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Can A Federal Collective Bargaining Statute for Public Employees Meet the Requirements of *National League of Cities v. Usery*?: A Management Perspective

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INTRODUCTION

Collective bargaining and the legal right of employees to bargain collectively has been a part of our society for less than one hundred years. We have grown accustomed to collective bargaining and many look upon it almost as if it were a constitutionally guaranteed right. Yet collective bargaining, as a legally protected concept, is a creation of statute—not of the Constitution.

Sixty years ago, the United States Supreme Court decided the case of *Hitchman Coal & Coke Co. v. Mitchell.*[1] The decision upheld the right of an employer to prohibit union membership as a condition of employment. The union movement has made great progress since 1917, to the point where no one seriously questions the right of the federal government, through the National Labor Relations Board and the National Mediation Board, to assure the rights of the employees to unionize and bargain collectively—at least in the private sector of our economy.

The public sector of our economy, however, has not accepted collective bargaining as the business world has been obliged to do. Although many states, and the trend is increasing, have adopted collective bargaining laws, the attempts to create a uniform national labor law for public employees has met with one very serious obstacle—state supremacy. In 1976, the United States Supreme Court decided *National League of Cities v. Usery*,[2] which has been touted as an assurance that state sovereignty will be preserved as to governmental functions—and as to employment practices, so long as specific constitutional safeguards are not violated.

LEGISLATIVE AND JUDICIAL BACKGROUND

Beginning with the 91st Congress (1969) and continuing in each of the succeeding sessions of Congress, numerous bills have been introduced in the

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[1] 245 U.S. 229 (1917).

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

Senate and House. These bills have generally sought to establish federal jurisdiction over state and local public employee labor-management relations, and particularly over the collective bargaining rights of these employees. None has yet been passed, and in the absence of such legislation the control, regulation, and existence of collective bargaining by state and local government employees will remain strictly a function of state law.

With the exception of the Supreme Court's decision in *National League of Cities v. Usery*, legislative enactments and judicial decisions over the past eleven years appeared to raise no question that there would be any serious constitutional problem were a federal collective bargaining law for employees of state and local governments enacted. We will briefly examine the legislative and judicial developments which preceded the decision in *National League of Cities*; discuss the decision in detail; and explore its implications for any future attempt to legislate federal regulation of collective bargaining by state and local government employees.

A. *Federal Legislation In Public Sector Labor Relations*

In 1966, Congress amended the Fair Labor Standards Act, extending its coverage to state operated hospitals, schools, and institutions of higher learning.[3]

In 1970, Congress passed the Economic Stabilization Act[4] which imposed wage controls and similar regulations on public employees of state and municipal governments as well as on employees in the private sector.

In 1972, Congress amended Title VII of the Civil Rights Act to extend the Act's coverage to employees of state and municipal governments.[5]

In 1974, Congress again amended the Fair Labor Standards Act to cover under its minimum wage and overtime provisions practically all employees of state and municipal governments.[6] In addition, these 1974 amendments expanded the application of the Equal Pay Act[7] and the Age Discrimination in Employment Act[8] to these employees. As will be discussed subsequently, the 1974 amendments extending minimum wage and overtime requirements of the Act to public employees were the subject of the Supreme Court's decision in the *National League of Cities* case.

In 1976, Congress passed the Unemployment Compensation Amendments providing full unemployment benefits for employees of State and local governments.[9] Such coverage is "voluntary" in that the failure of the States to extend coverage to public employees will result in the loss of federal funds supporting even non-public benefits.

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[3] 80 STAT. 831, 29 U.S.C. sec. 203 (d).

[4] Title II, Pub. L. 91-379, 84 STAT. 799, 12 U.S.C. sec. 1904.

[5] Equal Employment Opportunity Act of 1942, 86 STAT. 103, 42 U.S.C. sec. 2000 e (a) 2(1), (2), (5).

[6] 29 U.S.C. sec. 203(d), as amended; 29 U.S.C. sec. 203 (s) (5), as amended; 29 U.S.C. sec. 203(x), as amended.

[7] 29 U.S.C. sec. 206(d).

[8] 29 U.S.C. sec. 621 et. seq. (1975).

[9] Pub. L. 94-566, 90 STAT. 2667.

In 1972, Congress enacted the Revenue Sharing Act,[10] a concept put forth by the Nixon Administration to allow State and local government an opportunity to utilize federally collected funds on a generally unrestricted basis for purposes of their own choosing although it contains special conditions on equal employment opportunity.

Finally, Congress, pursuant to its spending power, has given numerous grants to the states and required the states to meet certain conditions in order to receive such funds.

B. *Judicial Construction*

Prior to the Supreme Court's decision in *National League of Cities*, the federal judiciary, and more particularly the Supreme Court, had refused to limit otherwise valid congressional enactments based upon the Commerce Clause of the Constitution merely because the regulation applied to a state or one of its political subdivisions.

The first significant precedent leading to the exercise of federal authority over State employment was in *United States v. California.*[11] The Supreme Court there ruled that an intra-state railroad operated by the State was subject to federal safety regulations. Federal control over commerce was the rationale relied upon.

In *Maryland v. Wirtz*,[12] the Supreme Court upheld the constitutionality of the 1966 amendments to the Fair Labor Standards Act as a proper exercise by Congress of its commerce power against the challenge that the commerce power must yield to state sovereignty in the performance of governmental functions. The Court stated:[13]

> "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."

and went on to remind that:

> ". . . while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."

In *Fry v. U.S.*,[14] the Supreme Court upheld the constitutionality of the 1970 Economic Stabilizations Act's applicability to employees of state and municipal governments. The Court determined that the federal government had constitutional authority to pass the Economic Stabilization Act which created an agency which in turn forbade pay increases to State employees in Ohio in excess of seven percent, notwithstanding Ohio's decision to grant

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[10] 31 U.S.C. sec. 1242 (1972).

[11] 297 U.S. 175 (1936).

[12] 392 U.S. 183 (1968).

[13] *Id.* at 196.

[14] 421 U.S. 542 (1975).

larger increases. The majority found *Maryland v. Wirtz* dispositive of the issue of the tenth amendment's limitations on the commerce power and concluded that the state's pay practices were not immune from federal regulation under the commerce clause. It is noteworthy to point out Justice Rehnquist's dissent was the first bright note for those who support limits to federal intervention in state employment practices. Rehnquist's dissent sought to redefine the proper allocation of authority between state and federal governments and to provide a future basis for overruling *Maryland v. Wirtz*. The Court might have been better advised to decide the case on a waiver of sovereignty approach in that the State had voluntarily submitted itself to the Pay Board in the first instance.

Finally, in *Fitzpatrick v. Bitzer*,[15] with Justice Rehnquist this time writing the opinion, the Supreme Court held the 1972 amendments to Title VII of the Civil Rights Act to be constitutional as a proper exercise of Congress' power under section 5 of the fourteenth amendment.

It is thus clear that, from *United States v. California* through *Maryland v. Wirtz*, the Court had no difficulty in overcoming tenth amendment barrier to laws enacted by the Congress pursuant to the Commerce Clause in areas reserved to the States:

The tenth amendment provides:

> "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."

The tendency to blithely disregard the tenth amendment was particularly true in the case of the Fair Labor Standards Act, its subsequent amendments, and particularly the 1966 amendments which were upheld in *Maryland v. Wirtz*. This was not always the case. The original Fair Labor Standards Act enacted in 1938 excluded the states and their political subdivisions from coverage as to minimum hourly rates as well as overtime compensation. This initial federal foray into regulation of economic condition in the *private sector* was *upheld* by the U.S. Supreme Court as a valid exercise of congressional power under the Commerce Clause in *United States v. Darby*.[16]

When the 1966 amendments to the Fair Labor Standards Act removed the exemption of states and their political subdivisions with respect to state hospital and school employees, the action was unsuccessfully challenged in *Maryland v. Wirtz*. The 1966 amendments were upheld, notwithstanding the tenth amendment.

Thus in 1974 when Congress again amended the Fair Labor Standards Act to delete the remaining exemption for states and their political subdivision, it was generally conceded that the holding of *Maryland v. Wirtz* would prevail and the amendments would be sustained against a similar constitutional challenge. This was especially true in view of the retirement of Mr. Justice Douglas whose dissent in *Maryland v. Wirtz* was based on the tenth amendment.

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[15] 425 U.S. 902 (1976).

[16] 312 U.S. 100 (1941).

C. *The National League Of Cities Case*

It has generally been expected that the Supreme Court would uphold the constitutionality of the 1974 amendments to the Fair Labor Standards Act in the *National League of Cities* case in view of its decisions in *Maryland v. Wirtz*, and *Fry v. U.S.* Instead, the Court appears to have halted the expansion of the federal commerce power where it interferes with state sovereignty. It has done so by holding that Congress lacked authority to enact these 1974 amendments under the Commerce Clause insofar as the amendments directly displace the freedom of the states to make integral decisions in areas of traditional governmental functions. In addition, the Court overruled its earlier decision in *Maryland v. Wirtz*.

Perhaps the resounding shock of the decision by the United States Supreme Court in *National League of Cities v. Usery*, should have been anticipated as the logical result of the "new federalism" espoused by the Nixonian scheme of government.

However, because of the clear trend in the decisions upholding the Commerce Clause supremacy over the tenth amendment most observers anticipated that the decision in *National League of Cities v. Usery* would not only uphold the validity of the 1974 amendments to the Fair Labor Standards Act but would serve to clearly prescribe a formula by which the Congress under the Commerce Clause might undertake to regulate collective bargaining in the public sector as it applied to the states and their political subdivisions.[17]

In view of the foregoing, it is obvious why the decision in *National League of Cities v. Usery* was received with both shock and surprise by those advocating a federal law to regulate collective bargaining for all employees—in private industry and on public payrolls. The decision of the Court in the *National League of Cities* case appears to give judicial recognition and approval to the doctrine of federalism which was said to have substantial support from the so-called "silent majority".[18]

Justice Rehnquist's language[19] is particularly reassuring to those who seek to preserve state sovereignty over employment practices.

> "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. In Wirtz, for example, the Court took care to assure the appellants that it had 'ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity,' which they feared. . . .
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> "In Fry, supra, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:
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> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' United States v. Darby, 312 U.S. 100, 124, 1 WH Cases 17 (1941), it is not without significance. The Amendment expressly declares that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. . . . " 421 U.S., at 547, 22 WH Cases, at 286."

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[17] H.R. 77, 94th Cong. 1st Sess.

[18] Nationally televised speech by Richard M. Nixon, November 3, 1969.

[19] 426 U.S. 833 at 842-5.

"It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. . . .

"One undoubted attribute of state sovereignty is 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. The question we must resolve in this case, then, is whether these determinations are '*functions essential* to separate and independent existence,' so that Congress may not abrogate the States' otherwise plenary authority to make them." (Emphasis Added)

The Court found that the 1974 amendments displaced state policies regarding the manner in which states will structure the delivery of the governmental services which their citizens require by requiring states to pay the minimum wage rates chosen by Congress. The Court also found that the 1974 amendments concerning overtime pay would directly penalize the states for choosing to hire governmental employees on terms different from those which Congress has sought to impose, thus displacing state decisions and substantially restructuring traditional ways in which local governments have arranged their affairs. The Court noted that the effect of the 1974 amendments, in extending wage and hour standards to the States "will impermissibly interfere" with the States' "integral governmental functions."

The Court went on to explain these "integral governmental functions" were—

" . . . areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, *it is functions such as these which governments are created to provide*, services such as these which the States have traditionally afforded their citizens." (Emphasis Added)[20]

The Court proceeded to warn that

"If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions may rest, we think there would be little left of the States' 'separate and independent existence.'*** This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, cl. 3"[21]

[20] *Id.* at 851.

[21] *Id.* at 851-2.

In addition to overruling *Maryland v. Wirtz*, the Court distinguished its decision in *Fry v. U.S.* by stating that the Economic Stabilization Act was occasioned by 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."[22]

It is explained that the Act was only for a "limited, specific period of time" during which it "displaced no state choices" on the structure of governmental operations. The Court further explained that the Act reduced rather than increased State budgets which was significant and finally qualified *Fry* stating:

> "The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency."[23]

The Court concluded by stating:

> "Congress may not exercise that power so as to force directly upon the States its choice as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in Wirtz, allow 'the National Government [to] devour the essentials of state sovereignty.' 392 U.S., at 205, 18 WH Cases, at 452, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause."[24]

The decision speaks repeatedly of a State's essential functions. In his dissenting opinion, Justice Brennan expresses the key to the thinking of the majority:[25]

> "No effort is made to distinguish the FLSA and Amendments sustained in *Wirtz* from the 1974 Amendments. We are told at the outset that 'the far reaching implications' of Wirtz should be overruled; later it is said that the 'reasoning in Wirtz' is no longer 'authoritative.' My brethren then merely restate their *essential function test* and say that Wirtz must 'therefore' be overruled." (Emphasis Added)

Therefore, it is apparent that the majority of the Court have recognized the new concept of federalism by applying a limitation to the Commerce Clause in the "essential functions test" as a renewed recognition of state sovereignty under the tenth amendment to the United States Constitution.

D. *Implications of National League of Cities*

There are those who support federal intervention in state collective bargaining who find hope for their cause in *National League of Cities*. They point to Justice Blackmun as a "swing vote" and a possible supporter of what is referred to as "less instrusive federal regulation" such as a collective bargain-

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[22] *Id.* at 853.
[23] *Ibid.*
[24] *Id.* at 855.
[25] *Id.* at 879.

ing law. But could a collective bargaining law be "less intrusive"? To say that it would be, is to completely misunderstand the reasoning of Justice Rehnquist's opinion for the majority, as well as his dissent in *Fry*.

In *Fry*, Justice Rehnquist took great pains to explain the origins of his thinking all the way back to 1793. He has made it abundantly clear that just as we apply legislative history in explaining statutory law, he has every intention of applying "constitutional history", as it was understood by those who drafted the Constitution, to explain and preserve the dual sovereignty intended by our Founding Fathers.

In the thirteen months between *Fry* and *National League of Cities*, Justice Rehnquist succeeded in gaining the necessary support of his brethren needed, not to break new legal ground, but to correct what he perceived as a major error in Constitutional thinking in *Wirtz*. As he argued in *Fry*, the majority opinion was correct insofar as it relied on *Wirtz*, but that such reliance was premised primarily upon the faults of *Wirtz*. Justice Rehnquist criticizes *Wirtz* for its *intrusion* into areas of traditional governmental function while at the same time accepting federal action in non-traditional functions in *United States v. California* and federal protection of constitutional rights in *Fitzpatrick v. Bitzer*.

Justice Rehnquist leaves little doubt that he intends to preserve state sovereignty over its essential governmental functions. It may seem ironic to some that the conservative majority has adopted the thinking of Justice Douglas, and his dissent in *Maryland v. Wirtz*, which stated in part:[26]

> "If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment."

Given the fact that the Supreme Court has now held that the federal government cannot constitutionally impose federal minimum wage and overtime requirements on the states under the Commerce Clause, it would also appear no less unconstitutional for the federal government to attempt to impose direct federal regulation of collective bargaining on state and local governments under the Commerce Clause.

RAMIFICATIONS FOR FEDERAL COLLECTIVE BARGAINING PROPOSALS FOR PUBLIC EMPLOYEES

The proposals for a collective bargaining law are far more intrusive than the question of whether the states must pay time and a half after forty hours. A collective bargaining law would of necessity erode the very cornerstone of state sovereignty for it would dictate, to a substantial degree, how the terms and conditions of employment are to be determined by the states. In so doing, state sovereign control over its labor relations would be decided not by the elected or appointed state official but by a federal bureaucrat.

Advocates of an all pervasive federal scheme have long relied upon the Commerce Clause as the vehicle for carrying federal law into every nook and

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[26] 392 U.S. 183.

cranny of American life. Catchy phrases such as "impact on interstate commerce" and "affecting commerce" have been used ever more broadly to expand federal control. Even in *National League of Cities* the Court recognized that the wages, hours, and working conditions of public employees have an impact upon interstate commerce. The Court therein acknowledged that the statute might be within the scope of the Commerce Clause. Nevertheless, the Court resoundingly slammed the door on this extension of the Commerce Clause.[27]

> "But we have reaffirmed that the States as States stand on quite a different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce.*** Congress may not exercise that power so as to force directly upon the States its choice as to how essential decisions regarding the conduct of integral governmental functions are to be made."

One has only to reread the foregoing paragraph to realize that a federal collective bargaining law would fall squarely within the proscribed exercise of power. Nor is that any reason to believe that the Court, speaking through Justice Rehnquist did not mean precisely what it said. The Commerce Clause cannot override essential decisions regarding the conduct of employee decisions in public schools and hospitals and police and fire departments.

Having suffered a conclusive defeat on the Commerce Clause, the proponents of a federal bargaining law have sought solace from other constitutional language. Their strongest hope appears to lie in the Spending Clause of Article I, Section 8, as to which the Court specifically expressed "no view."[28]

Without arguing the merits of social welfarism, it is generally accepted that the result is ever-increasing dependence of the populace upon welfare services. The federal Revenue Sharing program, seemingly without having so intended, has resulted in a similar ever-increasing dependence of its recipients upon the federal largesse. Once such dependence has become established, the logical consequence is not hard to conceive—if the local entity fails to comply with the wishes of the federal bureaucracy a cut-off of revenue sharing funds is threatened.

The question arises, obviously, whether such a threat can constitutionally be carried out in areas of traditional or essential governmental functions where constitutionally protected individual rights are not involved. The Supreme Court long ago recognized that "the power to tax involves the power to destroy" and prohibited taxation by the states of an activity (banking) of the federal government.[29] The same rationale has been applied to protect the states from economic coercion by the federal government.[30] In *National League of Cities*, the Court recognized that federal law could not be permitted to impair the States' ability to function. The right of the States to determine

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[27] 426 U.S. 833 at 854.

[28] *Id.* at 852.

[29] McCulloch v. Maryland, 4 Wheaton 316 (1819); *see also* Weston v. Charleston, 2 Pet. 449 (1829).

[30] Pollack v. Farmers Loan & Trust, 158 U.S. 601 (1895): immunity of municipal bond income from federal tax; U.S. v. Baltimore & O.R. Co., 17 Wall 322 (1873): immunity from Federal tax of income received by municipality from investments; Indian Motor Co. v. U.S., 283 U.S. 570 (1931): immunity of purchase of municipal police motorcycles from federal sales tax.

grievance procedures and to limit rights to hearing and review was similarly upheld as within State prerogatives in *Bishop v. Wood*.[31]

The Court may be expected to continue to maintain States' integrity by refusing to allow the federal government to do indirectly what it could not do directly—by refusing to allow the federal government to withdraw funds as a means of destroying the States' separate and independent existence.

Assuming arguendo, however, that the Spending Clause were permitted to serve as the iron fist in the velvet glove, what could realistically be advanced for a federal collective bargaining statute?

PROPOSED LEGISLATION

Proponents of a collective bargaining statute, in typical union fashion, ask for everything—far more even than is enjoyed under the aegis of the National Labor Relations Board. These demands have included:[32]

1. The right to picket and boycott
2. The right to compulsory arbitration
3. The right to grievance arbitration
4. The right to require compulsory dues payments by all employees
5. The right to recognition without election
6. The right to use of government property
7. The right to impose featherbedding
8. The right to strike

Just about every one of these demands falls within the scope of the rights reserved, in *National League of Cities*, to state and local government:

1. The right to determine pay scales[33]
2. The right to hire on terms other than those imposed by Congress[34]
3. The right to structure employer-employee relationships[35]

The Court has refused to condone interference with the States' right to determine wages, hours, and working conditions. These are the very essence of the collective bargaining concept.

The two proposals most recently pending before the United States Congress involve a scheme whereby the existing apparatus, that is the National Labor Relations Board, would extend its jurisdiction to encompass existing public employees under certain restrictions.[36] A second proposal that was pending before the Congress at the time of the decision in the form of several bills was the establishment under federal law of a national public employees relations act with its own commission similar to that scheme that was established in several of the states.[37]

Even a casual reading, however, of both of these legislative proposals seems to run "head on" into the newly established principle of federalism

[31] 426 U.S. 341 (1976).
[32] H.R. 8677, 93rd Cong. 1st Sess.
[33] 426 U.S. 833 at 848.
[34] *Id.* at 849.
[35] *Id.* at 850.
[36] H.R. 8677 93rd Cong., 1st Sess.
[37] H.R. 9730; 94th Cong., 1st Sess.

which was promulgated in *National League of Cities v. Usery*. What could more directly, "operate to directly displace the state's freedom to structure integral operations in areas of traditional governmental functions" than the pending legislation to establish and regulate state collective bargaining on the federal level.[38] There appears to be no question but that the "essential functions" test enunciated by the Court in *National League of Cities v. Usery* will successfully block regulation based purely upon the commerce power of the Constitution if the Court in fact continues to adhere to the essential functions test.[39]

What then could be included in a federal bargaining law? The logical first item would be to require the States to bargain without mandating any minimal standards. Essentially the National Labor Relations Act already does this. However, in order to require bargaining, the federal law must first impose on the States a federally chosen method of selecting the bargaining representative. This falls within the proscription against structuring employer-employee relationships. The second requirement would be a means of forcing the States to bargain in accord with a federally determined standard, and failing this, to enforce compliance with that federally determined standard. This would clearly invade the state sovereignty preserved by Justice Rehnquist's opinion.

Alternatively limited rights to strike or compulsory arbitration could be invoked to resolve bargaining impasses. But here again, the federal administrative body or third party is being granted or assumes those powers, responsibilites, and duties of the State officials elected by the people to exercise such powers and responsibilities rather than to have a delegation of power by federal fiat.

The enactment of any federal collective bargaining statute for public employees would bring about a confrontation between the *National League of Cities* holding and the federal law by virtue of the preemption doctrine. In the leading preemption decision, *San Diego Building Trades Council v. Garmon*, (359 U.S. 236, 1959), the Supreme Court held, in interpreting the National Labor Relations Act, that Congress intended to assume exclusive jurisdiction over activity "arguably protected or prohibited" by the Act and that State regulation is permitted only where the activity is of "peripheral concern" to the federal policy or involves interests "deeply rooted in local feeling and responsibility." (359 U.S. at 243–244)

The Supremacy Clause of the United States Constitution, article VI, clause 2, requires that federal law must prevail over a conflicting state law once the federal government has moved into an area of shared authority. *National League of Cities* has, however, precluded such a result in affirming the tenth amendment reservation of sovereignty to the states.

ARGUMENTS BASED ON RIGHTS

The most common error made by those arguing for a federal law is to confuse what they deem to be a natural or moral right to a collective

[38] 426 U.S. 833 at 852.
[39] *Ibid.*

bargaining law with a federal right to such a law. Each and every moralistic argument can be advanced on behalf of State employees within their own states where according to the Constitution their rights properly reside. Most states have either enacted or modified public employee statutes within recent years.

It is only the minimum standards syndrome which motivates argument for national legislation. Yet, it is precisely that concept—minimum standards—which was rejected in *National League of Cities*.

IN MEMORIUM

The Supreme Court has dealt a death blow to the cause of a uniform federal collective bargaining law which would have removed from the states their right to determine policy and maintain control of employment relations for their employees engaged in essential governmental functions. Absent a change in the composition of the Court, a federal collective bargaining law for public employees of State and local governments appears to be a closed issue.