Volume 13
Number 1 *Fall 1978*

*pp.*1-31

Fall 1978

The Constitutionality of a National Public Employee Relations Act: A Case for States' Rights

Richard W. Noble

W. Terrence Kilroy

Valparaiso University Law Review

Volume 13 Fall 1978 Number 1

THE CONSTITUTIONALITY OF A NATIONAL PUBLIC EMPLOYEE RELATIONS ACT: A CASE FOR STATES' RIGHTS

RICHARD W. NOBLE*
W. TERRENCE KILROY**

I. INTRODUCTION

Americans have, for nearly two hundred years, debated the extent of the States' role in our federal system. Some view the complexities of the modern world as requiring that all power be centralized in Washington.[1] Others believe the independent sovereign existence of the States is essential to the preservation of our basic freedoms. Their position is stated by the noted economist Milton Friedman:

> If government is to exercise power, better in the county than in the state, better in the state than in Washington. If I do not like what my local community does, be it in

*Member, Shughart, Thomson & Kilroy, Kansas City, Missouri; B.A., University of Kansas, 1967; J.D., University of Wisconsin, 1970; Special Labor Counsel for the City of Kansas City, Kansas.

**Associate, Shughart, Thomson & Kilroy, Kansas City, Missouri; B.S., University of Kansas, 1972; M.A., University of Kansas, 1974; J.D., Washburn University, 1977.

The authors wish to acknowledge the research assistance of David Gatchell, J.D. candidate, 1979, University of Kansas.

1. The advocates of strong national power would argue that an individual State's interests are adequately protected by its Representatives and Senators in Congress. This assumption often proves erroneous for several reasons. First, a State's interest may not be accurately presented by its congressional delegation because the representatives' views are often shaped by conflicting political pressures which may distort their advocacy of the State's position. Secondly, State legislatures no longer compel accountability from their Representatives or Senators. This is because reapportionment decisions have rendered the redistricting process largely mechanical and the seventeenth amendment took away from legislatures the power to elect Senators. A third reason why States are not always protected by their Washington representatives is that members of Congress representing one State may disagree as to the State's interests and therefore will not always vote in blocks. *See* Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065, 1072 (1977) (hereinafter referred to as *Unraveling National League of Cities*).

> sewage disposal, or zoning, or schools, I can move to another local community, and though few may take this step, the mere possibility serves as a check. If I do not like what my state does, I can move to another. If I do not like what Washington imposes, I have few alternatives in this world of jealous nations.[2]

The Supreme Court, with its recent decision in *National League of Cities v. Usery*,[3] rekindled the debate by holding that Congress cannot, by the exercise of its commerce clause powers, enact legislation which would impair the separate and independent existence of the States. The Court, in so holding, struck down the 1974 amendments to the Fair Labor Standards Act (FLSA)[4] which would have extended coverage of that Act to State and municipal employees. As if to ignore the implications of *National League of Cities*, proponents of a national Public Employee Relations Act have introduced several different bills which would dramatically affect the relationship between the States and their employees. This article addresses the question of whether congressional enactment of any of the proposed Public Employee Relations Acts would amount to an unconstitutional interference with the separate and independent existence of our sovereign states under the standards set forth in *National League of Cities*.

II. BACKGROUND

A. *Employee Relations Acts*

The National Labor Relations Act (NLRA) covers the majority of private sector employees.[5] Federal employees are covered by a comprehensive executive order comparable with the NLRA, except they are prohibited from striking, picketing or otherwise engaging in work stoppages or slowdowns.[6]

State and municipal employees do not generally fare as well as their counterparts in either private or federal employment. While

---

2. M. FRIEDMAN, CAPITALISM AND FREEDOM 3 (Univ. of Chicago Press, 1962).

3. 426 U.S. 833 (1976).

4. 52 Stat. 1060 *as amended* (codified at 29 U.S.C. § 201 *et seq.* (1976)).

5. 49 Stat. 449 *as amended by* 61 Stat. 136 and 73 Stat. 419, 29 U.S.C. § 141 *et seq.* (1976).

6. Exec. Order No. 11491, 34 Fed. Reg. 17605 (1970) (promulgated by President Nixon on Aug. 26, 1971) *as amended by* Exec. Order No. 11616, 36 Fed. Reg. 17319 (Aug. 26, 1971), Exec. Order No. 11636, 36 Fed. Reg. 24901 (Dec. 17, 1971), Exec. Order No. 11838, 40 Fed. Reg. 5743, 7391 (Feb. 7 and 20, 1975), and Exec. Order No. 11901, 41 Fed. Reg. 4807 (Feb. 2, 1976).

most States have provided for public sector bargaining, a few States still prohibit bargaining between a public employer and its employees.[7] Several States which do permit collective bargaining impose no obligation on the public employer to bargain. In these States, the right to unilaterally alter any labor agreement with a public employee representative has been reserved unto the public employer. Those States permitting public employees collective bargaining have one of two basic types of statutes: those merely requiring the public employer to meet and confer with the bargaining representative and those mandating it to bargain collectively in good faith.[8] Despite the differences between public and private employment, an increasing number of States have adopted modified versions of the NLRA.[9] While almost all States prohibit public employee strikes, a few States have recently accorded public employees the right to strike under certain limited circumstances.

Labor leaders, both public and private, and various public employee organizations have called upon Congress to enact federal legislation providing uniform organizational and bargaining rights for all public employees. The first session of the Ninety-Fifth Congress saw the introduction of two such bills. One bill would remove the NLRA exemption granted to State and municipal employers.[10] The other bill would afford public employees rights similar to those granted by the NLRA via a Public Employee Relations Act.[11] This latter proposal establishes a National Public Employee Relations Commission to administer the Act. The National Education Association has also proposed legislation which differs from the others chiefly in its unique impasse procedures.[12] While none of these bills were passed during the Ninety-Fifth Congress,[13] organized labor

7. Approximately three-fourths of the States have passed such legislation. For a further breakdown, *see* McCann and Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining*, 13 HARV. J. LEGIS. 479, 495-514 (1976).

8. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1974).

9. *Id.* at 916.

10. H.R. 777 introduced Jan. 4, 1977 by Rep. Thompson.

11. H.R. 1987 introduced Jan. 17, 1977 by Rep. Roybal.

12. *See* Chanin, *A Federal Collective Bargaining Statute for Public Employees: Redesigning the N.E.A. Proposal to Meet the Requirements of National League of Cities v. Usery* (1976) (a copy of this report may be obtained by writing the National Education Association, 1201 16th St., N.W., Washington, D.C. 20036) (hereinafter cited as *N.E.A. Proposal*).

13. While organized labor is still seeking passage of federal legislation to govern State and municipal employee bargaining, events of the 95th Congress have diminished their hopes of its passage. The defeat of common-situs picketing by the

has committed itself to the eventual passage of a Public Employee Relations Act.[14]

Extension of the coverage of the NLRA has closely paralleled that of the FLSA. Thus, in 1974, when organized labor obtained an extension of the FLSA to cover State and municipal employees, it was only a matter of time until a similar extension of the NLRA was sought. An anaylsis of the Court's treatment of the amendments to the FLSA, particularly *National League of Cities*, aids one in understanding the constitutional analysis the Court is likely to employ if called upon to determine the constitutionality of a National Public Employee Relations Act.

B. The Fair Labor Standards Act

The FLSA was enacted by Congress in 1938 pursuant to its power to regulate commerce between the States.[15] The Act provides for, among other things, a federal minimum wage,[16] maximum hours,[17] and overtime compensation.[18] Public employees were exempted from the coverage of the Act.[19] The FLSA was upheld in *United States v. Darby* as a legitimate exercise of congressional power under the commerce clause.[20]

In 1966 the FLSA was amended, expanding the definition of employer to include States and municipalities when operating public hospitals and schools.[21] This extension was ratified in *Maryland v. Wirtz*[22] on the basis that federal regulation is not less valid because

---

House forced organized labor to reduce its list of demands. The original list included a three dollar minimum wage, repeal of Section 14(b) of the N.L.R.A. (the so-called "right-to-work" provision), a "Labor Reform" act, common-situs picketing and federal public sector legislation. With the Senate's recent action sending the "Labor Reform" bill back to committee, no meaningful action on federal public sector legislation will occur in the 95th Congress. Legislation will no doubt be reintroduced in the 96th Session of Congress to add public employees to the N.L.R.A.'s coverage. Its future will depend on whether organized labor can regain its clout with Congress.

14. NEW YORK TIMES, Feb. 23, 1977, § B at 5.

15. 52 Stat. 1060 *as amended* (codified at 29 U.S.C. § 201 *et seq.* (1976)).

16. 29 U.S.C. § 206 (1976).

17. *Id.* at § 207.

18. *Id.*

19. Fair Labor Standards Act of 1938, ch. 676 § 3(d), 52 Stat. 1060 (codified at 29 U.S.C. § 203(d) (1976)). States were exempted under this section from the definition of "employer."

20. 312 U.S. 100 (1941).

21. Fair Labor Standards Amendments of 1966, Publ. L. No. 89-601, 75 Stat. 67 *amending* 29 U.S.C. § 203 (codified at 29 U.S.C. §§ 203(d), 203(r), 203(s), (1976)).

22. 392 U.S. 183 (1968).

a State or municipality is involved, if the State is engaged in an activity which is covered by federal labor law when performed in the private sector.[23] Justice Douglas dissented, stating that constitutional principles of federalism insulated the States from the exercise of Congress' commerce clause powers. Justice Douglas believed such a limitation on Congress' otherwise plenary commerce powers was necessary to protect State sovereignty.[24]

In 1974 the Act was again amended to include almost all public employees other than elected public officials and certain staff members.[25] Additionally, special maximum hour and overtime provisions were promulgated for fire and police personnel.[26] The National League of Cities, numerous cities and States, and the National Governors' Conference challenged Congress' right to bring States and municipalities within the coverage of the FLSA.[27]

C. National League of Cities v. Usery

The District Court felt obliged to follow *Maryland v. Wirtz* despite its concern that the 1974 amendments would intrude upon the States' performance of their governmental functions. Following *Maryland v. Wirtz*, the District Court required only that the state activity affect interstate commerce and that the federal legislation have a "rational basis" underlying its enactment.[28]

The National League of Cities consistently contended that the 1974 amendments conflicted with nearly 200 years of federalism and amounted to a federal takeover of the essential functions of State and local governments.[29]

> The question presented here is not one just of protection of State governmental power as sloganized under the term "states' rights." The question here is one of protection of our Federalist system of Government against the centralization of power the Constitution was designed to prevent. To reduce State and local governments to their

23. *Id.* at 197.

24. *Id.* at 204-05.

25. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, *amending* 29 U.S.C. §§ 203, 207 (1974).

26. 29 U.S.C. § 207(k) (1974).

27. For a detailed listing of all parties to the suit, *see* National League of Cities v. Usery, 426 U.S. 833, 836 n.7 (1976).

28. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974).

29. Brief of Appellant at 51, National League of Cities v. Usery, 426 U.S. 833 (1976).

> inferior status of reporting to and being governed by a Federal agency on such an important ultimate matter as terms and conditions of employment of all employees is not envisioned by the Federal partnership system.[30]

Maryland v. Wirtz, in the National League's opinion, should have been overruled, for federal legislation interfering with State and local governments could not be justified simply because a rational basis existed for its enactment. Instead, courts should examine such legislation with "careful and meticulous scrutiny" in order to determine if constitutional standards of federalism have been met.[31]

The Secretary of Labor asserted that, "[t]he rational basis test stated in *Maryland v. Wirtz* is the proper standard for assessing the constitutionality of legislation, unless it threatens to infringe the personal liberties guaranteed by the Bill of Rights."[32] Relying on *United States v. Darby*,[33] the Secretary sought to negate the plain meaning of the tenth amendment by asserting that it was merely declaratory of the relationship between the national and State governments.[34]

The Supreme Court rejected the Secretary of Labor's interpretation of the tenth amendment. Justice Rehnquist, speaking for the majority,[35] enunciated the familiar axiom that Congress has plenary power to regulate commerce.[36] However, while an enactment may be within Congress' grant of legislative authority under the commerce clause, the legislation may be invalid because it offends other constitutional rights.[37] Congressional power under the commerce clause may not impair the sovereign power of the States in the discharge of their obligation as a State for:

> There are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because

---

30. *Id.* at 54.

31. *Id.* at 94-96.

32. Brief of Appellee Department of Labor at 59-60, National League of Cities v. Usery, 426 U.S. 833 (1976).

33. 312 U.S. 100 (1941).

34. Brief of Appellee Department of Labor at 53, National League of Cities v. Usery, 426 U.S. 833 (1976).

35. Justice Rehnquist spoke for four members of the Court with the deciding vote cast by Justice Blackmun in a separate concurrence.

36. 426 U.S. 833, 840 (1976).

37. *Id.* at 841.

> the Constitution prohibits it from exercising the authority in that manner.[38]

"One undoubted attribute of state sovereignty is the States' power to determine the wages . . . [and] hours of its employees."[39] Since the State's right to make these fundamental determinations is essential to its continued existence, Congress may not impair the State's exercise of its sovereign wisdom.[40] The State's unfettered authority to determine the wages and hours of its employees is an inherent element of State sovereignty, for the ceding of this authority to an extraneous governmental body would: (1) increase costs to the States,[41] (2) necessitate cutbacks in essential governmental services,[42] and (3) displace the States' policies regarding the manner in which they will structure delivery of the governmental services their citizens require.[43] Accordingly, the 1974 amendments to the FLSA "impermissibly interfere[d] with the integral governmental functions of [the States]."[44] In reaching its decision in *National League of Cities*, the Court overruled *Maryland v. Wirtz*[45] and required an approach which renders unconstitutional any legislation impermissibly interfering with the essential functions of the State in its capacity as a State.

Justice Blackmun, concurring, read the majority as establishing a balancing test between federal and purely State interests.[46] His approach would "not outlaw federal power in such areas as environmental protection, where the federal interest is demonstrably greater and where state compliance with imposed federal standards would be essential."[47]

---

38. *Id.* at 845.
39. *Id.*
40. *Id.*
41. The City of Cape Girardeau, Missouri, estimated its fire protection budget would nearly double because of regulations issued under the Act. 426 U.S. 833, 846 (1976).
42. The City of Inglewood, California, stated it would be forced to curtail its affirmative action program providing employment opportunities for men and women interested in law enforcement careers. Additionally, the Inglewood Police Department would have to cut back job training programs due to additional costs. 426 U.S. 833, 847 (1976).
43. 426 U.S. 833, 847-48 (1976).
44. *Id.* at 851.
45. *Id.* at 853-55. The Court distinguished Fry v. United States, 421 U.S. 542 (1975), which upheld the Economic Stabilization Act of 1970, because a temporary freeze on wages of State and municipal employees was an emergency measure to counter severe inflation threatening the national economy. 426 U.S. at 852-53.
46. 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).
47. *Id.*

While Justice Blackmun's suggestion that the majority has adopted a "balancing test" is probably correct, Justice Rehnquist's opinion reveals an attempt to isolate essential State governmental functions[48] to provide them with enhanced protection.[49] Any federal intrusion with these functions would therefore be subjected to "close scrutiny" to insure that the essential elements of State sovereignty are left unimpaired. Identified as an essential element of State sovereignty is the State's power to control the wages and hours of its employees;[50] as such, any federal intrusion would seemingly require a compelling national interest.[51] Where an overriding national interest exists, however, such as eradicating discrimination[52] or environmental protection, the legislation would require only that it satisfy a "rational basis" test.

Justice Brennan, in a strong dissent, asserted that the majority opinion narrowed the scope of the commerce power.[53] In fact, the majority did not quarrel with Congress' plenary power to regulate commerce, so long as the activity affects commerce among the States or with foreign nations.[54] However, when a congressional enactment impermissibly interferes with the sovereignty of the

48. "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . . ." 426 U.S. 833, 845 (1976).

49. *Unraveling National League of Cities, supra* note 1, at 1074. Professor Tribe argues the Court's willingness to protect the State in its role as employer and not the State in its role as lawmaker is difficult to justify. He asserts the political safeguards against federal burdens on State treasuries when acting as employer are likely to be greater than intrusions on the State's ability to regulate private conduct within its borders. This is because the State and its taxpayers are more likely to protest additional burdens than increased federal regulation which relieves the State of regulatory duties. The argument is well taken and suggests avenues for further expansion of the protection *Usery* affords the States. Perhaps the Court will one day reapply the pre-1937 Court's commerce power analysis which restricted federal regulation of intra-state private activities.

50. 426 U.S. 833, 845 (1976).

51. Bishop v. Wood, 426 U.S. 341 (1976), reinforces this view. In *Bishop*, the Supreme Court deferred to State law in determining whether a public employee has a vested property right in his employment. Justice Stevens, speaking for the majority, stated: "The ultimate control of state personnel relationships is, and will remain, with the States." 426 U.S. at 349 n.14.

52. *See, e.g.*, Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) (§ 1983 of the Civil Rights Act of 1871 applies to state and local governments); Fitzpatrick v. Bitzer, 427 U.S. 447 (1976) (eleventh amendment does not bar a Title VII (Civil Rights Act of 1964) action against a municipality).

53. 426 U.S. 833, 868 (1976).

54. *Id.* at 840.

States acting as States, the tenth amendment shields the State from the interference.

Justice Brennan also claimed that the majority opinion created a "novel state sovereignty doctrine," whereas the tenth amendment is merely declaratory and was never intended as a substantial check on federal power.[55] Yet, analysis of the intent of the framers of the Constitution reveals that the concept of State sovereignty was clearly intended as a limitation on the exercise of congressional power.

III. A HISTORICAL VIEW OF THE CONCEPT OF FEDERALISM EMBODIED WITHIN THE TENTH AMENDMENT AS A SUBSTANTIVE CHECK ON CONGRESSIONAL POWER

The proposition that the tenth amendment is merely declaratory and not a substantive check on the power of Congress was most succinctly enunciated in *United States v. Darby*,[56] where the Supreme Court stated:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of this adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new government might seek to exercise powers not granted . . . .
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of the granted powers which are appropriate and plainly adapted to the permitted end.[57]

This decision eliminated the tenth amendment as a substantive check on federal power. The Court, in reaching its result, ignored historical evidence that the tenth amendment was promulgated specifically to prevent congressional overreaching into the internal affairs of the States.[58]

---

55. *Id.* at 862-63.

56. 312 U.S. 100 (1941).

57. *Id.* at 124.

58. *See* National League of Cities v. Usery, 426 U.S. 833, 868 (Brennan, J., dissenting). "We tend to forget that the Court invalidated legislation during the Great Depression, not solely under the Due Process Clause, but also and primarily under the Commerce clause and Tenth Amendment. It may have been the eventual abandonment of that overly restrictive construction of the commerce power that spelled defeat for

An analysis of the Constitution reveals a scheme of federalism woven throughout the Constitution which was intended to limit congressional power. The Supreme Court has, except for two epochs, strongly defended the sovereign rights of the States. The Court's decisions have at times been couched in terms of intergovernmental immunity or in terms of a restrictive interpretation of the commerce power. Nevertheless, the concept that the tenth amendment preserves State sovereignty by acting as a substantive check on the power of the federal government has had continuing vitality.

A. The Constitutional Convention

One of the central issues facing delegates to the 1787 Constitutional Convention was how to strengthen the central government while simultaneously insuring the continued existence of the sovereign States.[59] Strong sentiments were expressed on both sides of the issue.[60] An early draft of the Constitution stated:

> To provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the government of individual States, in matters which respect only their internal police, or for which their individual authority may be competent.[61]

Although this version of the Constitution was not accepted, it is worth noting for at least two reasons. The framers of the Constitution were concerned about the possibility of congressional encroachment on State government. As one of the members of the Constitutional Convention warned:

> The State legislatures also ought to have some means of defending themselves against encroachments of the National Government. In every other department we have

---

the Court-packing plan, and preserved the integrity of this institution . . . *see e.g.*, United States v. Darby . . . ." *Id.*

59. *See* J. MADISON, JOURNAL OF THE FEDERAL CONVENTION (E.H. Scott ed. 1970) (hereinafter referred to as JOURNAL OF THE FEDERAL CONVENTION).

60. Alexander Hamilton, an ardent supporter of a strong national government, stated: "[T]he [g]eneral power, whatever be its form, if it preserves itself, must swallow up the state powers." Another delegate proposed doing away with the States altogether. *Id.* at 148-49. Madison, on the other hand, believed States' rights should be preserved as carefully as trial by jury. *Id.* at 280.

61. Proposed by the Committee of Detail whose members were delegates Rutledge, Randolph, Gorham, Ellsworth and Wilson. *Id.* at 585.

> studiously endeavored to provide for its self-defense. Shall we leave the States alone unprovided with the means for this purpose . . . ?[62]

Many of the State ratifying conventions voiced great opposition to the Constitution because of the failure to provide protection for State sovereignty. This opposition culminated in the tenth amendment,[63] embodying the check on Congress which many of the State ratifying conventions felt was essential.

B. State Ratifying Conventions

The Constitution ran into formidable opposition in the State ratifying conventions. The Federalists, proponents of a strong national government, vigorously asserted that the tenth amendment would be merely redundant. They argued that the Constitution, without the tenth amendment, would still reserve to the States all powers not yielded to the national government.[64] The State conventions were not persuaded by the Federalist logic. Patrick Henry, a leader of the Antifederalist opposition, insisted America would follow the path of European nations — an ever-increasing flow of power to the central government — unless the national government was limited by explicit substantive checks on the exercise of its power over subordinate units of government. He stated:

> I repeat, that all nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily unseparable from the delegated powers . . . . If you intend to reserve your inalienable rights, you must have the most express stipulation; where if implication be allowed, you are ousted of those rights . . . . It was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of the United States. But there is no such thing here. You,

---

62. *Id.* at 130.

63. "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." U.S. CONST., amend. X.

64. *E.g.*, delegate James Wilson, a leading Federalist and later a Supreme Court Justice during the Marshall era, argued that since Congress was not given the power to regulate the press, no amendment guaranteeing freedom of the press was necessary. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 529 (1971).

> therefore, by natural and unavoidable implication, give up your rights to the federal government.[65]

The Antifederalists carried the day, and the Constitution was not ratified until there were assurances that the first Congress would adopt a Bill of Rights. No less than eight states suggested amendments which, in one form or another,[66] would have expressly reserved to the States all powers not specifically granted Congress by the Constitution. A safeguard protecting the States' sovereignty was believed to be an essential ingredient for the continued viability of the grand new scheme of government. These suggestions culminated in the eventual adoption of the tenth amendment,[67] which was proposed by more States ratifying conventions than any of the other fundamental liberties contained within the Bill of Rights.[68]

C. Judicial Construction of the Tenth Amendment

The Supreme Court's treatment of the tenth amendment has varied depending on the composition of the Court. The Court has, for the most part, been sensitive to the sovereign rights of the States and has given full force and effect to the tenth amendment. During periods of national crisis, however, the Court has favored a strong national government by emphasizing the commerce clause. These shifts by the Court can be separated into three distinct periods which coincide with periods of national strife when a strong national government was perceived as essential for the preservation of the Union.

The initial departure from the clear meaning of the tenth amendment occurred during the tenure of Chief Justice John Marshall, at a time when the fledgling federal government needed strong support to ensure its survival. In *McCulloch v. Maryland*[69]

---

65. *Id.* at 797-98.

66. The New York, Massachusetts, Virginia, New Hampshire and South Carolina Conventions all voted recommendatory amendments. The minority block of the Pennsylvania Convention proposed amendments. The Maryland Convention appointed a committee to draft suggested amendments. North Carolina voted not to ratify the Constitution until it was amended. A conditional list of amendments was proposed to aid this effort. It was not until the First Congress adopted the Bill of Rights that North Carolina ratified the Constitution. *See id.* at 983.

67. *Id.*

68. *Id.*

69. 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, Chief Justice Marshall held: "[T]he government of the United States, then, though limited in its powers is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'" *Id.* at 406.

and *Gibbons v. Ogden*,[70] the Court established the overriding authority of the national government by holding that the commerce clause gave Congress plenary power to regulate commerce between the States irrespective of any apparent limitation in the tenth amendment.

A new era began upon the death of Chief Justice Marshall, during which time the Court expressly recognized the tenth amendment as limiting the power of Congress. During this period, which lasted approximately one hundred years, the Court restored the intended vitality of the tenth amendment[71] by holding that the powers reserved to the States comprise a substantive limitation on otherwise constitutional acts of Congress.[72] Thus, a national income tax, otherwise constitutional, could not be levied upon the salaries of State officials. Since this power was not expressly granted to Congress, it was reserved to the States by the tenth amendment. In *Collector v. Day*,[73] the Court stated:

> The general government, and the states, although both exist within the same territorial limits, are separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as

---

70. 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Chief Justice went even further in stating the federal government's powers: "[T]his power (to regulate commerce) like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than prescribed in the Constitution." *Id.* at 9.

71. The first indication was the 1837 decision of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), in which the Court, relying on the tenth amendment, stated:

> We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States . . . . That all those powers which related to merely municipal legislation, or what may, perhaps, properly be called *internal police*, are not thus surrendered or restrained; and that, consequently in relation to these, the authority of a state is complete, unqualified and exclusive.

Id. at 139.

72. *See* U.S. v. Dewitt, 76 U.S. (9 Wall.) 41 (1869); Texas v. White, 74 U.S. (7 Wall.) 700 (1868); Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860); Scott v. Sanford, 60 U.S. (19 How.) 393 (1853); The License Cases, 46 U.S. (5 How.) 504 (1847).

73. 78 U.S. (11 Wall.) 113 (1870).

> independent of the general government as that government within its sphere is independent of the states.[74]

The Court in *Hammer v. Dagenhart*[75] and subsequent cases[76] perceived the tenth amendment as shielding the States from an erosion of their sovereign powers by the federal government. Congress, during this period, was limited to exercising its commerce clause powers to regulate conduct exclusively within the private sector.

The Great Depression again caused a general sentiment favoring a strong central government. Critical economic conditions demanded immediate and far-reaching action on an unprecedented scale. The Supreme Court initially resisted the rush to create an omnipotent federal government. However, President Roosevelt's threats of court-packing and appointments to the Court ensured that the national government would assume more authority. The Court enlarged Congress' power when it decided in *United States v. California*[77] that a state-owned railroad was subject to the Federal Safety Appliance Act. California argued that it could not constitutionally be subject to the provisions of the Act since it, in its sovereign capacity, was engaged in discharging a public function.[78] However, in the words of Chief Justice Stone, "[T]here is no . . . 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."[79]

The Court, between 1937 and 1941, broadened the scope of the commerce clause by emasculating the tenth amendment.[80] *Darby*, in overruling *Hammer v. Dagenhart*, relegated the tenth amendment to a "mere truism."[81] *Darby* reached its apex in *Maryland v. Wirtz*,[82] where the Court stated it "will not carve upon the commerce power

---

74. *Id.* at 124.

75. 247 U.S. 251 (1911).

76. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (excise tax on the sale of coal produced by non-members of a coal code established by federal regulation); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (commerce power not sufficient to regulate poultry); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (excise taxes on profits of factories employing child labor).

77. 297 U.S. 175 (1935).

78. *Id.* at 183.

79. *Id.* at 185.

80. United States v. Darby, 312 U.S. 100 (1941); Helvering v. Davis, 301 U.S. 619 (1937); Stewart Machine Company v. Davis, 301 U.S. 548 (1937); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

81. 312 U.S. 100, 116-17 (1941).

82. 392 U.S. 183 (1968).

to protect enterprises indistinguishable in their effect on commerce from private business, simply because those enterprises happen to be run by the states."[83]

However, the pendulum began its swing back toward a recognition of State sovereignty in the mid-1970's with the Court's decision in *Fry v. United States*.[84] In upholding the constitutionality of the Economic Stabilization Act as applied to State and local governments, the Court recognized the continuing vitality of the tenth amendment.

> While the Tenth Amendment has been characterized as a 'truism' stating merely that 'all is retained which is not surrendered.' *United States v. Darby*, . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system . . . .[85]

The language in *Fry* foreshadowed the Court's decision a year later in *National League of Cities v. Usery*.[86]

IV. MAY CONGRESS CONSTITUTIONALLY IMPOSE ON THE STATE AN ACT REGULATING STATE AND MUNICIPAL EMPLOYEE RELATIONS?

There were two proposals before the Ninety-fifth Congress for the federal government to regulate state and municipal employees. One would simply delete the exemption status of state and local governments under the National Labor Relations Act. States and municipalities would then be regulated by the National Labor Relations Board. The other proposal would create a separate Public Employee Relations Board to regulate only states and their political subdivisions. The former proposal is based entirely on Congress' commerce power. The latter proposal is based on both the commerce power and Congress' power under the fourteenth amendment. In addition, one Congressman has suggested that Congress utilize its spending power to force the states to adopt the federal legislation. Application of these proposals under any of the suggested federal powers indicates serious interference with the concepts of federalism embodied in the Constitution and recently enunciated in *National League of Cities*.

---

83. *Id.* at 198-99.
84. 421 U.S. 542 (1975).
85. *Id.* at 547 n.7.
86. 426 U.S. 833 (1976).

A. The Commerce Power as a Basis for Congressional Enactment of an Act Regulating State and Municipal Employee Relations

The commerce power is most often suggested as a basis for federal regulation of state and municipal employees. Arguing that current state regulation leads to strikes and other forms of strife and unrest, it is suggested that the result is an obstruction of the flow of commerce.[87] This analysis, as applied to the private sector, succeeded in sustaining enactment of the National Labor Relations Act.[88] However, the additional factor of state sovereignty presents problems not passed upon by the courts forty years ago. Serious interference with the States' ability to provide essential governmental services for their citizens is violative of the federalism embodied in *National League of Cities.*

An essential element of State sovereignty is the authority to make those fundamental employment decisions upon which the States' systems of performance must rest.[89] As the National League of Cities so aptly stated in its brief:

> In our Nation, Governments are bundles of law powers. Governments act only through their employees. One of their most vital internal and intimate governmental functions is, therefore, the terms and conditions of employment that they prescribe for their employees. 'No more vital internal function of government exists for States and cities than control of their employees and the budget items relating to said employees.'[90]

If Congress were allowed to withdraw from the States the exclusive authority to make fundamental employment decisions, there would be little left of the States' "separate and independent existence."[91] Illustrative of the extent to which the proponents of this legislation want the federal government to usurp the States' power to establish its employees' terms and conditions of employment is Section 13 of the proposed National Public Employee Relations Act:

> This act shall supersede all previous statutes concerning this subject matter and shall preempt all contrary local ordinances, Executive orders, legislation, rules, or regula-

87. H.R. 1987, National Public Employee Relations Act, § 1.

88. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

89. National League of Cities v. Usery, 426 U.S. 833, 851 (1976).

90. Brief of Appellant at 56, National League of Cities v. Usery, 426 U.S. 833 (1976).

91. National League of Cities v. Usery, 426 U.S. 833, 851 (1976).

tions adopted by any State or any of its political subdivisions or agents such as a personnel board or civil service commission.[92]

The provisions of the proposed legislation which require recognition of an exclusive employee representative, classification of employees, and collective bargaining would substantially impair the States' unilateral authority to make fundamental employment decisions. The requirement that a State recognize an exclusive employee representative cedes to a third party the right to participate in the process by which the State will structure integral operations and deliver traditional governmental services.[93] Congress may not exercise its commerce clause power so as to limit the States' prerogative to determine how it will administer its integral functions.[94] Congress similarly may not, under the guise of a public employee bargaining law, grant to a third party rights beyond congressional exercise.[95]

Application of the NLRA to state and municipal employees could require governments to bargain collectively with employee representatives concerning wages, hours and conditions of employment.[96] The duty to bargain has required employers to consult with the employee representatives prior to reducing an employee work force.[97] Application of this requirement to the public sector would require legislatures to halt the legislative process to consult with a bargaining representative prior to altering or restructuring delivery

92. H.R. 1987, introduced by Rep. Roybal Jan. 17, 1977, at 33.

93. The ceding of essential legislative decisions to outside parties would violate the delegation doctrine. Legislatures are not permitted to be divested of legislative decisions. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); United States v. Shreveport Grain & Elev. Co., 287 U.S. 77, 85 (1932). Although the federal courts have been reluctant to apply the delegation doctrine in recent years, the doctrine is viable in the state courts. Indeed, recent cases have utilized the delegation doctrine to invalidate transfer of legislative power concerning state and municipal employees to arbitration panels. School Board of City of Richmond v. Parkam, 1977-78 CCH PBC ¶ 36,269 (Va. S. Ct. 1978); Maryland Classified Employees Ass'n., Inc. v. Anderson, 1977-78 CCH PBC ¶ 36,115 (1977); *cf.* Transit Union, Div. 540 v. Mercer Cty. Improvement Authority, 1977-78 CCH PBC ¶ 36,270 (1978).

94. National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

95. *Id.*

96. 29 U.S.C. § 158(a)(5) (1976).

97. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964). In *Fibreboard*, the Surpeme Court held that an employer could not subcontract out work without first bargaining in good faith with the bargaining representative concerning the proposal. The employer must enable the bargaining unit an opportunity to lower its costs or offer its services in such a manner so as to meet the needs of the employer. *See also* Civil Service Ass'n., Local 400, SEIU, AFL-CIO v. City and County of San Francisco, 1977-78 CCH PBC ¶ 36,084 (1977).

of essential governmental services.[98] If a proposal were before the legislature to eliminate a state agency and contract out the work or give it to another agency, the legislature would be forced to halt hearings on the bill and consult with the employee representative to insure that no violations of the duty to bargain in good faith occurred.[99]

The NLRA's duty to bargain in good faith could deny elected officials the right to engage in public debate concerning their positions on public employee salaries, manpower and other terms and conditions of employment. Governors and mayors frequently have decisive roles in bargaining with State and local employee unions. A mayor who campaigns on a platform proposing limits on public employee benefits faces a serious dilemma. For the mayor to bargain on a union proposal exceeding that benefit level would be political suicide. On the other hand, his refusal to bargain on the proposal would amount to an unfair labor practice as a refusal to bargain.[100] The people could thereby be denied critical information necessary to make an informed choice at the polls. Yet, there can be little doubt that the recent financial difficulties of many of our States and cities have made salaries and manpower utilization issues of genuine concern to taxpayers.[101]

The proposed legislation also provides for continuing federal supervision of the State's management of personnel who perform in-

98. Current state statutes governing public employees provide that employers shall meet and confer with the exclusive bargaining representatives, but this duty has not generally been extended to require consultations mandated by the *Fibreboard* decision, *supra* at note 97. *See* V.A.M.S. § 105.520 (Supp. 1977); Kan. Stat. Ann. § 75-4327 (1977); *cf.* Los Angeles City Civil Service Comm. v. Superior Court of Los Angeles Cty., 1977-78 CCH PBC ¶ 36,058 (1977) (Duty to meet and confer requires more than opportunity to present views at public meeting concerning proposed rules dealing with layoffs of public employees). While the possibility exists the N.L.R.B. might not require such extensive bargaining, there are no assurances that such an onerous duty would not be placed on the public employer.

99. The National Public Employee Relations Act also has the requirement of good faith in bargaining with the employees' exclusive representative. H.R. 1987 § 5(5).

100. Lieberman, *Neglected Issues in Public Employee Collective Bargaining Legislation*, Education Resource Information Center: E.D. 105, 615, p. 4 (1975).

101. George Gallup reports politicians can win votes by attacking public employee unions. *See Public Employee Unions Push to Catch Up*, BUSINESS WEEK, p. 49, col. 3 (Aug. 1, 1977). This prediction has proven accurate with the recent New York City mayoral contest where U.S. Rep. Ed Koch was successful in his quest for election by attacking municipal unions, their high salaries and pension. *See* Hertzberg, *Even the Democrats Sound Conservative in Mayoral Campaign*, WALL ST. J., Nov. 1, 1977 at 1, col. 1.

tegral government functions by the NLRB or the Public Employee Relations Boards. These Boards would have power to adjudicate and remedy alleged unfair labor practices. Thus, the proposed legislation interferes with the right of the State to manage and control its employees by substituting the judgment of a federal bureaucracy for the wisdom of the sovereign State. The federal government would, if these proposals are enacted, be charged with determining whether or not a State employee has been disciplined or discharged for cause. The federal bureaucracy could, in the event it finds there was no cause for the dismissal, order reinstatement with full back pay to an unsatisfactory employee. If the United States Civil Service Commission is an example of the efficacy of federal regulation of the employment relationship, there is ample reason to fear a substantial impairment of the States' ability to deliver traditional governmental services.[102]

Several other interferences with the States' ability to deliver essential services are seen in the proposed National Public Employee Relations Act. Section 10 provides for mediation and fact finding. The Federal Mediation and Conciliation Service would have power under the Act to assign a mediator upon request of *either party* or upon *its own motion.* The mediator would have the power to establish dates and places of hearings, issue subpoenas, administer oaths and provide for full trial-type hearings upon the issues in dispute. During the mediation process, there could be no unilateral change in terms or conditions of employment for a period of 60 days in order to "permit the successful resolution of the dispute." The mediation process would, therefore, cede to the federal government broad powers over the State's bargaining procedure with its employees. If a State's desire to restructure its essential governmental services caused a dispute between the State and its employees, the mediation service could stay the State's ability to ration its services by using the 60 day status quo period. This mediation procedure could, therefore, intrude deeply into the State's ability to render to its citizens the essential governmental services required.

Proponents of a national act to regulate public employees argue that it would not impinge upon the separate and independent existence of the States, but would merely set forth procedures by which the State could voluntarily bargain with its employees regard-

102. House, *Civil Service Rule Book May Bury Carter's Bid to Achieve Efficiency*, WALL. ST. J., Sept. 26, 1977, at 1, col. 1.

ing their terms and conditions of employment.[103] This argument indicates ignorance of the bargaining process. Even the N.E.A., a leading proponent of the proposed legislation, admits:

> [P]rocedure often is the gateway to substance, and there are . . . aspects of the N.E.A. proposal which would intrude deeply into the authority of the states to determine the substantive terms and conditions of employment of the persons who work for them.[104]

Eighty to eighty-five percent of a State's budget is consumed by salaries.[105] If the federal government can require a State to collectively bargain with its employees, the cost of providing basic governmental services would rise dramatically, for a natural result of the bargaining process is higher wages. Higher wages could result in the need to reduce personnel with a consequent reduction in services. New York City's current fiscal dilemma illustrates the fact that requiring a public employer to collectively bargain with its employees will adversely affect the State's ability to render essential governmental services.

Accordingly, enactment of legislation governing state and municipal employees would present serious intrusions upon state sovereignty. These instrusions could seriously impair the States' ability to offer and structure essential services required by their citizens. Therefore, Congress would not have authority under the commerce power as both proposals would impermissibly interfere with the separate and independent existence of the states and violate standards promulgated by *National League of Cities.*

B. The Congressional Spending Power as a Basis for Constitutionally Enacting a Public Employee Relations Act Which is Otherwise Prohibited Under the Commerce Clause

The Court, in *National League of Cities,* declined to express its view as to "whether different results might be obtained if Congress seeks to affect integral operations of state government by exercis-

---

103. Fox, *Federal Public Sector Labor Relations Legislation: The Aftermath of National League of Cities v. Usery,* 26 KAN. L. REV. 105, 117 (1977). Fox believes the proposed federal legislation would not in and of itself cause additional fiscal burdens. Rather, any cost increases would be a result of a voluntary agreement between the governing body and the public employee organization. However, this view ignores the realities of the increased bargaining power afforded employee organizations which would result from the proposed legislation's passage.

104. *N.E.A. Proposal, supra,* note 12 at 16.

105. *See* Appellant National League of Cities Jurisdictional Statement, p. 10.

ing authority granted it under" the spending power.[106] Thus, the Court left open the possibility that Congress might have properly enacted the 1974 amendments to the FLSA had it acted pursuant to its spending power. One Congressman has suggested Congress should circumvent the *National League of Cities* decision by conditioning the disbursement of revenue sharing monies on acceptance of a Public Employee Relations Act.[107]

Typically, the spending power is exercised to provide money for the States to implement programs in accordance with federal guidelines, or to require State compliance with federal standards by threatening the loss of existing funding.[108] Cities and States which rely on revenue sharing to fund their budgets can thereby be coerced into complying with the dictates of the federal government. Congress could theoretically, under its spending power, enact legislation otherwise constitutionally impermissible.

Congress may not however, by the exercise of its spending power, erode the functions essential to the States' separate and independent existence. The Supreme Court in *United States v. Butler*[109] held that Congress cannot impose through economic coercion legislation which is otherwise unconstitutional. The Court in *Butler* struck down the Agricultural Adjustment Act which required farmers to curtail production as a condition to receiving financial grants. The Administration argued that the farmer's election to curtail production in order to receive the benefits of the Act was voluntary and not the result of coercion. The Court, in rejecting this contention, stated:

---

106. 426 U.S. 833, 852 n.17 (1976).

107. Rep. Erlenborn in remarks before the Federal Relations Network of the National School Board Ass'n., Feb. 8, 1977. *Court Decisions in the Public Sector*, MIDWEST MONITOR 8 (May/June 1977). On December 17, 1977 the A.F.L.-C.I.O. came out in support of amending the N.L.R.A. to include state and local government workers through Congress' spending power if the commerce clause would not constitutionally support such an enactment. Public Employee Bargaining (CCH) No. 3, Jan. 3, 1978, p. 6.

108. A recent example of both approaches is the Emergency Energy Conservation Act, Pub. L. 93-239, 87 Stat. 1046 (1974). Section 2 of the Act conditions receipt of federal highway aid funds on each State establishing a 55 mile per hour speed limit upon all public highways within its jurisdiction. Section 3 makes available to the States 90 percent of the cost of approved projects to encourage car pools in urban areas.

109. 297 U.S. 1 (1936). The Argicultural Adjustment Act required farmers to agree to curtail production as a condition to receipt of federal grants. The Court held this was coercion and additionally that agricultural production was a matter for the States to regulate via the tenth amendment.

> The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. . . . This is coercion by economic pressure. The asserted power of choice is illusory.[110]

While *Butler* involved an individual as opposed to a State, the tenth amendment was viewed as a substantive check on the spending power. The Court, in construing the Social Security Act subsequent to *Butler*, extended to the States the principle that Congress may not by economic coercion constitutionally enact legislation otherwise unconstitutional,[111] even though the Court did not declare the Social Security Act unconstitutional.[112] The Supreme Court has never reversed its decision in *Butler*. Although authority exists suggesting *Butler* is of limited persuasiveness,[113] these objections to *Butler's* viability are laid to rest by *National League of Cities*.

The tenth amendment, as a result of *National League of Cities*, has again been recognized as a shield protecting the States from federal interference with their exercise of traditional sovereign

---

110. *Id.* at 70-71.

111. Stewart Machine v. Davis, 301 U.S. 548 (1937); Carmichael v. Southern Coal and Coke Co., 301 U.S. 495 (1937).

112. In *Carmichael*, Chief Justice Stone wrote:

> Even though it be assumed that the exercise of a sovereign power by a state, in other respects valid, may be rendered invalid because of the coercive effect of a federal statute enacted in the exercise of a power granted to the national government such coercion is lacking here. It is unnecessary to repeat now these considerations which have led us to our decision in the Chas. C. Steward Machine Co. case, that the Social Security Act has no coercive effect. As the Social Security Act is not coercive in its operation, the Unemployment Compensation Act [the challenged state enactment brought about as a result of the Social Security Act] cannot be set aside as an unconstitutional product of coercion.

301 U.S. at 525-26.

113. *See* Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947). The State of Oklahoma objected to Hatch Act provisions stipulating receipt of federal highway funds was contingent on State Highway Commission employees not participating in party politics. When presented with the tenth amendment argument, the Court, relying on *Darby*, stated:

> The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case . . . . We do not see any violation of the state's sovereignty in the hearing or order. Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion.

Id. at 143-44.

powers. Although the Court in *National League of Cities* limited its decision to the commerce clause, many of the cases the Court utilized in developing its concept of federalism were not commerce clause cases.[114] The concept of federalism specifically enunciated in the tenth amendment runs throughout the Constitution and operates as a restraint on all the constitutional powers of the federal government to prevent a usurpation of the States' sovereign powers. Accordingly, any Public Employee Relations Act Congress would enact pursuant to its spending power should be constitutionally prohibited.

The coercive effect of preconditioning the granting of funds to cities and States upon an adoption of a federal Public Employee Relations Act would materially aid the centralization of government and the demise of State sovereignty. As the Court pointed out in *United States v. Butler*, "the power to confer or withhold unlimited benefits is the power to coerce or destroy."[115]

The truth of this statement is painfully evident forty years later. Federal funding of projects at the State and local levels has made a quantum leap.[116] States and municipal budgets rely on federal funds for over twenty percent of their income.[117] Given a federal tax bite which claims forty-eight percent of taxable corporate income and up to seventy percent of individual earnings, there is no real hope for a substantial increase in municipal and State tax revenues. Additionally, the urban flight of the upper and middle classes to suburbia has left many cities with declining property values from which to tax.[118]

---

114. New York v. United States, 326 U.S. 572 (1946) (inter-governmental tax immunity); Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) (taxing power limited by State sovereignty); Coyle v. Oklahoma, 221 U.S. 559 (1911) (federal government may not impose requirements for admission to the Union which impairs the State's sovereignty); Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868) (state may refuse to accept United States legal tender as payment of taxes); Texas v. White, 74 U.S. (7 Wall.) 700 (1868) (contracts entered into by a state while controlled by a government hostile to the United States were void).

115. 297 U.S. 1, 71 (1936).

116. For example, in 1959, the City of Kansas City, Missouri, received one hundreth of one percent of its budget from federal funds. By 1976 federal assistance had grown to nearly twenty-three percent of the total municipal expenditures. *See* Serviss, *Too Many Strings Attached—Federal Dollars and Local Government*, OUTLOOK, August-September, 1977, at 28.

117. Case & Rogers, *Financing State and Local Governments: Crisis of the 1970's*, CURRENT HISTORY Nov. 1975 at 183, 186.

118. *Id.* at 185. The authors suggest the difference between city and suburban property tax bases is marked with an increasing gap. The problem is particularly acute because city expenditures rise more rapidly than those of suburbs.

The remaining poor and aged residents place great demands upon the cities for services.[119] Continued high rates of unemployment have caused dramatic increases in the cost of social programs.[120] The increased reliance upon the public sector, coupled with its limited financial resources, forced the cities into the dilemma of either cutting back services, thereby hastening urban decline, or seeking federal funding.

The infusion of revenue sharing and other federal aid to States and municipalities has permitted maintenance of essential services. A cut-off of these funds would cause "severe . . . disruption in State and local governments."[121] Yet, former U.S. Attorney General Ramsey Clark once asserted that the decision by State and local governments to receive federal funds with compliance standards is essentially "voluntary."[122] This statement overlooks the necessary reliance by States and municipalities on federal funds and the onerous consequences of any cut-off.

The Court in *National League of Cities* found that federally authorized "pressures upon state budgets" posed unacceptably high risks that adequate services would not be provided.[123] The pressure imposed by the 1974 FLSA amendments would in fact be less than a cut-off of federal funds to States and cities whose constituents have relied upon these funds to maintain essential services. The displacement of "required" governmental services, resulting from severance of revenue sharing, is precisely the evil sought to be eradicated by *National League of Cities*.

To permit unrestricted exercise of the spending power would "effectively eviscerate a State's government and leave it an empty vessel."[124] The conditions accompanying federal grants to the States and cities should be reasonably related to the burdens imposed.[125] If

---

119. *Id.* at 185.

120. *Id.* at 184.

121. Report issued by New Orleans Mayor Moon Landrieu and St. Louis Mayor John Poelker, as co-chairman of Revenue Sharing Task Force of the National League of Cities. *The American City* (Aug. 1975) p. 74. These sentiments were more recently affirmed by Ralph Schlosstein, a Treasury Department official who told a National League of Cities convention that elimination of the fourteen billion dollars in federal aid to cities could result in layoffs, cuts in key services and tax boosts in many cities. THE WALL ST. J., Dec. 5, 1977, p. 1, col. 3.

122. 42 OP. ATTY. GEN. 331 at 336 (1966), citing Massachusetts v. Mellon, 262 U.S. 447 (1923).

123. 426 U.S. 833, 847, 853 (1976).

124. *Unraveling National League of Cities, supra*, note 1.

125. An example of non-coercive exercise of Congress' spending power is the

Congress desires to impose the NLRA on the States, let it also provide the funds necessary to meet the corresponding increase in their salary budgets resulting from greater employee bargaining power. The current proposal is, however, to link revenue sharing, upon which the States rely, with election to enact a state labor relations law covering public sector employees. The situation is analogous to the local junkie mainlining the neighborhood children at no cost, only to up the ante later.

The great reliance by States and cities on federal funding guarantees that any preconditions attached to revenue sharing will be met. A Public Employee Relations Act, enacted as a precondition to such funds, would amount to federal interference with an essential element of state sovereignty, the power to determine wages and hours of employees.[126] The result is no less pernicious because it was passed by the States via federal coercion. Revitalizing *United States v. Butler* would prohibit coercive exercise of the spending power to accomplish ends otherwise unconstitutional (e.g., a National Public Employee Relations Act). With the application of *Butler*, the Court can continue to "arrest the downgrading of States to a role comparable to the departments of France, governed entirely out of a national capitol."[127]

C. *Congressional Power to Enforce the Guarantees of the Fourteenth Amendment as a Basis for an Act Governing Public Employee Labor Relations*

The majority in *National League of Cities* also declined to rule whether Congress could, by exercising its authority under section five of the fourteenth amendment, impair integral operations of State and municipal governments.[128] Congress is empowered by virtue of section five to enact any legislation necessary to enforce the fourteenth amendment's guarantees[129] (i.e., equal protection and due process). Proponents of a National Public Employee Relations Act assert that Congress' power under section five will support the enactment of this legislation. These proponents assert the Act would

---

proposal to provide federal subsidies to States who elect to enact election-day voter registration. The subsidies would be sufficient to defray all costs incurred; the States not electing would not be cut off from any other funds. WALL ST. J., July 18, 1977, p. 1, col. 3.

126. 426 U.S. 833, 852 (1976).

127. Elrod v. Burns, 427 U.S. 347, 375 (1976) (Burger, C.J., dissenting).

128. 426 U.S. 833, 853 n.17.

129. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST., amend. XIV, § 5.

be "appropriate legislation" to enforce the guarantees of equal protection and freedom of association.[130] They claim that public and private sector employees are similarly situated,[131] and the disparity in their collective bargaining rights is therefore a denial of equal protection.

Recent Supreme Court decisions indicate that this view is erroneous. Though Congress' power under section five of the fourteenth amendment will overcome the tenth amendment's protection of the States,[132] the power granted Congress under the amendment is not sufficiently broad to permit Congress to enact a public employee relations act.

Congress' power under the fourteenth amendment has undergone substantial revision in recent years. While the 1966 Supreme Court decision in *Katzenbach v. Morgan*[133] granted Congress the power to interpret what is "appropriate legislation" to enforce the guarantees of the fourteenth amendment,[134] its broad language was overruled four years later in *Oregon v. Mitchell*.[135]

---

130. *N.E.A. Proposal, supra*, note 11 at 33.

131. *See* Fox, *Federal Public Sector Labor Relations Legislation: The Aftermath of National League of Cities v. Usery*, 26 KAN. L. REV. 105 (1977). Fox suggests that private and public employees are similarly situated but that public employers, as public agencies, do not control their own funding. *Id.* at n.6.

132. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court unanimously held that a Title VII damage suit for back pay and attorneys' fees was not barred by the eleventh amendment. While not directly involving the tenth amendment, the Court discussed congressional power over the States under section five of the fourteenth amendment. The Court stated the fourteenth amendment was intended to be a limit on the power of the States and an enlargement of congressional power. *Id.* at 454-56. Therefore, any *valid* exercise of congressional power under section five may override the protection afforded the States by the tenth amendment. More recently, the Supreme Court held that state and local governments were not immune from monetary, declaratory and injunctive relief under § 1983 of the Civil Rights Act of 1871. Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). The decision, however, was based upon a reinterpretation of legislative intent and did not discuss the tenth amendment implications.

133. 384 U.S. 641 (1966). *Cf.* Civil Rights Cases, 109 U.S. 3 (1883), where the Court stated: "[section five] does not invest Congress with power to legislate upon subjects which are within the domain of state legislatures . . . . [It] does authorize Congress to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment." *Id.* at 11.

134. Katzenbach v. Morgan, 384 U.S. 641, 659, 665-66 (1966) (Harlan, J., dissenting). This broad reading of section five was heralded as the most significant expansion of congressional power since the depression Court broadened the scope of the commerce power. *See* Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 102-05 (1966).

135. 400 U.S. 112 (1970).

Morgan upheld the suspension of literacy tests for voters with sixth grade educations in Puerto Rican schools. One of the grounds offered by the majority for sustaining the enactment was that Congress might have believed the tests were being used to discriminate against Puerto Ricans.[136] This broad reading of section five was heralded as the most significant expansion of congressional power since *N.L.R.B. v. Jones & Laughlin Steel Corp.*[137] The dissent[138] and commentators[139] viewed the majority opinion as standing *"Marbury v. Madison* on its head by judicial deference to congressional interpretation of the Constitution."[140] If *Morgan* were still the law, Congress could theoretically determine that the disparate treatment of public and private sector employment violates fourteenth amendment guarantees and could, pursuant to its section five powers, enact the proposed legislation.

The *Morgan* case was interpreted to empower Congress to lower the voting age to eighteen in local, State and national elections under section five's grant to Congress to enforce equal protection.[141] Based in part on this interpretation, Congress lowered the voting age in State, local and national elections in the Voting Rights Act Amendment of 1970 pursuant to its section five powers.[142] The Supreme Court, in *Oregon v. Mitchell*, struck down these amendments as applied to State and local elections.[143] In limiting congressional power under section five, Justice Black stated:

> It cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Fourteenth Amendment intended to prohibit every discrimination between groups of people.[144]

---

136. 384 U.S. 641, 654-55 (1966).

137. 301 U.S. 1 (1937). In *Jones & Laughlin*, the Supreme Court broadened the commerce power to include anything which "affected" interstate commerce.

138. 384 U.S. 641, 659, 665-66 (1966) (Harlan, J., dissenting (joined by Stewart, J.)).

139. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (hereinafter referred to as *Cohen*).

140. *Id.* at 606.

141. 116 Cong. Rec. 6934-36 (1970).

142. Pub. L. 91-285, 84 Stat. 314 (1970).

143. 400 U.S. 112 (1970).

144. *Id.* at 127.

Justice Black noted Congress made no legislative finding that the twenty-one year old vote was used by the States to disenfranchise voters on account of race.[145]

Justice Black would limit Congress' fourteenth amendment powers to eradicating race discrimination.[146] While this was the apparent intention of the drafters,[147] his view is not shared by the current Court.[148] An analysis of the decisions interpreting section five indicates that Congress can legislate and enforce clear constitutional guarantees and remedy conditions which Congress specifically finds lead to violations of the amendments.[149] But Congress cannot declare State laws invalid as a denial of equal protection or the freedom of association when in fact they do not violate these guarantees.[150]

The absence of a National Public Employee Relations Act does not amount to a constitutional violation of an individual's positive rights of association, free speech, petition, equal protection, or due process.[151] While there is little doubt that public employees may belong to labor oganizations,[152] the courts have almost unanimously

---

145. *Id.* at 130.

146. *Id.* at 126-127.

147. In *Ex parte Virginia*, the Court stated:

> One great purpose of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the States . . . . They were intended to be, what they really are, limitations of the power of the States and enlargments of the power of Congress. 100 U.S. 339, 344-45 (1880).

A recent exhaustive historical analysis of the guarantees intended by the fourteenth amendment framers indicates they merely sought to constitutionalize a few "fundamental" rights such as the freedom to contract and own property. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Harvard Press, 1977). The Court has never been restrained by this intent. Rather, it has engaged in selectively incorporating most of the Bill of Rights into the fourteenth amendment as well as certain penumbral rights such as the "right to privacy". *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

148. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). There was no dispute that in enacting the 1972 amendment to Title VII, Congress exercised its power under section five of the fourteenth amendment.

149. *Cohen, supra*, note 139 at 618-19.

150. *Id.*

151. Beauboeuf v. Delgado College, 428 F.2d 470, 471 (5th Cir. 1970); Indianapolis Education Association v. Lewallen, 72 L.R.R.M. 2071 (7th Cir. 1969); United Steelworkers v. University of Alabama, 430 F. Supp. 996, 1001 (N.D. Ala. 1977).

152. Lontain v. Vandeave, 483 F.2d 966 (10th Cir. 1973); Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970); A.F.S.C.M.E. v. Woodward, 406 F.2d 137 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo. 1976) (striking provisions of a state public sector bargaining law which prohibited police from belonging to labor organizations).

rejected the expansion of associational rights beyond the right to join such organizations.[153]

The right to associate with those of one's own choosing does not require recognition of a public employee labor organization and public employees may not insist upon collective bargaining with their public employer, for as the Seventh Circuit Court of Appeals observed in *Indianapolis Education Association v. Lewallen*:[154]

> The gravamen of the compliant goes to the failure on the part of the [school board] to bargain collectively in good faith. But there is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of the [board] to bargain in good faith does not equal a constitutional violation of the [union's] positive rights of association, free speech, petition, equal protection, or due process. Nor does the fact that the agreement to collectively bargain may be enforceable against a state elevate a contractual right to a constitutional right.[155]

The rule enunciated in *Lewallen* has been extended to deny public employee unions the right to particular grievance procedures[156] and the right to the use of the public employer's facilities.[157]

Similarly, the refusal of a State to accord its employees the same bargaining rights enjoyed by employees in private industry presents no violation of either the due process or equal protection clause of the fourteenth amendment.[158] This does not mean they have fewer rights and privileges than other citizens of the United States, for they enjoy all the rights and privileges afforded by the Constitution. Rather, it is a recognition that while public employees may associate and advocate unionism, they may not, in the absence

153. *See* Annot., 40 A.L.R.3d 728, 734-38 (1971).

154. 72 L.R.R.M. 2071 (7th Cir. 1969).

155. *Id.* at 2072.

156. Teachers Local 1954 v. Hanover Community School Corp. 457 F.2d 456 (7th Cir. 1972); Beauboeuf v. Delgado College, 428 F.2d 470 (5th Cir. 1970); Confederation of Police v. Chicago, 382 F. Supp. 624 (N.D. Ill. 1974); Winston-Salem/Forsyth County Unit, N.C. Ass'n. of Educ. v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

157. Teachers Local 858 v. School Dist. No. 1, 314 F. Supp. 1069 (D. Colo. 1970) (the grant of school facilities only to the union selected by the teachers in a representation election did not impair the losing union's rights to organize).

158. Beauboeuf v. Delgado College, 428 F.2d 470, 471 (5th Cir. 1970); United Steelworkers v. University of Alabama, 430 F. Supp. 996, 1001 (N.D. Ala. 1977).

of a State statute so requiring, compel their public employer to recognize and bargain with a union.[159] As one decision has stated: "When they . . . seek to force their public employer to recognize or bargain with a union they have gone beyond the outer limits of their constitutional protections of free expression and association . . . ."[160] Public employees have no right guaranteed by the equal protection clause of the fourteenth amendment to the benefits afforded employees of private industry.[161]

Disparate treatment afforded employees in the private and public sectors is rationally based. Public employees have rights not afforded their private sector counterparts which are granted under statutes, civil services rules and regulations, and the procedural guarantees of due process upon termination of employment.[162] Moreover, many of the public services performed by the cities and States are unique, having no counterpart in the private sector. There exists no competitor to provide necessary services during periods of labor strife. Government may not operate with a "public be damned" attitude as the government owes its entire being to the will of the people it serves.

To support congressional enactment of the proposed public employee relations acts under section five of the fourteenth amendment, the proposed law must be necessary to enforce some constitutional guarantee. No constitutional violations are presented by the current treatment of State and municipal employees. Private and public sector employees are not similarly situated. Affording rights to one and not the other does not, therefore, amount to a denial of equal protection.[163] Alternatively, since public employees are granted the right to join unions, their freedom of association is not abridged. Without the basis of a constitutional question or a finding that current State laws are being utilized to deny public employees their freedom of association, Congress is without power under section five to enact the proposed public employee relations acts.

V. CONCLUSION

Applying the doctrine of federalism, the proposed federal regulation of the employment relationship between a State and its

159. Johnson v. City of Albany, Ga., 413 F. Supp. 782, 797 (N.D. Ga. 1976).

160. *Id.* at 797.

161. Beaufoeuf v. Delgado College, 428 F.2d 470, 471 (5th Cir. 1970).

162. Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

163. Beauboeuf v. Delgado College, 428 F.2d 470, 471 (5th Cir. 1970).

employees is prohibited. The Court, in *National League of Cities v. Usery*, recognized the concept of federalism embodied in the tenth amendment as a shield protecting the States in the discharge of their traditional sovereign powers from impermissible federal encroachment. One of the inherent elements of this federalism is the authority of the States to make those fundamental employment decisions upon which the States' systems of performance must rest. Congress, therefore, may not, through the exercise of its commerce clause powers, impose a Public Employee Relations Act on the States.

Similarly, the concept of federalism woven into the very fabric of the Constitution prohibits Congress from constitutionally reducing the States to the role of mere departments governed entirely out of Washington by the exercise of either its spending powers or the powers granted in section five of the fourteenth amendment. Congress may not by guile obtain a result the Constitution prohibits it from achieving directly, for in the words of Chief Justice Marshall:

> Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so.[164]

A system of government recognizing the inherent sovereignty of each of the partners in our federal system is essential for the preservation of our individual liberties. States' rights is not a mere truism. Rather, it is a basic element in our constantly evolving system of government. Congress should not so lightly move to impair the constitutional adhesive which has for so long preserved our Union.

164. Craig v. Missouri, 29 U.S. (4 Pet.) 410, 433 (1830).