Spring 1975

The Bugaboo of Federal Preemption: An Analysis of the Relationship between a Federal Collective Bargaining Statute for Employees of State and Local Governments and State Statutes Affecting Such Employees

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THE BUGABOO OF FEDERAL PREEMPTION: AN ANALYSIS OF THE RELATIONSHIP BETWEEN A FEDERAL COLLECTIVE BARGAINING STATUTE FOR EMPLOYEES OF STATE AND LOCAL GOVERNMENTS AND STATE STATUTES AFFECTING SUCH EMPLOYEES

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I. INTRODUCTION

It is a tribute to the power of persuasive public relations that certain terms can become so laden with emotion that they are able to trigger support of, or opposition to, a particular concept. It has been noted, for example, that "[t]he term 'national emergency dispute' seems to stimulate lurid fantasies in the minds of otherwise sober and

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The opinions expressed in this article are those of the authors and do not necessarily represent institutional positions of the National Education Association.
The term "preemption" has similar properties, and in the current flap over the impact that a federal collective bargaining statute for public employees would have on state statutes affecting such employees, we see a classic example of the "lurid fantasies" reaction. Thus, Dr. Myron Lieberman, of Baruch College, City University of New York, and a consultant for the American Association of School Administrators, states that if the preemption doctrine that has developed in the private sector is applied to the public sector, it "may create widespread confusion and uncertainty; jeopardize important management rights and employee benefits; threaten the stability and viability of retirement funds; and lead to widespread and costly litigation." Apparently assuming that such transplantation would be the inexorable result if Congress remained silent on the point, he concludes that "leaving this issue unresolved in federal legislation would, in our judgment, be unwise, if not potentially disastrous for state and local public employment relations."

Spokesmen for other employer groups likewise have seized upon the term "preemption" in an effort to evoke the desired opposition to a federal collective bargaining statute for public employees. John Hanson, President of the National Public Employer Labor Relations Association, an organization that represents state and local governments in labor relations, referred to the matter in a letter to Senator Harrison Williams, Chairman of the Senate Subcommittee on Labor. After first noting that his organization was "opposed to the enactment of federal legislation covering public sector collective bargaining at the state and local levels," Mr. Hanson continued:

The impact of federal legislation is difficult to ascertain. Involved in the process are the state constitution, home rule charters, state civil service laws, tenure laws, and the like. . . . These kinds of issues do not exist in the private sector and their consideration and resolution must precede federal legislation, if it is to contribute to effective government at all levels.

The foregoing comments are not meant to suggest that we consider

2. As used in this article, the phrase "public employees" refers to employees of state and local governments and does not include employees of the federal government.
4. Id.
5. GOV'T EMPL. REL. REP. NO. 580, at B-1 (Nov. 11, 1974).
6. Id. at B-2.
the matter of preemption an unimportant one. On the contrary, it is of extreme importance and warrants the attention of anyone who seriously is concerned with the effective operation of a federal collective bargaining statute for public employees. There is in all states extensive statutory regulation of the terms and conditions of public employment and more than 30 states have enacted statutes which provide for at least some type of collective bargaining between public employers and their employees. Should Congress expressly indicate the relationship between these statutes and a federal collective bargaining statute or should it leave the matter to judicial determination on a case-by-case basis? If the former course is followed, what options are available to Congress and what factors should it consider in making its choice? If Congress chooses the latter course, what is likely to be the fate of the state statutes and, more specifically, to what extent can we use the application of the preemption doctrine in the area of private sector labor relations as a basis for prediction? This article considers these and related preemption problems that must be confronted in connection with a federal collective bargaining statute for public employees, and attempts to provide an appropriate framework for developing responsible answers to them.

II. The Nature of the Federal Statute

In order to discuss meaningfully the application of the preemption doctrine to public sector collective bargaining, it is essential to make certain assumptions as to the type of legislative action that Congress is likely to take. Two principal approaches are presently under consideration.

One approach calls for a separate statute to regulate collective bargaining in the public sector. The statute would, in broad outline, establish an administrative structure analogous but not identical to that established by the National Labor Relations Act for the private sector. In the 93d Congress, this approach was reflected in H.R. 8677, introduced by Representatives Clay and Perkins, and in

7. For a compendium of some of the state statutory provisions establishing terms and conditions of employment for teachers, see Lawyers' Committee for Civil Rights Under Law, A Study of State Legal Standards for the Provision of Public Education (1974).


It should be pointed out that the collective bargaining rights of public employees are sometimes dealt with in a state constitution. See, e.g., Fla. Const. art. I, § 6; N.J. Const. art. I, ¶ 19.

The second approach would be to bring public employees under the coverage of the NLRA. Two proposals which were introduced in the 93d Congress—H.R. 9730 by Representative Thompson and S. 3295 by Senator Williams—would have achieved this result simply by deleting the exemption for “any state or political subdivision thereof” which is contained in section 2, paragraph 2, of the NLRA. Representative Thompson has reintroduced his proposal in the 94th Congress as H.R. 77. Others, while supporting the general concept of NLRA coverage for public employees, believe that the foregoing proposals represent an oversimplified approach. They contend that the NLRA must be amended in several other respects in order properly to accommodate differences between the private and public sectors (e.g., the status of supervisors; impasse resolution machinery), but no proposal along these lines has been introduced.10

Although, at appropriate points infra, we draw certain distinctions between the separate statute and the NLRA amendment approaches, their pertinent common feature is that they both would establish a comprehensive federal system for regulating the relationship between public employers and their employees. This system would, among other things, obligate the parties to engage in collective bargaining regarding “rates of pay, wages, hours of employment, or other conditions of employment”11 or some equivalent generic phrase.

III. THE BASIS OF THE PREEMPTION DOCTRINE

The doctrine of federal preemption derives from the interaction of several provisions of the United States Constitution. The tenth

10. Although the above two approaches are receiving the greatest attention, in the interest of completeness reference also should be made to what is commonly referred to as a “minimum standards” approach. This approach envisions a federal statute which would set forth certain specified rights and obligations (e.g., the right of employees to form, join, and participate in the employee organization of their choice; the right of the organization selected by a majority of the employees in an appropriate collective bargaining unit to represent all such employees in bargaining with the employer), but would, at least in the first instance, leave it to the states to pass the necessary implementing legislation. We assume that if a state failed to enact such implementing legislation, the employees would come under the coverage of a backup federal scheme. No proposal embodying this approach has been submitted to Congress and, in the absence of a more complete elaboration of the specifics, it is not possible to discuss its potential preemptive effect. Moreover, the “minimum standards” approach has, to date, received limited political support.

Accordingly, we shall assume for purposes of this article that if Congress does provide collective bargaining rights for public employees, it will do so by means of one of the two approaches discussed in the text.

amendment provides that "[t]he 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." Thus, the initial question in any debate regarding preemption is whether congressional action can be traced to a power "delegated to the United States by the Constitution." If it can, the tenth amendments, by definition, becomes inapplicable. The task is then to determine the relative status to be accorded to a federal statute and a state constitution, statute, or other enactment dealing with the same subject matter. This status is governed by article VI, clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties 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 constitutional authority for Congress to enact a public sector collective bargaining statute would derive from the commerce clause, which grants Congress the power to "regulate Commerce . . . among the several States." Principal support for this proposition is provided by Maryland v. Wirtz, in which the Supreme Court upheld the 1966 amendments to the Fair Labor Standards Act (FLSA) that extended FLSA's minimum wage and overtime provisions to certain employees of schools and hospitals operated by the states or their political subdivisions. In upholding the amendments, the Court pointed out that "labor conditions in schools and hospitals can affect commerce;" that Congress had "interfered with" the states' performance of medical and educational functions "only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals;" and that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved."

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12. Unless otherwise indicated, we shall, for purposes of simplicity in discussion, use the phrase "state statute" to refer to all types of enactments by a state or any of its political subdivisions.
16. 392 U.S. at 194.
17. Id. at 193-94.
18. Id. at 196-97.
The Court concluded by noting that "it will not carve up the commerce power 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."19

On two subsequent occasions, the federal government has injected itself into the public employee-employer relationship at the state and local levels: (1) the Equal Employment Opportunity Act of 197220 extended the provisions of Title VII of the 1964 Civil Rights Act to state and local government employees; and (2) on August 15, 1971, pursuant to the Economic Stabilization Act of 1970,21 President Nixon issued Executive Order No. 1161522 providing for the stabilization of prices, rents, wages, and salaries. The Executive Order impaired hundreds of thousands of individual employment contracts, modified innumerable governmental budgets, and overrode many collective bargaining agreements. These enactments have not thus far been found wanting on constitutional grounds.23

IV. THE PRIVATE SECTOR PRECEDENTS AND THEIR IMPLICATIONS FOR THE PUBLIC SECTOR

Preemption is a primary concern whenever the federal government enters an area which previously has been left to state regulation. A threshold question for Congress in each such instance is whether to address the matter expressly or to leave it to judicial determination on a case-by-case basis. Congress has not been of one mind in this regard and the various federal labor statutes reflect different approaches. Thus, Congress chose the first option in the FLSA:

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum

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19. Id. at 198-99 (footnote omitted).

wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter . . . 24

The NLRA reflects a contrary judgment. Except for the section 14(b) reference to state statutes prohibiting union security arrangements, Congress did not expressly indicate its intention as to preemption, and "[t]he statutory implications concerning what has been taken from the States and what has been left to them [by the NLRA] are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." 25

Although there are many factors which Congress might consider relevant in deciding whether or not to set forth expressly the preemptive effect of a federal collective bargaining statute for public employees, its relative satisfaction or dissatisfaction with the consequences of congressional silence would surely be of major importance. Since the courts undoubtedly would construe such silence as a tacit endorsement of the prevailing doctrine of preemption, we may use the positions which have been taken in regard to the NLRA, and the counterpart Railway Labor Act 26 (RLA), as a basis for projection. In turn, we may use this projection as at least a partial basis for determining whether or not Congress should expressly address the preemption issue.

For purposes of analysis, the state statutes that might be subject to preemption by a federal collective bargaining statute for public employees can be divided into three categories. In the first category would be those state statutes, regardless of their subject matter, which are in conflict with an explicit provision of the federal statute. In the second category would be those state statutes which may or may not be in conflict with an explicit provision of the federal statute but which relate specifically to the collective bargaining process and attempt to regulate one or more of its aspects. The third category would include those state statutes which do not have either of the foregoing characteristics, but which establish specific terms and conditions of public employment which would come within the mandatory scope of collective bargaining under the federal statute. The potential impact of a federal collective bargaining statute on the state statutes in each of these categories is considered below.

A. State Statutes in Conflict with the Federal Statute

This aspect of the problem may be disposed of summarily. The federal statute clearly would prevail in regard to any matter which was addressed expressly by Congress. Thus, for example, the statement in section 5(b)(2) of H.R. 8677 that employee organizations shall have "the right to have deducted from the salary of employees... an amount equal to the fees and dues required for membership" would render invalid any state statute which prohibited or otherwise limited the right to dues deduction. The operative legal principle was phrased as follows by the Supreme Court in *Florida Lime & Avocado Growers, Inc. v. Paul:*

A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility....

B. State Collective Bargaining Statutes

The legal principle that would be pertinent to the statutes in this category was succinctly summarized by the Eighth Circuit Court of Appeals in *Northern States Power Co. v. Minnesota:*

[A]bsent inevitable collision between the two schemes of regulation it must be determined whether Congress manifested an intent to displace coincident state regulation in a given area. Where Congress has unequivocally and expressly declared that the authority conferred by it shall be exclusive, then there is no doubt but that states cannot exert concomitant or supplementary regulatory authority over the identical activity.

Consistent with this principle, the Supreme Court has held that in the private sector questions concerning organizational rights, employee representation, the resolution of collective bargaining disputes (at least in the absence of violence), and the like must be resolved pursuant to the federal statute even though the state statute may be supplementary rather than contradictory. It may be helpful to an understanding of this latter point to provide a specific illustration.

Several of the current state public sector collective bargaining statutes include supervisors within the definition of "employee" and accord to them various rights and benefits. If we assume that the

federal collective bargaining statute adopts the NLRA position regarding supervisors—i.e., that they are part of management and entitled to none of the statutory rights and benefits accorded to rank-and-file workers—could a state continue to accord these rights and benefits to them? To the extent we are to judge by analogy to the private sector, the answer is no. In Beasley v. Food Fair the Supreme Court held invalid as contrary to the NLRA a North Carolina statute which required employers to treat supervisors as "employees."

In sum, the courts have held that Congress intended to assume exclusive jurisdiction over any activity arguably protected or prohibited by the NLRA, and state regulation is permitted only in regard to those activities which are of "peripheral concern" to the federal policy or which involve interests "deeply rooted in local feeling and responsibility." There is no reason to anticipate a different judicial posture in the public sector, and we may conclude that, unless Congress provides otherwise, a federal collective bargaining statute for public employees would take precedence over any state collective bargaining statute.

C. State Statutes Establishing Terms and Conditions of Public Employment

Since a federal statute presumably would not mandate the content of collective bargaining agreements, the state statutes in this category would not present a situation in which dual compliance was a "physical impossibility." Moreover, since these statutes do not specifically relate to collective bargaining, one would be hard pressed to conclude that Congress had "unequivocally and expressly" manifested an intention to preempt them.

Their vulnerability derives instead from the third test that the courts have fashioned: to wit, a state statute is subject to preemption if it interferes with the accomplishment of the purposes and objectives of Congress in enacting the federal statute. More specifically, the

32. The state statutes would not be per se nullified. They would remain operative—as do the various state statutes regarding private sector collective bargaining—in situations in which the prerequisites for federal jurisdiction were not present or in which, for other reasons, federal jurisdiction was not invoked.
33. See note 27 and accompanying text supra.
34. See note 28 and accompanying text supra.
state statutes in this category establish terms and conditions of public employment which arguably would be mandatory subjects of collective bargaining under the federal statute. The decisive question is whether they therefore constitute an impermissible "frustration of the national policy objective of unfettered collective bargaining."36

The Supreme Court has, on two occasions, considered the effect of a state statute on the freedom of the parties to bargain collectively pursuant to federal law. The first case, California v. Taylor,37 arose when California contended that the Belt Railroad, which was owned and operated by the state, could not constitutionally be held subject to the RLA. The Court rejected this contention38 and then proceeded to touch upon two aspects of the preemption question. First, it noted that a California statute which prohibited collective bargaining by public employees was subservient to the RLA,39 the obvious conclusion under Garner v. Teamsters Local 776.40 The Court then continued in dicta as follows:

Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws.41

This dicta in the Taylor case formed the basis for the Supreme Court's holding two years later in Teamsters Local 24 v. Oliver.42 The latter case arose when an Ohio court held invalid a provision in a collective bargaining agreement that had been entered into pursuant to the NLRA on the ground that it was in violation of the state's antitrust law. The provision in question provided that when the employer rented trucks from their owners, the owner-drivers had to be paid the wages provided in the employer's agreement with the union in addition to a certain minimum rental for the truck. The provision's purpose was to prevent the undercutting of wages by the owner-drivers who were outside of the bargaining unit. After first holding that the minimum rental provision was a mandatory

41. 353 U.S. at 561 (emphasis added).
42. 358 U.S. 283 (1959).
subject of bargaining under the NLRA, the Court turned to the question of "whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." Because of its relevancy to the question presented here, this aspect of the Court's opinion is quoted in its entirety:

The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. . . . Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. . . . The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, . . . and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide . . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Cf. California v. Taylor, 353 U.S. 553, 566-567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. . . . The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. . . . Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. . . . Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. " . . . Congress has sufficiently expressed its purpose to . . . exclude state prohibition, even though that with which the federal law is concerned as a matter of labor

43. Id. at 295.
relations be related by the State to the more inclusive area of re-
We have not here a case of a collective bargaining agreement in con-
flict with a local health or safety regulation; the conflict here is
between the federally sanctioned agreement and state policy which
seeks specifically to adjust relationships in the world of commerce.
If there is to be this sort of limitation on the arrangements that
unions and employers may make with regard to these subjects,
pursuant to the collective bargaining provisions of the Wagner and
Taft-Hartley Acts, it is for Congress, not the States, to provide it.44

Although definitive on the major issue, the Oliver case leaves
several subsidiary questions unanswered.45 First, Oliver acknowledges
that "a local health or safety regulation" might prevail over a con-
flicting provision in a collective bargaining agreement but makes no
attempt to identify the types of state statutes which might come within
the ambit of the quoted phrase. In the private sector, the cases have
dealt with fairly traditional types of "health and safety" matters,46
and this has not been a source of difficulty. A greater potential for
mischief exists in the public sector, however. Consider a state statute
which guarantees teachers a minimum number of sick leave days each
year.47 While this might, at first glance, seem to be a purely personal
benefit, it could be argued that the statute prevents teachers from
being forced to decide between losing pay by staying home or infecting
children by going to work, a legitimate "health or safety" concern.
As such, it should prevail over any agreement providing for fewer
days of sick leave, despite the willingness of the employee organiza-
tion to agree to the lesser number in return for an improvement in
some other area.

A similar argument might be made in connection with a teacher
certification statute. Although these statutes are designed primarily
to establish certain minimum professional standards for teachers,

44. Id. at 295-297 (footnote and some citations omitted).
45. There are several curious aspects to the Oliver case. Although it preceded San
Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), by only three months,
it was not discussed in the latter decision. Moreover, while the Court cited many of
the same cases in both Oliver and Garmon, a limited analysis of the preemption doctrine
was attempted in the former while a rather exhaustive consideration was undertaken
in the latter. Furthermore, while Oliver often has been cited on the issue of collective
bargaining for employees outside of the unit, it rarely has been cited on the preemption
issue.
47. See, e.g., CAL. EDUC. CODE § 13468 (1974); FLA. STAT. § 231.40 (1973).
they are in a broader sense intended to assure that those persons who are placed in charge of children are adequately equipped to discharge that responsibility, and thus, might well be characterized as involving "health or safety." 48

Second, while the Oliver case clarifies the relationship between the collective bargaining agreement and the conflicting state statute, it does not indicate what the status of the state statute would be in the absence of the agreement. Would it remain a valid statute with which both the employer and the employees must comply unless and until a contrary agreement was reached? Or would it be invalid even before the execution of an inconsistent agreement because of the "chilling effect" that its very existence might have upon the ability of the parties to bargain in a totally unfettered environment?

We have found only one reported case—Baltimore & Ohio R.R. v. Commonwealth Department of Labor & Industry49—dealing with this precise question. In that case, the union contended that the employers were in violation of a Pennsylvania statute requiring railroad employees to be paid on a weekly basis. The employers conceded the violation, but defended on the ground that the statute was at odds with the RLA and, therefore, unenforceable. Since the state statute was, by its terms, applicable only if the parties had not "otherwise stipulated in the . . . applicable labor agreement,"50 it presented the pure question of whether the very existence of a state statute establishing a term or condition of employment constituted an improper intrusion upon the federal requirement of free and unfettered collective bargaining. The court answered this question in the affirmative:

Although the Act of 1971 is expressly subject to the provisions of existing labor agreements, . . . [i]t substitutes for customary conditions, until an agreement is reached, the heavy and immediate hand of state law for the collective bargaining process which Congress has declared to be the best and only means of changing such conditions. If we should hold that Pennsylvania may regulate customary pay periods without the agreement of the parties required by The Railway Labor Act, the state could similarly effect (and except for our supersedeas would have here effected) changes in existing practices so drastic as to render subsequent bargaining thereon

48. Although qualifications for new employees are recognized as a mandatory subject of collective bargaining under the NLRA, see, e.g., Associated Gen. Contractors, 143 N.L.R.B. 409 (1963), enf'd, 349 F.2d 449 (5th Cir. 1965), some state interference is permitted even in the private sector—e.g., licensing of insurance agents, certain hospital employees, etc.
pointless. Or, state regulations could be instituted during bargaining, arbitration or mediation under The Federal Railway Act so favorable to one of the parties as to render it impossible realistically for the representatives of that party to relinquish the advantage so conferred at the bargaining table although the other party is prepared for a work stoppage unless a change is made.51

The ramifications of the court's position are far reaching indeed. In the context of the present discussion, the decision stands for the proposition that all state statutes establishing terms and conditions of employment would be invalidated by the mere passage of a federal collective bargaining statute for public employees. It is important to point out however, that this single opinion by an intermediate Pennsylvania appellate court hardly can be cited as the prevailing view.

The absence of direct private sector precedent regarding the preemption of state statutes establishing terms and conditions of employment should not be surprising: outside of the area of health and safety, such statutes are essentially a phenomenon of the public sector. Accordingly, it is necessary to turn to other contexts to obtain guidance as to the significance, for preemption purposes, of a congressional desire for free and unfettered collective bargaining. On several occasions this matter has been the subject of judicial attention in connection with state statutes which affect labor disputes, the precise question being whether the state statute so intrudes into the dispute resolution process as to improperly tip the employer-employee balance of power established by Congress. Since the standard preemption test of San Diego Building Trades Council v. Garmon52 (i.e., conduct arguably protected or prohibited by the NLRA) is not wholly adequate in answering this question, several courts have attempted to assess the state statute in terms of its potential interference with free and un-

51. 314 A.2d at 865-866.

This issue also was presented in United Air Lines, Inc. v. Industrial Welfare Comm'n, 28 Cal. Rptr. 238 (Dist. Ct. App. 1963), in which the plaintiff sought to invalidate a regulation of the California Industrial Welfare Commission which prohibited employers from requiring their employees to purchase uniforms. Included in the case were two categories of employees: stewardesses and ticket agents. The stewardesses were covered by a collective bargaining agreement which contained a provision which was contrary to the regulation, and consistent with the position taken in the Oliver case, the court held that the agreement took precedence over the regulation. The ticket agents, on the other hand, were not covered by a collective bargaining agreement and thus presented the same preemption question as was presented in the Commonwealth Department of Labor & Industry case. The court found it unnecessary to reach this question, however, since it invalidated the regulation on the ground that it had not been enacted in accordance with the requirements of state law.

52. 359 U.S. 236 (1959).
fettered collective bargaining. We recognize, of course, that the analogy to cases involving state statutes establishing terms and conditions of employment is by no means a perfect one: the parameters of free and unfettered collective bargaining in the development of collective bargaining agreements and the parameters in regard to the relative balance of power which must be maintained to assure such freedom once a dispute has begun are not necessarily the same. In both areas, however, the courts have been called upon to judge the validity of state-imposed restraints on what would otherwise be a laissez-faire situation and, in this sense, a comparison may be instructive.

The First Circuit Court of Appeals has been confronted with a series of cases alleging improper state interference in labor disputes. The first of these cases, General Electric Co. v. Callahan, was decided in 1961. It involved a Massachusetts statute which required the State Board of Conciliation and Arbitration to investigate the causes of certain labor disputes and to publish a factfinding report on the blameworthiness of the parties. After noting the extensive "[c]ongressional occupation of the [labor relations] field," the court found that the state's attempt to use the pressure of public opinion to induce a settlement was "quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after 'good faith bargaining between the parties.'" In 1970, ITT Lamp Division of ITT Corp. v. Minter came before the First Circuit Court of Appeals. In this case a struck employer alleged that in providing welfare benefits to strikers, the State of Massachusetts was altering the relative economic strength of the parties in derogation of the national policy that guarantees free and unfettered collective bargaining. The district court had refused to issue a preliminary injunction against payment of such benefits, and on appeal the First Circuit was required to decide only whether the employer had demonstrated a probability of success on the merits. The court concluded that the requisite probability had not been shown, citing the fact that the employer had failed to produce any empirical

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53. 294 F.2d 60 (1st Cir. 1961).
54. Id. at 66.
55. Id. at 67. A virtually identical Oklahoma statute was invalidated by the Tenth Circuit Court of Appeals in Oil, Chem. & Atomic Workers v. Arkansas Louisiana Gas Co., 332 F.2d 64 (10th Cir. 1964). To the same effect, see Delaware Coach Co. v. Public Service Comm'n, 265 F. Supp. 648 (D. Del. 1967) (holding invalid the state's revocation of a public utilities permit after a prolonged strike); John Hancock Mut. Life Ins. Co. v. Commissioner of Ins., 208 N.E.2d 516 (Mass. 1965) (holding invalid the state's suspension of premium payments during a strike of insurance agents).
evidence demonstrating the impact which the availability of welfare benefits to strikers had on the collective bargaining process. It was not sufficient, said the court, merely to infer an infringement of the federal policy. Furthermore, the court indicated that even if the employer could demonstrate an impact on the collective bargaining process, that would not be the end of the matter: since preemption questions often require a "balancing of interests," it would then be necessary to assess the countervailing impact on the state of the denial of welfare benefits to strikers. Although the court's focus on "empirical evidence" and "balancing of interests" marked a departure from other preemption cases in the labor field, the Supreme Court denied certiorari.

Three years later, in *Grinnel Corp. v. Hackett*, another employer raised essentially the same legal issue in connection with the payment of unemployment benefits to strikers by the State of Rhode Island. The district court, relying on dicta in the *Minter* case, held that the proper forum for the resolution of the apparent conflict between the state and federal statutes was Congress and, accordingly, denied the request for a preliminary injunction. The First Circuit Court of Appeals disagreed. While conceding that Congress was the preferable forum, the court held that Congress was not the only forum and remanded the case to the lower court for a consideration of the issues in light of the position that it had expressed in *Minter*. In specific terms, it directed the lower court first to determine the actual relationship between the payment of unemployment benefits to strikers and the collective bargaining process. If that inquiry revealed that the state statute did, to some extent, infringe upon the federal policy of free and unfettered collective bargaining, the court indicated that it then would be necessary to determine whether the unemployment scheme "represented a compelling state interest 'so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act.' " Turning briefly to the possible compelling state interests, the court suggested that the payment of such benefits to strikers could minimize the occurrence of violence during strikes and could avoid the economic stagnation of communities. As in *Minter*, certiorari was denied by the Supreme Court.

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61. *Id.* at 459-61. Although observing that unemployment compensation, like welfare payments, is part of a federal-state system, the court did not limit its test for preemption to such joint systems.
In considering the applicability of the foregoing cases to the preemption of state statutes establishing terms and conditions of public employment, two caveats must be noted. First, not only are they private sector cases, but they also arise in an analytically distinct, albeit related, area. Second, the cases reflect essentially the thinking of a single court of appeals. We must, therefore, speculate in two directions.

What would be the fate of the various state statutes establishing terms and conditions of public employment if the tests laid down by the First Circuit Court of Appeals were to be applied? Would a teacher tenure statute, for example, be exempt from preemption? "Health and safety" would seem to offer no haven. However, by providing teachers with a certain degree of job security, such statutes are designed to assure professional freedom and thereby improve instructional quality, surely a matter which is "deeply rooted in local feeling and responsibility."\(^6\) In any event, the First Circuit cases would require empirical proof that a tenure statute interferes with the relative bargaining power of the parties and, if so, a showing that the degree of interference is sufficient to outweigh the interests of the state in maintaining a statutory tenure system. It is by no means clear that this burden could be met.

Passing from the public sector/private sector dichotomy to the second of the two caveats, what can be said in regard to the broader application of the preemption tests developed in the First Circuit? Although no firm indication exists at this time as to whether other courts affirmatively will support these tests,\(^6\) several observations would seem appropriate. First, the current Supreme Court has, as a general matter, tended to take a somewhat restricted view of the permissible outer limits of federal action, at least in comparison to some of its more recent predecessors. Although the expansive Garmon rule of preemption still prevails, later decisions in tangential areas,\(^4\) and vigorous dissents,\(^5\) may slowly be eroding what once was assumed to be black-letter law.

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63. It is, of course, inappropriate to infer Supreme Court approval from the denial of certiorari. The only substantive Supreme Court decision in this area, Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974), is limited to a holding that the question raised regarding the payment of welfare benefits to strikers is justiciable even after the strike has ended.

64. See, e.g., Teamsters Local 20 v. Morton, 377 U.S. 252 (1964) (upholding federal preemption of secondary boycott activities but indicating that the continued validity of certain state statutes in the labor field is possible).
The existing preemption doctrine also has been subject to increasing attack by legal commentators. Professor Archibald Cox, for example, in criticizing the continued judicial reliance on Garmon, has suggested the following approach, which would, in effect, allow courts to look into the purposes of the state and federal statutes in each case:

It is obviously too loose to assert that federal law excludes any state law that affects the balance of interests among management, union, employees, and public in union organization and collective bargaining. . . . Consequently, if the underlying rationale for federal preemption is the need for preserving the balance which Congress struck, some formula is required to measure the outer limits of congressional concern.

Here again it seems possible to arrive at an answer by asking what Congress was doing when it enacted the national labor laws. Congress obviously had its own views concerning the special rights and duties to be imposed upon employers, unions, and employees because of their relation to employee self-organization and free collective bargaining. Where further particularization would be appropriate, it delegated the function to a specially constituted administrative agency. But it is equally plain that Congress developed this special framework for self-organization and collective bargaining within a larger context of state law creating rights of property, bodily security, and personality, preserving public order, and promoting public health and welfare. These laws apply to the general public or substantial segments thereof without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute. Neither the laws themselves nor any particular application involves weighing the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes. The likelihood that the collateral impact of such laws upon management or labor will upset the national balance is small enough to permit their operation unless interference with a specific federal right can be affirmatively demonstrated. It is only where the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes that the likelihood that its application to persons under NLRB jurisdiction will upset the balance struck by Congress is so great as to require exclusion of state law unless Congress has provided otherwise.66

In sum, the private sector law of preemption is in a state of flux and, despite the traditional judicial predilection for preemption, it is really not possible to predict with any degree of accuracy what is likely to happen to state statutes establishing terms and conditions of public employment if Congress enacts a collective bargaining statute for public employees without specifically addressing the preemption question.

V. THE CONGRESSIONAL OPTIONS

It is against the foregoing backdrop that we now consider whether Congress should indicate expressly its intent regarding the preemptive effect of a federal collective bargaining statute for public employees, and if so, what its options are in this regard. Our discussion is divided into two parts. The first focuses upon state statutes establishing systems of collective bargaining for public employees; the second is concerned with state statutes establishing terms and conditions of public employment.

A. State Collective Bargaining Statutes

The overriding purpose of a federal collective bargaining statute would be to provide a uniform structure for regulating the relationship between public employers and their employees. It is within this context that we must assess both the need for an express statement and the available options. It scarcely warrants extended discussion to demonstrate that a uniform structure can best be assured if the federal statute is the exclusive vehicle for public sector collective bargaining and since, in the absence of a congressional statement to the contrary, a federal collective bargaining statute clearly would preempt state collective bargaining statutes, the case for congressional silence is a persuasive one.

It does not follow, however, that this is the only way in which a uniform structure for collective bargaining can be achieved. A uniform structure can result even if state statutes are not preempted, provided that those which remain in effect establish a structure which is substantially equivalent to that established by the federal statute. This option is reflected in Section 12 of H.R. 8677, which sets out a system

(emphasis added). Although this excerpt is from an article analyzing the doctrine of preemption as it relates to strikes and picketing, it would seem to apply in other contexts as well. Indeed, the First Circuit approved of the approach in Grinnell, stating that it was consistent with the test of preemption which it applied in the case. 475 F.2d at 461 n.13. See also Note, Federal Preemption: Governmental Interests and the Role of the Supreme Court, 1966 Duke L.J. 484, 510, 511.
under which a state may be exempted from the coverage of the federal statute if its own statute meets a test of substantial equivalence.\textsuperscript{67}

Another option would be for Congress to provide for the exemption of state collective bargaining statutes on some basis other than substantial equivalence or even to grant a blanket exemption to such statutes. Since the rationale for a federal statute would be to establish a uniform structure for collective bargaining in the public sector, however, we may discard this option without further consideration.

\textbf{B. State Statutes Establishing Terms and Conditions of Public Employment}

As far as state statutes establishing terms and conditions of employment are concerned, we believe that there are several reasons why Congress should set forth expressly the balance that it seeks to strike between federal and state policy. The sheer volume of state statutes that potentially are subject to preemption marks this as a problem of major proportions. One need not be omniscient to recognize that in the absence of an explicit statement by Congress, considerable litigation would be necessary before workable guidelines emerged. Moreover, to the extent that the private sector provides a basis for projection, those guidelines would, for reasons indicated subsequently, appear to be less than optimum. Finally, the degree of concern which this matter has generated would, in and of itself, argue strongly against the "congressional incompleteness" which characterizes the NLRA.\textsuperscript{68}

Assuming that Congress chooses to indicate expressly the preemptive effect of a federal collective bargaining statute for public employees, what are its options? Viewed on a continuum that begins with a totally free and unfettered system of collective bargaining, there are at least the following options:

\begin{itemize}
\item \textsuperscript{67} The option here under discussion should be distinguished from that portion of § 10(a) of the NLRA which provides that the National Labor Relations Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.
\end{itemize}
1. State statutes establishing terms and conditions of employment could be invalidated by the very enactment of the federal statute.  

2. State statutes establishing terms and conditions of employment could remain valid unless and until the parties agreed to a contrary arrangement through collective bargaining.  

3. State statutes establishing terms and conditions of employment could remain valid only as "minimum standards" regardless of their phraseology, and the parties would be free to supplement them through collective bargaining. A spin-off of this approach would be for the state statutes to remain valid if they met certain specified criteria.  

4. State statutes establishing certain terms and conditions of employment (e.g., sick leave) could be invalidated while those establishing other terms and conditions of employment (e.g., retirement) could remain valid. The degree of validity or invalidity could be qualified to reflect the positions taken in options 1, 2 or 3 above. A similar approach could be taken with time as the critical variable (e.g., only those state statutes which were in effect prior to the enactment of the federal statute could remain valid).  

5. State statutes establishing terms and conditions of employment could remain valid notwithstanding the federal obligation to engage in collective bargaining regarding the matters dealt with.  

69. In order to highlight the basic thrust of each of the options we shall state them in somewhat oversimplified terms, ignoring various qualifications. Thus, for example, even under this option, state statutes relating to health and safety presumably would survive.  

70. See, for example, the criteria set forth in cases cited notes 53, 56, 58 supra.  

71. It has been suggested that Congress cannot properly consider the options available to it in regard to the preemptive effect of a federal collective bargaining statute on state statutes establishing terms and conditions of employment unless it knows (1) the precise number of states which have enacted statutes establishing each of the various terms and conditions, and (2) the approaches which have been taken in each of the counterpart statutes. See Lieberman, Memorandum Analysis of Preemption Problems With Proposed Federal Bargaining Legislation for State/Local Employees, Gov't Empl. Rel. Rep. No. 593, at E-2 to -3 (Feb. 17, 1975); Interim Resolution No. 1 of the Education Task Force, National Conference of State Legislatures, March 1975. We fail to see how Congress could use this information in determining the position to take in regard to preemption.  

The aforementioned study by the Lawyers' Committee for Civil Rights Under Law reports that 41 states have enacted teacher tenure statutes while only 19 have statutes regulating sabbatical leaves for teachers. Lawyers' Committee for Civil Rights Under Law, supra note 7, at 69. If the underlying rationale for the preemption of state statutes establishing terms and conditions of employment is the need to preserve the federal policy of free and unfettered collective bargaining, there might at first glance seem more reason to preempt tenure statutes than sabbatical leave statutes since the former tend to cast a wider net. Upon closer analysis, however, it becomes apparent that the impact upon the federal policy cannot be judged in gross terms, but must be assessed in the context of a specific collective bargaining relationship. And the plain fact is that in every bargaining unit in each of the 19 states which have a statute
VI. RECOMMENDATIONS REGARDING PREEMPTION

It would serve little purpose to undertake a precise analysis of the pros and cons of each of the options set forth in Part V above. These options really do not lend themselves to this type of analysis, since the choice ultimately must turn on individual perceptions of the proper balance between federal and state interests. Our approach, therefore, will be to try to identify the factors which are relevant in striking this balance, and to use these factors as a framework for formulating a position regarding the preemption question. The order in which the following factors are set forth is not intended to reflect their relative importance:

1. The position taken should be designed to cause as little disruption of the present system as may be necessary in order to achieve the federal purpose. Phrased otherwise, Congress should not be unmindful of the fact that there now exist in many states rather extensive—and presumably workable—structures for regulating both the regulating sabbatical leaves, collective bargaining as to this matter would be restricted. Perhaps the frequency of enactment should cut in the opposite direction. Thus, if the educational policymakers in 41 states have seen fit to enact a teacher tenure statute, might this not be sufficient to mark tenure as a matter that is so “deeply rooted in local feeling and responsibility” that it should be exempt from the reach of the federal statute? Regardless of which view is taken, it must be remembered that both the 41 and the 19 are transitory figures which simply reflect the number of state legislatures which have chosen to deal with a particular term or condition of employment at a particular point in time. Should the position taken as to preemption shift if and when the number of state statutes in a given area reached some specified number?

Could the information be designed to indicate whether the statutory treatment of a particular term or condition of employment is “more” or “less” comprehensive in order to enable Congress to determine whether there still would be room available for free and unfettered collective bargaining if the statute were allowed to remain valid? Any attempt to make an across-the-board judgment in this regard would be fatuous in light of the acknowledged diversity among the various states. Nor would it make any sense to make such judgments on a state-by-state basis since this could produce patently absurd results—e.g., Congress might preempt the tenure statute in the State of New York because it tends to “occupy the field” while allowing the Kansas tenure statute to remain valid because it is less comprehensive in nature. And, surely, no one seriously would suggest that Congress should make a judgment as to the merits of the specific approach taken by the various states and then resolve the preemption question on the basis of this judgment.

It would seem unnecessary to belabor the point. The position which Congress takes in regard to the preemption of state statutes establishing terms and conditions of public employment must be formulated as a matter of policy, and the critical question is this: to what extent, if at all, is Congress prepared to defer to the judgment of state legislatures regarding the establishment of terms and conditions of public employment, despite the fact that such deference will infringe to some degree upon the federal policy of free and unfettered collective bargaining? Suffice it to say that the type of data which the proposed study is designed to produce would be of little assistance to Congress in answering this question.
public employer-employee relationship and various substantive aspects of public employment.

2. Some problems which arise in regard to public employment often are more suitable for resolution on a statewide basis than on a local basis, and a state legislature is uniquely situated to fashion appropriate statewide remedies for such problems.

3. In the public sector, disagreements over whether a state statute is or is not preempted almost inevitably will involve a federal-state conflict. The potential for such conflict should be minimized. This can best be done if the federal statute takes a categorical position regarding preemption and does not require a federal court or administrative agency to judge state statutes against some subjective standard (e.g., "deeply rooted in local feeling and responsibility"). Although this concern would seem to loom largest in connection with state statutes establishing terms and conditions of employment, it also would have some relevance to the substantially equivalent test for exempting state collective bargaining statutes in section 12 of H.R. 8677.

4. Congress is not in a position to judge adequately the relative merit, importance, and/or impact of particular state statutes upon free and unfettered collective bargaining, nor is it desirable for Congress to do so as a matter of policy. Judgments of this type presumably would be necessary if Congress were to take a selective approach to preemption—that is, to preempt state statutes establishing certain terms and conditions of public employment (e.g., sick leave) but not those establishing others (e.g., retirement).

5. Permitting state statutes establishing terms and conditions of employment to remain valid as "minimum standards," or for some other limited purpose, could create certain difficulties in implementation. While it may be easy enough to apply a "minimum standards" concept to a wage rate or the length of a workday, it is quite another matter to attempt to apply the concept to a retirement plan, a tenure system, or other regulatory or procedural statute.

6. The time factor presents something of a dilemma. It must be noted that the state statutes that are in effect at a particular moment reflect simply an interim judgment of the state legislature and appear to have no common characteristic which is relevant for purposes of preemption. In light of this, it makes little sense, for example, to "grandfather in" those state statutes which were in effect prior to the enactment of the federal statute, but to preempt those which became effective thereafter. Moreover, a statute that used time as a determina-

72. Cf. note 24 and accompanying text supra.
tive variable could generate difficult implementation problems. To illustrate, how much could a "grandfathered" statute be amended before it became "new" for purposes of preemption? And if a restrictive view were taken in this regard, might it not deter a state legislature from making warranted modifications? Upon closer analysis, however, the matter is not quite so clear-cut, and from a somewhat different perspective the time factor does assume a certain relevance to the preemption question. Whatever other factors may have prompted a state legislature to enact existing statutes establishing terms and conditions of employment, we know that a desire to avoid the effect of a federal collective bargaining statute was not among them. To put this another way, a state might choose to demonstrate its resistance to federal intervention by enacting statutes which were so all-encompassing as to eliminate any meaningful collective bargaining. Although we believe that the political realities in the states are such as to render this largely a hypothetical concern,73 the position taken by Congress should seek to foreclose the possibility.

7. The number of public employees is so large74 that substantial pressure would be placed upon any federal administrative structure assuming exclusive jurisdiction over them. The existing private sector structure already is clogged and, in order to avoid intensifying the problem, there would have to be an expansion in resources sufficient to accommodate the millions of additional public employees. Similar problems may be anticipated even if a new administrative structure is established for public employees, as through the separate statute approach.

8. The position taken in regard to the preemption of state collective bargaining statutes should dovetail properly with the position taken in regard to the preemption of state statutes establishing terms and conditions of employment. Thus, if the federal collective bargaining statute permits states to operate pursuant to their own col-

73. The type of statutes to which we refer would have to differ markedly from those that traditionally have been enacted by state legislatures, and be couched in rigid, all-encompassing terms—e.g., "teachers shall be entitled to a duty-free lunch period of 45 minutes, no more and no less." Such statutes presume a type of political impotence by employee interests which has not heretofore existed and which would, if anything, seem even less likely after employees have been guaranteed organizational and collective bargaining rights. Nor would the impetus for such statutes be likely to come from public employers—quite the contrary. The opposition of public employers to collective bargaining traditionally has been that it dilutes their management prerogatives. It hardly seems logical that, in order to avoid collective bargaining, they would urge the state legislature to strip them totally of their decision making power.

74. In 1973, there were approximately 11.3 million state and local government employees. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1974, at 265.
lective bargaining statutes,\textsuperscript{75} the exercise of this option should not have substantive consequences vis-a-vis the preemption of state statutes regulating terms and conditions of employment—that is, the preemptive effect of the federal statute on statutes of the latter type should be the same in those states which remain subject to the federal statute as in those states which opt out.\textsuperscript{76}

The foregoing factors do not necessarily all cut in the same direction and certainly do not mandate the acceptance or rejection of any particular option. They do suggest, however, that the strongly preemptive approach that has characterized the private sector would tend to have several negative consequences in the public sector, and, corollarily, point up several advantages that would result from a contrary emphasis. In effect, then, these factors lead us to make the following recommendations.

\textbf{A. State Collective Bargaining Statutes}

We urge adoption of the approach taken in section 12 of H.R. 8677. In addition to the not insignificant political advantage of softening the opposition of many states' rights advocates, it could, by enabling the states to utilize their own administrative structures, have the practical advantage of reducing the burden placed upon the federal machinery. Although this approach would create a situation in which a federal agency would be required to judge state statutes against a less than objective standard,\textsuperscript{77} the situation would by no means be an open-ended one: the criteria for determining equivalency would be found in the provisions of the federal collective bargaining statute itself,\textsuperscript{78} and the universe for potential dispute would be extremely limited (\textit{i.e.}, at maximum, the number of jurisdictions subject to the federal statute). It also should be pointed out that the continued use of state enforcement systems would reduce somewhat the inter-jurisdictional precedent value of administrative and judicial rulings.

\textsuperscript{75} See H.R. 8677, 93d Cong., 1st Sess. \textsection{} 12 (1973).

\textsuperscript{76} This might at first glance seem to present a problem if Congress were to take a strong preemption position in regard to state statutes establishing terms and conditions of employment, since it would seem somewhat anomalous to provide in a federal statute that one state statute (\textit{i.e.}, a collective bargaining statute) preempts other state statutes (\textit{i.e.}, statutes establishing terms and conditions of employment). This problem could be avoided, however, by making the position taken as to preemption in the state's own collective bargaining statute a sine qua non for equivalency.

\textsuperscript{77} See factor number 3, p. 258 supra.

\textsuperscript{78} There is one factor which technically is not a criterion for equivalency but which is of critical importance if the intent of this approach is to be realized—\textit{i.e.}, that the state provide the funding that is necessary to implement adequately its own collective bargaining statute. We recommend, therefore, that explicit reference be made to this factor in the federal collective bargaining statute.
but this would not, in our opinion, significantly interfere with the federal objective of establishing a meaningful, uniform system of public sector collective bargaining.

B. State Statutes Establishing Terms and Conditions of Public Employment

Our recommendation in regard to these statutes is divided into two parts. The first deals with those statutes that were in effect prior to the enactment of a federal collective bargaining statute for public employees; the second deals with those statutes that become effective thereafter.

We believe that Congress should permit those state statutes in the first of the above two categories to remain valid notwithstanding the fact that this would detract from a truly free and unfettered system of collective bargaining. In order to avoid any misunderstanding, some elaboration of this position may be helpful:

1. If the federal statute expressly addressed a term or condition of employment, it would, of course, prevail over any conflicting state statute.

2. Only state constitutional and statutory provisions would be exempt from the reach of the federal statute. The exemption would not extend to other types of state-level enactments (e.g., regulations, administrative rulings), or to local charters, ordinances, etc.

3. The continued validity of a state statute would, in no sense, "occupy the field" in regard to the subject matter in question. On the contrary, the parties would be prohibited only from entering into an agreement which was in direct conflict with the terms of the statute and would be free through collective bargaining to supplement it. Disputes as to the distinction between impermissible conflict and permissible supplementation would be left to administrative and judicial resolution on a case-by-case basis.

In order to set the stage for the second part of our recommendation, we note that the principal advantage of the foregoing position is that it would not disrupt the structures that have been developed by state legislatures over the years. Since this is not a consideration in regard to future statutes, a somewhat different balance seems called for. On the one hand, it would seem unwise for Congress to deprive state legislatures of the power to amend existing statutes or to deal with statewide public employment problems that might arise in the future. On the other hand, we cannot ignore completely the aforementioned possibility that a state might seek to undercut the federal purpose by enacting statutes establishing terms and conditions of
employment which were so all-encompassing as to render meaningful collective bargaining impossible. We would recommend, therefore, that state statutes establishing terms and conditions of employment which become effective after the enactment of the federal statute (including modifications of existing statutes) be valid only as "minimum standards." By this we mean that, regardless of how such statutes were phrased, they would constitute "floors" below which the parties could not reach agreement, but would not otherwise restrict the parties' freedom to bargain collectively about the subjects in question.

Although there are certain implementation problems inherent in any "minimum standards" approach,79 these problems would not be overly severe vis-a-vis future state statutes. In the first place, we would be dealing with a relatively limited number of statutes (at least in comparison to the extensive body of existing law) enacted over a continuing period of time. Moreover, state legislatures would be aware of the "minimum standards" limitations and their awareness presumably would be reflected in the nature of their enactments, whereas existing statutes were enacted without any consideration of this factor.

In conjunction with the positive case for the recommended position, it is appropriate to consider potential objections to it, objections likely to come from both employee and employer spokesmen. The former may contend that the failure to preempt state statutes establishing terms and conditions of employment will so restrict the scope of collective bargaining that no meaningful collective bargaining will be possible. In response, we would point out that the recommended position represents basically a continuation of the system that exists under virtually all of the current state collective bargaining statutes,80 and few would deny that meaningful collective bargaining has taken place in many states. Indeed, the press for federal intervention does not derive from the fact that the scope of public sector bargaining is unduly restricted by the existence of other state statutes, but from the failure of the states to establish meaningful systems of collective bargaining. It also should be noted that any purposeful attempt by a state to upset the balance struck by Congress through subsequent enactments would be thwarted by the "minimum standards" aspect of the recommended position.

Employer representatives likewise may object to the recommended position and, somewhat ironically, their primary objection promises to be the other side of the coin of employee dissatisfaction. Thus, they may contend that the position allows the employees "two bites of the

79. See factor number 5, p. 258 supra.
apple": if employees are unable to obtain a particular right or benefit at the collective bargaining table, they will then be able to seek it through legislative action. As previously noted, this is the system that now exists under the state collective bargaining statutes and it has hardly operated in a one-sided manner. The state legislatures have amply demonstrated that they are not the tools of employee interests, but that they will act only when, in light of all of the relevant circumstances, it is in the best public interest to do so.81

In the final analysis, the objections from both sides probably will stem largely from the fact that the position we have recommended is different from that which exists in the private sector. This, of course, we concede, but view it as a subsidiary consequence of the self-evident proposition that collective bargaining in the public sector is itself different from collective bargaining in the private sector.82 It does not, of course, follow from this proposition that the practices of the private sector necessarily are inappropriate for the public sector. What does follow, however, is that the problems of the public sector cannot be resolved solely by analogy to the private sector, but must be considered on their own terms. The answers that emerge may, in some areas, be quite different. We suggest that preemption is one such area.83

81. As Dr. Lieberman has quite correctly observed, the state statutes in question "include some employer as well as some employee protections . . . [and] include a great deal of legislation which appears to favor, or could favor, either employers or employees, depending on the circumstances." Lieberman, Memorandum Analysis of Preemption Problems with Proposed Federal Bargaining Legislation for State/Local Employees, Gov't Empl. Rel. Rep. No. 593, at E-2 (Feb. 17, 1975).

82. As one commentator has put it, "government is not 'just another industry.' " H. Wellington & R. Winter, Jr., The Unions and the Cities 202 (1971).

83. See Appendix infra for proposed statutory language that would implement the recommendations made in this section.
APPENDIX:
PROPOSED STATUTORY LANGUAGE

A. This Act shall be the exclusive method for regulating the relationship between employers and their employees in regard to all matters covered herein: Provided, that if any state, territory, or possession of the United States shall by law establish a system for regulating the relationship between employers and their employees which is substantially equivalent to the system established by this Act, and shall provide adequate funding for the implementation of such system, said state, territory, or possession, or any employee organization which has been recognized as the representative of employees pursuant to the system in said state, territory, or possession, may apply to the Commission\(^1\) for an exemption from the provisions of this Act. If the Commission determines that the system of regulation established by said state, territory, or possession is substantially equivalent to the system established herein, it shall grant the requested exemption, to take effect on a date fixed by the Commission. Any state, territory, possession, or person aggrieved by the decision of the Commission granting or denying the request for an exemption may obtain a review of such decision in the same manner as provided under Section 11(f) of this Act.\(^2\)

B. The duty to bargain collectively imposed by this Act shall extend to matters which are or may be the subject of a constitution, statute, ordinance, regulation or other enactment by a state, territory, or possession of the United States, or a political subdivision thereof, and if legislative action is necessary to implement any agreement reached, shall include the obligation of the employer to submit such agreement to the appropriate governmental body for action: Provided, that, except as otherwise expressly provided herein, nothing contained in this Act shall excuse noncompliance with:

1. Any express provision of a constitution or statute of any state, territory, or possession of the United States, establishing terms and conditions of employment, which was enacted prior to the date of enactment of this Act; or

2. Any express provision of a constitution or statute of any state, territory, or possession of the United States, establishing minimum

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1. The word "Commission" is appropriate if a public employee collective bargaining statute modeled after H.R. 8677 is enacted; the "National Labor Relations Board" would be appropriate if public employees are brought under the coverage of the NLRA.

2. This language anticipates passage of a public employee collective bargaining statute modeled after H.R. 8677; an appropriate counterpart reference would be required if public employees are brought under the coverage of the NLRA.
standards for terms and conditions of employment, which was enacted subsequent to the date of enactment of this Act.

C. All laws or parts of laws of the United States inconsistent with the provisions of this Act are modified or repealed as necessary to remove such inconsistency, and, except as otherwise expressly provided in Sections A and B above, this Act shall take precedence over all constitutions, statutes, ordinances, rules, regulations, or other enactments of any state, territory, or possession of the United States or any political subdivision thereof.