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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

No. 74-879

THE STATE OF CALIFORNIA, APPELLANT

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the three-judge district court (J.S. App. A; II App., p. 643) is not reported.

JURISDICTION

This action seeks to enjoin, as unconstitutional, enforcement of the 1974 amendments to the Fair Labor Standards Act of 1938 (P.L. 93-259, 88 Stat. 55, amending 29 U.S.C. 201 *et seq.*), insofar as those amendments apply to State and local governments. A three-judge district court was convened pursuant to 28 U.S.C. 2284, and on December 31, 1974 the court entered a judgment granting appellee's motion to dismiss. The notice of appeal of appellants National League of Cities, *et al.*,[1] was filed on December 31, 1974, and the notice of appeal of the State of California was filed on January 8, 1975. Probable jurisdiction was noted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

In *Maryland* v. *Wirtz*, 392 U.S. 183, this Court sustained, against constitutional challenges, the 1966 amendments to the Fair Labor Standards Act of 1938 (Act), 80 Stat. 830, which extended the Act's basic wage and hour standards to 2.9 million public school, hospital and transit employees. The 1974 amendments to the Act, 88 Stat. 55, extend those standards to an additional 3.4 million employees of the States and their political subdivisions.

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[1] Appellant National League of Cities is hereinafter referred to as "National League" or "N.L." and its brief is referred to as "N.L. Br." The brief of appellant California is referred to as "Cal. Br." "I App." and "II App." refer to the parties' joint appendix in this Court.

The question is whether the 1974 amendments exceeded Congress' power under the Commerce Clause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
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> To regulate Commerce * * * among the several States * * *
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> * * * *
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> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI:

> * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fair Labor Standards Amendments of 1974 are set forth in the appendix to the brief of each appellant.

STATEMENT

The Fair Labor Standards Act, as originally enacted in 1938, required employers covered by the Act to pay those of their employees who were engaged in commerce or in the production of goods for commerce a minimum wage, as well as one and one-half times their regular rate of pay for hours worked in excess of 40 a week; to keep records necessary or appropriate for the enforcement of the Act; and to comply with certain child labor standards (29 U.S.C. (1940 ed.), 206(a), 207(a) and (b), 211(c), 212). The States and their political subdivisions were specifically excluded from the Act's coverage (29 U.S.C. (1940 ed.) 203(d)).

In 1961, Congress extended the coverage of the Act beyond employees themselves engaged in commerce or in the production of goods for commerce, to all employees of certain "enterprises" which had some employees so engaged (29 U.S.C. (1964 ed.) 203(r), 203(s), 206(b), 207(a)(2)). The States and their political subdivisions remained among the

employers specifically excluded from the Act's coverage (29 U.S.C. (1964 ed.) 203(d)).

In 1966, Congress extended the Act's coverage (including the prohibition against sex-based wage differentials added by the Equal Pay Act of 1963) to 2.9 million employees of State and other public enterprises engaged in operating transit companies, hospitals, schools, and related institutions (29 U.S.C. (1970 ed.) 203(d), 203(r)(1) and (2), 203(s)(1) and (4), 206 (d)). Except to this extent, "any State or political subdivision of a State" was excluded from the Act's definition of an "Employer" (29 U.S.C. (1970 ed.) 203(d)). The constitutionality of this extension of the Act's provisions to the States and their political subdivisions was upheld in *Maryland* v. *Wirtz*, 392 U.S. 183.

In 1974, Congress amended the Act[2] to cover an additional 3.4 million employees of the States and their political subdivisions.[3] This extension of cover-

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[2] The 1974 amendments became effective on May 1, 1974. The overtime provisions for employees engaged in fire protection and law enforcement activities did not, however, become effective until January 1, 1975.

[3] S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 16. Appellants use the figure 11.4 million, which was the total employment for State and local governments in 1973 (N.L. Br., p. 10). As they concede, however, the minimum wage and overtime provisions apply only to nonexempt employees. The equal pay provisions are also inapplicable to certain employees (*i.e.*, those subject to any of the exemptions set forth in 29 U.S.C. (Supp. III) 213(a), other than 29 U.S.C. 213(a)(1)). The 11.4 million figure also includes employees already covered

age was accomplished by removing the exclusionary language from the Act's definition of "Employer" and by adding to it the phrase "public agency" (29 U.S.C. 203(d); N.L. Br. App., p. 4a). "Public agency" was defined to include "the government of a State or political subdivision thereof" (29 U.S.C. 203 (x); N.L. Br. App., p. 5a). The definition of an "Enterprise engaged in commerce or in the production of goods for commerce" was amended to include "an activity of a public agency" (29 U.S.C. 203(s); N.L. Br. App., p. 5a). That amendment continues (*ibid.*):

> The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

In addition to the Act's general exemption from coverage of "executive, administrative, or professional" personnel (29 U.S.C. 213(a)(1)), the 1974 amendments specifically exclude from coverage any individual who "holds a public elective office" or is appointed by such an officeholder to be a "member of his personal staff" or "to serve on a policymaking

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under the prior law held constitutional in *Maryland* v. *Wirtz*, *supra*. Thus, of the 11.4 million employees, 6.9 million are employed by schools, hospitals and transit companies and therefore are covered (except 4.0 million who are exempt) without regard to the 1974 amendments. See U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973*, p. 9.

level," or is an immediate advisor to such officeholder "with respect to the constitutional or legal powers of his office" (29 U.S.C. 203(e)(2)(C); N.L. Br. App., p. 4a).[4]

The Act's minimum wage and overtime requirements applicable to appellants, which are generally lower than those the Act provides for private employers, are self-executing and do not depend upon the issuance of any rules or regulations (29 U.S.C. 206(b), 207(k), 213(b)(20); N.L. Br. App., pp. 1a, 5a, 6a). The Secretary is not authorized to add any additional requirements not already applicable to private employers.[5]

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[4] The 1974 amendments also extended the provisions of the Age Discrimination in Employment Act of 1967 to all State and local government employees, except those who are elected or appointed by elected officials to their personal staffs or to policy making positions. 29 U.S.C. 630(b), (c), (f); N.L. Br. App., p. 19a.

[5] The 691 pages of Regulations referred to by appellants (N.L. Br., pp. 25, 117) are a codification of all Federal Register documents issued on the Fair Labor Standards and Age Discrimination in Employment Acts (29 C.F.R. Parts 500 to 860). Only a small part of those documents, as appellants themselves concede (N.L. Br., pp. 25, 117-118), even remotely concerns the States and local governments. Moreover, with the exception of the Department of Labor's regulations on record-keeping and hazardous child labor, its rulings and interpretations do not impose additional requirements on employers, as the court below mistakenly assumed. Instead, they implement (in the case of the exemption for executive, administrative and professional employees) or explain (in the case of the Act's overtime exemptions, including the partial exemption provided by Section 7(k) (29 U.S.C. 207(k); N.L. Br. App., p. 5a) for fire protection and law enforcement person-

On December 12, 1974, appellants National League of Cities, *et al.* brought this suit in the United States District Court for the District of Columbia to enjoin the enforcement of the 1974 Amendments insofar as they apply to States and local governments.[6] A three-judge district court was convened and, after hearing oral argument on appellants' motion for preliminary relief and appellee's motion to dismiss,[7] granted appellee's motion on December 31, 1974, on the ground that this case "is controlled by the decision of the Supreme Court in *Maryland* v. *Wirtz*, 392 U.S. 183" (II App., p. 649).[8]

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nel) sections of the Act which, if invoked, would relieve employers from certain of the Act's requirements.

[6] Appellants seek not only to enjoin the application of the Act to employees not previously covered, but also to enjoin application of the new minimum wage rates for employees who were first covered by the 1966 Amendments upheld in *Maryland* v. *Wirtz, supra.* The coverage of the new minimum wage rates ($1.90 until January 1, 1975, and $2.00 during the next phase) is shown in a 1973 report prepared for Congress which estimated that 314,000 of the 2.9 million public employees covered by the 1966 amendments were paid less than $1.80 in September 1973 (Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220).

[7] The court held no evidentiary hearing and made no factual findings. Its comments on what it erroneously assumed to be regulations and on dollar impact, as well as on the nature of the activities covered by the 1974 amendments (II App., pp. 650-651), are simply a repetition of appellants' allegations and are not findings based on evidence.

[8] On the same day, the Chief Justice granted a stay of "those parts of the 1974 Amendments * * * which go into effect January 1, 1975" and of the "Regulations promulgated

ARGUMENT

Introduction and Summary

The issues raised by appellants were all resolved by this Court only seven years ago, with respect to the same statute, in *Maryland* v. *Wirtz*, 392 U.S. 183. There are no significant differences between this case and *Maryland*; and *Maryland* itself is soundly based on an unbroken line of Commerce Clause decisions.

The Fair Labor Standards Act was first enacted in 1938 as a result of congressional findings, set forth in Section 2(a) of the Act, 52 Stat. 1060, 29 U.S.C. 202(a), 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 standard 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.

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by the Secretary of Labor, 29 C.F.R. Part 553—Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activities * * *" 39 Fed. Reg. 44142 (December 20, 1974), effective January 1, 1975 (Oct. Term, No. A-553). The stay was continued by order of the Court entered January 13, 1975.

1. The original Act was upheld as a valid regulation of commerce in *United States* v. *Darby*, 312 U.S. 100. When the Act's coverage was extended in 1966 to 2.9 million employees in schools and hospitals operated by States and local governments (*supra*, p. 5), the extension was likewise sustained under the commerce power. *Maryland* v. *Wirtz*, *supra*. The Court noted the millions of dollars of interstate purchases made by these agencies (392 U.S. at 194) and added that "[s]trikes and work stoppages involving employees of schools and hospitals * * * obviously interrupt and burden this flow of goods across state lines" (392 U.S. at 195; footnote omitted). The Court concluded "that a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals * * *" (392 U.S. at 195), notwithstanding the fact that "a State is involved" (392 U.S. at 197).

It is not seriously disputed that the same "rational basis" exists for the Congressional action here challenged. Rather, appellants seek to distinguish *Maryland* on the ground that the public agencies covered by the 1974 Amendments—unlike those covered by the 1966 Amendments—are not in competition with the private sector (N.L. Br., p. 126; Cal. Br., p. 45). But the decision in *Maryland* that the Act could be extended to public agencies was not based on a conclusion that those agencies competed with private enterprises. In any event many of the newly covered public agencies in fact compete with the private sector. Moreover States and local bodies compete among

themselves for the location of industry by lower taxes, subsidies and other incentives. Like a low-wage private employer, a public agency that pays a substandard wage has an unfair advantage in this competition. Finally, as large scale employers, public agencies are implicated in all of the other Congressional policies underlying the 1974 Amendments, including the stimulation of the economy by additional consumer spending, the creation of new jobs by spreading employment and the reform of the welfare system.

2. State and local governmental activities having a substantial effect upon commerce have no immunity from Congress' exercise of the commerce power. "[I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' " (*Maryland, supra*, 392 U.S. at 195). This conclusion in *Maryland* follows established constitutional doctrine.

The concerns expressed by the dissenters in *Maryland* do not justify invalidating the 1974 Amendments. The dissent recognized that much federal regulation may legitimately be applied to the States, so long as it does not threaten to destroy the sovereignty of the States guaranteed by the Constitution. The 1974 Amendments do not threaten State sovereignty. They do not displace State policy, they only require that, in pursuit of that policy (which remains solely within the States' discretion), the State must satisfy very minimum standards as to wages and hours.

The alleged financial burdens of complying with the 1974 Amendments are vastly overstated, proceed from misunderstandings of the actual operation of the Amendments, and, in any event, are concededly not a factor in the constitutional validity of the 1974 Amendments.

The Tenth Amendment does not affect the validity of action taken within the commerce power. That Amendment reserves to the States and people the powers not otherwise delegated to the United States. It "does not operate as a limitation upon the powers * * * delegated to the national government." *Case* v. *Bowles*, 327 U.S. 92, 102.

The Eleventh Amendment is invoked prematurely and is, in any event, not applicable to suits brought by the Secretary of Labor or in State courts.

Appellants' statutory arguments are also premature and, in any event, groundless.

I

THE ACTIVITIES OF STATE AND LOCAL GOVERNMENTS COVERED BY THE 1974 AMENDMENTS HAVE A SUFFICIENT EFFECT ON INTERSTATE COMMERCE TO BE A PROPER SUBJECT OF LEGISLATION BY CONGRESS UNDER THE COMMERCE POWER.

In *Maryland* v. *Wirtz* this Court upheld the 1966 extension of the Fair Labor Standards Act to State and local public school and hospital workers. All of the considerations held sufficient in *Maryland* to support the application of the Act to public schools and

hospitals are equally applicable to the State and local government functions covered by the 1974 Amendments.

A. Substandard labor conditions in the covered activities may lead to labor disputes burdening the flow of goods in interstate commerce.

In *Maryland* the Court held that Congress had the power under the Commerce Clause to extend the coverage of the Act to public schools and hospitals because "[i]t is clear that labor conditions in schools and hospitals can affect commerce" (392 U.S. at 194). The Court's conclusion rested on two well-founded premises: first, that "such institutions are major users of goods imported from other States" (*ibid.*) and, second, that "[s]trikes and work stoppages involving employees of schools and hospitals * * * obviously interrupt and burden this flow of goods across state lines" (392 U.S. at 195). The necessary conclusion which the Court drew was that "a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals * * *" (*ibid.*).

Similarly, here the affected State and local activities "are major users of goods imported from other States" and labor disputes involving those activities "obviously interrupt and burden this flow of goods across state lines."

It is no less true of public establishments generally than of public schools and hospitals that, in the words of *Maryland* v. *Wirtz*, "[they], as a whole, obviously purchase a vast range of out-of-state commodities

[that] are put to a wide variety of uses, presumably ranging from physical incorporation * * * into * * * structures [*e.g.*, police and fire facilities and libraries] to over-the-counter sale for cash * * * [*e.g.*, alcoholic beverage monopolies and vehicle registration services]." See 392 U.S. at 201.

In 1971 the purchases of goods and services by State and local governments amounted to 135 billion dollars, constituting 12 percent of our gross national product for that year (119 Cong. Rec. S14057 (daily ed., July 19, 1973)).[9] The expenditures have a significant effect on every sector of the economy. The data available for 1963[10] show that in that year State and local government purchases accounted for 23.4 percent of the national output of the new construction industry and 14.6 percent of that of the office supplies industry. Other areas of substantial purchases by States and local governments in that year were: stone and clay products, 18.4 percent; lumber and wood products, other than containers, 14.9 percent; non-household furniture and fixtures, 13.6 percent; printing and publishing, 8.4 percent; heating, plumbing, and structural metal products, 18.2 percent; radio and television broadcasting, 8.0 percent.[11]

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[9] Of this figure, 57 percent was for compensation of their own employees, creating over 9 million jobs (see *infra*, p. 22). The remaining 43 percent reflected over 5 percent of the entire gross national product.

[10] "Input-Output Structure of the U.S. Economy, 1963," *Survey of Current Business*, U.S. Department of Commerce, Office of Business Economics, Vol. 49, No. 11 (November 1969), p. 21, Table A.

[11] *Ibid.*

These figures do not, of course, reflect the impact of revenue sharing on expenditures by State and local governments.[12]

The Senate Report on the 1974 Amendments (S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 24) noted the purchasing by State and local governments: "Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. * * *" Thus the district court correctly stated that "the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods" (II App., p. 649).

Equally well supported in this case is the second premise of the *Maryland* decision: Labor disputes involving public agencies affect the flow of commerce. Congress' finding in 1938 that substandard labor con-

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[12] Thus, "[i]n 1975, Federal aid to State and local governments is expected to total $52.0 billion * * *." Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government*, p. 203 (Washington, D.C. 1974). "In total, Federal aid will finance about 22% of State and local expenditures in 1975" (*id.* at 205). This substantial flow of Federal funds will correspondingly increase the involvement of State and local government agencies in the flow of interstate goods and supplies. In the congressional debate on the Amendments, the availability of federal assistance was viewed both as a reason for extending the coverage of the Act (118 Cong. Rec. 24748-24750), and as a means of alleviating any adverse financial impact the extended coverage might have (120 Cong. Rec. H2301-H2302 (daily ed., March 28, 1974)).

ditions "lead to labor disputes burdening and obstructing commerce and the free flow of goods in commerce" (29 U.S.C. 202(a)(4)) is equally applicable to the public agencies covered by the 1974 Amendments.

In considering the 1974 Amendments, Congress had before it evidence of the existence of substandard labor conditions in State and local governments. An estimated 409,000 State and local government employees were paid less than $1.90 an hour in 1973 [13]—at a time when the poverty level income for a nonfarm family of four was $4,540 or approximately $2.27 an hour.[14] Ten percent of the nonsupervisory State and local government employees (including 20 percent of the police and fire employees) worked more than 40 hours a week.[15]

Moreover, it is true of public power systems, airport facilities, and even libraries, no less than public schools or hospitals, that "labor conditions * * * can affect commerce" by causing strikes and work stoppages which "interrupt and burden [the] flow of goods across state lines" (392 U.S. at 194-195). Dur-

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[13] The 409,000 figure is reached by adding to the 314,000 employees covered by the 1966 Amendments, earning less than $1.80 an hour in September 1973, the 95,000 employees that Congress proposed to cover additionally when the minimum was raised to $1.90 an hour. See, Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H.Rep. No. 93-913, 93d Cong., 2d Sess., p. 28.

[14] S.Rep. No. 93-690, 93d Cong., 2d Sess., *supra,* at p. 8.

[15] H.Rep. No. 93-913, 93d Cong., 2d Sess., *supra,* at p. 29.

ing the hearings on the Amendments, there was testimony concerning the growing frequency of labor disputes and strikes among public employees.[16] In 1970, excluding educational institutions and State agencies, there were 197 work stoppages by local government employees, resulting in a loss of 289,300 man-days of work. Burton and Krider, *The Incidence of Strikes in Public Employment*, Conference on Labor in Nonprofit Industry and Government, Princeton University (May 1973), Table 3, p. 6. There were 409 work stoppages among all categories of State and local government employees, resulting in a loss of 1,375,100 man-days of work (*id.* at Table 2, p. 4). See also White, "Work Stoppages of Government Employees," *Monthly Labor Review* (December 1969), pp. 29-34; University of California Institute of Governmental Studies, *Strikes by Public Employees and Professional Personnel: A Bibliography* (June 1967).

Appellants have not suggested any reason for assuming that the effect of such strikes and stoppages on the flow of commerce would be less in the newly covered establishments than in those considered in *Maryland* v. *Wirtz*. To the contrary, it would seem that the effect on commerce would be greater if a

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[16] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 2295, 92d Cong., 1st Sess., p. 366; Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 10498 and H.R. 17596, 91st Cong., 2d Sess., pp. 53, 59; 120 Cong. Rec. S2518 (daily ed., February 28, 1974) (Statement by Senator Javits).

municipal airport or a publicly owned utility system was forced by labor trouble to close, than if a school or hospital was similarly shut down.

In sum, as the district court concluded (II App., p. 649):

> Since it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods, the decision in *Wirtz* disposes of this case.

B. Competition between public and private agencies was not the basis of *Maryland* v. *Wirtz*; in any event, many of the newly covered public activities and employees compete with private enterprises.

In *Maryland* v. *Wirtz* the Court noted (392 U.S. at 194, 197) that private persons, as well as governments, operate schools and hospitals. Appellants seek to distinguish *Maryland* on the basis of these observations, arguing that—unlike schools and hospitals—the activities covered by the 1974 Amendments are "noncompetitive" (Cal. Br., p. 47; see N.L. Br., pp. 18 and 126).[17]

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[17] National League (N.L. Br., p. 18) suggests that the Congressional rationale for the 1966 Amendments was solely the fact that the newly covered enterprises were in substantial competition with private business enterprises. But, as this Court pointed out in *Maryland, supra,* 392 U.S. at 191 and n. 14, the finding in Section 2 of the Act, 29 U.S.C. 202, "that the existence of substandard labor conditions 'leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce'," led Congress to "promote labor peace by regulation of subject matter, wages, and hours,

The Court's finding of a rational basis for the congressional action in *Maryland*, however, was not based on a finding of competition between public and private employers. The finding of an effect upon commerce rested on the substantial importation of goods by the covered enterprises and the effect of their labor

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out of which disputes frequently arise." "This objective," the Court added, "is particularly relevant where, as here, the enterprises in question are significant importers of goods from other states"—which is, of course, equally true in the instant case. Moreover, the Committee report quoted by National League (N.L. Br., p. 18) continues:

> Even outweighing the consideration of unfair competition between covered and noncovered enterprises were the needs of the employees of these enterprises. A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. * * * Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum. They continue to expand and construct new facilities at the prevailing market costs. They can pay their own employees wages necessary for the maintenance of the minimum standard of living [H. Rep. No. 89-1366, 89th Cong., 2d Sess., p. 17].

In addition, as the Senate report cited by National League points out, Congress was concerned by the fact that State and local employers require many of their employees to work long overtime hours, thus denying employment to others and aggravating the nation's unemployment problem:

> Approximately 5 million employees will be protected by the overtime provisions of the act for the first time. The committee believes that new jobs will become available as the excessive hours worked by present employees are reduced [S. Rep. No. 89-1487, 89th Cong., 2d Sess., p. 22].

disputes upon the flow of such goods (see 392 U.S. at 194-195).

To the extent that the potential for competition between public and private schools and hospitals may have influenced the decision in *Maryland* v. *Wirtz*, a like potential exists for a large number of the activities covered by the 1974 Amendments. State and local governments operate gas and electric authorities,[18] trash collection agencies, water and transport terminals (which in 1973 aggregated approximately $105 million in gross revenues),[19] airports ($73 million in 1973),[20] recreation facilities, libraries, and the like—all of which, in the absence of the 1974 Amendments, would have a competitive advantage.[21] U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973*, p. 9. The newly covered public employees are, moreover, employed in the same kinds of occupations as covered employees in the private sector: *e.g.*, custodial workers, dock sweepers, laborers, groundkeepers, laundry workers, cooks, food service workers, elevator operators, bridge tenders, library aides, home service aides, community work-

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[18] Even when these authorities operate under exclusive franchises, they compete with private suppliers of oil, coal, and other sources of energy.

[19] *State Government Finances in 1973,* U.S. Dept. of Commerce, Bureau of the Census, Table 7, pp. 24-25 (1974).

[20] *State Government Finances in 1973, supra,* at pp. 24-25.

[21] See, *e.g., Schultz* v. *Instant Handling, Inc.,* 418 F.2d 1019 (C.A. 5) (trash removal company); *General Electric Co.* v. *Porter,* 208 F.2d 805 (C.A. 9) (fire protection company). Some municipalities likewise contract with private companies to perform their fire protection services.

ers, farm and dairy hands, messengers, building guides, etc. *Nonsupervisory Employees in State & Local Governments*, U.S. Department of Labor, Workplace Standards Administration, 1971 Report to Congress, pp. 52-57.

In addition, States and local bodies compete with each other for business investments, property development, population, tourist and convention business, and the like, which they seek to attract by offering lower taxes, subsidies, and other incentives. The public agency that pays substandard wages to its employees is to that extent in a better position to offer those inducements, and thereby enjoys a competitive advantage in essentially the same way as the low-wage employer in the private sector. Cf. *United States* v. *Darby*, 312 U.S. 100, 122.

The Advisory Commission on Intergovernmental Relations (created under P.L. 86-380, 42 U.S.C. 4271) notes that this type of competition is very much in the consciousness of State and local officials. Report on State-Local Taxation and Industrial Location, April 1967, p. 1. The Commission reports the trend to an "active role" by State and local governments "to create an 'economic climate' calculated to encourage business activity," of which a "very important part * * * is a tax structure which encourages economic growth" (*ibid.*). While the Commission also concludes that the tax differential factor is not the primary consideration in a business' choice of a region of the country in which to locate (*id.* at 78), it is one factor, and one which the States obviously believe is significant (*id.* at 1).

Paying subminimum wages is, of course, one way to permit the maintenance of a low tax policy helpful in the inter-regional competition for business development. This factor is a valid basis for Congressional legislation under the commerce power, since it provides a "rational basis," no less than in the case of private employers, for "the logical inference that the pay and hours of * * * employees affect [the employer's] competitive position" (*Maryland* v. *Wirtz*, *supra*, 392 U.S. at 190). A public body, striving in an interstate market for the attraction of investment and business activities into its localities, is subject to the same unfair competition as is a private employer when its rivals bring to bear the financial advantages of low wage scales.

C. Congress has power, under the Commerce Clause, to deal with the economic consequences of substandard labor conditions.

The State and local functions covered by the 1974 Amendments are a major segment of the economy, affecting commerce in numerous ways. As previously indicated, purchases of goods and services by State and local governments amounted to 135 billion dollars. In that year direct employment by State and local governments accounted for 9.7 million jobs, and employment generated by the purchase of goods and supplies by those activities accounted for an additional 3.7 million, making a total of 13.4 million jobs —more than 16 percent of the country's total civilian employment (119 Cong. Rec. S14057 (daily ed., July 19, 1973)).

This level of employment places a significant demand on the national job market. Based on the figures just stated, Senator Williams, the Chairman of the Senate Committee on Labor and Public Welfare, which reported out the 1974 Amendments, concluded (119 Cong. Rec. S14056-S14057 (daily ed., July 19, 1973)):

> This means that, on the average, each $1 billion of State and local government purchases that year generated almost 100,000 jobs. With the continued channeling of large amounts of Federal funds to States and localities, the spending of State and local governments will continue to create significant demand on the national job market.

The effect on commerce of spending and employment by State and local government was summarized in the Senate Report on the 1974 Amendments (S. Rep. No. 93-690, 93d Cong., 2d Sess. ("Senate Report"), p. 24):

> [T]here is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the

> activities and magnitude of all levels of government have an effect on commerce as well.

As large scale employers, State and local governments are implicated in all of the other Congressional policies underlying the 1974 Amendments, including the stimulation of the economy by additional consumer spending, the creation of new jobs by spreading employment and the reform of the welfare system. The Senate Report, p. 9, stated these policies as follows:

> The Committee also believes that [by] establishment of minimum wage rate * * * and [by] eliminating overtime exemptions where they have been shown to be unnecessary, the economy will be stimulated through the injection of additional consumer spending and the creation of a substantial number of additional jobs.
>
> The Committee also believes that by raising the minimum wage rate at a level which will at least help to assure the worker an income at or above the poverty level is essential to the reduction of the welfare rolls and overall reform of the welfare system in the United States.

The projected increase in consumer spending has an obvious and immediate impact on commerce and flow of goods. As the Senate Report noted (p. 12):

> The Committee recognized that a higher minimum wage may mean increased employer costs, but it also means increased purchasing power in the hands of the poor and a greater demand for goods and services.

The effects of the new minimum wages on the welfare system were also a legitimate object of congressional concern. The Senate Report recognized (p. 12) that "[f]or the Government, [a higher minimum wage] means lower welfare costs." Federal programs in which States participate include Aid to Families with Dependent Children (AFDC) and unemployment compensation programs.[22] The Senate Report, p. 12, illustrated the relation of the minimum wage laws to AFDC with the following example:

> Under the requirements of the Social Security Act with respect to Aid to Families with Dependent Children, for a family of four headed by a woman working fulltime a $.60 increase in the minimum wage would result in about a $.40 reduction in assistance or a reduction of $69 per month or $832 a year. There would be some variation among the states but in 33 states the full $69 per month reduction will be realized. In another 15 states reductions of less than $69 per month would be realized.

Because many employees working for less than a poverty-level wage are presently receiving supplemental assistance through welfare, an increased minimum wage will reduce welfare payments to

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[22] AFDC and unemployment compensation were established in the Social Security Act of 1935, 49 Stat. 610. AFDC is now codified in 42 U.S.C. 601 *et seq.* The unemployment compensation program is now codified in 42 U.S.C. 501 *et seq.* and the Federal Unemployment Tax Act (FUTA) in 26 U.S.C. 3301-3311.

fully-employed workers. The 1974 Amendments will thus directly affect the rising costs of AFDC (which in fiscal 1974 amounted to $7.5 billion, of which $4 billion was paid by the federal government)[23] and the food assistance programs (which in fiscal 1974 cost the federal government an estimated $5 billion).[24]

Similarly, the 1974 Amendments are intended to reduce both the needed level of those programs and the strain on unemployment insurance funds by generating new jobs. As the Senate Report, p. 9, noted, "eliminating overtime exemptions where they have been shown to be unnecessary" will lead to "the creation of a substantial number of additional jobs" (see also p. 19, n. 17, *supra*). This is a matter of considerable concern to Congress in light of the nation's rising unemployment[25] and the demand being placed on the unemployment funds.[26] To meet this growing problem, Congress recently enacted several statutes which provide federal assistance in pay

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[23] U.S. Department of Health, Education, and Welfare, Office of Financial Management, Social and Rehabilitation Service Report No. 75-04011 (1974), p. 12.

[24] U.S. Department of Agriculture, 1975 Budget, Explanatory Notes, Vol. 3, p. 204.

[25] Between February 1974 and February 1975, the unemployment rate in the nation rose from 5.2 percent to 8.2 percent of the civilian work force. *News*, U.S. Department of Labor, Bureau of Labor Statistics, USDL 75-136, March 7, 1975.

[26] In the calendar year ended September 30, 1974, unemployment insurance benefits under State programs totaled $5.2 billion. *Unemployment Insurance Statistics*, U.S. Department of Labor, January 1975, Table 6.

benefits to the long term unemployed and to workers not covered by State unemployment insurance laws.[27]

More generally, in enacting the 1974 Amendments, Congress recognized that substandard wages were destroying the incentive to work and thus burdening the nation's welfare rolls. As former Secretary of Labor Shultz stated in his 1970 report to Congress (quoted in Senate Report, pp. 15-16):

> One of the major goals of this Administration is to get people off the welfare rolls and on to payrolls. Once having achieved that, unless the worker receives the minimum wage he is more likely to fall back on the welfare rolls.

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[27] The Employment Security Amendments of 1970 (P.L. 91-373, 84 Stat. 695) extended benefits for an additional 13 weeks after State benefits would otherwise have ceased. The costs of extended benefits under the statute are shared equally by the States which paid benefits, and by the Federal government through payments to the States from the Unemployment Trust Fund created by the statute and funded by a Federal excise tax. The Emergency Unemployment Compensation Act of 1974 (P.L. 93-572, 88 Stat. 1869) provides for a second 13 week extension of unemployment benefits under State programs to be financed wholly by federal funds from the Unemployment Trust Fund. The Emergency Jobs and Unemployment Assistance Act of 1974 (P.L. 93-567, 88 Stat. 1845) provides unemployment insurance benefits for the substantial number of workers who are not covered under State unemployment insurance plans, including employees of State and local governments. Payments under this program are financed wholly by payments made by the United States to participating States, as necessary to meet the cost of benefits. Most recently, Congress has extended unemployment benefits under State programs for an additional 13 weeks (the third 13 week extension of such benefits) by passing H.R. 2166 (the Tax Reduction Act) on March 26, 1975.

The substantial impact of substandard wages and of unemployment on these major federal spending programs (AFDC, food assistance, unemployment compensation) was a legitimate concern of Congress in enacting the 1974 Amendments. Indeed, when that impact is considered along with the large proportion of total employment accounted for by state and local governments (p. 22, *supra*) and the fact that total federal financial aid to those governments far exceeds any possible cost by them of complying with the 1974 Amendments, it suggests an alternative constitutional basis for the enactment of those Amendments: it is legislation which is "necessary and proper" as an adjunct to the exercise of the congressional power to make these expenditures "for the * * * general Welfare of the United States" (Const., Art. I, Section 8). Cf. *United States* v. *Oregon*, 366 U.S. 643, 648-649.

In any event, poverty and unemployment have an effect on interstate commerce which the Congress is entitled to consider. In a different context, this Court observed that diminished spending—in that case, by Negroes who were refused service—"has, regardless of the absence of direct evidence, a close connection to interstate commerce." *Katzenbach* v. *McClung*, 379 U.S. 294, 299. Conversely, a minimum wage and the creation of new jobs (see *supra*, pp. 24-27) will have a direct effect on the purchase and movement of goods in commerce.

The federal commerce power is "not confined to the regulation of commerce among the states. It ex-

tends 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 * * *." *United States* v. *Darby*, 312 U.S. 100, 118; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119.[28]

Contrary to appellants' contention (N.L. Br., p. 41), the Commerce Power is not limited to strictly "commercial" matters;[29] it is broad enough to permit

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[28] *Gulf Oil Corp.* v. *Copp Paving Co.*, No. 73-1012, decided December 17, 1974, cited by appellant (Cal. Br., p. 40), is not to the contrary. There the Court held that the intrastate activities were not covered by the Robinson-Patman Act. The Court added, however, (slip op., pp. 8, 10) that, "[a]s in *Overstreet* [v. *North Shore Corporation*, 318 U.S. 125] and *Alstate* [*Construction Company* v. *Durkin*, 345 U.S. 13] [the Fair Labor Standards Act cases], there is no question of Congress' power under the Commerce Clause to include otherwise ostensibly local activities within the reach of federal economic regulation, when such activities sufficiently implicate interstate commerce. * * * 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze' " (slip op., pp. 8, 10).

[29] The Court has held that the Commerce Power extends to non-commercial and non-profit activities, including those which are governmental in nature. In *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, this Court rejected the contention that the term "commerce," as used in both the Constitution and the Fair Labor Standards Act, was limited to commercial activities, and held that the production of war materials at a government-owned plant, for subsequent transportation by the government for war purposes, constituted production "for commerce" (339 U.S. at 509-515). In so holding, the Court cited a number of decisions holding that the Commerce Clause power was applicable to a variety of "non-commercial"

Congress to deal with national economic problems. Thus in *North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686, in upholding the constitutionality of certain provisions of the Public Utility Holding Company Act, this Court indicated the breadth of the commerce power (327 U.S. at 705):

> This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private con-

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movements or transactions, including: *Edwards* v. *California*, 314 U.S. 160 (1941) (movement of indigents across State lines); *Thornton* v. *United States*, 271 U.S. 414 (1926) (diseased cattle ranging across State lines); *United States* v. *Hill*, 248 U.S. 420 (1919) (transportation of liquor for one's own consumption). For other cases under the Fair Labor Standards Act, see *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (C.A. 7), certiorari denied, 347 U.S. 1013 (employees of a church who were engaged in printing religious materials); and *Public Building Authority of Birmingham* v. *Goldberg*, 298 F.2d 367 (C.A. 5) (government employees engaged in processing claims for the payment of Social Security benefits were engaged in commerce-related activities). See also *National Labor Relations Board* v. *Central Disp. & E. Hosp.*, 145 F.2d 852 (C.A.D.C.), certiorari denied, 324 U.S. 847, holding that the National Labor Relations Act, as then worded, applied to a non-profit charitable hospital, and *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256-257, where, in reviewing the types of interstate transportation which had been regulated under the Commerce Clause, this Court concluded: "Nor does it make any difference whether the transportation is commercial in character."

> tracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U.S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

The concerns of Congress underlying the 1974 Amendments have as much application to employees of State and local governments as to employees generally. We consider hereafter appellants' claim to sovereign immunity (Part II); here, it is sufficient to observe that, in its effect on these concerns, payment of substandard wages by these entities is indistinguishable in principle from the payment of such wages by a private employer. This principle was recognized in a different context in *Case* v. *Bowles*, 327 U.S. 92, 100, where this Court upheld the application to a State of the Emergency Price Control Act of 1942:

> Excessive prices for rents or commodities charged by a State or its agencies would produce exactly the same conditions as would be produced were these prices charged by other persons.

II

THE EXTENSION OF THE FAIR LABOR STANDARDS ACT TO ADDITIONAL PUBLIC AGENCIES DOES NOT VIOLATE ANY CONSTITUTIONAL IMMUNITY OF THE STATES.

A. State and local governmental activities having a substantial effect on commerce are not immune from Congress' exercise of the commerce power.

Maryland v. *Wirtz* decisively disposed of the claim that the "[commerce] power must yield to state sovereignty in the performance of governmental functions" (392 U.S. at 195). The Court confirmed in that case that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved" (392 U.S. at 196-197). The Court concluded:

> This Court * * * will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens [392 U.S. at 198-199].

These observations in *Maryland* v. *Wirtz* reflect the uniform decisions of this Court that Congress may regulate State activities that have a substantial effect upon commerce.

In *Sanitary District* v. *United States*, 266 U.S. 405, for example, the United States sued to enjoin the diversion of water from Lake Michigan to dispose of sewage from Chicago, claiming that the diversion conflicted with the power of the United States

to regulate interstate commerce. The Court stated (266 U.S. at 426) that the power and authority of the United States to remove obstructions to interstate and foreign commerce was, without question, "superior to that of the States to provide for the welfare or necessities of their inhabitants." Similarly, in *United States* v. *California*, 297 U.S. 175, the Court upheld the application of the Federal Safety Appliance Act to a wholly intrastate nonprofit railroad operated by California to facilitate transportation to a port. The Court said (297 U.S. at 185):

> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Appellants seek to distinguish *Maryland* on the ground that the 1974 Amendments—unlike the 1966 Amendments—interfere with "essential Government services" and "essential sovereign functions" (N.L. Br., pp. 44-45, 121; Cal. Br., p. 35). But the schools and hospitals covered by the 1966 Amendments were as much "essential government services" as any of the public agencies covered by the 1974 Amendments;[30] indeed they are more "essential" than li-

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[30] Cf. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 296 (Marshall, J., concurring in the result). The opinion of the Court in that Eleventh Amendment case

braries, liquor stores, automobile inspection stations, and a great variety of public activities for which appellants here claim an across-the-board immunity.

In any event, *Maryland* recognized "that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195). The conclusion in *Maryland* that the characterization of an activity as "governmental" does not affect Congress' power applied established constitutional doctrine. Thus, although the State activities in the California railroad case were of a commercial, though non-profit, nature,[31] the Court deemed it "unimportant

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(411 U.S. at 284) distinguished *Parden* v. *Terminal R. Co.*, 377 U.S. 184, by stating that "*Parden* was in the area where private persons and corporations normally ran the enterprise," whereas in the case of State mental hospitals, "the public sector took over." The Court said: "State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit are not proprietary."

[31] The State railroad was operated "without profit, for the purpose of facilitating the commerce of the [State's] port," and, in the State's view, this constituted a "public function" which it "perform[ed] * * * in its sovereign capacity" (297 U.S. at 183). In language reminiscent of the claims made here, California argued at page 14 of its brief (No. 33, Oct. Term, 1935): "If it may be said that the State of California * * * is subject to the * * * Federal Safety Appliance Act, it follows that the State of California, in the exercise of its governmental functions in facilitating and expediting the commerce of its principal port, may exist only by leave of the federal government, and that the power lies with that government to prevent the state from discharging its sovereign functions for the general welfare of the people of California."

to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity" (*United States* v. *California, supra,* 297 U.S. at 183). In *Sanitary District, supra,* the disposal of Chicago's sewage was not a commercial function but a governmental health measure; it nevertheless had to defer to the federal commerce authority, because that authority "is superior to that of the States to provide for the welfare or necessities of their inhabitants" (266 U.S. at 426).

The same principle was applied in *Case* v. *Bowles, supra,* 327 U.S. 92, where it was argued that the Emergency Price Control Act of 1942 could not be applied to a sale by the State of Washington "because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.' " 327 U.S. at 101. The Court rejected the view that "whether [state functions] are 'essential' to the state government" is a proper "criterion in measuring the constitutional power of Congress" (*ibid.*).[32]

Nor may an otherwise valid exercise of the commerce power be invalidated because it may, in some

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[32] This Court's decision in *Employees* v. *Missouri Public Health Department, supra,* is not to the contrary. The Court there drew distinctions between state activities for purposes of the Eleventh Amendment's specific limitation on permissible remedies, but specifically noted that the exercise of Congress' commerce power there involved could be enforced by means of suits by the Secretary of Labor (411 U.S. at 285-286) and possibly by employee suits in the state courts (411 U.S. at 287). See, *infra,* p. 64.

instances, supersede or conflict with a State statute or constitutional provision (N.L. Br., p. 86). As this Court pointed out in *Sanitary District*, *supra*, "the action of Congress overrides what [the States] have done" (266 U.S. at 426). See also *Sperry* v. *Florida*, 373 U.S. 379, 403. And in *California* v. *Taylor*, 353 U.S. 553, this Court upheld the application of the Railway Labor Act to a railroad owned and operated by the State of California, even though the Act precluded the State from applying its own civil service laws. As the Court noted (353 U.S. at 560), the State laws were "the antithesis" of the Railway Labor Act, which required the State, contrary to its own laws, to consult and bargain with employee representatives and to submit employee grievances and questions of contract interpretation to the National Railroad Adjustment Board.

B. The concerns expressed by the dissenters in *Maryland* v. *Wirtz* do not justify invalidating the 1974 Amendments.

Underlying all commerce power cases is the issue of federalism. The Court's concern must necessarily be to preserve the proper constitutional balance between national and state governments. We think that balance is not disturbed by the 1974 Amendments. In order to demonstrate that, we will address directly the concerns expressed in Mr. Justice Douglas' dissent, concurred in by Mr. Justice Stewart, in *Maryland* v. *Wirtz*.

Standing by themselves the 1974 Amendments do not appear a very serious threat to the federal-state

balance. The federal law does not impose any policy objective upon the States or deny to them the power to choose their own objectives. It imposes only the minor constraint of requiring that, whatever a State may choose to do and however it may choose to do it (matters which remain solely within the State's discretion), it must, as to certain employees, satisfy very minimum standards as to wages and hours.

The issue raised by the dissent in *Maryland* is the degree of impact a particular federal measure has upon State sovereignty. The dissent distinguished the precedents we have cited in the preceding section on the ground that "In none of these cases, however, did the federal regulation overwhelm state fiscal policy. It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas." 392 U.S. at 203.

That the issue is one of degree of impact is also apparent from questions posed by the dissent (392 U.S. at 204-205):

> * * * If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget

> to avoid "disruptive effect[s] . . . on commercial intercourse."? *Atlanta Motel* v. *United States*, 379 U.S. 241, 257.

We agree, of course, that Congress may not employ the commerce power to destroy the sovereignty of the States guaranteed by the Constitution. And the dissent agrees that much federal regulation may be applied to the States through exercise of the commerce power. The question, therefore, is necessarily one of degree. Can the Court say that federalism itself will be imperiled if the Act passed by Congress is upheld? We think that clearly no such conclusion is appropriate in this case.

There are a variety of ways of demonstrating that the 1974 Amendments will not harm State sovereignty. We have already pointed out that no policy goal of any State is foreclosed by the federal statute and that the law imposes only the minimal constraint that State policies not be carried into effect by State imposition of substandard working conditions.

That this constraint is minimal and not of the exaggerated proportions described by appellants is shown by our discussion, *infra*, pp. 40-52. That effect can hardly be said to carry the result of "overwhelming State fiscal policy." Such a prediction is not only unrealistic on these facts but is made even less realistic by recognition that the federal government subsidizes State budgets in a variety of ways. See *supra*, pp. 15, n. 12, 23, 25-27. This shows that the impact upon the States is small in absolute terms.

That impact is also small in relative terms, that is, by comparison with other, clearly allowable, federal regulations of state policy independence. The *Maryland* dissent suggests that the rationale of the majority opinion would permit the Congress to draw up the States' budgets. But that result does not follow precisely because the rationale of *Maryland* is necessarily limited by the countervailing value of federalism. It is this Court's role to adjust those two values, allowing full scope to the commerce power given Congress by the Constitution but, in an appropriate case, refusing to permit that power to destroy effective State and local government.

Thus, the power of Congress to set minimum wages and maximum hours does not, by any stretch of the imagination, imply a power to draw up the States' budgets. There is an obvious parallel. The power of Congress to preempt State law by federal legislation does not imply the power to enact the entirety of the States' legal codes. If it did, this Court would never have sanctioned the doctrine of preemption. There is an example very close to this case. In enacting the National Labor Relations Act, Congress ousted most state control of the subject of labor relations. This Court did not strike down the Act on the theory that upholding it would necessarily mean that Congress could repeal all State laws and substitute its own code. Now, when Congress has dealt with another aspect of labor conditions, there is not, we submit, any occasion to declare it unconstitutional on the theory that a decision upholding the law would lead to full control of state budgets.

Moreover, to the degree that these situations are not completely parallel and that the National Labor Relations Act and the 1974 Amendments to the Fair Labor Standards Act have different impacts upon State sovereignty, the comparison favors the Amendments here under review. There is less reason for this Court to feel concern about the minor fiscal constraint here imposed than about federal legislation that ousts State law and policy in an area. The 1974 Amendments may set remote outer limits upon State policy choice; federal preemption of an area by substantive law destroys the States' power to make any policy choice. If the latter is constitutionally permissible, and there is no doubt it is when the aggregate of federal preemptions does not make State government meaningless, the former should plainly be allowable.

Some degree of political realism is also called for. Congress has no desire in either the fiscal or the substantive area to obliterate federalism and State sovereignty, to press its practice of making limited regulations to a point of logical and constitutional absurdity. Congress' sense of appropriate limits to the exercise of its power under the Commerce Clause is evident in the legislation here under review. Thus the 1974 Amendments specifically exclude from coverage any individual who "holds public elective office" or is appointed by such an officeholder to be a "member of his personal staff" or "to serve on a policymaking level," or is an immediate advisor to such officeholder "with respect to the constitutional

or legal powers of his office" (29 U.S.C. 203(e)(2)(C); N.L. Brief App., p. 4a).

It is highly unlikely, given American political realities, that there ever will be a Congress with an ambition to obliterate federalism and State sovereignty. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Columbia L. Rev. 543 (1954). But if one could imagine a future Congress manifesting such a desire, this "Court has ample power to prevent * * * 'the utter destruction of the State as a sovereign political entity.'" 392 U.S. at 196.

We must always be concerned about the preservation of federalism. But that concern is not best translated into constitutional law by striking down a statute like this on the theory that any principle may be pushed so far as to obliterate equally important opposing principles. The task of judicial judgment is one of assessing balances and degrees. To draw the line here would be to draw it in the wrong place, at the wrong time, for the wrong reasons.

C. The 1974 Amendments do not "take over" State and local governmental functions.

Appellants' claims that the 1974 Amendments are a "take-over" of State and local government budgets and personnel (N.L. Br., pp. 2, 41, 55, 58, 112; Cal. Br., pp. 39, 41) are not factually accurate; the present Act, like the 1966 Act, interferes with state and city functions only to the extent that it requires "a minimum wage and a maximum limit of hours unless

overtime wages are paid, and does not otherwise affect the way in which * * * duties are performed" (*Maryland* v. *Wirtz*, *supra*, 392 U.S. at 193). The 1974 amendments extend the Act's coverage to the same type of employees as were initially covered by the 1966 Amendments: *viz.*, nonsupervisory civil service employees who are neither elected nor appointed to policymaking positions or to the personal staffs of elected officials. The 1974 extension, like that of 1966, "establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid," and like the 1966 Act, "does not otherwise affect the way in which * * * [a public agency's] duties are performed" (*ibid.*).

There is thus no basis for appellants' contention that the 1974 Amendments "usurp" control of the "terms and conditions of employment" (N.L. Br., pp. 2, 41). The minimum wage requirements do nothing more than set a floor below which wages may not fall; they require only that the wage be at least $1.90 (now $2.00) an hour. Even this minimum obligation affects only the relatively small number (approximately 3.6 percent) of public employees being paid less than the specified minimum (*supra*, p. 16).[33]

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[33] Appellants also err in stating that the Amendments were added "largely upon the false representations [that they would have] no impact" upon the State and local governments (N.L. Br., p. 89). Although the House report noted that the "wage levels for State and local government employees not covered by the FLSA"—*i.e.*, non-school and non-hospital employees—were "on the average" higher than the wage levels for workers already covered (H. Rep. No. 93-913, 93d Cong., 2d Sess.,

Indeed, most of these employees (an estimated 314,000 out of 409,000) are among those who were first covered by the 1966 amendments.[34]

The only restriction imposed by the Act's overtime requirements—which is the same restriction as that of the 1966 Amendment—is that, except where an overtime pay exemption is provided, the employer must pay a premium rate for the hours worked in excess of 40. This premium rate can be avoided if the employer uses other employees to do the overtime work. This, in effect, tends to discourage overtime work and to spread employment, which is the result Congress intended. (See discussion *supra*, pp. 24, 26 and Senate Report, p. 9; see also *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-424.

While appellants object to this interference with their practice of using full-time workers in various government jobs (N.L. Br., p. 85), the spreading of employment is no less valid an objective of national

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supra, at pp. 28-29), they also estimated that the extension of coverage to additional public employees would increase the wage costs of State and local governments by one or two percent. See discussion *infra*, pp. 43, 47-52.

[34] In this respect, the 1974 Amendments are quite different in their impact from the Economic Stabilization Act of 1970 (84 Stat. 799, now repealed), which imposed controls on the wages of *all* State and local government employees, and not just on those few who were paid less than a minimum living wage. See *Fry* v. *United States*, No. 73-822, pending decision of this Court; see also *Coan* v. *California*, 113 Cal. Rptr. 187, 203, (Sup. Ct.), 520 P.2d 1003, 1019 (dissenting opinion). See also *infra*, pp. 43-52.

labor policy in the large sector of public employment than in the sector of private employment, as Congress noted. S. Rep. No. 89-1487, 89th Cong., 2d Sess., p. 22; H. Rep. No. 89-871, 89th Cong., 1st Sess., pp. 30-31; Background Material on the Fair Labor Standards Act Amendments of 1973, *supra*, at p. 298; 112 Cong. Rec. 11282, 11284, 20481, 22652. In any event, as this Court said with respect to a similar complaint about the overtime provisions of the 1966 Amendments, these "are matters outside judicial cognizance" (*Maryland* v. *Wirtz*, *supra*, 392 U.S. at 194, n. 22).

D. The financial burdens of complying with the 1974 Amendments do not affect their validity and, in any event, are vastly overstated by appellants.

The minimum wage and overtime requirements of the 1974 Amendments will not, as appellants contend, "dictate 85% of City and State budgets" (N.L. Br., p. 112). On the contrary, reports published by Congress estimate that the increased costs of these requirements (assuming that employment is not spread to avoid overtime) will amount to less than two percent of the total wage costs of the State and local governments.[35] Moreover, some of this

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[35] For example, an increase in the minimum wage to $1.80 in 1973 would have cost the State and local governments an estimated $128 million a year, which represented an increase of only 0.3 percent in their total wage bill; an increase to $2.00 in 1974 would have cost an estimated $162 million a year, which represented an 0.5 percent increase in the wage costs. Background Material on the Fair Labor Standard Act Amendments of 1973, 93d Cong., 1st Sess., p. 220. (National

cost will be borne by the federal government, whose aid to State and local governments far exceeds any possible costs of compliance.[36]

In any event, as appellants acknowledge (N.L. Br., p. 37), the cost of complying with the Act's minimum labor standards would not be a basis for invalidating an otherwise valid Congressional regulation. In *Employees* v. *Missouri Public Health Department, supra,* 411 U.S. at 279, 284, this Court, in discussing the cost impact of the 1966 Amendments to the Fair Labor Standards Act, stated that the validity of Congressional action under the commerce power is not affected by the fact that "it may place new or even enormous fiscal burdens on the States." Such considerations "raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts" (*Oklahoma* v. *Guy F. Atkinson Co.*,

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League's brief mistakenly states that Congress estimated that the first year costs were $28 million; N.L. Br., pp. 12, n. 8, 39). The estimated increase for overtime compensation was 1.0 percent, but in actual effect it would be less since more than 40 percent of the employees are already entitled to premium overtime pay under State or local laws or ordinances. H.Rep. No. 93-913, 93d Cong., 2d Sess., pp. 28-29; *Non-supervisory Employees in State & Local Governmentals, supra,* at pp. 25 and A-46, Table 44.

[36] In 1975, Federal aid to State and local governments will total approximately $52.0 billion and "will finance about 22% of State and local expenditures" (Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government,* pp. 203, 205 (Washington, D.C. 1974)).

313 U.S. 508, 527). "Nor," said the Court, "is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking" (313 U.S. at 528). See also *Sanitary District, supra*, 266 U.S. at 432.[37]

In any event, appellants' cost estimates are largely without foundation and, in significant respects, misconceive the Act.

Paragraph 44 of the verified complaint of appellants National League, *et al.* (I App., p. 28) asserts: "Increased costs for other essential State and City governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 Amendments to the Act." The figure is reiterated in appellants' brief (N.L. Br., p. 11). Yet Allen E. Pritchard, Jr., the Executive Vice President of National League, who verified the complaint as to the cities' claims (I App., p. 39), acknowledged in depositions taken by the appellee that he was "not prepared at this time to go through the calculations to indicate where that billions of dollars per year comes from" (I App., p. 245). Similarly Charles A. Byrley, the Executive Director of

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[37] Similarly the comments of the two former Secretaries of Labor and of the former President, relied on by appellants (N.L. Br., pp. 82-83), raise questions of policy. There were of course differences of opinion expressed in the pre-enactment debate as to the wisdom of extending the Act's wage standards to the States. In the end, however, these differences were resolved by the final action of Congress in passing the 1974 Amendments and of the President in approving them.

appellant National Governors' Conference, who verified the complaint as to the States' claims (I App., p. 40), admitted that he had never seen any calculations indicating the sources of this alleged increased cost (I App., p. 262). Appellants thus provide no substantiation for their claim of costs of "billions of dollars per year."

Where appellants' claims of impact are sufficiently specific to permit analysis, they are likewise without foundation. Appellants state, for instance, that the Amendments require "vast new Federal records, and reports" (N.L. Br., p. 122) and that these "burdensome record keeping requirements" (N.L. Br., pp. 84, 87) will cost $800,000 a year in the case of Florida [38] and an "*inestimable* amount" throughout the nation (Cal. Br., p. 14; emphasis in original).

In fact, however, the Act does not require the preparation or filing of any reports. The records themselves do not have to be kept in any particular form, and need only show the employee's name, age, address, social security number, daily hours,[39] and total wages earned each pay period (29 C.F.R. 516.2). The records contemplated by the Act require only the most basic kind of employment information, which

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[38] Governor Askew, in submitting this figure to appellants (II App., pp. 575-576), did not explain the basis for his estimate.

[39] Records for exempt administrative, executive and professional employees need not show any daily or weekly hours, but only the time and day on which the employee's workweek began. 29 C.F.R. 516.3.

the States and local governments necessarily presently maintain for their own purposes.

Appellants themselves acknowledge that the Act's minimum wage requirements will not have a major impact on their budgets (I App., p. 124; N.L. Br., pp. 79-80).[40] They do cite two cost examples, but these reflect misconceptions of the Act's requirements. Thus California (Cal. Br., p. 18) estimates that the cost of complying with respect to its Ecology Corps employees (who were paid 75 cents an hour) at one million dollars; in fact, however, under Section 3(m) of the Act (29 U.S.C. 203(m)), the State could count toward its minimum wage obligation the cost of providing these employees with room and board (and, depending on the circumstances, the cost of the uniforms).

Appellants also mistakenly assert that "volunteers" must now be paid the minimum wage (N.L. Br., pp. 83-85). According to one report they cite (N.L. Br., p. 84, n. 65), the cost of replacing volunteers with paid firefighters will be $4.5 billion. But nothing in the Act or in the Department of Labor's regulations prohibits the use of volunteers or requires that they be paid the minimum wage. Nor

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[40] National League itself reported to Congress that the dollar impact of the minimum wage requirements would not be "substantial." Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 4757 and 2831, 93d Cong., 1st sess., (House Hearings), p. 154. This reflects the fact, as explained by the National League's Executive Vice President, Mr. Pritchard, that as to the minimum wage requirements "most cities were already in compliance in most cases" (I App., p. 124).

has the Department determined, as appellants assert (N.L. Br., p. 85, n. 66), that the payment of $2.50 per call automatically precludes a firefighter from "volunteer" status. What the regulations do provide is that payments in this amount will be presumptive evidence of volunteer status; the regulations expressly recognize that "[p]ayments in excess of this amount" may also be consistent with a volunteer status, "depending upon the * * * expenses incurred by the volunteer." 29 C.F.R. 553.11, II App., p. 611.[41]

Appellants' principal assertion of cost impact is made with respect to the Act's overtime requirements. The only specific national figure cited as an estimated cost is $200 million for fire protection services (N.L. Br., p. 11), considerably less than that vague "billions of dollars per year" alleged in the complaint. Firefighting services will in fact account for most of the overtime costs of public agencies,[42] but the $200,000,000 figure is demonstrably overstated, since it is

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[41] Appellants also erroneously assume that volunteers engaged in other activities, and not dealt with in 29 C.F.R. 553.11, must be paid the statutory minimum. In fact, however, as 29 C.F.R. 785.44 affirmatively advises, volunteer participation in civic and charitable work is not counted as working time for purposes of the Act. The question whether an individual is an employee or a volunteer is ultimately one for the courts, and is not a matter for final decision by the Department of Labor. See, *e.g.*, *Walling* v. *Portland Terminal Co.*, 330 U.S. 148.

[42] National League reported to Congress, "the dollar impact of the overtime provisions is largely due to police and fire shifts" (House Hearings, *supra*, at p. 154). However a 1974 report prepared by the International City Management Association shows that police average only 39 to 40 hours per week. Urban Data Service, Report 9/74, p. 4.

based on the explicit assumption that numerous local governments will fail to take advantage of the partial overtime exemption provided by Section 7(k) of the Act (29 U.S.C. 207(k); N.L. Br. App., p. 5a). Under this section, no overtime compensation is required unless the employees work an average of over 60 hours per week in any 28 day period.

Appellants themselves note that only 15 percent of the public fire protection agencies (about 10 percent of the firefighting personnel) work in excess of 60 hours per week (II App., p. 627-628; see also 120 Cong. Rec. H 2297 (daily ed., March 28, 1974)). Appellants' own calculation of the estimated overtime costs for these agencies is $30,499,000 for the first year (II App., p. 628)—which figure is close to the Department of Labor's estimate of $27,000,000 (29 C.F.R. 553; II App., p. 596, 621-624). Of the remaining $169.5 million, $165.8 million is appellants' estimated cost for employers who, as already indicated, qualify for the Section 7(k) exemption (II App., pp. 630, 635).

In assuming that some firefighting agencies will not qualify for the Section 7(k) exemption, appellants erroneously assume that the employer must expressly "declare" a work period of from 7 to 28 days, and that the work period must coincide with the employee's fire "duty cycle," which in Texas is set by law at 365 days (N.L. Br., p. 32). There are, however, no such requirements in Section 7(k),[43] and, in-

[43] The Department of Labor does require that a "notation" be made in the employer's records of the work period appli-

cable to each employee (29 C.F.R. 553.16(b), 553.21; II App., pp. 616-617, 620), but this is a recordkeeping requirement and not a condition of the exemption. None of the "regulations" issued by the Department under Section 7(k), other than the recordkeeping requirements, has the force and effect of law. Section 7(k) is self executing; the regulations are therefore only interpretative and were issued for the express purpose of assisting public agencies in understanding their new statutory obligations (29 C.F.R. 553; II App., pp. 592-593). Thus, in the example which appellants cite as "[t]he most commonly used fire duty cycle in the nation" (II App., p. 632), in which the employee alternates 24 hours on and 48 hours off duty, there would be no requirement for overtime pay under Section 7(k), since the employees, in every two week period, would work only 120 hours or 60 hours a week. Moreover, the exempt status of these employees is not affected by the Department of Labor's interpretative ruling that "sleep and meal time" must, for purposes of the Fair Labor Standards Act, be counted as hours worked where the employee is on duty for 24 hours or less, but can be excluded from hours worked where the employee is on duty for more than 24 hours (29 C.F.R. 553.15; II App., pp. 615-616). This ruling corresponds to both judicial and interpretative rulings in the private sector (*see, e.g., Armour & Co.* v. *Wantock,* 323 U.S. 126; 29 C.F.R. 785.21-785.22), except that in the private sector the employer can exclude uninterrupted sleep and meal time where the employee is on duty for at least 24 hours. In departing in this one instance from the "hours of work" concept used in the private sector, the Department was conforming its interpretation to the explicit legislative history (S. Rep. No. 93-758, 93d Cong., 2d Sess., p. 27; 120 Cong. Rec. S4692 (daily ed., March 28, 1974)). This interpretation did not represent a "shocking reversal * * * of customary practices" (N.L. Br., p. 119); it was first announced on May 17, 1974, 39 days after the enactment of the 1974 Amendments (39 Fed. Reg. 17596) and it followed what the public hearings established was the usual practice in most fire departments (official Report of the Proceedings, June 3 and 4, pp. 80, 121, 137, 209). If, however, there exist some fairly unique factual situations where public agencies would actually be "disadvantaged" by Section 7(k)

sofar as can be determined from the facts stated in appellants' exhibits, the jurisdictions where fire protection employees average 60 hours or less a week apparently qualify for exemption from the Act's overtime requirements.

California also overestimates the overtime cost for firefighters employed by the State Department of Conservation, which it places at $23 million (Cal. Br., pp. 15-17). This estimate is based on the fact that California firefighters work an 84-hour week during the fire season, as follows: "four 24-hour days on, three 24-hour days off, followed by three 24-hour days on and four 24-hour days off" (Cal. Br., p. 12, n. 7). California erroneously assumes that under this schedule it will have to pay 24 hours of overtime compensation each week. In fact, however, since the firefighters are on continuous duty for *more* than 24 hours, sleep and meal time does not have to be counted as hours worked, and weekly compensable hours thus would not exceed 60. See, *supra*, p. 50, n. 43.

Nor do the 1974 Amendments interfere with California's compensatory time-off arrangements for firefighters. Under California law, "comptime" or other overtime compensation must be paid for all weekly hours worked over 40. Since the Federal overtime requirements do not apply until after the employee has worked 60 hours, however, the overtime hours

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(as appellants claim; N.L. Br., p. 118), they are not required to calculate overtime under that Section and may calculate overtime according to the rule applicable to private employers.

between 40 and 60 may be paid for in any manner consistent with State law. See 29 C.F.R. 553.19, II App., pp. 619-620.

E. Since the 1974 Amendments were within the delegated power to regulate commerce, they were not precluded by the Tenth Amendment's reservation to the States of "powers not delegated."

Appellants' contentions with respect to the Tenth Amendment add nothing to their case. As shown above, the extension of the Act to public employers is within the power of Congress under the Commerce Clause (properly interpreting that power in light of the considerations of federalism discussed at pp. 35-40, *supra*). The Tenth Amendment does not limit that power, since the Amendment in terms reserves to the States only those powers which are "not delegated to the United States." As this Court has recognized, the Tenth Amendment "states but a truism that all is retained which has not been surrendered" (*United States* v. *Darby*, *supra*, 312 U.S. at 124; *Sperry* v. *Florida Bar*, 373 U.S. 379, 403).

"There is nothing in the history of [the Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment * * *" (*United States* v. *Darby*, *supra*, 312 U.S. at 124). The amendment was adopted "to allay fears that the new national government might seek to exercise powers not granted" by the then recently adopted Constitution and "to confirm the understand-

ing of the people at the time the Constitution was adopted" (*ibid.*;[44] *United States* v. *Sprague*, 282 U.S. 716, 733). As James Madison noted while the Tenth Amendment was pending adoption and during the debate on a proposed establishment of a national bank:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States. [II Annals of Congress, p. 1897 (1791), quoted in *Sperry* v. *Florida Bar*, *supra*, 373 U.S. at 403.]

Accordingly, when the Tenth Amendment was asserted as an affirmative limitation upon congressional power, in the first Commerce Clause case to reach this Court, the limitation was unequivocally rejected (*Gibbons* v. *Ogden*, 9 Wheat. 1). As summarized by Frankfurter in *The Commerce Clause under Marshall, Taney and Waite* (1937), p. 40, "[Chief Justice] Marshall not merely rejected the Tenth Amendment as an active principle of limitation; he countered with his famous characterization of the powers of Congress, and of the commerce power in particular, as the possession of the unqualified authority of a

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[44] Citing, II Elliot's Debates, pp. 123, 131 (2d ed., 1787); III Elliot's Debates, pp. 450, 464, 600-601 (2d ed., 1787); IV Elliot's Debates, pp. 140-141, 148-149 (2d ed., 1787); I Annals of Congress, pp. 432, 761, 767-768 (1789); Story, *Commentaries on the Constitution*, §§ 1907-1908 (2d ed., 1851).

unitary sovereign." The reference is to the following passage in *Gibbons* v. *Ogden*, *supra*:

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States [9 Wheat. at 197].

This passage remains a keystone of constitutional jurisprudence. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 255.

There is accordingly no ground for asserting at this late date that the Tenth Amendment undermines the validity of an otherwise proper exercise of a delegated power when the affected party is a State. This Court specifically rejected that contention when it was asserted as a bar to the application of federal price regulations to State bodies. *Case* v. *Bowles*, 327 U.S. 92, 102. The argument likewise did not prevent the application of the commerce power to restrict activities of the City of Chicago in the operation of its municipal sewage system (*Sanitary District* v. *United States*, 266 U.S. 405), to impose duties on the purchase of scientific apparatus by the State-owned University of Illinois (*Board of Trustees* v. *United States*, 289 U.S. 48), to apply Federal safety regulations to a State-owned nonprofit local railroad (*United States* v. *California*, 297 U.S. 175, 185),

or to impose the wage standards of the Fair Labor Standards Act on State-owned schools and hospitals (*Maryland* v. *Wirtz, supra,* 392 U.S. 183).

Appellants' attempt to distinguish the instant case by the wider scope of the application of the 1974 Amendments and their greater financial impact are dealt with above (*supra,* pp. 35-52). The impact of the federal law upon preservation of State sovereignty is properly considered in determining the reach of Congress' commerce power. There is no occasion to consider that factor over again in the context of the Tenth Amendment, which, as this Court has said, "does not operate as a limitation upon the powers, express or implied, delegated to the national government" (*Case* v. *Bowles, supra,* 327 U.S. at 102). Where the destruction of State sovereignty is not involved, as it certainly is not here, the only limitation in the Constitution upon the exercise of the Congressional power over commerce is that the federal action must be rationally related to that power. "As long ago as *Sanitary District* v. *United States,* 266 U.S. 405 [this] Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 195-196).[45]

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[45] Although appellants suggest that the commerce clause language in *Sanitary District* was mere "dictum" (N.L. Br., pp. 124-125) and "cannot be read without reference to the treaty power" (*ibid.*), this Court specifically stated that the commerce clause power was "the main ground" for its decision (266 U.S. at 425).

Appellants rely on *New York* v. *United States*, 326 U.S. 572, and other cases decided under the federal taxing power to support their claim that essential State functions are immune from Federal regulation under the Commerce Clause (Cal. Br., p. 25). This reliance is misplaced. Whatever the import of those decisions with respect to limitations on the levying of federal taxes on organs or instrumentalities of the States, any attempt to limit the exercise of the commerce power by analogy is inappropriate.

Congress must be accorded broad freedom to regulate commerce without limitations imposed by claims of sovereign immunity merely because State interests are affected, if the ends for which the commerce power was created are to be accomplished.

In rejecting similar claims of limitations on another broad delegated power the Court said (*Case* v. *Bowles*, *supra*, 327 U.S. at 102): "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." If activities of States or local governments, such as the imposition of substandard labor conditions, that burden commerce cannot be proscribed, "a prime purpose of the Federal Government's establishment" would be impaired.

For this reason, the Framers of the Constitution intended that the commerce power "though limited to specified objects, is plenary as to those objects" (*Gibbons* v. *Ogden*, 9 Wheat. 1, 197). The

taxing power, on the other hand, does not have ends which would be comparably frustrated if a particular manner of its exercise were proscribed, and the States thus retained concurrent jurisdiction. *New York* v. *United States, supra,* 326 U.S. at 576. This distinction is explained in *United States* v. *California, supra,* 297 U.S. at 184-185:

> * * * the constitutional immunity of state instrumentalities from federal taxation * * * is implied from the nature of our federal system and the relationship within it of state and national governments [citation omitted]. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Also misplaced is appellant's reliance on *Employees* v. *Missouri Public Health Department, supra.* The Court did not, as appellant suggests, "refus[e] * * * to surrender [the States'] Tenth Amendment sovereignty" over their "governmental" activities (Cal. Br., pp. 46-47). On the contrary, the Court—while refusing to presume that Congress had lifted the States'

immunity from suits in a federal forum by its employees—expressly reaffirmed the Act's application to such "governmental" activities as the operation of "state mental hospitals, state cancer hospitals, and training schools for delinquent girls" (411 U.S. at 284-285).

In *Maryland* v. *Wirtz, supra,* 392 U.S. at 195, this Court sustained the 1966 Amendments because it found that "a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals * * *." Nevertheless, appellants argue that the "rational basis" test is not an appropriate standard for assessing the constitutionality of the 1974 Amendments; rather, they suggest that "the Government should be required to bear the burden of establishing that * * * [the 1974 Amendments are] supported by a compelling national interest" (Cal. Br., p. 24; see N.L. Br., pp. 96-97). While "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments" (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4), none of the specific Bill of Rights protections is infringed by the 1974 Amendments.

Although the legislation must meet the Fifth Amendment's standard of due process, that is precisely the "rational basis" test applied by the Court in *Maryland* v. *Wirtz*. The rational basis test is the proper standard for assessing the constitutionality

of legislation, unless it threatens to infringe the personal liberties protected by the Bill of Rights.[46] See, *e.g.*, *Thomas* v. *Collins*, 323 U.S. 516, 530. Since the Tenth Amendment merely reserves to States powers not delegated, no otherwise valid exercise of a delegated power could "appear * * * on its face to be within a specific prohibition of the Constitution" (*United States* v. *Carolene Products Co.*, *supra*, 304 U.S. at 152, n. 4).

Moreover, even if the preferred freedoms of the Bill of Rights were implicated, there would be no objection to the 1974 Amendments. This Court has previously sustained the application of the Fair Labor Standards Act to newspapers, against the claim that such an application of the Act would interfere with the freedom of the press guaranteed by the First Amendment. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-193; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; see also, *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 116.

In any event, we do not merely rely on presumption of constitutionality. Our submission, based on the legislative reports and pertinent background materials, is that Congress had a "rational basis" for extending the Fair Labor Standards Act to additional State and local government employees. Appellants were not able to persuade Congress of

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[46] The States and local governments are not, of course, "persons" within the contemplation of the Fifth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324.

their view that the 1974 Amendments were unwise or unnecessary. They now ask this Court to review Congress' judgment; this the Court cannot properly do. *Oklahoma* v. *Guy F. Atkinson Co.*, *supra*, 313 U.S. at 527.

F. The Eleventh Amendment is invoked prematurely and is, in any event, not applicable to suits brought by the Secretary or in State courts.

Appellants' contention that the Eleventh Amendment bars the Secretary from suing the States for enforcement is premature and, in any event, groundless. It is premature in that once the validity of the 1974 Amendments has been adjudicated, there will then be occasion to consider what forms of enforcement are constitutionally available. *Maryland* v. *Wirtz*, 392 U.S. 183, 200:

> The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more remedies the Act provides might not be available when a State is the employer-defendant.

The Act provides for suits by the Secretary and by aggrieved employees; it authorizes suits for back pay and for injunction; it authorizes suits in federal and State courts.[47] The application of the Eleventh Amendment to the various combinations of these litigation possibilities must be considered separately. What is relevant to suits in federal court may have

[47] See 29 U.S.C. 216(b), 216(c) and 217.

no bearing on suits in State courts; suits by the Secretary are different in their relation to the Eleventh Amendment from suits by private plaintiffs; and the considerations applicable to money suits are not the same as those applicable to suits to compel compliance. Moreover, it is likely that many States and municipalities, once assured of what their obligations are under the Act, will comply with those requirements, as many already have.

The question of how the Act may be enforced against noncomplying States should await the determination whether the substantive provisions of the Act may constitutionally be applied to them, and should be considered in light of the particular form of enforcement that may be sought. As this Court said in *Maryland* (392 U.S. at 200):

> Percolating through each of [the Act's several] provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. * * * They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. [Citations omitted.]

In any event, appellants' Eleventh Amendment contentions are unsound. It has uniformly been held for almost a century that the States' immunity to suit in federal court, whether under the Eleventh Amendment or under the doctrine of *Hans* v. *Louisiana*, 134 U.S. 1, does not extend to suits brought by the United States. *United States* v. *Texas*, 143 U.S. 621, 641-646; *Sanitary District* v. *United States*, 266 U.S. 405, 425-426; *United States* v. *California*,

supra, 297 U.S. at 184-185; *Board of Trustees* v. *United States*, 289 U.S. 48, 56-60; *United States* v. *Mississippi*, 380 U.S. 128, 140-141; *Department of Employment* v. *United States*, 385 U.S. 355, 358.

This principle is not, as National League contends, a question of "legerdemain" to permit the federal government to avoid the Eleventh Amendment (N.L. Br., p. 121). The Eleventh Amendment's purpose was to reassert the States' sovereign position vis-a-vis individual citizens. Suit by the Secretary does nothing to affect the position of a State vis-a-vis its citizens. The States, however, have no similar claims of sovereign position vis-a-vis the federal government. As this Court stated in the *Mississippi* case, "nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States * * * with or without specific authorization from Congress * * *" (380 U.S. at 140).

It is immaterial that plaintiff is an official of the United States suing in its behalf rather than the United States in its own name. Suits brought by the Secretary of Labor to enforce the Fair Labor Standards Act have consistently been treated as suits by the United States.[48] Indeed, this Court recently recognized that the Constitution permits suits by the

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[48] *Mitchell* v. *McCarty*, 239 F.2d 721, 724 (C.A. 7); *Brennan* v. *State of Iowa*, 494 F.2d 100, 103; *Walling* v. *Norfolk Southern Ry. Co.*, 162 F.2d 95, 96 (C.A. 4); *Walling* v. *Frank Adam Electric Co.*, 163 F.2d 277, 283 (C.A. 8); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 260 F.2d 929, 932 (C.A. 5), reversed on other grounds, 361 U.S. 288.

Secretary against States pursuant to the Act. In *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, the Court held that Congress had not intended to permit individual employees to sue the State under Section 16(b), 29 U.S.C. 216(b). The Court observed, however, that this conclusion was consistent with the expanded application of the Act to State institutions through suits by the Secretary (411 U.S. at 285):

> By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless. * * * [The Act] gives the Secretary of Labor authority to bring suit * * *. * * * [S]uits by the United States against a State are not barred by the Constitution. See *United States* v. *Mississippi*, 380 U.S. 128, 140-141.[49]

Cf. also, *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 145-146.

Although the relief sought by the Secretary may include a monetary benefit to underpaid employees, the Secretary nevertheless acts for the United States in bringing such suits. Cf. *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27. The pur-

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[49] The concurring opinion also recognized that "suits brought in federal court by the United States against States are within the cognizance of the federal judicial power" (411 U.S. at 294, n. 9). And the dissenting opinion takes the position that there is no State immunity in Fair Labor Standards Act cases, whoever the plaintiff may be (411 U.S. at 298-299).

pose of the Secretary's suit is to vindicate the public interests declared in Section 2 of the Act, including the abatement of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of the workers" and "conducive to labor disputes burdening and obstructing commerce." The "enforced payment" of wages withheld "is simply a part of a reasonable and effective means * * * to bring about general compliance with the [Act]" even though "as a result, money may pass from the employer into the pocket of the employee * * *." *Wirtz* v. *Jones*, 340 F.2d 901, 904 (C.A. 5). Cf. *United States Fidelity Co.* v. *Kenyon*, 204 U.S. 349, in which a suit was instituted by the United States for the benefit of a materialman on the bond of a contractor for a public work. In rejecting the contention that the materialman was the real party in interest, this Court said (204 U.S. at 357):

> * * * We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is, therefore a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the Government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. * * *

Edelman v. *Jordan*, 415 U.S. 651, upon which appellants rely, is not to the contrary. In *Edel-*

man, the Court held that the Eleventh Amendment was violated by a decree in a suit by a private citizen which ordered the State to make retroactive welfare payments. But the Court distinguished that case from the situation where suit is brought in behalf of the United States. The Court noted that the line of cases which "reaffirmed the principle that the Eleventh Amendment was no bar to a suit by the United States against a State" (415 U.S. at 669) was simply not applicable to suits by private citizens.

Moreover, the Eleventh Amendment does not foreclose a suit brought *in a State court*, whether by a private plaintiff or by the Secretary. In fact, such suits have been successfully brought by private plaintiffs. *Clover Bottom Hospital and School* v. *Townsend*, 513 S.W. 2d 505 (Sup. Ct. Tenn., appeal pending No. 74-487, filed Oct. 25, 1974); *Glick* v. *Montana*, 509 P.2d 1 (Sup. Ct. Mont.).

III

APPELLANTS' STATUTORY CONTENTIONS NEED NOT BE DECIDED NOW AND, IN ANY EVENT, ARE WITHOUT MERIT.

1. Appellant California makes the additional argument that, as a matter of statutory construction, it is not within the Act. As in *Maryland* v. *Wirtz*, *supra*, this case presents no occasion to decide "in the abstract and in general" whether particular public agencies are within the Act (392 U.S. at 201). The pleadings, motions, affidavits, and briefs in this case, as well as the decision of the district court, have

dealt with the broad contention that the extension of the Act to state employees generally is beyond congressional power. Questions of statutory construction, which necessarily depend upon factual questions not presented in this case, "may be considered as occasion requires" (392 U.S. at 201).

2. In any event, appellant's construction of the Act is incorrect.

a. Citing *Mitchell* v. *Zachry Co.*, 362 U.S. 310, appellant argues that Congress "did not imbue the [Fair Labor Standards] Act with its full power under the Commerce Clause," and that it specifically expressed a "concern *not* to impinge upon matters of local interest" (Cal. Br., p. 34). The *Zachry* case, however, was decided before the Act's original coverage provisions were broadened by the 1961, 1966 and 1974 Amendments to extend to employees who, although not themselves engaged in commerce or in the production of goods for commerce, are employed in an enterprise which has at least some employees engaged in such activities *or* in "handling * * * or otherwise working on goods *or materials* that have been moved in or produced for commerce" (29 U.S.C. 203(s); emphasis added).[50]

The result of those post-*Zachry* Amendments has been to extend the Act's coverage to employees of numerous local businesses, including schools (*Maryland* v. *Wirtz*, *supra*), building management companies (*Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S.

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[50] The words "or materials" were added by the 1974 Amendments. See discussion, *infra*, pp. 70-71.

512), apartment houses (*Brennan* v. *Dillion*, 483 F. 2d 1334 (C.A. 10)), private country clubs (*Shultz* v. *Deane-Hill Country Club, Inc.*, 310 F.Supp. 272, 277-278 (E.D. Tenn.), affirmed *per curiam*, 433 F.2d 1311 (C.A. 6), certiorari denied, 400 U.S. 820), and laundromats (*National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689 (C.A. D.C.); *Wirtz* v. *Washeterias, S. A.*, 304 F.Supp. 624 (D. Canal Zone)).[51] As this Court explained the expanded coverage of the Act in *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516-517:

> The concept of "enterprise" under the Fair Labor Standards Act * * * substantially broadened the coverage of the Act. Rather than confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce" [citations omitted], the new amendments brought those "employed in an enterprise engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.

Thus, to be covered, an "enterprise" need not itself engage in the production of goods for commerce or perform any activities of a business nature (see pp. 29-30, n. 29, *supra*); it may receive, handle and con-

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[51] The intent of Congress to cover such "matters of local interest" is clear not only from the statutory language, but also from the legislative history (S. Rep. No. 145, 87th Cong., 1st Sess., pp. 2-3, 76, 94-96; 107 Cong. Rec. 5964-5965), including, in particular, the rejection of an earlier bill which would have limited the Act's enterprise concept of coverage to establishments operating in two or more States (107 Cong. Rec. 5973, 6088-6089, 6243).

sume such goods. In this case, as the district court observed, "it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods" (II App., p. 649).

2. Appellant contends that its "mere purchase" and subsequent handling of interstate goods is not sufficient to satisfy the Act's requirement that a covered enterprise have employees "handling * * * or otherwise working on goods that have been moved in * * * commerce," since the term "goods" is defined in the Act to exclude goods in the possession of the ultimate consumer (29 U.S.C. 203(s); Cal. Br., pp. 43-44).

This argument overlooks Section 6(a)(5)(E) of the Amendments (N.L. Br. App., p. 5a) which added a final sentence to Section 3(s)(5) of the Act providing that the "employees of an enterprise which is a public agency shall * * * be deemed to be employees engaged in commerce * * *."[52] It also ignores the fact that coverage also exists if the enterprise has at least some employees engaged in commerce or in the production of goods for commerce.[53]

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[52] The addition of this language simply recognizes the obvious—*viz.*, that "the activities of government at all levels affect commerce" (S.Rep. No. 93-690, 93d Cong., 2d Sess., *supra*, at p. 24).

[53] Thus, regardless of any limitation on the definition of "goods," employees receiving purchases shipped interstate are "engaged in commerce" (*e.g., Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564) and employees engaged in the order-

Moreover, both the language and the legislative history of the 1961, 1966 and 1974 Amendments indicate that Congress never intended the term "goods," as used in Section 3(s), to exclude articles that are consumed in the operation of the employer's enterprise. This is shown by the frequently expressed intention to regulate the effect of substandard wage conditions on the interstate flow of goods (107 Cong. Rec. 6236; see H.Rep. No. 75, 87th Cong., 1st Sess., pp. 3, 8; S.Rep. No. 145, 87th Cong., 1st Sess., pp. 3-4; 107 Cong. Rec. 5841, 6234, 6236, 6240-6241); that flow of goods is no less substantial when the goods are consumed by the employer than when he otherwise disposes of them. That the term "goods" as used in Section 3(s) included goods which are consumed in the enterprise is indicated by the fact that, when Congress intended to refer to goods held for resale, it did so in those terms. Thus in 1961, in extending coverage to retail enterprises, Congress added the additional requirement that a retail enterprise purchase or receive "goods *for resale* that * * * have moved across State lines" in the annual gross volume of at least $250,000 (emphasis added). If the word "goods" excluded goods which remained with the enterprise, then the words "for resale"

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ing of such purchases and in other interstate communications or transmissions are "engaged in commerce or in the production of goods for commerce" (see, *e.g., Public Building Authority of Birmingham* v. *Goldberg, supra,* and *Hodgson* v. *Travis-Edwards, Inc.,* 465 F.2d 1050 (C.A. 5), certiorari denied, 409 U.S. 1076).

would have been superfluous. See S.Rep. No. 145, 87th Cong., 1st Sess., *supra,* at p. 44.

But any possible doubt concerning the meaning of the word "goods" as originally used in Section 3(s) was dispelled by the 1974 Amendments, which inserted after the word "goods" the phrase "or materials," which phrase is not defined in the Act and thus is not restricted or limited by the exclusionary language of Section 3(i).[54] Congress' express pur-

[54] Even the statutory definition of the term "goods" exempts from the exclusionary clause goods which are in the possession of an ultimate consumer who is a "producer, manufacturer, or processor" of such goods. Since the term "produc[ing]" is broadly defined in Section 3(j) (29 U.S.C. 203(j)) to include "handl[ing]," the exclusionary clause—by its own terms—does not apply to "goods" which are consumed in the operation of an enterprise. And, indeed, the courts of appeals, in construing the "handling" clause in Section 3(s), have uniformly found coverage where the employees of an enterprise handled goods that had moved in commerce even though such goods were necessarily consumed in the employer's operations: *Brennan* v. *Dillion,* 483 F.2d 1334 (C.A. 10) (an apartment house using out-of-State paints and cleaning equipment for maintenance purposes); *Brennan* v. *State of Iowa,* 494 F.2d 100 (C.A. 8), petition for a writ of certiorari pending, No. 73-1565 (schools and hospitals using out-of-State supplies and equipment for both housekeeping and therapeutic operations); *Wirtz* v. *Melos Construction Co.,* 408 F.2d 626 (C.A. 2) (a construction company using concrete made from out-of-State materials); *National Automatic Laundry & Cleaning Council* v. *Shultz, supra* (automatic laundries using out-of-State soaps and detergents); *Clifton D. Mayhew, Inc.* v. *Wirtz,* 413 F.2d 658 (C.A. 4) (a painting subcontractor using out-of-State paints and materials). See also *Shultz* v. *Union Trust Bank of St. Petersburg,* 297 F.Supp. 1274 (M.D. Fla.) (a nursing home using out-of-State soap, cleaning materials and linens); *Wirtz* v. *Washeterias, S. A., supra* (a laundry using out-of-State detergents and bleaches).

pose for adding this phrase was "to make clear [its] intent to include within th[e] additional [handling] basis of coverage the handling of [interstate] goods consumed in the employer's business, as, *e.g.*, the soap used by a laundry" (S.Rep. No. 93-690, 93rd Cong. 2d Sess., *supra*, at p. 17).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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