "weak" on various fronts. First, as a statistical matter the court pointed out that the City had not done a "multivariate regression to control for other variables, such as the presence of late-night taverns." The City's data did not show that robberies are more likely at adult bookstores than other late-night establishments – at least not in any degree to be "statistically significant." In addition, the court pointed out that the City was misapplying the reasoning of *Renton* because the secondary effects approach has never been endorsed by the Supreme Court to allow the closure of establishments in order to protect patrons of those establishments. Instead, the secondary effects approach is permitted to protect third parties—in this case, those that "want nothing to do with dirty books from harms created by adult businesses." The essential problem for the court was the City's closure of the stores altogether; as the Supreme Court had put it in *Los Angeles v. Alameda Books, Inc.*, "a city may not regulate the secondary effects of speech by suppressing the speech itself."

The City countered that patrons are free to patronize the stores during open hours and, therefore, no speech is suppressed because people can still ultimately get the reading materials they want. The court did not accept the argument that delay had no impact on speech. It posed a hypothetical to test the City's proposition: Suppose that the City prohibited the distribution of newspapers on Sundays (to reduce traffic accidents, early-morning robberies and pollution). In that scenario all the news and advertising could still appear in the paper on the following Monday, and it would still be available on-line on Sunday. The court asked what the difference would be, from a First Amendment perspective, between prohibiting the sale of paper newspapers on Sunday and prohibiting the sale of paper adult magazines on Sunday. There was none: "Indianapolis likes G-rated newspapers but not sexually-oriented books, magazines and movies. "

Unless the City could demonstrate that the adult materials were obscene—which it had not – there were no grounds to force closure of the bookstores in the early morning and on Sundays. The Circuit Court reversed and ordered an injunction against the closure ordinance.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D01-24/C:13-1500:J:Easterbrook:aut:T:fnOp:N:1279403:S:0 (last accessed Feb. 5, 2014).

Taxation: Fannie Mae and Freddie Mac Exemption From Paying County Transfer and Recording Taxes Is Permitted By Statute and Does Not Violate the Commerce Clause

***Montgomery County v. Federal National Mortgage Association*, No. 13-1691 (4th Cir. Jan. 27, 2014).**

As a general rule, when real property is transferred between parties, state and local transfer taxes apply. This is the case in both South Carolina and Maryland, and many other states. Fannie Mae and Freddie Mac, which provide a secondary market for residential mortgages, came into ownership of numerous properties around the nation due to foreclosures stemming

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from the real estate meltdown. When they re-sold the properties to third parties, they refused to pay local transfer taxes, including recording fees, claiming they are exempt from those taxes under 12 U.S.C. §§ 1723a(c)(2) and 1452(e), respectively. Counties in Maryland and South Carolina brought suit, arguing that (1) as a matter of statutory interpretation the exemptions Congress granted to Freddie and Fannie do not apply to state and local real property taxes, including transfer taxes and recording taxes, and (2) alternatively, exempting Fannie and Freddie from state and local transfer taxes would be an unconstitutional infringement on the states' taxing power.

The district courts in both Maryland and South Carolina ruled for Fannie and Freddie, holding that the tax exemptions provided to Fannie and Freddie by Congress, though not applicable to property taxes, do apply to transfer taxes. Moreover, both lower courts held that Congress had acted within its authority under the Commerce Clause in granting the tax exemptions. The Counties appealed, and the cases were consolidated at the Fourth Circuit.

HELD: The Fourth Circuit affirmed the district courts on both issues.

DISCUSSION: The Circuit Court started by addressing the general tax exemptions provided by Congress for Fannie and Freddie. Both entities are generally exempt from state and local taxes "except that any real property of [either Fannie Mae or Freddie Mac] shall be subject to State, territorial, county, municipal, or local taxation to the same extent as other real property is taxed." The Counties argued that the term "real property" taxes as used in the statute includes transfer taxes.This follows, so explained the Counties, because "real property ownership is a 'bundle of sticks' that includes the right to transfer property, [and thus,] a real property transfer tax is a tax on real property." The Fourth Circuit rejected this argument by way of an analogy: to equate property and transfer taxes "would mean analogously that any reference to a personal property tax (a tax on the ownership of personal property) must also be a reference to sales taxes imposed on the transfer of personal property. Yet, every legal and common understanding distinguishes a property tax from a transfer or sales tax."

The court noted the Supreme Court itself has made the distinction in two cases - *United States v. Wells Fargo Bank*, 485 U.S. 351, 355 (1988) and *Pittman v. Home Owners' Loan Corp*., 308 U.S. 21 (1939) – and that, critically, the statutory schemes of Maryland and South Carolina make the same distinction. It pointed out that both states impose both a tax on the transfer of real property and a tax on the real property itself. Thus, the federal scheme exempting Fannie and Freddie from taxes generally, but subjecting them to "real property taxes," does not allow states to apply transfer taxes to them.

As their second argument, the Counties posited that transfer taxes are exclusively intrastate in nature and therefore Congress could not rely on the Commerce Clause to justify providing Fannie and Freddie with the tax exemption.. Instead, such an exemption amounted to an "infringement on the states' sovereign power to tax – a power 'indispensable to their existence."

Before getting to the merits of this argument, the court dealt with the Counties' argument that since the power to tax is "fundamental, from a Constitutional stand point" it should be reviewed under strict scrutiny. The Circuit Court found no authority for this argument, and instead pointed to Commerce Clause jurisprudence from the Supreme Court wherein it applied rational basis review to such questions. As for the merits, the court found it reasonable for Congress to presume that local and state taxes would interfere with Fannie and Freddie's mission to provide mortgages nationwide. The question then became whether "the statutory exemptions from state

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and local taxes [were] necessary and proper to Congress's legitimate exercise of its Commerce Clause power."

To answer such a question the court inquired into whether the statute is a "means that is rationally related to the implementation of a constitutionally enumerated power." This inquiry brought the court back to its initial position that indeed Congress could have determined that state taxation at any level would interfere with the purposes of Fannie and Freddie because taxation would reduce their capital, and with it the ability to issue mortgages, and subject the two to different tax rates in different states, thereby incentivizing activity in some states and deterring it in others. As a result, the tax exemptions authorized by Congress were deemed a valid exercise of that body's Constitutional power.

http://www.ca4.uscourts.gov/Opinions/Published/131691.P.pdf (last accessed Feb. 5, 2014).

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