CONSTITUTIONAL IMPLICATIONS OF A FEDERAL COLLECTIVE BARGAINING LAW FOR STATE AND LOCAL GOVERNMENT EMPLOYEES*

INTRODUCTION

One impact of the Supreme Court's 1976 decision in National League of Cities v. Usery1 was to freeze efforts in the United States Congress to pass a federal law which would provide collective bargaining rights and protections to state and local government employees.2 The legislation then under consideration3 would have granted rights to public employees4 equivalent to those afforded private sector employees under the National Labor Relations Act.5

To the extent it set up the tenth amendment6 as a barrier to congressional use of the commerce power7 to regulate the employment relationship at the state and local government level,8 the League of Cities decision appeared to prohibit the enactment of the legislation which Congress was considering under

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4. The term "public employee" will be used in this paper interchangeably with the term "state and local government employee" and does not incorporate federal employees.
5. 29 U.S.C. § 152(2) (1970) excludes state and local governments from the Act: "The term 'employee' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any federal reserve bank, or any state or political subdivision thereof. . . ."
6. "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.
7. U.S. CONST. art. I, § 8, cl. 3 provides: "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."
8. 426 U.S. at 840-52.
its commerce power. The oral arguments in *League of Cities* showed that the Court was cognizant of the impact its decision would have on the proposed collective bargaining legislation. One observer has characterized the *League of Cities* decision as "written with a national public sector collective bargaining law in mind."10

The legislative movement has nonetheless been reactivated. New legislation has not yet been introduced, but two new positions have been advocated. One proposal would shift the source of congressional authority to act from reliance on the commerce power to the spending power.11 The other proposal would continue to rely principally on the commerce power and utilize the balancing test of Mr. Justice Blackmun's concurring opinion in *League of Cities*. Additionally, it would be buttressed with the enforcement power of Congress under section five of the fourteenth amendment.12 This proposal would modify the earlier legislation to make federal imposition of bargaining less intrusive upon state sovereignty and reflect the dual objective of enforcing the fourteenth amendment through protection of public employee first amendment rights to organize and select representatives for the purpose of collective bargaining.13

Considering the inclination of Congress to enact legislation in some form,14 it is the purpose of this article to examine the

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10. Bornstein, *Perspectives on Change in Local Government Collective Bargaining*, 1977 Lab. L.J. 431, 433. "If one were to substitute a national public bargaining law for the Fair Labor Standards Act in the Rehnquist opinion, one must conclude that the present majority of the Supreme Court has expressed its views as clearly and forcefully as any court can on this precise issue."

11. The constitution provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imports and Excises shall be uniform throughout the United States . . . ." U.S. Const. art. I, § 8, cl. 1.

This position is being advocated by the AFL-CIO, which has several affiliated unions which represent public employees. Sachs, *Federal Regulation of the Public Sector: Implications of National League of Cities v. Usery*, in *Labor Relations in the Public Sector* 11, 18 (A. Knapp ed. 1977).

12. The fourteenth amendment states, in part: "The Congress shall have the power to enforce by appropriate Legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

13. This is the position of the National Education Association, which represents 1.7 million teachers in elementary, secondary, and higher education. See *National Education Ass'n, Proposed Public Employment Relations Amendments for the 95th Congress* (1977).

14. Elisburg, *Legislative Outlook for Public Sector Labor Relations*, in *Labor Relations Law in the Public Sector* 21, 24-25 (A. Knapp ed. 1977). "Based upon all the evidence that is available to Congress at this time, the
constitutional implications of federal collective bargaining for state and local government employees in the wake of the *League of Cities* decision.

**PUBLIC EMPLOYEE UNIONIZATION: SOME HISTORICAL BACKGROUND AND REASONS FOR FEDERAL LEGISLATION**

State and local governments employed more than 12.2 million in 1976, a nearly four-fold increase since 1945. Unionization among public employees is greater than among their private sector counterparts and now comprises nearly one-half of the total of full-time equivalent employees at the state and local government level. Of the total U.S. work force, less than one-fourth is unionized.

Thirty-eight states have some type of legislation authorizing or requiring collective bargaining or a lesser form of representational rights for some or all of their employees. Only eight...

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19. Alabama (firefighters); Alaska (public employees, teachers); California (local employees, state employees, teachers, firefighters); Connecticut (municipal employees, state employees, teachers); Delaware (public employees, teachers); District of Columbia (all District employees); Florida (public employees); Georgia (firefighters); Hawaii (public employees); Idaho (teachers, firefighters); Indiana (teachers, public employees, except police, firefighters, professional engineers, faculty of any university, confidential employees, and municipal and county health care institution employees); Iowa (public employees); Kansas (public employees, teachers); Kentucky (firefighters, police); Maine (public employees, university employees); Maryland (teachers); Massachusetts (public employees, police, firefighters); Michigan (all public employees except state employees); Minnesota (public employees); Missouri (all public employees except police and teachers); Montana (public employees, teachers, nurses); Nebraska (public employees, teachers); Nevada (municipal employees, teachers, state-employed nurses); New Hampshire (public employees); New Jersey (public employees, school administrators); New York (public employees); North Dakota (teachers); Oklahoma (municipal employees, police, firefighters, professional and nonprofessional school employees); Oregon (public employees); Pennsylvania (public employees, police, firefighters, municipal transit employees); Rhode Island (state and municipal employees, teachers, police and firefighters); South Dakota (public employees, police and firefighters); Texas (police, firefighters); Utah (firefighters); Vermont (state and municipal employees, teachers); Washington (state and municipal employees, teachers, community college academic and state university classified employees); Wisconsin (state and municipal employees); and Wyoming (firefighters). J. NAJITA & V. TRIPLETT, GUIDE TO STATU-
teen of these state statutes are considered comprehensive by neutral observers.20 None is considered to afford public employees rights equivalent to those of private sector employees.21 Each is different in the rights and protections it extends and its administration.22

State statutes typically make strikes by state and local government employees illegal.23 Alaska, Hawaii, and Pennsylvania allow a limited right to strike by statute.24 In some cases, the right to strike has been recognized either by the judicial25 or executive branch.26 Further, by denying appellate review of cases which have denied the right to strike, the United States Supreme Court has implied that there is no constitutional right to strike.27

Despite antistrike legislation strikes nonetheless have occurred at an accelerating rate. In 1960 there were thirty-six public employee strikes.28 In comparison, the year 1975 saw 478 public employee strikes which involved 319,000 state and local government employees at a loss of 2.2 million work days.29 Significantly, the percentage of public employees who went on

TORY PROVISIONS IN PUBLIC SECTOR BARGAINING (Indus. Relations Center, College of Business Administration, Univ. of Hawaii, 1975).

23. J. NAJITO & V. TRIPLETT, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR BARGAINING (Indus. Relations Center, College of Business Administration, Univ. of Hawaii, 1975).
24. Id.
25. Montana has judicially recognized the right to strike in State v. Public Employees Craft Council, 529 P.2d 785 (Mont. 1974). "Concerted activity" in a statute granting to public employees the right to engage in self-organization and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection is a technical phrase which has acquired a peculiar and appropriate meaning in law, and that meaning includes strikes. Id. at 787-88.
strike in 1975 equaled the level of private sector employees for the first time.30

In addition to the work force aspects, state and local government purchasing activities impact heavily on interstate commerce. These governments made $135 billion in interstate purchases in 1971, which comprised 12.9% of the gross national product (GNP). Corresponding data for the same year shows federal government interstate purchases of $97.8 billion or 9.3% of GNP. The 1971 interstate purchases of state and local governments generated 3,741,000 private sector jobs. Approximately one out of every three of the 15.6 million new jobs in the civilian economy of the 1959-71 period was generated by state and local governments, which had enlarged their payrolls or purchased goods and services in the private sector.31

Proponents of the collective bargaining legislation for state and local government employees use these factors—dramatic employment growth and resultant economic impact, exploding unionization, inconsistent or nonexistent state laws, unequal treatment under state laws, increasing numbers of strikes—to argue that a federal collective bargaining law is needed to: (1) deal with the failure of the states to devise workable solutions to the problem posed by employee demands for collective bargaining; (2) rectify the inequities that exist from state to state in the processes available to solve the problems which arise in the employment relationship; and (3) provide uniform mechanisms for the fair and peaceful resolution of disagreements which occur.32

This mix of aggressive employees and resistant employers has produced a flood of United States Supreme Court litigation.33 The federal court caseload in recent years on the state

30. Id.
employment relationship has been so heavy it lends credence to the contention that state employee labor relations are already federally regulated, but by the courts rather than Congress. Significantly, most recent Supreme Court decisions have favored the public employer position over that of the public employee. The pattern of public employee union development in this regard—and generally—is not unlike that of private sector unionization prior to enactment of federal legislation.34

THE CONSTITUTIONAL OUTLOOK BEFORE LEAGUE OF CITIES

Prior to the League of Cities decision, the United States Supreme Court decisions provided support for congressional use of the commerce power to regulate the employment relation of state and local governments. For example, Maryland v. Wirtz35 upheld congressional extension under the commerce power of the minimum wage-maximum hours provisions of the Fair Labor Standards Act (FLSA) to state employees in certain educational and health care institutions. The Court rejected the arguments of infringement on state sovereignty granted under the tenth amendment and that government operations were not "commerce" within the meaning of the Constitution.36 The majority said that "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. . . . [F]ederal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants."37

By thus permitting federal regulation of a substantive element of the state employment relationship under the commerce clause, Maryland v. Wirtz encouraged the conclusion that the commerce clause was sufficient to permit federal regulation of other aspects of the employer-employee relationship in state and local government. The states, it was inferred, could not avoid federal regulation of their labor relations under the

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34. T. Brooks, Public Unions: Parallels To the 1930's, 1977 AFL-CIO Federationist 8-10.
36. Id. at 195-99, 200-01.
37. Id. at 195-96.
commerce clause by merely asserting their sovereign status.\textsuperscript{38} Subsequently, legislative proposals were developed for federal regulation of collective bargaining between state and local governments and their employees.\textsuperscript{39}

In \textit{Fry v. United States},\textsuperscript{40} the Court again upheld congressional action under the commerce power to regulate an element of the state and local government employment relationship.\textsuperscript{41} However, while holding that Congress had the power to subject public employees to wage controls for a temporary period of national economic emergency, the Court also recognized the tenth amendment as a limitation to the commerce power.\textsuperscript{42} Mr. Justice Marshall's opinion for the majority turned on the actual impact of the federal regulation. He found it "even less intrusive" here than in the FLSA amendments upheld in \textit{Maryland v. Wirtz}.\textsuperscript{43} The test applied appeared to be an investigation of the degree of factual intrusion upon state sovereignty.

**THE LEAGUE OF CITIES DECISION AND THE TENTH AMENDMENT LIMITATION UPON THE COMMERCE POWER**

Under the authority of the commerce power, Congress made further amendments to the FLSA in 1974, which extended the Act's minimum wage-maximum hour, equal pay, age discrimination, and other provisions to all state and local government employees.\textsuperscript{44} Writing for the five-four plurality in \textit{League of Cities}, Mr. Justice Rehnquist, the lone dissenter in \textit{Fry}, found the amendments invalid "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental function. . ."\textsuperscript{45} The

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} at 195.
\item \textsuperscript{39} \textit{Appellants do not contend that labor conditions in all schools and hospitals are without the reach of the commerce power, but only that the Act may not be constitutionally applied to state-operated institutions because that power must yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable.}
\item \textsuperscript{40} \textit{Id.} at 542 (1975).
\item \textsuperscript{41} \textit{Id.} at 548.
\item \textsuperscript{42} \textit{Id.} at 547 n. 7.
\item \textsuperscript{43} \textit{Id.} at 548.
\item \textsuperscript{44} \textit{29 U.S.C. §§ 203(d), (s)(5), (x) Supp. IV 1970.}
\end{itemize}
The tenth amendment was held to be an express declaration of limitation to the exercise of the commerce power. Accordingly, *Maryland v. Wirtz* was expressly overruled. However, *Fry* was distinguished as a case concerning a statute which had been enacted on a national economic emergency matter. The statute did not displace state choice, but instead only required temporary maintenance of existing state choices that reduced rather than increased pressures upon state budgets.

The Court did not wholly invalidate the 1974 amendments. Confirming this view is the Court's recent refusal, without comment, to hear a Third Circuit case which held that the extension of the equal pay provisions of the FLSA was unaffected by the *League of Cities* decision. The Third Circuit found the equal pay provision a separate law with a separate legislative history and subject to the severability provisions of the FLSA. Further, the Third Circuit found that Congress has the power under the fourteenth amendment to prohibit such discrimination in employment. Such power, despite the tenth amendment, extends to the state and its subdivisions as an employer. Similar holdings on the effect of *League of Cities* on the equal pay and age discrimination provisions of the FLSA have been numerous among the federal courts.

The Court's emphasis in *League of Cities* on "governmental" as opposed to "proprietary" functions of state government is reflected in the identification of traditional governmental functions to include fire prevention, police protection, public health, parks and recreation, sanitation, and education. "These examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments."

In distinguishing *League of Cities* from *United States v. California*, 297 U.S. 175 (1936), in which the Court rejected a state sovereignty challenge to federal commerce power regulation, Mr. Justice Rehnquist noted that the state's activity in *California*, operation of a railroad, was not governmental in nature. "California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental
left open the possibility that nongovernmental state functions might still be subject to the FLSA minimum wage and maximum hour provisions. Accordingly, the Department of Labor has expressed its intent to make this argument in enforcement proceedings.53

Federal regulation of public employee wages and hours, while limited under the commerce clause by League of Cities, is not foreclosed. Mr. Justice Rehnquist emphasized that the Court’s opinion was confined to the commerce power issue and that other powers might be exercised to effectuate federal regulation: “We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, §8, cl. 1, or §5 of the Fourteenth Amendment.”54 In agreement, Mr. Justice Brennan’s dissenting opinion, in which Messrs. Justices Marshall and White joined, singled out the spending power as an alternative course for Congress to achieve its wage and hour objectives.55 These alternatives will be explored later.

Mr. Justice Blackmun, the fifth and controlling vote in the case, asserted in his brief concurring opinion that the Court had adopted a balancing approach to assess the point at which the tenth amendment becomes a prohibition to congressional regulation of the states under the commerce power.56 His separate opinion negates any conclusion that the Court adopted a per se test for federal regulation of the state employment relationship. Instead, the test is one of balance between the importance of the federal and state interests with the added factor of essentiality of state compliance. Mr. Justice Blackmun declared the balancing approach “does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”57 His statement that he was “not troubled by certain possible implications of the Court’s opinion—some of them suggested by the dissents”

activities.” 426 U.S. at 854 n.18. Such distinctions in governmental function were considered a “quagmire” and “inherently unsound” in a case under the Tort Claims Act. Indian Towing Co. v. United States, 350 U.S. 61, 65-68 (1955).

53. 92 LAB. REL. REP. 272.
54. 426 U.S. at 852 n.17.
55. Id. at 880.
56. “I may misinterpret the Court’s opinion, but it seems to me that it adopts a balancing approach. . . .” Id. at 856.
57. Id.
affords argument for a more traditional federal v. state interest balancing.\textsuperscript{58}

However, he also referred to Mr. Justice Rehnquist's distinction of \textit{Fry} as the kind of balancing he had in mind.\textsuperscript{59} Implicit in this reference is a restricted balancing approach, since the most pertinent point in Mr. Justice Rehnquist's \textit{Fry} distinctions is "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall."\textsuperscript{60} Presumably, Mr. Justice Blackmun was declaring his preference for a balancing approach instead of a \textit{per se} test. Further, he indicated that when it comes to balancing, he would look favorably upon the imposition of federal standards on the states only when the federal interest was "demonstrably" greater than that of the state and state compliance was essential to achievement of the federal objective.\textsuperscript{61}

Mr. Justice Brennan's dissent,\textsuperscript{62} in which Messrs. Justice Marshall and White joined, assessed the \textit{League of Cities} decision as overriding 152 years of constitutional precedent, "discarding [Mr. Chief Justice John Marshall's] postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process."\textsuperscript{63} By finding a state sovereignty limitation upon a delegated congressional power, Mr. Justice Brennan wrote,\textsuperscript{64} \textit{League of Cities} overruled governing decisions of the Court dating from \textit{Gibbon v. Ogdens}\textsuperscript{65} in 1824. The dissenting opinion declared that "nothing in the tenth amendment constitutes a limitation on congressional exercise of powers delegated by the constitution to Congress."\textsuperscript{66} The court's decision, therefore, was viewed as "patently in deroga-
tion of the sovereign power of the nation to regulate interstate commerce."67 Further, Mr. Justice Brennan asserted: "It is unacceptable that the judicial process should be thought superior to the political process in this area. Under the constitution the judiciary has no role to play beyond finding that Congress has not made an unreasonable legislative judgment respecting what is commerce."68 He characterized the plurality's opinion as a "transparent cover for invalidating a congressional judgment with which they [the majority] disagree."69

Mr. Justice Stevens, in a separate dissent,70 viewed the legislative enactment at issue as "a policy issue which has been firmly resolved by the branches of government having power to decide such questions."71 He noted there was no disagreement that the power over the labor market which Congress possesses embraced public employees. "[S]ince I am unable to identify a limitation upon that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible,"72 Mr. Justice Stevens declared that he was persuaded this statute was valid.

Therefore, in an attempt to characterize the test applied by the Court in *League of Cities*, one can look to Mr. Justice Brennan's dissent. He felt the test the court applied was an "essential-function test,"73 but he recognized that Mr. Justice Blackmun's concurrence converts the decision to a balancing approach.74 Indeed, lower federal courts, considering equal pay and age discrimination effects of the decision, view the *League of Cities* decision as adopting a balancing approach along the less intrusive lines of *Fry*.75

Nevertheless, *League of Cities* clearly established that the federal interest in minimum wage-maximum hour coverage for public employees was not great enough there to outweigh the tenth amendment protection of the state's authority to make its own choices on the wages and hours of state employees. The

67. Id. at 872.
68. Id. at 876.
69. Id. at 887.
70. Id. at 880-81.
71. Id. at 881.
72. Id. See also Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1977). "In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment . . . ." (Stevens, J., concurring).
73. Id. at 875, 879-80.
74. Id. at 876, 880.
75. See notes 50,51 supra.
FLSA amendments were held to threaten "the States' 'ability to function effectively in a federal system'." As analyzed by Mr. Justice Rehnquist, the threatening features of the FLSA amendments were (1) financial burden and (2) interference with the decisionmaking power of the states.

The financial burden upon the state and local governments appears to be only a factor in the analysis. The *League of Cities* Court cited one illustration of federal action—prohibiting a state from moving its state capital—which could theoretically reduce the financial burden but would still be struck down. The concern expressed is to avoid financial burdens which would foreclose state options.

The operative words of the Court's decision concern regulations which have the effect of direct displacement of essential decisions and of denial of state policy choices in areas of traditional governmental functions. These conclusions reach to the state's freedom of choice in policy decisions, which would include the substantive terms of state employment. The basic defect of the 1974 FLSA amendments, then, was not that they reached to the state employment relationship but that they reached that relationship in a manner which impermissibly impaired the states' authority to determine the wages and hours of their own employees.

The Court did not say in *League of Cities* that Congress has no authority under the commerce power to regulate the state employer-employee relationship. Instead, it held that the authority which Congress has is subject to limitation by other sections of the constitution. In *League of Cities*, the tenth amendment was an affirmative limitation upon commerce power legislation which impaired the ability of the states to function effectively in a federal system. Mr. Justice Blackmun, as the fifth and controlling member of the majority, interpreted the Court's opinion as adopting a balancing test to assess the impairment of state decision-making authority. In the balance, direct federal displacement of state determination of the sub-

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76. 426 U.S. at 852 (quoting Fry v. U.S., 421 U.S. 542, 547 n.7 (1975)).
77. Id. at 846-51.
78. Id. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).
79. Id. at 852.
80. Id. at 855.
81. Id. at 853.
82. Id. at 852.
83. The four Justices in the minority did not see the tenth amendment as an affirmative limitation on the commerce power. Id. at 862, 881.
84. Id. at 856.
stantive terms of employment would weigh against the constitutionality of the statute.

**SOURCES OF CONGRESSIONAL AUTHORITY FOR A COLLECTIVE BARGAINING STATUTE**

**IS THE COMMERCE POWER A VIABLE OPTION**

The undercurrent of the dissenting opinions in *League of Cities* was that the Court's opinion was result-oriented, in that it applied personal judgment rather than judicial tests of constitutionality. A similar thread of thought may be extracted from Mr. Justice Blackmun's separate concurrence. He concluded: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach..." The fact that he felt it necessary to so qualify his interpretation of the Court's opinion shows uncertainty as to just what test the Court did apply. An inference can be drawn from such uncertainty that the Court applied something other than a judicial test to the case. If this characterization of the Court's opinion as a result-motivated decision is correct, there is a strong indication in the opinion that any federal enactment which impacts upon the integral structural and traditional governmental facets of the state employment relationship will be invalidated by the present Court.

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85. It will be assumed for the purposes of this article that collective bargaining is defined as practiced in the private sector under the National Labor Relations Act, 29 U.S.C. 141-200 (1970). Section 7 of the NLRA guarantees a threefold right to private sector employees: 1) the freedom to form, join, or assist labor organizations; 2) the freedom to bargain collectively with the employer, which means to bargain through the union; and 3) the right to engage in concerted activities, i.e., strikes and picketing for the purpose of wielding collective power. *Id.* § 157.

The other provisions of the NLRA are concerned with the implementation and enforcement of § 7 rights. These provisions concern such matters as the right to choose a bargaining representative and impartial representation election procedures, the appropriate uniting of employees for representation election and bargaining purposes, the majority rule principle and exclusive representation, unfair labor practices by management and by labor, the duty to bargain, mechanisms for dispute resolution, and impartial enforcement. *Id.* §§ 158-174 (1970).

86. Mr. Justice Brennan stated in his dissent, in which Messrs. Justice White and Marshall joined, that "today's repudiation of this unbroken line of precedents that firmly reject my brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree." 426 U.S. at 867. *See also* Mr. Justice Steven's dissent, *Id.* at 881, wherein he stated: "Since I am unable to identify a limitation upon that federal power (commerce) that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid."

87. *Id.* at 886.
insofar as Congress relies upon the commerce power for its legislative authority.

It nonetheless appears that the better view is one of permissive intrusion upon the state employer-employee relationship in ways which would not displace the ultimate authority of the states to determine wages, hours, and other substantive terms and conditions of employment for state employees. It is this kind of balancing test, similar to the Court's opinion in *League of Cities*, which will be applied in this article to analyze the constitutionality of a collective bargaining statute under the commerce power. It is felt that to this extent, the commerce power remains a viable option for enactment of such legislation by congress.

There is a valid federal interest in a collective bargaining statute for state and local government employees. The effect of state and local government spending in interstate commerce is substantial. federal action to minimize the labor unrest among public employees impeding the flow of interstate commerce would be as appropriate for this purpose as it was under the National Labor Relations Act (NLRA). Additionally, the Supreme Court has implicitly acknowledged in *Fry* and *League of Cities* that Congress' power over the labor market incorporates state and local government employment.

Since collective bargaining is essentially a procedural mechanism, there is the potential to draft legislation which would establish procedures for decisionmaking in labor relations which do not deprive the states of the ultimate authority to determine the substantive terms of employment for their employees. Such legislation arguably would be sufficiently unintrusive to meet the balancing test of *League of Cities*. The

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88. *See* text at note 31 supra.
90. 426 U.S. at 840-45. *See also* Mr. Justice Steven's dissent wherein he stated: "There is no dissent from the proposition that the Federal Government's power over the labor market is adequate to embrace these employees." *Id.* at 881.
states' "separate and independent existence" would not be threatened by such legislation, nor would "the States' ability to function effectively in a federal system" be impaired.

The purpose of legislation guaranteeing collective bargaining rights, such as the NLRA, is not to compel agreements between employer and employee on wages, hours, and other substantive terms of employment. The purpose is to encourage the making of voluntary agreements by protecting the employees' right to organize and by imposing on labor and management the mutual obligation to bargain collectively. Federal collective bargaining legislation for public employees would seek not to regulate the substantive terms and conditions of employment, but rather to encourage public management and public labor to "establish mutually satisfactory conditions." The legislation, thus, would not impose a federal decision, for example, as to what specific amount the state would pay its employees as wages. It would impose a federal decision which would govern the process of reaching that determination on wages when, but only when, the employees had by democratic process determined that they wished to deal with their employer collectively rather than individually on such matters as wages. Thus, such a statute might meet the standards of League of Cities.

The contrary argument is that by enacting such legislation, Congress is foreclosing the state's choice of decisionmaking procedures governing its labor relations with its employees and that such denial of choice is too intrusive on state sovereignty. Further, forced state acceptance of a federally mandated procedure for decisionmaking, it can be argued, may have a coercive influence on the state's decisionmaking on substantive terms. For example, while not compelled to accept an employee proposal, the state employer would be compelled to bargain over that proposal and, in doing so, would be faced with a practical

91. Id. at 851 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).
92. Id. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).
93. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-02 (1952); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); "The act does not compel... any agreement whatever... [F]ree opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel." Id. at 45. See 29 U.S.C. § 151 (1970) (findings and declarations of policy of NLRA); Id. § 158(d) (the obligation to bargain "does not compel either party, to agree to a proposal or require the making of a concession"). See also H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). The federal government may not compel employer acceptance of a proposal even though "the employer was trying effectively to destroy the union by refusing to agree to what the union may have considered its most important demand." Id. at 109.
choice between accepting the proposal in whole or part or facing employee counteraction of one nature or another.

Certain factors incorporated into private sector collective bargaining under the NLRA, when applied to public sector collective bargaining, would impact greatly upon ultimate state decisionmaking authority. One such factor, the right to strike, would, if incorporated in the public employee legislation, grant public employees the power to halt the operations of government. That power is more intrusive than the federal establishment of minimum wages and maximum hours. It allows not merely for displacement of state choice but for a complete halt in essential governmental functions. A second factor would be the effect of preemption of existing state statutes and of future state statutes covering subject matter which falls within the mandatory scope of the federal collective bargaining statute. Other aspects of a federal law could seriously interfere with state plenary authority—union security and exclusive representation, to name two. This article will concentrate on the right to strike and preemption, since they represent extremes sufficiently illustrative to analyze the paramount constitutional issues presented. These two features of collective bargaining as practiced under the NLRA are sufficiently intrusive to be held invalid under League of Cities and will require modification to come within Congressional authority.

The Right to Strike

One means of resolving the constitutionality of the right to strike would be not to include the guarantee of the right to strike in the legislation. While probably unacceptable to those pressing employee interests, this approach would at least not impair, through federal preemption, those state statutes already affording the right to strike in one manner or another. Alternatively, enactment of relatively toothless legislation which prohibited the right to strike and did not provide for an alternative means of impasse resolution, such as binding arbitration, would raise the threat of federal preemption of state statutes affording the right to strike. 95

The more viable option for public employees, who are as insistent as their private sector counterparts on having some form of leverage in bargaining and representational disputes, would be to frame the right to strike as a matter of state choice.

95. See notes 23-26 and accompanying text supra.
so as to obviate direct federal displacement of state decision-making. Framing the issue as a matter of state choice can be achieved in at least two ways. One is to make no guarantees of the right to strike in the legislation but to include a provision which would leave a state free to grant this right to its employees, if it chose to do so. The second would be to include the right to strike in the legislation, but also provide that the right could be prohibited or restricted by state statute. This provision would be analogous to that provided under the NLRA for union security arrangements. This approach avoids the direct displacement of decisionmaking found unacceptable in League of Cities. While it technically permits federal legislative intrusion, it provides for state statutory avoidance of that intrusion.

Similar analysis and options would apply to a provision for binding arbitration as a means of resolving collective bargaining impasses. The major intrusion presented by binding arbitration is final decisionmaking by a third party, raising the prospect of a state challenge of unlawful delegation of state authority. However, state courts have rejected such challenges. A provision for binding arbitration would arguably be permissible to the extent it left some freedom of choice to the state.

Preemption of State Statutes Governing Terms and Conditions of Employment

In recognition of private sector-public sector distinctions, legislative proposals prior to the League of Cities decision would have added to the basic NLRA approach to collective bargaining a provision to soften the preemptive effect of federal legislation upon state statutes which would establish substantive terms and conditions of employment (for example, retirement programs). The provision would have protected statutes existing at the time of enactment of federal legislation but subsequently enacted statutes would have had force only as


minimum standards for terms and conditions of employment. But the "minimum standards" limitation would probably be unconstitutional under the *League of Cities* decision, since it directly impairs the right of the states statutorily to establish substantive terms and conditions of employment. Inclusion of such a provision would weigh against constitutionality.

**Financial Impact**

Financial impact, which the Court in *League of Cities* indicated would be at least a factor in the balance on commerce power legislation, is minimized or neutralized by two elements of the legislation as thus far outlined: (1) the fact that any costs generated by the bargaining agreement of necessity require the consent of the state; and (2) the fact the states could, if they chose to do so, remove from the bargaining environment the employee's principal means of pressuring for agreement—the right to strike. The collective bargaining procedure itself would generate some costs (clerical and legal expenses) but these would be minimal and easily incorporated into day-to-day general administrative expenses. They could hardly be held to impair the states' ability to function. Proposed legislation which provided for federal assumption of the administration and related costs, such as through the National Labor Relations Board or an equivalent federal agency, would further obviate the direct financial impact upon the states of federally mandated bargaining.99

**The Spending Clause As An Independent Or Supplementary Authority For Bargaining Legislation**

One manner in which Congress exercises its spending power "to provide for . . . the general welfare"100 is through federal grants of aid to states and their political subdivisions. Those grants, which Mr. Justice Brennan noted in *League of Cities* will exceed $60 billion in 1977,101 are often conditioned upon state compliance with federally established standards. Therefore, Congress could, as a condition of giving grants-in-aid, require compliance with federally stipulated standards of labor relations.

Consideration of the spending power as authority for enactment of public employee collective bargaining legislation is

99. *See* notes 3, 32 *supra* for a list of proposed legislation.
100. U.S. CONST. art 1, § 8, cl. 1.
101. 426 U.S. at 878 (Brennan, J., dissenting).
prompted by two references in the *League of Cities* decision: (1) Mr. Justice Rehnquist's footnote that the Court was not deciding congressional authority to regulate state employee wages and hours under the spending power;\(^1\)\(^2\) and (2) Mr. Justice Brennan's suggestion in his dissent that Congress might consider such an alternative.\(^1\)\(^3\) It is an attractive option because Congress traditionally has exercised broad authority under the spending power.\(^1\)\(^4\) The Supreme Court has consistently held that Congress "does have the power to fix the terms upon which its money allotments to states shall be disbursed".\(^1\)\(^5\) Rather than the direct displacement of states' decisionmaking authority, a conditioned federal grant merely offers federal benefits to a state dependent upon cooperation by the state with the federal plans.\(^1\)\(^6\) Significantly, the tenth amendment has been held not to forbid the proper exercise of this power.\(^1\)\(^7\) Accordingly, the spending power has often been used to apply labor standards to state and local governments.\(^1\)\(^8\) Most recently, the spending power has been relied upon to bar wage increases in New York City employee labor contracts as a condition of receiving federal aid to alleviate a municipal fiscal crisis.\(^1\)\(^9\)

The theory used to impose federal standards upon the states through the spending power is that the states are not required to take the federal aid; they have a choice. However much that freedom of choice may have become illusory, as state and local government dependency on federal aid has grown, the United States Supreme Court has adhered to the premise that the states

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\(^{102}\) Id. at 852 n.17.
\(^{103}\) Id. at 880.
\(^{106}\) Id. at 143-44.
\(^{107}\) Id. at 143. Congress may, with regard to the tenth amendment, "resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." Id. (quoting from United States v. Darby, 312 U.S. 100 (1941)).
freely choose to apply for and accept such funds and the accompanying standards.110

Achieving collective bargaining spending power legislation would require an across-the-board application of federally established labor standards to all federal grant programs to the states and their political subdivisions. The Hatch Act,111 upheld against state challenge in *Oklahoma v. Civil Service Comm’n*,112 was a similar across-the-board application of federal standards. It barred active participation in political management or campaigns by any state officer or employee whose principal employment is in connection with any activity which is financed in whole or in part by federal funds.113 The United States Supreme Court rejected the state’s argument that the coercive effect of the authorization to withhold sums allocated to a state was an interference with the reserved powers of the state.114 Indeed, the Court found the federal action valid in the face of the tenth amendment, even though it did constitute a federal intrusion “upon certain activities within the state.”115 The Hatch Act applied an across-the-board employment condition to federal grants; this condition was found to be “appropriate and plainly adapted” to achieve its end of better public service.116 Federal legislation establishing across-the-board labor standards incorporating collective bargaining could similarly be “appropriate and plainly adapted” to achieve the ends of reduction of labor strife and of increased effectiveness of state employment relations in a manner facilitating achievement of the purposes for which the federal grants were provided.

Reliance upon the spending power could produce some difficult problems of legislative draftsmanship. However, it does appear feasible. An appropriate statutory vehicle might be an across-the-board aid program such as revenue sharing funds117 which filter extensively throughout the operations of recipient states and their political subdivisions. Another likely candidate, which affords a pervasive reach through state and local govern-

110. “The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare is not unusual.” *Oklahoma v. Civil Service Comm’n* 330 U.S. 127, 144 (1947).
114. 330 U.S. at 142.
115. *Id.*
116. *Id.* (quoting from *United States v. Darby*, 312 U.S. 100 (1941)).
ment personnel operations, is the Intergovernmental Personnel Act (IPA).^{118}

Areas of legislative action which would require careful attention under *League of Cities* are: (1) financial burden upon the states; (2) findings of substantial national interests and (3) the essentiality of compliance by each state.

One answer to the objection of the financial burden upon the states to adhere to federal standards (meaning administrative costs rather than cost increases which might be voluntarily agreed to through the bargaining process)^{119} would be federal absorption in one manner or another of necessary administrative and related costs. Such action would counter any argument of displacement state choice made along the lines of the displacement the Court found in minimum wage and hour standards under *League of Cities*.

The Supreme Court can be expected to carefully assess the effect of the legislation on the states' ability to function effectively in a federal system. For that reason, it would be prudent to document carefully a congressional finding that the federally established labor standards were necessary to *increase* the ability of the states to function effectively in a federal system. The same reasoning is applicable to a showing of the necessity of compliance by all the states. Both findings appear reasonable within the context of the large and expanding number of state and local government employees, the substantial economic impact of state and local government payrolls, the increasing assertion of rights to unionization, and the rising and extensive labor strife present among state and local government employees.

While the spending power can be distinguished from the commerce power in that legislation enacted under it would not directly displace a state's freedom of choice, as was found unacceptable in *League of Cities*, Congress would still be acting under a delegated power found in article I of the Constitution, as is the commerce power. If the tenth amendment is an affirmative limitation upon the delegated commerce power, as the

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^{118} 42 U.S.C. §§ 4701, 4772 (1970). Congressional findings and declaration of policy, § 4701, state, in part: "Effective State and local government institutions are essential in the maintenance and development of the Federal system..."; "a national interest exists in a high caliber of public service in State and local governments..."; and "public service at all levels of government can be improved by the development of systems of personnel administration...".

^{119} See text at notes 99 *supra*. 
Court held in *League of Cities*,\(^{120}\) it follows that it is also a limitation upon the delegated spending power. If it is, the limitation may be overcome by the element of free choice left to the states in imposition of standards through federal grants. However, the Court could find the exercise of the spending power to impose labor relations standards an improper exercise of authority threatening the separate and independent existence of the states in the federal system. The *League of Cities* decision offers guidance only to this extent: 1) the issue was not decided in that case; and 2) the element of free choice left to the states would seem to weigh the balance in favor of such exercise of authority.\(^{121}\)

\(^{120}\) *See* text at note 46 *supra*.

\(^{121}\) The issue may be clarified in a legal challenge to be filed in United States District Court by the National Institute of Municipal Law Officers (NIMLO) on behalf of Los Angeles County and 1,200 other jurisdictions (including the state of Nebraska).

The NIMLO suit challenges the constitutionality of the 1976 amendments to the Federal Unemployment Tax Act, Pub. L. No. 94-566, which extended unemployment compensation benefits to most employees of state and local governments. Under the amendments, state and local governments which choose to participate in the program assumed, as of January 1, 1978, the financing of employment benefits for their former employees, as is now required of private employers. States failing to enact conforming legislation would lose the federal benefits now enjoyed because of their participation in the program as it affects private employees. That would mean the loss of a tax credit to private employers within the state for their contributions to unemployment insurance, assumption by state treasuries of the expenses of administering the State unemployment compensation law, and an end to federal reimbursement of one half of extended benefits paid to claimants from the 27th through 39th weeks of unemployment.

The plaintiffs in the NIMLO case rely on *League of Cities* and argue the amendments enacted under Congress' spending and taxing powers violate the tenth amendment because they infringe upon state sovereignty. The suit argues that the states are coerced into accepting the program, that there is no real state choice, only an illusory one. While the factual pattern of these amendments is somewhat analogous to the Fair Labor Standards Act (FLSA) amendments struck down in *League of Cities*, the unemployment compensation amendments can be distinguished by their nonmandatory nature. The state is not required to participate in the federal program. There is the option of not participating.

An initial test of court reaction to the suit, an action for a preliminary injunction to prevent the government from implementing the amendments, was unsuccessful. County of Los Angeles v. Marshall D.D.C. Judge Charles Richey of the United States District Court for the District of Columbia denied the motion, finding, in part, that it is unlikely the plaintiffs will prevail on the merits in light of *Steward Machine Co. v. Davis*, 301 U.S. 548 (1936). *League of Cities* was found to be distinguishable: "The regulations there were mandatory on the states; here, the imposition of an unemployment compensation scheme is at the option of the state . . . . Furthermore, the Court there stressed several times that the challenged regulations directly displaced the state's freedom to structure its operations. Thus, legislation that allows the state a choice—to avoid
The Enforcement Section of the Fourteenth Amendment

The League of Cities' majority relied on the state sovereignty limitations of the tenth amendment upon congressional action under the delegated commerce power. A source of congressional authority not subject to such a limitation is the enforcement power under section five of the fourteenth amendment.

The Supreme Court has held that enforcement of the prohibitions of the fourteenth amendment "is no invasion of state sovereignty" and "the Constitution now expressly gives authority for Congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete."123

The present Supreme Court upheld this position in Fitzpatrick v. Bitzer,124 which was decided four days after League of Cities. The Bitzer case involved an eleventh amendment state sovereignty challenge but the constitutional principles are analogous to state sovereignty claims under the tenth amendment. Mr. Justice Rehnquist, who presented the opinion of the Court in Bitzer, as he had in League of Cities, asserted: "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."125

enacting a scheme that may interfere with its sovereignty—does not directly interfere with a state's sovereignty and is not in violation of the tenth amendment. In fact, the 1976 amendments are supportive of the tenth amendment by allowing the states a choice and, thereby, preserving the independence of the state's decision" (emphasis added). The plaintiff's charge of coercion and illusory choice was rejected as being the same argument rejected by the Supreme Court in Steward. Judge Richey noted one limitation Steward placed upon the latitude of Congress to fix the terms upon which its money allotments and tax credits may be conditioned. The condition must be within the power of Congress. He found it within the power of Congress "to attempt to deal with the problems of unemployment by inducing the states to extend unemployment compensation to public employees."

Judge Richey also expressed the view that the court may not even have jurisdiction over the suit, since the federal Anti-Injunction Act does not permit suits to restrain the assessment or collection of a tax.

122. 426 U.S. at 852.
125. Id. at 456.
Reviewing cases assessing the intent of the amendment and its effect on the federal-state balance, Mr. Justice Rehnquist observed:

There can be no doubt that this line of cases has sanctioned intrusions by Congress... into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' power—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments...\textsuperscript{126}

The state sovereignty limitations placed upon congressional authority under \textit{League of Cities} would thus not apply to congressional action under section five of the fourteenth amendment.\textsuperscript{127} With a view toward assessment of the present Supreme Court's posture on federal regulation of state employment practices, it is significant that "the regulations which have been enforced have dealt with federal policy decisions designed to guarantee constitutional rights protected by the Fourteenth Amendment."\textsuperscript{128}

While the fourteenth amendment's enlargement of Congressional power at the expense of state sovereignty makes it a desirable source of congressional authority for enactment of federal collective bargaining legislation for public employees, it still remains to bring the subject matter of collective bargaining within the grant of that congressional power.

First amendment rights are incorporated into the fourteenth amendment.\textsuperscript{129} Thus, Congress may enforce first amendment rights through its fourteenth amendment powers. The federal courts have held that state and local government employees have the constitutional right derived from first amendment rights of association, assembly, speech, and petition, to form and join a union and select representatives for the purpose of collective bargaining.\textsuperscript{130} The United States Supreme Court has

\begin{enumerate}
\item Id. at 455-56.
\item See Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976).
\item Lontine v. Van Cleave, 483 F.2d 966, 967-68 (10th Cir. 1973); Orr v. Thorpe, 427 F.2d 1129, 1130-31 (5th Cir. 1970); AFSCME v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 396 F.2d 287, 288 (7th Cir. 1968); United Fed'n of Postal Clerks v. Blount, 325 F.Supp. 878, 883 (D.D.C. 1971)
\end{enumerate}
characterized "the right to organize and select representatives for lawful purposes of collective bargaining . . . as a 'fundamental right' . . . "\(^{131}\)

However, the federal courts have not gone so far as to afford the same constitutional protection for the right of public employees to actually engage in collective bargaining. The Seventh Circuit Court of Appeals has recognized that collective bargaining could be held a "necessary adjunct" to the right to organize and select representatives for bargaining.\(^{132}\) Still, many federal courts have found "no constitutional right to make collective bargaining [by the employer] mandatory."\(^{133}\)

Congressional authority under the fourteenth amendment to impose federally established labor standards upon the states would be clear if the courts were to hold that the fundamental right of public employees to self-organization extended to requiring the public employer to enter into collective bargaining with employee representatives. Congress could thus clearly find collective bargaining a constitutionally protected right embraced by the fourteenth amendment and enact appropriate legislation to protect that right. However, congressional authority to act in this manner would be less clear were the courts to hold that public employee rights under the first and fourteenth amendments did not extend that far.

Despite such a finding by the courts, it would not necessarily prohibit congressional action. Congressional authority under the fourteenth amendment's enforcement section has been broadly construed as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees


\(^{132}\) Confederation of Police v. City of Chicago, 519 F.2d 89, 93 (7th Cir. 1976).

of the Fourteenth Amendment." In Katzenbach v. Morgan, the United States Supreme Court applied a rationality test in assessing congressional authority to act under section five of the fourteenth amendment: "It is enough that we perceive a basis upon which Congress might predicate a judgment." Mr. Justice Harlan dissented in Morgan. His dissent, in which Mr. Justice Stewart joined, focused on that element of Mr. Justice Brennan's majority opinion which suggested a congressional power to define the substantive scope of the amendment and to go beyond the limits of judicial interpretation of the amendment. He insisted that "it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all." Further, he insisted, Congress must provide a legislative record justifying its findings.

In Oregon v. Mitchell, the Court, with a somewhat changed membership, upheld a Morgan-like broad construal of section five powers but was widely split in its views. Mr. Justice Black attracted no support from the other justices for his dissenting view that when federal legislation intervened in an area reserved to the states, congressional action must be tied more closely to the original intent of the fourteenth amendment, that is, to ban racial discrimination. Mr. Justice Stewart, joined by Mr. Chief Justice Burger and Mr. Justice Blackmun, concurred in part and dissented in part. While conceding that Congress could, under section five, override state laws violative of the fourteenth amendment even though a court in an individual lawsuit might not have reached the same factual conclusion, Mr. Justice Stewart asserted that this did not mean that "Congress has the power not only to provide the means of eradicating situations that amount to a violation... but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause..." The congressional in-

135. 384 U.S. at 656.
136. Id. at 666.
137. Id. at 670-71.
139. Id. at 130.
140. Id. at 296.
interpretation, he intimated, must be consistent with judicial standards.  

Of the Justices in the Morgan majority and the Oregon plurality, only Messrs. Justices Brennan, Marshall, and White remain on the bench. It is not without significance that Mr. Justice Rehnquist in Fitzpatrick v. Bitzer, 142 although directly addressing the congressional enforcement power under the fourteenth amendment, chose to ignore any reference to Morgan and Oregon, 143 although Messrs. Justices Brennan and Stevens found cause for doing so in their separate concurrences. 144 Mr. Justice Rehnquist relied upon Ex Parte Virginia 145 and South Carolina v. Katzenbach, 146 both of which, nonetheless, afford support for a broad construal of the enforcement power of Congress. The Court in South Carolina, 147 addressing the issue of congressional versus court authority, expressed the view that “the Framers indicated that Congress was to be chiefly responsible for implementing the rights. . . . Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition. . . .” 148 Ex Parte Virginia contemplated an equally broad congressional role. 149 In South Carolina the Court noted two cases in which Congress had been found to have unconstitutionally exercised its enforcement powers under the fifteenth amendment, which are analogous to enforcement powers under the fourteenth amendment. 150

The exercise of discretionary authority by Congress, such as that upheld in the forementioned cases, is consistent with the principle that the political process is best for the resolution of federalism questions. 151 It also falls within the apparent contemplation of federal courts ruling on the collective bargaining rights of public employees. As noted previously, some federal courts have found no constitutional right to collective bargain-

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141. Id. at 296 (referring to his concurrence with Mr. Justice Harlan’s dissent, Katzenbach v. Morgan, 384 U.S. 641 (1966)).
143. Id.
144. Id. at 458.
145. 100 U.S. 339 (1879).
146. 383 U.S. 301 (1966).
147. Mr. Justice Stewart joined the eight-member majority.
148. Id. at 326.
149. 100 U.S. at 345.
150. 383 U.S. at 326. See James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1875). Both cases concerned statutory construction of penal statutes which are to be construed strictly.
ing. Each of the federal courts which held against a constitutional right to collective bargaining has drawn support from the opinion of the three-judge court in *Atkins v. City of Charlotte*, which said: "The right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution." The very fact that the concept of a collective bargaining agreement is so deeply imbedded in the American concept of unionization makes easier a congressional finding that it is a necessary element in safeguarding employee first amendment rights.

Other federal courts have suggested that while public employers are not required to hold good faith bargaining sessions or to reach agreement with their employees, they may be required to listen to the presentation of employee demands and grievances. These judicial suggestions add weight to the arguments in favor of such congressional action, in that they infer some duty on the part of the public employer to respond to employee representatives. However, these suggestions speak even more convincingly to congressional enactment of something less than full collective bargaining for state employees as an appropriate exercise of fourteenth amendment power. Such legislation at the state level, typically referred to as "meet and confer" legislation, has been regarded unfavorably by employee representatives, since it does little to alter the unilateral authority of the public employer over wages, hours, and working conditions. The employers are obligated to meet and confer with employee representatives—but no more than that. There is no requirement of good faith bargaining, nor of reaching agreement, if possible, as is required of private sector employers by the NLRA.

In finding that the right to collective bargaining was necessary to effectively protect the right to organize for the purpose of collective bargaining, Congress could find support in judicial opinions on comparable questions of private sector labor relations at a similar period in private sector union development:

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152. *See cases cited at note 133 supra.*
154. *Id.* at 1077.
Congress was not required to ignore this right of the employees ("to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work") but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.\textsuperscript{157}

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. \textit{Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.}\textsuperscript{158}

The validity of such an analogy between the public and private sector labor experience is supported by Mr. Justice Stewart's opinion for the court in a recent Supreme Court decision which held the exclusive representation principle in the public sector constitutionally valid: "The differences between public and private sector collective bargaining simply do not translate into differences in First Amendment rights. . . . 'No special dimension results from the fact that a union represents public rather than private employers'."\textsuperscript{159}

With regard to the concerns some federal courts have expressed about making collective bargaining by the employer mandatory,\textsuperscript{160} it is worth recalling at this point that while the federally established labor standards contemplated would potentially compel bargaining by the state with their employees, bargaining would be mandated only where the employees had gone through prescribed democratic procedures to select bargaining representatives. Even then, as noted in the earlier discussion of the commerce power,\textsuperscript{161} the public employer would not be compelled to agree to employee demands. Congress would be mandating only a process of resolving conflicts created by the vigorous competing assertions of employee rights and employer sovereignty. Rather than mandating specif-

\textsuperscript{158} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (emphasis added).
\textsuperscript{159} Abood v. Detroit Bd. of Educ., 45 L.W. 4473, 4479 (1977) (quoting H. Wellington & R. Winter, The Unions and the Cities 95-96 (1971)).
\textsuperscript{160} See cases cited at note 133 supra.
\textsuperscript{161} See text at note 93 supra.
ic decisions, Congress would be mandating a process of decisionmaking. To the extent the state's discharge of ordinary functions would be altered, it would be altered by freely bargained choice rather than congressional mandate.

It is not clear that congressional action to establish collective bargaining rights is constitutionally required. It is clear from the case law that Congress has a broad discretionary authority within which to act to safeguard rights guaranteed by the fourteenth amendment. In this contest, it would not be an unreasonable judgment by Congress that the public employee right of self-organization for the purpose of collective bargaining is a hollow right if not accompanied by the right actually to engage their employers in bargaining. Nor would it be an unreasonable judgment by Congress that it was in the interests of national policy to take action to safeguard the unionization rights of public employees in a manner which could contribute to appropriate congressional concerns for labor strife in interstate commerce and for efficient and competent performance in the public service.

CONCLUSION

Less than twenty years ago, state and local government employees were not a major factor in interstate commerce. They were not a major portion of the work force and only a handful were unionized. Accordingly, there was little state law governing the nature of the employer-employee relationship. The law which did exist was prohibitive of bilateral relationships such as collective bargaining. However, the conditions have changed. The number of public employees has mushroomed and they are a major factor in the work force and interstate commerce.

By virtually any measure the conditions pose a problem national in scope and require a national solution. Congressional interest in the problem shows a willingness to act. However, the United States Supreme Court's decision in *League of Cities* has raised serious questions as to the Court's willingness to approve such congressional action.

Substantial congressional authority to act to regulate the state employment relationship is embraced by the commerce clause, the spending clause, and the enforcement clause of the fourteenth amendment. Room remains under the commerce clause to permit Congress to draft and enact collective bargaining legislation which would appear to meet the requirements of the League of Cities decision on federal intrusion. However, as
the dissenting opinions illustrate, there is uncertainty as to the nature of the test applied by the Court and as to the Court's motivation in its decision. Existing case law supports congressional action under the spending clause. However, that seemed to be the case with the commerce clause prior to *League of Cities*. Congressional action to impose collective bargaining legislation under the fourteenth amendment's enforcement section would fall in a largely uncharted area of law. Substantial congressional discretion exists to find action necessary to safeguard other clearly defined rights. However, Court approval would appear to hinge on adherence to the dictum in *Katzenbach v. Morgan* on broad congressional discretion, a result which seems questionable before the Court as presently constituted.

If proponents of federal legislation to afford collective bargaining rights to state and local government employees were determined to rely on but one source of congressional authority, the spending clause offers the best choice. It would be wiser to bring to bear in the legislation all the authority available to the Congress, drawing from the commerce power, the spending power, and section five of the fourteenth amendment. Appropriate integration of these congressional powers would require careful, but not magical, legislative draftsmanship. Such legislation, properly buttressed with demonstrative evidence to produce findings and determinations of the need for national policy relative to the burden upon interstate commerce, the need for better public service, and unfettered exercise of employee rights, would appear to be constitutionally supportable.

*John Hein—'78*