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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL.,

Appellants,

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS

REFERENCE TO OPINIONS BELOW

The District Court rendered three separate Opinions in the case below, which are reported in 269 F. Supp. 826 (1967). A copy of said Opinions and a copy of the subsequent Order thereon are set forth in the Appendix hereto, pp. 1a-51a.

GROUNDS OF JURISDICTION

This action was originally instituted by the State of Maryland in the District Court for the District of Maryland pursuant to Title 28, U.S. Code, Sections 1337, 2201, 2202, 2282 and 2284 to declare the application of the Fair Labor Standards Act (Title 29, U. S. Code, Sections 201, *et seq.*) to employees of the State and its political subdivisions, as

provided by Public Law 89-601, to be in violation of the United States Constitution and to enjoin the various defendants from so enforcing the Act. Twenty-seven other States and one school district subsequently joined Maryland as parties plaintiff. A three-judge court, convened pursuant to Title 28, U. S. Code, Sections 2282 and 2284, rendered three Opinions on June 13, 1967, two of which held that the declaratory and injunctive relief requested by Appellants should be denied. On June 26, 1967, a final judgment was entered by the court which denied the relief and dismissed the Complaint. A Notice of Appeal to this Court was filed in the United States District Court for the District of Maryland on August 24, 1967.

This is a direct appeal from the judgment of the three-judge District Court denying, after notice and hearing, a permanent injunction in a civil action required by Title 28, U. S. Code, Section 2282 to be heard by a three-judge court. This Court has jurisdiction to consider this appeal under Title 28, U. S. Code, Section 1253. *Radio Corp. of America v. United States* (D.C. Ill., 1950), 95 F. Supp. 660, *aff'd* 341 U.S. 412, 71 S. Ct. 806, 95 L. Ed. 1062; *Stafford v. Wallace* (1922), 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735.

QUESTIONS PRESENTED

1. Did the Congress of the United States, in enacting Public Law 89-601, exceed its power to regulate interstate commerce granted under Article I, Section 8 of the United States Constitution, insofar as said Public Law 89-601 purports to extend the provisions of the Fair Labor Standards Act to the school systems and hospitals of the States and their political subdivisions?

2. Did the Congress of the United States, in enacting Public Law 89-601, infringe upon powers reserved to the

States under Article X of the Amendments to the United States Constitution, insofar as Public Law 89-601 purports to extend the provisions of the Fair Labor Standards Act to the school systems and hospitals of the States and their political subdivisions?

3. Did the Congress of the United States, in enacting Public Law 89-601, authorize the violation of Article XI of the Amendments to the United States Constitution, insofar as said Public Law 89-601 purports to authorize actions by or on behalf of private citizens against the States in United States District Courts?

4. Under our dual system of government, does the Congress of the United States have the constitutional authority to regulate a State in the performance of its *necessary* governmental functions?

5. Does the Congress of the United States have the authority to require a State Legislature or the governing body of any political subdivision thereof to either levy and collect taxes for a particular purpose or curtail or discontinue necessary governmental services?

6. Does a State, in the performance of its necessary governmental functions, engage in commerce within the meaning of Article I, Section 8 of the Constitution of the United States?

7. Are state and local school systems and hospitals ultimate consumers within the meaning of Section 3(i) of Public Law 89-601 and, therefore, not subject to the provisions of said law?

STATEMENT OF THE CASE

Public Law 89-601, which became effective February 1, 1967, purports to extend the minimum wage and maximum hour provisions of the Fair Labor Standards Act (Title 29,

U. S. Code, Sections 201, *et seq.*) to public elementary and secondary schools, institutions of higher education, and hospitals owned and operated by the States and/or their political subdivisions. The funds necessary to operate such schools, institutions and hospitals, and therefore to pay any increased wages occasioned by application of the Act, are required by the Constitutions of all of the Appellant States to be appropriated by their respective legislatures, generally pursuant to an Executive Budget system, and to be funded by taxes.

The factual record in this case consists of extensive stipulations agreed to between the parties. Three States — Maryland, Texas and Ohio — were used as representative States to show (1) the extent to which the activities of the affected institutions and agencies thereof may "affect" interstate commerce, and (2) the financial and political effect of the Act upon State government and governmental activities.

With respect to (1) above, the facts show that the local public schools and hospitals spend a great deal of money purchasing goods from other States. The mass of detail contained in the exhibits or stipulations emanating from the Appellees only serve to bear out this fact. It is these expenditures which formed the basis of the District Court's conclusion that there was a sufficient nexus with interstate commerce, or effect thereon, to make the agencies subject to Congressional regulation. The facts further show, however, that other agencies of State government, such as the Governor's office, the Legislature, the Judiciary, the Attorney General, etc. also spend funds for out-of-State purchases, and that they too affect commerce. In 1965, for example, the Baltimore City Police Department spent over $400,000.00 for motor vehicles, many or all of which were produced out-of-State (Appendix p. 75a).

With respect to (2), the facts, or the inferences fairly deducible therefrom, show:

1. Most of the States already pay the federal minimum wage to their employees. The instances of substantially subminimum wages are very limited. The main effect on the States is the requirement of paying a 50% premium for overtime hours. Most of the States (like the federal government) compensate their employees for overtime hours by the device of "compensatory time". If an employee works six hours overtime, he is permitted to take off six hours at another time and he can generally accumulate his compensatory time in order to take off whole days instead of hours. In this way, he is in effect paid "straight time" for his overtime hours. Public Law 89-601 provides that, unless the compensatory time is given within the same pay period, the State must pay the 50% premium for overtime hours and can no longer use the device of compensatory time. The agreed facts show that in many instances it is impossible or impracticable to give compensatory time during the same pay period.

2. The resulting financial impact (of paying the 50% premium) to the State of Maryland during the first, and least expensive, year of operation under the Act would be nearly $2,500,000.00. This figure does not include the additional indirect cost of paying the premium to State employees not directly covered under Public Law 89-601 but who, by State law, must be treated equally with the federally covered employees. This additional cost is estimated for the first year to be $1,884,000.00. The total effect of the Act on Maryland, therefore, would be almost $4,400,000.00 for the first year (Appendix p. 76a). As the required minimum scale increases under the Act (for the States, it jumps from $1.00 an hour to $1.60 an hour over a five-year period), the cost will increase both in overtime penalties and in meeting the higher minimums.

No attempt was made to extrapolate the Maryland figures nationwide. Texas estimated its additional costs for a single year as over $13,000,000.00, excluding the additional costs to the 1,300 school districts. If the direct Maryland cost of $2.5 million is merely multiplied by 50 (which, because of her small size and generally high wage rates, is probably conservative), the national cost to the States would exceed $125,000,000.00 annually.

3. In addition to the adverse financial impact — or rather as a corollary to it — there is the more fundamental effect on State government itself. The affected agencies, unlike private industry, do not meet their costs by raising prices or increasing productivity. Schools and hospitals are not subject to annual productivity increases. Instead, their funds must, by State Constitutional requirement, come from legislative appropriations. The agencies will estimate their needs a year and a half in advance and submit a budget. That budget or a revision of it must then be enacted into law by the State legislature. The immediate effect of Public Law 89-601, in this connection, is

(a) To jeopardize the stability of the State budgetary system by making amounts requested and appropriated subject to change by independent Congressional action, possibly, as in the actual case of Public Law 89-601, in the middle of a fiscal year. Thus, a school board which requested and had appropriated to it "X" dollars based upon existing lawful scales may find that Congress has increased the cost to "Y" dollars in the middle of the year.

(b) In such an event, unless a special session of the legislature were called, State officials would be put in the position either of ignoring the federal law or violating State law by expending more than has been appropriated.

(c) If a special session of the legislature were called, its calling would not be a voluntary act, but one required by federal law. The additional appropriations and taxes necessary to support the higher costs would be dictated by federal law. In other words, the legislature would not be performing its traditional legislative function but merely responding in ministerial fashion to the Congressional fiat.

The clash of the two considerations — the effect of the State agencies on interstate commerce and the impact of the Act upon the States — gives rise to the constitutional issues. In the District Court, the issues were raised in the form of cross-motions for summary judgment (the Appellees' motion being, in the alternative, a motion to dismiss). On June 13, 1967, the court rendered three Opinions as follows: (1) Judge Winter held the entire Act, as applied to the States and their subdivisions, to be constitutional; (2) Judge Northrop held the entire Act, as so applied, to be unconstitutional; and (3) Judge Thomsen held the minimum wage provisions of the Act, as so applied, to be constitutional, but expressed doubt as to the constitutionality of the overtime provisions.

SUMMARY OF ARGUMENT

When Congress first enacted the Fair Labor Standards Act, it did so in order to curb or alleviate certain specific conditions, which apparently did not exist with respect to State employment. The extended coverage in Public Law 89-601 was based on the assertion that public schools and hospitals are in "substantial competition" with private counterparts, and that their regulation was essential to the effectiveness of the overall regulation. The facts show, however, that this assertion is untrue; for example, less than 1% of the children in this country attend nonpublic, nonreligiously-affiliated schools.

Coverage on the theory that these institutions buy goods and services from out-of-State would enable Congress to regulate every official and agency of State government, a power which neither was contemplated by the Convention in 1787 nor has ever been countenanced by this Court. The schools and hospitals are especially unique — unlike State-owned railroads or other commercial enterprises — and do not constitute or engage in commerce.

Even if they do engage in commerce, however, they are not subject to the type of regulation imposed by Public Law 89-601. The thrust of the Act goes beyond the schools and hospitals and strikes at the heart of State government. It permits Congress to override State budgetary systems, to nullify State Constitutional provisions relating to the manner of appropriating funds and levying taxes for the support of State and local government, and to remove the discretion of State legislatures in determining the scope and character of State government. No decision of this Court has ever permitted such an assertion of federal power.

To the extent that coverage is asserted under the "enterprise" test, it is unconstitutional as an unlimited extension of the commerce power. It permits Congress to regulate activities which may have, at the most, a remote and inconsequential effect on commerce.

In addition, by including State agencies within the definition of "employer", the Act authorizes private citizens to sue the States for civil damages in federal courts, in direct contravention of the Eleventh Amendment.

Finally, it is asserted that the public schools and hospitals are the ultimate consumers of whatever goods and services they purchase in commerce and that, by statutory construction, they are exempt from the Act.

ARGUMENT

I.

QUESTIONS NOS. 1, 2, 4, 5 AND 6

MAY THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE BE EXERCISED IN A MANNER WHICH IS DESTRUCTIVE TO EFFECTIVE STATE GOVERNMENT, AND DOES PUBLIC LAW 89-601 CONSTITUTE SUCH AN EXERCISE?

A. INTRODUCTION

The questions presented in this appeal as set forth in the Appellant's Jurisdictional Statement, as well as in this Brief, are listed as seven in number. A reading of them will indicate, however, that Nos. 1, 2, 4, 5 and 6 are, in the context of the facts of the case, essentially the same. The variety in their wording was thought necessary in order to present all facets of a complex problem to the Court. The overriding issue common to all five of these questions, however, is whether the maintenance of an effective dual system of Government — the federal system — which necessarily requires strong autonomous State governments, is an implied limitation upon an otherwise unlimited Congressional power to regulate interstate commerce.

Appellants contend that the operation of public schools and hospitals do not constitute commerce and do not affect commerce in a way which makes them subject to direct Congressional regulation. Furthermore, Appellants assert that, even if such schools and hospitals should affect commerce, they are not subject to the type of regulation contained in the Fair Labor Standards Act, because such regulation goes beyond these particular agencies and seriously impairs the essential internal processes of State government itself.

Never before in the history of this nation has the federal government presumed to enact a law which, both in theory

and in practice, serves as the basis for the utter destruction of the State as a sovereign political entity. At issue here is not a mere inconsistency between State and federal law. Neither is it a question of whether some incidental function or activity engaged in by a State may be subject to federal regulation under a general, nondiscriminatory law. And it is not even a question of whether the government can exercise some form of control over the public school system or public health services. See *Brown v. Board of Education* (1954), 347 U.S. 483, and *Cooper v. Aaron* (1958), 358 U.S. 1.

The issue here, simply, is whether, by virtue of its power to regulate interstate commerce, Congress has the ability to require state legislatures to levy taxes in excess of what they otherwise would levy, to appropriate funds in excess of what they otherwise would appropriate and for purposes for which they would not otherwise provide them, or, in the alternative, to require that elected and appointed State officials violate the Constitution and laws of their state. Also at issue is whether purely State matters — taxes, appropriations, merit systems, public schools and hospitals — are subject to an overriding Congressional control.

As will be developed, if the test of Congressional jurisdiction is merely whether the particular activity affects commerce, then each and every function carried on by State and local governments is so regulable. The plain, inescapable meaning of such a test is that States exist only at the sufferance of Congress and, by indirection, it lies within the power of Congress to convert them into federal districts. No case known to Appellants has ever gone this far.

There has, in the history of this nation, been only one reported instance where the federal government has considered (much less attempted) regulating the wages and

hours of State and local government employees. In 1942, the National War Labor Board considered the question of its jurisdiction over labor disputes between such employees and their sovereign employers. This matter, it is noted, was decided after the decisions in *United States v. Darby* (1941), 312 U.S. 100, and *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1936), 301 U.S. 1.

The Board determined that neither it nor the federal government generally had jurisdiction in the matter of state employment (Case No. 47, Case No. 726, National War Labor Board, December 23, 1942, reported in *Labor Unions and Municipal Employee Law*, Charles S. Rhyne, 1946, pp. 226, *et seq.*). In so deciding, it stated:

> "The states have the undisputed power to regulate working hours of those who are deemed to require special protection of the state. Thus, the United States Supreme Court has upheld the validity of state statutes regulating the hours of work of children and women. It has never been suggested that the state lacks power to limit the hours of labor of its own employes. Rather, it has been held to be within the power of the state to limit the hours of labor of those in its employ. Furthermore, the multitude of details pertaining to the compensation of municipal employes may be governed either by statutory, charter, or ordinance provisions.
>
> "It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its power and jurisdiction. The employes involved in the instant cases are performing services for political subdivisions of state governments. *Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employes would constitute a clear invasion of the sovereign*

rights of the political subdivisions of local state government." (Emphasis supplied.)

It may be noted that the Board was unanimous in this decision, the industry and labor members concurring.

The only area of unanimous agreement in the District Court was that this was a case of first impression. Even Judge Winter, who upheld the Act in its entirety, and gave the broadest construction to the commerce power, conceded that "the precise claim of unconstitutional interference with state sovereignty made in this case has not been adjudicated by any court". 269 F. Supp. at page 837. He concluded, however, on the basis of *Board of Trustees v. United States* (1933), 289 U.S. 48, that "the specific and peremptory rejection of the argument that the principle of duality in our system of government may limit in any way the authority of Congress to regulate commerce is dispositive of the present case". 269 F. Supp. at page 840.

Judges Thomsen and Northrop declared that the federal system created by the Constitution was an implied restriction on Congressional power, differing only as to where the limits were to be drawn. Because this is a case of first impression, and because it brings into conflict one of the most important powers of the national government with what Appellants and most political scientists regard as the cornerstone of our American political system, a complete review of both the power and its asserted limitations is in order. It is not enough to take dictum from the past and apply it blindly to a situation which the Court has not previously considered. Instead, a fresh look at what the people intended to create in 1787 should be had, as well as a realistic analysis of how this Court has balanced the delicate federal-state relationship since then.

In approaching the problem by historical analysis, Appellants do not contend that the ideas expressed in 1787

must be controlling now, or that decided cases since then must be ignored. They urge only that the erosion of State authority and integrity which we have experienced in the past several decades is neither inexorable nor inevitable and that, with this last and most serious attempt actually to regulate the scope of State and local *government,* it is time to reconsider just what kind of constitutional system we really have.

Leonard D. White expressed the need for such a reconsideration in 1953, when he stated:[1]

> "The time has come to reconsider the present condition of the states in the federal system and to take sober account of the consequences of the trends that have so long been at work against them. I do not assert that the states are in immediate danger, nor that much that has happened in transferring power and influence upward has been harmful. I do predict, however, that if present trends continue for another quarter century, the states may be left hollow shells, operating primarily as the field districts of federal departments and dependent upon the federal treasury for their support. This result would be bad for the federal government and would hold grave consequences for the kind of self-governing, local democracy that has been an essential part of our way of life."

The fear expressed by Mr. White fourteen years ago has become far more real and serious as a result of Public Law 89-601. Both the enormous thrust of the Act and the nonchalant — almost cavalier — fashion in which the public school system was subjected to it show that Congress has no apparent concern for the maintenance of a true federal system. But the Constitution created such a system, and resort must be had to this Court to save it.

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[1] Leonard D. White, *The States and the Nation,* Louisiana State University Press (1953), p. 2.

B. THE OPERATION OF PUBLIC SCHOOLS AND HOSPITALS DOES NOT CONSTITUTE COMMERCE AND DOES NOT AFFECT COMMERCE IN A WAY WHICH SUBJECTS THEM TO CONGRESSIONAL REGULATION.

In the District Court, the principal argument of the Appellees in favor of the Act's validity, and that which was accepted to a greater or lesser degree by Judges Winter and Thomsen, was that, since the schools and hospitals of the States affected commerce *by the volume of their purchases,* they were regulable under the commerce clause. As will be seen, however, this was not the basis upon which Congress enacted the law.

When Congress first enacted the Fair Labor Standards Act in 1938, it left no doubt as to its purpose. Section 2(a) of the Act stated:

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

Apparently, Congress did not find any of these unfortunate situations to exist with respect to State or local governmental employment (or perhaps it found that States were not "in industries engaged in commerce or in the production of goods for commerce") because, in Section 3,

it excluded from the provisions of the Act "any State or political subdivision of a State". Since 1938, the Act has been amended at least seven times, excluding Public Law 89-601, but throughout all of these amendments over a twenty-five year period, no serious attempt was made to bring the States and their political subdivisions within the Act. In no part of the legislative history of any of these amendatory Acts is there any suggestion that States are involved in industries engaged in commerce or in the production of goods for commerce, or that any of the detrimental effects which gave rise to the original Act were present in State or local government employment.

The legislative history of the Act contains no discussion of the history of the original exemption, except that it was in the bill from the beginning, and was never deleted. It would seem to reflect, however, the awareness and concern of Congress over the constitutionality of the Act and the bill was drawn with this very much in mind. See House Rpt. No. 1452, 75th Congress, 1st Sess., p. 9, August 3, 1937.

In 1966, Congress enacted Public Law 89-601 which removed the legislative exemption of State and local governments in the area of schools and hospitals. The legislative history of Public Law 89-601 began on January 4, 1965, when the President, in his State of the Union Message, advocated the "extension of the minimum wage to more than 2 million unprotected workers". U. S. Code Congressional and Administrative News, 89th Congress, 1st Session, No. 1, p. 9. On January 28, 1965, the President submitted his Economic Report to Congress (H. Doc. No. 20, 111 Congressional Record 1402), wherein he again recommended coverage "for an additional 2 million workers".

On May 18, 1965, a Special Message from the President on amending the Fair Labor Standards Act was delivered to Congress (H. Doc. No. 176, 111 Congressional Record

10399). The President therein urged extension of the law to cover an additional 4,500,000 workers and submitted a draft bill to accomplish that purpose. The Administration Bill (S. 1986, H.R. 8260) did *not* remove the existing exemption for States or their subdivisions.

The Bills were referred to the respective Labor Committees of each house, where they were substantially revised. Separate bills had also been introduced by Congressman Roosevelt (H.R. 8260 and H.R. 10518), which were also referred to the Labor Committee. The House Bill, as reported by the House Labor Committee (renumbered H.R. 13712) was expanded to cover 7,200,000 workers. In its Report (No. 1366, 89th Congress, 2nd Session) the Committee noted that there were some sixty million wage and salary workers in the United States, of which less than twenty-seven million were then covered by the Act. A large number of the sixty million, said the Report,

> "are beyond the scope of the Act's practical, possible, or needed coverage. But of the 47 million workers *in private industry* who might be brought within the coverage of the wage and hour guarantees, 17½ million are not in fact covered." (Emphasis supplied.)

Notwithstanding the apparent concern only for persons employed in "private industry", the Committee recommended removal of the exemption of state and local governments with respect to hospitals, institutions of higher education and schools for mentally-handicapped or gifted children. Removal of the exemption with respect to the public elementary and secondary schools was not recommended. On the floor of the House, an amendment was offered removing the exemption for public schools, which was passed without debate.

In the Senate, the Labor Committee reported a Bill which, with respect to the matter involved here, was similar to the one recommended by the House Labor Commit-

tee. It covered hospitals, institutions of higher education and special schools for mentally-handicapped or gifted children, but not the general public school system. In commenting on the House action, the Senate Labor Committee noted:

> "The committee amended the House bill to delete from coverage employees of public and private elementary and secondary schools. By this action, approximately 900,000 employees were removed from coverage of the bill. *Coverage for elementary and secondary schools was adopted during House consideration of H.R. 13712 and without the benefit of hearings or prior consideration of the amendment.* By exclusion of these employees from coverage under the Senate reported bill, the committee is not passing upon the merits of extending coverage of the act to employees of elementary and secondary schools. *It believes that this amendment should be the subject of hearings and further consideration in future amendments to the act. The committee was also concerned about the impact which a possible increase in wages for such employees might have upon local school districts that depend in part upon tax dollars for operating revenues.*" (Emphasis supplied.)

In this connection, it is believed, and therefore asserted as fact, that not one State, State agency, school district, public hospital, or other affected entity was ever officially notified of the pendency of these bills, or asked to present its views. Except for the comment in the Senate Labor Committee Report, quoted above, there is nothing in the legislative history to indicate that any consideration was given to the repercussions of the amendment as finally adopted.

The Senate passed the bill essentially as recommended by its Labor Committee — covering nonfederal hospitals, institutions of higher education, and special schools, but not the general public school system. The last two bills

then were referred to Conference Committee. In its Conference Report No. 2004, the Committee adopted the House version without assigning any reasons therefor. The Congress thereafter enacted the bill as so reported, and it was later signed by the President.

The reasoning behind extending the coverage of the Act to State and local government employees can only be gleaned from the respective Labor Committee Reports, since there was no apparent debate on the subject on the floor of either house. The House Labor Committee stated that:

> "These enterprises (i.e., schools and hospitals, etc.) which are not proprietary, that is, not operated for profit, are engaged in activities *which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce'.*" (Emphasis supplied.)

In discussing the "fact" of competition, the Committee was referring exclusively to the minimum wage, and made no mention of the overtime provisions of the Act, although the same basis would appear to be equally applicable to overtime premiums as well. The Committee's sole concern, however, was that these institutions pay "this bare minimum". The Senate Labor Committee's Report parroted the above quotation from the House Committee Report verbatim. *Thus, the only rationale for intruding into the area of State and local government employment was that the newly-covered activities were in "substantial competition" with similar private commercial organizations.* In other words, Congress was using the rationale of *United States v. Wrightwood Dairy Co.* (1942), 315 U.S. 110, and, to a

certain extent, *Wickard v. Filburn* (1942), 317 U.S. 111, to include within the scope of its regulation those State activities which it considered to be in substantial competition with activities clearly regulable.

In *Wrightwood,* the question was whether the competition between milk produced locally and milk produced for interstate commerce was a sufficient basis for regulating the local product. The facts showed that 40% of the milk needs of Chicago were met from milk produced out-of-State, the balance being produced in Illinois. The fact of, and substantiality of, the competition, according to the Court, demonstrated the effect of the local product on interstate commerce, and thereby authorized its regulation. *Wickard* was in the same vein. The accumulated total of all the homegrown wheat produced on small farms was sufficient to have a substantial impact on the market price of wheat generally.

Contrary to the unsupported assertions of the House Labor Committee and as distinguished from *Wrightwood, Wickard* and similar cases, the facts here generally (and especially the facts stipulated to by the parties hereto) illustrate quite clearly that there is no real competition in these areas, and that the wage and hour terms of the affected public employees have little or no effect on that phase of commerce which Congress was attempting to regulate.

The stipulations filed herein show that in Maryland, which, together with Texas and Ohio, is declared to be representative of the other forty-seven States, 84.3% of all children attending elementary and secondary schools are in the public school system. The largest "competitor" are non-profit schools owned by or affiliated with religious organizations, which account for another 14.3%. When the other State-run schools (such as the training schools and the

programs in the mental hospitals) are considered, it is found that slightly over 1% of all Maryland children are attending elementary or secondary schools "carried on by enterprises organized for a business purpose" (Appendix, p. 67a).

With respect to the hospitals, the facts show that 100% of the tubercular patients in Maryland are in State hospitals, because there are no private hospitals with tubercular beds. The facts show that 94.4% of all mental patients in Maryland are confined either in State hospitals (91.6%) or in hospitals owned and operated by religious organizations (2.8%). They further show that, under State law, every patient in a State-operated chronic disease hospital is there because "the special facilities required by their conditions are not otherwise obtainable elsewhere in Maryland". Article 43, Section 599, Annotated Code of Maryland (Appendix, p. 70a).

On a national scale, figures published by the United States Department of Health, Education and Welfare show that in the fall of 1961 (the latest date for which a complete breakdown is available) there were 43,240,670 children attending elementary and secondary schools. Of these, 37,504,190, or 86.73%, attended the public schools, 5,496,529, or 12.71%, attended religiously-affiliated schools, and only 239,951, or 0.56%, were enrolled in nonpublic, nonreligiously-affiliated schools.[2]

To claim the need to regulate between 99 and 99.5% of an "industry" because it is in "substantial competition" with the privately-owned and -operated ½ to 1% which is legitimately regulable is the most extreme example of the tail wagging the dog. As a basis for regulating such a vital

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[2] *Enrollment, Teachers and Schoolhousing*, U. S. Dept. of Health, Education and Welfare, OE-20007-61, p. 10; Statistics of Nonpublic Elementary Schools — 1961-62, OE-20064-62; Statistics of Nonpublic Secondary Schools 1960-61, OE-20050.

State function, this "finding" of the House Labor Committee is simply improper. It is utterly devoid of any factual support.

In order to justify the Act, therefore, the Appellees, and a majority of the court below, relied not on the question of competition, but on the fact that the schools and hospitals affect commerce in other ways — by purchasing goods and services from out-of-State, accepting federal funds and engaging in correspondence with persons out-of-State. This is the basis upon which it was held that Public Law 89-601 (or at least the minimum wage provisions of it) is constitutional. In examining this contention, however, we find that there was no evidence offered to show that the application or nonapplication of the federal standards will have even the slightest effect on (1) the volume of purchases made in interstate commerce, (2) the amount of correspondence carried on with persons out-of-State, or (3) the inflow of federal funds.

The States are committed to providing public education and, in certain areas, public hospital facilities. To carry out these functions, they will be required to purchase a certain amount of materials and supplies; but the amount of such purchases will not, as in private, profit-making industry, depend on the nature of the relationship with their employees.

The wages and hours of janitors, dieticians, and other affected employees will hardly affect the amount of drugs, X-ray equipment, desks, blackboards or other supplies purchased by the State hospitals and schools. In light of the Congressional concern over the low wages of hospital employees, as expressed in the Labor Committee Reports, and the need to regulate State hospitals as competing institu-

tions, it is interesting to note that the stipulated facts herein, derived from exhibits prepared by Appellees, show the average wage in State and local government hospitals for 1965 to be $4,381.00. This is 8.7% higher than the average wage paid by nongovernmental hospitals, and 116% higher than the federally-required minimum for 1967. The facts further show the average hourly earnings of nonsupervisory personnel in State and local government hospitals to be 6% above that for nongovernment hospital personnel, and 94% above the federally-required minimum. (Appendix, p. 122a).

No evidence was offered below, and there was nothing in either of the two Committee Reports, or in any other part of the legislative history of Public Law 89-601, to show that there was an inordinate number of work stoppages in the public schools and hospitals, or that such stoppages which did occur were due to wages below the federal minimum, or that they substantially affected or burdened commerce. In short, the whole basis of the extended coverage to State personnel rests on surmise and speculation, and no real connection with interstate commerce has been demonstrated. It would take a major strike — probably of persons, like teachers, who are not even subject to the Act — for an extended period of time before interstate commerce would "feel the pinch"; and there was no evidence below that such strikes have occurred, or are likely to occur.

The word "commerce" may be very broad, but it does not encompass every form of activity. The word "commerce" in its most liberal sense has certain limitations and, since it is used in the context of a grant of power in an organic instrument of government, whatever limitations may attach to it, or circumscribe it, are *constitutional* in nature. Thus, if a particular form of activity is not com-

merce, it is constitutionally not commerce, and Congress cannot regulate it simply by declaring it to be commerce.

So it is with public schools and hospitals. There can be no doubt that the creation, maintenance and control over a system of public education is a State governmental function. This has been recognized judicially. *Marshall v. Donovan* (Ky., 1874), 10 Bush 681; *Talbott v. Independent School Dist. of Des Moines* (1941), 230 Iowa 949, 299 N.W. 556; *Board of Education v. Society of Alumni of L.M.H.S.* (Ky., 1951), 239 S.W. 2d 931; *State v. D'Aulisa* (1947), 133 Conn. 414, 52 A. 2d 636; *Carlberg v. Metcalf* (1930), 120 Neb. 481, 234 N.W. 87; *School Dist. No. 3 of Town of Adams v. Callahan* (1941), 237 Wis. 560, 297 N.W. 407; *State v. Brand* (1937), 214 Ind. 347, 5 N.E. 2d 531; *People v. Jackson-Highland Bldg. Corporation* (1948), 400 Ill. 533, 81 N.E. 2d 578; *Brown v. Board of Education* (1954), 347 U.S. 483.

Every State in the Union has a free public school system administered or supervised by State authorities. In most States, the provision of such a system is required by Constitutional mandate.[3] The stipulations filed in this case

[3] See for example, the Constitutions of Arizona (Article XX, Section 7; Article XI, Section 1), Arkansas (Article XIV, Section 1), Delaware (Article X, Section 1), Florida (Article XII, Section 1), Idaho (Article IX, Section 1), Illinois (Article VIII, Section 1), Indiana (Article VIII, Section 1), Kansas (Article VI, Section 2), Kentucky (Section 183), Maryland (Article VIII, Section 1), Michigan (Article XI, Section 9), Minnesota (Article VIII, Section 1), Montana (Article XI, Section 1; Ord. I, Section 4), Nebraska (Article VII, Section 6), Nevada (Article XI, Section 2), New Mexico (Article XII, Section 1; Article XXI, Section 4), New Jersey (Article VIII, Section IV-1), New York (Article XI, Section 1), North Dakota (Article VIII, Sections 147, 148), Oklahoma (Article I, Section 5; Article XIII, Section 1), Oregon (Article VIII, Section 3), Pennsylvania (Article X, Section 1), South Dakota (Article XXVI, Section 18(4)), Texas (Article VII, Section 1), Utah (Article X, Sections 1, 2), Virginia (Article IX, Section 129), Washington (Article IX, Section 2; Article XXVI), West Virginia (Article XII, Section 1), Wyoming (Article VII, Section 1; Article XXI, Section 28).

bear witness both to the extent of the State commitment in this area and the lack of any "commercial" competition.

The operation of a public school system and certain types of public hospitals has three attributes which, together, remove it from any legitimate definition of "commerce". Such a system is (1) free, and therefore nonprofit; (2) purely governmental; and (3) so marginal, in an economic sense, that there could never be a nongovernmental system to compete with or substitute for it.

The Appellants are aware of no instance in which an activity having all three of those attributes has been held to be "commerce", and the Appellees have cited none. In response, Appellees, and a majority of the court below, pointed to a number of decisions to the effect that "commerce", as used in Article I, Section 8 of the Constitution, includes activities which may be nonprofit, or even non-"commercial".[4] An examination of these decisions, however, show that they are not really in point.

Edwards v. California (1941), 314 U.S. 160, held that the transportation or traveling of persons across State lines constitutes commerce and that a State could not burden or obstruct it by prohibiting the transportation of indigents from other States. *Caminetti v. United States* (1917), 242 U.S. 470, held the transportation of women interstate for purposes of prostitution to be commerce and, therefore,

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[4] The cases referred to by Judge Winter in this regard were *Edwards v. People of State of California,* 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941); *Thornton v. United States,* 271 U.S. 414, 46 S. Ct. 585, 70 L. Ed. 1013 (1926); *Caminetti v. United States,* 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917); *Brooks v. United States,* 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699 (1925); *United States v. Hill,* 248 U.S. 420, 39 S. Ct. 143, 63 L. Ed. 337 (1919); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. at pp. 256-257, 85 S. Ct. at p. 357.

regulable by Congress. *Brooks v. United States* (1925), 267 U.S. 432, declared the interstate transportation of stolen motor vehicles to be commerce, subject to Congressional control. *Thornton v. United States* (1926), 271 U.S. 414, sustained a conviction for assaulting an employee of the federal Bureau of Animal Industry, in the course of which it was held that the movement of cattle across State lines constituted commerce which Congress could regulate. *United States v. Hill* (1919), 248 U.S. 420, sustained a conviction under the Webb-Kenyon Act for transporting liquor from a "wet" State to a "dry" State, in violation of the latter's laws. The Court held it immaterial that the liquor in question was for the defendant's own consumption and not for resale on the theory that "commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities". 248 U.S. at page 423.

These cases all involved objects of commerce moving across State lines, and it was the movement of the objects which was being regulated. They are in no way akin to the attempted regulation here. The cases of *Powell v. United States Cartridge Co.* (1950), 339 U.S. 497; *Mitchell v. Lublin, McGaughy & Assoc.* (1959), 358 U.S. 207; *Mitchell v. Pilgrim Holiness Church Corp.* (7th Cir., 1954), 210 F. 2d 879; and *N.L.R.B. v. Central Disp. & E. Hosp.* (D.C., 1945), 145 F. 2d 852, relied on by Judge Winter, did not involve State or local governmental institutions and are not, therefore, in point. These cases merely hold that the existence of a profit motive is not necessary for an activity to constitute commerce. The other two characteristics present here were lacking.

Neither does *Public Building Authority of Birmingham v. Goldberg* (5th Cir., 1962), 298 F. 2d 367, lend any sub-

stantial support. In that case, the question was whether maintenance personnel employed by a private corporation which was under contract with a municipal authority to manage a building leased in part to the Social Security Administration were covered under the Fair Labor Standards Act. The Court had no difficulty in finding that the employees were not engaged in commerce, or in the production of goods for commerce. The government contended, however, that the federal employees working in the building were engaged in the production of goods for commerce, and that the maintenance personnel were therefore engaged in a "closely related process or occupation directly essential" to such production. The Court, in considering this approach, stated, at page 370:

> ". . . It just seems somewhat difficult to grasp the concept of a Government employee working on a Social Security Claim as producing goods for commerce. This is partially because the concept of 'producing goods' must be stretched to the outermost to include preparation and working on documents and partially because commerce generally has a connotation of business or profit. . . ."

Nevertheless, because "the courts have held that what these Government employees do would, if done in industry, amount to 'production of goods for commerce' ", the Court was constrained to hold that they too were so engaged. Accordingly, the maintenance employees were held to be covered because of their vicarious connection with commerce.

There are certain very real distinctions to be raised between the *Public Building Authority* case and the case at bar. In the first place, the Social Security employees were not sought to be covered under the Act, and no issue was raised as to whether they (or, more particularly, their

counterparts in State service) could constitutionally be covered. The case did not answer the question of whether State and local government employees could be subjected to federal regulation. Second, even as to the government employees themselves, their duties were far different than the duties of the employees affected here. Their job was to accept and process applications from and mail checks to persons residing out of the State. They performed no local function whatever. Nearly everything they did was for the ultimate purpose of sending money out-of-State — money which would be spent by its recipients for goods and services. The direct effect on interstate commerce is quite clear. If the maintenance people stopped working, the building may have been closed, the checks would not get out, and interstate commerce would have been burdened.

In short, by no legitimate test has the employment relationship of public school and hospital personnel been shown to have a substantial effect on commerce, whether by the illusion of competing with private institutions or by purchasing goods and services from out-of-State. These are functions of government and have no more than a remote and incidental effect on commerce as do all functions of government.

C. Even If the Operation of Public Schools and Hospitals Affects Commerce, They Are Not Subject to the Type of Regulation Imposed by the Fair Labor Standards Act.

As previously noted, Appellants do not contend that the public schools and hospitals are immune from all federal regulation. The Fourteenth Amendment has authorized certain guidelines to which they must conform and which have, on occasion, been federally enforced. But a distinc-

tion must be made between various types of regulations. If the regulation, though on its face directed solely at particular institutions, such as schools and hospitals, actually transcends them and strikes at the heart of State government, the question is no longer whether these institutions can be regulated, but whether the State government can be regulated.

Moreover, if the power to regulate schools and hospitals can be found merely because their operations affect commerce, then it cannot be denied that every other agency of State government which similarly affects commerce is also as regulable. Judge Winter, below, dismissed this concept as conjuring up nonexistent ghosts and limited his consideration of the question solely to the facts at hand. But it is not just what Congress has actually done which is at issue, but the Constitutional power to do it. As Justice Frankfurter stated in dissent in *West Va. State Bd. of Educ. v. Barnette* (1943), 319 U.S. 624, 660, the case is not dissociated from the past nor unrelated to the future. The effects of the Court's decision on possible related issues can be considered, as they were in *Zorach v. Clauson* (1952), 343 U.S. 306, 312, 313. The argument here is that the "effect" test has certain implied limits — that Congress can no more regulate a school janitor's salary than it can the Governor's, because the legal principle is the same. The Appellees' contention that the janitor's salary can be regulated because the school which employs him purchases goods and services from out-of-State necessarily requires them to admit that Congress may also regulate the wages and hours of the Governor, the judges, members of the State legislature, the Attorney General, the district attorneys and, in fact, the members and employees of all State and local boards and agencies, whenever it appears that such agencies or officials buy goods and services from out-

of-State. It was stipulated below that nearly all, if not all, of these officials and agencies do, in fact, make such purchases so that they too affect commerce.

If this admission is made — as by the force of logic it must be — then the true scope or depth of the issue can be seen. We are talking about relative power and sovereignty; Appellants will seek to demonstrate that the type of interference or intrusion involved here was never authorized by the framers of the Constitution, or the States which ratified it, and that it has never been approved by any decision of this Court. In this context, the scope of and limits to federal power can be examined.

1. *The Commerce Power and Federalism — Original Intent.*

The journals of the Constitutional Convention of 1787 and the ratifying conventions in the various States, as well as the letters and documents of the principal actors of the time, reveal two very clear and definite facts: (1) in granting to Congress the power to regulate commerce, the States never intended that such power, either negatively or affirmatively, could or would be used to circumscribe their exclusive authority over local matters; and (2) no power delegated to the national government could authorize that government to interfere with the operation of State government.

The late Justice Felix Frankfurter wrote in 1937 that[5]

> "The records [of the Convention and State ratifying Conventions] disclose no constructive criticism by the States of the commerce clause as proposed to them. . . . The conception that the mere grant of the commerce power to Congress dislodged state power finds no ex-

[5] Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite,* Univ. of North Carolina Press (1937), pp. 12, 13.

> pression. At least the negative evidence permits the inference that the commerce clause was a sword available for Congressional use; it was an authorization to remove those commercial obstructions and harassments to which the militant new free states subjected one another, and to enable the community of the states to present a united front to the world."

This point of view was reflected by James Madison in Federalist No. 45, where he stated that[6]

> "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."

That the purpose of the new power was to curb the trade barriers erected by the States against each other and not to permit regulation of their own governments was also expressed by Madison in Federalist No. 42.

The Frankfurter view finds support also in the writings of Joseph Story, who stated:[7]

> "In the convention there does not appear to have been any considerable (if, indeed, there was any) opposition to the grant of the power. It was reported in the first draft of the constitution exactly as it now stands, except that the words, 'and with the Indian tribes' were afterwards added, and it passed without a division."

Aside from the commentaries of Justice Frankfurter, it is a logically compelling conclusion that, in view of the concept of State sovereignty then prevalent, this grant of power was directed at a single purpose only — to end the commercial rivalries between the States and present a united commercial front to the rest of the world. The very

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[6] James Madison, *The Federalist,* No. 45, published by R. Wilson Desilver (1847), p. 185.

[7] Joseph Story, *Commentaries on the Constitution of the United States,* Vol. II (1833), § 1054, p. 505.

absence of substantial objection to it, under the circumstances of the times, indicates rather clearly that it was never thought to be a weapon which could be used *against* the States; it was intended to strengthen them.

The second fact which emerges from the various documents — that the States, as politically autonomous units, were to be a major participant in the new system, and that no power delegated to the national government could be used to encroach upon their area of authority — finds expression in many ways. The Constitution itself bears witness to it.

The States — as States — chose the President (and still do) as well as the Senators. The State legislatures also played an important, if not dominant, role in choosing Congressmen in the House of Representatives, although this political fact was not given constitutional recognition. The times, places and manner of electing the federal legislators is, by Article I, Section 4, to be determined by the States. The territorial integrity of the States was guaranteed by Article IV, Section 3, and their participation in the amending process required by Article V.

The Federalist papers are replete with assurances that State autonomy would not be disturbed under the new constitution; in fact, the States were to be the bulwark against federal power generally. Even the nationalist Hamilton declared in Federalist No. 28:[8]

> "It may safely be received as an axiom in our political system, that the State Governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the National authority."

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[8] Alexander Hamilton, *The Federalist,* No. 28, published by R. Wilson Desilver (1847), p. 107.

Madison, in Federalist No. 45, pointed out that "the State Governments may be regarded as constituent and essential parts of the Federal Government; whilst the latter is nowise essential to the operation or organization of the former."[9] Continuing, he described the powers of the two sovereignties as follows:[10]

> "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."

With particular relevance to the issue in the proceeding at bar, Hamilton, in Federalist No. 32, dismissed the idea that the national government could control or interfere with the free and unfettered power of State taxation, stating:[11]

> ". . . I am willing here to allow, in its full extent, the justness of the reasoning, which requires, that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm, that (with the sole exception of duties on imports and exports) they would, under the plan of the Convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the National Government to abridge them in the exercise of it, would be a violent assumption of

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[9] *Op. cit.*, n. 6, p. 186.
[10] *Op. cit.*, n. 6, p. 187.
[11] *Op. cit.*, n. 8, No. 32, p. 119.

power, unwarranted by any article or clause of its Constitution."

Although, as Justice Frankfurter noted, there was little or no opposition to the delegation of the commerce power on the various ratifying conventions, there was a good deal of concern over the continued effectiveness of State government, and the degree of control over it which the national government may be authorized to exercise. The concern was in each case allayed by assurances such as those expressed by Hamilton and Madison.[12] Notwithstanding these assurances, however, several of the States ratified the Constitution only upon the condition that certain amendments would immediately be made, one of which would confirm the understanding that the powers not delegated to the national government were reserved to the States, free from national interference,

In the first Congress assembled under the Constitution, Madison's committee proposed a series of amendments, the last of which became the Tenth Amendment.

The Tenth Amendment, it may be conceded, added nothing specifically to the Constitution; it neither enlarged nor restricted any particular State or national power. *United States v. Sprague* (1931), 282 U.S. 716. It did, however, confirm the understanding that the newly-created government was one of specific powers, and that all other power was reserved to the States or the people. It presupposed that such reserved powers were inviolate and could not

[12] See, for example, the Bodman-Sedgwick discussion in Massachusetts, reported in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution,* Jonathan Elliott (1836), Vol. II, p. 60; Governor Huntington's comments in Connecticut, reported at page 199 of the same volume; Alexander Hamilton's Comments in New York, reported at page 353 of said volume; comments of James Wilson in Pennsylvania, reported at page 459 of said volume.

be usurped by the national government, in accordance with the many assurances of the federalists, as noted above. See *Hopkins Fed. S. & L. Asso. v. Cleary* (1935), 296 U.S. 315, 337.

Thus, in ratifying the Constitution, the original States accepted Congressional control over commerce (although there perhaps was no agreement on just what constituted commerce) but they certainly did not accept Congressional control over the scope and affairs of their own governments. All of the relevant literature indicates most strongly that the States were not at all disposed to create a national government which could, under any of its powers, interfere with the operation of State government, and that they did not, in fact, do so.

2. *The Commerce Power Generally — Judicial Construction*

From the time of the Marshall Court until the late 1880s, or even into the mid-1930s, the conflict between the commerce power and State autonomy arose in the context of which level of government would have the ultimate control over various external (i.e., nongovernmental) economic matters, or, conversely, the extent to which the States could pass laws which tended to hinder or obstruct the free flow of commerce. In most of the cases during this period, it was the validity of State, rather than federal, laws which was at issue.[13]

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[13] See, for example, Louis H. Pollak, *The Constitution and the Supreme Court* (1966), World Publishing Co., Vol. I, pp. 230, *et seq.*; *The Constitution of the United States of America,* prepared by the Legislative Reference Service of the Library of Congress, 88th Congress, Document No. 39 (1964), p. 150; Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite, op. cit.,* n. 5, p. 7; *Wickard v. Filburn* (1942), 317 U.S. 111.

It had never seriously been disputed that, if a State regulation of commerce were in conflict with a valid federal regulation, the latter would control. The question in the early cases was whether the States could regulate commerce in the absence of a federal regulation; in other words, was the Congressional power so exclusive as, of itself, and without an actual exercise of it, to preclude State action? The cases fall into three definable patterns: (1) those where a State regulation of commerce was tested against the federal commerce power;[14] (2) those where a State tax or revenue measure was tested against the commerce power;[15] and (3) those where a State regulation of commerce was tested against other constitutional provisions.[16]

The factual situations in these cases, and the shifts in philosophy by the Court, need not be recounted here.[17] Their relevance to the case at bar is in the three interlocking concepts which arose from them; namely, (1) that the commerce power is plenary and broad and, in situations

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[14] See, for example, *Gibbons v. Ogden* (1824), 9 Wheat. 1; *Wilson v. Black Bird Creek Marsh Co.* (1829), 2 Pet. 245; *Cooley v. Board of Wardens* (1851), 12 How. 299; *Hall v. DeCuir* (1877), 95 U.S. 485; *Morgan v. Commonwealth of Virginia* (1946), 328 U.S. 373; *Bob-Lo Excursion Co. v. Michigan* (1948), 333 U.S. 28; *Southern Pacific Co. v. Arizona* (1945), 325 U.S. 761.

[15] *M'Culloch v. Maryland* (1819), 4 Wheat. 316; *Brown v. Maryland* (1827), 12 Wheat. 419; *Woodruff v. Parham* (1869), 8 Wall. 123; *The License Cases* (1847), 5 How. 504; *The Passenger Cases* (1849), 7 How. 283.

[16] See *The Slaughterhouse Cases* (1873), 16 Wall. 36; *Lochner v. New York* (1905), 198 U.S. 45; *Muller v. Oregon* (1908), 208 U.S. 412; *Adkins v. Children's Hospital* (1923), 261 U.S. 525; *Morehead v. New York* (1936), 298 U.S. 587; *West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379. It is noted that this line of cases begins later than the other two primarily because the other provision of the Constitution against which the State regulation was tested was largely the Fourteenth Amendment, which did not take effect until 1868.

[17] They are summarized in Frankfurter, *op. cit.*, n. 5, and Pollak, *op. cit.*, n. 10.

where national uniformity is required, also exclusive; but (2) that it is not unlimited, there being some activities which are beyond its reach; and (3) that implicit in our Constitutional scheme is the maintenance of strong and effective State governments. Many passages from these opinions could be quoted to support each of the three propositions. *Gibbons v. Ogden* (1824), 9 Wheat. 1, best sustains the first concept. The other two, equally important, were summarized best by Justice McLean in *Pierce v. State of New Hampshire* (1847), 5 How. 504, 588 (one of the *License Cases*), when he stated:

> "The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal conditions. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty so exclusively as powers delegated appertain to the general government."

Continuing, at page 592, he noted that what has not been delegated to Congress (in terms of commerce) remains with the States.

> ". . . every reason which leads to this result, applies with still greater force to the internal polity of a State, over which there is no pretense of any jurisdiction by Congress. No subtlety of reasoning, no refinement of construction, or ingenuity of supposition, can make commerce embrace police or pauperism, which would not, by parity of reasoning, include the whole code of State legislation. . . ."

Starting with the Interstate Commerce Act in 1887, Congress began to exercise its power under the Commerce

Clause in a more affirmative fashion, and the cases coming before the Court began more and more to involve the degree to which positive Congressional action was authorized rather than the extent to which State action was unauthorized. The early cases arising in this context indicated that the plenary power was not really so plenary.[18] These decisions did not rest on the basis that Congress could not regulate commerce, but rather that either (1) the activities to be regulated were not commerce, or (2) the power to regulate commerce was itself subject to other Constitutional limitations (such as the prohibition against laws impairing the obligation of contracts).

In 1936, the philosophy behind the earlier restrictive decisions changed, and the Court began to apply the broad concepts enunciated by John Marshall in the context of State actions to the positive programs of Congress. It is partly from these decisions that Appellees (and certainly Judge Winter below) draw support for their position, so careful consideration must be given to them. The cases, as noted by Judge Thomsen in his concurring opinion below, fall into two categories; namely, "those in which the regulation was being applied to and challenged by a party other than a State or a political subdivision, and those in which the regulation was being applied to and challenged by a State itself or by a political subdivision of a State" 269 F. Supp. at page 847.

Because these later cases involved, or required, a redefinition of the commerce power and what activities it

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[18] See *United States v. E. C. Knight Co.* (1895), 156 U.S. 1; *Hammer v. Dagenhart* (1918), 247 U.S. 251; *Adair v. United States* (1908), 208 U.S. 161; *Panama Refining Co. v. Ryan* (1935), 293 U.S. 388; *Railroad Retirement Board v. Alton Railroad Co.* (1935), 295 U.S. 330; *A. L. A. Schechter Poultry Corp. v. United States* (1935), 295 U.S. 495; *United States v. Butler* (1936), 297 U.S. 1; *Carter v. Carter Coal Co.* (1936), 298 U.S. 238.

could reach in the face of the earlier decisions, some very broad and general language was used which Appellees have lifted and made applicable to the case at bar. In this connection, it is important to recall the self-restraint imposed by Chief Justice Taney in the *License Cases, supra,* 5 How. 504, when he stated, at page 573:

> "It is not my purpose to enter into a particular examination of the various passages in different opinions of the court, or of some of its members, in former cases, which have been referred to by counsel, and relied upon as supporting the construction of the Constitution for which they are respectfully contending. And I am the less inclined to do so because I think these controversies often arise from looking to detached passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the court never intended should be given to them, and which in some instances would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court."

The same concept was restated in *Gomillion v. Lightfoot* (1960), 364 U.S. 339, 343, as an admonition that:

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. . . ."

In this light, the cases can be considered.

(a) *Cases Involving Private Parties.*

The first category of cases, as noted, involved an attempted regulation of nongovernmental parties by Congress, the challenge usually being that the activity involved

did not constitute commerce, or that it was subject to regulation, if at all, only by the States. The "sovereignty" of the States was vicariously interposed, not in order to preserve some essential *governmental* function, but only to elude federal regulation of a private economic activity.

N.L.R.B. v. Jones & Laughlin Steel Corp., supra, 301 U.S. 1; *United States v. Darby, supra,* 312 U.S. 100; *United States v. Wrightwood Dairy Co.* (1942), 315 U.S. 110; *Wickard v. Filburn, supra,* 317 U.S. 111; *Heart of Atlanta Motel v. United States* (1964), 379 U.S. 241; *Katzenbach v. McClung* (1964), 379 U.S. 294, are examples of such cases.

In *Jones & Laughlin,* the National Labor Relations Act was challenged "as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns". 301 U.S. at page 29. The Court answered this contention by recognizing that the Act limited the federal reach to those activities which burdened or obstructed commerce or the free flow of commerce. As to the argument that the plant in question was engaged in manufacturing, which was purely local and did not of itself constitute commerce, the Court noted, at 301 U.S., page 37:

> ". . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . ."

The Court was careful, however, to place some boundaries on the newly-interpreted power. Continuing, it said:

> ". . . Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects

> upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. . . ."

In the particular case, the Court refused to shut its eyes to the plain facts of economic life. However local an operation may be in and of itself, labor unrest in a company like Jones & Laughlin could and would have a direct and serious effect on interstate commerce, and, because of this, the phases of the employment relationship which were most likely to cause such unrest were subject to Congressional regulation.

The basis of the original Fair Labor Standards Act, which led to *United States v. Darby, supra,* 312 U.S. 100, has already been noted. *Darby* involved a restatement and slight extension of the principles announced in *Jones & Laughlin.* Three central issues were raised; namely, (1) did manufacturing for shipment in interstate commerce itself constitute commerce, especially where part of the goods so manufactured may not find their way into interstate commerce; (2) if so, did the Congressional regulatory power extend to prohibiting the shipment of goods in commerce; and (3) did the fact that the federal government was moving into an area theretofore subject to regulation only by the States constitute a violation of the Tenth Amendment?

The Court answered the first question by holding that, although manufacturing itself was not commerce, "the shipment of manufactured goods interstate is such commerce" which Congress may regulate; 312 U.S. 113. With respect to the argument that some goods may not find their way into interstate commerce and, to that extent, both

their manufacture and distribution constitute only intrastate commerce, the Court held that the Congressional power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce". 312 U.S. 118. This was simply a rewording of the old "effect" test which had its origins in *M'Culloch v. Maryland* (1819), 4 Wheat. 316, 421.

The third challenge, that the federal regulations contravened the Tenth Amendment, was put to rest with the statement that "it is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states". 312 U.S. 114. It was in this context that the Court stated that the Amendment was but a truism — that all which has not been granted is reserved. But, as noted, and as must be kept in mind with respect to this series of cases, no reserved power of the State was, in point of fact, being infringed upon. An area of commerce previously subject only to State regulation (and not effective regulation at that, particularly as a result of *Hammer v. Dagenhart,* 247 U.S. 251) was now being made subject to federal regulation as well. Nothing was being removed from State government, and no outside control over *it* was being exercised.

United States v. Wrightwood Dairy Co., supra, 315 U.S. 110, followed the pattern of *Jones & Laughlin* and *Darby* and led the way to *Wickard v. Filburn, supra,* 317 U.S. 111.

The *Wrightwood* case, previously discussed *infra* at page 19, does not constitute any marked extension of the commerce power. It acknowledged only that, where there was substantial competition between a local and interstate

form of commerce, the former could be regulated if it affected the latter. This concept was restated in *Wickard v. Filburn, supra,* 317 U.S. 111, which held that homegrown wheat, intended to be used solely by its planter for his own domestic purposes, was subject to the Secretary of Agriculture's quota allotments because such wheat was in competition with other wheat shipped in interstate commerce, and thereby affected the market price of the commodity. In both *Wrightwood* and *Wickard* the Court cited the broad language of Chief Justice Marshall in *Gibbons v. Ogden* as authority for the extension of the commerce power over activities local in nature which substantially affect interstate commerce. But, in all of these cases, the activity to be regulated was commerce, not government; and the language employed to justify or explain the specific conclusions of the Court cannot be lifted out of that context.

The two "civil rights" cases — *Heart of Atlanta Motel, Inc. v. United States, supra,* 379 U.S. 241, and *Katzenbach v. McClung, supra,* 379 U.S. 294 — relied upon by Appellees below as well as by Judge Winter, are of the same effect. In *Heart of Atlanta,* wherein the Public Accommodations sections of the Civil Rights Act of 1964 were upheld, the Court stated:

> ". . . While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. . . ." (p. 252).
>
> ". . . We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel" (p. 253).

Upon these findings, the Court then considered the application of the commerce power. After liberally quoting from *Gibbons v. Ogden, supra,* the Court held, with ample

authority, that interstate travel constitutes commerce which Congress can regulate. As to the argument that hotels and motels were local in character, the Court said:

> ". . . It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, 'if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' [Citations.]
>
> ". . . Thus the power of Congress to promote interstate commerce also includes the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may — as it has — prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear."

The holding with respect to the commerce power in *Heart of Atlanta* was carefully related to the factual evidence in the case, and that evidence clearly demonstrated that racial discrimination placed a substantial burden on interstate commerce. The same situation existed in *Katzenbach v. McClung, supra,* 379 U.S. 294, wherein the application of the Public Accommodations sections of the Civil Rights Act of 1964 to certain restaurants was sustained. There, also, the Court found that:

> ". . . The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. . . ." (p. 299).
>
> ". . . In addition, there were many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities. . . ." (p. 300).
>
> "Moreover there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. . . ."

The Court concluded from these facts that:

> ". . . established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it. . . ."

Upon these conclusions, the Court then stated that, where the exercise of the commerce power "keeps within its sphere and violates no express constitutional limitation", the Court would not interfere.

The cases in this first category establish the proposition that the commerce power authorizes the regulation of those activities which have a substantial effect on interstate commerce. They serve as no authority for the propositions advanced by Appellees and accepted by Judge Winter and, to a certain extent, by Judge Thomsen, that anything at all which affects commerce may be regulated, or that the maintenance of effective State government is not an implied limitation on the commerce power.

In each case, and in the cases referred to in Part B hereof, *supra*, at pages 24 and 25, the activity regulated either moved itself in interstate commerce or, absent the regulation, could be expected to burden or obstruct interstate commerce. In *Jones & Laughlin*, the Court reiterated the fact, expressed many times before, that there were activities which may have an indirect and remote effect on commerce, but which were beyond the scope of Congressional power. The maintenance of our federal system was an implied limitation. See 301 U.S. at page 37, quoted *supra*, at page 39 hereof. No case since *Jones & Laughlin* has overturned this principle. It was, in fact, reaffirmed in *Polish Nat. Alliance v. N.L.R.B.* (1944), 322 U.S. 643, where the Court, though sustaining the application of the National Labor Relations Act to insurance companies,

noted with respect to the federal-state relationship, at page 650:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. *Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity.*" (Emphasis supplied.)

It is especially important to note also the context in which the Tenth Amendment arguments were rejected in these cases. The concern expressed by the States during the 1787 Convention and during the various ratifying conventions which led to the Tenth Amendment was not that the federal government would exercise dominion over private commercial activity. As previously noted, the commerce power was granted without substantial opposition in order to permit such regulation. The States were not afraid of sharing their own regulatory power over private enterprise. Their concern was that the new government might attempts to exercise dominion over *them* and to infringe upon their integrity as States — as semiautonomous political entities; and that was the reason for the Tenth Amendment.

Accordingly, the interposition of State sovereignty and the Tenth Amendment by private groups to elude federal regulation involved a misapplication of both the doctrine and the Amendment; and its rejection by the Court did not lessen their true and intended existence and effect. No reserved power of the States was being denied in any of these cases.

(b) *Cases Involving States and State Agencies.*

In contrast to the above cases, there have been several decisions of this Court wherein the regulation of an eco-

nomic activity by Congress has been held applicable to States and State agencies to the extent that they may engage in the activity. Appellees relied very heavily in the court below on these decisions to sustain Public Law 86-601. Appellants maintain that these decisions do not justify that conclusion and, in fact, the reasoning behind them (as opposed to the *dicta* in them) indicate that Congress does not have the power it has presumed to exercise here.

The cases within this second category tend to fall into three subgroups: (1) the application of commercial regulations to State agencies engaging in purely commercial activities; (2) the supremacy of federal power appropriately exercised over a conflicting State interest; and (3) the extent of State immunity from direct federal regulation.

The cases of *United States v. California* (1936), 297 U.S. 175; *California v. Taylor* (1957), 353 U.S. 553; and *Parden v. Terminal R. Co.* (1964), 377 U.S. 184, are characteristic of the first subgroup and may be considered together.

The two California cases concerned the State-owned Belt Railroad. This was a line owned and operated by the State which paralleled the San Francisco waterfront. It extended to forty-five wharves and directly served 175 industrial plants. It had track connections with one interstate railroad and linked three other interstate lines with freight yards in San Francisco. The larger part of the traffic carried on the railroad had its origin or destination outside of California.

The first case in time (*United States v. California,* 297 U.S. 175) involved the question of whether the State, in its operation of this railroad, was subject to the Federal Safety Appliance Act. After reviewing the above facts, the Court concluded that "all the essential elements of interstate rail transportation are present in the service rendered by the State Belt Railroad".

The issue was whether the State could be subjected to the Act because it was a State. Granting that California had the power to operate the railroad (and dismissing the distinction as to whether its operation was in a "sovereign" or "proprietary" capacity), the Court held that "California, by engaging in interstate commerce by rail, has *subjected itself* to the commerce power, and is liable for a violation of the Safety Appliance Act" (emphasis supplied). The Court used very broad language in describing the commerce power, but always in the context that the activity in question was, in fact, commerce to which the power was applicable in the first instance.

The second case (*California v. Taylor,* 353 U.S. 553) was similar. The question there was whether the State, in its operation of the Belt Railroad, was subject to the Railway Labor Act. From the facts developed in the previous case, the Court concluded that "it is a common carrier engaged in interstate commerce and files tariffs with the Interstate Commerce Commission". The Court noted one additional point of considerable significance, that the whole employment relationship (promotions, layoffs, dismissals, rates of pay, and overtime) "differed from their counterparts under the state civil service laws". The railroad had observed and followed the Railway Labor Act on its own for a number of years.

The Court described in some detail the history of the Act — how the railroad industry had to be treated as a whole and apart from other industries because of its peculiarities. It also mentioned, as was perfectly obvious, that labor disputes in the Belt Railroad could very directly and seriously affect interstate commerce. Accordingly, on the same theory adopted in the earlier case, the Court held that:

> ". . . If California, by engaging in interstate commerce by rail, subjects itself to the commerce power

> so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships."

Once again, there could be no question but that the affected activity was, itself, commerce.

Parden v. Terminal R. Co., 377 U.S. 184, involved a similar factual situation. The question there was whether a railroad owned by the State of Alabama was subject to the Federal Employers' Liability Act. The railroad ran near the docks at Mobile, served several industries, operated an interchange with private railroad companies, and performed its services "for profit under statutory authority authorizing it to operate 'as though it were an ordinary common carrier' ". The Court concluded from the evidence that "it is thus indisputably a common carrier by railroad engaging in interstate commerce" (p. 185).

The argument by Alabama was that the suit could not be maintained under the Eleventh Amendment — not that Congress had exceeded its power under Article I, Section 8. The Court held that, although the Eleventh Amendment was applicable and ordinarily would have barred the suit, Alabama waived its right to object to the suit by operating the railroad. At page 192, the Court stated:

> ". . . Our conclusion is simply that Alabama when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act."

That is all the *Parden* case holds.

Akin to the railroad cases is *California v. United States* (1944), 320 U.S. 577, wherein the federal Shipping Act of 1916 was held applicable to waterfront terminal operations conducted by the State of California and the City of Oakland. The Court found as a fact that:

> ". . . In thus providing facilities for waterborne traffic, Oakland and California have for many years competed with privately owned terminals in San Francisco Bay. Cut-throat competition ensued, with the inevitable chaos following abnormally low rates" (p. 580).

The power of Congress to regulate this type of activity was assumed from *United States v. California, supra,* 297 U.S. 175, the case concerning the Belt Railroad (p. 586).

These four cases each involved a situation where a State engaged in a purely commercial activity — usually in competition with private, profit-making enterprise which was not a necessary State function. The activity was not an integral part of State government, and, if the State withdrew from the activity, private industry would immediately move in. The citizenry would be generally unaffected. More importantly, however, *in not one of these cases was there any showing that the federal regulation would substantially interfere with the essential sovereignty of the State.* In each case the Court merely said that, if the State wished to engage in such a commercial and, from a governmental point of view, nonessential activity, it would have to conform its laws to meet the overriding federal statutes. In none of these was a State forced to scrap its constitutional budgetary system, to impose additional taxes to meet Congressional regulations, or to withdraw or restrict an activity, such as public education or hospitals, which it alone could perform.

The State of California claimed in the first railroad case (*United States v. California, supra,* 297 U.S. 175) that the operation of the railroad was a sovereign act of the State. The Court agreed that it might be so, on the theory that the State did have the power to run the railroad. In that sense it was an exercise of sovereignty. But, in the broad political sense — in the sense of the nature of our federal

system, and the degree of political integrity possessed by the States — the question of State sovereignty was not really in issue. None of these cases involved the question of whether (1) a function containing the three elements mentioned above (i.e., nonprofit, purely governmental and so marginal as to preclude effective competition) could be regulated and (2) regulated in a way that destroyed the fiscal independence and integrity of the States. The instant case involves exactly this question, and the railroad-dock cases serve as no real precedent. They serve only to point up the distinction.

In a footnote to his Opinion, Judge Winter made reference to *United States v. Feaster* (5th Cir., 1964), 330 F. 2d 671; *State of Colorado v. United States* (10th Cir., 1954), 219 F. 2d 474; and *N.L.R.B. v. Local 254, Building Service Employees* (1st Cir., 1967), 376 F. 2d 131, as further supporting the proposition that State activities could be regulated. These cases add nothing to the principles, and limitations, announced in the California cases. *United States v. Feaster* involved the Alabama Docks Department, the same agency involved in *Parden v. Terminal R. Co., supra,* 377 U.S. 184. The issue was whether an injunction should issue to restrain the agency's officials from barring access of the National Mediation Board to certain books and records. No question was raised as to the power of Congress to extend the Railway Labor Act to the State-owned docks and terminals, the case turning on other issues. To the extent that the question was implicit in the case, it was determined in the same context as *Parden;* i.e., an admittedly commercial activity, substantially affecting interstate commerce, which was not an indispensable State function.

The *Colorado* case is similar. There, the Court held that, if the State wished to engage in brand inspection activities at the stockyards, it would have to do so pursuant to the

Packers and Stockyards Act of 1921. The rationale of the decision was very close to that of *Parden* — if the State desired to enter into an activity (which was in no way an essential governmental function) which affected commerce and which was already subject to Congressional regulation, then, by doing so, it voluntarily diminished its sovereignty. See 219 F. 2d at page 477. This is different from the situation at hand, both in type and effect on the State.

The third case — *N.L.R.B. v. Local 254, Building Service Employees,* 376 F. 2d 131 — is not at all in point. The question there was whether secondary picketing by employees of a window washing firm constituted an unfair labor practice. One of the employer's customers who was picketed was the Massachusetts Department of Education, which was held to be a "person engaged in commerce" for purposes of declaring the picketing unlawful. No Congressional regulation was being applied against the Department, and there was no suggestion in the case that the engagement in commerce was of a type sufficient to subject the Department to any such regulation.

In short, the cases in this first category did not involve an interference with State budgetary processes, or a financial burden to the States, or subject to regulation an activity which was nonprofit, purely governmental, and free from substantial competition.

Judge Winter referred to *United States v. Ohio* (1966), 385 U.S. 9, as permitting federal regulation of such a function. The question there was whether the quota allotments under the Agricultural Adjustment Act were applicable to wheat grown on State penal farms. In the District Court, the State questioned the constitutional power of Congress to apply the quotas to State farms without success. The Court of Appeals for the Sixth Circuit re-

versed on the basis of statutory construction. 354 F.2d 549. The constitutional question was not raised by the State or discussed by the Court. On certiorari, this Court reversed the Court of Appeals without opinion, simply citing *Wickard v. Filburn,* 317 U.S. 111. The State did not raise the constitutional issue before this Court, and it would appear that the disagreement between this Court and the District Court, on the one hand, and the Court of Appeals, on the other, was over a matter of statutory construction.

Even if the constitutional question was impliedly considered, the case is still distinguishable, having much the same posture as the railroad and dock cases. Judge Winter apparently analogized the operation of penal farms with that of public schools and hospitals and concluded that, if, under the *Ohio* case, the former was subject to regulation, then so was the latter. But that is not the proper analogy. What was subject to regulation was the growing of wheat, which was in no way essential to the operation of the Ohio penal system, but which, under the *Wickard* doctrine, had a substantial effect on interstate commerce.

The regulation involved here is far more direct. The schools and hospitals cannot operate without the people covered under Public Law 89-601, and the effect of their coverage is, as noted, not only to increase substantially the cost of providing these services, but also to interfere with the most basic political processes of State government.

The second subgroup of cases, wherein a federal regulation, appropriately exercised, has been held to be superior to various types of State interests, is typified by *City of Tacoma v. Taxpayers* (1958), 357 U.S. 320; *Oklahoma v. Atkinson Co.* (1941), 313 U.S. 508; *Sanitary District v. United States* (1925), 266 U.S. 405; *Case v. Bowles* (1946), 327 U.S. 92; *Board of Trustees v. United States* (1933), 289

U.S. 48; *United States v. Oregon* (1961), 366 U.S. 643. *Cf. Ashton v. Cameron County* (1936), 298 U.S. 513; *Hopkins Fed. S. & L. Asso. v. Cleary, supra,* 296 U.S. 315.

The first three cases — *City of Tacoma, Oklahoma* and *Sanitary District* — were, like *Gibbons v. Ogden,* cases involving the Congressional power to regulate the navigable waterways. *City of Tacoma* was decided on the question of *res judicata,* but its effect was to hold that the City could, pursuant to a license from the Federal Power Commission, construct a hydroelectric project, although the reservoir thereby created would inundate a State-owned fish hatchery.

The *Oklahoma* case was very similar. There, the construction of a dam on the Red River, as part of a comprehensive flood control program, was authorized, although its effect would be to inundate land in Oklahoma, including land owned by the State. The question essentially concerned the extent of the federal power of eminent domain. The Court noted that the respective property owners would receive just compensation, and that there would be no loss of political jurisdiction by the State over the lands taken, except with its consent. The economic effect on the State from the taking (there being no serious or apparent political effect) was no bar to the power to condemn.

In *Sanitary District v. United States,* the Court sustained an injunction restraining the Chicago Sanitary District from diverting more than 250,000 cubic feet of water per minute from Lake Michigan. The government alleged that further diversions in excess of that amount would lower the water levels of four of the Great Lakes, five major rivers, and all the harbors connected therewith. All of these bodies of water were navigable, and the extra diversion "will thus create an obstruction to the navigable

capacity of said waters" and alter the condition and capacity of the harbors connected with them. 266 U.S. at page 424. The Sanitary District predicted dire results to the City of Chicago if the rate of diversion were reduced, which the Court felt were probably exaggerated. The Court viewed the case as the United States "asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce . . . but also to carry out treaty obligations to a foreign power . . .".

The *Sanitary District* case did no more than affirm the federal power of eminent domain exercised with respect to an obstruction to interstate commerce pursuant to the commerce power. That some damage will be suffered by the condemnee is to be assumed in every such case, but, as the Court noted, the fact of the resulting injury, in that instance, could not act as a defense to the power. At the risk of it becoming a cliché, however, the very basic distinction between the consequences of the injunction in that case, as well as the condemnations in *City of Tacoma v. Taxpayers, supra,* 357 U.S. 320, and *Oklahoma v. Atkinson Co., supra,* 313 U.S. 508, and of the Act in question here, must be recognized. The most that was involved in those cases was an interference with a particular State activity. There was no interference with State government itself — no tampering with or outside control over the budgetary and legislative appropriation process. It is not a question of comparing schools and hospitals to sanitation and saying that all three are on the same footing, because, as noted, it is not just schools and hospitals which are being regulated, but the fundamental political process of government itself.

Case v. Bowles, supra, 327 U.S. 92, involved a conflict between the war power and an activity in which a State, as

a sovereign entity, was otherwise permitted to engage, but which had to be subordinated to the superior federal power. The specific question was whether the regulations issued under the Emergency Price Control Act were applicable to the sale of timber by the State of Washington. Specifically, the issue was whether the sale, at a price in excess of the federal ceiling, but in accordance with the requirements of State law, could be enjoined.

The Court sustained the federal Act as an exercise of the war power. It then stated, at 327 U.S. 102:

> ". . . And our only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.
>
> "To construe the Constitution as preventing this would be to read it as a self-defeating charter. . . ."

The Court viewed the issue as a conflict in sovereign powers — the federal power to wage war and the State's power to sell timber. The two were contradictory, and the recognition of one would necessarily detract from the other. Although the power to sell timber may have been an exercise of sovereignty, in the sense that the State was constitutionally authorized to make the sale, its subordination of that power to the superior federal power did not affect its sovereignty in the most basic sense, or threaten its existence as a semiautonomous political entity, as does Public Law 89-601.

This group of cases must be read in the context of their factual situation. If there are limits to the extent of federal power, then somewhere a line must be drawn. That line must be fixed with reference to the relative degrees of intrusion in each case. If broad language authorizing a relatively mild and nonbasic intrusion can be lifted out of its context and used to authorize a much more serious form of regulation, then no line can ever be drawn. Such a doctrine represents the antithesis of a viable constitutional system. The balance between the State and federal governments is far too delicate and important to be so treated. Accordingly, Appellants believe that these aforecited cases do not serve as authority for Public Law 89-601.

The third subgroup of cases in the category of federal-State conflicts involves the problem of direct federal regulation of State government or, conversely, the degree of immunity therefrom. This is the critical consideration involved here, and the reasoning of this Court in these cases is especially pertinent. The cases in this area have generally concerned the extent to which the federal government can tax States and State activities, and have been in the context of reciprocal immunity of each level of government from taxing by the other. The Appellants assert that the federal government cannot tax the governmental functions of a State because such taxation would permit the destruction of such functions; that the reasoning implicit in such a conclusion would be equally applicable to any power whose exercise could have the same effect; and that it is especially applicable to the commerce power.

The law with respect to State governmental tax immunity was adequately summarized in the four Opinions rendered in *New York v. United States* (1946), 326 U.S. 572. As indicated therein, the concept enunciated by Chief Justice Marshall in *M'Culloch v. Maryland, supra,* 4 Wheat.

316, 431, that the power to tax involves the power to destroy, led the Court initially to assume that there was nearly absolute reciprocal immunity on the part of each level of government from taxation by the other. See *Collector v. Day* (1871), 11 Wall. 113. Later, a distinction was recognized between governmental and proprietary activities, and the State's tax immunity was limited to the former. *South Carolina v. United States* (1905), 199 U.S. 437; *Helvering v. Gerhardt* (1938), 304 U.S. 405; *Allen v. Regents of University System* (1938), 304 U.S. 439. The decisions, said the Court in *South Carolina*, at 199 U.S. 461:

> ". . . indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the state in carrying on of an ordinary private business."

The *South Carolina* case involved a nondiscriminatory excise tax on sellers of liquor, which the Court applied to the State when it went into the business of selling liquor. *Allen v. Regents of University System* sustained the application of a federal admissions tax to athletic contests in which State colleges participated. The rationale of the decision, as stated by the Court at 304 U.S. 451, was that, "when a state embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render it immune from Federal taxation". At pages 452 and 453, the Court asserted again that the immunity "recognized by the Constitution does not extend to business enterprises conducted by the States for gain". See also *Ohio v. Helvering* (1934), 292 U.S. 360, and *Helvering v. Powers* (1934), 293 U.S. 214.

In *New York v. United States, supra*, 326 U.S. 572, these cases, and the doctrines they espoused, were given careful

review. The eight Justices taking part in the case all agreed that some type or degree of State immunity did exist — there was a line, a limit to the federal taxing authority. In the "majority" Opinion of Justices Frankfurter and Rutledge, it was stated, at 326 U.S. 582:

> ". . . There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. . . ."

In a concurring Opinion by Chief Justice Stone, in which Justices Reed, Murphy and Burton joined, it was declared, at 326 U.S. 587, that:

> "A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed. . . ."

Later, at page 589, the four Justices further quoted the following language from *Metcalf v. Mitchell* (1926), 269 U.S. 514:

> "But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the

> government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it."

Justices Black and Douglas dissented from the result of the case, but supported entirely the distinction raised. At page 593 of 326 U.S., they quoted with approval the doctrine of *United States v. Balto. & Ohio R.R. Co.* (1873), 17 Wall. 322, as follows:

> "The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."

The practical application of the "power to tax involves the power to destroy" concept was noted when the dissenters observed, at page 594, that

> ". . . Many state activities are in marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched. In any case, the repercussions of such a fundamental change on the credit of the States and on their programs to take care of the needy and to build for the future would be considerable."

This concept, of course is not restricted in its application to a federal tax. The same effect is manifested by any type of federal requirement which adds to the cost of marginal State activities. The greatest expense to the States already is the provision of public education and public health. In

1964, over $15.6 billion dollars was spent by State governments for their schools and hospitals. There is no return on this money except the health and well-being of the citizens of the country. To add an additional burden, by Congressional fiat, of more than $100,000,000 may well be to require a curtailment of the services, or a reduction in their quality. To paraphrase the two dissenting Justices, here too we have State activities in marginal enterprises where private capital refuses to venture. Add the additional cost and the programs may be seriously affected, if not, in some instances, destroyed.

The essential difference between the three Opinions in *New York v. United States,* or points of view expressed therein, concerned the very question involved here: where do you draw the line? Justice Rutledge seemed to believe that a federal tax could be applied against any State activity, so long as it was nondiscriminatory, and so long as Congress expressly made the tax so applicable. But, by concurring in Justice Frankfurter's Opinion, he (and Justice Frankfurter) recognized that there were certain functions peculiar to State government (see the excerpt from that Opinion, *supra,* at page 58) which could *not* be taxed. The four concurring Justices (Stone, Reed, Murphy and Burton) could not accept the nondiscriminatory character of the tax as the constitutional test. They noted, at 326 U.S. 587, that "a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government". Accordingly, they felt that there were instances where a tax on the property and activities of private citizens may not be "constitutionally extended to the States, merely because the States are included among those who pay taxes on a like subject of

taxation". 326 U.S. 587. The test was "not the extent to which a particular State engages in the activity, *but the nature and extent of the activity by whomsoever performed is the relevant consideration*", 326 U.S. 590 (emphasis supplied).

The two dissenting Justices (Douglas and Black) were of the view that the federal government could not tax the States or State activities in any event, because such a tax amounted to requiring the States to pay a fee for the privilege of exercising their sovereign powers. In reply to the argument of Justice Frankfurter that the only recourse of the States (where a nondiscriminatory tax was concerned) was to Congress, the dissenters stated, at page 594:

> "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy."

The recognition by the Court in *New York* that there was a limit to the federal taxing power vis-a-vis the States has been consistently maintained. In *Wilmette Park Dist. v. Campbell* (1949), 338 U.S. 411, the Court considered the application of a federal admissions tax to a public beach and bathing area owned and operated by a State-created park district. The tax was applied and sustained on two theories: one, that immunity, under *Allen v. University System, supra,* 304 U.S. 439, was not applicable to "such activities as might be thought not essential for the preservation of state government"; and, two, that the State was not really being burdened by the tax, which it passed on to the users of the park area. The basis for the immunity,

i.e., the interference or destruction of essential governmental functions, was, therefore, not present.

A somewhat analogous case was *United States v. Washington Toll Bridge Authority* (9th Cir., 1962), 307 F. 2d 330. The question there was the application of a federal transportation excise tax to a system of ferries plying across Puget Sound owned and operated by a State Authority. The Authority was described by the Court as "a self-supporting entity with all of the rights and liabilities of a common carrier". 307 F. 2d 331. Reviewing the aforecited cases, the Court concluded, at page 334, that

> ". . . it is manifest that immunity of the State activity here involved from the taxing power of the federal government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. Attention must be focused on the specific activity and on the nature and extent of interference with, or burden upon, the State, and this interference or burden must be 'actual and substantial', and not the creature of speculation and conjecture."

The Court then concluded that, because the tax was absorbed by the users of the service, "it imposes no undue economic burden upon the State of Washington". 307 F. 2d 335.

Compare *United States v. State Road Department of Florida* (5th Cir., 1958), 255 F. 2d 516, where, by statutory construction, a federal tax was held to be inapplicable to a ferry owned and operated by the State of Florida.

Judge Winter determined, in his Opinion below, that there was a difference between the power to tax and the power to regulate commerce with respect to their exercise in a manner affecting State governmental activities. Whereas the taxing power may be subject to implied limitations, he reasoned, the commerce power was not. In

support of this proposition, he relied on *Board of Trustees v. United States, supra,* 289 U.S. 48. In that case, the Court held that the federally-established tariffs on imports were applicable to articles imported by the University of Illinois. The Court sustained the tariff not as an exercise of the taxing power, which in part it obviously was, but rather as a regulation of foreign commerce. The University argued that it was immune as an agency of the State discharging a governmental function, but the Court replied that the principle of duality did not touch the authority of Congress in the regulation of foreign commerce.

There are three aspects of the case which bear attention, and which serve to distinguish it from the case at bar. In the first place, consideration must be given to the date of the case, and the state of the law at that time. In 1933, the Court still accepted the idea of nearly absolute reciprocal tax immunity. The departure from that concept expressed in *Helvering v. Gerhardt,* and particularly *Allen v. Regents of University System,* was still four years in the future, *South Carolina v. United States* not being really in point. Thus, the Court could not have sustained the tariff as a tax. Had the case been decided after 1938, the tariff could certainly have been sustained for what it was — a tax. There would have been no need to resort to the proposition that the commerce power was more potent or more extensive than the taxing power.

Secondly, the Court, with respect to the "sovereignty" argument, noted at 289 U.S. 59, that:

> ". . . the fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of state government independent of federal power."

There was nothing in the Opinion to indicate that the tariff would result in anything more than a minimal eco-

nomic burden to the State. There was no allegation that its payment may seriously interfere with the carrying out of the educational function, as the stipulated facts demonstrate here. The application of the tariff to goods imported by the University would have nowhere near the serious political and budgetary effects as Public Law 89-601. In the words of the Court in *United States v. Washington Toll Bridge Authority, supra,* 307 F. 2d at page 334, the "nature and extent of the interference with, or burden upon, the State" was not "actual and substantial", whereas here it is.

Finally, the Court considered the practical aspects of the case. In words reminiscent of the fears attributed to John Marshall as he decided *Gibbons v. Ogden* and *Brown v. Maryland, supra,* 12 Wheat. 419, the Court stated at 289 U.S. 59:

> ". . . To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. . . ."

No such consideration is involved here. The inability of Congress to regulate the wages of State employees does not detract from its ability effectively to regulate interstate commerce, as it has done for eighty years prior to Public Law 89-601.

Upon the reasoning expressed in *New York v. United States,* and the cases which have followed it, there can be little doubt that a federal tax on State-owned and -operated public schools and hospitals could never be sustained. There is even less doubt that a federal tax on the operations of State government would be unconstitutional. To be even more specific, Congress could not impose a tax

in the amount of the difference between $1.60 an hour and the hourly wage actually paid for each State employee (or any group of them) or a tax amounting to 50% of the hourly wage for each hour worked in excess of some federally-determined maximum.

But Appellees asserted, and Judge Winter believed, that the commerce power permits a greater latitude of Congressional action against the States than the taxing power. Because the former is characterized as plenary and exclusive, while the latter is concurrent, the argument is made that there are no limits to the commerce power (or, at least, questions of federalism are not relevant considerations). In propounding this argument, they misconstrue the rationale of the limitations on the taxing power, and do not account for the more recent expressions on the subject by this Court.

In *United States v. California, supra,* 297 U.S. 175, the Court attempted to draw a distinction between the two powers, asserting that the commerce power was not subject to the same limitations which the Court had previously applied to the taxing power (p. 184). In *New York v. United States,* however, decided ten years later, the Court rejected that distinction by holding, at page 582 of 326 U.S.: "*Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce.*" (Emphasis supplied.) If, in the later case, the Court clearly recognized that there were certain State functions which could not be taxed (giving as a specific example public school houses), and if the taxing power is co-extensive with the commerce power, then it follows that these functions are not regulable as commerce either, or certainly not in the way authorized by Public Law 89-601.

The Court had previously rejected the *California* approach, at least implicitly, in *Ashton v. Cameron County, supra,* 298 U.S. 513, where it held that Congress had no power to enact bankruptcy laws applicable to the States or their agencies or subdivisions. In comparing the taxing and bankruptcy powers (and the same reasoning would necessarily hold true for the commerce power), the Court stated, at page 530:

> "The power 'To establish . . . uniform Laws on the subject of Bankruptcies' can have no higher rank or importance in our scheme of government than the power 'to lay and collect taxes'. Both are granted by the same section of the Constitution, and we find no reason for saying that one is impliedly limited by the necessity of preserving independence of the States, while the other is not. . . ."

In *United States v. Kahriger* (1953), 345 U.S. 22, the Court noted, at page 31, that "it is hard to understand why the power to tax should raise more doubts because of indirect effects than other federal powers".

The rationale of the *New York* and *Ashton* cases makes much better sense. There is nothing in Article I, Section 8 of the Constitution to indicate that one power is, by its terms, more extensive than the other. Each involves a limitation on the sovereignty of the States. But each is impliedly subject to such circumscription as may be necessary to preserve the federal-state form of government created by the Constitution.

The language in *United States v. Kahriger* (1953), 345 U.S. 22, with respect to the manner in which the Court has viewed various exercises of the regulatory and taxing powers is not apposite here. That case involved the question of whether Congress could indirectly regulate gam-

bling by means of a tax. The tax was not sought to be applied against a State.

Prior to the mid-1930s, the most formidable power Congress possessed (in terms of its use and effect) was the power to tax. John Marshall recognized this in *M'Culloch v. Maryland, supra,* 4 Wheat. 316, when he coined the phrase, "the power to tax involves the power to destroy". By reason of this, the Court was careful to hold that the maintenance of true federalism required that certain governmental functions of the States be immune from federal taxation, even though the Constitutional provision itself was unlimited in any relevant respect. The long line of cases establishing this doctrine need not be cited, because it is clearly recognized in *New York v. United States.*

The concept that the commerce power was broader than the taxing power rested on the assumption that the effect on the States (and therefore on the federal system) of the former was not as great as the latter. This is implicit in the reasoning of the Court in *United States v. California, supra,* 297 U.S., particularly at page 184.

With respect to the operation of railroads or dock terminals, this may well be true. But, when the regulation has the effect of dictating wages and hours in the public schools and hospitals, and obliterating the financial integrity of the States by nullifying the constitutional provisions relating to budgets and legislative appropriations, it can no longer be seriously contended that the commerce power has no limitations or has less of an effect upon the States. If the maintenance of federalism is the overriding consideration (and, even in the cases most favorable to the Appellees, the Court has recognized that it is), then *certainly the exercise of the commerce power can destroy just as effectively as the power to tax.*

Congress cannot tax a State, as a State, because that would enable Congress to tax a State out of existence. Congress cannot tax those activities which are peculiar to States, because that would accomplish the same result by indirection; it would enable Congress to prevent a State from carrying out its governmental functions, from exercising its reserved powers under the Tenth Amendment. These limitations are not expressed in the Constitution. They are implied from the nature of the system created by that document, not on the basis that the taxing power is concurrent, *but because, without the implication, Congress could, legislatively, abolish the States as effective instruments of government.* This is the rationale of the limitations, and it applies equally well to any power capable of such use, whether it be plenary or partial, exclusive or concurrent. The argument made here was best summarized by Justices Black and Douglas, dissenting in *New York v. United States,* when they said, at page 594, 326 U.S.: "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." The Appellants rest upon that.

D. Use of the "Enterprise" Concept As A Determinant for Coverage Is An Unconstitutional Extension of the Commerce Power.

The original Fair Labor Standards Acts, by its terms, required an employer to pay the minimum wage and overtime premiums to "each of his employees who is engaged in commerce or in the production of goods for commerce". The test for coverage was, therefore, the activity of the *employee,* rather than the *employer.* See *Overstreet v. North Shore Corp.* (1943), 318 U.S. 125;

A. B. Kirschbaum Co. v. Walling (1942), 316 U.S. 517; *Mitchell v. Zachry Co.* (1960), 362 U.S. 310.

This was in contrast to the application of other federal Acts adopted under the commerce power to employers engaged in commerce or in industries affecting commerce, which test was expressly rejected by Congress in its consideration of the Fair Labor Standards Act. See H. Rep. No. 2738, 75th Cong. 3d Sess., pp. 29, 30; 83 Cong. Rec. 9158, 9266, 9267; *A. B. Kirschbaum Co. v. Walling, supra,* 316 U.S. 517, 522. When the extent of coverage under the Act was reviewed in *United States v. Darby, supra,* 312 U.S. 100, it was conceded that Darby's employees were not "engaged in commerce". The constitutional question, therefore, as framed by the Court at page 117, was whether

> ". . . the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce *is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.*" (Emphasis supplied.)

In other words, although the coverage under the Act was not expressed in terms of employees or industries affecting commerce, that was the Constitutional limit of the Congressional power. The Act was sustained because the test devised by Congress fell within the limit. The cases interpreting the Act since *Darby* (but prior to 1961) have made it clear that the scope of coverage was, in fact, less than the total range of the commerce power.

See, for example, *Mitchell v. Lublin, McGaughy & Associates* (1959), 358 U.S. 207, 211; *McLeod v. Threlkeld* (1943), 319 U.S. 491; *A. B. Kirschbaum Co. v. Walling, supra,* 316 U.S. 517; *Walling v. Jacksonville Paper Co.* (1943), 317 U.S. 564; *Mitchell v. Zachry Co., supra,* 362 U.S. 310.

In 1961, coverage under the Fair Labor Standards Act was expanded by the introduction of the "enterprise" concept. In addition to the employees previously covered, employees of an "enterprise engaged in commerce or in the production of goods for commerce" were also included. The definition given to this creature was rather confusing, but essentially it meant certain enumerated enterprises having employees "handling, selling, or otherwise working on goods that have moved in or produced for commerce by any person" [Section 3 (s), 29 U.S.C., Section 203 (s)]. The effect of this new concept was that, if an enterprise had employees who handled or worked on goods that moved in commerce, not only those employees but (subject to certain specified limitations) all other employees of the enterprise and all employees of other enterprises engaged in "related activities" were covered. The test would seem to have shifted from the activity of the employee beyond that of the employer to the activities of any two or more fellow employees. Appellees argued below that the 1961 amendments did change the basic test, and that the new test has been held constitutional, citing *Wirtz v. Edisto Farms Dairy* (D. S.C., 1965), 242 F. Supp. 1, and *Goldberg v. Ed's Shopworth Supermarket* (D. La., 1963), 214 F. Supp. 781. Judges Winter and Thomsen accepted their contention, Judge Winter relying further on a number of cases involving the National Labor Relations Act.[19]

With respect to the effect of the "enterprise" concept as a change in the test, it is curious that the Court in

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[19] *N.L.R.B. v. Reliance Fuel Oil Corp.* (1963), 371 U.S. 224; *N.L.R.B. v. Denver Bldg.-Constr. Trades Council* (1951), 341 U.S. 675; *Building Trades Council v. Kinard* (1954), 346 U.S. 933; *Plumbers, etc. Local 298 v. Door County* (1959), 359 U.S. 354; *San Diego Building Trades Council v. Garmon* (1957), 353 U.S. 26; *Amalgamated Meat Cutters, etc. v. Fairlawn Meats, Inc.* (1957), 353 U.S. 20; *Howell Chevrolet Co. v. N.L.R.B.* (1953), 346 U.S. 482.

Wirtz v. Edisto Farms Dairy, supra, 242 F. Supp. 1, held that there had been no change. Speaking of the 1961 amendments, the Court said, at page 5:

> ". . . The Congress was careful to retain the existing criteria of whether employees did 'engage in commerce' or 'the production of goods for commerce' as the test to determine whether an enterprise is subject to the Act. *The basic test remains the actual type commerce engaged in by employees.*" (Emphasis supplied.)

There has actually been no judicial determination of the constitutionality of the "enterprise" test prior to the decision below. In *Wirtz v. Edisto Farms Dairy* and *Goldberg v. Ed's Shopworth Supermarket, supra,* 214 F. Supp. 781, the Courts merely concluded that, in the factual circumstances there present, the defendants had not sustained their burden of proving the Act to be unconstitutional. In fact, the Court in *Edisto* recognized that the "enterprise" test was of doubtful validity, stating, at page 5:

> "However, in considering the fact that section 3 [s] [3] sets no standard for the number of employees who must be engaged in interstate commerce before an enterprise is deemed to engage in interstate commerce, it appears that the statute does go far towards invading the field of intrastate commerce where the provisions of the Act should not be effective. Indeed, legislative history of the amendments reflects that some members of Congress had serious doubts as to its constitutionality on grounds that it would afford coverage to some employees not connected in any way with interstate commerce."

To the extent that the employees actually covered may "affect" commerce, there would seem to be no constitutional problems. This was the basis on which the claims in *Edisto* and *Ed's Shopworth Supermarket* were rejected;

the defendants were unable to show that the affected employees did not affect commerce. See also *Wirtz v. Welfare Finance Corp.* (N.D. W. Va., 1967), 263 F. Supp. 229, and *West v. Wal-Mart, Inc.* (W.D. Ark., 1967), 264 F. Supp. 158, where no constitutional challenge to the concept was made.

The cases relating to the application of the National Labor Relations Act are not apposite here. They involved generally the jurisdiction of the National Labor Relations Board to disputes between unions and contractors who purchased goods from out-of-State, or an automobile dealer described as an integral part of the General Motors national distribution system, an oil company which purchased oil produced out-of-State, or the degree of preemption of State control over labor relations. The very real and significant distinction, constitutionally, between NLRA coverage and coverage under the "enterprise" concept is that the National Labor Relations Act applies only where the employer is in commerce or an industry affecting commerce. The "enterprise" concept permits far more extensive coverage.

An employer may have two isolated employees who handle goods which have moved in commerce. That fact renders all of his other employees subject to the Act even though (1) they or their activities do not affect commerce and/or (2) the employer is not engaged in commerce or in activities which affect commerce. The test under this concept is whether two or more employees handle any goods which have moved in commerce or were produced for commerce; and this is by no means indicative that the employer's activities affect commerce. There is hardly a single enterprise in this country that does not meet the "enterprise" test devoid of sales limitations. The most local operation imaginable will use something which has moved

in commerce. Even a child's lemonade stand involves lemons and sugar grown in other States, and, if the child were entrepreneur enough to hire two friends to help him, he would be an enterprise engaged in commerce.

The only barrier to such coverage is the minimum annual gross sales limits expressed in the Act, which Congress could at its will lower or remove altogether. Because they are subject to repeal or alteration, they cannot affect the constitutionality of the "enterprise" test.

Appellants conceive of the "enterprise" concept as straddling the constitutional line. It may well be that, in a particular situation, such employees who handle goods moving in commerce would, by virtue of their handling such goods, affect commerce. In that situation, the constitutional test would be met, notwithstanding the peculiar language used to describe the coverage. This was implicit in the *Edisto* decision.

But, in attempting to apply the "enterprise" test under Public Law 89-601 to public schools and hospitals, Congress reaches employees who have no effect on commerce and who produce nothing for commerce, and to that extent its application is unlawful. The regulation relates to an employment relationship, and the constitutional consideration must be whether that relationship affects commerce. Merely to say that it does because other employees handle goods which have moved in interstate commerce, without any evidence of an actual effect, will not suffice. The clear test that the regulated activity itself must have some effect on commerce has not been met. And the attempt to expand coverage to activities which have no such effect is unconstitutional.

II.

QUESTION No. 3

PUBLIC LAW 89-601, BY APPLYING THE FAIR LABOR STANDARDS ACT TO THE STATES AND THEIR POLITICAL SUBDIVISIONS, VIOLATES THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Public Law 89-601 amended Section 3(d) of the Fair Labor Standards Act so as to remove the legislative exemption of States and their political subdivisions from the definition of "employer". It amended Section 3(s), however, to restrict the resulting application of the Act to certain classes of employees.

Section 16(b) of the Act [29 U.S.C., Section 216(b)], which was not amended by Public Law 89-601, provides:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Sections 206 and 207, to which Section 16(b) refers, contain the minimum wage and premium overtime provisions. The effect of Section 16(b) therefore, is to render the States liable to suit and judgment in federal and State courts by their employees.

As was discussed earlier herein with respect to the commerce power, the States, in considering whether to ratify the proposed Constitution, were very much concerned over the extent to which the newly-created government would be able to control their affairs. Part of this concern involved the concept of sovereign immunity from suit. The States were assured, however, that there was nothing to fear, in statements such as the following from Hamilton in Federalist No. 81:

> "*It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. *A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.* The *contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?* It is evidence, it could not be done without waging war against the contracting State, and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a con-

sequence, would be altogether forced and unwarrantable." (Emphasis supplied.)

When, in the case of *Chisholm v. Georgia* (1792), 2 Dall. 419, the Court attempted to remove sovereign immunity of the States in the federal courts, the hue and cry against the decision was swift and vociferous. The speed with which the Eleventh Amendment was proposed and ratified after the decision in *Chisholm v. Georgia* is eloquent evidence of the importance and the universal acceptance of the concept that a State is not suable without its consent. In the *Chisholm* case, the Court sustained its own jurisdiction over a suit by an individual against the State of Georgia. In *New Hampshire v. Louisiana* (1883), 108 U.S. 76, Chief Justice Waite, delivering the opinion of the Court, recognized the speed with which the Eleventh Amendment followed the *Chisholm* decision:

> "As soon as the decision was announced, steps were taken to obtain an Amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the Governor. This led to the convening of the General Court of that Commonwealth, which passed resolutions instructing the Senators and requesting the members of the House of Representatives from the State 'To adopt the most speedy and effectual measures in their power to obtain such Amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States.' Other States also took active measures in the same direction and, soon after the next Congress came together, the 11th Amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States so as to go into effect on the 8th of January, 1798."

The Court then held that the Eleventh Amendment prohibited suits brought by a State as an agent of its citizens to collect debts owed them by another State. See also *Hans v. State of Louisiana* (1890), 134 U.S. 1, where the Court expanded the protection of the Eleventh Amendment to preclude suits in federal courts against States by their own citizens.

The immunity afforded by the Amendment cannot be overcome on the theory that the suit arises under federal law. *Duhne v. State of New Jersey* (1920), 251 U.S. 311; *Simmons v. South Carolina State Highway Department* (E.D. S.C., 1961), 195 F. Supp. 516; *Parden v. Terminal R. Co,. supra,* 377 U.S. 184. The only way in which a State can be sued by individuals is if it consents to the suit.

In *Parden,* the Court found that, when the State of Alabama began operation of a railroad which directly and substantially affected interstate commerce twenty years after the enactment of the Federal Employers' Liability Act, it necessarily consented to such suits as were authorized by the Act. As stated by the Court at 377 U.S. 192:

> ". . . By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads, by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit. . . ."

The hypothesis of the *Parden* case is far different from the situation here. It is one thing to undertake a new commercial venture and be subject to preexisting conditions and quite another to have a whole new set of conditions

federally imposed on governmental activities which States have been conducting for over a century. A law which subjects States to suits by individuals in the latter situation does precisely what the Eleventh Amendment expressly forbids; and it cannot be seriously maintained that, by continuing to perform a function which is both necessary and traditional, the States have consented to being sued. If the mere purchase of goods and services from interstate commerce is enough to imply a consent, then the Eleventh Amendment would have no real vitality, its very purpose and intent frustrated. This is not to be presumed.

In the court below, Appellees argued that Section 16(c) of the Act [29 U.S.C., Section 216(c)] authorizes the Administrator of the Wage and Hour Division of the Department of Labor to file suits on behalf of the individual employees, and that suits by the United States are not enjoined by the Eleventh Amendment. The answer to this contention is twofold. In the first place, even if Section 16(c) were valid, that would not validate Section 16(b), which authorizes individual suits. Even as to 16(c), however, the Administrator's authority to sue is merely derivative from the rights purportedly extended under 16(b). The Administrator is not suing for himself or on behalf of the United States, but for the account of the individual employees. Section 16(c) specifically provides that any sums recovered by the Administrator shall be placed in a special account and paid over to the employees. This type of indirection and vicarious standing is no different than that which was held to be unconstitutional in *New Hampshire v. Louisiana, supra,* 108 U.S. 76, where the Court held that a State could not sue another State on behalf of its citizens to collect a debt due to them individually.

Cases such as *United States v. Mississippi* (1965), 380 U.S. 128, and *Louisiana v. United States* (1965), 380 U.S.

145, are distinguishable on their facts. There, the Attorney General sued under provisions of a Civil Rights Act to restrain the State from enforcing unconstitutional laws which denied persons the right to vote. In the *Mississippi* case, where the jurisdictional defense of the Eleventh Amendment was considered, the Court reasoned that the principle involved was the Fifteenth Amendment, which obviously is of equal status with the Eleventh. That Amendment expressly forbade the States from denying their citizens the right to vote because of their color, and also authorized Congress to enforce the Amendment by appropriate legislation. The defendant States were doing what the Constitution said they could not do, and Congress had the power to authorize judicial action to stop them.

There is no such situation here. The States are not depriving anyone of their Constitutional rights, and there is no Constitutional authority, as in the Fifteenth Amendment, for Congress to authorize suits against them.

Accordingly, Public Law 89-601, or at least the sections thereof which authorize suits against the States, is in contravention of the Eleventh Amendment and therefore void.

III.

Question No. 7

ARE THE PUBLIC SCHOOLS AND HOSPITALS OF THE STATES AND THEIR POLITICAL SUBDIVISIONS THE ULTIMATE CONSUMERS OF THE GOODS AND SERVICES PURCHASED BY THEM IN COMMERCE AND THEREFORE NOT SUBJECT TO THE FAIR LABOR STANDARDS ACT?

In contrast to the other questions presented in this appeal, this question is not one of constitutional law, but rather of statutory construction. It is, nevertheless, one which is appropriate for consideration by the Court. *A. B. Kirschbaum v. Walling, supra,* 316 U.S. 517; *Mitchell v. Zachry Co., supra,* 362, U.S. 310.

As noted, coverage under the original Act was limited to employees engaged in commerce or in the production of goods for commerce. The word "goods" was defined in Section 3 (i) of the Act as

> "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, *but does not include goods after their deliverey into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.*" (Emphasis supplied.)

It was thus recognized from the beginning that coverage was not to be extended to employees of ultimate consumers (unless, of course, they were covered on some other basis). See, for example, *Barbe v. Cummins Const. Co.* (D.C. Md., 1943), 49 F. Supp. 168, *aff'd per curiam* 138 F. 2d 667; *Rhude v. Jansen Construction Co., Inc.* (D.C. N.D. Tex., 1965), 54 L.C. ¶31,870, *aff'd* 369 F. 2d 806. *Cf. Jackson v. Northwest Airlines* (D.C. Minn., 1947), 75 F. Supp. 32, *aff'd* 185 F. 2d 74, *cert. den.* 342 U.S. 812; *Gordon v. Paducah Ice Mfg. Co.* (D.C. W.D. Ky., 1941), 41 F. Supp. 980, where the exemption was held not to apply to the employees producing or transporting such goods *prior to* delivery to the ultimate consumer. Compare also *Lynch v. Embry-Riddle Co.*, (D.C. S.D. Fla., 1945), 63 F. Supp. 992.

The above cases considered the definition of "goods" in the context of the then existing test of coverage, i.e., employees engaged in commerce or in the production of goods for commerce. There is no indication, however, that by enacting a new test in 1961 Congress intended to include employees working on goods where their employer is the ultimate consumer of such goods. The definition of "goods" was unchanged, and the definition of an "enterprise engaged in commerce or in the production of goods for com-

merce" still relates to "goods". Section 3 (s) of the Act [29 U.S.C., Section 203 (s)] defines such an enterprise as one

> "which has employees engaged in commerce or in the production of *goods* for commerce, including employees handling, selling, or otherwise working on *goods* that have been moved in or produced for commerce by any person, and which . . ." (emphasis supplied).

is engaged in the operation of a school or hospital.

In order to assert coverage sucessfully, Appellees must show that the public schools and hospitals have employees who handle goods which are for resale (or of which their employer is not the ultimate consumer) and which were produced for or have moved in commerce. The stipulated facts bear directly on this matter. With respect to Maryland, it was agreed that:

> "The materials, supplies and equipment purchased by the State hospitals, the University Hospital and the local school systems are purchased for use and consumption by said agencies in the performance of their functions. Certain items, such as books used in the schools, are made available to students on a temporary basis and without charge, unless lost or destroyed. Other items, such as lockers, chairs and desks, remain in the possession of, and on the premises of, the school but are assigned to the students temporarily. Still others, such as visual aids, are neither delivered nor assigned to individual students but are operated by school employees for the benefit of students as a group. Materials, supplies and equipment purchased and used by the hospitals in relation to their patients are similarly handled except with respect to drugs, medicines and foods administered to the patients, generally without charge, and not returned. At the University Hospital charges are made to paying patients."

An identical stipulation was filed with respect to Ohio and, although worded differently, there is nothing in the Texas stipulations to suggest a different procedure there. It was agreed, of course, that the facts with respect to the three States may be taken as representative of the nation generally.

There was no evidence presented below to show that the employees of the public schools and hospitals work on or handle any goods purchased in commerce for resale. The items they touch are for the use of their employer. Their journey in commerce ends when they reach the employer's receiving door. There can be no clearer example of goods in the hands of an ultimate consumer.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the Fair Labor Standards Act, as amended by Public Law 89-601, to the extent that coverage thereunder is extended to employees of State and local governmental agencies and institutions, (1) is in contravention of the United States Constitution and (2) is in contravention of Sections 3 (i), (r) and (s) of said Act, and in either case is null and void.

Respectfully submitted,

FRANCIS B. BURCH
Attorney General of Maryland

ALAN M. WILNER
Ass't Att'y General of Maryland
1200 One Charles Center
Baltimore, Md. 21201

CRAWFORD C. MARTIN
Attorney General of Texas

A. J. CARUBBI

HAWTHORNE PHILLIPS
Ass't Att'ys General of Texas
Supreme Court Building
Austin, Texas 78711

MacDONALD GALLION
Attorney General of Alabama
State Administration Building
Montgomery, Alabama 36104

DARRELL F. SMITH
Attorney General of Arizona
159 State Capitol Building
Phoenix, Arizona 85007

JOE PURCELL
Attorney General of Arkansas
Supreme Court Building
Little Rock, Arkansas 72201

DUKE W. DUNBAR
Attorney General of Colorado
104 State Capitol
Denver, Colorado 80203

DAVID F. BUCKSON
Attorney General of Delaware
Kirk Bldg. — P.O. Box 752
Dover, Delaware 19901

EARL FAIRCLOTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304

BERT T. KOBAYASHI
Attorney General of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii 96813

WILLIAM G. CLARK
Attorney General of Illinois
Supreme Court Building
Springfield, Illinois 62706

RICHARD C. TURNER
Attorney General of Iowa
State House
Des Moines, Iowa 50319

ROBERT C. LONDERHOLM
Attorney General of Kansas
State House
Topeka, Kansas 66612

JAMES S. ERWIN
Attorney General of Maine
State House
Augusta, Maine 04330

ELLIOT L. RICHARDSON
Attorney General of Massachusetts
State House
Boston, Massachusetts 02133

JOE T. PATTERSON
Attorney General of Mississippi
State Capitol
Jackson, Mississippi 39201

NORMAN H. ANDERSON
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101

CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509

ARTHUR J. SILLS
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

BOSTON E. WITT
Attorney General of New Mexico

JAMES V. NOBLE
Ass't Att'y Gen. of New Mexico
Supreme Court Building
Santa Fe, New Mexico 87501

T. WADE BRUTON
Att'y General of North Carolina
Department of Justice Bldg.
Raleigh, North Carolina 27602

HELGI JOHANNESON
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58501

WILLIAM B. SAXBE
Attorney General of Ohio
State House
Columbus, Ohio 43215

G. T. BLANKENSHIP
Attorney General of Oklahoma
State Capitol
Oklahoma City, Okla. 73105

DANIEL R. McLEOD
Att'y General of South Carolina
Hampton Office Building
Columbia, So. Carolina 29201

FRANK L. FARRAR
Attorney General of South Dakota
State Capitol
Pierre, South Dakota 57501

JAMES L. OAKES
Attorney General of Vermont
State Library Building
Montpelier, Vermont 05602

ROBERT Y. BUTTON
Attorney General of Virginia
Supreme Court-Library Bldg.
Richmond, Virginia 23219

JAMES E. BARRETT
Attorney General of Wyoming
State Capitol
Cheyenne, Wyoming 82001