Perez v. U.S. 402/146

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

This Case raises the question whether Public Law No. 93-259, 88 Stat. 55 (hereafter sometimes "1974 Amendments", amending the Fair Labor Standards Act (hereafter sometimes "Act"),[1] the Portal to Portal Act,[2]

[1] c.676, 52 Stat. 1060, *as amended* 29 U.S.C. § 201 *et seq.* (1970)

[2] c.52, 61 Stat. 84, *as amended* 29 U.S.C. § 251 *et seq.* (1970). The statute of limitations provisions of § 6(d) of the Portal to Portal Act, 29 U.S.C. § 255(d), governing actions against States and political subdivisions under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) are amended by § 6(d)(2)(A) of Public Law No. 93-259. This amendment responds to the decision of this Court in *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279.

and the Age Discrimination in Employment Act,[3] to apply to all employees of States and their political subdivisions, are constitutional.[4] The questions presented involve whether our Federal system of Government as laid out in the entire Constitution is protected against subversion through a congressional claim that the entirety of each State Government and each local Government is an enterprise engaged in commerce or in the production of goods for commerce and can be regulated by the Federal Government by calling its governmental operation commerce. These questions have never been before this Court as now presented.[5]

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[3] Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. § 621 *et seq.* (1970). The definitions of "employer" and "employee" in §§ 11(b), 11(c) and 11(f) of the Age Discrimination in Employment Act, 29 U.S.C. §§ 630(b), 630(c), and 630(f) are amended by §§ 28(a)(2)-(4) of Public Law No. 93-259 to include States and political subdivisions of States.

[4] The effect on the system of constitutional Federalism of the amendment of each of these three acts is similar; State and City control of Government operation is usurped by including States and Cities within each Act. Because the fiscal impact is greatest from the amended Fair Labor Standards Act, that act (hereafter sometimes "Act") will be treated in detail. Appellants' constitutional objection applies to the amendment of all three acts.

[5] Other cases involving the collision between the Federal commerce power and constitutionally protected Federalism are pending before this Court in the cases of *Fry v. United States*, No. 73-822 (argued Nov. 11, 1974) and *California v. United States*, No. 74-739, *petition for certiorari filed*, 43 U.S.L.W. 3360, involving the Economic Stabilization Act of 1970; and *Iowa v. Brennan* No. 73-1565, *petition for certiorari filed*, 42 U.S.L.W. 3064, involving the 1966 amendments to the Fair Labor Standards Act.

This Case concerns the entire Constitution's scheme of Federalism, the basic constitutional sharing of Government power under our Federal system of Government, and whether the constitutional freedom of State Governments to carry out their internal governmental operations free from interference by the Federal Government occupies a higher protected status under the Constitution than any effect of the entirety of each State and local Government upon the "national free trade market" created by the Commerce Clause.

OPINION BELOW

The Order, Findings, and Opinion of the United States District Court for the District of Columbia, Civil Action 74-1812 (Dec. 31, 1974) (per curiam) is unreported but is included in the Appendix filed with this Court, App. 643-653.

JURISDICTION

This Suit was brought under 28 U.S.C. § § 1331 and 1337 for injunctive and declaratory relief that all the 1974 Amendments to the Fair Labor Standards Act, Pub. L. No. 93-259, 88 Stat. 55, *amending* 29 U.S.C. §201 *et seq*. (1970), made applicable to States and Cities, violate the principles of our Federal system of Government created by the entire Constitution of the United States and particularly the Fifth, Tenth, and Eleventh Amendments to the Constitution and cannot

be rationally based on Art. I, § 8, cl. 3 of the Constitution. This action was filed in the District Court on December 12, 1974. The District Court, having been constituted a Court of Three Judges, dismissed the Complaint and denied Plaintiffs' Application for a Preliminary Injunction on December 31, 1974. In its Order, the District Court stated it was acting under both Rule 12 and Rule 56, Federal Rules of Civil Procedure. (App. 652). On December 31, 1974, Plaintiffs noted their appeal in the District Court and applied to this Court for a stay. An injunction *pendente lite* was granted by the Chief Justice of the United States on December 31, 1974, and continued by this Court on January 13, 1975 on condition that the Jurisdictional Statement be filed by January 17, 1975. The companion case of *California v. Brennan*, No. 74-879, is an appeal by Plaintiff-Intervenor State of California from the same Order of the District Court below. The Jurisdictional Statement was timely filed, and an expedited briefing schedule agreed among counsel. The jurisdiction of this Court to review the District Court's Order by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether all State and local Governments are engaged in commerce among the States thus conferring constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and local Government employees.

2. Whether all State and local Government affects commerce among the States to an extent which confers constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and local Government employees.

3. Whether a Federal Act which usurps control of State and local essential Government services by increasing the cost of providing some services so greatly that these and other essential Government services must be altered or curtailed, and by conflicting with fair and valid State and local laws governing public employment and public debt, can have a rational basis under the Commerce Clause, where States and local Governments neither are in commerce nor provide essential Government services interstate.

4. Whether the careful balance struck between the Federal and the State Governments in the Constitution requires that a more direct impact on commerce be shown before the Commerce Clause can be used to rationalize an abrogation of the constitutional Federalism, in the form of a Federal preemption of control over the hours, wages and other terms and conditions of employment of State and local Government employees for the first time in 200 years, than the impact on commerce necessary to be shown to regulate private industrial functions.

5. Whether *Maryland v. Wirtz*, 392 U.S. 183, holding the Fair Labor Standards Act's "enterprise" concept to be constitutional under the Commerce Clause as applied to employees of those State-owned hospitals and schools which are in competition with private hospitals and schools is controlling precedent for

extension of that Act to all those State and local Government employees who are not engaged in such competition.

6. Whether the Due Process Clause of the Fifth Amendment is violated by applying to Government 691 pages of regulations promulgated to govern private industry, failing to recognize the unique political, economic and legal status of Government, and by issuing the only regulations particularly suited to Government (covering police and fire personnel), 39 Fed. Reg. 44141 (Dec. 20,1974), so few days before they were made effective as to make compliance impossible.

7. Whether the Eleventh Amendment is violated by a Federal Statute authorizing employee suits against States and local Governments in Federal Courts, including class actions, liquidated damages, counsel fees, and costs.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The entire Constitution of the United States, as amended, is involved in that Appellants rely upon all provisions creating the Federal system of Government.[6] Reference will be made particularly to:

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[6] There are 114 references to States in the Constitution. Other major constitutional provisions involving Federalism are:

Art. I, § 10: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts;

Article I, Section 8:

"The Congress shall have Power***

* * *

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pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws:. . .

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into an Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

Art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

Art. VI: ". . .

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

"To regulate Commerce *** among the several States ***;"

Article VI:

* * *

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made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;. . ."

AMEND. XIII: "§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"§ 2. Congress shall have power to enforce this article by appropriate legislation."

AMEND. XIV: "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

AMEND. XV: "§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

AMEND. XIX: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. . . ."

AMEND. XXI: "§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

"§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by

"This Constitution, and the laws of the United States which shall be made in Pursuance thereof *** shall be the supreme Law of the Land ***."

Fifth Amendment:

"No person shall *** be deprived of life, liberty, or property, without due process of law;"

Tenth Amendment:

"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."

Eleventh Amendment:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fair Labor Standards Amendments of 1974 are set forth in the Appendix to this Brief.

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conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

AMEND. XXIV: "§ 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

AMEND. XXVI: "§ 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

STATEMENT

This Case challenges the application of the Act to 11 million[7] State and City Government employees. By the 1974 Amendments, Congress declares it has power to legislate terms and conditions of employment for all Government employees, exempting some (such as supervisory employees) by grace. The Complaint in the District Court below set forth the State and City law and practice which would be pre-empted by the 1974 Amendments (Complaint ¶¶7-11, 16-19, 21-31, 35, 73-77; App. 10-15, 16-23, 25, 36-37).

City and State employees already receive more than the minimum wage under the Act, with minor exceptions; the average for Government employees is higher than in private industry. H. R. Rept. No. 913, 93d Cong., 2d Sess. 28-29 (1974). The areas of great increases in cost to Cities and States owing to the Act are for dual recordkeeping, new reports of City budgets (Pritchard Deposition at 33, App. 108), new Federal administrative procedures, and for overtime payments (Byrley Deposition at 64, App. 289-90). Cities and States must carry out their duties under what is left of State and local laws as well as their new, federally mandated duties. Mr. Pritchard and Mr. Byrley are experts on State and local Government. (See their resumes, Plaintiffs' Deposition Exhibit 1 and Defendant's Deposition Exhibit 39; App. 588, 566, respectively). They testified that the estimate of "billions" in

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[7] In October, 1973, State and local Governments employed 11.4 million persons. PUBLIC EMPLOYMENT IN 1973 (U.S. Dep't of Commerce, 1973).

increased yearly costs is a fair and reasonable estimate (Complaint ¶44, App. 27-28) as applied to the 50 States, 18,000 Cities, 3,000 Counties and thousands of special districts created for such special functions as snow removal, sewage, drainage, and paving. (Pritchard Deposition at 89-90, Byrley Deposition at 20-21; App. 146-47, 260)

Paragraphs 45-72 of the Complaint (App. 28-36) and Defendant's Deposition Exhibits 1-36, 38, 40-48 (App. 311-566, 570-585) set forth for 10 States and 25 Cities the dollar impact of the 1974 Amendments; for these jurisdictions alone, and for the first year alone, the cost of Government operation will increase by an estimated $57 million. Paragraph 44 of the Complaint (App. 27-28) sets forth an estimate for the nationwide impact on fire personnel alone, for the first year alone: $200 million. (Letter from William F. Danielson, Director of Personnel, Sacramento, Cal., Dec. 24, 1974; App. 625). The increased costs for overtime, new Federal record keeping, new Federal administrative processes, and other burdens which produce no increase in governmental service is estimated to be in the "billions" for all State and local Governments. (Complaint ¶44, App. 27-28). The reliability of fire (and police) personnel costs as an indicator of the impact on all State and City Government employees lies with the "ripple effect" on all Government employment from these two areas. (Pritchard Deposition at 10, App. 92). Salaries for Government employees constitute 80 to 85% of City budgets. (Pritchard Deposition at 125-26, App. 170-71).

Under § 11(c) of the Act, 29 U.S.C. § 211(c), and regulations promulgated thereunder, 29 C.F.R. § 516.1, records must be kept and preserved by "every employer who is subject to any of the provisions of the Fair Labor Standards Act of 1938 as amended". Therefore,

records must be kept and preserved even with respect to those claiming exemption as bona fide executive, administrative or professional employees under 29 C.F.R. § 516.3. Similarly, records must be kept and preserved for employees subject to other miscellaneous exemptions under the Act, 29 C.F.R. § § 516.11-516.33. This same principle would be applied to the intended police and fire overtime exemption and the police and fire regulations, 29 C.F.R. § 553.21. Failure to maintain and preserve the requisite records is itself a violation of the Act, 29 U.S.C. § 215(a)(5); whether or not certain employees may in fact be exempt, a covered employer is subject to the sanctions of 29 U.S.C. § 216 for failure to keep these records for all employees.

Governor Askew of Florida estimates (Defendant's Deposition Exhibit 43, App. 575) that the cost to Florida annually of this record-keeping alone will be $800,000. The Appellee states in the preamble to his Regulations of December 20, 1974 on tours of duty, wages, hours, compensable time in the counting of sleep and meal time, and other employment practices of fire and police for *overtime only* will cost States and Cities $27,500,000 in 1975. 29 C.F.R. § 553 (App. 596).

The Appellee, disputing the estimates of cost of the Complaint,[8] deposed Allen E. Pritchard, Jr. (App. 86),

[8] The Appellee herein cited the congressional finding, S. Rept. No. 300, 93d Cong., 2d Sess. 26 (1974), of a cost of the 1974 Amendments to States and Cities of $28 million the first year and $162 million the second year. As required by House Rule VII, the House estimated, H. Rept. No. 913, 93d Cong., 2d Sess. 41 (1974), a cost to the Federal Government of $250,000 for the first year of operation under the 1974 Amendments and $3 million for each of the next five fiscal years.

Executive Vice President of the National League of Cities (Appellant herein) and Charles A. Byrley (App. 246), Executive Director of the National Governors' Conference (Appellant herein) and introduced 47 exhibits (App. 311-565, 568-585) wherein States and Cities declared not only the bases for their estimates of fiscal dislocation owing to the 1974 Amendments, but also the damaging effect on the amount and quality of their Government services.

1. Legislative History of the Fair Labor Standards Act Through the 1974 Amendments.

Public Law No. 93-259 amends the Fair Labor Standards Act of 1938, 52 Stat. 1060, *as amended*, 29 U.S.C. § 201 *et seq.*; the Portal to Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 251-262; and the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. §621 *et seq*. It was passed by Congress on March 28, 1974 and signed into law on April 8, 1974. Among other changes, Public Law No. 93-259 removed a long-standing exemption of State and local Government employees and included all Government employees within the coverage of the Act.[9] With the

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[9] The following provisions from Public Law No. 93-259 apply to State and local Government employees:

§ 3(d). The definition of "employer" is amended to include a "public agency".

§ 3(e)(2). The definition of "employee" is amended to exclude in the cases where the employer is a State public agency, persons who are (1) not subject to a State's civil service laws and (2) publicly elected, or member of the

exception of police and fire personnel, the Act became effective against State and local Government employees

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personnel staff, or policy making appointee, or immediate legal advisor of one publicly elected.

§ 3(h). The definition of "industry" is amended to include "other activity" in addition to the original "trade, business or industry" language.

§ 3(r). The definition of "enterprise" is amended to include within the activities deemed to be performed for a business purpose, those activities performed by any person in connection with the activities of a public agency.

§ 3(s). The definition of "Enterprise engaged in commerce or in the production of goods for commerce" is amended to include an activity of a public agency and to state that "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce."

§ 3(x). Subsection is added defining "public agency" as follows: "Public agency" means the Government of the United States; the Government of a State or political subdivision thereof; an agency of the United States (including the United States Postal Service and the Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency."

§ 6(b). Specific rates of compensation are provided for newly covered employees.

§ 7(k). Subsection is added creating a limited and diminishing exemption for police and fire protection employees (partially stated in § 13(b)(20)).

§ 13(b)(7). Phasing out the former overtime exception for public transit workers.

§ 16(b). Subsection is amended to grant State and local Government employees a cause of action against a public agency in "any federal or state court of competent jurisdiction."

§ 16(c). Subsection is amended to allow the Secretary to bring an action for both liquidated damages and back pay on behalf of an employee subject to certain conditions.

on May 1, 1974. Special amendments to §§ 7 and 13 of the Act, 29 U.S.C. §§ 207 and 213, exempted police and fire personnel from the Act's overtime provisions until January 1, 1975. On that date a series of replacement amendments were to have taken effect over a three year period to create a limited and diminishing exception from the Act's overtime provisions for police and fire personnel.

The Fair Labor Standards Act, as originally enacted, stated its findings in § 2(a):

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. The Congress further finds that the employment of persons in domestic service in households affects commerce." c.676, § 2(a), 52 Stat. 1060, 29 U.S.C. § 202(a) (1970).

Section 2(b), 29 U.S.C. § 202(b), declares as the policy of the Act "to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power". The power conferred for congressional action there stated is the power "[t]o

regulate Commerce . . . among the Several States" U.S. Const., Art. I, § 8, cl. 3. "Commerce" is defined in § 3(b) of the Act as meaning:

> " . . . trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

States, political subdivisions of States, and Cities were expressly excluded from the coverage of the Act by c. 676, § 3(d), 52 Stat. 1060.

An amendment from the floor of the House to remove the exclusion of employees of Government was rejected, 83 Cong. Rec. 7414 (1938), without extended debate.

In the House debate on the Act in 1938, a Member quoted, 83 Cong. Rec. 7391 (1938), from the President's special message to Congress of May 24, 1937:

> "Most fair labor standards as a practical matter require some differentiation between different industries and different localities."

Debate in the House touched on the sufficiency to invoke the coverage of the Act under the commerce power, of importation of goods which have travelled in interstate or international commerce:

> "MR. SEGER. What about the newspapers?
>
> "MR. HEALY. They would be exempt if they were involved in interstate commerce as to have any great effect.
>
> "Mr. SEGER. Would that be true despite the fact they import newsprint from Canada?

"Mr. HEALY. I do not think it would have any effect on that at all.

* * *

"Mr. COX. If the purpose of the bill is to relieve the distressed condition of substandard workers, and if the lowest-paid workers today in this country are found in the fields of the farm and retail establishments, then why did the committee exempt these classes from the problem of the bill?

"Mr. HEALY. I am sure the gentleman knows the answer: because that would exceed the powers of Congress. We are limited by the Constitution to business in interstate commerce." 83 Cong. Rec. 7308 (1938).

The Act was held constitutional as applied to business and industry in *United States v. Darby*, 312 U.S. 100.

Since its original enactment in 1938, the Act has been in a continuous state of alteration by way of amendments in 1940, 1949, 1955, 1956, 1961, 1963, 1966, 1972 and finally the 1974 Amendments here challenged. Generally, these amendments have extended coverage of the Act to a greater number of industries or employees thereof, increased the minimum wage, or created or eliminated exemptions from various provisions of the Act.

The 1961 amendments, while continuing the exemption of State and City employees, created the "enterprise" concept, covering not only employees personally engaged in commerce, but also any employee of an enterprise with employees engaged in commerce. 29 U.S.C. § § 203(r), 203(s) (1970), *amending* 29 U.S.C. § 203 (1958).

In 1966, the § 3(d) exemption was ended for State and City employees in hospitals, schools and transit

companies. The entire Act, including the "enterprise" concept, was made applicable to these Government entities. 29 U.S.C. § § 203(d), 203(r), 203(s) (1970), *amending* 29 U.S.C. § § 203(d), 203(r), 203(s) (1964). The rationale for this extended coverage is stated in the 1966 Committee Reports:

> "These enterprises [public schools and hospitals] which are not proprietary, that is, not operated for profit, are engaged in activities which are *in substantial competition* with similar activities carried on by enterprises organized for a business purpose." S. Rept. No. 1487, 89th Cong., 2d Sess., 2 U.S. Code Cong. and Ad. News 3010 (1966); H.R. Rept. No. 1366, 89th Cong., 2d Sess. 16 (1966) (emphasis added).

These amendments were upheld as applied to State hospital and school employees in competition with private employees engaged in such endeavors by a divided Court in *Maryland v. Wirtz*, 392 U.S. 183.

In 1973 and 1974 the Congress considered removing in full the exemption of State and City employees from the coverage of the Act.

The following labor unions spoke in favor of extension of the Fair Labor Standards Act to State and City Governments: the American Federation of Labor – Congress of Industrial Organizations (Statement of President)[10] (Statement of Director, Department of Legislation),[11] the Service Employees International

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[10] *Hearings on S. 1861 and S. 1725 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare,* 93d Cong., 1st Sess., pt. 1 at 341, 351, 355 (1973). (hereafter, *Hearings - Senate* (1973)).

[11] *Hearings on H.R. 4757 and H.R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor,* 93d Cong., 1st Sess. 91 (1973) (hereafter, *Hearings - House* (1973)).

Union (Statement of President),[12] the American Federation of State, County and Municipal Employees (Statement of President),[13] International Association of Fire Fighters (Statement of President)[14] (Statement of Legislative Representative),[15] and the International Conference of Police Associations (Statement of Vice President).[16]

Governments at all levels stated that the extension of the Act to States and Cities was both unnecessary and unconstitutional.

Specific comments were made by the following local Government officials in hearings before Congress on the proposed extension: National League of Cities (Letter of Executive Vice President)[17] (Statement of Director of Personnel, Sacramento, California)[18], United States Conference of Mayors (Letter from Executive Director)[19], twenty-nine individual Cities (Letters to Sen. Harrison Williams).[20]

Secretary of Labor Hodgson had earlier testified:

> "We cannot support this proposal [extension of coverage to state and local Government employees].

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[12]*Hearings - Senate,* pt. 2, at 13a (1973); *Hearings - House* 345 (1973).

[13]*Hearings - Senate,* pt. 2, at 24a (1973); *Hearings - House* 341 (1973).

[14]*Hearings - Senate*, pt. 2, at 40a (1973).

[15]*Hearings - House* 327 (1973).

[16]*Hearings - House* 287 (1973).

[17]*Hearings - Senate*, pt. 1, at 499 (1973).

[18]*Hearings - House* 148 (1973).

[19]*Hearings - House* 367 (1973).

[20]*Hearings - Senate*, pt. 2, at 255a-269a (1973).

In 1966, enterprise coverage was extended to hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit. Here the Congress took the position that failure to cover all such institutions would have resulted in failure to implement one of the basic purposes of the act—the elimination of conditions which constitute an unfair method of competition in commerce.

"But extending coverage to all State and local employees is an entirely different matter. It would certainly involve the Federal Government in the regulation of the functions of State and local governments." *Hearings on H.R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor,* 92d Cong., 1st Sess. 552 (1971); *Hearings on S. 1861 & S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare,* 92d Cong., 1st Sess. 29 (1971).

Similarly, Secretary Brennan testified in 1973:

"I realize that the 1966 amendments extended enterprise coverage to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit.

"The reason for the extension to this group of employees was that failure to cover all employees of such institutions would constitute an unfair method of competition in commerce.

"However, extension of coverage to all State and local government employees is too great an interference with State prerogatives.

"Impositions of the Federal standard for coverage, particularly for overtime, could have a

> disruptive impact on many State civil service systems and the additional costs could overburden many small governmental units." *Hearings - House* 263 (1973).

In his veto of H.R. 7935, 93d Cong., 1st Sess., President Nixon said of the proposed Amendments to the Act:

> "Extension of Federal minimum wage and overtime standards to State and local government employees is an unwarranted interference with State prerogatives and has been opposed by the Advisory Commission on Intergovernmental Relations." 119 Cong. Rec. H.7596 (daily ed. Sep. 6, 1973).

Likewise, in his letter of February 27, 1974, to Senator Harrison Williams, 120 Cong. Rec. S. 2516 (daily ed. Feb. 28, 1974) President Nixon recognized "the need for enacting a responsible minimum wage bill . . . ", but cautioned:

> "The extension of the Federal minimum wage and overtime requirements to State and local government employees is also a problem. I appreciate the fact that the House bill under consideration tries to avoid undue interference in the operations of these governments by exempting police and firemen from the overtime requirements. However, I continue to agree with the Advisory Commission on Intergovernmental Relations that, in general, additional Federal requirements affecting the relationship between these governments and their employees is an unnecessary interference with their prerogatives. The available evidence has failed to convince me that these

governments are not acting responsibly in setting their wage and salary rates to meet local conditions. Additionally, if the Congress desires to make the minimum wage and overtime laws applicable to Federal employees, who are already adequately protected by other laws, it should place enforcement responsibility in the Civil Service Commission, which has the responsibility under the other laws."

The Senate Report on the Bill which became the 1974 Amendments (S. Rept. No. 300, 93d Cong., 1st Sess. 26 (1973), S. Rept. No. 690, 93d Cong., 2d Sess. 24 (1974)). stated:

"The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well."

Neither the House nor the Senate Committee Reports refers to the possibility of labor strife of an interstate nature between State and local Governments and their employees.

Furthermore, the legislative history contains no finding that labor disputes between public employees and local Governments have an impact on interstate

commerce, or that such employees are paid substandard wages.[21]

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[21] Appellee contends in his Motion to Affirm at 12-13 that:

> "In considering the 1974 amendments Congress had before it evidence of the existence of substandard labor conditions in State and local governments. An estimated 409,000 State and local government employees were paid less than $1.90 an hour in 1973[9] - at a time when the proverty level income for an urban family of four was $4,540 or approximately $2.27 an hour."

Footnote 9 to the Motion states:

> "The 409,000 figure is reached by adding to the 314,000 employees covered by the 1966 amendments, earning less than $1.80 an hour in September 1973, the 95,000 employees that Congress proposed to cover additionally when the minimum was raised to $1.90 an hour."

Such statistical argumentation ignores these facts. The 314,000 figure represents employees *already* covered by the FLSA under the 1966 amendments, not those brought under the 1974 coverage here challenged. The 314,000 figure cannot be considered as those receiving "substandard" wages according to any standard of the Act then in existence since those enumerated received a minimum wage of $1.60 an hour in compliance with the 1966 "standard". The 95,000 figure (less than 1% of those employees in State and local Government) attributed to 1974 coverage results from an "estimate" by the Department of Labor. H.R. Rept. No. 913, 93d Cong., 2d Sess. 28 (1974). Nowhere does the Report indicate the basis for this estimate of those who would be "benefitted by the impact of a $1.90 an hour minimum wage rate".

To the contrary, the House Report on the Act quotes a Department of Labor Report of 1970 that:

> "wage levels for State and local government employees not covered by FLSA are, on the average, substantially higher than workers already covered." *Id.*

Arguing from this Labor Department Report's statement, the House Report continues:

The committee reports proposing the 1974 Amendments noted that the Secretary of Labor, reflecting the view of the Civil Service Commission,[22] opposed extending coverage of the Act to Federal employees because the legislation would "confuse the [Commission's] administration" of special pay provisions for Federal employees in Title 5, United States Code, and "could raise jurisdictional problems of administration." S. Rept. No. 690, 93d Cong., 2d Sess. 23 (1974); H.R. Rept. No. 913, 93d Cong., 2d Sess. 28 (1974). Accordingly, the committees resolved the matter by charging the Civil Service Commission, rather than the Department of Labor, with administration of the Act's coverage of Federal employees.

On March 28, the 1974 Amendments to the Fair Labor Standards Act were passed. In signing the 1974 Amendments with "some reservations" on April 8, 1974, President Nixon, at 10 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 391-92, said:

> "S. 2747 also extends coverage to include Federal, State, and local government employees, domestic workers, and others previously excluded from coverage. The Congress has reduced some of the economic and social disruptions this extension

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"The actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." *Id.* at 29.

The Committee concludes:

"The actual impact on State and local governments then, of a 40 hour standard, will be virtually non-existent." *Id.*

[22] *Hearings - Senate,* pt. 1 at 616 (1973).

> could cause by recognizing the unique requirements of police, fire, and correctional services. Similarly, within the Administration, we will do our utmost to administer the overlapping rules which will now apply to Federal overtime."

Newly covered State and City employees immediately come under the some 691 pages of regulations in Title 29, Code of Federal Regulations, Parts 500 to 899, although only 15% of these regulations apply to States and Cities (Pritchard Deposition at 121-123, App. 167-69). In addition, 29 C.F.R. Part 553 covering police and fire employees (including security personnel in correctional institutions) was to have gone into effect January 1, 1975. 39 Fed. Reg. 44141 (Dec. 20, 1974). The Regulations, Part 553, define fire protection and law enforcement activities (§§ 553.3 and 553.4), regulate joint employment situations (§ 553.9), require overtime compensation under "mutual aid" agreements (§ 553.10), define "tour of duty" (§ 553.13), prohibit the use of compensatory time off outside the work period (§ 553.19), and require the keeping of records for both "exempt" and "non-exempt" employees (§ 553.21). Police and fire personnel are precluded from using the ruling applicable to all other employees in 29 C.F.R. § 785.21, and are regulated rather by 29 C.F.R. § 553.15 which prohibits deduction (in computing time worked) of sleeping and eating time where a shift is exactly 24 hours long or less.

In governmental activities other than police and fire, no modifications in 29 C.F.R. Parts 500-899 have been proposed or contemplated to relieve State and local Governments from falling under regulations written for, and which for decades have been applied exclusively to,

private industry. As noted above, 85% of these prior regulations are admittedly inapplicable to State and local Government employees (Pritchard Deposition at 121-123, App. 167-69).

2. Judicial History of the Act Challenged As Applied to State and City Functions including *Maryland v. Wirtz.*

The 1966 amendments to the Act came before this Court in *Maryland v. Wirtz,* 392 U.S. 183. Neither the briefs nor the opinion in that case reflect a thorough consideration of the basic nature of constitutional Federalism. The basic scheme of the entirety of the Constitution as designed to provide an overriding protection for the shared governmental powers of Federal and State Governments, our Federal system of Government, was not weighed against the constitutional protection of a "national free trade market" embodied in the Commerce Clause. That State Governments are given a high constitutional protection of their functions as Governments, a higher rank than the Constitution's protection against small impacts upon commerce, was not considered. The whole concept of Federalism as embodied in the Constitution, and the constitutional distinctions between that which is governmental and that which is private commercial business, were not considered.

Factually, *Wirtz* did not consider an impact on State and City Governments of near the magnitude of the damage which the 1974 Amendments to the Act cause. This Court was not swayed by the impact of applying the Act to school and hospital employees. According to

the Bureau of the Census' report, PUBLIC EMPLOYMENT IN 1973, *supra* footnote 7, hospital employees constitute only 9.6% of full-time State and local Government employees. *Id.* at 3, Table C. Of these, the Act as reviewed in *Wirtz* exempted from coverage physicians, nurses, professionals and administrators. Pub. L. No. 87-30, § 9, 75 Stat. 71, *amending* 29 U.S.C. § 213(a)(1) (1958). Of the 49.6% of full-time State and local Government employees who are in education, PUBLIC EMPLOYMENT IN 1973 at 3 Table C, well over half are teachers, *Id.* at 9 Table 3, who were exempted from coverage by the Act reviewed in *Wirtz,* Pub. L. No. 89-601, § 214, 80 Stat. 833, 29 U.S.C. § 213(a)(1) (1964).

The Court in *Wirtz* decided only that a rational basis for application of the Fair Labor Standards Act "interstate enterprise concept" to State-owned schools and hospitals was shown by the following: (1) that "strife disrupting an enterprise involved in commerce may disrupt commerce", 392 U.S. at 192, and that schools and hospitals "are major users of goods imported from other states", 392 U.S. at 194, whose strikes "obviously interrupt and burden this flow of goods across state lines", 392 U.S. at 195; and (2) "that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise", 392 U.S. at 192. The Court did not consider Governments as Governments and the higher status of Governments under the Constitution.

The Court refused to decide:

> ". . . whether schools and hospitals have employees engaged in commerce or production. Such institu-

> tions, as a whole, obviously purchase a vast range of out-of-state commodities. These are put to a wide variety of uses, presumably ranging from physical incorporation of building materials into hospital and school structures, to over-the-counter sale for cash to patients, visitors, students, and teachers. Whether particular institutions have employees handling goods in commerce, cf. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, may be considered as occasion requires." 392 U.S. at 201,

and it specifically limited its holding by stating:

> "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals." 392 U.S. at 193-194.

The Court did not treat Government operations as governmental and different from commerce.

Dissenting Justices Douglas and Stewart in *Wirtz* stated with respect to the commerce power:

> "The immense scope of this constitutional power is demonstrated by the Court's approval in this case of regulation on the basis of the 'enterprise concept' – which is entirely proper when the regulated 'businesses' are not essential functions being carried on by the States.
>
> Yet state government itself is an 'enterprise' with a very substantial effect on interstate commerce . . . If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build super-highways crisscrossing their territory in

> order to accommodate interstate vehicles, . . . to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] . . . on commercial intercourse'? [citations omitted]." 392 U.S. at 204-205.

To this the majority responded:

> "The Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity'." 392 U.S. at 196.

This statement was underlined by a strong and lengthy footnote, limiting the majority's decision:

> "The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole state an 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of *Wickard v. Filburn,* [317 U.S. 111] and of our decision.
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> * * *
>
> "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." 392 U.S. at 196 n. 27.

In *Employees v. Missouri Dep't of Health,* 411 U.S. 279, State-owned schools and hospitals were held immune from suits by employees in Federal Court

under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b). The Court, relying on *Wirtz* for the proposition that the employees of State institutions have "a relation to interstate commerce", concluded in dictum that when Congress acts in such situations to regulate, "it may place new or even enormous fiscal burdens on the States." 411 U.S. at 284. At the same time, the Court, 411 U.S. at 286, limited the right to sue States in Federal Courts to the Secretary with these words:

> "Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor."

3. State and City Personnel Laws To Be Preempted By The 1974 Amendments.

Paragraphs 21-26 of the Complaint (App. 17-20) show State and local civil service and other personnel laws which will be superseded by the 1974 Amendments.

All States and Cities have laws covering employment of personnel and their working conditions which are separate and distinct from employees of private or business employees. These civil service and similar law provisions are quite detailed as to employment rights. Law provisions for administrative hearings generally also provide for Court Hearings. Most of the States have

collective bargaining laws applicable to public employees.[23]

The future of these State laws for public employees is clouded as it is apparent they will be eliminated in large part. Dual records for State purposes, dual processes, dual procedures and dual administrative and Court decisions will also be required to satisfy the new Federal Act and State and local law.

States and Cities seek to keep salaries on a par with industry and the Federal Government. (App. 193)

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[23]Of the fifty States and the District of Columbia, the following number authorize or permit collective bargaining by the following employees:

(1) Police – 40 States, of which 26 specifically authorize or permit such bargaining as to wages and hours.

(2) Firemen – 43 States, of which 30 specifically authorize or permit such bargaining as to wages and hours.

(3) Teachers – 43 States, of which 25 specifically authorize or permit such bargaining as to wages and hours.

(4) Other State or Local Employees – 41 States, of which 25 specifically authorize or permit such bargaining as to wages and hours. SUMMARY OF STATE POLICY REGULATIONS FOR PUBLIC SECTOR LABOR RELATIONS (United States Department of Labor, Labor-Management Services Administration, 1974).

Thus, at least 80% of the States authorize or permit collective bargaining by some or all of the above classes of employees. And at least 50% specifically authorize or permit such bargaining as to wages and hours. For the remainder of States with collective bargaining, bargaining on wages and hours may be assumed. C.f., §9(a) of the National Labor Relations Act, Act of July 5, 1935, ch. 372, 49 Stat. 453, *as amended,* 29 U.S.C. §159 (a) (1970), which explicitly mentions within the scope of bargaining only "wages, hours of employment", leaving unspecified the other "conditions of employment".

Collectively-bargained State and City personnel practices are, by their very nature, mutually agreeable to Government and to the employees of Government. The 1974 Amendments will supersede these State and local Government arrangements.

The 1974 Amendments conflict with, wipe out, or at least modify many State and local civil service and personnel laws, thereby creating a legal chaos unlike applicability of the Act to private business. Large penalty provisions apply to violators of the provisions of the Act and the regulations under the Act.

The degree to which this supersession, conflict, confusion and chaos may be accomplished, is shown by 29 C.F.R. § 553.2, (App. 600-02), which reserves to the Secretary's Administrator of Wages and Hours the final decision power to "determine the compensable hours of work, tours of duty and work period in applying the section 7(k) exemption."[24] The fiscal effect of this rigidity is shown, for example, by the effect on the State of Texas. State law in Texas requires a 365-day duty cycle for employees, including firemen; conformity with State law will preclude compliance with the 1974 Amendments' requirement that the § 7(k) provision for police and fire personnel is available only if tours of duty are between 7 and 28 days. The result is that adherence to State law lowers from 60 to 40 hours per week the level beyond which police and fire personnel in Texas must be paid overtime. (Pritchard Deposition at 137, 141; App. 179-80, 181-82). No longer will decisions be made locally or at State capitols on State and local personnel matters. Final decisions will come from the Administrator and Federal Courts, including this Court.

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[24]Section 7(k) is added to the Act by the 1974 Amendments. Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 60, *amending* 29 U.S.C. § 207 (1970).

4. State and City Constitutional and Statutory Debt and Tax Limitations.

Paragraphs 73-77 of the Complaint (App. 36-37) set forth State constitutional debt and tax limitations which prevent deficit financing by Cities and States to meet increased costs mandated by the 1974 Amendments. As stated there, these increased costs must be met by curtailment of service levels, termination of services, or the foregoing of planned Government services. (Pritchard Deposition at 25, App. 102-03; Pritchard Deposition at 81, App. 140-41). The fear is very real that Congress, by imposing budget costs but not providing funds to pay those costs, will destroy the fiscal integrity of States and Cities.

If, as postulated by the Dissent in *Wirtz*, the commerce clause can be used as here to mandate costs upon States and Cities, their entire fiscal foundation will in fact be destroyed by the Congress. The effect of upholding congressional action nullifying these State and local debt and tax limitations upon State and local bonds is devastating. Municipal and State bonds are dependent upon State and local law binding the States and Cities, but there is no way States and Cities can bind the Congress or guarantee that a minimum wage power will not be used to mandate costs no State or City can afford.

5. State and City Estimates of Services and Personnel Practices Curtailed and Foregone Owing to the Fiscal Impact of the 1974 Amendments.

The Complaint sets forth decisions by States and Cities to alter and diminish Government services owing to the increased cost, imposed by the 1974 Amendments, of providing other Government services. The Act makes prohibitively costly certain personnel practices which had provided Cities and States needed flexibility and economies in providing Government services; among the practices adversely affected are: compensatory time off (Complaint ¶¶49,66; App. 29-30, 35), flexible scheduling practices (Complaint ¶49, App. 29-30), employment of student interns (Complaint ¶¶49,60; App. 29-30, 33-34), police and fire training (Complaint ¶¶56,69-70; App. 32, 35-36), availability of "reserve" policemen (Complaint ¶57, App. 32-33), and paid volunteers (Complaint ¶28, App. 21), institution of affirmative action programs (Complaint ¶59, App. 33), computation of payrolls (Complaint ¶63, 65; App. 34-35), membership on volunteer boards and commissioners (Complaint ¶65, App. 34-35), and joint employment (Complaint ¶¶29,46; App. 22, 29). These are illustrative, not exhaustive, as variety is a major fact and factor among State and local Governments, as they seek to adapt their resources to meet their varied needs. With the increased cost attendant to States' and Cities' inability, under the Act, to use these flexible and economical practices, States and Cities will have to curtail or forego some Government services.

In this case, an expert (see Plaintiffs' Deposition Exhibit 1, App. 588-90) in City administration testified that the 1974 Amendments would produce in Cities "a mass of confusion which is going to completely disrupt 200 years of stylized operations, which has been a tradition at the local government level." (Pritchard Deposition at 123, App. 169). He also said the Act caused great increases in costs and decreases in services. (Pritchard Deposition at 143, 151; App. 183, 189-90).

6. Order and Opinion of the District Court Below.

The Complaint, the Depositions of Messrs. Pritchard and Byrley, Deposition Exhibits consisting of letters and other documents from Governments of States and Cities, and other data of Record concerning the impact, in money spent, in services curtailed or foregone, in plans and procedures abandoned, in confusion and uncertainty, of the 1974 Amendments on State and City Government, was before the District Court below on the Appellee's Motion to Dismiss the Complaint, and Plaintiff Cities', States' and Government Organizations' Application for a Preliminary Injunction. The Court dismissed the Complaint and denied preliminary relief, making Rule 56, Fed. R. Civ. P., findings[25] as follows: that the State and City Governments before the Court are not seriously in competition with private industry (App. 650); that the impact of the 1974 Amendments may seriously affect the structuring of Government activities by reducing flexibility to adapt

to local and special circumstances (App. 650); and that States and Cities made substantial contentions that: (1) the 1974 Amendments will cause either an increase in local Government fiscal requirements or a reduction in services and personnel or both, (2) these results will obtain without any factual predicate showing that there has been in the past any substantial degree either of widespread labor unrest curtailing the flow of interstate commerce or of substandard wage scales, and (3) the 1974 Amendments will intrude upon State and City performance of essential Government functions far more than did those reviewed in *Maryland v. Wirtz*, 392 U.S. 183 (App. 651).

During the Hearing on the Motion to Dismiss and Application for Preliminary Injunction, one Member of the Court alluded, Tr., Dec. 30, 1974, at 36, to a higher-than-rational-basis test whether the 1974 Amendments are a valid enactment under the Commerce Clause, a test which was not applied in *Maryland v. Wirtz*. The Court, in its written findings and decision, expressly doubted some of the broad language of the majority in *Wirtz*. (App. 651).

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[25]The parties stipulated that the Depositions and Exhibits could be used for any purpose. Bryrley Deposition at 94, App. 309-10. They were introduced in evidence. Tr., Dec. 30, 1974, at 5, 6. The transcript of the Hearing of December 30, 1974 is not printed in the Appendix for Nos. 74-878 and 74-879, filed with this Brief.

SUMMARY OF ARGUMENT

I.

The Fair Labor Standards Act, by Amendments adopted in 1974, claims Congressional power to fix wages, hours, and other terms and conditions of employment for all State and local Government employees. Earlier regulation of salaries of State hospital and school employees remain a part of the Act. The Act actually reaches all State and local Government employees as new records are required to allow a Federal decision on those who are, by grace, exempted.

No prior Federal legislation has permeated the whole of State and local Government on such an intimate, internal, and important subject. No power "takeover" of this magnitude, operating directly on State and local Governments has ever been adopted before by the Congress.

States and local Governments, being bundles of law powers, must act through employees. Since this Act imposes regulatory controls which cover all their employees, this effectively intrudes the Federal Government into every function of every State and every local Government.

While the enormous costs of this intrusion are not a constitutional factor as such, these are a major fact flowing from the Act's provisions which overlap State and local law thus requiring dual records, dual reports, dual administrative processes, costly training of extra personnel, costly overtime, and new and expensive decisions. Employee actions are provided for in the Federal Courts for double time, penalties, attorney's

fees and class actions. Probable dual court jurisdiction is created over subject matter. The Act effectively eliminates volunteers now paid just enough to secure workman's compensation coverage or other benefits of local Government employment. Compensatory time off, joint employment, civil service provisions, and other unique State and local personnel plans designed to meet unique local needs at little cost must now be eliminated. This is done in large part through rigid uniform nation-wide rules under the Act which cause vast new costs by wiping out these unique and efficient low-cost arrangements.

That the Act imposes increased governmental costs directly on States and local Governments is not denied by Appellee. Appellee disputes Appellants' estimate of billions in costs, and tries to minimize costs, but he admits the costs are 27 millions of dollars for *overtime only* of police and fire fighters for the first year under the regulations he issued December 20, 1974.

The damaging fiscal impact of congressional mandating of great costs which breach State and local law on tax and debt limits is exceeded only by the fear and fact that such power in the Congress renders it legally impossible for States and Cities to give legally binding assurances to sell their bonds that tax and debt limits will not be exceeded in the future. They can bind themselves but not the Congress. Seemingly believing that a claim of *de minimis* impact would confer constitutional power, the House of Representatives passed the 1974 Amendments with a Committee finding that since States and local Governments have no substandard employment terms or conditions "The actual impact on State and local governments then of a

40 hour standard, will be virtually non-existent." H.R. Rept. No. 913, 93d Cong. 2d Sess., 28 n. 1 (1974).

The Senate Committee found a cost of $28,000,000 for the first year and $162,000,000 for the second year of applicability of the 1974 Amendments. S. Rept. No. 300, 93d Cong., 2d Sess., at 26.

II.

The major purpose of the Constitutional Convention of 1787 was to create a workable Federal system of Government. This Case involves all of that Federal system as embodied in the entirety of the Constitution of the United States.

The draftsmen of the Constitution made it clear in their explanations of that great charter that this governmental system of Federalism encompassed a sharing of governmental powers between the national Government and the State Governments. The plan envisioned full recognition and use of the State Governments then in being. The enumerated powers of the Federal Government were designed to do those national things the States could not adequately do. State Governments were subjected to specific prohibitions and requirements then apparent as needed to insure the operation of the Federal system of Government. This plan made it unnecessary to specifically enumerate the powers of the State Governments; that idea was not seriously considered. Even then, wide variety existed among the States in their Constitutional powers and laws as provided by their people.

Madison's NOTES OF DEBATE ON THE FEDERAL CONSTITUTION of 1787, the FEDERALIST Papers, and the ratification debates of the States make this basic Federalism concept clear beyond question. The Federal Government and the State Governments were often referred to, as "supreme" each within its own governmental area.

Hamilton articulated in FEDERALIST Paper No. 79 the view that this Court should strike down as unconstitutional any excessive assertions of power by the States or by the Federal Government. And Chief Justice Marshall embraced this implied power in *McCulloch v. Maryland*, 4 Wheat. 316, and as here, in many cases down through the years this Court is called upon to exercise that function.

A major purpose of the dual sharing of governmental powers under Federalism is to prevent centralization of power. This was a major part of the constitutional design.

This design is spelled out in the whole of the Constitution and the direct and implied restrictions there set forth even before the adoption of the Tenth Amendment. Down through the years the Federal and State Governments have built a wonderful record of cooperative Federalism and of comity and mutual respect for the governmental role of each other. Where taxes have been imposed on State Governments (*New York v. United States*, 326 U.S. 572 (with separate opinions)), or State license fees imposed on the Federal Government, (*Johnson v. Maryland*, 254 U.S. 51) this Court has invalidated these as violative of our Constitutional Federalism.

Here the Congress has by the 1974 Amendments overstepped constitutional Federalism by attempting to centralize power in itself to regulate the most intimate, internal and essential governmental function of States and local Governments of prescribing terms and conditions of employment of the employees of those Governments. As in *Kentucky v. Dennison,* 24 How. 66, 107-108, "such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights."

Another purpose of the Constitution's framers was to create a national free market for commerce by preventing State-imposed trade barriers. The prohibitions of State import and export taxes and other constitutional prohibitions were designed to help do this as well as the Commerce Clause.

For the Congress to have usurped control of terms and conditions of employment of all State and local employees as "commerce" under the Commerce Clause in 1787 would have been denounced as preposterous by the draftsmen and supporters of the Constitution. It still is. The Commerce Clause is for regulation by Government of commercial matters, not governmental matters. Such has been the uniform interpretation and understanding. The issue in this Case is not whether the Federal or State Government can regulate industry but who regulates the State Governments themselves.

In adopting this Act in 1938 and in numerous acts regulating those in commerce, Congress has exempted States and Cities in recognition of their special governmental partnership status under Federalism. Other Federal legislation has recognized the unique

differences of State and local Government as Governments from private industry and applied exemption or different approaches of comity in recognition of Governments as Governments as in the recent Employees Retirement Income Security Act of 1974. The Social Security Act is optional insofar as State Governments are concerned.

Instances of cooperation, or Federal deference to State regulation of private industry such as cable television are collected in the Brief to illustrate cooperative constitutional Federalism in action. Federal programs cannot provide the experimentation, adaption and wholesomeness of local or regional variations.

Recognition of the special expertise and unique position of State Governments, especially State Courts, is seen constantly in the deference to State Courts by the abstention and related doctrines of this Court.

Up until now State and local Governments have had wide scope in adapting local resources to their peculiar needs but now such unique local concepts as volunteerism and compensatory time off in lieu of overtime pay, are to be wiped out and replaced by rigid nation-wide uniform rules centralized under Appellee. Thus will the great concept of constitutional Federalism be destroyed. To return to Chief Justice Marshall once more and *McCulloch v. Maryland*, he also said (at 4 Wheat. 403): "[N]o political dreamer was ever wild enough to think of breaking down the line which separates the states, and of compounding the American people into one common mass." Yet that is what the Congress has done here. Madison in FEDERALIST Paper No. 46 said "ambitious encroachments" by the

Federal Government on the authority of State Governments would be "madness"!

State and local Government power over the vital functions of Government, here usurped by Congress, is protected against such usurpation by the great purpose and principles of the concept of Federalism. The 1974 Amendments are unconstitutional as in violation of that purpose, those principles and that concept.

III.

Maryland v. Wirtz did not give major consideration to the historical roots or the vast development of constitutional Federalism and the legal and factual cooperative workings of our Federal system of Government. The major focus was on the new "enterprise" concept of the Act and commerce rather than on the power of the Congress to regulate State and local Governments as against the immunities provided by Federalism.

The majority's reply to the dissent in *Wirtz* was that the postulated congressional declaring of an entire State as a commercial enterprise, and the mandating of bankrupting costs upon the State, was an event that could not happen. This has proved to be wrong. It has occurred in the 1974 Amendments. The majority called this wrong speculation, a false interpretation of its opinion. Now that the speculation is fact, perhaps the majority does not interpret *Wirtz* as upholding the 1974 Amendments.

Maryland v. Wirtz did not consider the totality of our Federal system of Government as laid against a congressional scheme impinging upon every function of

every State and every local Government. A scheme which centralizes power in Appellee to impose high cost, rigid, nation-wide uniformity, wiping out small cost arrangements developed by experience to meet unique State and local needs. And this centralization is not mandated to wipe out substandard labor conditions as such conditions do not exist among States and local Governments. They pay fair and reasonable salaries, fix reasonable hours and have civil service, public sector collective bargaining and other laws insuring that their employees have terms and conditions of employment which meet public service needs while providing fair treatment.

The scheme of the 1974 Amendments thus has no basis in fact or in constitutional power. And since *Maryland v. Wirtz* supplies neither of these missing elements it is not controlling and the broad language which disturbed the lower Court in this Case should be restated or overruled.

Governmental variety, the great strength of cooperative Federalism, cannot constitutionally be wiped out by calling it commerce and conferring unprecedented pervasive power upon one partner to the Federal system to take over the vital and intimate function of employee terms and conditions of employment of the other.

The elaborate treatment of Government in the Constitution indicates an intent to make certain Governments, as Governments, receive a higher status which would not allow functions of those Governments to be classified as commerce.

Wirtz is bottomed on the assumption that the amendments of 1966 worked no real Federal interference with the Government of States (392 U.S. at 193).

To extend the *Wirtz* doctrine to justify this complete takeover, one must abandon the principle that a rational basis for Federal legislation is more reluctantly found where to do so would force States and Cities to reduce or eliminate essential governmental service.

Admittedly, *Wirtz* condoned regulation of hospital and school employees competing with similar "enterprises" but without any firm analysis as to the ultimate impact on Federalism. In fact it appears to be denied by the exchange between the majority and dissent referred to above.

The focus of the Briefs and the majority opinion in *Wirtz* being on commerce, the threat that this initial Federal incursion presented to the integrity of constitutional Federalism received scant attention. Little, if any, analysis was given to the fundamental problem of preserving the careful governmental architecture of our Forefathers, while at the same time, giving proper recognition to the national free trade market embodied in the Commerce Clause. Given the absence of analysis, no balance was struck or attempted; and Federalism suffered at the hands of a legislative policy admittedly bottomed on a *de minimis* impact on commerce. The 1966 amendments' impact on State and local Government were, and are, not nearly as lethal as the potential governmental fiscal dislocation emanating from the 1974 Amendments.

As against the principles of our Federal system of Government, *Maryland v. Wirtz,* if interpreted to deny those principles, cannot stand. The programs and cooperative mutual respect of Federalism as sketched out in this Brief is not a picture of commerce in action but of Government in action.

IV.

The 1974 Amendments here challenged are bottomed on the Commerce Clause, which has been construed as a broad grant of power to the Congress to maintain and preserve a national free trade market, *Gibbons v. Ogden,* 9 Wheat. 1. Against this goal, this Court in considering challenged commerce legislation, has balanced the impact of the regulatory legislation in finding a rational basis for congressional action. *United States v. Carolene Products Co.,* 304 U.S. 144, 152. The "presumption" of constitutionality weakens as the legislation impacts a fundamentally protected right "within a specific prohibition of the Constitution, such as those of the first ten amendments. . .", *Carolene Products, supra,* 304 U.S. at 152 n. 4. This requirement of a higher-than-rational basis, commonly applied by this Court to legislation challenged on equal protection grounds, is as applicable to this challenge based on Fifth Amendment Due Process, See *Bolling v. Sharpe,* 347 U.S. 497, 499, especially here where the fundamental right of Federalism is preserved, not only in the Tenth Amendment, but in the 114 times throughout the Constitution's text where special provision is made for States. Private industry, the object of the Fair Labor Standards Act until the 1974 Amendments here challenged, depends on congressional grace when Congress acts rationally within the commerce power. The Constitution demands more for States and local Governments. *Polish Nat'l Alliance v. Labor Board,* 322 U.S. 643, 650 (dictum).

This Court has not been asked before to apply a higher-than-rational basis test to congressional legislation usurping State and City control of State and City Government; this was not done in *Maryland v. Wirtz,*

392 U.S. 183. But *Wirtz*, itself wrongly decided, is not this Case: this Case, for the first time before this Court, involves a congressional assertion of total power over the terms and conditions of employment of all Government employees, through whom States and Cities act for the people; these 1974 Amendments are an unconstitutional congressional assertion of power to control State and City Government itself.

V.

The Tenth Amendment did not create the Federal system of Government. The Constitution had already done that. The debates at the Constitutional Convention, the Constitution there produced, The Federalist papers, the debates at the State ratification Conventions all so establish.

The Federal system of Government is imbedded in the whole of the Constitution. To justify damage to that system, or violation of its principles designed to prevent centralization of the governmental functions of State and local Governments the Congress must enact legislation which meets a much higher constitutional standard than the traditional rational relation test.

Commerce in a national free trade market is important but so is our Federal system of Government. Protecting that system of Government is more important than protecting commerce, as that governmental system must in turn protect commerce. That system includes not only State powers and the peoples' powers under the Tenth Amendment. It includes protecting Federal Government powers and not allowing the

system to break down by the excesses which Hamilton in the FEDERALIST said this Court would strike down as unconstitutional.

The Case for unconstitutionality is based on the whole of the governmental scheme of the Constitution, before the Tenth Amendment was adopted as well as the language of the Tenth Amendment. Certain it is that the Tenth Amendment is an important part of the Constitution which this Court must implement by enforcing its purposes which are to make clear that "absorption of legislative power by the United States over every activity", *Polish National Alliance v. Labor Board, supra,* 322 U.S. at 650 is a violation of the Constitution.

The 1974 Amendments do not meet the higher-than-rational test or even the traditional rational test. They violate not only Federalism, they violate the Tenth Amendment.

VI.

The 1974 Amendments here challenged went into effect against States and Cities on May 1, 1974; the effective date of provisions covering police and fire personnel was deferred to January 1, 1975. A reading of the 1974 Amendments makes clear that in them Congress asserts the power to control the terms and conditions of employment of all State and local Government employees, with minor exclusions. That certain exemptions are granted by congressional grace, as for supervisory personnel, in no way diminishes the congressional assertion of control over City and State

Government. C.f., the Internal Revenue Code of 1954, 26 U.S.C., and especially 26 U.S.C. §61.

Interpretation of exemptions from the coverage of the Act of either wages, or hours, or both, phrased very generally by Congress in amending the Fair Labor Standards Act many times, has been provided by regulations issued by Appellee and his Administrator of Wages and Hours. These regulations comprise 691 pages of a volume of Title 29 of the Code of Federal Regulations, and are admittedly 85% inapplicable to Government with its particularly stylized operation developed over 200 years of operation under our Federal system. Yet, with the exception of police and fire regulations, regulations designed for private industry were the only guidance for State and City Government to comply with this attempted congressional takeover of their Government functions.

Appellee on December 20, 1974, issued regulations of tours of duty, sleeping and eating time and overtime, which radically changed State and local law and traditional practices for police and fire fighters. The treatment in the regulations of sleeping and eating time, 29 C.F.R. §553.15, was not only in conflict with State and local law and practice but in conflict with congressional representations. These regulations were to go into effect January 1, 1975.

The regulations were issued by being printed in the Federal Register of December 20, 1974, which due to the Christmas holidays meant that actual receipt of that issue was some days later. This reduced the time for action under the regulations prior to their effective date to even less than the 6 business days provided on paper.

This meant that it was impossible for States and Cities to give notices required by law, assemble legislators and councilmen, and amend laws and budgets to bring them into compliance with the regulations. Such action made it impossible to comply with these regulations and rendered them void as in violation of due process.

VII.

As with the Tenth Amendment, the Eleventh Amendment did not create the Federal system of Government but rather recognized a system already guaranteed by the Constitution. Hamilton indicated in FEDERALIST Paper No. 81 that States as partners in Government would be immune from suits brought against them without their consent. When that principle was endangered by the decision in *Chisholm v. Georgia,* 2 Dall. 419, both the Federal and the State Governments cooperated to preserve the sovereignty of the States through the Eleventh Amendment.

The 1974 Fair Labor Standards Act Amendments represent a Federal fiat eliminating the Eleventh Amendment without the express or implied consent of the States. Of course, no express consent was offered by or obtained from the States. Furthermore, it would be ludicrous to twist any doctrine of implied consent to fit the present case by forcing a State to choose to discontinue employment of personnel or consent to suit. Nor should the doctrine allowing the Federal Government's suit against a State in vindication of a constitutional right be here distorted to allow the Federal Government's enforcement of a private citizen's private cause of action against a State in Federal Court.

ARGUMENT

1. The 1974 Amendments Conflict With Nearly Two Hundred Years of Federalism, Our Federal System Of Government, The Partnership of State and Federal Governments In Sharing Governmental Powers.

a. The Framers of the Constitution envisioned a Federal system of Government, a constitutionally protected partnership.

Since the 1974 Amendments here challenged are the Congress' first attempt ever to regulate the whole of an essential Government function, control of terms and conditions of employment, for all eleven million State and local Government employees, this Case involves all of our Federal system of Government as laid out in the Constitution of the United States. States and local Governments engage in a vast number of governmental functions from operating airports to public housing, police and fire protection, tax collection and zoning. In each instance, they act through employees who are reached by these 1974 Amendments. (Complaint ¶16, App. 16).

Here, as the Congress attempts to make this startling new takeover of a State and local Government essential governmental function – control of State and local Government employees – it seems most appropriate that we examine at least in broad historical perspective, our entire constitutional scheme, our entire dual-shared power concept, as applied to our Government system which is usually labelled "Federalism". Since this is a case of first impression, a revisit to

the views of the draftsmen of our Constitution is illuminating.

Any careful study of the genesis, creation and interpretation of the Constitution of the United States makes clear that its paramount purpose in the field of intergovernmental relations was to establish this dual or Federal system of Government. State Governments were in being and the Constitution's plan for Federal Government powers was drafted with this major fact in mind. This fact is clearly a major part of the design of the Constitution. The famous "Virginia Plan", "New Jersey Plan", "Connecticut Compromise", and in fact the substance of the debates and votes at the Constitutional Convention, as so carefully recorded by Madison, are irrefutable proof of this purpose.[26] The views of Hamilton, Madison and Jay in THE FEDERALIST papers furnish confirmation.[28] The State by State debates on ratification of the Constitution are further confirmation.[28]

And while the State debates are a massive presentation of an understanding that State governmental powers and the ultimate power of the People would be further protected by an amendment embodying the

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[26]J. Madison, NOTES OF DEBATES ON THE FEDERAL CONVENTION OF 1787 (Norton ed. 1966); Warren, THE MAKING OF THE CONSTITUTION (1928); Smith, THE CONVENTION AND THE CONSTITUTION (St. Martins 1965)

[27]THE FEDERALIST (Mentor ed. 1961); In No. 39, Madison states: " . . . the new constitution will, if established, be a federal and not a national constitution."

[28]4 Elliott, DEBATES ON THE FEDERAL CONSTITUTION (1836) 177, 242, 244, 406, 545, 550, 625, 629.

principles of the Tenth Amendment, it is clear from the sources cited that even without such an amendment those who wrote the Constitution were unanimous in their view that the "Federalism" principles contained in the Constitution *prior* to and without the words of the Tenth Amendment guaranteed essential non-interference by either Federal or State Governments with the essential governmental powers of each. The decision here must therefore consider the whole of the Constitution to correctly evaluate the powers, functions, and cooperative "Federalism" thereby created.

Hamilton's view that this Court would strike down as unconstitutional any governmental excesses of power,[29] as enunciated later by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, was not seriously disputed. And while Hamilton's nationalistic stance and Madison's federalistic stance have provided grist for great constitutional debates to this day, no constitutional scholar of substance has ever denied that the Constitution created a Federal system of Government. Nor has anyone seriously denied this Court's umpire role in cases of power conflicts.[30]

And just as this Court's umpire role is implied from the whole of the scheme of the Constitution, so too is Federalism. The specific power authorizations to the Federal Government, the negative power prohibitions to the State Governments were all a part of the Constitution's Federalism design.

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[29]THE FEDERALIST NO. 78 (A. Hamilton), *supra*, note 2, at 466-472.

[30]H.M. Hart and H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

The question presented here is not just one of protection of State governmental power as sloganized under the term "states' rights". The question here is one of protection of our Federal system of Government against the centralization of power the Constitution was designed to prevent. To reduce State and local Governments to the inferior status of reporting to and being governed by a Federal agency on such an important, ultimate internal matter as terms and conditions of employment of all employees is not envisioned by the Federal partnership system.

Here the Congress by these 1974 Amendments has overstepped constitutional bounds; its action violates both the spirit and the letter of the Constitution. It is this Court's duty so to hold and thus to preserve Federalism as envisioned and embodied in the Constitution by the Founding Fathers.

While the entire constitutional scheme is carefully laid out to insure Federalism as a system of Government, the Tenth Amendment is designed to protect the State Governments' traditional powers and the People's power as the ultimate primary source of all powers.[31] And while Federalism is not dependent upon the Tenth Amendment as Federalism was written into the design of the original Constitution, one cannot ignore the Tenth Amendment as a guarantee to the People and to the States of State governmental powers

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[31] The 1974 Amendments here challenged usurp control of State and City Government from State and local officials responsible by election to the people; this power is given to unelected Federal employees responsible to no electorate.

or as a guarantee to the People of their paramount power.[32]

> "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." THE FEDERALIST No. 46 (J. Madison).

It would serve no useful purpose to detail the some 114 references to the States in the Constitution and explain the importance of each. The decisions of this Court have done that repeatedly with respect to the major constitutional references to the States. We do cite cases in this Brief to establish that this Court has consistently recognized Federalism as a basic concept of our system of Government. Here this Court is called upon for the first time[33] to interpret what our Federal system of Government means when the Congress moves in to regulate and clamp controls on the entirety of State and local Governments as Governments. This is greatly different from cases where the Tenth Amendment was interposed (unsuccessfully of late) in a conflict where both State and Federal Governments sought to regulate commerce by some private industry or entity.

Under "Federalism" for example, Federal postal drivers have been held immune from State driver's license requirements, which was seen as a State attempt to regulate the Federal Government as a Government. *Johnson v. Maryland* 254 U.S. 51, 57, in *Miller v.*

[32] See Costo, *The Doctrinal Development of the Tenth Amendment,* 51 W. Va. L. Rev. 227 (1949); Cowen, *What Is Left of the Tenth Amendment* 39 No. Car. L. Rev. 154 (1961).

[33] See *supra* pages 26-30.

Arkansas, 352 U.S. 187 (per curiam) a State licensing requirement for control was similarly rejected. In both cases a presumption was raised that the Government interfered with was adequately performing its licensing and certification function, a function which would be "frustrated", *Miller*, 352 U.S. at 190, by intergovernmental interference.

In *Mayo v. United States*, 319 U.S. 441, 447, a State inspection fee was invalidated as applied to fertilizer shipment and sales by the United States; permissible taxes, such as on salaries of employees or purchases by suppliers were distinguished, the Court saying:

> "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required *before executing a function of government.*" (emphasis added).

In our Nation, Governments are bundles of law powers. Governments act only through their employees. One of their most vital internal and intimate governmental functions is, therefore, the terms and conditions of employment that they prescribe for their employees. "No more vital internal function of government exists for States and cities than control of their employees and the budget items relating to said employees." Complaint ¶36, App. 25) In fact, salaries of City employees make up 80 to 85% of each City budget. (Pritchard Deposition at 125-126, App. 170-71). States and local Governments now have fair and reasonable terms and conditions of employment for their employees designed *for their unique needs.* (Complaint ¶¶19, 21, App. 17). The Federal Government does not

possess all the knowledge, wisdom, fairness and reasonableness in the exercise of this essential governmental employment function for State and local Government.

The impact of these Amendments on intergovernmental relations is devastatingly enormous. As is made clear in the Complaint and Record herein, the 1974 Amendments wipe out State and local civil service, budget, debt and other laws in a way never contemplated by the framers of the Constitution when they inserted the commerce power into that basic governmental charter.

State Governments free from Federal control are a paramount constitutional purpose, a purpose higher than any commerce impact they may make. Governments and the national free trade market envisioned by the Constitution were to coexist.

The 1974 Amendments fundamentally alter the distribution of governmental powers between the States and Federal Government thus destroying the very nature of our Federal system of Government by this usurpation through attempted Federal control over purely governmental organs and actions of State and local Governments.

In the decisions of this Court, one can trace most of the significant social, political and economic trends and developments of our Nation. Many of these cases have involved a decision whether the Federal or State Governments have power to act.[34] In the cases up to now the action so judged is largely regulation by Federal or State Governments of private persons or

[34] See Hart and Wechsler, *supra* note 30.

corporations.[35] Appellants urge that Government regulation of Government violates the constitutional principles of "Federalism" and is therefore unconstitutional.

This Act's 1974 Amendments are repugnant to the entirety of the Constitution of the United States. The Constitution enunciates a system of Government under which the Federal Government and the State Governments each perform Government functions appropriate to their assigned roles in our federalized system, with each Government respecting the role of the other and this Court acting as ultimate arbiter in case of conflict.

No act adopted by the Congress has ever before even attempted to directly control, regulate, take over or interfere with and impinge directly upon the whole of the employees and thus the whole of the governmental functions of State and local Governments *qua* Governments as substantially as do the 1974 Amendments here challenged.

The whole of State and local Government functions were not intended to be classified as commerce under any reasonable interpretation of the Commerce Clause of the Constitution which was inserted to enforce a national free market for trade. The Commerce Clause

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[35]See, e.g., *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1943) (the steel industry); *United States v. Darby*, 312 U.S. 100 (the lumber industry); *Wickard v. Filburn*, 317 U.S. 111 (the wheat market); *United States v. Wrightwood Dairy*, 315 U.S. 110; *United States v. Carolene Products Co.*, 304 U.S. 144 (the dairy industry), *Heart of Atlanta Motel v. United States*, 379 U.S. 241; *Katzenbach v. McClung*, 379 U.S. 294 (public accommodations).

should not provide the Federal Government with a slick gimmick to take over and regulate State and local Governments.

In *Craig v. Missouri*, 4 Pet. 410, 433, the Court considered attempts by a State to issue money under the label of "bills of credit"; commenting on this perversion of word meaning, Chief Justice Marshall said:

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

And so here the adoption by the Congress of these 1974 Amendments where "Government" is called "commerce" so that the Federal Government may regulate State Government is "great and ruinous mischief" to evade the Constitution's failure to give power to the Federal Government to so regulate State Governments.

The 1974 Amendments have no rational basis in the Commerce Clause as properly defined in relation to Governments. The Constitution's Framers defined Government through many grants and prohibitions of power; they operated on assumptions based on State Governments in being.

"Federalism" looks to the entire Constitution as its constitutional basis. The Tenth Amendment is an additional and a specific bar to the takeover of State and local Government functions by the Federal

Government under the 1974 Amendments. The respect of the Congress for State governmental functions and powers has been so great throughout our Nation's history as to prevent any previous takeover legislation as pervasive as that here challenged. The constitutional mistake here made by the Congress in imposing this Act upon States is clear and must be corrected by this Court.

b. The first Congress memorialized a constitutionally protected partnership system between Federal and State Governments, in part through State powers specifically embodied in the Tenth Amendment, in addition to the other parts of the Constitution creating our Federal system of Government.

While the Federal system of Government is spelled out in the whole of the Constitution stating the Federal Government's part in that system and imposing certain restrictions on both the Federal Government and State Governments, a provision similar to the Tenth Amendment, reserving to the States those powers not delegated to the Federal Government, was recommended by all eight of the States which, in ratifying the Constitution, proposed various amendments.[36] In fact, a commitment to present such a provision as an Amendment was promised to secure ratification of the Constitution.[37] The provision which ultimately became the Tenth Amendment was included, therefore, in the first proposal of amendments to the Constitution, introduced in the House of Representatives by James

[36] 2 B. Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983 (1971).

[37] *See* Schwartz, *Ibid.*, and Elliott, *supra*, note 28.

Madison.[38] The proposed amendment stated, "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."[39] This provision was retained by a select committee of the House chosen to consider and report on the amendments proposed by Madison and by the States.[40]

Debate on the amendment in the House of Representatives was brief. Twice, motions to add "expressly" before the word "delegated" were defeated.[41] James Madison, objecting to the changed wording, stated that "it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to account every minutiae."[42] Two other motions changing the wording of the amendment to that finally adopted were agreed to without debate,[43] and the proposed amendment was passed without further discussion.[44]

While the full Senate debates on the Bill of Rights are unreported, the Senate Journal shows that the Senate rejected a similar proposal to add the word "expressly" before "delegated".[45]

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[38] 1 Annals of Cong. 436, 441 (1789).

[39] *Id.* 436.

[40] *Id.* 761.

[41] *Id.* 761, 767-68.

[42] *Id.* 761.

[43] *Id.* 761, 768.

[44] *Id.* 768.

[45] 2 Schwartz, *supra* note 36, at 1150-51.

The Bill of Rights was proposed and then approved by the First Congress on September 25, 1789, and ratified by three-fourths of the States on December 15, 1791.[46]

c. This Court has preserved the constitutionally protected Federal system of Government, of Federal and State partnership.

The basic pattern of Federalism, of Federal-State cooperative intergovernmental relationships, and shared governmental powers, is reflected in the decisions of this Court which consider the whole structure and dynamics of the State and Federal law systems in drawing lines of demarcation between Federal and State governmental powers.

As this Court said in *Ex parte Siebold*, 100 U.S. 371, 394, in upholding concurrent Federal-State regulation of elections:

> "The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution . . . "

This Court considered in *Ex parte Kentucky v. Dennison*, 24 How. 66, a Federal statute imposing a "duty" on State executives to extradite criminals. Construing the statute as permissive rather than mandatory, the Court said:

> "The Act does not provide any means to compel the execution of this duty, nor inflict any

[46] *Ibid.* //65

> punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. *Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights.* And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer as such, any duty whatever, and compel him to perform it; for if it possessed this power, *it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State*, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 24 How. at 107-108 (emphasis added).

The 1974 Amendments overload the officers of each State and City with burdensome and expensive dual record-keeping and personnel scheduling chores mandated by those Amendments. These are in addition to State and City record keeping, personnel processing and other reporting. These federally ordered chores, to be used only to aid Federal usurpation of State and City personnel systems, violate constitutional Federalism.

In *Lane County v. Oregon*, 7 Wall. 71, a State statute requiring payment by a County to a State in coin (not in U.S. notes) was upheld, the Court saying:

> "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with

> powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well expressed by Mr. Madison in the Federalist, thus: 'The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes'." 7 Wall. at 76.

The area in which this Court has most commonly been called upon to preserve the constitutionally protected Federal partnership is intergovernmental tax immunity. This Court has distinguished from areas of State activity which are federally taxable,[47] the immune functions "without which a state could not continue to exist as a governmental entity." *Helvering v. Gerhardt,* 304 U.S. 405, 418. C.f., *New York v. United States,* 326 U.S. 572, 582, and 326 U.S. at 588 (Stone, J., concurring).[48]

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[47]See, e.g., *South Carolina v. United States*, 199 U.S. 437, and *Ohio v. Helvering*, 292 U.S. 360 (liquor sales).

[48]That the majority opinion in *Maryland v. Wirtz*, 392 U.S. 183, could avoid mentioning the tax case of *New York v. United States*, 326 U.S. 572, which the dissenting opinion found "echoed" in *Wirtz*, 392 U.S. at 202-203, is explained by the failure of this Court in *Wirtz* to distinguish the relative positions of the Federal and State Governments in regulating private industry, from the protected position of States in operating State Government itself. See page 123, *infra.*

In *Metcalf & Eddy v. Mitchell,* 269 U.S. 514, 523-24, this Court said:

> "*But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.* Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied nor extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." (emphasis added).

The cases of *Helvering v. Powers*, 293 U.S. 214, *Helvering v. Gerhardt,* 304 U.S. 405, and *Graves v. New York*, 306 U.S. 466, upheld Federal taxation of the salaries of employees of States or State-owned corporations. Each must be read in light of the finding of the effect of the tax there upheld on State Government operation.[49]

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[49]In *Alabama v. King & Boozer,* 314 U.S. 1, a State sales tax paid by a contractor was upheld against a claim of Federal immunity where the Federal Government had entered into a "cost plus" contract with the contractor and ultimately bore the incidence of the tax. The case turned on the question whether the Federal Government could be interpreted as the "purchaser" of lumber used in the construction within the State statute, the Court holding the Government was not the "purchaser". Therefore, the Court's statement, 314 U.S. at 8-9:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be

In *Powers*, the street railway, the salary of whose Trustees was held subject to Federal income taxation, was described by the Court as "intended to be self-sustaining . . . 'under such a flexible system of rate making as would allow the fixing of fares equal as nearly as might be to the cost of service.' The compensation of the trustees is undoubtedly a part of that cost." 293 U.S. at 223.

In *Gerhardt*, the Court found "that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." 304 U.S. at 424.

In *Graves*, the Court made no finding that a tax (here a State tax of a Federal corporation) by one Government would have a deleterious effect on the operation of the other Government. The Court dealt in the abstract, with "assumptions" and "implied constitutional immunities". 304 U.S. at 486.

Furthermore, in these cases the assertion of immunity from Federal taxation involved a burden on Federal Government operation which is not present in the limitation of unconstitutional Federal interference by regulation. The Court in *Gerhardt, supra*, 304 U.S. at 421, said:

> "The effect of the immunity if allowed would be to relieve respondents [employees] of their duty of financial support to the national government in

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free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox,* [277 U.S. 218]; *Graves v. Texas Co.,* [298 U.S. 393], is dictum we think it no longer tenable."

> order to secure to the state a theoretical advantage so speculative in its character and measurement as to be insubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far."

See also, *Helvering v. Powers*, 293 U.S. at 225.

This Court in *United States v. California*, 297 U.S. 175, 184, declared that State immunity from Federal taxation is "implied from the nature of our federal system. . . ."

In *United States v. Baltimore & O.R.R.*, 17 Wall. 322, 327-328, Federal imposition of tax on interest received by a City on railroad bonds was denied, a municipal corporation taking the immunity of the State from federal taxation. The Court there said:

> "The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. *The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization.* This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other." (emphasis added).

See also *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583-584.

The Court in *New York v. United States*, 326 U.S. 572, 576, said the Congress may not "do violence to the presuppositions derived from the fact that we are a Nation composed of States." The Justices of the Court continued in their separate opinions:

> "There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations.*** These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State." *Id.* at 582. (opinion of the Court by Frankfurter, J.).
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> "All agree that not all of the former immunity is gone." *Id.* at 584 (Rutledge, J., concurring).
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> "[A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587 (Stone, C.J., concurring).
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> "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *Id.* at 594 (Douglas, J., dissenting).

This analysis of constitutionally protected essential State governmental functions is as applicable to the commerce power as it was to the taxing power. In each instance a direct Government-on-Government burden is unconstitutional.

The Twenty-first Amendment, ratified after the Commerce Clause as was the Tenth Amendment, has been held to supersede the Commerce Clause, permitting State

license fees for the importation of alcoholic beverages, which before the Amendment "would obviously have been unconstitutional. . . ." *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62. See also *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U.S. 391, 394.

d. The Federal Government, even today, operates under this constitutionally protected Federal system partnership.

1) The Federal Government cooperates with, or defers to, State and City regulation of private industry.

Federalism – the shared governmental powers system of our Nation – requires many mutual accommodations, or comity, among Federal, State and local Governments with each Government performing that governmental service it can best perform.

The Federal Government has recognized the special expertise and the appropriateness of State and City regulations of matters of local concern. For example, in *Cable Television Report and Order*, 37 Fed. Reg. 3252 (Feb. 12, 1972) at ¶ 177, the Federal Communications Commission admits:

> "*Dual Jurisdiction*. The comments advance persuasive arguments against Federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for

example, as how best to parcel large urban areas into cable districts. Local authorities are also in better position to follow up on service complaints. Under the circumstances, a deliberately structured dualism is indicated; the industry seems uniquely suited to this kind of creative federalism."

It is difficult to see a rational basis for the Congress' acting contrary to this policy in usurping, through the 1974 Amendments, State and local expertise in prescribing terms and conditions of employment of their own employees through whom States and Cities provide their essential Government services.

Federal-State cooperation was the method chosen by Congress, in the Social Security Act of 1935, Title IX, c. 531, 49 Stat. 620, to provide unemployment benefits; this was upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585; the same cooperative effort in the generation of electricity was upheld in *Alabama Power Co. v. Ickes*, 302 U.S. 464, 476-477 (" 'Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of [the Federal Government] . . . ' ").

An amendment to the National Labor Relations Act provides that States may act in situations where the Labor Board declines to act for reasons of size or otherwise. Act of June 23, 1947, c. 120, 61 Stat. 146, 29 U.S.C. § 160(a) (1970).

The "Federal-State" amendments to the Atomic Energy Act allows the Atomic Energy Commission to enter into agreements with Governors of States to discontinue AEC regulatory powers over certain materials to protect health and safety from radiation

hazards. Section 1 of Pub. L. No. 86-373, 73 Stat. 688, 42 U.S.C. §2021 (1970).

Even concerning a congressional power so broad as the war power, this Court has rejected the argument that all power is in the Federal Government, favoring the view that "the constituted and constituting sovereignties must have power of cooperation against the enemies of all" *Gilbert v. Minnesota,* 254 U.S. 325, 329. See also, *Hamilton v. University of California*, 293 U.S. 245, 260.

Many other examples of cooperative Federalism could be cited,[50] but these illustrations indicate its enormous value and the damage which could flow from its destruction. There are hundreds of Federal programs (a few examples of such programs are found in the Catalog of Federal Domestic Assistance (7th ed., Ofc. of Mgmt. and Budget 1974)) which require participation by the States and their political subdivisions.

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[50]See, e.g., Section 15 of the Meat Inspection Act of 1967, Pub. L. No. 90-201, 81 Stat. 595, 21 U.S.C. §661 (1970); Sections 706(b) and 708 of Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259, 42 U.S.C. §§2000e-5(c), 2000e-7 (1970); Section 6(c) of Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107, 42 U.S.C. §2000e-8(b) (Supp. III 1973); Section 5 of the Wholesome Poultry Products Act of 1968, Pub. L. No. 90-492, 82 Stat. 796, 21 U.S.C. §454 (1970); Title V of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 88 Stat. 742, 30 U.S.C. §953 (1970); see also, the Federal Water Pollution Control Act, 33 U.S.C. §1151 *et seq*. (1970), as amended, 33 U.S.C. §1251 *et seq*. (Supp. III 1973); Clean Air Act, 42 U.S.C. §1857 (1970, as amended, Supp. III 1973); Occupational Safety and Health Act, 29 U.S.C. §651 *et seq*. (1970).

Until now the Federal Government has worked cooperatively to improve the status of State and local Government personnel.

Adoption of the National Intergovernmental Personnel Act (Pub. L. No. 91-648, 84 Stat. 1909, 5 U.S.C. §§1304, 3371-3376; 42 U.S.C. §§4701, 4702, 4711-4713, 4721-4728, 4741-4746, 4761-4772 (1970)) provided Federal technical and financial assistance in training State and local personnel to improve their merit systems. The United States Civil Service Commission may make grants up to 75% of training costs.

Cooperative Federalism has flourished in our Nation due to mutual respect of Governments. This cannot be if one Government is seeking to control an element as vital as personnel management of the other.

The Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577, 82 Stat. 1098, 42 U.S.C. §4201 *et seq.* (1970), and the Advisory Commission on Intergovernmental Relations created in 1959, Pub. L. No. 86-380, 73 Stat. 703, 42 U.S.C. §4271 *et seq.* (1970), provide the planning for enormous cooperative programs between the Federal, State and local Governments.

Numerous Executive Orders recognize the important governmental status of State and local Government. Circular No. 85-A issued by the Executive Office of the President on January 20, 1971 "to The Heads of Executive Departments and Establishments" mandates "Consultation With Heads of State and local Governments in developing of Federal Regulations" of interest to States and local Governments. In *New York v. O'Neill,* 359 U.S. 1, 6, this Court referred to

"increasing harmony within *the federalism created by the Constitution,*" (emphasis added), in upholding a voluntary agreement between States for attendance of witnesses at criminal trials. Reference was also made to "a constitutional division of powers." *Id.* at 10.

Cooperative programs carried out by Federal, State and local Governments have great value in considering the actual effect of the 1974 Amendments:

> "Testifying in 1966 before the Senate Committee on Governmental Operations, the then Director of the Budget, Charles L. Schultz mentioned that the preceding Congress had enacted twenty-one new health programs, seventeen new educational programs, fifteen new economic development programs, twelve new programs to meet city problems, four new programs for manpower training, and seventeen new resource development programs. These, he said, could have been shaped as direct operations of the central government, thus avoiding some difficult intergovernmental problems. But this course 'would not have led to effective solutions, since most of the problems which these programs attack are not the same nation-wide, and can only be solved in the context of widely different local conditions and requirements.' The soundness of this outlook is not denied by the fact that many national programs, when conducted wisely and with skill, can provide a good deal of experimenting and adaptation. On the whole, however, the case for acting indirectly through a variety of grants-in-aid is strengthened by the wholesomeness of local and regional variations as well as the frequent need for the collateral use of state governmental powers." A.W. MacMahon, ADMINISTERING FEDERALISM IN A DEMOCRACY 84-85 (1972).

Federalism has deepened the collaboration among levels of Government in the United States as grant-in-aid programs have grown.

These 1974 Amendments to the Act force State and local Governments into a uniform nation-wide mold.

In *United States v. Bekins,* 304 U.S. 27,54, the Court considered a bankruptcy statute passed to ameliorate the unconstitutionality of a former statute declared by the Court in *Ashton v. Water District,* 298 U.S. 513,530, to "materially restrict respondent's [political subdivision of a State] control over its fiscal affairs." In recognizing that such fiscal intrusion clearly would be unconstitutional, the Senate Committee on the Judiciary said in Senate Report No. 911, 75th Cong., 1st Sess., as the Court approved in *Bekins,* 304 U.S. at 51:

> "The bill here recommended for passage expressly *avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties.* No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. No involuntary proceedings are allowable, and *no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill . . .*" (emphasis added).

The statute upheld in *Bekins* was carefully drafted to avoid involuntary fiscal disruption of States, political subdivisions and Cities. The 1974 Amendments challenged here will produce exactly that effect: "restriction on the . . . states . . . in the exercise of their sovereign rights and duties."

In other areas, the Federal Government has recognized States and Cities as better able to regulate certain aspects of private industry. This Court has construed the intent of Congress to facilitate the greater ability of States and Cities to regulate local matters.

The Court in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, applied this balancing test to an area in which Congress was silent (fire insurance):

> "[T]he primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case the competing demands of the state and national interests involved can be accommodated." 322 U.S. at 548.

Accord, *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189; *California v. Thompson,* 313 U.S. 109, 114; *Parker v. Brown,* 317 U.S. 341, 362-363; *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 767 ("... the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress"); *United States v. Bass,* 404 U.S. 336, 349 ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Heublein v. South Carolina Tax Comm'n,* 409 U.S. 275, 281-282; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749; *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275.

Even the Age Discrimination in Employment Act, applied to States and Cities by the 1974 Amendments here challenged, contains in § 14[51] provisions for

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[51] Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. § 633 (1970).

Federal-State cooperation, which declare in relevant part:

> "(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action."

Federal recognition of the special position of State Government in our constitutional scheme is especially pervasive in the jurisdiction of Federal Courts. Rate orders by State bodies are preserved generally from Federal injunction,[52] a recognition of State expertise over local matters. Federal Courts abstain from constitutional questions which could arise only under an interpretation of State law which has not yet been made by State Courts. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501; and Federal Courts grant injunctive or declaratory relief against State criminal prosecutions only in extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37,41,49; *Samuels v. Mackell*, 401 U.S. 66, 69. Yet in the 1974 Amendments Congress has ignored State and City expertise and State and City law and decisions on terms and conditions of employment of their own Government employees as adapted to governmental needs and functions performed.

There are other areas of State action where the Federal Courts will not intervene such as probate of wills, administration of decedents' estates, divorce and intimate domestic relations like children's custody.

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[52] 28 U.S.C. § 1342 (1970).

These are recognized as areas restricted exclusively to the State.[53]

2) The Federal Government, even more importantly, in recognition of the Federal system partnership, has exempted State and City Government from Federal regulations of private industry.

In recognition of their special status as Governments and the importance of preserving "Federalism", the Congress has exempted State and local Government from Federal regulations of private industry.

As was done in 1938 in the Fair Labor Standards Act,[54] Congress traditionally has written into labor and industrial legislation its recognition that Government is different from private industry and that State and City Government is not within regulatory reach of the Federal commerce power. The Social Security Act of 1935,[55] expressly exempts States, political subdivisions and their instrumentalities from Federal old age, survivors and disability insurance contributions. States and Cities are similarly exempted[56] from the National

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[53]See Hart and Wechsler, *supra* note 30, at 1001-18.

[54]Section 3(d), 52 Stat. 1060.

[55]Sec. 811(b)(7), Act of August 14, 1935, c. 531, 49 Stat. 620, now 26 U.S.C. § 3121(b)(7) (1970).

[56]The Congress is presently considering usurpation of this area of State and City operation through amendment of the NLRA. H.R. 77, "A Bill to provide that employees of States and political subdivisions thereof shall be subject to the provisions of the National Labor Relations Act." introduced 121 Cong. Rec. H.13 (daily ed. Jan. 14, 1975).

Labor Relations Act,[57] and the Occupational Safety and Health Act.[58]

Other Federal legislation has expressly recognized the unique position of State and City Government, as not amenable to rules governing private industry. See, e.g., Section 3031 of the Employee Retirement Income Security Act of 1974;[59] see also H.R. Rept. No. 1280, 93d Cong., 2d Sess. 360 (1974) ("In studying whether the funding standards of the bill should be imposed on government [pension] plans, the study is to take into account the taxing power of the governmental unit maintaining the plan.")

Federal legislation has been construed by this Court not to treat State and City Government under rules applicable to private industry. Section 8 of the Sherman Act,[60] was so construed in *Parker v. Brown,* 317 U.S. 341, 351.

Section 308 of the Federal Regulation of Lobbying Act[61] exempts from registration requirements "any public official acting in his official capacity". The coverage of this regulatory act was found by this Court

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[57]Sec. 101, Act of June 23, 1947, c. 120, 61 Stat. 137, 29 U.S.C. § 152(2) (1970).

[58]Sec. 3(5), Act of December 29, 1970, Pub. L. No. 91-596, 84 Stat. 1591, 29 U.S.C. § 652(5) (1970).

[59]Pub. L. No. 93-406, 88 Stat. 829, 42 U.S.C.A. § 1231 (Supp. 1974).

[60]Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. § 7 (1970).

[61]Act of Aug. 2, 1946, c. 753, 60 Stat. 841, 2 U.S.C. § 267 (1970).

in *United States v. Harriss,* 347 U.S. 612, 625, to be "special interest groups . . . masquerading as proponents of the public weal," clearly distinguishing States and Cities from private industry. The exemption of State and City public officials was recently declared to extend to full-time officers and full-time employees of organizations[62] of public officials who act solely on the authorization of a public official and who are paid from public funds. *Bradley v. Saxbe,* Civil Action No. 74-1327 (D.D.C. Dec. 18, 1974). Thus, employees of States and Cities are distinguished from employees of private industry, just as Federalism requires that States and Cities themselves acting in their capacities as Government be distinguished from private industries.

Just as this Court has construed the intent of Congress in order to preserve Federalism concerning State regulation of private industry,[63] so this Court has construed the intent of Congress to preserve State immunity from Federal incursion. *Employees v. Missouri Dep't of Public Health,* 411 U.S. 279, 286.

e. Under this constitutionally protected Federal system partnership, States and Cities have fairly provided for wages and hours of employees in their Government operations.

As set forth in the Complaint, States and local Governments provide fair and reasonable terms and

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[62]National League of Cities, National Association of Counties, and United States Conference of Mayors.

[63]*United States v. South-Eastern Underwriters Ass'n, supra,* 322 U.S. at 548.

conditions of employment according to the unique needs of each Government, including fair and reasonable wages and hours. These personnel policies and employment terms and conditions include civil service and other laws to protect employment rights of state and city employees. (Complaint ¶¶19-35, App. 17-25).

The power to prescribe the terms and conditions of employment for its employees is vital to the performance of State and local governmental functions.

At least 80% of the States authorize or permit collective bargaining by some or all of the above classes of employees. And at least 50% specifically authorize or permit such bargaining as to wages and hours. For the remainder of States with collective bargaining, bargaining on wages and hours may be assumed. See *supra* footnote 23.

In light of Federal revenue sharing,[64] the Advisory Commisssion on Intergovernmental Relations emphasizes:

> "... the importance of improving the productivity and personnel practices of state and local governments. Though productivity and improvements at all levels are desirable, increasing productivity at the state and local level where direct use of resources is concentrated would have the greatest fiscal impact." ACIR, TRENDS IN FISCAL FEDERALISM 3(1974).

Secretary of Labor James Hodgson said in opposing the imposition of Federal control over State and City labor union relations, *Hearings on H.R. 12532, H.R.*

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[64]State and Local Fiscal Assistance Act of 1972, Title I, Pub. L. No. 92-512, 86 Stat. 919, 31 U.S.C. § 1221 *et seq.* (Supp. III 1973).

7684, H.R. 9324 Before Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 281-83 (1972):

> "The States are taking advantage of this opportunity to adapt various public sector labor relations models to their local needs. The past six years has been a period of great activity in public sector labor relations at the State level. Not only have States developed various initial approaches to public sector labor relations, but they are refining and perfecting these approaches on the basis of their experience. For example, Wisconsin and New York have both amended their comprehensive statutes. Minnesota has replaced two 'meet and confer' laws with one collective bargaining statute. Connecticut is involved in a major legislative study of possible revision of its law. Thus, the States are not neglecting the problems of labor and management in the public sector. Rather than being detrimental as in the private sector, experimentation on a State-by-State basis in the public sector takes into account important State differences and contributes substantially to our understanding of the issues in public sector labor relations. This process of development should not be interrupted when there is no urgency for Federal legislation. Under these circumstances, variation rather than uniformity among the States is the more valuable pattern for policy development."

Across our Nation there are a wide variety of State and local governmental arrangements designed to provide maximum public services at the lowest public cost. Initiative in conception and execution, and *pro bono publico* volunteerism are trademarks of this variety. No people has developed *pro bono publico*

volunteerism more highly than at the local level in our Nation.

It is here where the impact of the 1974 Amendments causes the most damage. These Amendments force State and local Governments into a uniform nation-wide mold.

The history of State and local Government in this Nation has been one of flexibility, adaptation to change, and experimentation. Cities undergo cycles of growth and decline (Pritchard Deposition at 203-204, App. 224-25), requiring changes in personnel practices and adaptation of Government services. Cities experiment to obtain the most efficient and economical service. For example. Seattle trains its firefighters as building inspectors (Pritchard Deposition at 183-184, App. 211-12), a practice which will be penalized by the imposition of overtime under the "joint employment" regulation. 29 C.F.R. §553.9 (App. 608). Sunnyvale, California combines police and firefighters into public safety teams (Pritchard Deposition at 167, App. 200).

f. The Congress was aware of the variety of State and City governmental activity, under this Constitutionally protected Federal system of partnership; nevertheless the Congress usurped State and City control of their Government operation to force a uniformity foreign to our system of Federalism.

Two Secretaries of Labor have testified on the basis of a Labor Department study that States and Cities do not pay substandard wages. They opposed application of the Act to State and local Governments as an undue intrusion into their affairs. (See *supra*, pages 19-21). The

Advisory Commission on Intergovernmental Relations opposed the proposed legislation for the same reason. And the President of the United States vetoed Amendments similar to the 1974 Amendments for the same reason. See *supra,* page 21.

The legislative history, as already noted *supra*, does indicate that Congress had before it ample and competent evidence that extension of the Act to State and local Government employees was both unnecessary and in conflict with Federalism. House Report No. 913, 93d Cong., 2d Sess. 28 (1974) quotes a 1970 Department of Labor Study stating that "wage levels for State and local Government employees not covered by FLSA are, on the average, substantially higher than workers already covered" and that the "actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." Based on this Department of Labor Study, the House Report concluded that "the actual impact on State and local Governments then of a 40 hour standard, will be virtually non-existent," H.R. Rept. No. 913, 93 Cong., 2d. Sess. 29 (1974)

All of these facts were known to the Congress, yet it adopted the Amendments again and the President reluctantly signed them as the vote in the House and Senate indicated no possibility that a veto would be upheld. Byrley testified however that the States had expected another veto. (Byrley Deposition at 57, App. 284).

Cities extensively use volunteers who are paid a nominal sum, generally to qualify for workman's