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# CONSTITUTIONAL BASIS AND IMPLICATIONS OF FEDERAL COLLECTIVE BARGAINING LEGISLATION FOR STATE AND LOCAL EMPLOYEES

\*Ronald C. Brown

If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.<sup>1</sup>

To many observers of public sector collective bargaining, this pronouncement by the Supreme Court laid to rest meaningful discussion of whether the federal government has the constitutional authority to pass collective bargaining legislation for state and local employees. Yet significant constitutional questions remain unresolved as to the appropriate relationship between state and federal governments, the scope of the commerce clause of the Constitution which permits federal regulation of state matters, and the degree to which the internal affairs of a state can be regulated before that regulation unduly interferes with the state's sovereignty.

Additionally, even if constitutional authority for such bargaining legislation exists, further constitutional and legal questions will need resolution before a federal bargaining statute can be enacted. For example, the issue of federal preemption of state and local laws relating to working conditions and employment benefits would need special attention to determine which, if any, such laws would be displaced or whether those laws cover proper subjects for bargaining. The permissibility of strikes by public employees would need careful examination to determine whether or to what degree they could be regulated without improperly infringing on first amendment rights; also to be determined is the question of whether such alternatives as binding interest arbitration will survive constitutional scru-

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1. *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968). On June 24, 1976, the Court handed down its decision in *National League of Cities v. Dunlop*; for a discussion of the impact of this recent case on *Maryland v. Wirtz* and this article, see note 121 *supra*.

tiny. A multitude of such issues exist and await creative legislative or judicial guidance to finalize the form of future public sector collective bargaining legislation. This article will assess the constitutional authority for federal bargaining legislation, raise and analyze some of the many constitutional implications which such legislation would have on state and local governmental employers, and suggest means by which the natural tensions between federal and state governments might be minimized.

The need for examination and resolution of the constitutional issues raised by federal bargaining law flows from the recent explosive developments in public sector labor relations. Not only has the number of public employees increased dramatically, from ten to fifteen million in the past decade, but the number of union members has increased to the point where almost a third of state and local employees are under union agreements and about three million employees are union members.<sup>2</sup> And rapid growth of state bargaining legislation has occurred so that forty states now have some type of legislation covering some of their public employees.<sup>3</sup>

Notwithstanding this flurry of legislative activity, arguments persist that only about one-half of the state legislation can be described as comprehensive in coverage and in obligations. The remainder is largely of the piecemeal, gap-filling variety that has been passed in response to demands by special interest groups such as firefighters or teachers.<sup>4</sup> Even in those states

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2. *Hearings on H.R. 12532, H.R. 7684, and H.R. 9324 Before the Special Subcommittee on Education and Labor*, 92d Cong., 2d Sess. 70, 71 (1972) [hereinafter cited as *Hearings*].

3. For a summary of state labor laws, see BNA GOVERNMENT EMPLOYEES RELATIONS REPORT [hereinafter cited as GERR], RF 51:501-523 (1975); and see Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 3-4 & n.18 (1973); and see *Hearings*, *supra* note 2, at 132-34.

4. States having legislation covering all or most public employees with one or more statutes include Alaska, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Vermont and Wisconsin. GERR, *supra* note 3; and see GERR RF 51:1011 *et seq.* (1974). States with separate legislation covering teachers include Alaska, California, Connecticut, Delaware, Idaho, Indiana, Kansas, Maryland, Montana, Nebraska, North Dakota, Oklahoma, Rhode Island, Vermont and Washington. *Id.* States with legislation covering policemen and/or firefighters include Alabama, Georgia, Idaho, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas and Wyoming. *Id.*

without express statutory authorization to engage in collective bargaining, that authority may and often does exist in the constitutional right to form and join unions and the implied statutory authority to enter into negotiated agreements.<sup>5</sup> Full negotiation usually occurs, however, only after the authority issues have been litigated. And inchoate, frequently extralegal relationships result which are not necessarily legally enforceable, are not regulated by a statutory scheme, and are not, therefore, always in the public interest inasmuch as important public rights can be compromised in the absence of legislative limitation and guidance. Proponents of federal legislation point to these developments as evidence of the states' default by establishing only minimal bargaining rights for most state and local public employees. Thus, they have turned to the federal government for a legislative solution.<sup>6</sup>

Congress has responded by holding public hearings on the question of the need for, and the form of, federal collective bargaining legislation. Although several different bills have been introduced, attention has recently been focused on two bills. One would create a new agency to administer a separate national public employment relations program,<sup>7</sup> and the other would amend the National Labor Relations Act to include the now excluded public employees.<sup>8</sup> In 1975-76, supporters of the

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5. For example in Virginia, a non-statutory state, it is estimated that a third of the state's teachers are under collective bargaining arrangements. For an example of recent case law supporting the implied authority to negotiate, see *Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ.*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975); *East Chicago Teachers, Union Local 511 v. Board of Trustees*, 153 Ind. App. 463, 287 N.E.2d 891 (1972). See generally Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 Iowa L. Rev. 539 (1969) [hereinafter cited as Dole].

6. AFSCME President Jerry Wurf, representative of the proponents of federal legislation, has stated:

No pattern prevails among the 50 states and 80,000 local government units save one—that public employees are always in an inferior, secondary class status compared to workers in private industry.

GERR No. 548, at B-16 (1974).

7. H.R. 8677 (National Public Employees Relations Act), 93d Cong., 1st Sess. (1973) (H.R. 1488, 94th Cong., 1st Sess. (1974)).

8. H.R. 77, 94th Cong., 1st Sess. (1975). The same bill was introduced earlier as H.R. 12532, 93d Cong., 1st Sess. (1973), and in the Senate as S. 3294. GERR No. 549, at B-8 (1974). For general discussion of the appropriateness and alternatives of federal legislation, see Brown, *Federal Legislation For Public Sector Collective Bargaining: A Minimum Standards Approach*, 5 U. TOLEDO L. REV. 681 (1974) [hereinafter cited as Brown].

first bill shifted their allegiance to the second, so that presently there is only one supported bill before Congress.<sup>9</sup> Since the time of the public hearings, action on the bill has proceeded slowly. This is due in part to the bill's controversial nature in an election year and in larger part to the hope that the Supreme Court, in ruling on the appropriate degree of federal involvement in state labor relations under the Fair Labor Standards Act, will by analogy give needed guidance on the constitutional issues raised by proposed federal bargaining legislation.<sup>10</sup>

### I. FEDERALISM AND FEDERAL REGULATION OF STATE AND LOCAL LABOR RELATIONS

In addition to examining the authority of the federal government to intervene in state labor relations, the conceptual impact of that intervention upon our system of federalism ought to be considered.<sup>11</sup> Federalism has long had a vital influence on the pattern of American constitutional development and it has been characterized as "the means and price of the formation of the Union."<sup>12</sup> Beyond that political reality, it is useful to identify the values it was designed to serve and to outline how it has been accommodated to the national interest of protecting

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9. The National Education Association (NEA) has continued to modify its position. In 1972 it supported categorical bargaining legislation for teachers. In 1973 it changed its support to omnibus legislation with its president stating before the House Committee hearing testimony on H.R. 8677:

Our experience has convinced us that similarities among the various categories of public employees outweigh the dissimilarities and that there are certain well recognized principles and procedures that should be uniformly applied to all public employees.

Contained in a booklet on testimony on H.R. 8677 prepared by Coalition of American Public Employees 24 (1973). NEA has now endorsed H.R. 77.

10. *National League of Cities v. Dunlop*, No. 74-878 (U.S. filed Jan. 17, 1975) and *California v. Brennan*, No. 74-879 (U.S. filed Jan. 17, 1975). Both cases have been argued, and a decision is imminent.

11. Arguments relating to the propriety of bargaining legislation and its appropriate form, *i.e.*, whether or not to treat government as just another industry or to accommodate its constitutional, legislative, financial, political and market differences will be set aside from this discussion of the constitutional appropriateness of federal legislation. Such arguments are summarized in Brown, *supra* note 8, at 684-86; and see Rhemus, *Constraints on Local Governments in Employee Bargaining*, 67 MICH. L. REV. 919 (1969).

12. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

and promoting interstate commerce<sup>13</sup> and to the tenth amendment of the Constitution.<sup>14</sup>

### A. *Federalism*

The problem of allocating powers between nation and state has often been couched in terms of the efficiency of a national approach to problems versus the danger of a central government's accumulating excessive power to the detriment of the interests of the states. On the question of federal collective bargaining legislation, the debate continues with opponents of federal regulation claiming that vital state interests in labor relations are best left to the control of the states. The claim is that intricate balances of varying state and local governmental structures require diversity and experimentation to resolve the complex problems in state and local governmental employee relations; solutions are necessarily going to be very different from state to state. Therefore, to devise national uniform legislation and to impose it upon the states would work to violate the basic tenets of federalism.

Proponents of federal legislation maintain that important employee rights of self-determination in labor relations are being sacrificed during this ongoing period of "experimentation" by the states. In addition, they maintain that experiments with bargaining legislation by the states have already produced a recognizable set of minimum standards such as secret ballot elections, employee free choice and prohibited practices. Other controversial matters such as strikes, interest arbitration, and bargaining by supervisors will most likely never be resolved by the states.

Whether diversity would be displaced by a federal law is also disputed by proponents of the law. Certainly the National Labor Relations Act has not produced bland uniformity and

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13. Justice Johnson made the Supreme Court's position clear many years ago when he observed in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824):

If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.

14. "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.

non-innovative collective bargaining practices. Experience illustrates that divergent practices have developed in particular industries such as construction, trucking, and the garment industries and that bargaining structures and strategies remain diverse. Proponents maintain, therefore, that special occupational groups in the public sector such as firefighters, teachers or social workers would hardly sacrifice their unique characteristics, which could be preserved by specific statutory provisions for different appropriate bargaining units and bargaining structures.

### B. Sovereignty

An essential aspect of federalism, in addition to its planned maintenance of diversity, is the concept of sovereignty. Although the legal ramifications of sovereignty will be discussed subsequently, the conceptual ramifications need also be addressed. The premise of the state sovereignty argument in the context of federal public sector bargaining legislation is that state governments' decisions on matters of vital state interest must be shielded from federal intervention. To permit federal interference with matters constitutionally entrusted to the states, such as the general welfare of its citizens, including its employees, and to compel it to bargain with its citizens on various matters, tends to undercut if not to abrogate the concept of sovereignty. Sovereignty in this sense denotes immunizing and insulating against outside tampering with constitutionally based structures of state and local government.<sup>15</sup> The conceptual limitation on federal intervention is of fading practical significance and to a great degree has been supplanted by judicial constructions of the commerce clause of the Constitution. These interpretations tend to negate lingering concepts of dual federalism raised in conjunction with the tenth amendment.<sup>16</sup>

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15. An argument related to sovereignty, though more legal in nature, involves questions of illegal delegation of authority absent permission or authorizing legislation from the state government such as when a government employer negotiates with its employees absent explicit statutory authorization or permits a third party to settle disputes. Although cases finding delegation problems are becoming infrequent, illustration of the principle can be found in *Mugford v. Mayor & City Council*, 185 Md. 266, 44 A.2d 745 (1945). See also *Dole*, *supra* note 5; and *McAvoy*, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972).

16. For a discussion on the concept that state powers limit the national power, *i.e.*,

C. *Default By States Necessitating and Providing a Rational Basis for Federal Legislation*

Experience has shown that, especially in the area of labor legislation, when the states fail to meet a perceived public need, the federal government may move to fill that need. Examples are laws which cover minimum wage, unemployment compensation, occupational safety and health, civil rights and private sector labor relations.<sup>17</sup> Thus, allocation of authority between national and state governments has on numerous occasions been in favor of the federal government. Close questions are influenced by the pragmatic assessment that if regulation is to come, the sophisticated distinctions of federalism must yield to permit a more efficacious solution to major problems ineptly or inadequately managed by the states.

A brief assessment of legislative developments in state and local labor relations shows that a substantial amount of new legislation has been enacted in the past five years and that additional legislation is forthcoming.<sup>18</sup> However, it is equally clear that less than half of the nearly forty recent statutes could reasonably be categorized as comprehensive.<sup>19</sup> Many statutes cover only special interest groups such as teachers or fire-fighters<sup>20</sup> and fewer than a fourth of the total require collective bargaining for all employees should the employees choose to bargain.<sup>21</sup> Neither is the use of administrative machinery to administer the acts uniformly established. Only a small percentage of states have created a new agency to administer their laws, while others use existing agencies such as state boards of

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"dual federalism," see generally A. MASON, *THE SUPREME COURT: PALLADIUM OF FREEDOM* 116-18 (1962). The essentials of the doctrine have been summarized as:

(1) The national government is one of enumerated powers only; (2) Also, the purposes which it may constitutionally promote are few; (3) Within their respective spheres the two centers of government are "sovereign," and hence "equal"; (4) The relation of the two centers with each other is one of tension rather than collaboration.

Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

17. For a clear description of federal intervention due to state inaction in unemployment compensation, see Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 185 (1955).

18. See note 3, *supra*.

19. See Brown, *supra* note 8, at 696-97.

20. *Id.*

21. *Id.* See *Hearings*, *supra* note 2, at 283. For a more detailed analysis, see GERR, *supra* notes 3 & 4.



education. Seven states permit local employers rather than an agency to determine the appropriate bargaining unit.<sup>22</sup> State labor relations legislation has also covered representation questions, bargaining obligations, impasse procedures, strike resolution and union security arrangements, some of which show great innovation and experimentation. Patterns of legislation have emerged which are sufficient to permit description and provide future guidance as to the minimum acceptable standards in those states which have passed legislation. This guidance could prove invaluable in the drafting or interpreting of a federal public sector bargaining law should the federal government be found constitutionally authorized to pass such a law.

In those states without applicable legislation the courts have been called upon to protect the organizational rights of employees who choose to unionize, contributing to a growing corpus of common law public sector labor relations. For example, in nonstatutory states, extra-legal, de facto bargaining relationships have developed as a result of courts' holdings that there is a constitutional right to organize. In addition, although there is no constitutional right to bargain, there may well be an implied statutory right of the employer to bargain if he so chooses.<sup>23</sup>

Thus, a preliminary assessment of legislative enactments by the states leads to the conclusion that the states have not done enough to refute the argument that they have defaulted by inaction and underregulation.<sup>24</sup> This argument provides the constitutionally necessary "rational basis" for federal legisla-

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22. *Hearings, supra* note 2, at 284; and see Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1969).

23. See Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57, 79-82 (1973).

24. Former Secretary of Labor Hodgson in congressional testimony on the question of federal legislation stated:

This lack of experience makes it impossible to adequately evaluate the efficiency and effort of various statutory provisions upon the governmental unit, public employees, and public interest.

*Hearings, supra* note 2, at 281. AFSCME President Jerry Wurf, speaking to the issue of whether diversity and experimentation should be permitted to continue, commented that public employees have tired of being the "white rats in a labor-management laboratory" and they seek the stability and equity of a federal law. GERR No. 548, at B-16 (1974).

tion. Analysis of whether legal authority exists for Congress to legislate over particular areas neglected by the states, without unduly violating the basic structural concepts of federalism or improperly interfering with protected areas of sovereignty must resolve any question of whether it makes a significant difference that it is public rather than private employees that would be regulated.

## II. CONSTITUTIONAL BASIS OF FEDERAL BARGAINING LEGISLATION

Paramount to any discussion of the propriety of federal legislation is a determination of its legality. The authority for the federal government to regulate the labor relations of the states must be found, if at all, in the United States Constitution within the commerce clause and the necessary-and-proper clause; the activities of state and local governments must first have a sufficient effect on interstate commerce to be a proper subject of federal legislation, and second, the legislation will be valid only where Congress has a rational basis for its regulatory scheme to protect commerce. Additionally, the scope of regulation under the commerce power must not be found to be so expansive as to violate any constitutional immunities of the states, either by transgressing tenth amendment powers reserved to the states or by improperly displacing "sovereign" powers of the states. These issues as well as the possible effect that the eleventh amendment may have in limiting national authority to regulate the states will be discussed below.

### A. *National Authority Under the Commerce Clause*

The commerce clause creates a national legislative power to protect the free flow of interstate commerce which overrides powers of the states.<sup>25</sup> Although the principle is generally accepted, the continuing subject of inquiry is the scope of Congress' power under the clause. Chief Justice Marshall in 1824 described it as the plenary power to regulate and went on to say:

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25. See 1 C. WARREN, *THE MAKING OF THE CONSTITUTION* 568 (1937); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.<sup>26</sup>

While the Supreme Court for a time departed from Chief Justice Marshall's broad definition of power under the commerce clause, the modern judicial interpretations have steadily expanded its scope, so that the modern commerce power is as broad as Marshall's original definition. In recent years the Supreme Court has consistently ruled that federal regulation of labor relations is a proper constitutional exercise of congressional power under the commerce clause; matters which have the potential for obstructing the interstate flow of goods, even though involving an employer engaged solely in intrastate activities, are subject to federal regulation.<sup>27</sup> In clear language the Court has stated:

The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement". . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . .<sup>28</sup>

The Supreme Court, in testing the limits of the scope of the commerce clause, has consistently found that even though the regulated activity itself might properly be called intrastate activity, where interstate commerce may be affected, it is a proper subject for regulation.<sup>29</sup> Thus, with the distinction between intrastate and interstate activity closely drawn, and the authority of Congress under the commerce clause expanded, it has been observed:

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26. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

27. See generally P. BENSON, *THE SUPREME COURT AND THE COMMERCE CLAUSE*, 1937-1970 (1970).

28. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-7 (1936); and see *United States v. Darby*, 312 U.S. 100 (1941).

29. *Perez v. United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942).

It may be true that the application of the principles now approved by the Supreme Court may leave only minor aspects of an economy free from the regulatory power of Congress. *The reason for this, however, is not legal but economic.*<sup>30</sup> (Emphasis added.)

The Supreme Court has in an increasing number of cases indicated that federal regulation of public sector employment relations is likewise constitutionally permissible under the commerce clause. In 1968 the Court upheld the extension of the Fair Labor Standards Act to cover public employees of state-owned hospitals and schools.<sup>31</sup> In 1976, the Supreme Court has been asked to resolve the same issues raised in that case in the *National League of Cities*<sup>32</sup> case.

Recent decisions provide insight into the likely outcome of the *National League of Cities* case. For example, the case of *Fry v. United States*<sup>33</sup> held that the federal government had constitutional authority to pass the Economic Stabilization Act which created an agency which in turn forbade pay increases to state employees in Ohio in excess of 7 percent, notwithstanding the state's decision to pay more. Although the arguments were stated not in terms of the commerce power, but in terms of the limitations on that power imposed by the tenth amendment, Justice Marshall found little difficulty in finding that *Maryland v. Wirtz* was dispositive and that the states were not immune from federal regulation under the commerce clause.<sup>34</sup>

Even though the scope of the commerce clause may be extended so as to permit federal regulation of state and local employees, questions remain as to whether Congress in passing federal bargaining legislation will have based its decision on a "rational basis" in an effort to protect the needs of interstate commerce as reflected in the statutory purposes.<sup>35</sup> Inasmuch as

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30. Stern, *Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 468 (1951).

31. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

32. *National League of Cities v. Dunlop*, No. 74-878 (U.S. filed Jan. 17, 1975); *California v. Brennan*, No. 74-879 (U.S. filed Jan. 17, 1975).

33. 421 U.S. 542 (1975).

34. *Id.* at 548. Justice Rehnquist in dissent seeks to analyze the cases used by the majority to redefine the appropriate allocation of authority between state and federal governments and thus provide a basis in the future for overruling *Maryland v. Wirtz*. *Id.* at 549.

35. See *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964).

the only bill presently before Congress, House Resolution No. 77, would amend the NLRA to remove the exemption for state and local employees, an examination of the purposes of the NLRA in the context of public sector bargaining is in order to determine the constitutionality of this added coverage. The act begins by noting:

The denial by some employers of the right to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . .<sup>36</sup>

The basic purposes of the act are to avoid or minimize this industrial strife and unrest, and to provide for equality of bargaining power between employees and employer.<sup>37</sup>

In the private sector, the Supreme Court has ruled that federal regulation of labor relations is a proper constitutional exercise of power under the commerce clause. In *NLRB v. Jones & Laughlin Steel Corporation*,<sup>38</sup> the Court held:

. . . stoppage of operations by industrial strife would have a most serious effect upon interstate commerce. . . . Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.<sup>39</sup>

The question then becomes whether Congress can, after appropriate investigation, conclude that labor problems that exist in the private sector likewise exist or may exist in the public sector.

Some guidance on this issue is found in *Maryland v. Wirtz*,<sup>40</sup> where the Court, in upholding the extension of the Fair Labor Standards Act to public employees, stated that "strikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously inter-

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36. National Labor Relations Act, 29 U.S.C. § 151 (1970).

37. *Id.*

38. 301 U.S. 1 (1937).

39. *Id.* at 41-42.

40. 392 U.S. 183 (1968).

rupt and burden this flow of goods across state lines.”<sup>41</sup> That the “flow of goods” is properly deemed substantial is apparent when one considers that in 1970 the interstate purchases made for all state and local governments amounted to an estimated \$121 billion, or 92 percent of total state and local governmental expenditures. This figure represents 12.4 percent of our gross national product (GNP), and involved over eleven million public employees and over three million private employees.<sup>42</sup>

As to the point that public employee strikes can and do occur, it has been noted that in 1966 there were 142 work stoppages resulting in a total loss of 455,000 man-days of work; in 1973, 386 work stoppages by state and local governmental employees resulted in a loss of 2,299,300 man-days of work.<sup>43</sup>

In the absence of federal legislation, there is significant potential for labor unrest in the possible depression of wage rates (presumably resulting from the absence of collective bargaining) by states or localities which are seeking to gain a competitive advantage over their neighboring governments. Such a possibility may well have influenced the Court in *Maryland v. Wirtz*, where the Court noted that it was logical to infer that the pay and hours of employees affect the employer’s competitive position.<sup>44</sup> It is a similarly logical inference that such competition presently exists between states and localities in that each is continually vying to attract business investments, property development, etc.; and it is by no means unfair to observe

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41. *Id.* at 195. In *Maryland*, 87 percent of the \$8 million spent for supplies and equipment by its public school system during the year represented direct interstate purchases. *Id.* at 194.

42. *Hearings*, *supra* note 2, at 34. In 1971, purchases amounted to \$135 billion, constituting 12 percent of the gross national product (GNP). 119 CONG. REC. 14,057 (daily ed. July 19, 1973). Of this figure, 57 percent was for compensating some 9.7 million employees (the remaining 43 percent constituted over 5 percent of the GNP); and employment generated by the purchase of goods and supplies by these activities accounted for an additional 3.7 million jobs, making a total of 13.4 million jobs, which is more than 16 percent of the nation’s total civilian employment. *Id.* For a summary of the effect on commerce of spending and employment by state and local government, see S. REP. NO. 690, 93d Cong., 2d Sess. (1974).

43. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, REPORT NO. 434, WORK STOPPAGES IN GOVERNMENT, p. 3 (1973). For a treatment of the consequences of a strike on strikers and on the community, see Thiebolt & Corwin, *Welfare and Strikes, The Use of Public Funds to Support Strikers*, LABOR RELATIONS AND PUBLIC POLICY SERIES, Report No. 6 (Wharton School of Fin. & Commerce 1972).

44. 392 U.S. at 190.

that the locality with the lowest costs of public services (water, gas, police, trash pickup) and the lowest tax rates will be most attractive to the prospective investor.<sup>45</sup> Minimization of the disruptive aspects of such a competition should provide a valid, rational basis for legislation under the commerce clause.<sup>46</sup>

Another issue that arises under the application of the commerce clause is whether it is limited to strictly *commercial* matters, leaving *governmental* functions under the control of state sovereignty. Years ago the Supreme Court addressed this issue by observing that the commercial versus governmental quagmire involves “. . . distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation” and that the courts’ use of such inherently unsound distinctions would only result in chaos.<sup>47</sup> The Court upheld the same principle in *Maryland v. Wirtz*:

It 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’ in character.<sup>48</sup>

In view of the long history of precedents which buttress the *Maryland v. Wirtz* holding, it would appear that the authority of Congress under the commerce clause to pass federal bargaining legislation would be within the scope of that clause; as in *Maryland v. Wirtz* establishment of minimum labor standards would rest on a rational basis.<sup>49</sup> The legal inquiry continues, however, as to whether the sovereignty of the states or the immunity of the tenth amendment provide a limitation on the scope of the commerce power.

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45. For detailed statistics as to the costs of such public services, see, e.g., BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATE GOVERNMENT FINANCES IN 1973, Table No. 7, at 24-5 (1974).

46. For discussion of the relevancy of this factor in *Maryland v. Wirtz*, see 392 U.S. at 190.

47. *Indian Towing Co. v. United States*, 350 U.S. 61, 65, 68 (1955). For example, the types of activities in which government employees are engaged include work in hospitals, transit operations, highway construction, education and private guard services, all, to some degree, having private sector counterparts. See U.S. DEP’T OF LABOR 1971 REPORT TO CONGRESS, NONSUPERVISORY EMPLOYEES IN STATE AND LOCAL GOVERNMENTS 52-7.

48. 392 U.S. at 195. See also *Case v. Bowles*, 327 U.S. 92, 101 (1946).

49. 392 U.S. at 194.

*B. State Sovereignty and the Tenth Amendment: Limitation on National Authority*

Even assuming that the authority of the federal government to regulate commerce has become nearly boundless, the question still arises whether under our system of federalism there are or should be limits on the federal government's ability to regulate the sovereign affairs of the states. Early notions of "dual federalism," the concept that the tenth amendment sets an independent limitation on the powers of Congress and that national and state governments are distinct, separate, and impenetrable, have given way over the years to constitutional interpretations which have broadened the power of the federal government to legislate over the states.<sup>50</sup> It has been said that the reason for the demise of dual federalism is not "legal but economic,"<sup>51</sup> as the economy becomes more interdependent; yet the basis for these constitutional interpretations was laid at the time the Constitution was created. James Madison, for example, spoke against making the tenth amendment the touchstone of federal legislative power:

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.<sup>52</sup>

The Supreme Court, in a long line of precedents, has maintained the position that the framers of the Constitution intended that the commerce power "though limited to specified objects is plenary as to those objects,"<sup>53</sup> and that the tenth amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government."<sup>54</sup>

Though the tenth amendment has been characterized as a "truism," merely stating that "all is retained which has not

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50. See Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

51. Sterns, *Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 468 (1951).

52. II ANNALS OF CONGRESS 1897 (1791), and quoted in *Sperry v. Florida Bar*, 373 U.S. 379, 403 (1963).

53. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 197 (1824).

54. *Case v. Bowles*, 327 U.S. 92, 102 (1946).



been surrendered,"<sup>55</sup> it still may be found to have significance in the context of federal regulation under the commerce power. The Supreme Court has recently observed that the tenth 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."<sup>56</sup> In upholding the right of the federal government to impose wage controls over state employees, the Court found that a regulation that affected the state's labor relations did not constitute too drastic or improper an invasion of state sovereignty.<sup>57</sup> Yet this limitation may be difficult to define. For example, in *Maryland v. Wirtz*, the Supreme Court made the point that "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."<sup>58</sup>

A related argument is that the Court should distinguish between state governmental and non-governmental activities, and that only the latter should be a proper subject of federal legislation. The Supreme Court showed its disdain for this distinction by holding in *Maryland v. Wirtz*: "[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' in character . . ."<sup>59</sup> and "the State . . . may be forced to conform its activities to federal regulation."<sup>60</sup> More recently, the Court, in

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55. *United States v. Darby*, 312 U.S. 100, 124 (1941).

56. *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

57. *Id.* The dissent in *Fry* takes a different view, noting that although the majority claims to find the tenth amendment to have meaning, it is difficult to show what it is. *Id.* at 550. Justice Rehnquist then cites for support the dissent of Justice Douglas in *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) which decries the apparent limitlessness of federal power to control commerce: "If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." Opponents of federal regulation in *National League of Cities v. Dunlop* and *California v. Brennan*, *supra* note 10, both presently before the Supreme Court, maintain that *Fry* is not a precedent for federal regulation but rather is distinguishable on grounds that the existence of a national emergency sustains a burden of the compelling national interest in upholding the Economic Stabilization Act of 1970. GERR No. 647, at B-10 (1976).

58. 392 U.S. 183, 195-96 (1968).

59. *Id.* at 195.

60. *Id.* at 197. See also *Parden v. Terminal R.R.*, 377 U.S. 184 (1964); *California v.*

discussing the ability of the federal government to regulate the employment relationship of state governments under the Fair Labor Standards Act (FLSA) stated:

Where employees in state institutions, not conducted for profit, have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act.<sup>61</sup>

A final issue requiring discussion is whether federal legislation which imposes financial burdens on the states is constitutionally valid. This issue has been addressed by the Supreme Court, which has determined that 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."<sup>62</sup>

Opponents of federal bargaining legislation maintain that enormous burdens will be placed on governmental employers by compulsory bargaining through additionally negotiated benefits to employees and by the added costs of administering a labor relations program.<sup>63</sup> The Supreme Court, in discussing the cost impact of the FLSA amendments, has resolved this issue by holding 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."<sup>64</sup>

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United States, 320 U.S. 577 (1943); *United States v. California*, 297 U.S. 175 (1936); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48 (1933).

61. *Employees v. Missouri Public Health Dep't*, 411 U.S. 279 (1973).

62. *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941). The Court added, "[N]or 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." *Id.* at 528. See also *Sanitary Dist. v. United States*, 266 U.S. 405, 432 (1925).

63. For a discussion of some of the possible implications of compulsory bargaining in the public sector and its costs, particularly in loss of sovereignty, see Petro, *Sovereignty and Compulsory Public Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974).

64. *Employees v. Missouri Public Health Dep't*, 411 U.S. 279 (1973). It should also be noted that, while on the one hand the federal government imposes fiscal burdens, it also provides much funding. In 1975, federal aid to state and local governments is estimated to total approximately \$52 billion and will finance about 22 percent of state and local expenditures. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, SPECIAL ANALYSES, BUDGET OF THE U.S. Gov't, 203, 205 (1974).

C. *Eleventh Amendment as Possible Limitation on National Authority*

As discussed above, Congress has broad legislative powers based on the commerce clause which limit the power that the states had until that power was delegated to the federal government under the Constitution.<sup>65</sup> By this delegation the states necessarily relinquished any part of their sovereignty that would stand in the way of such regulation.<sup>66</sup> However, a question arises as to what effect, if any, the eleventh amendment has in providing a possible constitutional immunity to the applicability of federal legislation to the states.<sup>67</sup> To a certain extent the eleventh amendment, even though directed to judicial power, does limit congressional power under the commerce clause. The eleventh amendment state immunity prohibits Congress in some cases from providing federal jurisdiction over violations of a citizen's federal rights by the states.<sup>68</sup>

Though the precise nature and effects of the eleventh amendment are often difficult to define, certain conclusions can be reached as to its potential impact on federal bargaining legislation.<sup>69</sup> The recent holding in *Employees v. Missouri Department of Health & Welfare* made clear that Congress has the constitutional power under the commerce clause to legislate in the area of labor standards applied to public employers.<sup>70</sup> Speaking for the majority, Justice Douglas found no constitutional impediments to Congress' regulating the states in their capacity as employers under the FLSA. He noted that the "states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."<sup>71</sup> The issue of the case, however, was whether employees could sue their state employers in the absence of a clear expression that Con-

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65. See *Parden v. Terminal R.R.*, 377 U.S. 184, 191 (1964).

66. *Id.* at 192.

67. "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 or Subjects of any Foreign State." U.S. CONST. amend. XI.

68. For a complete treatment of the origins and evolution of the eleventh amendment, see C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972).

69. See, e.g., Comment, *The Elusive Eleventh Amendment and the Perimeters of Federal Power*, 46 U. COLO. L. REV. 211 (1974).

70. 411 U.S. 279, 282-86 (1973).

71. *Id.* at 286, quoting *Parden v. Terminal R.R.*, 377 U.S. at 191.

gress intended to lift the nonconsenting states' usual immunities from suit by a private citizen when brought in the federal courts. The Court ruled that despite the plenary power of Congress over commerce, congressional intent to lift the immunity provided by the eleventh amendment was not to be implied, but must be express.<sup>72</sup> Justice White, dissenting in *Parden*, also agreed that "only when Congress has . . . expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense."<sup>73</sup> Thus, the cases indicate that, by express provision, Congress may lift the states' immunities.

Nevertheless, the question is not so easily resolved. Though immunities can be waived vis-à-vis the federal government's right to sue, the constitutional amendment appears clearly to prohibit suits by *citizens* against the states in *federal* courts. The Court in *Employees* stated:

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. . . . Suits by the United States are not barred by the Constitution.<sup>74</sup>

In *Edelman v. Jordan*, the Court held that the eleventh amendment was violated when a decree in a suit by a private citizen ordered the state to make retroactive welfare payments.<sup>75</sup> However, the Court again distinguished it from a suit which is brought on behalf of the United States.<sup>76</sup> In sum, the federal government has constitutional authority under the commerce power to legislate over the states and to sue them for violations; and it is not limited by any eleventh amendment immunities. However, it also appears that the federal courts remain without

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72. The Court added that Congress can "readily repair the deficiency . . . by simply amending the Act expressly to declare that a State that engages in an enterprise covered by the 1966 amendments shall be amenable to suit under § 16 (b) in federal court." *Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 308-09 (1973).

73. 377 U.S. at 198-99.

74. 411 U.S. 279, 285-86. See also *United States v. Mississippi*, 380 U.S. 128, 140-41 (1972).

75. 415 U.S. 651, 669 (1974).

76. *Id.*

jurisdiction to entertain suits by private citizens against the states notwithstanding dicta in the *Employees* case.<sup>77</sup>

An obvious way to avoid this apparent limitation on federal legislative remedies is for Congress to establish that federal rights will be redressed in state courts. Indeed, there is precedent for this simple solution;<sup>78</sup> and the argument that states may have an obligation to provide a forum for the vindication of federal rights under the supremacy clause of the Constitution has some validity.<sup>79</sup>

The possible limitation of remedies under federal legislation does not affect the constitutionality of the act. In *Maryland v. Wirtz*, the Court held:

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.<sup>80</sup>

The relevancy of the above discussion of available remedies to the issue of the constitutionality of federal bargaining legislation may be minimal when it is recalled that states have, for the most part, consented in employment contracts to sue and be sued, and that most contract claims are necessarily brought in state court. However, drafters of federal legislation would need to provide proper forums for suit and remedies, especially in view of possible federal preemption problems and other related and unrelated constitutional implications raised by federal bargaining legislation.

77. See note 72, *supra*. Of course, public officials under section 1983 can be enjoined from prospectively violating the law. 42 U.S.C. § 1983 (1970); see *Edelman v. Jordan*, 415 U.S. 651, 675-77 (1973).

78. *Clover Bottom Hosp. & School v. Townsend*, 513 S.W.2d 505 (Tenn. 1974); *Glick v. Montana*, 509 P.2d 1 (Mont. 1973).

79. *Testa v. Katt*, 330 U.S. 386 (1947). See generally Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). It may also be possible for the Government to sue as the party in interest for the benefit of the private citizen. See also *United States Fidelity v. Kenyon*, 204 U.S. 349, 357 (1907).

80. 392 U.S. 183, 200 (1968). The Court added, "Percolating through each of [the Act's] 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." *Id.*

### III. REMAINING CONSTITUTIONAL IMPLICATIONS

Assuming that constitutional authority exists for Congress to pass federal bargaining legislation, certain issues having constitutional implications do arise and should be carefully examined and resolved prior to enactment. It is the purpose of this section to raise some of the issues and their implications rather than to provide definitive analysis or judgments regarding their desired or probable resolution, a task best left to separate undertakings and/or legislative inquiry.

The constitutional obligations of state and local employers flow of course from their being *governmental* employers. That is, constitutional duties are owed by government, not only to its citizens, but also to its employees. Innumerable conflicts arise in public sector labor relations which have constitutional dimensions. Two recurring problems with constitutional implications are those involving (1) associational and equal protection rights and duties, and (2) preemption.

#### A. *First and Fourteenth Amendment Rights and Duties*

A myriad of possible conflicts involving first and fourteenth amendment rights arise in the public sector. For example, it has been shown that public employees have a constitutional right to organize and form unions and to be free from employer discrimination because of such organization. But what is the extent of the public *employer's* right to limit such conduct or to accord different treatment to competing unions (*e.g.*, denial of dues check-off) or to deny or permit a meeting with a statutorily defined "non-exclusive" employee representative?

Even absent statutory proscription, the Courts have, to a large extent, created a constitutionally based system of unfair *employer* practices. For example, public employees may not be dismissed or disciplined for a lawful exercise of their first amendment rights to associate or assemble.<sup>81</sup> In organizational campaigns the employer retains free speech rights and may actively provide persuasive information on the relative merits

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81. *E.g.*, *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilden*, 398 F.2d 287 (7th Cir. 1968); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969).

of unionism<sup>82</sup> or of one union over another; he may deny institutional advantages such as the use of school mailboxes during an organizational campaign, or prohibit solicitation on behalf of a union (within certain limitations).<sup>83</sup> However, the employers' conduct may be proscribed not only for exceeding his lawful interests in regulating first amendment conduct,<sup>84</sup> but also for violating the proscriptions of the fourteenth amendment.

The fourteenth amendment prohibits discriminatory treatment of similarly situated classes of citizens without valid reasons for the classification.<sup>85</sup> The courts have enforced this requirement by requiring employers to treat competing unions equally during pre-election periods; if, for example, the employer grants institutional advantages to one competitor, he cannot deny that privilege to other competitors.<sup>86</sup> Decisions have also established constitutional criteria for determining the validity of no-solicitation rules.<sup>87</sup>

Two cases in public sector labor relations with constitutional dimensions are currently before the Supreme Court. The first deals with a public employer's meeting only with a statutorily recognized exclusive bargaining agent, when other employee or citizen groups wished to meet with the employer to discuss matters within the scope of bargainable subjects.<sup>88</sup> The Wis-

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82. See *Friedman v. Union Free School Dist. No. 1, Town of Islip*, 314 F. Supp. 223 (E.D.N.Y. 1970); *Los Angeles Teachers Union, AFT Local 1021 v. City Bd. of Educ.*, 71 Cal. 2d 551, 445 P.2d 827, 78 Cal. Rptr. 723 (1969). For the same principle in the private sector, see *NLRB v. Armco Drainage & Metal Prods., Inc.*, 220 F.2d 573 (6th Cir. 1955), *cert. denied*, 350 U.S. 838 (1955).

83. See *Friedman v. Union Free School Dist. No. 1, Town of Islip*, 314 F. Supp. 223 (E.D.N.Y. 1970).

84. See *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969).

85. U.S. CONST. amend. XIV; for general discussion see Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

86. As discussed earlier, the use of institutional advantages, e.g., school mailboxes, may be limited, but once they are made available to one union it will usually be unconstitutional to deny use to another union, absent authorizing legislation. See, e.g., *Local 1880, AFT v. Florida Bd. of Regents*, 355 F. Supp. 594 (N.D. Fla. 1973); *Dade County Classroom Teachers Ass'n v. Ryan*, 225 So.2d 903 (Fla. 1969).

87. See *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969); *Friedman v. Union Free School Dist. No. 1, Town of Islip*, 314 F. Supp. 223 (E.D.N.Y. 1970).

88. *City of Madison Joint School Dist. No. 8 v. W.E.R.C.*, 69 Wis.2d 200, 231 N.W.2d 206 (1975), *petition for cert. filed*, 44 U.S.L.W. 3400 (U.S. Jan. 5, 1976) (No. 946). See Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004 (1970).

consin Supreme Court found in this case that first amendment rights were subordinate to the legislative interest in maintaining a collective bargaining system.

The second case involves the power of a governmental employer to distinguish between union and non-union payroll deductions and to permit the latter while denying the former.<sup>89</sup> The Fourth Circuit upheld the district court's injunction forbidding the city to refuse to withhold union dues under its check-off procedures; that court also determined that under the fourteenth amendment it would be difficult, albeit possible, for a public employer to discriminate in a constitutionally permissible way between payroll deductions for union dues and other payroll deductions.<sup>90</sup>

An ever present issue in discussions of public sector unionism is the right to strike. If the National Labor Relations Act were amended so as to apply to public employees, such a right would exist just as it does for private employees. However, the political realities are such that although it is open to considerable debate, it is extremely probable that a modification would result so as either to ban strikes or to provide a substitute mechanism such as binding interest arbitration.<sup>91</sup> Strike bans have repeatedly been upheld as the courts find that a constitutional right to strike does not exist.<sup>92</sup> Likewise, courts have had little difficulty in finding that interest arbitration, when limited by appropriate standards, is constitutional and not an illegal delegation of constitutional authority.<sup>93</sup> These constitutional issues

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89. *City of Charlotte v. Firefighters Local 660*, 381 F. Supp. 500 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3228 (U.S. Oct. 14, 1975) (No. 250).

90. *Id.* at 2609.

91. For example, see Postal Reorganization Act of 1970, where postal employees were granted rights substantially the same as those guaranteed private sector employees under the National Labor Relations Act (NLRA), except for the right to strike. 39 U.S.C. §§ 1201-09 (1970).

92. The constitutionality of strike bans is illustrated in *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971); *aff'd mem.*, 404 U.S. 802 (1971); and *Anderson Fed'n of Teachers Local 519 v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15 (1969), *cert. denied*, 399 U.S. 928 (1970). For discussion of the prevalence of interest arbitration, see *Brown*, *supra* note 8, at 703-05.

93. See McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972); Note, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129 (1968). However, a recent decision in New York held unconstitutional as a violation of the one-vote principle a New York statute



must be considered in formulating appropriate federal bargaining legislation and, if possible, accommodated to the constitutional requirements of governmental employers.

*B. Possible Impact of Preemption on the States*

In view of the expansive reach and supremacy of federal law passed under the authority of the commerce clause as applied to state laws, it is evident that there is a pressing need for examining the possible impact of federal preemption on the structures of state and local government. Commentators have predicted that if the prevailing private sector law on preemption is followed in the public sector it "may create widespread confusion and uncertainty; jeopardize important management rights and employee benefits; threaten the stability and viability of retirement funds; and lead to widespread and costly litigation."<sup>94</sup> Therefore, it is urged that a comprehensive summary analysis of all state and local laws should be a prerequisite to passage of federal legislation.<sup>95</sup> The fear of preemption and the need for such "summary analysis" is vigorously decried by other commentators who claim that the doctrine of preemption is manageable and that any such study would be useless and of little assistance to Congress.<sup>96</sup>

To understand the potential impact of preemption on the states it is necessary to examine briefly the private sector precedents to establish a proper framework within which implications on the public sector can be discussed. The preemption doctrine originates with the interplay between the authority of Congress to legislate under its delegated powers and the tenth amendment's reserving to the states powers not delegated to the federal government. The question becomes, as between federal and state law on the same subject, which shall prevail. If

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opposing arbitration in police and firefighters' disputes. *City of Amsterdam v. Helsby*, 79 Misc. 2d 677, 362 N.Y.S.2d 698 (Sup. Ct. 1974).

94. Statement by Dr. Myron Lieberman of Baruch College, City University of New York. GERR No. 593, B-3 (1975).

95. Lieberman, Memorandum Analysis of Preemption Problems with Proposed Federal Bargaining Legislation for State/Local Employees, GERR No. 593, at E-2 (1975).

96. Chanin & Snyder, *The Bugaboo of Federal Preemption: An Analysis of the Relationship Between a Federal Collective Bargaining Statute for Employees of State and Local Governments and State Statutes Affecting Such Employees*, 3 FLA. ST. U.L. REV. 236, 256 n.71 (1975) [hereinafter cited as Chanin & Snyder].

there is a direct and irreconcilable conflict the federal law clearly prevails under the supremacy clause of the Constitution.<sup>97</sup>

The choice facing Congress as it seeks to legislate in an area heretofore covered by state legislation is whether to respond to the issue expressly or to leave it to a case-by-case determination.<sup>98</sup> If the legislative intent is not clear then the judiciary will have to determine whether Congress intended to displace coincident state regulation in a given area.<sup>99</sup> The leading private sector case explaining the doctrine of preemption is *San Diego Building Trades Council v. Garmon*,<sup>100</sup> where the Court in interpreting the NLRA held that Congress intended to assume exclusive jurisdiction over activity "arguably protected or prohibited" by the Act and that state regulation is permitted only where the activity is of "peripheral concern" to the federal policy or involves interests "deeply rooted in local feeling and responsibility."<sup>101</sup>

The effect of the application of that doctrine in the public sector, in the context of a federal bargaining law, enjoys only sparse public sector precedent. Authors Chanin and Snyder in an article on the subject of preemption categorize the implications into three areas:<sup>102</sup> (1) state statutes in conflict with the federal statutes;<sup>103</sup> (2) state collective bargaining statutes; and

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97. U.S. CONST. art. VI, cl. 2. See *Florida Lime & Avocado Growers, Inc. v. Paul*, holding that no judicial inquiry into congressional design is necessary "where compliance with both federal and state regulations is a physical impossibility. . . ." 373 U.S. 132, 142-43 (1963). See also *Fry v. United States*, 421 U.S. 542, 548 (1975).

98. The Fair Labor Standards Act expressly provided that state and local governments must comply with the federal law, and any inconsistent laws would therefore be invalid. Fair Labor Standards Act, 29 U.S.C. § 218(a) (1970). The NLRA, on the other hand, was silent on preemptive effect and left to the courts the arduous task of case-by-case analysis. See 29 U.S.C. § 151 (1970).

99. See, e.g., *Beasley v. Food Fair*, 416 U.S. 653 (1974).

100. 359 U.S. 236 (1959). See also Note, *Federal Preemption: Government Interests and the Role of the Supreme Court*, 1966 DUKE L.J. 484.

101. 359 U.S. at 243-44. A broader rationale for preemption rooted in a conflict of state law with a uniform national labor policy intended by Congress, permits a court to find preemption more easily than in *Garmon*. See *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260 (1964); *Garner v. Teamsters Local 776*, 345 U.S. 485 (1953). For a thorough discussion of the area, see generally Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

102. Chanin & Snyder, *supra* note 96, at 236.

103. As was discussed under the supremacy clause and cases like *Fry v. United States*, 421 U.S. 542 (1975), there is no doubt that direct conflicts will be resolved by upholding the federal statute.

(3) state statutes' establishing terms and conditions of public employment.

The implication of preemption on existing state bargaining legislation, absent express congressional intent, is that state legislation would be displaced inasmuch as it would fall within the private sector *Garmon* rule, *i.e.*, the rights affected would arguably be protected or prohibited by the federal law.<sup>104</sup>

The most difficult area in which to assess implications of preemption deals with the effect a federal bargaining law might have on state statutes which establish terms and conditions of employment. In 1957 the Supreme Court, in *California v. Taylor*,<sup>105</sup> held that a state-operated railroad was subject to the Federal Railway Labor Act, which permitted employee bargaining notwithstanding a state statute prohibiting it.<sup>106</sup> The Court added that the negotiated collective bargaining agreement "would take precedence over conflicting provisions of the state civil service laws."<sup>107</sup> A later case amplified the import of that statement when the Court held that a state law cannot be applied to prevent "the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain."<sup>108</sup> Thus, it appears clear that precedent exists for the displacement of many state statutes by the preemptive effects of the federal bargaining law.<sup>109</sup> On the highly provocative question of whether all state statutes establishing terms and conditions would be invalidated by the mere passage of a federal bargaining law, *i.e.*, even before execution of an inconsistent agreement, an argument exists that to hold

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104. 359 U.S. 236 (1959).

105. 353 U.S. 553 (1957).

106. *Id.* at 559-67. This conclusion would likewise follow under the *Garner* rationale discussed *supra* note 101.

107. *California v. Taylor*, 353 U.S. 553, 561 (1957).

108. *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 295 (1959); the Court added that to hold otherwise "would defeat the full realization of the congressional purpose . . . [and] frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and has imposed no limitations relevant here." *Id.* at 295-96. The Court provided that exceptions to this preemption could exist, as for example, "local health or safety regulations" might prevail. For discussion of this issue as it could relate to public employees, see Chanin & Snyder, *supra* note 96, at 247.

109. For an analogous case see *Baltimore & Ohio R. R. v. Commonwealth Dep't of Labor and Indus.*, 12 Pa. 292, 314 A.2d 862 (1974).

otherwise would improperly fetter what is statutorily required to be free and open bargaining. There is a paucity of case law on this issue and any tentative conclusions would be only speculative and premature.<sup>110</sup>

In summary the constitutional implications of constitutionally authorized federal bargaining legislation are of sufficient magnitude to warrant heightened concern and precise legislative drafting so as to minimize potential adverse or undesired effects.

#### IV. FEDERAL LEGISLATIVE OPPORTUNITIES

In allocating power between the national and state governments the Supreme Court has made clear that national power predominates in the field of regulating commerce. The constitutional basis for regulating the labor relations of the states is likewise clear. Arguments that such legislation will cut too deeply into state sovereignty and policy decision-making lose much of their force when consideration is given to the substance of proposed federal legislation which would require the parties to engage in employment contract negotiations within and under the guidance of a statutory scheme, just as is presently done in nearly forty states, and that neither party must agree to terms or capitulate to unreasonable terms any more than is done absent federal legislation.<sup>111</sup>

Should Congress deem federal bargaining legislation desirable, specific legislative opportunities now exist to shape it in such a way as to accommodate the competing tenets of federalism and to minimize the anticipated constitutional difficulties. First of all, the constitutional difficulties created by the fact that governmental employers, as government, must observe first and fourteenth amendment requirements are of no greater complexity than those which presently occur under state bar-

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110. For speculation on this issue, see Chanin & Snyder, *supra* note 96, at 248-54.

111. For example, the NLRA imposes an obligation to bargain but specifically states that "such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." 29 U.S.C. § 158 (1970). Indeed some public employers have opted for federal coverage under the NLRA so as to gain access to procedures and remedies against *union* unfair labor practices not available under state statutes. See Ferguson, *Collective Bargaining in Universities and Colleges*, 19 LAB. L.J. 778, 784 (1968). See generally D. STANLEY, *MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE* (1972); H. WELLINGTON & R. WINTER, JR., *THE UNIONS AND THE CITIES* (1971).

gaining statutory schemes. Interestingly, the results of much of the pre-election constitutional litigation parallel the NLRB precedents governing unfair labor practices, *e.g.*, employers are limited to nondiscriminatory treatment of competing unions in granting advantages. Additional case law regulating no-solicitation rules also shows that a balancing of first amendment rights in effect provides much the same type of regulation permitted under the NLRA. The appropriate relationship between exclusive recognition and the rights of employee-citizens to petition their government will undergo Supreme Court review this session; and it is likely that a result similar to the NLRA proscription guaranteeing employee access to the employer will be approved although the public employee's rights may well need to be held more absolute.<sup>112</sup> These difficulties can best be minimized through federal legislation, which could take cognizance of the constitutional obligations of public employers and direct administrative interpretations to comport with them.

On the issue of preemption and the best method by which to achieve an appropriate balance between federal and state policy, it is clearly preferable for Congress to state its intention expressly. This would preclude considerable litigation and permit bargaining to commence within clear guidelines, preventing the private sector preemption analogies from clouding issues of bargainable subjects such as terms and conditions of employment. Many options are available to Congress in adopting an express policy concerning the preemptive effect of a collective bargaining statute for public employees. The possibilities range from total invalidation of state laws establishing terms and conditions of public employment to a policy which would not invalidate any such provisions.<sup>113</sup> Other options include permitting statutes to remain unaffected unless superseded by collective bargaining agreements,<sup>114</sup> permitting

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112. While this would not be applicable to access for "statutory bargaining" purposes, it would apply to access for individual grievances. The NLRA typifies state statutory provisions which preserve the rights of individuals to present grievances to their employers. 29 U.S.C. § 159(a) (1970).

113. See Chanin & Snyder, *supra* note 96, at 256.

114. Most statutes which have considered the problem of potentially conflicting statutory provisions such as civil service laws as a limitation on the scope of bargaining have provided that civil service legislation takes precedence. See Brown, *supra* note 8,

statutes to remain valid but susceptible to being supplemented by agreement, or to undertake specifically by legislation (or to authorize by administrative interpretation) the selection of those types of statutes which would be valid or invalid (*i.e.*, defining the scope of bargaining to permit or deny negotiation on such subjects as personal leave or retirement).<sup>115</sup> The ultimate decision necessarily requires legislative judgment; however, in considering the options this author would submit that there are clearly preferable courses to follow which would minimize potential litigation and better accommodate the needs of federalism.

That Congress has the constitutional authority to create federal bargaining legislation does not mean that it should exercise it to the fullest extent possible. The values of federalism remain viable and while a uniform approach and legislative structure appear desirable, the appeal of diversity and permitting the state and local governments to develop and maintain their own labor relations schemes, so as to minimize the impact on their legislative and constitutional structures, also remains highly desirable. The objective of any federal bargaining legislation is to provide certain *minimum standards* which guide and govern the parties in their negotiations. Therefore, it appears that it is possible to accommodate some of the legitimate state interests (sovereignty) in retained control of labor relations, while simultaneously protecting certain minimum bargaining rights on a uniform basis. This can be accomplished by establishing a system of federal-state regulation under a *minimum standards collective bargaining statute*.<sup>116</sup>

This system would delineate basic guidelines for public sector labor relations, reserving ultimate administrative authority

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at 702 n.82. See also Comment, *The Civil Service—Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826 (1971). Michigan, on the other hand, took a different course when the Michigan Supreme Court held that those sections of the civil service laws dealing with mandatory subjects of bargaining under the collective bargaining laws were superseded pro tanto by the latter legislation. *Civil Serv. Comm'n v. Wayne County Bd. of Supervisors*, 348 Mich. 363, 184 N.W.2d 201 (1971).

115. Of course, the NLRB is not beyond performing such a task and has been defining mandatory and non-mandatory bargaining subjects for many years. See, *e.g.*, *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); Note, *The Scope of Collective Bargaining*, 74 YALE L.J. 1472 (1965).

116. See Brown, *supra* note 8, at 716-20.

to the federal government but allowing the states broad discretion to fashion rules of implementation and to experiment with innovative provisions in substantive areas such as scope of bargaining<sup>117</sup> and impasse resolution. This act would provide all state and local employees with certain "minimum standards" of essential bargaining rights,<sup>118</sup> and would provide that any state or local governmental unit with a law in "substantial conformity" or the "substantial equivalent" would be given the authority to administer its own law, subject only to federal administrative review.<sup>119</sup> Noncomplying states would be subject to a comprehensive federal statute administered by a federal agency.

The advantages of this system are obvious. It minimizes the basic antagonism of those who resist federal encroachment upon state labor relations; it reduces the potential burden of federal administrative machinery; and it promotes diversity in reaching solutions to the complex problems facing state and local governments in their labor relations. Additionally, the constitutional implications of preemption would be minimized (assuming compliance by the states) and in situations necessitating an examination of the preemptive effects of federal legislation, clearly expressed congressional intent with respect to the reach by the federal government into matters such as bargainable subjects would provide clear guidance and stability to public sector bargaining relationships. To lessen the disruptive effects of a new federal bargaining law, it would seem preferable that Congress consider, as the proper stance on the preemption issue, permitting present statutes concerning terms and

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117. As discussed, some legislative guidance as to the preemptive effects, if any, on the mandatory subjects of bargaining would be needed.

118. The essential minimum standards should include at least the recognition of the right to organize and bargain; creation of an administrative agency to make determinations on appropriate bargaining units, representation questions, unfair labor practices, and impasse resolution; guidelines providing for secret ballot elections and exclusive recognition; mandatory bargaining in good faith obligations; and binding grievance arbitration. For more complete treatment see Brown, *supra* note 8, at 718. For support of this approach see Chanin & Snyder, *supra* note 96, at 262.

119. A variation of this approach could be used as is done by the Equal Employment Opportunity Commission to permit *deferral* by the federal agency to the state agency. See 42 U.S.C. § 2000(e) (1970), *as amended*, (Supp. II, 1972); and implementing regulations, 29 C.F.R. § 1601.12 (1975). This deferral arrangement was upheld by the Supreme Court in *Love v. Pullman Co.*, 404 U.S. 522 (1972).

conditions to remain valid though subject to supplementation by a negotiated agreement. Admittedly, this places a burden on the public employer, who must begin bargaining with a statutorily-created minimum benefit package which would permit public employees additionally to attempt to gain benefits through both political action or the collective bargaining process. An alternative is to invalidate state employee benefit statutes, if that is legally and politically possible. These are difficult decisions and one can be assured that any new federal collective bargaining law will be the result of legislative compromise. The result of that compromise will be benefited by a full understanding of the constitutional implications of preemption and the available legislative options for creative legislation on the subject.<sup>120</sup>

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120. Essential to making certain the statutory scheme works is the assurance that it will be adequately funded. This could be accomplished by legislative direction, *e.g.*, making it a criterion of "substantial equivalency," or by tying such a condition to the grant of federal funds. Presently under the Urban Mass Transit Act, 49 U.S.C. § 1609(3)(c) (1970) federal money is made available to public transit agencies which were formerly privately owned with the condition that the employees, now public, be permitted to bargain like their private sector counterparts with the exception that strikes are banned and binding interest arbitration is substituted therefor. In a state which did not otherwise authorize public sector bargaining, authorizing legislation was needed to qualify for the funds, and is usually passed. *See, e.g.*, VA. CODE § 15.1-1357.2 (1974). Of course, more sophisticated grant inducements can be designed to meet the special needs of a federal collective bargaining statute.

121. On June 24, 1976, the Supreme Court decided the *National League of Cities v. Dunlop* case on a date too late to permit integration into this publication. The ruling is significant in that it appears to have halted the easy and automatic expansion of federal powers over commerce where it interferes with state sovereignty. In a 5—4 decision, the majority said it did not believe the reasoning of *Maryland v. Wirtz* "may any longer be regarded as authoritative." It was held that Congress may not exercise its power under the commerce clause "so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral government functions are to be made" because to do so would "allow the national government to devour the essentials of state sovereignty." The Court did not accept the tenth amendment argument. The dissent questioned the majority's legal basis and said it appeared in "derogation of the sovereign power of the nation to regulate commerce."

Whether this holding is distinguishable from federal legislation regulating state and local collective bargaining remains to be seen, but it can be observed that the FLSA imposed wage-and-hour requirements on governmental employers whereas the bargaining legislation would require only that certain procedures be followed and nothing specifically must be agreed to. Additionally, a minimum-standards-legislation approach as suggested in this article would minimize the unconstitutional aspects. *N.Y. Times*, Jun. 25, 1976, at 1, col. 8.