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Public Employee Labor Relations in the Southeast-An Historical Perspective

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PUBLIC EMPLOYEE LABOR RELATIONS IN THE SOUTHEAST—AN HISTORICAL PERSPECTIVE

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Although the rights of public employees to organize and bargain collectively have increased significantly in many states, the southeastern states have been reluctant to join this expansion. In this Article, Dean Beaird surveys the public sector labor policies of the southeastern states and then examines the prospects for federal regulation of public employee labor relations. The drive for federal regulation of this area of labor law received a severe setback in National League of Cities v. Usery. *After carefully examining this important decision and its background, Dean Beaird concludes that Congress lacks the authority under either the commerce clause, the spending power, or the fourteenth amendment to enact comprehensive legislation governing public sector labor relations. Therefore, the onus is upon the states to enact this needed legislation.*

I. INTRODUCTION

As recently as a decade ago, a well-known authority in the field of public employee labor relations stated that "[i]f state and local governments don't act quickly to provide the machinery for the resolution of employer-employee relation disputes in their locality, the Federal Government will do so."[1] In *National League of Cities v. Usery*,[2] however, the Supreme Court seems to have dealt a severe blow to the cause of federal uniformity in this area by reserving to the states the right to determine policy and maintain control over certain employment conditions for those employees engaged in essential government functions.[3] State legislation governing the labor relations of state and local government employees prior to *National League* was inconsistent at best, and states have not responded substantially to the growing need for development of labor policies governing these groups. The time has come for states to exer-

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1. Anderson, *Overview of Collective Bargaining in the Public Sector*, in NAT'L INST. OF MUN. L. OFFICERS, REP. NO. 153, LABOR UNIONS AND MUNICIPALITIES 47, 50 (1968).

2. 426 U.S. 833 (1976).

3. *Id.* at 852. *See* Weil & Manas, *Can a Federal Collective Bargaining Statute for Public Employees Meet the Requirements of National League of Cities v. Usery?: A Management Perspective*, 6 J.L. & EDUC. 515, 526 (1977).

cise their authority to establish much-needed policies for state and local government employee labor relations.

This Article will review the prospects for federal or state regulation of employer-employee relations at the state and local government level. After briefly examining the legal status of state and municipal employee labor relations, I will trace the development, or lack thereof, of laws governing these employee groups in the Southeast. I then will explore the historical underpinning of *National League of Cities v. Usery* in an effort to understand the extraordinary character of the Supreme Court's decision that Congress lacks authority under the commerce clause to regulate wages and hours of state employees.[4] Next, examination of the aftermath of *National League* will indicate that prospects for federal regulation of collective bargaining for these groups under either the commerce clause, the spending power, or the fourteenth amendment are bleak.

II. THE STATUS OF PUBLIC EMPLOYEE LABOR RELATIONS LAW

Over 14 million Americans now are employed by federal, state, and local governments,[5] and in recent years these public employees have sought to join unions and employee associations in increasing numbers. Nevertheless, when Congress enacted the National Labor Relations Act in 1935,[6] the rights of employees to organize and bargain collectively were guaranteed only to employees in the private sector;[7] the Act specifically exempted both federal and state government employees.[8] Furthermore, beginning with the Ninety-First Congress and continuing in each succeeding session, numerous bills have been introduced to establish federal jurisdiction over state and local public employee labor-management relations.[9] None, however, has yet passed.[10] Although there have been some efforts to expand federal authority over state and local labor relations through Congressional withdrawal of certain longstanding exemptions from regulation—for example, the 1966[11] and 1974[12] inclusions of state and local governments under the Fair Labor Standards Act of 1938, the 1970[13] and 1976[14] inclusions under the unemployment compensation

4. *See* Weil & Manas, *supra* note 3, at 519.

5. U.S. DEP'T OF LABOR, SUMMARY OF PUBLIC SECTOR LABOR RELATIONS POLICIES v (1976).

6. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1976)).

7. 29 U.S.C. § 152(2) (1976). *See* Comment, *The Right of Public Employees to Unionize*, 40 MISS. L.J. 415 (1969).

8. 29 U.S.C. § 152(2) (1976).

9. *See* Weil & Manas, *supra* note 3, at 516.

10. *Id.*

11. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830 (codified at 29 U.S.C. § 203(d) (1976)).

12. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55 (codified at 29 U.S.C. § 203(d) (1976)).

13. Employment Security Amendments of 1970, Pub. L. No. 91-373, § 104(b)(1), 84 Stat. 695 (codified at 26 U.S.C. § 3309(a)(2) (1976)).

provisions[15] of the Social Security Act of 1935,[16] and the 1972 inclusion[17] under the equal employment guarantees of Title VII of the Civil Rights Act of 1964[18]—such expansion apparently has been slowed by the Supreme Court's ruling in *National League of Cities v. Usery*.[19]

III. DEVELOPMENT OF PUBLIC SECTOR LABOR RELATIONS IN THE SOUTHEAST

Like federal legislation, most state statutes guaranteeing the right to organize and bargain collectively have not been applied to public employees.[20] The first affirmative legislative approach to public employee labor relations did not appear until 1959 when Wisconsin enacted the landmark Municipal Employment Relations Act.[21] Although each state has the authority to establish its own policy and structure for labor relations, only twenty-three states and the District of Columbia have enacted comprehensive statutes concerning all public employees.[22] The legislative response to the growing incidence of public sector organization and collective bargaining in the Southeast has been noticeably deficient. Only Florida has enacted a comprehensive provision covering all public employees.[23] While only North Carolina[24] and Virginia[25] expressly have denied bargaining rights to public employees,[26] most southeastern states have been reluctant to enact more than limited legislation. What follows is a detailed, state-by-state analysis of the status of "public labor" policy in the Southeast, framed in the context of the rights of public employees to organize, collectively bargain, and strike.[27]

Alabama's right to work law has not been applied to state and local em-

14. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(b)(1), 90 Stat. 2667 (codified at 26 U.S.C. § 3309(b)(3) (1976)).

15. 26 U.S.C. § 3309 (1976).

16. Pub. L. No. 74-271, 49 Stat. 620 (codified in scattered sections of 26, 42 U.S.C. and other titles in U.S.C.).

17. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (codified at 42 U.S.C. § 2000e(a) (1976)).

18. 42 U.S.C. § 2000e (1976).

19. *See* Rhyne, *Federal Powers of Regulation*, 30 LABOR L.J. 571 (1979). The expansion of federal regulation of state and local public employee labor relations was not limited to the elimination of earlier established exemptions. In an evolving line of cases the courts have recognized a constitutional right of state and local employees to organize. *See* American Fed'n of State, County and Mun. Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1969); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

20. Beaird, *Labor Relations Policy for Public Employees: A Legal Perspective*, 4 GA. L. REV. 110, 116 (1969).

21. Municipal Employment Relations Act, ch. 509, 1959 Wis. Laws 623 (codified as amended at WIS. STAT. ANN. § 111.70 (Supp. 1969)).

22. U.S. DEP'T OF LABOR, SUMMARY OF PUBLIC SECTOR LABOR RELATIONS POLICIES v (1979) [hereinafter cited as U.S. DEP'T OF LABOR SUMMARY.

23. FLA. STAT. ANN. § 447:201 -:607 (West 1977 & Cum. Supp. 1979).

24. N.C. GEN. STAT. § 95-97 (1975).

25. Teamsters Local 822 v. City of Portsmouth, 423 F. Supp. 954 (E.D. Va. 1975), *aff'd*, 534 F.2d 328 (4th Cir. 1976).

26. U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 65.

27. *See* Beaird, *supra* note 20, at 117.

ployees.[28] Like most southeastern states, Alabama has limited its public labor legislation to two categories of employees, firefighters and teachers, and both groups expressly are permitted to join or refrain from joining unions.[29] Although firefighters are empowered to present proposals,[30] teachers have been granted only consultation rights.[31] Similarly, the firefighters' scope of bargaining encompasses salaries and other conditions of employment,[32] while that of teachers extends only to rules and regulations concerning the conduct and management of the schools.[33] Strikes by public employees are illegal, and public employees cannot bargain with unions without the express constitutional or statutory authority to do so.[34]

Florida is the sole southeastern state to enact comprehensive legislation covering all public employees.[35] Florida's right to work law has been applied to all public employees,[36] and all members of the public sector have the right to form or join any employee organization of their choice.[37] There is a statutory duty to bargain in Florida.[38] Public employees have the right to negotiate collectively through a certified bargaining agent with their employer in the determination of the terms and conditions of their employment.[39] They also have the right to be represented in any adjudication of grievances.[40] Once certified, bargaining agents are permitted to bargain collectively in the determination of wages and hours within the bargaining unit.[41] Like Alabama, Florida expressly prohibits strikes,[42] and extensive penalties may result from work stoppage.[43]

Georgia's right to work law specifically excludes the state and its political subdivisions from coverage.[44] Georgia has limited its public labor legislation to a single group—firefighters.[45] These individuals are granted the right to meet and confer concerning determinations of wages, rates of pay, hours, working conditions, and all other terms and conditions of employment.[46] A

28. ALA. CODE § 27-7-34 (1975). For an in-depth examination of right to work laws in the South, see this symposium, Haggard, *Right to Work Laws in the Southern States*.

29. ALA. CODE §§ 11-43-143(b), 16-8-10, 16-11-18 (1975).

30. *Id.* § 11-43-143(b).

31. *Id.* §§ 16-8-10, -11-18.

32. *Id.* § 11-43-143(b).

33. *Id.* §§ 16-8-10, -11-18.

34. United Steelworkers v. University of Ala., 430 F. Supp. 996 (N.D. Ala. 1977), *aff'd*, 599 F.2d 56 (5th Cir. 1979); Operating Engineers Local 321 v. Water Works Bd., 276 Ala. 462, 163 So. 2d 619 (1964).

35. Act of May 30, 1974, ch. 74-100, 1974 Fla. Laws 134 (codified as amended at FLA. STAT. ANN. § 447.201 -.607. (West. 1977 & Cum. Supp. 1979)).

36. FLA. CONST. art. 1, § 6.

37. FLA. STAT. ANN. § 447.301(1) (West 1977).

38. *Id.* § 447.301(2).

39. *Id.*

40. *Id.*

41. *Id.* § 447.309(1).

42. *Id.* § 447.505.

43. *Id.* § 447.507.

44. GA. CODE ANN. § 54-90 (1974).

45. *Id.* § 54-1304.

46. *Id.*

governmental body cannot enter into a binding contract with a union, and, therefore, collective bargaining contracts between, for example, school boards and unions are void as illegal delegations of policy.[47] In Georgia, state employees are prohibited from promoting, encouraging, or participating in strikes;[48] furthermore, the Georgia judiciary will enforce the mandatory strike penalties of loss of employment plus forfeiture of civil status, job rights, and seniority.[49]

While Kentucky has no statute of general application dealing with public sector labor relations, the state has promulgated a comprehensive set of labor laws for firefighters[50] and police officers.[51] Strangely, although the courts of Kentucky uniformly have held that there is neither a statutory nor a common-law right of public employees to engage in concerted work activities for collective bargaining purposes, the principle of public employee collective bargaining has been upheld.[52] Firefighters and police officers thus have been granted the right to organize and join unions, and their scope of bargaining rights encompasses wages, hours, and terms and conditions of employment.[53] In Kentucky no public employee has the right to strike or engage in other concerted work activities against a public employer.[54]

Although Louisiana's right to work law[55] does apply to state and local government employees, the state does not have a collective bargaining statute for public employees.[56] Police officers, firefighters, and teachers can join unions and engage in collective bargaining with their employers.[57] Nevertheless, Louisiana law does not require collective bargaining with municipal employee unions,[58] and the recognition of unions by state agencies is a policy determination made administratively.[59] Public employees have no statutory right to engage in concerted actions involving refusal to work or other strike-related activities.[60]

Mississippi has no relevant legislation pertaining to employment in the public sector.[61] The state has no collective bargaining statute for public em-

47. Chatham Ass'n of Educators v. Board of Pub. Educ., 231 Ga. 806, 204 S.E.2d 138 (1974).

48. GA. CODE ANN. § 89-1301 (1980). *See* U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 31.

49. *See* GA. CODE ANN. § 89-1303 (1980) (strike penalties listed).

50. KY. REV. STAT. §§ 345.010-130 (1977).

51. *Id.* §§ 78.470-480 (Supp. 1978).

52. Zielke, *Public Sector Labor Law in Kentucky*, 6 N. KY. L. REV. 327, 334 (1979).

53. KY. REV. STAT. § 345.030(1) (1977) (firefighters); *id.* § 78.470-.480 (Supp. 1978) (police).

54. Zielke, *supra* note 52, at 347. *See* Jefferson County Teachers Ass'n v. Jefferson County Bd. of Educ., 463 S.W.2d 627 (Ky. 1970).

55. LA. REV. STAT. ANN. §§ 23:981-987 (West Cum. Supp. 1980).

56. U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 21.

57. *Id.*

58. Beauboeuf v. Delgado College, 303 F. Supp. 861 (E.D. La. 1969), *aff'd*, 428 F.2d 470 (5th Cir. 1970).

59. U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 21.

60. *Id.* at 20.

61. *Id.* at 30.

ployees.[62] The state's right to work law, however, is applicable to all employees other than those under the jurisdiction of the Federal Railway Labor Act.[63]

North Carolina represents the nadir of state legislation implementing public sector organization and collective bargaining.[64] Originally, the public sector was statutorily denied the right to organize, as public employees were prohibited from becoming members of any union that had as its purpose "collective bargaining . . . with respect to grievances, labor disputes, wages or salary, rates of pay, hours of employment, or the conditions of work."[65] In 1969 this statute was declared unconstitutional.[66] Nevertheless, bargaining rights still are prohibited, and all contracts pursuant to bargaining agreements are illegal and void as against public policy.[67] Striking public employees are not protected under the laws of the state.[68]

South Carolina's right to work law arguably could apply to state and local employees.[69] An opinion of the South Carolina Attorney General suggests, however, that the right to work law was not intended to apply to public employees.[70] The state has no collective bargaining statute for public employees.[71] Although South Carolina grants public employees no statutory rights to organize or bargain, there are two statutes that deal with grievance procedures for state[72] and local[73] employment. South Carolina public employees are, as is the norm in the Southeast, prohibited from striking.[74]

Virginia, like North Carolina, denies public employees any bargaining rights.[75] Thus, Virginia has not enacted a collective bargaining statute for public employees,[76] and local governments are precluded from negotiating or entering into binding contracts with public employee organizations.[77] Like South Carolina, Virginia does have several statutes dealing with grievance procedures for state[78] and local[79] employees. Strikes are prohibited, and strik-

62. *Id.*

63. Miss Const., art. 8, § 198-A.

64. For an in-depth examination of the rights of public employees in North Carolina, see this symposium, Comment, *Labor Law: Public Sector Employees and Unions in North Carolina.*

65. N.C. GEN. STAT. § 95-97 (1975).

66. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

67. N.C. GEN. STAT. § 95-98 (1975).

68. *See* U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 49.

69. S.C. CODE § 41-7-10 (1976).

70. 1963-64 Op. Att'y Gen. 298 (1964).

71. U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 49.

72. S.C. CODE §§ 8-17-10 to -17-40 (1976).

73. *Id.* §§ 8-17-110 to -17-160.

74. U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 49.

75. *Id.* at 65. *See* Teamsters Local 822 v. City of Portsmouth, 423 F. Supp. 954 (E.D. Va. 1975), *aff'd*, 534 F.2d 328 (4th Cir. 1976). (Virginia legislature does not recognize union representation of public employees).

76. U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 56.

77. Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

78. VA. CODE § 2.1-114.5:1 (1979). *See* U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 56.

79. VA. CODE § 15.1-7.2 (Cum. Supp. 1980).

ing public employees forfeit their employment and eligibility for public employment for one year.[80]

The southeastern states clearly have made little effort to respond to the growing incidence of public sector organization and collective bargaining. Significantly, of the three states specifically prohibiting bargaining rights in the public sector, two are in the Southeast;[81] similarly, three of the eleven states providing no public sector labor legislation are in this area.[82] Public employees clearly have no right to strike in the Southeast, and many states in the region impose harsh penalties for work stoppage. Of the twenty-three states enacting comprehensive statutes covering all public employees, only one, Florida, is in the Southeast.[83]

IV. HISTORICAL BACKGROUND OF *NATIONAL LEAGUE*

As the preceding survey indicates, the development of state labor relations policies for public sector employees has been a halting and irregular process. Public policy, particularly in the southeastern states, reflects indifference or outright hostility towards the collective efforts of public workers. The minimal existing regulation usually affects narrow segments of the total work force. Dissatisfied with the state response to their problems, labor leaders during the early 1970's began to call for comprehensive schemes of federal regulation. The details of their proposals ranged from the suggested elimination of the National Labor Relations Act's state and municipal employer exclusion[84] to comprehensive recommendations for new agencies dealing exclusively with public sector labor relations.[85]

Underlying most of these proposals was the assumption that Congress' power to regulate interstate commerce would provide ample constitutional support for their enactment. Forty years of commerce clause precedent precipitated by the Fair Labor Standards Act[86] virtually assured the constitutional success of the proposed legislation. Proponents of this legislation were startled in 1976 when the Supreme Court's decision in *National League of Cities v. Usery*[87] upset their most basic assumptions. Assessing the prospects for the proposals in the new decade[88] requires careful examination of the com-

80. *Id.* § 40.1-55 (1976).

81. *Id.* at 65. The two southeastern states are North Carolina and Virginia. *Id. See* text accompanying notes 64-68, 75-80 *supra*. The third state is Texas. *See* TEX. REV. CIV. STAT. ANN. art. 5154c (Vernon 1971). Texas, however, does give the right to bargain collectively to firefighters and police officers. *Id.* art. 5154c-1 (Vernon Supp. 1979).

82. These states are Louisiana, Mississippi, and South Carolina. U.S. DEP'T OF LABOR SUMMARY, *supra* note 22, at 65.

83. *Id.*

84. H.R. 777, 95th Cong., 1st Sess. (1977).

85. H.R. 1987, 95th Cong., 1st Sess. (1977).

86. 29 U.S.C. §§ 201 -219 (1976).

87. 426 U.S. 833 (1976).

88. The author wishes to acknowledge the use in preparing the following portion of this article of his previous publication on this subject: Beaird & Ellington, *A Commerce Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35 (1976).

merce clause precedent on which they had relied and of the decision in *National League*.

As an express exercise of its power to regulate interstate commerce, Congress enacted the Fair Labor Standards Act (FLSA) in 1938.[89] The Act established minimum wage[90] and maximum hour[91] provisions for employees directly engaged in commerce or in the production of goods for commerce, but specifically excluded from its coverage employees of states and their political subdivisions.[92] The wage and hour provisions were premised on a congressional finding that maintenance of substandard labor conditions burdened the free flow of goods and led to labor disputes that obstructed commerce.[93]

In 1941 the Supreme Court upheld the constitutionality of the FLSA in *United States v. Darby*.[94] Dismissing arguments that the power to regulate wages was a police power reserved to the states by the tenth amendment, the Court decided that Congress could regulate the local production of goods even to the extent of establishing minimum labor standards as an appropriate means of regulating commerce itself.[95] No barrier to commerce clause regulation inhered in the tenth amendment, which was "but a truism . . . declaratory of the relationship between the national and state governments."[96]

Two amendments to the FLSA invoked the second major challenge to the constitutionality of the Act. In 1961 FLSA coverage was expanded to include all employees of an "enterprise" that has any employees engaged in commerce.[97] In 1966 Congress removed certain employees of public schools, hospitals, and other institutions from the original public employer exemption and thus extended the Act's benefits to 3.5 million nonsupervisory government employees.[98] Following the 1966 amendments, a state claiming the power to control its own employees could invoke the tenth amendment more powerfully than it had in *Darby* when the state's interest was limited to regulation of local private business.

When Maryland tried to enjoin the Secretary of Labor from enforcing these amendments against state-operated schools and hospitals in 1968, the Court upheld both amendments in *Maryland v. Wirtz*.[99] Rather than attacking factually the classification of schools and hospitals as "enterprises" in commerce or challenging the alleged effect on commerce of the labor conditions of

89. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1976)).

90. *Id*, § 6 (codified as amended at 29 U.S.C. § 206 (1976)).

91. *Id*. § 7 (codified as amended at 29 U.S.C. § 207 (1976)).

92. *Id*. § 203(d) (codified as amended at 29 U.S.C. § 203(d) (1976)).

93. *Id*. § 2(a) (codified as amended at 29 U.S.C. § 202(a) (1976)).

94. 312 U.S. 100 (1941).

95. *Id*. at 121.

96. *Id*. at 124.

97. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 (1961) (codified at 29 U.S.C. § 203(s) (1976)).

98. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966) (codified at 29 U.S.C. §§ 203(d), (r) (l), (s) (4) (1976)).

99. 392 U.S. 183 (1968), *overruled*, National League of Cities v. Usery, 426 U.S. 833, 855 (1976).

such institutions, the *Wirtz* plaintiffs attacked the 1966 amendments directly as an unconstitutional exercise of the commerce power over a state governmental entity.[100] The Court did not analogize the commerce power to the taxing power, from which a state immunity already had been developed and upheld for uniquely state operations.[101] Instead, the Court relied on *United States v. California*,[102] a 1936 case in which it upheld congressional exercise of the commerce power in the Federal Safety Appliance Act[103] to cover California's state owned and operated railroad.[104] The *Wirtz* Court quoted from *United States v. California*:

> [W]e think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.
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> . . . .
>
> [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.[105]

In restating the *California* rule in *Wirtz*, the Court declared 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."[106] The Court even implied that there was no room for a balancing of interests, claiming that the Court had already "put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce."[107]

Justice Douglas voiced a prophetic dissent in *Wirtz*. He argued that some distinction between the activities of a state in its sovereign and nonsovereign capacity should control the constitutionality of commerce clause regulation.[108] Using terms later adopted in the *National League* majority opinion,[109] he insisted that the tenth amendment must raise some barriers to the commerce

100. *Id.* at 195.
101. *See, e.g.*, New York v. United States, 326 U.S. 572 (1946); Helvering v. Gerhart, 304 U.S. 405 (1938).
102. 297 U.S. 175 (1936).
103. 45 U.S.C. §§ 1-16 (1976).
104. 297 U.S. at 182-83.
105. 392 U.S. at 197-98, (quoting United States v. California, 297 U.S. 175, 183-85 (1936)) (citations omitted).
106. 392 U.S. at 195.
107. *Id.* at 195-96.
108. *Id.* at 203-04 (Douglas, J., dissenting).
109. *See* 426 U.S. at 855.

power, for otherwise the national government "could devour the essentials of state sovereignty."[110]

Seven years later, in *Fry v. United States*,[111] Ohio state employees challenged congressional authority to mandate in the Economic Stabilization Act[112] a wage and salary freeze pursuant to the commerce power.[113] In rejecting arguments that the Act's regulation of state and local government wage levels interfered with sovereign state functions in violation of the tenth amendment, the Supreme Court in *Fry* reiterated the *Wirtz* conclusion that there was no intergovernmental immunity from commerce power regulation.[114] In terms less ambitious than those used in *Wirtz*, the majority in *Fry* recognized that tenth amendment considerations were to be respected, but held that the wage restrictions did not amount to the "drastic invasion of state sovereignty" that the tenth amendment was designed to prohibit.[115] Through this statement it is possible that Justice Marshall, writing for the *Fry* majority, was attempting to move the constitutional discussion from one of unlimited congressional freedom to exercise the commerce power (as articulated in *Wirtz*) to one of a factual determination whether the federal intrusion into state affairs was too substantial.

Justice Rehnquist issued a strong dissent in *Fry*, arguing that a state might assert the tenth amendment in affirmative defense of its sovereignty when confronted by an exercise of the regulatory power delegated to Congress by the commerce clause.[116] Relying on intergovernmental tax immunity cases,[117] Justice Rehnquist proposed a test that permitted congressional regulation of state activity so long as it was "unlike the traditional governmental activities of a state,"[118] but which prohibited interference with traditional state functions. His proposal for a case-by-case analysis balancing state interests against federal commerce power objectives[119] would in a year's time become substantially the majority opinion in *National League*.

New amendments to the FLSA in 1974 established revised minimum wage provisions for state and local government employees and extended the Act's coverage to include eleven million workers in nearly all areas of state government.[120] Less than twenty-four hours before the amendments were to become fully effective, the National League of Cities and others unsuccessfully

110. 392 U.S. at 205 (Douglas, J., dissenting).
111. 421 U.S. 542 (1975).
112. 12 U.S.C. § 1904 (1976).
113. 421 U.S. at 545.
114. *Id.* at 548.
115. *Id.* at 547-48 n.7.
116. *Id.* at 553 (Rehnquist, J., dissenting).
117. As authority for state immunity from federal taxation Justice Rehnquist cited, among others, United States v. Butler, 297 U.S. 1 (1936). 421 U.S. at 553 (Rehnquist, J., dissenting).
118. 421 U.S. at 558 (Rehnquist, J., dissenting).
119. *Id.*
120. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified at 29 U.S.C. §§ 201-219 (1976).

sought to enjoin their enforcement before a three-judge district court.[121] Later the same day, Chief Justice Burger, sitting as a circuit justice, granted the requested injunction pending review by the full Court of the "novel" legal questions raised by the petition.[122]

Justice Rehnquist then carefully set to work to overturn *Maryland v. Wirtz* and establish the tenth amendment as an affirmative constitutional limitation on Congress' use of the commerce power to regulate a state in the exercise of its traditional functions. His conviction was that the plenary power of Congress could not be used to destroy the ability of the states to survive as states. Speaking for a five-man majority in *National League of Cities v. Usery*,[123] he adopted as a broad statement of principle the protection of "functions essential to separate and independent existence" of a state.[124] These functions were those "undoubted attribute[s] of state sovereignty,"[125] the "congressionally imposed displacement [of which] may substantially restructure traditional ways in which the local governments have arranged their affairs."[126] Noting anticipated increases in state costs, curtailment of state services, and displacement of certain state policy choices that would result from the 1974 FLSA amendments,[127] he concluded that "both the minimum wage and the maximum hours provisions [of the Act] will impermissibly interfere with the integral governmental functions of these bodies."[128] The opinion denied that the degree of interference involved was crucial, and suggested instead that a threshold test of federal intrustion within areas of traditional state functions would apply.[129] Justice Rehnquist expressly rejected as "simply wrong" the *United States v. California* dictum disclaiming limits on the commerce power,[130] and he overruled *Wirtz* in its allowance of FLSA coverage of public schools and hospitals.[131]

In its renewed recognition that structural federalism constrains congressional action, *National League* is unquestionably a decision of considerable significance. Faced with new claims of the right of states to protect their sovereignty against federal intrusion, the Court elevated the tenth amendment from the status of a mere "truism"[132] to a position of dominance protecting the states as "corrdinate element[s]" in the federal system.[133]

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121. National League of Cities v. Brennan, 406 F.Supp. 826 (D.D.C. 1974).
122. National League of Cities v. Brennan, No. A-553 (D.C. Cir. Dec. 31, 1974).
123. 426 U.S. 833 (1976). Justice Rehnquist was joined in the majority opinion by Chief Justice Burger and Justices Stewart, Blackman, and Powell.
124. *Id.* at 845, *quoting* Coyle v. Oklahoma, 221 U.S. 559, 580 (1911).
125. 426 U.S. at 845.
126. *Id.* at 849.
127. *Id.* at 846-48.
128. *Id.* at 851.
129. *Id.*
130. *Id.* at 854-55.
131. *Id.* at 855.
132. United States v. Darby, 312 U.S. at 124.
133. 426 U.S. at 849.

V. AFTERMATH OF *NATIONAL LEAGUE*

Notwithstanding the significant contributions of constitutional analysis made by Justice Rehnquist in *National League*, his decision immediately raised grave doubts about the viability of various proposals for federal regulation of state and local government employee labor relations. What are the prospects for such legislation after *National League*?

A. The Commerce Clause

Generalizations about the future impact of *National League* are safest in discussions of proposals predicated on the commerce clause as this was the source of congressional power underlying the objectionable 1974 FLSA amendments. Most proponents of federal regulation of state and local government employee labor relations had assumed, especially in light of the broad pronouncements in *Wirtz*, that the commerce power would amply support their new schemes. Justice Rehnquist's majority opinion in *National League*, however, specifically recognized as "[o]ne undoubted attribute of state sovereignty . . . the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime."[134] Moreover, in rejecting the *United States v. California* dictum that state sovereignty imposed no limits on the congressional commerce power, he flatly declared that "Congress may not exercise that power so as to force directly upon the States its choices as to *how* essential decisions regarding the conduct of integral governmental functions are to be made."[135]

It is difficult to conceive how Congress could draft consistent with these limits on commerce clause regulation. Proponents of such legislation argue that it merely would establish a procedural framework leaving substantive details of employment decisions to the states.[136] The protections for state sovereignty articulated in *National League* appear to extend beyond substantive decision making, however, to include "choices as to *how* essential decisions regarding the conduct of integral governmental functions are to be made."[137] Moreover, to the extent that federal regulation may impose a duty on state and local government employers to bargain with their employees (a duty that seems essential to an effective regulatory scheme), the "States' abilities to structure employer-employee relationships"[138] certainly would be "significantly alter[ed]."[139] Finally, although increased costs resulting from implementation of the 1974 FLSA amendments were not "crucial" in the Court's

134. *Id.* at 845.
135. *Id.* at 855 (emphasis added).
136. *See* Shaller, *The Constitutionality of a Federal Collective Bargaining Statute for State and Local Employees*, 8 CAP. U. L. REV. 59 (1978).
137. 426 U.S. at 855 (emphasis added).
138. *Id.* at 851.
139. *Id.*

analysis in *National League*,[140] the increase in wage levels that predictably may follow implementation of a federal regulatory scheme certainly would influence the Court in assessing the intrusive nature of such labor legislation. In short, prospects for federal regulation of state and local government employee labor relations predicated on Congress' commerce power are unpromising.

B. The Spending Power

National League did not reach the question "whether different results might be obtained if Congress seeks to affect integral operations of state government by exercising authority granted it under" the spending power.[141] The Supreme Court traditionally has made a very expansive reading of the spending power. "[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[142] Thus, it might be argued that Congress could initiate a federal public employee relations act as a condition of federal assistance.[143]

Nevertheless, it has been suggested that any federal collective bargaining provision Congress might enact pursuant to its spending power should be prohibited constitutionally.[144] Although the Supreme Court limited its decision in *National League* to the commerce clause, many of the cases Justice Rehnquist cited in establishing the Court's concept of federalism did not involve the commerce clause.[145] To prevent an usurpation of the states' traditional sovereign powers, the tenth amendment now operates as a restraint on all constitutional powers exercised by the federal government.[146] A federal collective bargaining statute, enacted as a precondition to federal funding, thus would amount to an unconstitutional federal interference with an essential element of state sovereignty—the power to determine wages and hours of employees.[147]

C. The Fourteenth Amendment

It also might be contended that Congress could implement public employee labor legislation pursuant to section five of the fourteenth amendment. Because Congress is empowered under that provision to enforce the fourteenth amendment's equal protection and due process guarantees,[148] one might con-

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140. *Id.*

141. *Id.* at 852 n.17.

142. United States v. Butler, 297 U.S. 1, 66 (1936). *See* Buckley v. Valeo, 424 U.S. 1, 90 (1976) (Court reaffirmed broad reading of the spending power).

143. *See* Shaller, *supra* note 136, at 69.

144. *See* Noble & Kilroy, *The Constitutionality of a National Public Employee Relations Act: A Case for States' Rights*, 13 VAL. U. L. REV. 1, 23 (1978).

145. *Id.*

146. *Id.*

147. *Id.* at 25.

148. Section 5 of the fourteenth amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. *See* Noble & Kilroy, *supra* note 144, at 25.

clude reasonably that a federal statute protecting the rights of public employees to organize and select collective bargaining representatives would withstand judicial scrutiny.[149] The majority in *National League* did not consider what would have been the result had Congress passed the 1974 Amendments pursuant to the fourteenth amendment.[150] Recent Supreme Court decisions, however, indicate that the power granted Congress under that amendment is not broad enough to permit such action.[151] For example, in *Oregon v. Mitchell*[152] the majority clearly evidenced their belief that the states' exercise of their traditional sovereign power should be protected from federal interference premised on the fourteenth amendment: "[I]t cannot be successfully argued that the Fourteenth Amendment was intended to strip the states of their power, carefully preserved in the original Constitution, to govern themselves."[153]

In *Fitzpatrick v. Bitzer*,[154] however, Justice Rehnquist did find broader Congressional power to act under section five of the fourteenth amendment than under any of the Article I powers. In *Fitzpatrick* the Court upheld, under the aegis of the fourteenth amendment, the 1972 congressional extension of Title VII coverage to state employees, stating:

> 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. We think that Congress may. . .provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[155]

Nevertheless, the balancing approach applied in *National League*, which protects state sovereignty by weighing the state's claim to independence in decision making against the federal policy interests sought to be furthered, arguably would preclude Congress from using the fourteenth amendment to invade the immunity protected by the eleventh amendment, unless individual rights otherwise could not be protected. Thus, because of the judicially enforced doctrine of federalism advocated in *National League*, Congress lacks power under section five of the fourteenth amendment to enact a federal collective bargaining statute.[156]

149. *See* Shaller, *supra* note 136, at 76.
150. 426 U.S. at 852 n.17.
151. *See* Noble & Kilroy, *supra* note 144, at 26.
152. 400 U.S. 112 (1970).
153. *Id.* at 127.
154. 427 U.S. 445 (1976).
155. *Id.* at 456.
156. *See* Noble & Kilroy, *supra* note 144, at 30.