

# Michigan Law Review

---

Volume 66 | Issue 4

---

1968

## Constitutional Law—Commerce Clause—1966 Amendments to Fair Labor Standards Act Extending Coverage to Employees in State-Operated Schools, Hospitals, and Related Institutions Held Constitutional—*Maryland v. Wirtz*

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

Michigan Law Review, *Constitutional Law—Commerce Clause—1966 Amendments to Fair Labor Standards Act Extending Coverage to Employees in State-Operated Schools, Hospitals, and Related Institutions Held Constitutional—Maryland v. Wirtz*, 66 MICH. L. REV. 750 (1968).

Available at: <https://repository.law.umich.edu/mlr/vol66/iss4/7>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## RECENT DEVELOPMENTS

### CONSTITUTIONAL LAW—Commerce Clause—1966

#### Amendments to Fair Labor Standards Act

#### Extending Coverage to Employees in State-Operated Schools, Hospitals, and Related Institutions Held Constitutional

#### —*Maryland v. Wirtz*\*

In 1966, Congress amended the Fair Labor Standards Act<sup>1</sup> (FLSA) and for the first time extended the coverage of the minimum wage and overtime provisions to employees in state-operated schools, hospitals, and related institutions.<sup>2</sup> The State of Maryland, joined by twenty-seven other states,<sup>3</sup> brought an action to enjoin enforcement of the amendments insofar as they applied to these state-operated facilities and sought a declaratory judgment ruling the amendments unconstitutional. The states asserted that the amendments were unconstitutional in two respects. First, they contended that the "enterprise" concept of FLSA coverage, which extended the Act to cover all employees of an "enterprise" if some of those employees were "engaged in commerce or in the production of goods for commerce,"<sup>4</sup> was an invalid exercise of congressional power under the commerce clause.<sup>5</sup> Second, the states made the two-pronged assertion that their

\* 269 F. Supp. 826 (D. Md. 1967), *appeal docketed*, 36 U.S.L.W. 3174 (U.S. Oct. 19, 1967), *jurisdiction on appeal to the United States Supreme Court noted*, CCH LAB. L. REP. (1 WAGES AND HOURS) at 35,492 (Jan. 15, 1968) [hereinafter cited as the principal case]. For a detailed analysis of the judges' opinions in the principal case, see Recent Decision, *A Balancing Test for the Commerce Power?*, 56 GEO. L.J. 392 (1968); Comment, *Constitutional Law—Fair Labor Standards Act—1966 Amendments Extending Coverage to Certain Employees of State Public Schools, Hospitals, and Related Institutions Held Constitutional*, 43 NOTRE DAME LAW. 414 (1968).

1. 29 U.S.C. §§ 201-19 (1964).

2. 29 U.S.C. §§ 203-18 (Supp. II, 1967), *amending* 29 U.S.C. §§ 201-19 (1964). Section 203(r) of the Fair Labor Standards Act (FLSA) as amended extends coverage to employees of enterprises operating suburban or interurban electric railways and local trolley or motorbus carriers, whether public or private, as well as to employees of schools, hospitals, and related institutions. However, the states limited their challenge to the inclusion of the employees of public schools, hospitals, and related institutions. Undoubtedly, the states followed this course in order to avoid strong past precedent upholding federal regulation of state-operated railways. See notes 52-55 *infra* and accompanying text.

3. Along with Maryland, the following states and their political subdivisions intervened as parties plaintiff under FED. R. CIV. P. 24: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Vermont, Virginia, and Wyoming. In addition, the Fort Worth, Texas Independent School District joined in the action. Amicus curiae briefs in support of the Secretary of Labor were filed by the AFL-CIO and the American Federation of State, County and Municipal Employees, AFL-CIO.

4. 29 U.S.C. §§ 203(r) & (s) (Supp. II, 1967) (quoted at notes 14-15 *infra*).

5. U.S. CONST. art. I, § 8: "The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

activities in operating schools and hospitals are entirely outside the scope of the congressional power to regulate commerce,<sup>6</sup> and, alternatively, that, even if their activities could be considered within the scope of that power, the application of federal wage and hour regulation interferes with the states' performance of their sovereign functions and thus violates the basic federal scheme of the Constitution as declared by the tenth amendment.<sup>7</sup> A three-judge federal district court<sup>8</sup> denied the injunction, holding that Congress did not exceed its power by applying the minimum wage provisions of the FLSA to employees in state-operated schools and hospitals, and that the "enterprise" concept of coverage is not itself an unconstitutional extension of Congress' power to regulate interstate commerce.<sup>9</sup>

Prior to 1961, the FLSA did not extend to "enterprises" but covered only individual employees in private businesses who were personally "engaged in interstate commerce or in the production of goods for commerce."<sup>10</sup> Each individual employee had to fall within this standard to be covered;<sup>11</sup> thus, it was theoretically possible for

6. Brief for Plaintiff State of Maryland at 13-22.

7. Brief for Plaintiff State of Maryland at 28-48. The states admitted that the tenth amendment operates merely as a declaration of the relationship between the federal and state governments [*United States v. Darby*, 312 U.S. 100 (1941)] and thus does not bar a congressional exercise of a granted power over state activities incidentally falling within the scope of such regulation [*see, e.g., Parden v. Terminal R.R. of Alabama Docks Dep't.*, 377 U.S. 184 (1964)]. Nevertheless, they argued that if the tenth amendment is to have any meaning at all, it must limit congressional power to the extent of preventing Congress from enacting measures destructive of our federal system of government under the guise of regulating interstate commerce. Brief for the Plaintiff State of Maryland at 48-49a.

8. The three-judge court was convened under 28 U.S.C. § 2282 (1964), which provides that an application for a permanent or interlocutory injunction restraining the enforcement, operation, or execution of a congressional act must be heard and determined by a district court composed of three judges.

9. After the decision by the district court, the states secured an extension of the temporary restraining order issued at the commencement of the suit so as to enjoin enforcement of the FLSA until the states could prosecute a direct appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1253 (1964). The case has been docketed and is now pending before the Supreme Court. 36 U.S.L.W. 3174 (U.S. Oct. 19, 1967), *jurisdiction on appeal to the Supreme Court noted*, CCH LAB. L. REP. (1 WAGES AND HOURS) a 35,492 (Jan. 15, 1968).

10. Employees of states and their political subdivisions were expressly excluded prior to 1961. 29 U.S.C. § 203(d) (1964). Congress gave no express reason for providing this exclusion for state employees. Apparently it did so in order to avoid any possible constitutional problems. Thus, during hearings on the proposed statute, Attorney General Jackson testified that "there is a constitutional problem involved the moment the Federal Government attempts to regulate anything that a State . . . does in reference to its employees." *Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Labor and the House Comm. on Labor*, 75th Cong., 1st Sess., pt. 1, at 82 (1937).

11. Because the statutory language was framed in terms of an employee's "engaging in commerce," the Supreme Court held in a series of pre-1961 cases that the fact that an employee "affected commerce" was not sufficient to bring him within the statutory coverage of the FLSA. For an excellent review of these decisions, *see Goldberg v. Wade Lahar Constr. Co.*, 290 F.2d 408 (8th Cir. 1961), *cert. denied*, 368 U.S. 427 (1961). Although something more than merely "affecting" commerce was required, direct contact with interstate commerce was not essential to coverage of an employee; it was considered sufficient if the activity engaged in by the employee was "in proximity to

the Act to cover only a fraction of the employees of a given business. The United States Supreme Court upheld the Act's standard of coverage in *United States v. Darby Lumber Co.*<sup>12</sup> on the grounds that "an employee's engagement in commerce or in the production of goods for commerce" is one of "those activities intra-state which so affect interstate commerce or the exercise of the power of Congress over it, as to make the regulation of them appropriate means to the attainment of a legitimate end . . . ."<sup>13</sup>

commerce" [*Mitchell v. H. B. Zachery Co.*, 362 U.S. 310 (1960)] or so closely related to commerce as to be capable of being considered a part thereof. *Mitchell v. Vollmer & Co.*, 349 U.S. 427 (1955). Because the application of the FLSA was thus completely dependent upon the nature of the employee's activities and not upon the character of the employer's business, the fact that an employer was engaged in commerce or was even affecting commerce did not mean that all his employees were necessarily covered by the FLSA. *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); *Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942).

12. 312 U.S. 100 (1941).

13. 312 U.S. at 118. In upholding the original FLSA as a valid exercise of the commerce power, the Court specifically overruled its prior decision in *Hammer v. Dagenhart*, 247 U.S. 251 (1918). It held that the power to regulate interstate commerce and those intrastate activities having a "substantial effect" on interstate commerce includes the power to prohibit the interstate shipment of goods produced in violation of the FLSA. Prior to *Hammer*, charges that wage and hour regulation exceeded the limits of the commerce power, violated the fifth amendment, and invaded the reserved powers of the states were sufficient to invalidate federal wage-hour legislation. Although it was recognized that the federal government, the states, and municipalities could constitutionally regulate wage rates for persons employed on public work so long as the requirements of certainty and reasonableness had been met [*see cases cited in Annot.*, 50 A.L.R. 1480 (1927); 132 A.L.R. 1297 (1941)], the Supreme Court persisted in frustrating legislative policy. *See, e.g., Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding a congressional statute which gave a minimum wage board the power to fix minimum wages for women in the District of Columbia violative of the due process clause of the fifth amendment); *Hammer v. Dagenhart*, 247 U.S. 379 (1918) (holding the Federal Child Labor Law of 1916 unconstitutional on the grounds that the commerce clause did not empower Congress to exclude products from interstate commerce unless the articles in question were inherently dangerous). *See also Annot.*, 90 A.L.R. 814 (1934), for a detailed analysis of earlier cases recognizing the validity of statutes limiting only the *hours* of labor in private industry. The following pre-*Darby* articles are of interest in regard to the historical development of the wage and hour law: *Symposium—The Wage and Hour Law*, 6 LAW & CONTEMP. PROB. 321 (1939); Note, *The Fair Labor Standards Act of 1938*, 39 COLUM. L. REV. 818 (1939); Comment, *The Federal Wages and Hours Act*, 52 HARV. L. REV. 646 (1939); Note, *Constitutional Aspects of the Fair Labor Standards Act of 1938*, 87 U. PA. L. REV. 91 (1938).

Subsequently, the *Adkins* case was overruled by the Supreme Court in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), where the Court upheld a Washington statute setting minimum wages for women. The *West Coast Hotel* case, together with the overruling of *Hammer v. Dagenhart* in *Darby*, evinced a marked change in judicial attitude, which in turn opened the door for the far-reaching wage and hour statutes thereafter enacted by both Congress and the states. This subsequent development is analyzed in *Annot.*, 39 A.L.R.2d 740 (1955). Thus, the Supreme Court has rejected contentions that the FLSA constitutes an improper delegation of legislative powers [*Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941)], an infringement of freedom of the press [*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)], an authorization of unreasonable searches and seizures [*Oklahoma Press Publishing Co. v. Walling*, *supra*] and a law which provides arbitrary and discriminatory bases for exemption [*Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946)].

The 1961 amendments significantly expanded the original coverage of the Act by introducing the "enterprise" concept.<sup>14</sup> Congress defined a regulated enterprise not as a business unit that "affects commerce," but instead as one "which has employees engaged in commerce or in the production of goods for commerce . . ."<sup>15</sup> This language has been administratively interpreted to mean that an enterprise which has more than one employee engaged in commerce can be brought within the coverage of the Act.<sup>16</sup> Once an enterprise is brought within the ambit of the Act, all of its employees are covered by the regulatory provisions. The states in the principal case claimed that this was an unconstitutional extension of the commerce power because it may extend coverage to employees who have no connection with interstate commerce other than the fact that two of their fellow employees are engaged in commerce.<sup>17</sup>

Although two other courts had previously been presented with this problem,<sup>18</sup> the court in the principal case was the first court to make a conclusive determination of the constitutionality of the enterprise concept and to present cogent reasons for its holding. In validating the new coverage, the court relied mainly on the similarity between the regulation of an enterprise in the context of the FLSA and the regulation of an employer under the National Labor Relations Act (NLRA).<sup>19</sup> Under section 10 of the NLRA,<sup>20</sup> the National

---

14. "Enterprise" is defined in § 203(r) as follows:

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include related activities performed by such enterprise by an independent contractor. . . .

29 U.S.C. § 203(r) (1964).

15. 29 U.S.C. § 203(s) (1964).

16. CCH LAB. L. REP. (1 WAGES & HOURS) ¶ 25,185 (1967).

17. See Brief for Plaintiff State of Maryland at 26-27. Some legislators raised this question of constitutionality during discussions of the 1961 and 1966 amendments [S. REP. NO. 145, 87th Cong., 1st Sess. 76 (1961); 2 U.S. CODE CONG. & AD. NEWS 1689-94 (1961)], but apparently their objections were not considered serious.

18. *Wirtz v. Edisto Farms Dairy*, 242 F. Supp. 1 (D.S.C. 1965) (holding that dairy products purchasers, producers, and distributors constituted an enterprise engaged in interstate commerce within the meaning of the FLSA and that retail route helpers, not being otherwise exempt, were covered by the minimum wage and overtime provisions); *Goldberg v. Ed's Shopworth Supermarket, Inc.*, 214 F. Supp. 781 (D. La. 1963) (holding that a retail grocery store was within the provisions of the FLSA by virtue of its receipt of a sufficient volume of goods which had travelled in interstate commerce). In neither of these cases did the courts make a conclusive determination of the constitutionality of the "enterprise" concept. They merely concluded that the defendants had failed to overcome the presumption of constitutionality. Rejection of the claims of invalidity was based upon the failure of the defendants to show that the employees held to have been covered did not affect commerce; it was not based upon a broad approval of the enterprise concept. The court in the principal case converted these inconclusive decisions into authoritative precedent.

19. Principal case at 836.

20. 29 U.S.C. § 160 (1964).

Labor Relations Board has been given jurisdiction over labor disputes which "affect commerce" and thus has been vested with the fullest jurisdiction constitutionally permissible under the commerce clause.<sup>21</sup> Existing precedents under the NLRA hold that Congress has the power to regulate the labor relations of local businesses which directly or indirectly affect interstate commerce whether or not individual employees affect commerce.<sup>22</sup> The court found that Congress could similarly regulate the wages and hours of employees without regard to whether the employees themselves directly engage in interstate commerce. However, this analogy seems somewhat inappropriate because the statutory basis of coverage under the NLRA is the effect that the disruption of the employment relationship might have on interstate commerce. To determine whether the requisite effect exists in NLRA cases courts often refer to the volume of the employer's interstate business which is, or might be, withdrawn from interstate commerce as a result of a strike or other interference.<sup>23</sup> In adopting the 1961 amendments, Congress did not base the extended coverage of the FLSA on the fact that the employment relationship "affected commerce"; rather it focused upon the connection of individual employees with interstate commerce as the determinant of whether an enterprise falls within the Act. It is the connection of two or more employees engaged in interstate commerce

---

21. *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224 (1963). Similarly, the FLSA was designed to cope with substandard labor conditions which "lead to labor disputes." 29 U.S.C. § 202 (1964).

22. In many cases arising under the NLRA, the Supreme Court has sustained NLRB jurisdiction over a particular employer or an entire labor dispute found to affect commerce even though individual employees or isolated incidents did not meet the test. For example, in *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224 (1963), the Court upheld NLRB jurisdiction over unfair labor practices committed by a retail distributor of fuel oil, where the retailer had obtained the oil from a wholesaler who brought it in from another state. *See also* *Plumbers Union v. Door County*, 359 U.S. 354 (1958); *Howell Chevrolet Co. v. NLRB*, 346 U.S. 483 (1953); *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675 (1951); *Polish National Alliance v. NLRB*, 322 U.S. 643 (1944). Under these rulings, the NLRB is deemed to have jurisdiction to regulate the acts of the employer toward each of his employees without regard to whether the employee himself has satisfied the requisite jurisdictional test. All of the employer's employment relationships are thus subject to regulation so long as his business affects commerce.

23. Jurisdiction of the NLRB has repeatedly been sustained even in cases where the amount of out-of-state goods used by the local businesses was strikingly small in value. *See, e.g.*, *United States v. Ricciardi*, 357 F.2d 91 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966) (jurisdiction over superintendents of small apartment buildings which annually spent from \$1,200 to \$4,500 for fuel originating out of state upheld); *NLRB v. Inglewood Park Cemetery Ass'n*, 355 F.2d 448 (7th Cir. 1966) (jurisdiction over operation of a cemetery which expended \$3,000 on out-of-state purchases during one year upheld); *NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229 (7th Cir. 1962) (jurisdiction sustained over the operation of a local bus company which locally purchased \$2,000 worth of materials originating outside the state); *NLRB v. Stoller*, 207 F.2d 305 (9th Cir. 1953) (jurisdiction over operation of dry cleaning establishment which annually purchased some \$12,000 worth of soap, cleaning solvent, and paper originating out-of-state upheld.)

which establishes whether an enterprise is covered, and not the volume of interstate goods sent or received by the business unit.<sup>24</sup> As mentioned, once an enterprise is found to be covered, all the employees in that enterprise are subject to the provisions of the Act whether or not they would be individually covered.<sup>25</sup>

Putting aside the NLRA analogy, it seems doubtful that an "enterprise" satisfies the constitutional standard of "affecting commerce" merely because two of its employees are "engaged" in commerce, despite the far-reaching decisions extending the scope of the commerce power.<sup>26</sup> Indeed, one court has expressed such a doubt:

[I]n considering the fact that [the definition of "enterprise" in the FLSA] 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.<sup>27</sup>

The discussion above assumes that "enterprise" means a business unit taken as a whole. It may be possible to avoid the constitutional problems, however, by viewing "enterprise" as a term of art meaning something less than the entire business unit. The Act defines "enterprise" as follows: " 'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . ." <sup>28</sup> And, a covered enterprise is, of course, one "which has employees engaged in commerce or in the production of goods for commerce." <sup>29</sup> It is possible to argue that "related activities . . . for a common business purpose" may refer to less than the entire business unit in some instances. For example, in a business in which some employees are

24. See text accompanying notes 15 & 16 *supra*. It should be noted that § 203(s) provides that certain enterprises must meet specified "dollar-tests." These provisions merely impose a limit on the coverage of the FLSA once it is determined that the enterprise falls under FLSA's commerce test. The individual employee's connection with interstate commerce is the key to determining enterprise coverage which is then limited by the dollar volume of the business.

25. See generally BUREAU OF NATIONAL AFFAIRS, THE NEW WAGE AND HOUR LAW (1961); CCH LAB. L. REP. (1 WAGES & HOURS) ¶ 25,185 (1967) for definitive treatments of the 1961 amendments and their application. The following legislative reports deal with the scope of the amendments: S. REP. NO. 145, 87th Cong., 1st Sess. (1961); H.R. REP. NO. 75, 87th Cong., 1st Sess. (1961); H.R. REP. NO. 327, 87th Cong., 1st Sess. (1961) (Conference Report to accompany H.R. 3935).

26. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). *Wickard v. Filburn*, where the Court held that a farmer's consumption of wheat raised on his own farm substantially affected interstate commerce so as to bring him within the Agricultural Adjustment Act, represents one of the most extreme examples of the reach of the commerce power.

27. *Wirtz v. Edisto Farms Dairy*, 242 F. Supp. 1, 5 (D.S.C. 1965).

28. 29 U.S.C. § 203(r) (1964); see note 14 *supra* and accompanying text.

29. 29 U.S.C. §§ 203(r) & (s) (1964); see notes 15 & 16 *supra* and accompanying text.

"engaged in commerce," an enterprise may be comprised only of these employees plus other employees of the business whose activities are "related" to those of the employees engaged in commerce.<sup>30</sup> In such a situation, the "related" employees may well be said to be engaged in activities which "affect commerce," albeit indirectly. Their work, after all, is necessary to the successful performance of jobs by employees engaged in commerce; should they cease working, the work of the employees engaged in commerce might be rendered either more difficult or nugatory.<sup>31</sup> Under this narrowed definition of "enterprise," FLSA coverage could be sustained as a matter of constitutional principle, since every employee in the "enterprise" by definition "affects" commerce by virtue of his relation to those engaged in commerce. In most cases, all employees in a business unit would be included in the FLSA "enterprise" because they would be performing activities related to those of the employees engaged in commerce. In those rare cases where employees in a business unit might not be sufficiently related to those engaged in commerce, they would not be in the "enterprise" and hence not covered. Thus, it would be impossible for an employee who does not affect commerce to be regulated, and the states' contention that it might be possible would be clearly without merit.

Although the "enterprise" concept may be considered constitutionally valid under a proper construction of the statute, there still remains the more troublesome and more fundamental problem of whether Congress has the power to extend the coverage of the FLSA, or any other regulatory scheme enacted under the commerce clause, to public schools, hospitals, or other state activities. In the 1966 amendments, Congress specifically included such state-operated institutions as "enterprises," thus bringing these theretofore excluded activities within the wage and hour provisions,<sup>32</sup> and for the first

30. For an interpretation of what constitutes "related activities" under § 203(r), see CCH LAB. L. REP. (1 WAGES & HOURS) ¶ 25,185 (1967).

31. This approach seems to be supported by, although not expressly set forth in, an example given by Judge Winter in the principal case at 836:

It is a matter of elementary logic that the hospital and the school function as a result of the sum of all of the activities of all of their employees. The hospital administrator or the superintendent of education (himself exempt from the provisions of the Act), or his secretary, or some other employees, would have no occasion to engage in commerce, or the production of goods in commerce, if the services of the employees covered by the Act under the 1966 Amendments were permanently withdrawn. Their services are essential to the operation of the hospital or the school and, hence, their activities, although local in nature, substantially affect commerce, so that Congress may regulate the minimum wages to be paid them as well as the maximum hours they may be required to work without payment of overtime.

Such an approach is in accordance with prior Supreme Court decisions that congressional power over commerce extends to employees whose activities are related to but not directly part of interstate commerce. *See, e.g., Borden Co. v. Borella*, 325 U.S. 679, 684 (1945); *Walton v. Southern Package Corp.*, 320 U.S. 540 (1944).

32. This result was accomplished by the amendment of the statutory definition of "employer" to eliminate the existing exclusion of states and their political subdivisions



time attempting directly to regulate a state activity by federal legislation.<sup>33</sup> In the principal case, two of the three judges on the panel held the application of the minimum wage provisions to state activities constitutional, although each of the three judges took a different position on the validity of the extension of the overtime pro-

so far as they engaged in the operation of schools, hospitals, and related institutions. 29 U.S.C. § 203(d) (Supp. II, 1967). The definitions of "enterprise" and "enterprise engaged in commerce or in the production of goods for commerce" were accordingly modified. They extend enterprise coverage to hospitals, nursing homes, and schools, regardless of whether public or private or whether operated for profit or not for profit, where the requisite commerce test is met, that is, where the enterprise has "employees engaged in commerce, in the production of goods for commerce, or in handling, selling, or otherwise working on goods that have been moved in or produced for commerce." 29 U.S.C. § 203(r) & (s) (Supp. II, 1967). See note 25 *supra* and accompanying text. The amendments did not, however, purport to bring all employees of state-operated enterprises within the FLSA. Rather they extended the white collar exemption so as to exclude from coverage executive, administrative, and professional employees, such as teachers and academic administrative personnel. 29 U.S.C. § 213(a)(2) (Supp. II, 1967). In addition, certain partial exemptions to the overtime provisions were given to hospitals and nursing homes. 29 U.S.C. §§ 207(j), 213 (Supp. II, 1967).

The apparent impetus to the enactment of the 1966 amendments was the desire of Congress to broaden coverage of the FLSA in response to presidential recommendation. U.S. CODE CONG. & AD. NEWS 9 (1965); PRESIDENT'S ECONOMIC REPORT TO CONGRESS, 111 CONG. REC. 1402 (1965); SPECIAL MESSAGE FROM THE PRESIDENT, 111 CONG. REC. 10,399 (1965). The congressional committee reports reveal that of the 60 million wage and salary workers in the United States, including some 9.5 million public employees, less than half were covered by the existing law. H.R. REP. NO. 1366, 89th Cong., 2d Sess. 2, 7 (1966); S. REP. NO. 1487, 89th Cong., 2d Sess. 2 (1966). The effect of the 1966 amendments was to protect an additional 5.8 million private employees and 1.4 million public employees. The added coverage for public schools, hospitals and related institutions, and local transit systems was provided on the basis of congressional belief that employees of such enterprises are as much in need of a minimum standard of living as workers employed in private industry and that in several areas public employees were not receiving sufficient compensation to enable them to maintain such a standard. See 112 CONG. REC. 10,820-21 (daily ed. May 5, 1966); *Hearings on H.R. 8259 Before the House Comm. on Educ. and Labor*, 89th Cong., 1st Sess. pt. 1, at 429-30, 449, 455 (1955).

33. It has been the traditional congressional policy to exclude state employees engaged in certain state activities from the coverage of legislation embodying social welfare objectives. See, e.g., Federal Unemployment Tax Act, 26 U.S.C. §§ 3301, 3306(c)(7) (1964); National Labor Relations Act, 29 U.S.C. §§ 141, 152(2) (1964); Equal Employment Opportunity Act, 42 U.S.C. § 2000e(b) (1964). In addition, social security legislation excludes the states as covered employers. 26 U.S.C. § 3121(b)(7) (1964); 42 U.S.C. § 410(a)(7) (1964).

However, in 1942 an organ of the federal government—the National War Labor Board—did consider the issue of whether it had jurisdiction to oversee labor disputes between state employees and their governmental employers, and determined that no jurisdiction existed. National War Labor Board, Cases Nos. 47, 726 (Dec. 23, 1942), reported in C. H. RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW* 226 (1946). The decision was based on the notion that a state has undisputed power to regulate the working hours and compensation of its employees: "[A]ny directive order of the National War Labor Board which purported to regulate the wages, working hours, or the conditions of employment of state or municipal employees would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government." It is noteworthy that this decision was reached after the decisions in *United States v. Darby*, 312 U.S. 100 (1941), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936).

visions to these state activities.<sup>34</sup> Since the decision in the principal case adds judicial sanction to direct federal control over state functions, it assumes landmark proportions. The implications of the decision may well signal the need for a reinterpretation of the scope of Congress' power under the commerce clause.<sup>35</sup>

The plaintiff states initially argued that the operation of public schools and hospitals is purely "local" and hence not "interstate commerce" within the meaning of the commerce clause.<sup>36</sup> However, despite popular thinking which views schools and hospitals as carrying on activities peculiarly "local" in nature, the "interstate" nature of such activities can be easily demonstrated. There can be little doubt that school and hospital expenditures for supplies and equipment generate a substantial flow of goods in interstate commerce.<sup>37</sup>

---

34. Judge Winter deemed the amendments constitutional both as to the minimum wage and the overtime provisions on the theory that the operation of schools and hospitals exerted a substantial effect upon interstate commerce and thus was within the reach of the federal commerce power. Principal case at 832, 836-37. Chief Judge Thomsen, concurring in the result as to the minimum wage provisions, conceded that the operation of schools and hospitals by the states may affect interstate commerce to a substantial degree; nevertheless, he went on to rest his decision upon the theory that an application of the FLSA to the states did not "seriously interfere with the state's performance or regulation of its indispensable sovereign functions." Principal case at 850. Applying this latter test to the overtime provisions, however, Judge Thomsen concluded that they "probably" go beyond constitutionally permissible limits with respect to some if not all of the covered employees. He would have permitted the states to challenge the overtime provisions on a case-by-case basis, thus allowing the court in each case to determine if impermissible undue interference with sovereign state functions existed. Principal case at 851-52. A similar "undue interference" test was utilized by Judge Northrop in reaching the conclusion that the extension of both the minimum wage and overtime provisions to the states is unconstitutional. Principal case at 852-53. As a result of this division in the court, the reasoning of the concurring and dissenting opinions, while not leading to the same result, actually constitutes the majority rationale. See generally Recent Decision, *A Balancing Test for the Commerce Power*, 56 GEO. L.J. 392 (1968); Comment, *Constitutional Law—Fair Labor Standards Act—1966 Amendments Extending Coverage to Certain Employees of State Public Schools, Hospitals, and Related Institutions Held Constitutional*, 43 NOTRE DAME LAW. 414 (1968).

35. Although the principal case is the first case in which a court has been squarely presented with express regulation of the states under the commerce clause, consideration of the problem of intergovernmental immunity as a limitation on the exercise of federal powers other than the taxing power is by no means new. See cases cited in note 43 *infra*. See also Recent Decision, *Constitutional Law—Intergovernmental Immunities—Statutory Construction—Applicability of Price Control Legislation to Sales by States*, 45 MICH. L. REV. 94 (1946) (noting *Case v. Bowles*); Note, *State Sovereignty as a Limitation Upon the Federal Commerce Power*, 45 YALE L.J. 1118 (1936) (noting *United States v. California*).

36. Brief for Plaintiff State of Maryland at 13-22.

37. During fiscal year 1967 an estimated \$38.3 billion was spent by the nation's state and local public educational and medical institutions. In fiscal year 1965 state and local authorities spent some \$3.9 billion in the operation of public hospitals. The stipulations of the plaintiff states indicate that substantial portions of these amounts are expended to purchase supplies and equipment in the interstate market. Thus, in Maryland, 87% of the \$8 million spent in 1965 for supplies and equipment for use in the public schools involved direct interstate purchases, and over 55% of its hospital purchases were for out-of-state goods. In Ohio 42% of the total of \$9 million

Thus, all three judges in the principal case agreed that state operation of schools and hospitals "affected" commerce and could be regulated under the commerce power as traditionally defined.<sup>38</sup> One

spent by Ohio's six state universities on certain supplies during 1966 were purchased directly out of state, and an undetermined portion had been manufactured out of state. Information provided by Texas similarly shows that almost all textbooks originate outside of the state, and that "the major portion" of drugs and hospital equipment is either purchased directly from out-of-state concerns, or at least manufactured in other states. It is noteworthy that the interstate flow of school and hospital supplies is necessitated by the limited geographical distribution of manufacturers of such goods. There are, for example, no Maryland suppliers for fourteen out of eighteen major categories of school supplies and equipment, including textbooks, teaching tools and audio-visual aids, science equipment, and physical education equipment. Even some of the larger states, such as Ohio and Texas, have few producers of such essential commodities. Principal case at 833-34; Reply Brief of Defendant at 2-4; Brief of the American Federation of State, County and Municipal Employees as Amicus Curiae at 3-4.

In addition, it is well established that actual shipment of goods across state lines is "interstate" and not "local," and it has been held that goods so shipped need not be tangible, but can consist of "ideas, wishes, orders and intelligence." *Western Union v. Lenroot*, 323 U.S. 490 (1945). Under this concept, the preparation of written documents and other materials for out-of-state transmission, as well as the actual transmission of funds, documents and other communications, seemingly can be classified as "interstate commerce." Several cases in fact have held that employees engaged in the preparation of written documents and other materials for interstate transmission or in the actual interstate transmission of such documents, communications, and funds are within the coverage of the FLSA. See, e.g., *Beneficial Fin. Co. v. Wirtz*, 346 F.2d 340 (7th Cir. 1965); *Willmark Service System, Inc. v. Wirtz*, 317 F.2d 486 (8th Cir. 1963), cert. denied, 375 U.S. 897 (1963); *Public Bldg. Authority v. Goldberg*, 298 F.2d 367 (5th Cir. 1962); *Mitchell v. Kroger Co.*, 248 F.2d 935 (8th Cir. 1957); *Aetna Fin. Co. v. Mitchell*, 247 F.2d 190 (1st Cir. 1957).

Applying these concepts to state-operated schools and hospitals, Judge Winter reasoned that the preparation and exchange of documents in connection with various federal aid programs is sufficient to support a finding that "public schools and hospitals are directly engaged in commerce and the production of goods for commerce." Principal case at 834. The significance of the notion that the mere interchange of communications with the federal government is sufficient to put one "in commerce" is readily apparent. If that is the rule it can well be wondered what, if anything, is not interstate commerce.

38. See note 34 *supra*. The traditional bounds of congressional power under the commerce clause have undergone comprehensive treatment by other authorities and will not be re-considered here. See, e.g., Barnett, *Ten Years of the Supreme Court: 1937-1947—Power To Regulate Commerce*, 41 AM. POL. SCI. REV. 1170 (1947); Fallon, *The Commerce Clause From the Schechter Case Through the 1944-45 Term*, 19 TEMP. L.Q. 421 (1946); Green, *Some Heretical Remarks on the Federal Power Over Commerce*, 31 MINN. L. REV. 121 (1947); Light, *The Federal Commerce Power*, 49 VA. L. REV. 717 (1963); Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 883 (1946). It is sufficient for present purposes to note that the battle over the power of Congress to regulate activities "affecting" commerce, which culminated in the decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), was fought almost exclusively between the states and the federal government insofar as each claimed the power to regulate particular private activities. See *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Under the "substantial effect" test developed in these early cases, any activity which "substantially" affects or burdens interstate commerce may be regulated even though the activity itself is considered "local" in nature and even though the effect of a particular individual engaging in the activity is trivial. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). Whether the effect of the activity is

judge, having arrived at this conclusion, said that the inquiry need go no further since the congressional power under the commerce clause is "plenary," and the regulation of any activity, including that of a state, which affects commerce is constitutional.<sup>39</sup> However, the concurring and dissenting judges argued that in spite of the fact that the Supreme Court has yet to distinguish governmental from private activity in defining the scope of the commerce power,<sup>40</sup> the constitutional inquiry should not stop with a mechanistic application of the "substantial effect" test; a perfunctory recital of the

"direct" or "indirect" is immaterial so long as the effect is "substantial." *NLRB v. Jones & Laughlin Steel Corp.*, *supra*. Furthermore, the particular activity need not be "commercial" or conducted for profit. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Powell v. United States Cartage Co.*, 339 U.S. 497 (1950); *Edwards v. California*, 314 U.S. 160 (1941); *Brooks v. United States*, 267 U.S. 432 (1925).

Only a handful of cases involved issues arising from the fact that state operations came within the regulatory ambit of a generally applicable federal commerce statute. *See* cases cited in note 43 *infra*. These cases are more fully analyzed hereinafter in connection with their value as precedent for sustaining the 1966 amendments. *See* notes 43-58 *infra* and accompanying text.

Although it is thus evident that, through their operation of schools and hospitals, the states "affect commerce," it is not so clear how, through noncompliance with the federal minimum wage or maximum hour standards, state operation of schools, hospitals, mental institutions, reformatories, and so forth, would constitute "unfair methods of competition" which "burden commerce and the free flow of goods in commerce"; cause the channels of commerce to be used to "spread and perpetuate substandard labor conditions"; lead to labor disputes; or "interfere with the orderly and fair marketing of goods in commerce." 29 U.S.C. § 202 (Supp. II, 1967). *See* Brief for Plaintiff State of Texas at 24; Appellants' Jurisdictional Statement in the United States Supreme Court at 27-29.

39. Judge Winter, principal case at 832. Judge Winter explicitly rejected the notion that the nature of our federal system imposes any limitation on Congress' power under the commerce clause: "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." Principal case at 840 [citing *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48 (1933)].

It should be noted that even accepting the application of the FLSA to these state activities, public schools and hospitals may be "ultimate consumers" within the statutory definition of "goods," and therefore excluded from the FLSA's provisions. 29 U.S.C. § 203(i) (Supp. II, 1967). Under this theory, which was asserted by Maryland and Texas in the district court, the public hospitals and schools of the states are the ultimate consumers of all materials, supplies, and equipment utilized in their operations. Their employees, as employees of an ultimate consumer, would not be covered since by definition "goods" do not include goods after their delivery to the ultimate consumer. *See* Brief for Plaintiff State of Maryland at 58-66; Brief for Plaintiff State of Texas at 31-33; Jurisdictional Statement in the United States Supreme Court at 35-37, 40-42. Since this argument is one of statutory construction, the district court, in confining itself to the constitutional issue, held that it would be more properly asserted in a suit involving the application of the FLSA to an individual school or enterprise. Principal case at 831. This issue is being included in the appeal being taken by the states to the Supreme Court.

40. *See, e.g., California v. Taylor*, 353 U.S. 553 (1957); *California v. United States*, 320 U.S. 577 (1944); *United States v. California*, 297 U.S. 175 (1936). In *United States v. California*, the Supreme Court expressly rejected the argument that the power to regulate state activities under the commerce clause depends upon whether those activities are governmental or proprietary in nature. 297 U.S. at 183.

plenary nature of the commerce power thus should not be used to sustain automatically a direct regulation of activities undertaken by the states, but rather should entail consideration of the practical effects which the federal regulation would have upon the operation of state governments.<sup>41</sup> Both of these judges agreed that the commerce power, rather than being absolute, is subject to a limitation similar to that applied to the federal taxing power, which is limited to the extent that it "unduly interferes" with a state's performance of its sovereign functions.<sup>42</sup>

Any conclusion that the commerce power is inherently limited must distinguish a number of past cases which have held that state activities can indeed be subject to federal commerce clause regulation.<sup>43</sup> The two judges in the principal case who put forth the inherent limitation theory merely dismissed these strong precedents with the observation that "in none of those cases were the essential taxing and budgetary functions so seriously affected as by the statute under consideration" in this case.<sup>44</sup> Closer scrutiny of those cases presents a clearer and more meaningful distinction. This distinction rests upon the notion that the commerce clause is not a source of undifferentiated power applicable to any given state activity which

---

41. See note 34 *supra*.

42. *Id.*

43. The cases upholding federal commerce clause regulation of certain state activities are *Parden v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964) (state operating a railroad in interstate commerce held liable to suit under the Federal Employers' Liability Act); *California v. Taylor*, 353 U.S. 553 (1957) (Federal Railway Labor Act held applicable to a state in its capacity as railroad employer engaged in the operation of a belt-line railroad even though congressional policy of promoting collective bargaining conflicted with the state's civil service laws); *California v. United States*, 320 U.S. 577 (1944) (order of the Federal Maritime Commission directing a state and a municipality to limit free wharfage time and to observe prescribed minimum prices for their services in operating waterfront terminals upheld); *United States v. California*, 297 U.S. 175 (1936) (holding that the state by engaging in interstate commerce by rail subjected itself to the requirements of the Federal Safety Appliance Act so as to be liable for penalties for statutory violations); *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48 (1933) (imposition of a federal customs duty on scientific apparatus imported by a state university for educational purposes upheld as a valid exercise of Congress' "plenary and exclusive" power to regulate foreign commerce); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925) (state sanitary district enjoined from diverting water from Lake Michigan in excess of that authorized by the Secretary of War under a statute prohibiting alterations and obstructions in the navigable capacity of the Great Lakes waters).

In a more recent case, *United States v. Ohio*, 385 U.S. 9 (1966), *rev'g per curiam* 354 F.2d 549 (1965), a state was held liable to the United States for penalties under the 1938 Agricultural Adjustment Act for growing wheat on state-owned prison farms in excess of federally imposed acreage allotments. This decision is distinguishable from the cases above in that the federal statute that was applied to the state activity did not concern control of an instrumentality of commerce. For a fuller discussion, see text accompanying notes 60 and 61 *infra*. See also *Case v. Bowles*, 327 U.S. 92 (1946), a case arising under the war power, where a state was enjoined from selling school-land timber at prices in excess of the maximum price prescribed by the OPA under the authority of the Emergency Price Control Act.

44. Principal case at 848.

may come within its ambit; rather, it should be considered a *hybrid* power containing both a plenary and a nonplenary component.<sup>45</sup> Thus, there are areas which demand a plenary exercise of power in order to effectuate a constitutional objective requiring a unified national perspective, but there are also areas where the permissible extent of federal power over state activities is limited by the constitutionally recognized sovereignty and integrity of the states.<sup>46</sup>

Although this dual aspect of the commerce power has never been explicitly enunciated, it seems to be entirely in keeping with prior cases decided under the commerce clause. The plenary aspect of Congress' power to control commerce can best be seen in cases upholding the validity of federal regulation of states and their political subdivisions in the area of foreign commerce. United action in the field of foreign commerce was undeniably one of the prime reasons for the establishment of a strong national government.<sup>47</sup> Thus, it has been recognized that in problems of international relations a principle of federalism is not operative;<sup>48</sup> rather, a federal, instead of a state, perspective is constitutionally required so that a necessarily national policy applicable to the country as a whole can be established.<sup>49</sup> In this respect, then, the commerce power is "plenary" and may be exercised to control state as well as private activities irrespective of the sovereign character of the states, just as the federal government's war and treaty powers are exercised.<sup>50</sup>

In like manner, there seem to be classes of interstate commerce

45. *But see* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1067-68 (5th ed. 1891) (suggesting that the commerce clause grants a power that is a "uniform whole").

46. This analytical framework is suggested by the following passage from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, at 194-95 (1824):

The genius and character of the whole government seems to be that its action is to be applied to all external concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect the states generally, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

47. *See, e.g.*, 2 STORY, *supra* note 45, § 1058:

Those who felt the injury arising from . . . [the oppressed and degraded state of commerce prior to the adoption of the Constitution] . . . perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, a matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce . . .

48. *Board of Trustees of University of Illinois v. United States* 289 U.S. 48 (1933), where the Court held that the principle of state immunity has no application to duties imposed on the exercise of the power to regulate foreign commerce.

49. *Id.* at 59: "In international relations and with respect to *foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.*" (Emphasis added.) *See Johnson, When the Importer Is a State University, May the Government Collect a Duty?*, 27 MICH. L. REV. 499 (1929). *See also Sanitary Dist. v. United States*, 266 U.S. 405 (1925) (holding that the Attorney General of the United States could secure an injunction against the Sanitary District of Chicago to prevent it from obstructing foreign and interstate commerce by diverting a volume of water from Lake Michigan in excess of that allowed by federal statute).

50. *Case v. Bowles*, 327 U.S. 92 (1946); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925).

problems as to which the Constitution requires that the federal government have plenary power to formulate a rule applicable to the country as a whole.<sup>51</sup> One such class seems to be the control of the highways and instrumentalities of commerce. Here, the objective which justifies federal supremacy through an exercise of a plenary commerce power without regard to state sovereignty is maintenance of the free movement of goods, an objective which can be achieved in the context of conflicting state interests only by a paramount federal power.<sup>52</sup> In fact, it is in this area of interstate commerce that the courts have always upheld federal regulation of state-owned and -operated facilities. Thus, state-run railroads, port facilities, and the like have been held subject to federal regulation under the commerce clause.<sup>53</sup> This objective is not merely one of national legislative policy, but involves a "prime purpose" for which the federal government was created.<sup>54</sup>

In contrast to this plenary aspect, there seems to be an area of interstate commerce in which a complete federal power is neither constitutionally commanded nor constitutionally contemplated.<sup>55</sup>

51. See, e.g., *Case v. Bowles*, 327 U.S. 92, 102 (1946), where the Court talked of a "prime purpose of the Federal Government's establishment." The commerce power itself was granted in order to vest the federal government with the power to deal with the chaotic condition of American domestic trade under the Articles of Confederation and embodies a constitutional objective of eliminating "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." *Baldwin v. Seelig*, 294 U.S. 511, 522 (1934). See also *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 378 (1964); 2 STORV, *supra* note 45, § 1066.

52. See, e.g., *Railroad Comm'n v. Chicago, B. & Q. R.R.*, 257 U.S. 563 (1922) (holding federal control over intrastate railroad rates essential to maintaining an adequate national railway system). See also *Southern Ry. v. United States*, 222 U.S. 20 (1911); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). A broad range of federal statutes dealing with the actual channels of interstate commerce have been enacted by Congress in order to effectuate this constitutional purpose. See, e.g., Federal Power Act of 1935, 16 U.S.C. §§ 824-25r (1964) (transmission and sale of electric energy); Natural Gas Act of 1938, 15 U.S.C. §§ 717-17w (transportation and sale of natural gas) (1964); Motor Carrier Act of 1939 (now Part II of Interstate Commerce Act) 49 U.S.C. §§ 301-27 (1964) (motor carriers); Interstate Commerce Act, 49 U.S.C. §§ 901-23 (1964) (water carriers); Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1964) (air carriers).

53. E.g., *Parden v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *California v. United States*, 320 U.S. 577 (1944); *United States v. California*, 297 U.S. 175 (1936). (See abstracts of these cases in note 43 *supra*.) Other types of cases included in this category of commerce are those dealing with the navigable waterways which interfere with but do not directly regulate state activities. See, e.g., *Oklahoma v. Atkinson*, 313 U.S. 508 (1941) (holding constitutional a federal act authorizing the construction of a dam on nonnavigable waters that would flood state-owned land used for schools, a prison farm, and highways and bridges and would interfere with the state's own program of water development and conservation).

54. *Case v. Bowles*, 327 U.S. 92, 102 (1946). See note 51 *supra*.

55. At times it has been suggested in dicta that the scope of Congress' power to regulate interstate commerce is not as broad as the power to control foreign commerce. Thus, the dissenting opinion in the *Lottery Case*, 188 U.S. 321, 373-74 (1903) stated:

It is argued that the power to regulate commerce among the several States is the same as the power to regulate commerce with foreign nations, and with the Indian

This area would seem to include congressional regulation of activities which merely "affect" commerce, as opposed to the regulation of activities concerned with the actual transportation of goods across state lines—that is, the regulation of activities which "*affect*" commerce, as opposed to the regulation of activities which *are* commerce. Examples of the types of activity in this area of commerce are labor disputes and the maintenance of substandard labor conditions, both of which Congress has found to interfere with or burden the free flow of goods in commerce.<sup>56</sup> Yet, in both cases, the finding of interference with interstate commerce merely served as the basis to support social legislation which was not necessarily related to commerce clause objectives. In other words, the element of constitutional objective is purely incidental, if not fictitious, and is utilized only to justify the legislation constitutionally; the furtherance of *legislative* social policy is the paramount objective. The issue in the principal case appears to be of this type, since it does not involve the need for unfettered operation of instrumentalities of commerce<sup>57</sup> or any other such matter of constitutional purpose, but rather entails a legislative policy against substandard labor conditions and Congress' attempt to deal with these conditions under the aegis of the commerce clause. This element of legislative policy, rather than constitutional objective, serves to distinguish the principal case from previous cases subjecting states to federal regulation under the commerce clause and indeed seems to distinguish the nonplenary aspect of the power over interstate commerce from its plenary aspect.<sup>58</sup>

---

tribes. But is its scope the same? . . . [T]he power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure quality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other.

See also *Brolan v. United States*, 236 U.S. 216, 222 (1915). However, there have also been dicta to the contrary: that the interstate aspect of Congress' power to control commerce is as plenary as its foreign commerce power. See, e.g., *License Cases*, 46 U.S. (5 How.) 504, 578 (1874); *Pittsburgh & C. Coal Co. v. Bates*, 156 U.S. 577, 587 (1895). Treating the interstate commerce power as a hybrid as suggested in the text would, of course, accommodate both views. See generally LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 155-57 (1964).

56. National Labor Relations Act, 29 U.S.C. §§ 141-87 (1964); Fair Labor Standards Act, 29 U.S.C. § 202 (1964). See note 38 *supra*.

57. See note 2 *supra*.

58. This distinction is suggested by the following passage from THE FEDERALIST No. 31, at 199 (H. Dawson ed. 1863) (Hamilton):

[A]s the plan of the Convention aims only at a partial union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would exist only in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an au-



Although it is well-recognized that the federal government has power to regulate private activities which "affect" commerce,<sup>59</sup> no case has held that state activities can be constitutionally regulated in a like manner. One decision, *United States v. Ohio*,<sup>60</sup> has held an activity of a state government amenable to a federal statute enacted under the commerce clause merely because that activity "affected commerce." This case, however, did not raise the basic issue of whether such an act could constitutionally be applied to a state, but merely decided that the state activity came within the statute's jurisdictional standard.<sup>61</sup> Thus, there is no authority for the proposition that, as a matter of constitutional law, activities of state governments which do not directly involve the operation of an instrumentality of commerce, but which merely "affect" commerce, are amenable to federal regulation under the commerce clause.

Rather than compelling federal supremacy in all such cases, it is possible that the Constitution allows for an adjustment of competing federal and state interests with a view to preserving the effectiveness of both governments. Unless the states are to be rendered mere administrative units, there must be an intrinsic limitation on the commerce power arising from the constitutionally recognized identity and sovereignty of the states and from the practical necessities engendered by the existence of two sovereign governments within one geographical area.<sup>62</sup> Since our federal scheme of govern-

---

thority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different: I mean where the *exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority*. [Emphasis added]

The distinction between a constitutional objective and a legislative policy is not always easy to make, since the legislative policy and the exercise of power to accomplish it may often be justified in terms of constitutional purpose. Thus, the FLSA, which expresses a legislative policy against substandard labor conditions and is a public welfare measure, is justified in the legislative findings as a measure designed to accomplish the constitutional objective of eliminating burdens and obstructions on the free flow of goods in commerce. 29 U.S.C. § 202 (Supp. II, 1967).

59. Congress thus far has been deemed to have exclusive control over private activities which affect commerce (*see* articles cited in note 38 *supra*), not, however, because of a constitutional imperative, but because courts have found no compelling reasons to allow a state to control private activities when the federal government has acted in the area.

60. 385 U.S. 9 (1966).

61. The Agricultural Adjustment Act is intended to apply to wheat producers when their wheat could be said to exert a substantial economic effect on interstate commerce. 7 U.S.C. §§ 1301(a)(3) & (4), 1331 (1964).

62. The expansion of the federal commerce power since the 1930's has caused some commentators to wonder whether there is any limit to the power which the federal government can exercise under the aegis of the commerce clause and whether the

ment necessarily implies restrictions on the exercise of all governmental power so as to preserve the integrity of its constituent units, it would seem that the commerce power, perhaps like the taxing power,<sup>63</sup> should be limited so that it cannot be utilized to destroy state sovereignty. This notion of inherent limitation is in accord with the principle of federalism embodied in the tenth amendment. While the tenth amendment may not operate as an affirmative limitation upon federal power, it must at least guarantee the continued vitality of the states as governmental units in a federal scheme if it is to have any meaning at all.<sup>64</sup> Although such a limitation has yet

states can retain their vitality in the face of such power. *See generally* L. WHITE, *THE STATES AND THE NATION* (1953); Crampton, *The Supreme Court and the Decline of State Power*, 2 J. LAW & ECON. 175 (1959); Cudlip, *The Function of the States*, 43 MICH. L. REV. 95 (1944); Fordham, *The States in the Federal System—Vital Role or Limbo?*, 49 VA. L. REV. 666 (1963); Light, *The Federal Commerce Power*, 49 VA. L. REV. 717 (1963). In fact, the fear that Congress was deliberately disregarding its authority under the Constitution was early voiced by Woodrow Wilson:

The old theory of the sovereignty of the States . . . has lost its vitality . . . . [T]he federal government is, through its courts, the final judge of its own powers . . . . Its power is "to regulate commerce between the States," and the attempts now made during every session of Congress to carry the implications of that power beyond the utmost boundaries of reasonable and honest inference show that the only limits likely to be observed by the politicians are those set by the good sense and conservative temper of the country.

W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 178-79 (1908). The precise role to be played by the states is not important for present purposes. What is noteworthy is that the fact that there are areas of peculiarly local concern which the Constitution leaves to the states has been recognized as a limitation upon the unrestricted exercise of the commerce power, even in those cases which have contributed significantly to the expansion of that power. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In the last mentioned case the essential problem presented to the Court was that of defining those private activities which are within the reach of the federal commerce power and those which are of purely local concern and which must be left to state regulation. It was in this context that the substantial effect test developed and not in the context of cases dealing with the issue of which state activities may be constitutionally subjected to an exercise of federal power. *See note 38 supra*.

63. At least one commentator has suggested that this idea serves as a basis for making an analogy between the taxing power and the commerce power. Professor Charles L. Black in *PERSPECTIVES IN CONSTITUTIONAL LAW* 25, 30 (1963) states:

The Federal powers—over commerce, taxation, the post, the armed forces, the currency, patents and copyrights, maritime affairs, and so on—can be used to coerce any result concerning any matter, however "local," unless an implied limitation (on Federal authority) exists, and the concept of a legally defined Federalism, judicially implied, has then no substance . . . .

The issue, rather, is whether the Federal system has any legal substance, any core of constitutional right that the courts will enforce.

If it has not, but exists only at the sufferance of Congress, that cardinal fact should be recognized. The only viable alternative is the working out of a body of doctrine stating limitations on Congress that are implied from the existence and authority of the states.

64. The constitutional recognition of state governments does not mean that the tenth amendment is to be viewed as an affirmative limitation on the powers of the federal government. Such a view has been rejected consistently since the late 1930's. Probably the most notable decision on this point is *United States v. Darby*, 312 U.S. 100, 123 (1941), in which the Supreme Court dismissed the tenth amendment as "but a truism—that all is retained that has not been surrendered."

to be placed upon the commerce power by any court, it would seem to be supported by the statement of Justice Frankfurter in his opinion in *New York v. United States*,<sup>65</sup> to the effect that "the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce."<sup>66</sup> The suggestion that in some respects the commerce power is coextensive with the taxing power may indicate that the commerce power should be similarly limited when its exercise upon the states has an impairing effect akin to that which results from an exercise of the taxing power.

The basic issue in the principal case thus resolves itself into a problem of defining those state activities which may be constitutionally regulated and those which may not. Analogizing to the test under the taxing power, the appropriate test for determining which state activities are regulable should consider the degree of impairment of state functions resulting from an exercise of the commerce power upon the states.<sup>67</sup> This test is similar to the one suggested by

---

The tenth amendment does, however, buttress the argument for implying a principle of intergovernmental immunity inasmuch as it expressly declares what the seven basic articles of the Constitution imply, namely, that the system of government they establish was intended to preserve the integrity of the states and protect a certain field of autonomy against federal encroachment. *See United States v. Baltimore & O.R.R.*, 84 U.S. (17 Wall.) 322, 327-28 (1873) [quoted with approval by Justices Douglas and Black, dissenting in *New York v. United States*, 326 U.S. 572, at 593 (1946)]:

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. . . . Their operation may be impeded and may be destroyed, if any interference is permitted.

*See also Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868):

The preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states.

65. 326 U.S. 572 (1946).

66. *Id.* at 582.

67. Analogies to the taxing power cannot be readily dismissed by reference to broad language in some opinions to the effect that the principle of intergovernmental immunity cannot operate as a limitation upon the power to regulate commerce. *See, e.g., United States v. California*, 297 U.S. 175 (1936). Cases in which such statements have been made are distinguishable from the principal case. *See* notes 43-58 *supra* and accompanying text. If some constitutional principle limits the federal government's power to interfere with the sovereign functions of the states, that limitation, it would seem, must apply with equal force to an exercise of the commerce power. All of Congress' powers are granted by the same section of the Constitution, U.S. CONST. art. I, § 8. Thus, there would seem that limitations on one power which are derived from other provisions of the Constitution not specifically limited to that power should similarly restrict all Congress' powers. *See Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936), where the Court, in comparing the bankruptcy power to the taxing power, stated at 530: "Both [powers] 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." *See also Note, State Sovereignty as a Limitation Upon the Federal Commerce Power*, 45 YALE L.J. 1118 (1936).

Chief Justice Stone in *New York v. United States* as determinative of the amenability of state activities to federal taxation, the basic inquiry of which was whether the imposition of a nondiscriminatory tax results in "a State . . . being taxed so as unduly to infringe, in some manner, the performance of its functions as a government which the Constitution recognizes as sovereign."<sup>68</sup> The concurring and dissenting judges in the principal case utilized a similar notion in asserting that the appropriate test for determining the permissibility of an exercise of the commerce power upon the states should involve a balancing of the extent of interference with indispensable state functions against the effect that such functions have upon interstate commerce.<sup>69</sup>

Application of an "undue interference test," similar to the one suggested in the taxing power cases,<sup>70</sup> to the facts of the principal case perhaps best demonstrates the necessity of implying a limitation on the power over interstate commerce and illustrates the way in which such a test would operate as a balancing device to resolve the conflict of sovereignties resulting from an exercise of the federal commerce power upon state activities. In determining the amenability of state-operated schools and hospitals to federal wage and hour regulation, the possible frustration of federal wage and hour policy arising from failure to regulate these activities should be balanced against the impact which application of the FLSA will have upon the states. In assessing the extent of the frustration of federal goals, it is necessary to consider the significance of the federal regu-

68. 326 U.S. 572, 587 (1946). Later in his opinion Chief Justice Stone reiterated language he had previously used in *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-24 (1926):

[T]he limitation upon the taxing power of each [the states and the federal government], so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference 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.

For earlier formulations of the idea of permitting both governments to function "with a minimum of interference," see *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939); *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Wilcutts v. Bunn*, 282 U.S. 216 (1931); cases cited in note 70 *infra*.

69. Chief Judge Thomsen, concurring, phrased the applicable test as follows: "The attempted exercise against a State of the power of the federal government over interstate commerce should face the test: does it interfere unduly with the State's performance of its sovereign and indispensable functions of government? If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufferance of the federal government." Principal case at 849. Judge Northrop stated that the test should be similar to the one suggested in Chief Justice Stone's opinion in *New York v. United States*: "The question before us is whether this Congressional exercise of power under the Commerce Clause constitutes an undue infringement upon the 'performance of [the state's] function as a government which the Constitution recognizes as sovereign.'" Principal case at 853.

70. E.g., *New York v. United States*, 326 U.S. 572 (1946); *Helvering v. Powers*, 293 U.S. 214 (1934); *Ohio v. Helvering*, 292 U.S. 369 (1934); *Metcalf v. Mitchell*, 269 U.S. 514 (1926). See also note 68 *supra*.

latory activities being attacked in relation to Congress' over-all scheme of regulation and to ascertain whether alternative means of achieving the same goals are available. Under the FLSA, Congress has succeeded in regulating about 30 million of the 60 million wage and salary workers in the United States. The 1966 amendments expanded this coverage, but included only some 1.4 million public employees, many of whom are already receiving a wage at or above the minimum wage prescribed by the Act.<sup>71</sup> Moreover, Congress has alternative means of securing its objective of a minimum wage for public employees: a scheme of conditional grants. Thus, the potential frustration of the federal minimum wage policy is minimal. On the other side of the scale, a literal application of the statute<sup>72</sup> with increases in wages for covered employees, threatens to impose substantial and perhaps destructive financial burdens upon already strained state budgets.<sup>73</sup> For most states to meet these added costs, it will be necessary for them either to curtail indispensable services now being provided<sup>74</sup> or to increase taxes, an alternative which,

---

71. See note 32 *supra*.

72. Opinions of the Wage-Hour Administrator indicate that the 1966 amendments will be literally applied once their validity has been upheld. See CCH LAB. L. REP. (2 WAGES & HOURS) ¶¶ 30,004, 30,006, 30,647 (1967).

73. It is estimated that a total of some \$215 million in additional funds would be needed to cover the increased expenses in the first year above. Brief of Plaintiff State of Maryland at 5. Texas alleged that to meet the standards imposed by the FLSA, the expenses of the Texas Youth Council would have to be increased \$3 million annually; the Department of Mental Health and Mental Retardation would require \$7.5 million more per year; institutions of higher learning would have additional costs of over \$3.25 million imposed on them annually; and the Fort Worth Independent School District, which is merely one of 1,300 other Texas School Districts, would need additional tax revenues of \$575,000 annually by 1971. Furthermore, some of these districts have already reached their constitutional tax rates and property value limitations. Brief for the State of Texas at 18; principal case at 851.

74. "Indispensable" as used here is not intended to be a mere euphemism for what was formerly called an "essential" state function or a "governmental" function, but is meant to cover state activities which cannot reasonably be supplied to the general public unless the state undertakes them. For example, a substantial portion of available hospital facilities and care would probably be unavailable unless supplied by the states. In Maryland, for example, state-provided beds constitute the only facilities available for tubercular care in the state. Similarly, 90% of the facilities for the mentally ill and defective in Maryland are provided by the state. In Texas non-state hospital beds are virtually nonexistent and the few private facilities that do exist are extremely expensive. Similar conditions exist in other states. The primary role played by the states in the area of education, of course, is well recognized. In Maryland, Texas, and Ohio over 80% of the total number of secondary and elementary school pupils are enrolled in public schools. Public institutions of higher education serve 74% of the students enrolled in degree programs in Maryland, 77% in Texas, and 63% in Ohio. See principal case at 850. It should also be noted that public institutions bear the main burden of caring for the indigent. These facts indicate the vital role that the states play in providing needed facilities and services in response to the desires of their citizens, a role which may become too burdensome when the federal government is allowed to regulate a large portion of the costs of such activities. What has been said in respect to schools and hospitals applies, of course, with equal force to the "related institutions" covered by the 1966 amendments.

even if politically feasible, may often be impossible since many of the political subdivisions involved are already saddled with sizeable debts and are taxing at their constitutional maximums.<sup>75</sup>

Also significant is the nature of the state activities being brought within the ambit of congressional regulation. Certainly the propriety of regulating activities involving the actual functioning of a state government, including the provision of indispensable public services of such an economically marginal nature that they would not otherwise be provided, is highly questionable.<sup>76</sup> Indeed, it has been suggested that there are special considerations where the federal government endeavors to exercise its power upon activities involving the functioning of a "State as a State."<sup>77</sup> It should here be noted that the distinction suggested between regulable and nonregulable state activities does not rest upon the unworkable and discredited distinction between "governmental" and "proprietary" functions<sup>78</sup> or upon arbitrary classifications of state activities on the basis of whether they are deemed "essential" or "nonessential."<sup>79</sup> Rather, it rests upon whether the state activity contributes to the public health, safety, and welfare and would not otherwise be provided were the state to curtail its activities.<sup>80</sup>

---

75. See principal case at 851; Brief for Plaintiff State of Texas at 18.

76. See *New York v. United States*, 326 U.S. 572, 593-94 (1946), where Justices Douglas and Black observed in dissent:

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.

See note 74 *supra*.

77. 326 U.S. at 582.

78. This approach was discredited in *New York v. United States*, 326 U.S. 572, 583 (1946), where Chief Justice Stone noted that he regarded "as untenable the distinction between 'governmental' and 'proprietary' interest . . ." Early taxing power cases had used the distinction between governmental and proprietary activities in determining the amenability of state activities to federal taxation. See, e.g., *Allen v. Regents*, 304 U.S. 439, 453 (1938); *Helvering v. Powers*, 293 U.S. 214, 225, 227 (1934). See also *Annots.*, 163 A.L.R. 542 (1946); 155 A.L.R. 423 (1945).

79. The essential-nonessential approach has been rejected by the Supreme Court in several cases. See, e.g., *Case v. Bowles*, 327 U.S. 92, 101 (1946), where the Court, in rejecting the state's contention that the Emergency Price Control Act interferes with the state's performance of an "essential governmental function—the education of its citizens," said: "[T]he petitioner's argument is that the extent of [the war] power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved." The contention that the state activity involved was "essential" was likewise rejected in *United States v. California*, 297 U.S. 175 (1936). Even if the distinctions between governmental and proprietary interests and essential and nonessential activities are helpful insofar as they provide a guide based on past precedent, the operation of both schools and hospitals has long been regarded as "governmental" in nature and "essential" to the public health, safety, and welfare. See cases collected 18A WORDS & PHRASES 283-86, 297 (1956).

80. See note 74 *supra*. See generally the dissenting opinion of Justice Douglas in *New York v. United States*, 326 U.S. at 590.

Finally, there is the argument that a state by engaging in a particular activity has somehow "subjected itself to [the commerce] power."<sup>81</sup> Thus, if a state were to engage in commercial activities in competition with private concerns, or if it undertook the operation of instrumentalities of commerce for the private advantage of the state and its residents,<sup>82</sup> it would be deemed to be "in commerce" just as private persons would be were they to engage in such activities. Noteworthy in this respect is the fact that where a state actually competes with private enterprise, it is difficult to argue that its activity is "indispensable" since even in the absence of state action the service would be provided by private concerns. Moreover, if the state were not subject to the federal regulation it might gain an unfair advantage over its private competitors. It is not easy to see, however, how the states in operating schools and hospitals have somehow purposely engaged in commerce. Rather, the effect that they exert upon interstate commerce arises only as a necessary incident to the performance of functions which are basically noncommercial in nature and essential to the health and welfare of local residents.<sup>83</sup>

Weighing all of these factors, it appears that the issue in the principal case should be resolved in favor of the states. The 1966 amendments interfere with the states in operating public schools and hospitals to a degree not justified by the need to effectuate the congressional objective of eliminating substandard labor conditions throughout the country.

---

81. *California v. Taylor*, 353 U.S. 553, 568 (1957). The Court held as follows: "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 has also *subjected* itself to that power so that Congress can regulate its employment relationships." See also *Parden v. Terminal R.R. Alabama Docks Dep't*, 377 U.S. 184 (1964); *New York v. United States*, 326 U.S. 572, 579 (1946); *United States v. California*, 297 U.S. 175 (1936).

82. See *California v. United States*, 320 U.S. 577, 580 (1944) ("In thus providing facilities for waterborne traffic, Oakland and California have for many years competed with privately-owned terminals in San Francisco Bay."); *Ohio v. Helvering*, 292 U.S. 361, 369 (1934) ("When a state enters the market place seeking customers it divests itself of its quasi-sovereignty pro tanto, and takes on the character of a trader. . .").

83. *Lierberthal v. North County Lanes, Inc.*, 332 F.2d 269 (1964) (citing cases holding that the incidental flow of supplies in interstate commerce does not in itself suffice to transform an essentially intrastate activity into an interstate enterprise). It would seem that the use of goods originating out of the state is merely incidental to—indeed often necessarily incidental to—the various state agencies carrying out their official governmental duties. See notes 37 and 38 *supra* and accompanying text.