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No. 74-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE NATIONAL LEAGUE OF CITIES, *et al.*,
Appellants,

v.

HON. WILLIAM J. USERY
Secretary of Labor of the United States,
Appellee.

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

BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

INTEREST OF THE AMICUS NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

The National Institute of Municipal Law Officers (NIMLO) files this brief, *amicus curiae,* in support of the position of Appellants, National League of Cities, *et al.*, pursuant to Rule 42(4) of the Rules of this Court. The members of NIMLO are political subdivisions of States and this Brief is sponsored by their authorized chief legal officers.

A. History of NIMLO

Organized in 1935, the National Institute of Municipal Law Officers is a non-profit, non-partisan organization composed of over 1400 towns, cities, counties, school districts, villages and other municipal corporations and government units in all fifty of the States, the District of Columbia and Puerto Rico. Since only municipal corporations and other government units may belong to NIMLO, there are no personal or individual memberships. Municipalities participate through their chief legal officers (approximately 6,000) in fact-finding and fact-publishing services designed to collect and disseminate the varied legal experiences of American municipalities. The chief legal officers of NIMLO-member municipalities are uniquely qualified to assess the impact of the 1974 Fair Labor Standards Act Amendments, Pub. L. No. 93-259, on primary state and city concerns. From May 1, 1974 through the present, these chief legal officers have assessed the effect on their municipalities of this Labor Act.

B. Importance Of This Case

The issues presented by this case vitally affect the interest of all municipalities. They present one of those occasional great controversies[1] which establish the ground rules of our whole constitutional order. The National Institute of Municipal Law Officers asserts that only by taming the Commerce Clause before it swallows our whole Federal system can reservation of autonomy to

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[1] NIMLO *amicus* Briefs have previously been filed in similar cases. For example, see Brief *Amicus Curiae* in *Baker v. Carr* (No. 103, Oct. Term 1960).

cities and other political subdivisions of States be preserved.

If the Act here challenged is upheld, there remains no foundation from which municipal governments can assert their Federal constitutional rights. The result will most assuredly be further national legislation[2] shifting power to Washington by taking it from municipal government. Aside from this threat, upholding the Act here challenged will mean the permanent and irreparable destruction of local control over local personnel costs, comprising 85% of municipal government budgets.

The case of *Fry v. United States*, 421 U.S. 542, reiterated a balancing test between the impact of exempting State and City operations from a challenged Federal regulatory scheme (and the impact of State and City operations on interstate commerce as the justification for Federal regulation), and the impact of the Federal regulation on those State and City operations. In *Fry*, the balance favored the Federal anti-inflationary regulation, where the State wished to pay in excess of the Federal limits.

In this case, we submit, the same balancing process favors the States and Cities who are Appellants here. The primary nature of the State and City concern, and the secondary nature of the Federal concern are treated in detail in the Argument. Here, we wish to set forth the

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[2] Bills to regulate public employee retirement income (H.R. 9155), to extend the provisions of the National Labor Relations Act to States and Cities (H.R. 77), and to establish a separate Federal system to regulate labor relations of States and Cities (H.R. 1488) have been introduced in the 94th Congress, and currently are pending.

facts of impact of the 1974 Labor Act Amendments which cities have appraised. It will be seen that against this deleterious effect on primary State and City concerns, the Congress gave no sufficient commerce-protecting or commerce-promoting reason.

1. The Solicitor General Misunderstands the Effect of the Labor Act Amendments on States and Cities.

The Solicitor General in his original presentation to this Court claimed that all these Amendments do is "add a slight additional cost" (Tr. 54, Oral Argument April 16, 1975) for their personnel to the budgets of States and Cities. He claims the Act does not force States and Cities to change any "policy objective". (*Id.* at 50). He says "the effect it (The Labor Act) will have is slight" (*Id.* at 50) that if "pinched" financially States and Cities need not give up police and fire services but can give up unnamed "peripheral services" which he assumes are unimportant (p. 33). In his presentation the Solicitor General almost totally misunderstood how State and local Governments operate and the enormous intrusion of this Act into those governmental operations. By his argument of slight changes caused by the Act, he admits there is no compelling constitutional Commerce Clause need for this Act insofar as applying it to States and Cities is concerned. Why then impose this massive disruptive double regulation of State and local Governments' largest budget item for a slight effect? The Solicitor General is wrong about the Act's impact, wrong about the Act's cost and wrong about Act's constitutionality under the principles re-enunciated by this Court in *Fry*.

2. The Effect the Solicitor General Would Require to Invalidate the 1974 Amendments Is the Total Destruction of States and Cities.

The Solicitor General argues wrongly that no sovereignty is destroyed by this Act's massive changes and impact upon hundreds of State and local personnel functions and the enormous costs created by the changes which the Act imposes.

The Solicitor General's constitutional test is:

> "The impact upon State and local Government cannot be so severe that State sovereignty is destroyed."

Salaries, pensions and personnel costs are 85% of the budget of nearly every City. The Labor Act Amendments we here oppose place power to control this 85% of City budgets in the Federal Labor Department, and then untimately, if Cities object and fight, in Federal Courts with the Act's new Federal class actions, and attorneys fees.

Thus in ultimate thrust, under this Act, power to make the fiscal decisions that control the fiscal integrity of each City is removed from elected City councils, or town meetings, and given to the Federal Labor Department and to the Federal Courts on appeal.

We in this brief urge that such a vast transfer of governmental power violates not only the Tenth Amendment but our entire constitutional scheme of shared governmental power.

The Act is such a massive intrusion into the fiscal integrity of Cities as to doom forever the entire system of Federalism which has in large measure made our Nation the greatest and strongest on Earth. These Amendments destroy that strength of diversity which is

the keystone of Federalism, and the cornerstone of our entire Federal system, by centralizing ultimate control over governmental spending for local services, and thus over the amount of local taxes, and budgets, in the Federal Government.

3. Duplicate Processes, Duplicate Costs Both Serving No Reasonable Purpose.

At the present time it is reliably estimated that approximately one-half of all City litigation in State Courts involves personnel matters. The Labor Act's Personnel regulations impose upon Cities a duplicate and more costly Federal judicial system, a duplicate and more costly Federal administrative decision procedure, and a duplicate and more costly group of Federal officials who know and care little of the many differences and diversities of this Nation's 18,000 Cities. Further, the new Amendments authorize the application to the public's business of a mass of Federal regulations drafted for private business and unfitted to government operations. Those regulations created by the Labor Department expressly for local police and firemen are unrealistic in actual application by trying to make all 18,000 Cities operate uniformly throughout the Nation, despite diversities required by weather, location, unique businesses and diverse needs. Their pouring of all police and firemen personnel regulations into one uniform mold creates enormous problems costing millions of dollars which Cities do not have and cannot raise. If made effective, many firemen and police, beyond those already fired for budgetary reasons, must be terminated.

4. Federal Court Actions on Most City Personnel Matters Are Practically Guaranteed by the Act's Provisions.

In authorizing new Federal Court actions, power to impose attorneys fees, double and even triple damage payments, and criminal penalties, the Act's provisions and other aids provided for by the Federal Labor Department, practically guarantee that all City personnel matters will be decided in, or with the aid of, that Department and the Federal Courts.

All this new massive layer of costs, officials and courts are laid upon Cities by the Act even though no real rational federal constitutional problems exist in the personnel problems of Cities. Those problems now are, honestly, fairly and much more knowledgeably soluble under State law, and City civil service law, and by State or City administrative decisions, and by State or City official regulatory groups, and by State Courts. This State law and this City law is created for government personnel with understanding of City needs and what the City can pay for and after full City employee hearing or input often through labor unions of their own choice. City personnel are not mistreated. In fact, the media almost daily enunciates City salaries, pensions, leave and their fair and reasonable amounts (or their alleged unreasonable amounts) as fixed by City councils who must live and work daily with these City employees.

There is no compelling constitutional rights of any person, nor any constitutional power in the Federal government, to wipe out all this State and local law – much of it in State constitutions and City charters. The certain, almost endless jurisdictional litigation over what

is preempted by this Act, and what is not, staggers the imagination.

To impose such costly, unnecessary and unreasonable duplication of administrative, legislative and judicial effort upon fiscally struggling Cities for no proper constitutional purpose whatever demands this brief of protest.

5. Cities Do Not Pay Below the Federal Minimum Wage. Congress Cited No Substantial Improvements To Be Achieved By the 1974 Amendments.

In its reports on this Act and the Amendments, Congress says that this Labor Act is supposed to raise wages to fixed minimums but in reality Cities do not pay below those minimums and Congress cited no facts of substance to support its claim. In fact some Cities pay such high wages and other benefits they must cut thousands of jobs to meet budget limits. In its reports on this Act, Congress also says this Act is supposed to spread the work among more employees. But here instead of spreading the work, the Act's effect is to wipe out thousands of jobs.

6. Who are Volunteers? Their use probably is ended.

All over our Nation there have grown up in the past 200 years almost as many unique volunteer arrangements as there are Cities – and there are some 18,000 Cities. Our people take pride in their free public service and provide more of it than any other people in the world.

These Amendments force uniformity and order payment for all work in such vague terms, e.g. § 3(g)'s "employ" includes "to suffer or permit to work" so as to practically wipe out all volunteer work entirely or force the risk of the above-mentioned class actions, attorney fees, and costs for work assumed to be free to cities. No such problems exist in private business and this illustration alone proves that commerce and government are too different to treat identically by declaring all government to be commercial enterprises as does this Act. § 3(s)(5).

7. No Commerce Evil Is Cured: No Real Nexus to Commerce is Present.

There is not one scintilla of fact or reason to support or identify the existence of an evil which these amendments cure or a nexus to commerce under any identifiable standard enunciated by this Court up to this time. These Amendments apply to City budgets enacted as law as distinguished from the private acts of private business. The extra costs these Amendments impose cannot be passed along to consumers as can the extra costs of private business. The extra costs can only be met by imposing more taxes or cutting out jobs so the extra costs will not be incurred. Government is "the public weal" *United States v. Harriss,* 347 U.S. 612, 625; and so different from private business that this court has so held, as in *Harriss* just cited. Further, Cities are ultimate consumers and thus in fact exempt from the Act. § 3(i).

No one questions the power of Congress to regulate, and protect commerce, but defining the all of City Government as "commerce" is a false label beyond justification in constitutional law, semantics, or in fact.

8. Strength of Diversity Destroyed For No Reason.

There is tremendous diversity in personnel services, practices, procedures, salaries, pensions, laws, administration and court reviews of the 50 States, 3,000 Counties and 18,000 Cities. Each has different problems and each solves them differently according to the needs and desires or the dictates of those in ultimate control, the voters. Many services like fire and police are now being curtailed of necessity as revenues of Cities and States shrink. The opposite of the *Fry* Case exists here.

9. States and Cities in Fiscal Trouble.

Media reports all State and local Governments in fiscal trouble. Each of the States and Cities and Counties are trying hard to work their way out of this current fiscal trouble by fitting revenues to expenditures.

What does this Act do to aid this trouble?

Our answer is nothing but added trouble.

We urge that City fiscal problems can be cured by good old American initiative at the local level and if left alone Cities will do precisely that. Destroy that initiative by upholding the Labor Department's power to run the major item, 85%, of each City budget and disaster is certain with Federalism but a myth of the past.

10. What Does the Act Accomplish?

According to Solicitor General Bork, it raises 95,000 unidentified persons, out of 11,400,000 employees above the minimum wage level. Although repeatedly

challenged to identify the 95,000 paid below minimum wages, he never has and we do not believe they really exist.

The Solicitor General time and time again in his brief and argument said that the States and Cities claims of enormous aggregate cost impact and interference with their policies and actions was exaggerated. He claims that the Act's impact is less than 1% of State and City budgets. The truth is just the opposite. The Solicitor General's *de minimis* claims are exaggeration in reverse. He is the one who exaggerates and, when in fact he claims Cities here misrepresent the facts it is he who misrepresents the facts by his claim of slight impact and no control of State and local policy. His charges are in fact wrong;he in fact"misunderstand[s]" (Tr. Oral Argument, Apr. 16, 1975, at 63) the Act.

While the illustrations are many, one suffices: He said of Cities:

> "The only power they have lost, Mr. Justice Rehnquist, is to determine to pay substandard wages." *Id.* at 64.

He completely ignores the fact that this is a battle not over substandard wages but about overtime and forced costly charges by changing the way local needs are met by local taxpayers as set forth in this brief.

Never does the Solicitor General point out any substantial evidence that this Act is in any substantial way essential to protect commerce in any way or that it has any real rational relation to commerce.

SUMMARY OF ARGUMENT

The importance which this case has for Cities, and the disastrous impact which the Labor Act Amendments here challenged has on Cities, form a primary State and City concern: the preservation, under our constitutional system, of local control over the 85% of budgets which personnel represents.

Against this primary State and City concern, the Congress posits an extemely attenuated nexus to commerce and an extremely weak national concern.

As with most constitutional issues, this Court is called upon to balance – here a weak, secondary national concern with a primary State and City concern. This construct is consistent with the balancing process inherent in the Constitution and explicitly recognized in *Fry v. United States,* 421 U.S. 542, 547 n.7. On the facts of this case, the balance must be struck on the side of the Cities' and States' primary concern.

It is the balancing of the weak national against the strong State and City interests in this case, which makes clear that no decision of this Court can be cited as controlling here, not even *Maryland v. Wirtz,* 392 U.S. 183, which the Solicitor General urges as the complete answer to the facts of this case (see, e.g., Appellee's Brief, Question Presented).

The *Amicus* urges that analysis of the facts reported by Cities, within the balancing construct submitted, shows the unconstitutionality of the 1974 Labor Act Amendments.

ARGUMENT

I.

THE PRESENT CONSTITUTIONAL CHALLENGE IS ONE OF THOSE TRULY SEMINAL CASES WHICH ARISE INFREQUENTLY BUT WHICH GO TO THE ROOTS OF OUR SYSTEM OF GOVERNMENT.

The ultimate issue which may be reached in this case is whether the interstate and foreign commerce power authorized in Article I of the Constitution is limited at certain points by the concurrent principle of Federalism which is the foundation principle of our constitutional order, our political order, and indeed our social order. This is one of those truly seminal cases which arise infrequently but which go to the roots of our system of government – analogous to *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579, and *United States v. Nixon,* 418 U.S. 683 concerning that other great principle which also pervades the whole Constitution – Separation of Powers.

The 1974 Amendments to the Fair Labor Standards Act of 1938 would subject all State and local Governments, in respect to all of their nonsupervisory employees (with insignificant exceptions), to the jurisdiction of the Federal Department of Labor in respect to wages, hours, overtime and related matters. Even supervisory, policy-making and elected employees and officials come within the Labor Department's recordkeeping requirements. The Act thus asserts Federal jurisdiction over the core of State and local personnel policies and local budgeting and local responsibility therefor, including flexibility of work

assignment as affected by rigid Federal overtime regulations.

It is important to note what this challenge to the 1974 Amendments involves, and what it does not involve. We are questioning whether there is sufficient relation to commerce on the precise facts here to create any valid basis for the asserted congressional power. We strongly assert that in any event Federalism does not permit the inroad attempted here on State and local Government power over its own employees, who are not even working on nationally-subsidized programs.[3]

We are not trying to re-argue that quite distinct concept, sometimes called "Dual Federalism" and exemplified by such cases as *Hammer v. Dagenhart,* 247 U.S. 251, *Bailey v. Drexel Furniture,* 259 U.S. 20, and *United States v. Butler,* 297 U.S. 1. "Dual Federalism" as appealed to in those cases consisted of the proposition that the power to regulate private conduct reserved to the States under the Tenth Amendment constituted a built-in check on national power, specifically, a restraint on extending national authority over intrastate activities traditionally viewed as being within the State's domain, even though the activities affect interstate commerce in some way. On this basis the Court in *Hammer* and *Bailey* turned aside Congressional attempts to regulate child labor, even though goods were being produced for commerce, and in *Butler* the Court nullifed the New Deal's first attempt to regulate farm production. *Hammer* was overruled in *United States v. Darby,* 312 U.S. 100 in which – again in the context of regulation of private

[3] See *Oklahoma v. Civil Service Commission,* 330 U.S. 127, discussed in Brief for Appellants, p. 93.

business – the Court announced the principle that the reserved powers of the States under the Tenth Amendment do not begin until the national powers under Article I, as stretched by reasonable implication, end. Summing up in an oft-quoted line, Justice Stone said that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." 312 U.S. at 124. *Darby* upheld the constitutionality of the Fair Labor Standards Act of 1938, the parent statute of the 1974 Amendments now at issue, and appeals to the Tenth Amendment as a check on national power have been in somewhat bad odor ever since.[4] But all of these "Dual Federalism" precedents and the resultant tarnished image of the Tenth Amendment must be kept in the context of their factual settings – the allocating of policy control as between Federal and State Governments over *private* activities which are in commerce or substantially affect commerce.

This case presents no such issue. We deal here with a different kind of "truism," more basic than the Tenth Amendment (albeit also supported by the Tenth Amendment). This is the truism that the very concept of "State" as understood throughout our Nationhood and recognized throughout the constitutional text is a concept presupposing a high degree of State autonomy in arranging the structure and operation of State Government itself. This broad, traditional, autonomy principle regarding the internal affairs of State Government is, of course, subject to limitation by specific constitutional clauses such as those affecting the

[4]See comment of Justice Jackson, Brief for Appellant, pp. 98-99.

freedom of expression rights of State and local employees, or prohibiting racially discriminatory practices.[5] No such limitations are at issue in the present case.

Indeed, this Court has itself given significant support to the broad autonomy principle regarding the *internal* affairs of State and local Government in its line of cases dating from *Luther v. Borden,* 48 U.S. (7 How.) 1 in treating as political questions lying outside the realm of judicial review the claims which have arisen under the constitutional clause (Art. IV, Sec. 4) guaranteeing to each State a "republican form of government." *Luther* involved the question of which of two governments was legitimate after an insurrection. In *Pacific States Tel. & Tel. Co. v. Oregon,* 223 U.S. 118 the Court refused to decide a claim that the initiative and referendum procedure for enacting laws, thus bypassing the State legislature, violated the Guarantee Clause. The effect of such decisions is to leave the matter for resolution by whatever political processes are available. Normally these processes are the autonomous State political processes. Such was the case in *Pacific States,* and also in the frequent early judicial refusals to adjudicate State power over the State legislative apportionment and congressional districting.[6]

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[5] See, *e.g., Pickering v. Board of Education,* 391 U.S. 563 dismissal of school teacher for writing letter attacking school board's financial management; *Carter v. Gallagher,* 452 F.2d 315 (8th Cir. 1972), *cert. den.* 406 U.S. 950, discrimination in hiring of fireman; *United States v. Montgomery County Board of Education,* 395 U.S. 225, faculty desegregation.

[6] See, *e.g., Colegrove v. Green,* 328 U.S. 549; *MacDougall v. Green,* 80 F. Supp. 725 (N.D. Ill. 1948), *aff'd,* 335 U.S. 281; *South v. Peters,* 339 U.S. 276, *Anderson v. Jordan,* 343 U.S. 912; *Radford v. Gary,* 352 U.S. 991, see generally Dixon, *Democratic Representation:* Reapportionment in Law and Politics, 104-114 (1968).

In *Luther,* to be sure, the resolution of the matter was said to turn on congressional action. But this was not congressional action pursuant to any general congressional power to disregard State autonomy over internal affairs of government. Rather, it was pursuant to the expressly authorized congressional power (Art. I, Sec. 5), necessary to the operation of the nation, to judge elections and seat the appropriate members sent to Congress from the States. State activity in respect to legislative apportionment and congressional districting is now, of course, subject to extensive judicial scrutiny, but again the inroad on State autonomy here, like the inroad under the First Amendment (cited *supra*), is only to vindicate the effectiveness of a personal right, here the right to vote. *Baker v. Carr,* 369 U.S. 186, *Reynolds v. Sims,* 377 U.S. 533.

This same sense of a high degree of State autonomy, at its highest regarding governmental arrangements, per se, such as public personnel policies, undergirds Professor Herbert Wechsler's notion of the "political safeguards of Federalism" safeguards needed lest the process of plausible expansion of national power, each step seemingly only an incremental advance on the preceding step, causes us to lose sight of our Federalism starting point. To be sure, Wechsler was writing primarily in terms of the role of the States in the composition and electoral selection of the national government. But the informing premise was the intrinsic value of Federalism, not merely the means of preserving it.[7]

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[7]Wechsler, *"The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,"* 54 *Col. L. Rev.* 543 (1954), as reprinted in Association of American Law Schools, *Selected Essays on Constitutional Law* 185 (1963). His lines about judicial deference to congressional judgment relate only to the nation-State division of power in regulating the private sphere, and not to matters affecting the independence of State Governments, per se.

Federalism thus is not only an original value, it is an enduring and high value in our constitutional system. No constitutional value, of course, not even freedom of speech[8] nor the privilege against compulsory self-incrimination,[9] is an absolute in our constitutional order. As the above-discussed demise of "Dual Federalism" under our distribution of powers system indicates, there is no clear line demarking a point beyond which national powers may not be exercised over intrastate commerce or other matters. Nor do we assert any absolute immunity – or even easily-defined point of immunity – of State Governments per se from appropriate national regulation in the interest of vital, paramount, and constitutionally-authorized national purposes. (See *infra* at 24)

In short, the present case is unique. To demonstrate the unconstitutionality of the 1974 Amendments to the Federal Fair Labor Standards Act, it is not necessary to reverse past precedents of this Court, although, of course, just as there are no constitutional absolutes, no past precedent should be viewed as sacred. In this area of Federalism what is needed is not a repetition of the absolute language of the past but rather, in the language of Professor Paul Freund, a search for "intermediate principles more tentative, experimental and pragmatic."[10]

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[8] *Dennis v. United States,* 341 U.S. 494; *Cox v. New Hampshire,* 312 U.S. 569.

[9] *Kastigar v. United States,* 406 U.S. 441; *Brown v. Walker,* 161 U.S. 591.

[10] Freund, *Umpiring the Federal System,* 54 Col. L. Rev. 561, 578 (1954).

II.

THERE CAN BE NO POWER UNDER THE COMMERCE CLAUSE HERE WHERE A NATIONAL SECONDARY CONCERN OR ACTIVITY COLLIDES WITH A STATE PRIMARY CONCERN OR ACTIVITY.

With this background let us turn to the constitutional questions, and put them in broad perspective appropriate to a basic institutional dispute of this dimension. The argument in favor of the 1974 Amendments is based on a grandiose view of the ever-expanding commerce power, each incremental addition being not too surprising until we look back and see how far we have come. The argument against the 1974 Amendments by Plaintiff-Appellants here rests on two perceptions. It rests on the need to recognize that strong as it is the Commerce Clause was never intended to be a charter for a unitary government (see Justice Stewart, dissenting, *Perez v. United States*, 402 U.S. 146). As Mr. Justice Stewart put it:

> It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets. 402 U.S. at 157-158.

Plaintiff-Appellants also argue that State autonomy in the internal affairs of State-local Governments is the quintessential requirement for maintaining our constitutional Federalism in spirit as well as in form. The Government's Commerce Clause argument, pushed into the very core of Federalism, is an extraordinary

example of the oft-ignored observation by Benjamin Cardozo of "[t]he tendency of a principle to expand itself to the limit of its logic . . ."[11]

There comes a time when reality must prevail, when we must raise our eyes high enough to perceive the implications of what we are doing, when first principles must be reasserted. There is a striking parallel between the development of the present issue of scope of Federal intrusion over State personnel practices, and the development of "one man-one vote" theory and practice, which also has a major impact on State-local Government structure and autonomy.

The early reapportionment rulings were unexceptionable; gross population malapportionment, producing "rotten boroughs," had to go. The equal population district concept, although effective to solve the rotten borough problem, had little to contribute toward solving the problem of political misrepresentation, but it did keep districting in turmoil. In the 1973 cases, this Court, while not at all abandoning the substantial equality principle as an aspect of fair districting, recognized the political purpose and effect of all districting, and announced some limiting principles

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[11]*Nature of the Judicial Process* 40-50, 51. (Yale University Press 1921).

responsive to the real issue of fair representation. *Mahan v. Howell,* 410 U.S. 315; *Gaffney v. Cummings,* 412 U.S. 735; *White v. Regester,* 412 U.S. 755.[12]

Likewise in this case, on the question of Federal intrusion into State personnel practices, we reach a constitutional turning point. The proper answer cannot be achieved just by juggling numbers and dollars, and trading charges of short-run de minimis effect either on the States or on the economy, or by adding one more brick to the Commerce Clause edifice. The Commerce Clause here collides with Federalism – an important

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[12]Professor Casper has made this comment about the reflective nature of the 1973 reapportionment decisions:

> "With regard to last Term's apportionment cases, it seems that the Court is moving from policing numbers to viewing representation as a concept which needs further clarification. It is doing so within the broad framework established by the Warren Court, while simultaneously turning away from *syllogistic reasoning.* This is accomplished by *deemphasizing the catchwords in favor of a case-by-case strict scrutiny.*" Casper, "Apportionment and the Right to Vote: Standards of Judicial Scrutiny," 1973 Sup. Ct. Rev. 1, 32, (Emphasis added).

The State legislative reapportionment cases are not the only example of instances when established trends of interpretation need fresh scrutiny and reevaluation from a broader perspective. Another good example is provided by the 1972 witness immunity decisions, *Kastigar v. United States,* 406 U.S. 441; *Zicarelli v. New Jersey,* 406 U.S. 472, which clarified the Fifth Amendment's self-incrimination provision and upheld the validity of full "use and fruits" immunity as a replacement for the traditional absolute immunity which had precluded prosecution even with independent evidence. The essence of the earlier decision was retained while their excesses were contained. See *Brown v. Walker,* 161 U.S. 591; *Counselman v. Hitchcock,* 142 U.S. 547.

national power and a cardinal institutional principle in apparent conflict.

In order to ascertain whether the national or State interest is the weightier when the core of Federalism is touched, *i.e.*, State autonomy in internal government affairs, we should think in terms of a continuum, not in terms of absolutes.[13] This is exactly the way we best approach the other cardinal and equally delicate institutional area in our constitutional order – Separation of Powers. On the latter, *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, and especially the oft-referred to opinion of Mr. Justice Jackson, is exceptionally sophisticated and instructive. It provides a directly relevant guide for our present task of deciding where to draw the line on national instrusive power over State governmental policies and internal operations.

The issue in *Youngstown* was the classic one of drawing the line between the law-making power of the Congress and the law-making power of the President.

Eschewing absolutes, Mr. Justice Jackson suggested a realistic and helpful analytical framework as follows:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> "2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

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[13]On the rejection of absolutes in matters of Federalism see comment of Mr. Justice Black in *Younger v. Harris*, quoted Br. for Appellant, p. 108.

> "3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . ." 343 U.S. at 635-637.

The issues presented in this case and the other major Federalism cases from *Sanitary District of Chicago v. United States,* 266 U.S. 405 and *United States v. California,* 297 U.S. 175 down to the present lend themselves to a similar identification and balancing of common or basic variables. Ever bearing in mind that we are not dealing with matters susceptible of being neatly compartmentalized, the following construct has helpful analytical value in grouping and contrasting the cases.

First, the national government's interest in imposing national policies on States is in some instances *primary.* In other instances it is *attenuated* or derivative as under the outer reaches of the "affecting commerce" concept when utilized to extend social policies to activities having no nexus to commerce except as part of a "class." *Perez v. United States,* 402 U.S. 146; *cf. United States v. Five Gambling Devices,* 346 U.S. 441; *Rewis v. United States,* 401 U.S. 808; *United States v. Bass,* 404 U.S. 336. See also,Stern, *The Commerce Clause Revisited - The Federalization of Intrastate Crime,* 15 Ariz. L. Rev. 271 (1973).

Second, the impact of national action can either be on State activities of a "uniquely governmental" nature, in which the State has a *primary* interest in autonomy, or on State activities of "proprietary" or "non-exclusive service" nature, in which case the interest in State autonomy becomes more *attenuated.*

A. National Primary Concern or Activity vs. State Secondary Concern or Activity.

Within this construct when a policy falling in the *national-primary* area collides with a State policy falling in the *State-attenuated area,* the former should prevail. The following cases fall in this category: *United States v. California, supra; New York v. United States,* 326 U.S. 572; *Board of Trustees of University of Illinois v. United States,* 289 U.S. 48; *Case v. Bowles,* 327 U.S. 92. In *California,* involving application of the Safety Applicance Act to a State-owned railway which handled interstate cars as a vital nexus in interstate movement, there was a national-primary interest because the very core of the Commerce Clause is reached in a situation directly involving interstate movement and safety. The State activity was "proprietary," despite the Court's disavowal of the term, hence the interest was attenuated. *New York* lends itself to a similar analysis – the national tax power, versus another non-essential State activity, marketing mineral waters. *Board of Trustees* involves foreign imports, where there is a uniquely exclusive constitutional commitment to national control, and impact on a State activity, higher education, which is a non-exclusive State service shared with the private sector.

In *Case* the state of Washington argued unsuccessfully that it could not be subjected to the World War II Emergency Price Control Act in respect to sale of state-owned timber held for the "support of the common schools." The state interest in *Case* is at a secondary level because however education might be classified, at stake was only one aspect of state financing, not schools per se. This state interest in *Case*

collided with a congressional policy in which there was a vital, primary, national interest, and it had to yield. Otherwise, as Mr. Justice Black put it in his opinion for the Court, "the constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the Federal Government's establishment." 327 U.S. at 102. By analogy to the *California* case, *Parden v. Terminal R. Co.*, 377 U.S. 184 may also be classified here.

B. National Primary Concern or Activity vs. State Primary Concern or Activity.

When a policy falling in the *national-primary* area collides with a state policy falling in the *state-primary* area we have a more difficult situation, but one in which considerations of federal supremacy normally tip the balance in favor of the national policy. Examples include *Fry v. United States*, 421 U.S. 542, and *Sanitary District, supra.*

In *Fry* there was a re-play on *Case*, with two important distinctions. The issue was the application of peacetime wage-price stablization under the 1970 Act, and the coverage extended to all State-local employees regardless of the function being performed. Hence, here the vitals of State government *are* being touched, yielding a State primary interest. On the national side the commerce rather than the war power is the basis for the law. This is the use of the Commerce Clause in relation to a matter, inflation control, which is a subject "imperatively demanding a single uniform rule," *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, and vital to our national

well-being in commercial and monetary matters.[14] The distinction in *Cooley* and other early Commerce Clause cases between primary and secondary zones of concurrent non-conflicting authority in the latter but not the non-conflicting authority in the latter but not the former) has, to be sure, been somewhat eroded over the years in the sequence of decisions extending national jurisdiction over ever-more-peripheral activities. However, it retains special vitality, and indeed is a necessary concept in the interest of intelligent adjudication of Federalism principles when the national legislation not merely affects peripheral State government actions as in *California, supra* and *New York, supra,* but intrudes into personnel and budgets per se.

With respect to *Fry* the exempting State-local salaries from national wage stabilization would have allowed these units to "raid" the national government and the private sector for employees. The full coverage was needed to avoid direct intermeddling. Absent such coverage there would be pressure on other employers to find a way around wage stabilization in order to avert State-local raiding. Thus full coverage also was needed to avert maneuvering and avoid an enforcement problem for the national government.

Hence, in *Fry* a national primary concern collided with a State primary concern, *i.e.*, the application of national economic stabilization policy to State personnel and budgets. This Court decided that the national concern was paramount. But with the trump card of

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[14] It is not too far-fetched to suggest that national inflation policy rests not solely on the Commerce Clause but on the monetary clauses themselves, as to which there concededly is a national plenary power. See *Norman v. Baltimore,* 294 U.S. 240; *Legal Tender Cases (Juilliard v. Greenman)* 110 U.S. 421.

the war power lacking there was one dissent and the majority opinion said that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a Federal system." 421 U.S. at 547 n. 7. No such impairment was seen. Furthermore *Fry*, unlike the present case which arises under the 1974 Fair Labor Standards Act Amendments, did not involve direct interference with work scheduling through Federal control over overtime regulations.

The old case *Sanitary District of Chicago v. United States*, 266 U.S. 404, likewise can be placed under this heading, for both interests in conflict were of primary concern. The District, a State agency, wished to continue to use the waters of Lake Michigan at the existing rate for purposes that included sanitation and water supply interests which go to the core of the purpose of government. The Attorney General of the United States sought, and obtained, an injunction to materially restrict the diversion, relying on the Commerce Clause and a Canadian Treaty, in the interest of preserving the lake level and navigability. The City of Chicago and States bordering on the Mississippi were allowed to file briefs. *Sanitary District* therefore presents "Federalism" issue of a different sort from the ones in the cases discussed above, and the Court's decision in favor of the Attorney General, speaking of the "edict of a paramount power," (266 U.S. 432) is quite understandable. For this case involved not merely "commerce" but Federal allocation of a scarce interstate resource. This is the one thing only Federal authority can do; indeed, it can be done by this Court alone under Article III in original suits between States. *Kansas v. Colorado*, 206 U.S. 46.

Arguably, *Pennsylvania v. Nelson*, 350 U.S. 497 can be listed here too for it involved national-State mutual "primary" concerns about subversion against government.

C. National Secondary Concern Or Activity vs. State Secondary Concern Or Activity.

Like the foregoing category of a facially equal balance between a primary national concern and a primary State concern, with the nod going to the national government, there may be also a facially equal balance between a national secondary concern and a State secondary concern. *Maryland v. Wirtz,* 392 U.S. 183, is such a case. Again the nod went to the national government, with dissents by Justices Douglas and Stewart, and Mr. Justice Marshall not participating.

In *Maryland* it cannot be said that either the national concern or the State concern is at a "primary" level. When the Commerce Clause is used as a basis for nullifying interstate trade barriers or burdens, for promoting safety in transit and honesty in interstate dealings, for allocating scarce resources be they water or air waves, it is being used to achieve core purposes associated with the creation of the national government. A process of attenuation begins, although the power is still legitimate, when the Commerce Clause is used as a basis for imposing on intrastate activities various congressional economic and social policies.

Some nexus with commerce, or theory of nexus with commerce, is needed as a constitutional peg, but the focus is more on the intrinsic worth of the policy in question as a police power matter, than on the needs of effective interstate operation, per se. With the primary

focus on the social or economic policy, *i.e.*, prohibiting child labor, or curbing extortionate credit transactions, an inverted process of analysis tends to occur. The effort is to see how far the national reach can be stretched, in the interest of approximating as nearly as possible the power Congress would have in a unitary State. And we have seen that the affecting commerce concept, somewhat in the spirit of the "for want of a nail a shoe was lost. . . ," lines, can be considerably attenuated, often on a merely assumed sets of facts, before the breaking point is reached.

Indeed, once certain loose formulae are adopted, there is in truth no logical stopping point. For example we have tended more and more to treat the Commerce Clause as a "national economy" concept yielding broad power over any factor which may affect the total national supply and demand. See *Wickard v. Filburn*, 317 U.S. 111, regarding home-grown, home-consumed wheat. Such reasoning was an important element in working out a commerce clause basis for the public accommodations portion of the Civil Rights Act of 1964 in its application to an intrastate restaurant, without need to show presence of any interstate consumer. *Katzenbach v. McClung*, 379 U.S. 294. Obviously, by such reasoning, we also can articulate a "rational basis" for national jurisdiction over birth control and family planning, for this is the most critical annual supply and demand variable affecting the national economy.

We can even reach the point of attenuation when no nexus with commerce need be shown, if a law enforcement problem might be eased by full Federal control. Commenting on *Perez v. United States*, 402 U.S. 146, Stern asks, and on the basis of *Perez* answers in the affirmative, this provocative question: "Can Congress

forbid the possession or transfer of all pills, or of all white pills, because of the difficulty of distinguishing dangerous pills from others and because some might move interstate?" Stern, *The Commerce Clause Revisited – The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. at 280 (1973).

Again, we are not contending that this process of construction is illegitimate as applied to the private sector, so long as particular personal liberties are not infringed. But it *is* a process of *attenuation*, and this factor must be taken into account when the attempted regulations impringes on internal aspects of State and local Government. As the Court said in *Fry*, the Tenth Amendment gives explicit recognition to retention of State governments, and necessarily some degree of State autonomy, as an independent constitutional value.

An analysis based on the Commerce Clause alone prejudges the answer. Explicit consideration must be given to Federalism in developing viable lines between national legislative power and State Government autonomy.

In *Maryland v. Wirtz*, however, when we turn from analysis of the national interest to analysis of the State interest in respect to the employees there covered by the 1966 Fair Labor Standards Act Amendments, we find a somewhat mixed picture. These amendments did not cover all State-local employees regardless of function and therefore did not raise a State primary concern, as was the case in *Fry*, discussed *supra* (and overborne in *Fry* by a primary national concern). The 1966 Amendments covered transit, hospital, school employees (29 U.S.C. Sec. 203(r), with the standing exemption of professional and supervisory employees dating from 1961 (29 U.S.C. Sec. 213 (a)(1)). The core of State government was not

touched therefore, as was the case in *Fry*, and as is the case here. The coverage of transit and State institutional employees raised only a State secondary concern, because these are nonessential services commonly provided privately too. Schools, to be sure, are nearer the line, but teachers and supervisory personnel were exempted.

It must be stressed that we are dealing with an inexact continuum providing a more realistic basis for analysis than heretofore, but necessarily inexact given the nature of the tension of values at issue. This Court does retain the sovereign prerogative of choice.

The basic thrust of Mr. Justice Harlan's opinion is in accord with this analysis. He said the commerce power would not be carved up "to protect enterprises *indistinguishable in their effect on commerce from private businesses* simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-199 (emphasis added). And further indication that Mr. Justice Harlan had in mind only those State activities which have direct analogies to private activities, and not State-local government in general, as found in his express disclaimer of any intent to sanction a Congressional power to "declare a whole state "enterprise' affecting commerce and take-over its budgeting activities." 392 U.S. at 196-97 n. 27.

To summarize on the facts of the coverage at issue in *Maryland v. Wirtz*, and facts are more important than rhetoric here, it may be noted first, that all of the "enterprises" in *Wirtz* were identifiable, separate subparts of the State Government, and inside each no statutory "relatedness" problem was raised. This is in stark contrast to the "joint employment" and "volunteer to a second government agency" problems presented when the Act of *Wirtz* is extended in its 1974 Amendments to encompass all of State and local Govern-

ment. Second, all were "economic" or quasi-economic in the sense that all had counterparts in the private sector. Third, all were severable in the sense that a State can sell or lease to the private sector the operations of transit, hospitals, and even schools, or close them down, absent invidious racial purpose. *Griffin v. County School Board,* 377 U.S. 218; *cf., Palmer v. Thompson,* 403 U.S. 217. Fourth, it is true that all "used" goods which had come through interstate commerce, but a simple, across-the-board "use" test, which a fortiori would encompass all State-local Government and all life, was repudiated by Justice Harlan in his footnote 27, cited *supra.*

In short, *Maryland v. Wirtz* presented the Court with a "standoff" situation with neither national primary concerns nor State primary concerns at stake. In that situation, the principle of Federal supremacy again prevailed, just as in the situation with facially equal primary interests at stake.

D. National Secondary Concern or Activity vs. State Primary Concern or Activity.

When a *national primary* concern or activity is confronted by a *State secondary* concern or activity, national power is at its maximum, as indicated in the discussion in Category 1 above. When the two intermediate categories are reached, Categories 2 and 3 above, some close calls may be unavoidable particularly in Category 3. Nevertheless there has been a tendency to uphold the national power. When the present Category 4 is reached and a *national secondary* concern or activity under an attenuated commerce concept is confronted by a *State primary* concern or activity,

national power is at its minimum. Barring very special justification, it should not prevail. We submit that this challenge under the 1974 Amendments presents such a case.

1. The Primary Nature Of The State Concern In Respect To The Impact Of The 1974 FLSA Amendments Flows From Several Considerations.

Abandoning the enterprise concept, which does have certain internal logic and consistency, Congress by simple declaration has swept all State-local employees (excepting supervisory, professional and political) under the Labor Act and stated that they all shall be "deemed" to be commerce-connected, without exception. 29 U.S.C. Sec. 203(s) as amended. The coverage extends from the most conventional common services overlapping the private sector (*e.g.*, homes for the aged, hospitals) to the most essential type of employees working at the core of those activities uniquely governmental. The partial exemptions provided for fire and law enforcement activities are given by grace, not by concession of insufficiency of constitutional power. 29 U.S.C. Sec. 213(b)(20)

The 1974 Amendments in particular touch a State primary concern because of the impact of the overtime provisions on work scheduling, on compensatory time off in lieu of overtime (snow removal being an especially dramatic example), and on use of volunteers and part-time workers, to mention only a few. (See Brief for Appellant, p. 34-35; Reply Brief, p. 4-6).

Furthermore, the State-local Governments are not being subjected here to a clear simple rule. The long list

of statutory exemptions[15] and qualifications, supplemented by extensive rulemaking by the Secretary of Labor, have the effect of subjecting the State-local Governments to a voluminous, shifting, and in some instances petty body of detailed do's and don'ts. (See Brief for Appellant, p. 32).

The monetary impact of the 1974 Amendments is not the dominant aspect of our Federalism argument; the foregoing points are more important. See Br. for Appellant, pp. 82-92. But the monetary impact is real, and not de minimis. There is an annoying double-standard aspect to the Government's approach to the

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[15] The basic thrust of the Appellee's case is that Congress can regulate State-local employees' wages-hours-overtime matters to ward off dangers of labor disputes which would diminish State-local use of interstate goods, dangers of unfair competition to induce industry to come in, and to spread the work. Laying aside our critique of these supposed dangers, even if the dangers are assumed to have some reality, the Act itself demonstrates that the national interest does not rise to the level of a primary concern – because of the startlingly long list of 28 exceptions to the Act, many of them quite extensive in effect. 29 U.S.C. Sec. 213. These exemptions show how attenuated the "commerce" protection or promotion concern is. A State legislature, to be sure, with plenary regulatory power, can choose to take a "step at a time." *Williamson v. Lee Optical,* 348 U.S. 483. When the legislative power base is commerce, however, the presence of exceptions such as these - directly impacting on the supposed purposes of the Act - undercuts the validity of the asserted jurisdictional theory itself.

monetary impact question. When the Government seeks to belittle the Plaintiff-Appellants' State burden argument, it focuses on the relatively small number of State-local employees who are now "substandard" and would be affected by the Labor Act. It says little change will occur. But when the Government seeks, as it must, to demonstrate the needed nexus with commerce it switches and uses gross figures in respect to State-local employees, budgets, purchases, and use. It cannot have it both ways. (Compare Brief for Appellee, p. 32 with p. 41, see Brief for Appellant, p. 24-26; Reply Brief, p. 4).

2. The Secondary Nature of National Concern In This FLSA-Federalism Dispute Likewise Flows From Several Considerations.

It is not necessary to repeat here the Commerce Clause discussion in Category 3 above, demonstrating that the national concern was at a secondary level in *Wirtz* also. But some significant points may be added.

A functional, realistic "impact" analysis demonstrates that the relation to commerce of the State-local personnel practices which would be affected by the 1974 Amendments is certainly de minimis and perhaps borders on zero.

Even assuming some higher wage payments resulting from application of the 1974 Amendments, it is unlikely that this would have a beneficial effect on commerce, or remove any detrimental effect attributable to present practice. The reason is that higher wage payments would constitute only an *internal transfer* inside the State, and would not affect the State's demand for or use of interstate goods. If the States pay lower wages than the Labor Act would require, the result is not to reduce the demand

for interstate goods, because, as a reciprocal corollary to the lower wage payment, the State (or citizens through lower taxes) have more money for interstate goods. Hence, the State nexus with commerce on a "user" theory is unaffected by the Labor Act issue; the question instead is distribution of money within a State with commerce impact a constant. This is rudimentary economic realism in the style of the University of Chicago "school" of economic analysis.

One thing to bear in mind about this last point is that it undercuts *Wirtz* too, unless undue stress is placed on the supposed competitive relationship between, for example, a private hospital and a State hospital. It could be said (although *Wirtz* does not read that way) that the *Wirtz* holding is a safeguard against undue inroad on national wage policies by the device of transfer of vast ranges of "services" from the private sector to the public sector. No such danger arises from preserving the exemptions at issue here. This point is another way of providing a special explanation for *Wirtz*, and distinguishing it from the present controversy.

Although the "user" theory is the Government's primary reliance, other theories likewise do not show a substantial or meaningful impact on commerce emanating from State-local personnel policies not exempted from the Labor Act, and most certainly do not show the presence of a national primary-level concern. Neither the "unfair competition" theory, the "labor dispute" theory, nor the "spreading the work" theory are credible as giving rise to a national interest anywhere near strong enough to justify the intrusion into the core of Federalism and State autonomy attempted here.

Because State Governments are not exporters of

products, through use of the employees at issue here, the "unfair competition" theory of *United States v. Darby*, 312 U.S. 100, has little or no relevance. Low wage rates or disregard of the Labor Act's requirements do not result in States being able to undersell others on the interstate market, and thus drive other wages down. (Indeed Mr. Justice Harlan in *Wirtz* used the *Darby* unfair competition theory only in his general discussion of the new 1961 enterprise concept, and did not utilize it in the portion of his opinion discussing coverage of certain State-local employees under the Act.). The other suggestion of the Government (Brief for Appellee, p. 22) that lower public wages may permit marginally lower tax rates, making the State attractive to industry, is fanciful and totally unsupported factually. Indeed, to meet inference with inference, it would seem that the miniscule amounts represented by the *gap* between wages actually paid (most being well-above the Act's requirements) and required wages could have no measurable influence on taxes. There simply are no States and Cities paying wages below the minimum.

The "labor dispute" theory, *i.e.*, that wages below the Labor Act's minima are a cause of strikes, during which State-local Governments "use" fewer interstate goods, is at best tenuous and hardly provides an adequate basis for the far greater inroad on State autonomy here than occurred in *Wirtz*. Factually, although strikes do occur in State and local Governments, it has not been demonstrated that lack of Fair Labor Standards Act coverage is a cause of such strikes. (See Reply Brief, p. 40.) The "spreading of the work" theory, apparently not vigorously asserted by the Government, has the prime vices both of being logically limitless, and of imposing burdens on

State-local Governments to solve a national problem more properly handled by national economic up-lift programs – for our financial strength is in our national government, not our State-local Governments. The fact is that the States and Cities in their current fiscal crisis are cutting down drastically on the number of persons they employ so the Amendments have an opposite effect to the purposes of the Act in spreading employment. By making State and local services more costly the Amendments reduce the number of State and local jobs; they thus do not spread work or create jobs – they destroy jobs.

Nor does the recent decision in *Fry v. United States, supra,* lend support to the Government's position in this case. Exempting State-local salaries and wages from the emergency Economic Stabilization Programs would have allowed State and local Governments to attract Federal and private sector employees, thus directly and unfairly interfering with the Federal and private sector work forces. Against the 28 exceptions to the Fair Labor Standards Act must be set the universal coverage of the statute in *Fry.* Here, given the much more ephemeral and attenuated nature of the commerce-based national interest, continuing the present exemption from the Labor Act would have indirect, peripheral, and indeed perhaps no measurable impact. (See more detailed impact discussion, above.)

In short, with this case we are at the point where national legislative power to intrude on the State autonomies traditionally and currently (*Fry, supra* footnote 7) viewed as components of constitutional Federalism, is at its lowest ebb. As was learned at the recent Seventh World Conference on Law these autonomous components of Federalism are traditional with all Federal nations and

no such nation growing out of the common law experience (to include Canada, New Zealand and Australia) permits the national Government to exercise the power of control over local Government which Appellee would here assert. (See, e.g., the British North America Act of 1867 §§91,92 and cases decided thereunder). The assertion of this power, therefore, is unheard of in the entire experience of common law Federal nations.

III.

MORE THAN A SIMPLISTIC RATIONAL BASIS TEST MUST BE HERE EMPLOYED TO ACCOMMODATE THE FEDERALISM PRINCIPLES AT ISSUE

We are told that if Congress can find a rational basis for exercise of commerce power, it can do so – without more – even against the State Governments' internal affairs. We respond, not so. Unlike private business payrolls, State payrolls are protected by one of the two highest principles in our constitutional order, the principle of Federalism. Hence, a higher-than-rational basis is required to justify action impacting on State payrolls and personnel. Indeed, something analogous to the showing required of a State under the strict scrutiny test developed under the Fourteenth Amendment Equal Protection Clause in respect to suspect categories and fundamental interests is required.

Such a showing by the Government is required here not just because a constitutional value can be pleaded by Plaintiffs-Appellants but because in the two large areas of Federalism and Separation of Powers the

fundamental rule – operating on both contestants – is restraint and accommodation. That is a rule of life in these areas. For example, in Separation of Powers, President Nixon lost the tapes suit not just because there was a "rational basis" for wanting access, but because the tapes were essential to a criminal trial – a vital public interest. And in *Sanitary District,* Illinois lost not just because there was a rational basis for national action, but because only the national government can allocate scarce resources. *Fry* can be viewed in similar light, and likewise *United States v. California,* although in the latter there was the added factor that the level of State concern was secondary, not primary.

The "rational basis" test proves too much. Congress would never lack a "rational basis" for subjecting State Governments to particular, uniform, national purposes, once Federalism is laid aside and we look only at national power and Bill of Rights checks, as though we were in a unitary State.

That such an approach is abhorrent to the careful analysis of Federalism is shown by *Brown v. EPA,* 521 F.2d 827 (9th Cir. 1975) which is at this Court for review, and similar cases.[16] Even the sanctions[17] which

[16]See *Arizona v. EPA,* 8 E.R.C. 1238 (9th Cir. Sept. 8, 1975); *Maryland v. EPA,* 8 E.R.C. 1105 (4th Cir. Sept., 1975); *District of Columbia v. Train,* ____U.S. App. D.C. ____, ____Fed. 2d ____ (Oct. 28, 1975).

[17] "The sanctions include, the Administrator insists, injunctive relief, imposing a receivership on certain state functions, holding a state official in civil contempt with a substantial daily fine until compliance is secured, and requiring a state to allocate funds from one portion of its budget to another in order to finance the undertakings required by the Agency. The Agency disclaims any authority to seek criminal penalties against state legislators."

Brown v. EPA, 521 F.2d at 831 (footnotes omitted).

the Court in *Brown* rejected along with the prospect of Congress "control[ling] ever increasing portions of the states' budgets," 521 F.2d at 840, are not as serious as those this case presents. For the 1974 Labor Act Amendments contemplate entire State or City Governments as criminal defendants, 29 U.S.C. § 216(a). Unlike the goal of environmental improvement involved in *Brown,* which at least benefited all citizens; these Labor Act Amendments promote more money, almost entirely through overtime payment, for only some of the 11.4% of citizens who are State and local Government employees. Even these employees often prefer compensatory time-off for overtime cash, as the Appellants' briefs point out. In any case, these employees are also taxpayers who will see their taxes increased, their services reduced, or both, under the Labor Act whose administrators they cannot vote down.

A simplistic "rational basis" test, as articulated by the Government, conceives of a Congress limited only by the Bill of Rights, because any possibility of intrinsic limits inside the Commerce Clause itself virtually vanishes with *Katzenbach v. McClung* and *Perez v. United States.* In the Government's perspective, there is room for *State wrongs,* to be corrected congressionally by any means not violative of express guarantees in the Bill of Rights, but no room for *State rights* – or if that is too shopworn a term – for State integrity and autonomy inside State Government itself.

The true question is not whether the national policy is legitimate, or whether its touching the State Government constitutes a small or a large battery, but whether there is any *significant national harm* which can be averted only by the intrusion of these Amendments.

CONCLUSION

This case is not controlled in any way by *Maryland v. Wirtz*. The unprecedented damage to our Federal system of non-interference, one Government with another, cannot stand on the weak nexus to commerce articulated by the Congress in passing Public Law No. 93-259. The Federal interest here is too tenuous, the interest of States and Cities too important and too threatened, for this Court not to reverse the District Court below and to declare these 1974 Amendments unconstitutional.

Respectfully submitted,

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