

# Public Sector Collective Bargaining: Defining the Federal Role

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# PUBLIC SECTOR COLLECTIVE BARGAINING: DEFINING THE FEDERAL ROLE

*Dennis R. Nolan*†

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## INTRODUCTION

The American labor movement has repeatedly urged Congress to enact legislation establishing collective bargaining rights for state and local government employees. Pro-labor congressmen have introduced bills to that effect each year since 1970,<sup>1</sup> and the election in 1976 of both a Democratic President and an overwhelmingly Democratic Congress has greatly increased political pressure.<sup>2</sup> Despite these developments, a comprehensive, dispassionate analysis of the crucial issues and numerous proposals on the subject has yet to appear.<sup>3</sup>

This Article seeks to fill that void. Its purpose is twofold: (1) to present and analyze the various arguments for and against federal legislation on public sector<sup>4</sup> collective bargaining and (2) to examine the specific proposals now before Congress. The close balance between competing arguments and the shortcomings of current legislative proposals help explain why, despite the astound-

<sup>1</sup> For a discussion of the most widely supported of the proposed bills, see notes 127-204 and accompanying text *infra*. The Committee Reports of the ABA Section of Labor Relations Law provide an annual account of the fate of these bills. See ABA SECTION OF LABOR RELATIONS LAW, 1977 COMMITTEE REPORTS (pt. 2) 259-60 (1977) (Report of the Committee on State and Local Government Bargaining); ABA SECTION OF LABOR RELATIONS LAW, 1976 COMMITTEE REPORTS (pt. 2) 430-32 (1976) (Report of the Committee on State and Local Government Bargaining); ABA SECTION OF LABOR RELATIONS LAW, 1975 COMMITTEE REPORTS (pt. 1) 293-94 (1975) (Report of the Committee on State Labor Law and Public Employee Bargaining); ABA SECTION OF LABOR RELATIONS LAW, 1974 COMMITTEE REPORTS 320-21 (1974) (Report of the Committee on State Labor Law and Public Employee Bargaining). See also Williams, *Public Employee Collective Bargaining: The Need for a Federal Presence*, 1 OKLA. CITY U.L. REV. 85, 114-21 (1976).

<sup>2</sup> See, e.g., Wall St. J., Dec. 21, 1976, at 1, col. 5; NATIONAL EDUCATION ASSOCIATION, PROPOSED PUBLIC EMPLOYMENT RELATIONS AMENDMENTS FOR THE 95TH CONGRESS (1977) [hereinafter cited as NEA PROPOSALS].

<sup>3</sup> Although many observers have addressed the subject, most of the commentary has been narrow, cursory, or one-sided. See Baird, *National Legislation for Public Employees: "End Run" on the Wagner Act?*, 61 ILL. B.J. 410 (1973); Bilik, *Close the Gap: NLRB and Public Employees*, 31 OHIO ST. L.J. 456 (1970); Boynton, *Industrial Collective Bargaining in the Public Sector: Because It's There?*, 21 CATH. U.L. REV. 568 (1972); Brown, *Federal Legislation for Public Sector Collective Bargaining: A Minimum Standards Approach*, 5 U. TOL. L. REV. 681 (1974); Hedding, *Proposed Bargaining Legislation May Violate States' Rights*, 4 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 329 (1975); Mass & Gottlieb, *Federally Legislated Collective Bargaining for State and Local Government: A Logical Imperative*, 2 EMPLOYEE REL. L.J. 273 (1977); McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining*, 13 HARV. J. LEGIS. 479 (1976); Petro, *Sovereignty and Compulsory Public Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974); Sebris, *The Right to Collective Bargaining for All Public Employees: An Idea Whose Time Has Come?*, 4 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 297 (1975); Williams, *supra* note 1.

<sup>4</sup> As used herein, the term "public sector" refers only to governmental agencies of state-wide or lesser jurisdiction; it therefore excludes multi-state and federal government agencies.

ing growth of membership in public employee unions<sup>5</sup> and the willingness of most states to engage in collective bargaining,<sup>6</sup> neither house of Congress has ever passed a public sector bargaining bill.

## I

### THE MERITS AND DEMERITS OF PUBLIC SECTOR COLLECTIVE BARGAINING

Proponents of federal legislation have expended surprisingly little effort in extolling the virtues of collective bargaining in the public sector. Apparently, advocates of public sector bargaining view the benefits of private sector bargaining as self-evident and assume that these benefits would also accrue in the context of government employment. Thus, many commentators appear to support public sector bargaining "because it's there."<sup>7</sup> To the extent debate exists, it centers on three distinct arguments: first, that public employees need collective bargaining rights to achieve equity with workers in the private sector; second, that collective bargaining fosters labor peace by preventing more strikes and strife than it creates; and third, that public employees need the additional power they gain through collective bargaining to protect themselves from overreaching employers.

#### A. *The Equity Argument*

The equity argument appears to be of consummate simplicity: since private sector employees may legally engage in collective bargaining, denying public employees that privilege relegates them to second-class status.<sup>8</sup> The argument is, however, much more com-

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<sup>5</sup> Nationwide, union membership among employees of state and local governments rose from 556,000 in 1964 to 1,710,000 in 1976, an increase of 207.6%. During the same period, union membership among nongovernmental employees grew only 9.3%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1977, cited in [1977] GOV'T EMPL. REL. REP. (BNA) No. 726, at 24, 27; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1975—REFERENCE EDITION, Table 155, at 384 (1975) [hereinafter cited as HANDBOOK OF LABOR STATISTICS].

<sup>6</sup> By one recent count, 37 states have enacted at least one statute dealing with collective bargaining for public employees. McCann & Smiley, *supra* note 3, at 495. In a number of other states, collective bargaining exists without formal authorization. Nolan, *Public Employee Unionism in the Southeast: The Legal Parameters*, 29 S.C. L. REV. 235, 267 (1977). For a current summary of state law on public sector labor relations, see [1970-1977] 1 GOV'T EMPL. REL. REP. (BNA) (Reference File) 51:501-51:531.

<sup>7</sup> See Boynton, *supra* note 3.

<sup>8</sup> See generally Bilik, *supra* note 3; Harum, *Are Public Unions Second Class Citizens? Yes:*

plex than this statement indicates. Proponents of public sector bargaining do not suggest that there are no differences between public and private employment. They assert, however, that the similarities between the two far outweigh these differences, and that existing differences are too insignificant to justify disparate treatment regarding bargaining rights.

Walter McCann and Stafford Smiley put the case clearly.<sup>9</sup> They note that "many of the functions performed by governmental agencies are not uniquely governmental";<sup>10</sup> in fact, well over half of all public employees engage in activities with significant private sector counterparts, such as education, hospitals, utilities, and recreational and environmental facilities.<sup>11</sup> Many of these jobs are "indistinguishable from jobs available in the private sector" and "[t]here is no reason to believe that individuals do not move between the public and private sectors . . . in response to job availability and relative wage and benefit levels."<sup>12</sup> Moreover, many of these employees belong to the same unions that represent private sector employees.<sup>13</sup>

The argument is plausible, and, if valid, would lead naturally to the conclusion that public employees should have the same bargaining rights as private employees. It has not, however, convinced skeptics. Professor Myron Lieberman, for example, notes that the concept of equity itself requires definition.<sup>14</sup> It cannot mean that in each and every condition of employment, public and private employees must be treated alike; that would, by extension, require either depriving public employees of civil service protection or granting it to private employees, and either eliminating all restrictions on political activities by public employees or extending them to private workers. "Equity" must therefore denote comparable *packages* of rights and benefits.

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*Legal Warfare Continues as They Struggle for Bona Fide Collective Negotiations*, 48 FLA. B.J. 92 (1974).

<sup>9</sup> See McCann & Smiley, *supra* note 3.

<sup>10</sup> *Id.* at 515.

<sup>11</sup> *Id.* at 515-16.

<sup>12</sup> *Id.* at 516 (footnote omitted).

<sup>13</sup> *Id.* Even those jobs without direct private sector counterparts, such as police and fire protection, are not unique in all respects. They may be "essential" and therefore different from "non-essential" lines of work, but so are several categories of private sector jobs possessing bargaining rights. Railroads, airlines, and electric power plants exemplify "essential" private activities.

<sup>14</sup> Address by Myron Lieberman on Equity and Collective Bargaining in Education to AASA Convention (Feb. 28, 1977), *reprinted in* [1977] GOV'T EMPL. REL. REP. (BNA) No. 699, at 33, 33.

If equity is to be meaningful, however, it must take into account *all* the advantages and disadvantages of employment in the two sectors. The fact that public employees do not have particular rights accorded private sector employees may not be an inequity if there are advantages associated with public but not private employment.<sup>15</sup>

Although not all public employees would acknowledge the general superiority of public employment, it does offer several advantages over private employment. Professor Lieberman notes the following: (1) Public employees have a significant influence on the determination of "who is management"; that is, they can engage in some forms of political activity to obtain a more sympathetic employer. (2) Public enterprise cannot move; thus public employees are free of fear that the employer may close up shop and move to a new location. (3) Public employees, at least those who have acquired an expectancy of reemployment, cannot be dismissed without due process of law; and all public employees are protected by the Constitution from discipline or discharge for discriminatory reasons or for exercising first amendment rights. (4) Public employees "frequently have the benefit of an extensive system of statutory benefits which must be bargained in the private sector"; among these benefits are tenure and other job security systems, sick leave, vacation pay, and retirement plans.<sup>16</sup>

Although Professor Lieberman's point is perhaps obvious, it is seldom discussed. His argument does not directly attack public sector collective bargaining. It instead suggests that collective bargaining advocates bear the burden of demonstrating that the entire package of benefits and drawbacks associated with public employment is significantly less valuable than its private sector counterpart. If that showing is made, the equity argument would weigh heavily in favor of public sector bargaining. Until then, however, the argument lends no support to reformers' demands.<sup>17</sup>

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<sup>15</sup> *Id.* (emphasis in original).

<sup>16</sup> *Id.* at 34.

<sup>17</sup> None of the recent congressional hearings on public sector bargaining bills contains any support for the proposition that public employment is less advantageous than private employment. See *Public Employee Labor-Management Relations: Hearings on H.R. 77 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 House Hearings*]; *National Public Employment Relations Act, 1974: Hearings on S. 3295 and S. 3294 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *1974 Senate Hearings*]; *Labor-Management Relations in the Public Sector: Hearings on H.R. 8677 and H.R. 9730 Before the Special Subcomm. on Labor of the House Comm. on Education and*

### B. *The Labor Peace Argument*

In 1935, Congress passed the National Labor Relations Act (NLRA) to minimize "industrial strife and unrest" by removing one of its major causes—the refusal of some employers to engage in collective bargaining.<sup>18</sup> The Act stated:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . . .<sup>19</sup>

The policy statements in current public sector bargaining proposals also view labor peace as a prime objective. A bill introduced in 1977 by Representative Roybal of California quotes the above NLRA language almost verbatim,<sup>20</sup> as do several earlier proposals.<sup>21</sup>

We can reduce the labor peace argument to a testable hypothesis: collective bargaining reduces the incidence of strikes in the public sector.<sup>22</sup> Available data, however, refute this hypothesis. Private sector strikes have increased threefold since enactment of the NLRA,<sup>23</sup> and public sector strikes are far more common in states that engage in bargaining than in those that do not. Although only one of the ten southeastern states has a comprehensive bargaining statute for public employees,<sup>24</sup> the southeast suffered

*Labor*, 93d Cong., 1st Sess. (1973-1974) [hereinafter cited as *1973-1974 House Hearings*]; *Labor-Management Relations in the Public Sector: Hearings on H.R. 12532, H.R. 7684 and H.R. 9324 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *1972 House Hearings*].

<sup>18</sup> National Labor Relations Act, Pub. L. No. 198, ch. 372, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1970)).

<sup>19</sup> 29 U.S.C. § 151 (1970).

<sup>20</sup> The bill states that the refusal of some employers to engage in collective bargaining "leads to strikes and other forms of strife and unrest, with the consequent effect of obstructing the flow of commerce." H.R. 1987, 95th Cong., 1st Sess. § 1 (1977).

<sup>21</sup> See, e.g., H.R. 8677, 93d Cong., 1st Sess. (1973); H.R. 7684, 92d Cong., 1st Sess. (1971).

<sup>22</sup> "Strikes" here provide a quantifiable index of "strife and unrest."

<sup>23</sup> The number rose from 2,014 in 1935 to 6,031 in 1974. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, Table 623, at 386 (1976); HANDBOOK OF LABOR STATISTICS, *supra* note 5, Table 159, at 390. This is not to say that factors other than the NLRA were not at play; it indicates only that further proof is required to demonstrate that the NLRA reduced labor strife. See notes 28 & 33 *infra*.

<sup>24</sup> Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia comprise, for our purposes, the southeastern states.

only five percent of the 478 strikes against state and local governments in 1975. Of the 318,500 workers involved in the 1975 strikes, less than 12,000—or 3.7%—were in the southeast, and a third of those were in the one state authorizing collective bargaining.<sup>25</sup> In the face of such statistics, supporters of the labor peace argument bear a heavy burden of proof.

Implicit in the hypothesis that collective bargaining reduces strike activity is the assumption that many public employees strike to force employers to engage in bargaining rather than to win specific concessions in the course of bargaining. A typical expression of this assumption is this statement by Representative Frank Thompson, Jr. of New Jersey, Chairman of the House Subcommittee dealing with public sector bargaining legislation and sponsor of one of the major bills under consideration:

A great many people, when one discusses this legislation, express tremendous fear of strikes. The fact is that *in almost every instance those strikes are for recognition as distinguished from disputes over wages, hours, working conditions*. History shows that once recognition is granted by inclusion under the [NLRA], the recognition strike virtually disappears.<sup>26</sup>

The Labor Department does not provide the exact percentage of public sector strikes attributable to recognition disputes, because it combines these strikes with several others under the general heading of “union organization and security.” It is clear, however, that—contrary to Representative Thompson’s assertions—the percentage of pure recognition strikes must be extremely low, for in 1975 the “union organization and security” category accounted for only 5.2% of public sector strikes and for only 2.6% of the workers involved in such strikes.<sup>27</sup> Thus, even assuming that bargaining

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Among these states, only Florida has a comprehensive bargaining statute. Nolan, *supra* note 6, at 255.

<sup>25</sup> *Id.* at 237. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, WORK STOPPAGES IN GOVERNMENT, 1975, Tables 5, 8, 9, reprinted in [1974-1977] 2 GOV’T EMPL. REL. REP. (BNA) (Reference File) 71:1015, 71:1017, 71:1019 [hereinafter cited as WORK STOPPAGES IN GOVERNMENT]. Again, it should be noted that other factors have not been held constant.

<sup>26</sup> 1973-1974 House Hearings, *supra* note 17, at 78 (remarks of Rep. Thompson) (emphasis added). Rep. William D. Ford of Michigan agrees:

I am suggesting to you out of your cited 2 million man-days of idleness [caused by strikes in the public sector] you will find a majority of those came about as a result of either the refusal of a public body to recognize the employees for bargaining purposes, or, a refusal of a public body to bargain in good faith.

*Id.* at 108 (remarks of Rep. Ford).

<sup>27</sup> WORK STOPPAGES IN GOVERNMENT, *supra* note 25, Table 6, at 71:1016. Allowing for strikes over agency shop, union shop, and dues checkoff demands, and over other matters

legislation would eliminate all recognition strikes—hardly a realistic assumption in light of private sector experience<sup>28</sup>—it would not significantly contribute to labor peace unless it had additional beneficial effects.<sup>29</sup>

Because it is impossible to hold constant factors other than the availability of collective bargaining, it is difficult to determine precisely the effect of bargaining statutes. However, available data reveal a strong correlation between passage of bargaining legislation and an increase in public sector strikes. For example, public employee bargaining statutes and public employee strikes were both rare before 1960. By 1974, such statutes were common,<sup>30</sup> and public employee strikes were literally an everyday occurrence.<sup>31</sup> Moreover, states with mandatory bargaining such as Pennsylvania, Rhode Island, and Michigan, suffered the most severe disruptions.<sup>32</sup>

We can approach the labor peace argument from a different

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included under the heading of "union organization and security," a more reasonable estimate of the percentage of pure recognition strikes would be in the neighborhood of 1%-2%. Another Department of Labor statistic supports this figure. In 1975, only 3.3% of all public sector strikes (16 out of 478) were called by unions without official recognition—that is, by those unions that could conceivably be seeking recognition. These 16 included strikes for all reasons, however, and the percentage of pure recognition strikes must therefore have been less than 3.3%. *Id.*, Table A-5, at 71:1031.

<sup>28</sup> In 1973, 38 years after passage of the NLRA, recognition questions were at issue in 4.2% of the nation's private sector strikes. HANDBOOK OF LABOR STATISTICS, *supra* note 5, Table 162, at 405.

<sup>29</sup> It has been suggested, for example, that "[c]ollective bargaining minimizes conflict and helps reduce the potential for strikes by providing a mechanism for settlement of disputes without strikes." 1972 *House Hearings*, *supra* note 17, at 43-44 (statement of Jerry Wurf, President, American Federation of State, County, and Municipal Employees (AFSCME)).

<sup>30</sup> See note 6 *supra*.

<sup>31</sup> In 1975, there were 478 public sector strikes, or 1.3 per day. WORK STOPPAGES IN GOVERNMENT, *supra* note 25, Table 1, at 71:1012.

<sup>32</sup> 1973-1974 *House Hearings*, *supra* note 17, at 98 (statement of Nat'l Ass'n of Mfrs.). In Michigan alone, strikes by nonstate public employees jumped dramatically from only two in the eight years preceding passage of the state's collective bargaining act to 103 in the three years following passage. 1972 *House Hearings*, *supra* note 17, at 254-55 (statement of Robert Taylor, Nat'l Legislative Chairman, Am. Ass'n of Classified School Employees).

Among teachers, the most populous category of public employees, there appears to be a tendency toward increased strike activity following the enactment of bargaining legislation. Thornton & Weintraub, *Public Employee Bargaining Laws and the Propensity To Strike: The Case of Public School Teachers*, 3 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 33 (1974). A recent study by the Public Service Research Council reached a similar conclusion with regard to public employees generally. "In every state except one, passage of a compulsory public sector bargaining law has resulted in increased strike activity." PUBLIC SERVICE RESEARCH COUNCIL, PUBLIC SECTOR BARGAINING AND STRIKES 5 (2d ed. 1976).

standpoint. Perhaps bargaining legislation leads to an increase in strike activity in the short run, but to a decrease in the long run after the collective bargaining process has been accepted. Statistics for the private sector are unclear, but they do not support this hypothesis.

Unfortunately, strike activity data fluctuate widely from year to year, apparently in response to other factors. Comparing the first five years after adoption of the NLRA with the most recent five-year period for which statistics are available, however, we find virtually no change in the level of private sector strike activity even though collective bargaining has become far more common.<sup>33</sup> Thus, private sector data do not support the rephrased labor peace argument, but, because of other variables, the data do not refute it.

Public sector data are much less plentiful, in part because most public bargaining legislation was enacted too recently to allow analysis of long-term effects. In 1965, six states—California, Connecticut, Massachusetts, Michigan, Oregon, and Washington—adopted collective bargaining legislation covering teachers.<sup>34</sup> The following table summarizes teachers' strike activity in these states during the first and second five-year periods beginning with the school year 1965-1966.

In California and Massachusetts, teachers' strikes decreased markedly in the second five-year period; in Connecticut and Washington, they increased markedly; and in Michigan and Oregon, there was no significant change. These figures should be read cautiously, however, because other variables have powerful effects. In 1975 alone, for example, California had 12 strikes in education, Connecticut 11, and Massachusetts 4;<sup>35</sup> in each case, this was far above the yearly average for either of the five-year periods. Other calculations are similarly inconclusive.<sup>36</sup> Thus, these figures pro-

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<sup>33</sup> To correct for the enormous growth in employment since the adoption of the NLRA in 1935, we must take as a measure of strike activity the percentage of workers involved in strikes in a given year and the percentage of total working time in the nonfarm economy lost to strikes, rather than the absolute number of strikes. In 1936-1940, an average of 3.7% of the work force was involved in strikes each year; in 1969-1973, the figure was 3.6%. *HANDBOOK OF LABOR STATISTICS*, *supra* note 5, Table 159, at 390-91. The 1936-1940 figures were, by comparison, much higher than the 1.9% average for 1924-1928, the last five-year period before the Depression. *Id.* In 1936-1940, an average of .23% of the nation's working time was lost to strikes; in 1969-1973, the average was .24%. *Id.*

<sup>34</sup> See PUBLIC SERVICE RESEARCH COUNCIL, *supra* note 32, at 6-9. Several of these laws covered other categories of public employees as well.

<sup>35</sup> WORK STOPPAGES IN GOVERNMENT, *supra* note 25, Table 9, at 71:1019.

<sup>36</sup> For example, Wisconsin, which passed bargaining legislation covering teachers in

*Teachers' Strikes During Five-Year Periods*<sup>37</sup>

	<i>School Years 1965-1966 to 1969-1970</i>	<i>School Years 1970-1971 to 1974-1975</i>	<i>% Change</i>
California	26	14	- 46%
Connecticut	15	20	+ 33.3%
Massachusetts	10	3	- 70%
Michigan	124	126	+ 1.6%
Oregon	0	2	+ a
Washington	0	16	+ a

<sup>a</sup> Percentage calculation impossible due to zero base figure.

vide no reason to believe that the availability of collective bargaining reduces the frequency of public sector strikes.

A mere correlation between bargaining legislation and strikes does not establish a causal relationship and assertions of such a relationship are subject to statistical refutation.<sup>38</sup> As a result, the labor peace argument cannot be regarded as conclusively disproved. It is more accurate to say that the argument is unproved, and that available statistics offer no support for it.

### C. *The Bargaining Power Argument*

Like the labor peace argument, the bargaining power argument harks back to the NLRA. In that Act, Congress found:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the

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1959, had no teacher strikes at all until 1967-1968, when it had just one. During the next seven school years, when collective bargaining was widespread, it had 40 more. D. COLTON, *DO PUBLIC EMPLOYEE BARGAINING LAWS INCREASE TEACHER STRIKES?*, Table 1, at 5 (1977).

<sup>37</sup> These data are condensed from *id.*

<sup>38</sup> See *id.* at 9. Colton challenges the Public Service Research Council report (see note 32 *supra*) on the basis of flaws in the collection and compilation of data. D. COLTON, *supra* note 36, at 2-4. After a study of statistics on teachers' strikes, he failed to find any causal relationship with bargaining legislation. *Id.* at 3-4, 9.

stabilization of competitive wage rates and working conditions within and between industries.<sup>39</sup>

The NLRA established statutory collective bargaining rights in part to restore "equality of bargaining power between employers and employees."<sup>40</sup>

Although the statute's principle of economic anticompetitiveness sounds somewhat archaic today, the unstated premise that bargaining should be used to give employees a greater share of the economic pie finds modern manifestations. Representative Roybal's bill explicitly seeks to restore "equality of bargaining power,"<sup>41</sup> and academic commentators appear equally concerned that an existing inequality results in unfair treatment of public employees.<sup>42</sup>

"Bargaining power" is used here as a political term, not an economic one. To economists, the phrase refers to the "highest alternative salary one can get from *other* jobs"<sup>43</sup> without regard for the size or wealth of the parties. In the political sense the term can have either of two meanings. It often refers to the deeply held belief that employees are always cheated on the price of their labor and therefore deserve more from their employers. Because of its complete subjectivity, this argument is not debatable. However, it will not persuade one who does not accept it to support legislation designed to help employees. It is more profitable, then, to treat the term as part of an empirical argument asserting that in the absence of collective bargaining public employers treat their employees "unfairly" as judged by some objective standard.

The only objective standard suggested by proponents of public sector bargaining is a comparison with private sector employees. Such a comparison, however, provides little support for their cause. In a typical statement, two advocates of bargaining legislation rely on the undocumented assertion that "[i]n the forty years since the passage of the Wagner Act, public sector employees often have fallen behind their private sector counterparts in compensation and benefits."<sup>44</sup> The word "often" is imprecise, but if it implies that public employees generally lag behind their private sector

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<sup>39</sup> 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1970)).

<sup>40</sup> 29 U.S.C. § 151 (1970).

<sup>41</sup> H.R. 1987, 95th Cong., 1st Sess. § 1 (1977).

<sup>42</sup> See, e.g., Mass & Gottlieb, *supra* note 3, at 276-77; McCann & Smiley, *supra* note 3, at 523-24.

<sup>43</sup> A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL 396 (2d ed. 1977) (emphasis in original).

<sup>44</sup> Mass & Gottlieb, *supra* note 3, at 276.

counterparts, it contradicts the available data. Several studies indicate that where differences in wages occur between comparable government and private employees, such differences frequently favor public employees.<sup>45</sup> Furthermore, these studies do not consider the nonmonetary advantages of public employment.<sup>46</sup> Any meaningful comparison of private and public employment should consider the value of all these factors. Although a formidable task, until it is undertaken we cannot conclude that public employees need collective bargaining rights to achieve fair wages and benefits.

Even assuming that public employees are in some sense treated unfairly, it is not clear that unionization would solve the problem. Although economic analysis shows that private sector unions increase wages about ten to fifteen percent above the nonunion level, that increase is at the expense of nonunionized employees and results in overall reduced employment.<sup>47</sup> "[I]n a fundamental sense, employees do not compete against employers; they compete against other labor."<sup>48</sup> Moreover, by altering the wage structure and opposing many technological innovations, private sector unions create "an obstacle to the optimum performance of our economic system."<sup>49</sup> Unions may well have off-setting noneconomic benefits,<sup>50</sup> but Congress should determine who will benefit and who will suffer before passing legislation to strengthen unions in the public sector.

Many studies in recent years have focused on the wage effects of public sector unions.<sup>51</sup> Although the results of these studies

<sup>45</sup> See ORR, *Public Employee Compensation Levels*, in PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 131 (A. Chickering ed. 1976); Reder, *The Theory of Employment and Wages in the Public Sector*, in LABOR IN THE PUBLIC AND NONPROFIT SECTORS 38-48 (D. Hamermesh ed. 1975); Smith, *Pay Differentials Between Federal Government and Private Sector Workers*, 29 INDUS. & LAB. REL. REV. 179 (1976).

<sup>46</sup> See text accompanying note 16 *supra*.

<sup>47</sup> H.G. LEWIS, UNIONISM AND RELATIVE WAGES IN THE UNITED STATES 10-46, 183-94, 286-96 (1963); A. REES, THE ECONOMICS OF TRADE UNIONS 69-99 (1962). One recent study suggests that the union-nonunion wage differential may be somewhat less. See Boskin, *Unions and Relative Real Wages*, 62 AM. ECON. REV. 466 (1972).

<sup>48</sup> A. ALCHIAN & W. ALLEN, *supra* note 43, at 402. See also Vieira, *Of Syndicalism, Slavery, and the Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" in Public-Sector Employment*, 12 WAKE FOREST L. REV. 515, 543-51 (1976).

<sup>49</sup> A. REES, *supra* note 47, at 194.

<sup>50</sup> *Id.* at 195.

<sup>51</sup> See, e.g., Ashenfelter, *The Effect of Unionization on Wages in the Public Sector: The Case of Fire Fighters*, 24 INDUS. & LAB. REL. REV. 191 (1971); Baird & Landon, *The Effects of Collective Bargaining on Public School Teachers' Salaries*, 25 INDUS. & LAB. REL. REV. 410 (1972), and Kasper, *Reply, id.* at 417; Ehrenberg, *Municipal Government Structure, Unionization, and the Wages of Fire Fighters*, 27 INDUS. & LAB. REL. REV. 36 (1973); Ehrenberg & Goldstein, *A Model of Public Sector Wage Determination*, 2 J. URBAN ECON. 223 (1975);

vary, they seem to indicate an "average" wage effect of about five percent,<sup>52</sup> somewhat less than that produced by unionization in the private sector. Union-negotiated increases of whatever size will have to come at the expense of either nonunion public employees or reduced employment opportunities, as in the private sector—or at the expense of the taxpayer, who will either pay more taxes or receive fewer services. The bargaining power argument thus involves a trade-off, for there is no free source of funds. If Congress chooses to make the trade—to increase the power and wealth of unionized public employees, and decrease the power and wealth of some other segment of society—it will presumably act as a result of evidence that the trade will redress injustice or promote the common good. To date, however, proponents have not submitted any such evidence.

#### D. *Additional Considerations*

Opponents of public sector bargaining have raised a number of objections which, if valid, would far outweigh the proponents' arguments discussed above. Because these objections are based largely on speculation rather than empirical data, no attempt will be made to prove or disprove them. The objections (and responses thereto by bargaining proponents) are presented only to suggest the risks involved in bargaining and the need for further research.

##### 1. *Impact on the Quality, Scale, and Cost of Public Services*

As put most forcefully by Professor Robert S. Summers in a recent monograph,<sup>53</sup> public sector bargaining could have detri-

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Freund, *Market and Union Influences on Municipal Employee Wages*, 27 *INDUS. & LAB. REL. REV.* 391 (1974); Frey, *Wage Determination in Public Schools and the Effects of Unionization*, in *LABOR IN THE PUBLIC AND NONPROFIT SECTORS*, *supra* note 45, at 183; Hall & Carroll, *The Effect of Teachers' Organizations on Salaries and Class Size*, 26 *INDUS. & LAB. REL. REV.* 834 (1973); Hall & Vanderporten, *Unionization, Monopsony Power, and Police Salaries*, 16 *INDUS. REL.* 94 (1977); Kasper, *On the Effect of Collective Bargaining on Resources Allocation in Public Schools*, 23 *ECON. & BUS. BULL.* 1 (spring-summer 1971); Kasper, *The Effects of Collective Bargaining on Public School Teachers' Salaries*, 24 *INDUS. & LAB. REL. REV.* 57 (1970); Lewin, *Public Sector Labor Relations*, 18 *LAB. HIST.* 132, 136-40 (1977); Lipsky & Drotning, *The Influence of Collective Bargaining on Teachers' Salaries in New York State*, 27 *INDUS. & LAB. REL. REV.* 18 (1973); Schmenner, *The Determination of Municipal Employee Wages*, 55 *REV. ECON. & STATISTICS* 83 (1973); Thornton, *The Effects of Collective Negotiations on Teachers' Salaries*, 11 *Q. REV. ECON. & BUS.* 37 (winter 1971). For a convenient summary of the major studies, see Lewin, *supra* at 136-37.

<sup>52</sup> Lewin, *supra* note 51, at 138.

<sup>53</sup> R. SUMMERS, *COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE* 29-43 (1976).

mental effects on the quality, scale, and cost of public services. Attempting to prove either a beneficial or detrimental effect raises severe methodological problems. The advocate would be required to show, *inter alia*, that a change in public services occurred, that bargaining caused the change, that the change was beneficial (or detrimental), and that the effects of the change were not outweighed by more serious detrimental (or beneficial) results.<sup>54</sup> Summers therefore suggests an alternative method of evaluation which he terms a "rebuttal strategy":<sup>55</sup>

[O]pponents [of bargaining legislation] would be required to make out a kind of "prima facie" case that their specific claim of diminishing effect is sufficiently strong to force the proponents to undertake the task of rebuttal. The elements of each "prima facie" case of adverse benefit impact that the opponents would have to make out would be (1) that an instance of a type of effect has occurred or is occurring, (2) that it is attributable at least partly to collective bargaining, (3) that the occurrence is likely not to be merely an isolated and unrepresentative instance of the workings of bargaining, and (4) that the effect actually *diminishes* benefit.

Once such a "prima facie" case is made out, the proponents would then be called upon to rebut it. They might (1) deny that the effect occurred or occurs and marshal available evidence to show as much, or (2) deny that the effect is at all attributable to collective bargaining and marshal evidence to show this, or (3) admit the effect and that it is attributable to collective bargaining, but deny that it will ever occur again or deny that it is likely to occur with any significant frequency, and support these denials with whatever evidence can be marshaled, or (4) deny that the effect truly diminishes benefit and support this with available evidence and argument.

If the proponents are unable to rebut the specific prima facie case involved via one or more of the foregoing four moves then that specific prima facie case would stand unrebutted as a factor weighing *against bargaining*. But if the proponents satisfactorily rebut this case, then this factor at least would not itself count against bargaining.<sup>56</sup>

Summers then suggests a number of possible prima facie cases of bargaining's detrimental effects on public school education. Brief sketches of two of them are provided here.

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<sup>54</sup> *Id.* at 30-35.

<sup>55</sup> *Id.* at 35-36.

<sup>56</sup> *Id.* (footnote omitted) (emphasis in original).

a. *Length of the School Day.* Teachers' unions have on occasion negotiated a reduction in length of the school day, as in New York City in 1974 (parts 1 and 2 of the prima facie case). From the public's point of view this change is detrimental because it reduces the amount of teaching without reducing the cost of schools (part 4). Is this an isolated instance under part 3 of the prima facie case? Summers suggests not. Since hours are like money and reduced work is like a raise, unions are likely to continue to press for such provisions.<sup>57</sup>

b. *The Probationary Process.* Public schools use a probationary period to evaluate new teachers before granting them tenure. Teachers' unions frequently bargain for shorter probationary periods, lower standards for granting tenure, and a rigid, quasi-judicial procedure for denial of tenure (parts 1 and 2 of Summers' test). In the public's view, such changes are detrimental because they increase the likelihood that marginally qualified teachers will receive tenure (part 4). Moreover, the issue is important enough to arise in almost all negotiations (part 3).<sup>58</sup>

Summers argues that many such prima facie cases could be established and that satisfactory rebuttal will often be impossible. That being so, "the proponents would still not have discharged their burden of persuading the legislature that bargaining is a good thing in light of its benefit impact";<sup>59</sup> therefore, they should not prevail.

Summers' arguments are perhaps too recent to have drawn a response. Certainly the existing literature does not deal with his basic thesis. Public sector unions have frequently suggested that they produce favorable results,<sup>60</sup> but such statements do not sufficiently answer the fundamental challenge Professor Summers poses.

## 2. *Impact on the Merit Principle of Public Employment*

Several potential points of conflict exist between collective bargaining and the merit principle of the civil service system. The essence of civil service is the belief that merit should, so far as

<sup>57</sup> *Id.* at 37.

<sup>58</sup> *Id.* at 38-39.

<sup>59</sup> *Id.* at 41-42.

<sup>60</sup> See, e.g., 1974 Senate Hearings, *supra* note 17, at 275 (statement of Albert Shanker, President, Am. Fed'n of Teachers); 1973-1974 House Hearings, *supra* note 17, at 34-36 (statement of Dr. Helen D. Wise, President, Nat'l Educ. Ass'n (NEA)); Selden, *Needed: More Teacher Strikes*, in COLLECTIVE NEGOTIATION FOR PUBLIC AND PROFESSIONAL EMPLOYEES 339 (R. Woodworth & R. Peterson eds. 1969).

possible, be the sole determinant of hiring, promotion, and other personnel decisions. Unions, by contrast, favor the use of criteria not entirely congruent with objective merit, such as seniority, union membership, or dues payment. Opponents of bargaining have claimed that this potential conflict is so serious that to engage in any bargaining will mean abandoning the merit principle.

[T]he decision is not where to draw the line. The decision is about two kinds of personnel systems. Which are we going to have? They are different. They employ different principles, and they have different concerns. We can no longer believe that we can be half collective bargaining and half merit system.<sup>61</sup>

Proponents of bargaining dismiss these fears as unfounded. They point out that the merit principle has never been strictly followed in practice and that civil service systems are no longer regarded as the protector of individual employees. To many, civil service systems are but another arm of management.<sup>62</sup> Bargaining proponents also note that the impact of bargaining is not uniform—that is, in many cases unions actually strengthen the merit system by forcing administrators to follow their own rules more strictly and by opposing elements of personal bias.<sup>63</sup> Finally, bargaining advocates point out that recent research indicates a variety of ways in which bargaining and the merit principle can be accommodated so that neither irreparably harms the other.<sup>64</sup>

On this issue, then, opponents of bargaining are unconvincing. They are correct in pointing to potential conflicts, but the potential

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<sup>61</sup> Morse, *Shall We Bargain Away the Merit System?*, in DEVELOPMENTS IN PUBLIC EMPLOYEE RELATIONS: LEGISLATIVE, JUDICIAL, ADMINISTRATIVE 154, 160 (K. Warner ed. 1965). See also 1972 House Hearings, *supra* note 17, at 258, 263-64 (statement of James F. Marshall, President, Assembly of Gov. Employees); Boynton, *supra* note 3, at 579.

<sup>62</sup> See, e.g., 1974 Senate Hearings, *supra* note 17, at 173, 175 (statement of Jerry Wurf, President, AFSCME); U.S. DEP'T OF LABOR, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT AND THE MERIT SYSTEM 109 (1972); Lewin, *Collective Bargaining Impacts on Personnel Administration in the American Public Sector*, 27 LAB. L.J. 426, 427-29 (1976).

<sup>63</sup> See 1974 Senate Hearings, *supra* note 17, at 176-78 (statement of Jerry Wurf, President, AFSCME); Horton, Lewin & Kuhn, *Some Impacts of Collective Bargaining on Local Government: A Diversity Thesis*, 7 AD. & SOC'Y 497 (1976); Lewin, *supra* note 62, at 429-35; Lewin & Horton, *The Impact of Collective Bargaining on the Merit System in Government*, 30 ARB. J. 199 (1975).

<sup>64</sup> See, e.g., D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE 32-59 (1972); U.S. DEP'T OF LABOR, *supra* note 62, at 110; Feigenbaum, *Civil Service and Collective Bargaining: Conflict or Compatibility?*, 3 PUB. PERSONNEL MANAGEMENT 244 (1974); Helburn & Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LAB. L.J. 618 (1972); Stanley, *What Are Unions Doing to Merit Systems?*, 31 PUB. PERSONNEL REV. 108 (1970); Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826 (1971).

is not sufficiently widespread or serious to impede the passage of collective bargaining legislation.

### 3. *Impact on the Democratic System*

Just as some commentators perceive an inherent conflict between the merit principle and collective bargaining, others believe that public bargaining is inconsistent with our democratic system of government. In part this attitude represents a traditional view of the concept of sovereignty, that is, the principle that any ordered government requires absolute power.<sup>65</sup> Any requirement that the government bargain with a group before taking action shatters the state's absolute sovereignty. Most opponents—and all proponents—of public sector bargaining reject this approach out of hand, perhaps because political theory is out of fashion, and its style of debate is not the mode in which most labor law commentators feel comfortable. Sovereignty must, after all, “seem to the critics too elusive and too remote a concept to be of practical significance in the fashioning of labor policy.”<sup>66</sup>

In any event, most critics of public sector bargaining rely on a more modern theory put forth initially by Professors Harry H. Wellington and Ralph K. Winter, Jr.<sup>67</sup> Borrowing a term from political scientist Robert Dahl, they suggest that bargaining may be inconsistent with the “‘normal’ American political process” because it gives unions the power “to withhold labor—to strike—as well as to employ the usual methods of political pressure.”<sup>68</sup> Granting unions these two bites at the political apple may give them “a disproportionate share of effective power in the process of decision.”<sup>69</sup>

This argument builds upon the well-accepted principle that the accumulation of “too much” political power by one interest group threatens the integrity of the entire system. As Professor Kurt Hanslowe put it a decade ago:

[I]t must also be recalled that a democratic political structure has limits as to the amount of organized group pressure it can tolerate. At some point the risk arises of a dangerous dilution of governmental authority by its being squeezed to death by conflicting power blocks. If that point is reached, foreign policy is

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<sup>65</sup> See Petro, *supra* note 3, at 65.

<sup>66</sup> Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1109 (1969).

<sup>67</sup> See Wellington & Winter, *supra* note 66.

<sup>68</sup> *Id.* at 1123.

<sup>69</sup> *Id.*

made by defense industry, agricultural policy by farmers, and public personnel policy by employee organizations, and *not* by government representing the wishes of an electorate consisting of individual voters. If that point is reached, an orderly system of individual liberty under lawful rule would seem to be the victim. For surely it is difficult to conceive of a social order without a governmental repository of authority, which is authoritative for the very reason that it is representative and democratic.<sup>70</sup>

The question thus boils down to whether collective bargaining gives public employee unions "too much" power. Wellington and Winter's affirmative answer to this question triggered a lively debate that still continues.<sup>71</sup> Responses to Wellington and Winter have taken several forms. Some writers argue that public sector unions possess insufficient power to cause the harm envisioned.<sup>72</sup> Others suggest that we should view collective bargaining not as a challenge to the political system but as an integral part of it.<sup>73</sup> Still others believe that careful structuring of the bargaining process can diffuse unhealthy concentrations of power.<sup>74</sup>

Neither side has converted the other, nor is either likely to.

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<sup>70</sup> K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 114 (1967) (emphasis in original). Hanslowe goes on to suggest that collective bargaining could corrupt our democratic system by allowing unions to exchange political help for contracts providing for compulsory union membership and coerced support of the union's political activities. "Unless careful protections are worked out," warns Hanslowe,

the union shop in public employment has the potential of becoming a neat mutual back-scratching mechanism, whereby public employee representatives and politicians each reinforce the other's interests and domain, with the individual public employee and the individual citizen left to look on, while his employment conditions, and his tax rate, and public policies generally are being decided by entrenched and mutually supportive government officials and collective bargaining representatives over whom the public has diminishing control.

*Id.* at 115.

<sup>71</sup> See, e.g., R. SUMMERS, *supra* note 53, at 1-17; Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 *YALE L.J.* 418 (1970); Clark, *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 *U. CIN. L. REV.* 680 (1975); Love & Sulzner, *Political Implications of Public Employee Bargaining*, 11 *INDUS. REL.* 18 (1972); Siegel & Kainen, *Political Forces in Public Sector Collective Bargaining*, 21 *CATH. U.L. REV.* 581 (1972); Summers, *Public Employee Bargaining: A Political Perspective*, 83 *YALE L.J.* 1156 (1974); Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 *U. CIN. L. REV.* 669 (1975); Wellington & Winter, *More on Strikes by Public Employees*, 79 *YALE L.J.* 441 (1970); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 *YALE L.J.* 805 (1970); Project, *Collective Bargaining and Politics in Public Employment*, 19 *U.C.L.A. L. REV.* 887, 1034-51 (1972).

<sup>72</sup> See Burton & Krider, *supra* note 71.

<sup>73</sup> See Summers, *Public Employee Bargaining: A Political Perspective*, *supra* note 71, at 1199-1200.

<sup>74</sup> See Clark, *supra* note 71; Project, *supra* note 71, at 1034-51.

Whether any group in our society is "too strong" will always depend upon individual perceptions of the group and its objectives. As a result, the Wellington and Winter argument must stand more as cautionary than as convincing. It articulates one unquantifiable risk of public sector bargaining. Although it may influence the form that bargaining laws will take, it will not, on its own, prevent passage of such legislation.

#### E. *Summary*

Proponents of public sector bargaining legislation have not demonstrated that public employees need bargaining rights to gain equality with private sector employees. Similarly, they have provided no reason to believe that collective bargaining will reduce labor strife, and have not provided any standard or evidence indicating that public employees have been treated so unfairly as to need the added power that bargaining rights would give them. Although they seem to have refuted the charge that bargaining would destroy the merit system, they have dealt less successfully with more serious problems concerning the adverse impact of bargaining on the quality, scale, and cost of public services. Finally, bargaining advocates have not yet put to rest the most serious allegation of all—that bargaining threatens the very fabric of our political system.

In short, proponents have not carried the burden of persuasion on the merits of public sector collective bargaining. Political forces being what they are, this may not prevent passage of bargaining legislation; it should, however, give congressmen much to think about before supporting such a significant reform.

## II

### IS THERE A NEED FOR FEDERAL LEGISLATION?

Perhaps we are past the point where debates over the merits of collective bargaining in the public sector have any significant impact. Collective bargaining, already widespread, may continue to proliferate regardless of legislative action. Granting this, or even granting the general desirability of such bargaining, it by no means follows that federal action is essential.

We should note at the outset that the states have not ignored public sector labor relations. At least thirty-seven states have laws granting collective bargaining rights to some public employees, and

laws in twenty-six of these cover most categories of employees.<sup>75</sup> Many more states engage in bargaining pursuant to executive orders, attorney general's opinions, local ordinances, or *de facto* arrangements,<sup>76</sup> although many of these laws and customs apply only to certain groups of employees, and several of them provide only the most basic outline of a bargaining system. One could reasonably assume from these facts that state laws cover those employees most likely to engage in bargaining (and, by extension, exclude those not yet ready to bargain) and that gaps in the legislation are filled in by mutual consent. Nevertheless, many commentators argue that federal legislation is necessary in order to (1) guarantee rights that the states would otherwise violate; (2) avoid the bias that must attend any state's attempt to regulate its own labor relations; and (3) provide uniformity among the states. The strength of these arguments is far from overwhelming.

#### A. *A Guarantee of Rights*

It has become commonplace to speak of federal legislation as necessary to guarantee the "rights" of public employees. One commentator has complained, for example, that an evaluation of state laws "mostly reveals *underaction*" by the states in providing the "essential elements of public sector bargaining rights."<sup>77</sup> The favorable connotations of the term "rights" may make such arguments politically effective, but the issue requires a more thorough analysis.

To begin with, the "rights" in need of protection must have a source. Jurisprudence recognizes four possible sources of rights: moral or "natural" law, the Constitution, statutes, and common law. Bargaining advocates have not relied on the first of these; nature, it seems, does not command public sector collective bargaining. The other potential sources warrant further discussion.

Several public employee unions have sought to establish the existence of a constitutional right to engage in collective bargaining. They have been uniformly unsuccessful. The Constitution does establish certain rights for public employees, such as the first amendment protections of freedom of speech and association.<sup>78</sup>

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<sup>75</sup> See McCann & Smiley, *supra* note 3, at 495-96.

<sup>76</sup> See [1970-1977] 1 GOV'T EMP'L. REL. REP. (BNA) (Reference File) 51:501-51:531.

<sup>77</sup> Brown, *supra* note 3, at 711 (emphasis in original).

<sup>78</sup> See generally Nolan, *supra* note 6, at 240-42.

Public employees may not be punished for advocating or joining unions,<sup>79</sup> but the Constitution goes little farther. Courts have consistently held that it does not establish a right to bargain collectively,<sup>80</sup> a right to strike,<sup>81</sup> or a right to have union dues checked off.<sup>82</sup> Those advocating public sector bargaining to guarantee the rights of employees may be referring to the rights to advocate and join unions, but no one has shown that public employers have denied these rights in recent years. Moreover, the paucity of litigation on these questions suggests the contrary.

As to statutory rights, no federal statute generally extends bargaining rights to public employees. Thus, the proposed legislation cannot be defended as necessary to safeguard existing statutory rights. An argument based on statutory rights thus becomes tautological: legislation is needed to protect the statutory rights that the new legislation will create. Although this may accurately reflect the desires of bargaining proponents, this form of the argument adds nothing to the case for federal legislation.

Finally, proponents of public sector bargaining may be refer-

<sup>79</sup> There are three leading cases on this point: *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court).

<sup>80</sup> *See, e.g., Lontine v. VanCleave*, 483 F.2d 966 (10th Cir. 1973); *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071 (7th Cir. 1969); *United Steelworkers v. Volker*, 95 L.R.R.M. 2158 (N.D. Ala. 1977); *Teamsters Local 822 v. City of Portsmouth*, 423 F. Supp. 954 (E.D. Va. 1975), *aff'd mem.*, 534 F.2d 328 (4th Cir. 1976); *Board of Educ. v. AFSCME*, 401 F. Supp. 687 (N.D. Ga. 1975); *United Steelworkers v. University of Ala.*, No. 75-H-17885 (N.D. Ala. Oct. 24, 1975), *quoted in United Steelworkers v. Volker*, 95 L.R.R.M. 2158, 2164-65 (N.D. Ala. 1977); *Winston-Salem/Forsyth County Unit of N.C. Ass'n of Educ. v. Phillips*, 381 F. Supp. 644 (M.D.N.C. 1974) (three-judge court); *Newport News Fire Fighters Local 794 v. City of Newport News*, 339 F. Supp. 13 (E.D. Va. 1972); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971); *Bateman v. South Carolina State Ports Auth.*, 298 F. Supp. 999 (D.S.C. 1969); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court); *Government & Civic Employees Organizing Comm. v. Windsor*, 116 F. Supp. 354 (N.D. Ala. 1953) (three-judge court), *aff'd mem.*, 347 U.S. 901 (1954); *International Longshoremen's Ass'n v. Georgia Ports Auth.*, 217 Ga. 712, 124 S.E.2d 733, *cert. denied*, 370 U.S. 922 (1962); *Cook County Police Ass'n v. City of Harvey*, 8 Ill. App. 3d 147, 289 N.E.2d 226 (1972).

<sup>81</sup> *See, e.g., United Steelworkers v. Volker*, 95 L.R.R.M. 2158 (N.D. Ala. 1977); *Johnson v. City of Albany, Ga.*, 413 F. Supp. 782 (M.D. Ga. 1976); *Teamsters Local 822 v. City of Portsmouth*, 423 F. Supp. 954, 957 (E.D. Va. 1975) (dictum), *aff'd mem.*, 534 F.2d 328 (4th Cir. 1976); *Kirker v. Moore*, 308 F. Supp. 615 (S.D.W. Va. 1970), *aff'd per curiam*, 436 F.2d 423 (4th Cir.), *cert. denied*, 404 U.S. 824 (1971). *Cf. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976) (school board may constitutionally dismiss teachers for striking).

<sup>82</sup> *See, e.g., City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976).

ring to common-law rights. It is true that a number of courts have upheld the legality of *de facto* public sector collective bargaining;<sup>83</sup> however, no court has found a common-law right to engage in collective bargaining against the wishes of the public employer.

Therefore, the argument that federal legislation is necessary to protect employee rights must be dismissed either because it is tautological or because no clear source of generally accepted rights exists.

### B. *The Elimination of Partiality*

Public employee unions are reluctant to rely on state laws in part because of their belief that the administration of these laws is inherently biased in favor of the employer. One union official put it rather bluntly: "A labor relations board appointed by the public employer has no greater right to claim impartiality in disputes that involve that public employer than a similar board appointed by the president of General Electric in a labor matter involving GE. An employer is an employer is an employer. . . ."<sup>84</sup> In a more academic vein, two scholars have noted that self-regulation in this area raises at least the appearance of a conflict of interest that could easily be removed by "[t]ransferring the rule-making function to another level of government"—the federal government.<sup>85</sup>

Without some documentation of actual prejudice, however, these statements are not persuasive. First, as a simple matter of administrative experience, different agencies of the same government do not necessarily take the same positions. No one is surprised when the Department of State disagrees with the Department of Defense over a matter of international policy, or when the Secretary of the Treasury and the Secretary of Labor propose competing economic plans. Such intragovernmental differences of opinion would seem to be equally common at the state and local levels. The reasons for divergent views—different backgrounds and goals of officials, different statutes and regulations, and different pressures from "client" groups—undercut the assumption

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<sup>83</sup> See, e.g., *Louisiana Teachers' Ass'n v. Orleans Parish School Bd.*, 303 So. 2d 564 (La. App. 1974), *cert. denied*, 305 So. 2d 541 (La. 1975). See generally Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539, 539-51 (1969), and cases cited therein.

<sup>84</sup> Bilik, *supra* note 3, at 480. *Accord*, 1972 *House Hearings*, *supra* note 17, at 47-48 (statement of Jerry Wurf, President, AFSCME).

<sup>85</sup> McCann & Smiley, *supra* note 3, at 525.

that state labor relations agencies are inevitably biased in favor of state or local employers. Second, absent clear evidence of some personal or official interest in the outcome of a dispute, government officials are presumed as a matter of law to be acting without bias. The recent Supreme Court decision in the *Hortonville* case<sup>86</sup> is illustrative. The school board in the Wisconsin town of Hortonville dismissed a group of teachers who had engaged in an illegal strike. The teachers successfully sued in the Wisconsin courts to prevent the terminations, arguing that the due process clause of the fourteenth amendment required evaluation of the teachers' conduct by an impartial decisionmaker, and that the school board could not be impartial. The Supreme Court rejected this argument on appeal: "A showing that the Board was 'involved' in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power."<sup>87</sup>

Although the due process clause is not at issue in the current congressional struggle over public employee bargaining, the "presumption of honesty and integrity" acknowledged by the Supreme Court discredits bargaining proponents' allegations of bias. Absent some specific showing of prejudice against public employees, there is no reason to assume that state or local administrators cannot act impartially.

### C. *Uniformity Among the States*

One of the primary objectives of the NLRA was to eliminate differences among the states in handling labor relations issues.<sup>88</sup> This attempt to achieve nationwide uniformity was designed in part to guarantee certain minimum standards of protection to all employees<sup>89</sup> and in part to abolish competitive advantages accruing to employers in states that did not protect collective bargaining efforts.<sup>90</sup> Proponents of public sector collective bargaining invoke these same arguments to demonstrate the need for federal legislation.

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<sup>86</sup> *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976).

<sup>87</sup> *Id.* at 496-97.

<sup>88</sup> See National Labor Relations Act, Pub. L. No. 198, ch. 372, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1970)).

<sup>89</sup> Bilik, *supra* note 3, at 473.

<sup>90</sup> McCann & Smiley, *supra* note 3, at 527 n.269.

Some bargaining advocates direct their complaints at the aesthetic impurity of the present system.<sup>91</sup> Others contend that the anticompetitive objectives of the NLRA are equally valid in the public sector. Mayor Coleman Young of Detroit, for example, believes that Michigan, which has a statute governing public sector bargaining, has often lost revenue because businesses chose to locate instead in Ohio, which has no such statute.<sup>92</sup>

The validity of this theory is dubious. To deal with Mayor Young's example first, only actual bargaining and the severity of its impact on tax rates would influence a business' choice of location—not whether bargaining has a statutory *imprimatur*. On that score, there is little difference between Michigan and Ohio, for bargaining is widespread in both states.<sup>93</sup> More generally, no measurable economic competition between states arises out of the existence of public sector bargaining. Professors Wellington and Winter put it this way: "New York City teachers are not paid less because of competition with the school system of Decatur, Georgia. Municipal employers simply do not compete in an interstate product market which effectively prevents some states from adopting collective bargaining as a policy because others do not."<sup>94</sup>

Proponents of public sector bargaining also argue, with greater plausibility, that only federal action can achieve "administrative simplicity." Unquestionably, the current dispersion of authority over public employees is far from "simple." This alone has prompted some commentators to call for federal legislation:

The current patchwork of agencies, without a unifying central authority, inevitably yields differences in administrative pol-

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<sup>91</sup> See, e.g., 1972 House Hearings, *supra* note 17, at 32 (statement of Jerry Wurf, President, AFSCME) (union frustrated by "the astonishing jungle of state laws"); Erstling, *Federal Regulation of Non-Federal Public Employment*, 24 LAB. L.J. 739, 742 (1973) (differences among the states "chaotic"); McCann & Smiley, *supra* note 3, at 519 (criticizing "patchwork of agencies").

<sup>92</sup> See 1974 Senate Hearings, *supra* note 17, at 287-88 (statement of Mayor Young); AMERICAN ARBITRATION ASSOCIATION, FEDERAL LEGISLATION FOR PUBLIC SECTOR COLLECTIVE BARGAINING 63 (T. Colosi & S. Rynecki eds. 1975). *Accord*, McCann & Smiley, *supra* note 3, at 527 n.269 ("States may still fear that public employee bargaining could force tax rises that would place local business at a disadvantage compared to other States").

<sup>93</sup> See Comment, *The Authority of the Public Employer To Engage in Collective Bargaining in the Absence of a State Statute: Ohio, A Case in Point*, 24 CLEV. ST. L. REV. 672, 673 (1975). If strikes are any indication of the seriousness of collective bargaining, Ohio prevails easily over Michigan. In 1975, the most recent year for which statistics are available, Ohio lost more than twice as many man-days to public sector strikes (92,600) as Michigan (41,400). WORK STOPPAGES IN GOVERNMENT, *supra* note 25, Table 8, at 71:1018.

<sup>94</sup> Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, *supra* note 71, at 812.

icy which are based more on local political pressures than on irresistible administrative logic, or even on differences in statutory provisions. Lodging authority for administrative decisions in a single board would not inevitably lead to consistency, as critics of the NLRB would no doubt be quick to point out, but the likelihood of consistency would increase. Furthermore, duplicative costs could be avoided.<sup>95</sup>

This summary of the administrative simplicity argument contains several debatable points. Most obvious, perhaps, is the assumption that "political pressures" underlie local policies but that "irresistible administrative logic" would underlie the proposed federal policies. Federal labor policy, from the initial passage of the Wagner Act<sup>96</sup> to its amendment by the Taft-Hartley<sup>97</sup> and Landrum-Griffin<sup>98</sup> Acts, has always reflected "political pressures." Moreover, if political pressures are to influence governmental labor relations (and there is no reason why they should not), local, as opposed to national, pressures approach more closely the democratic ideal; citizen impact at the local level is both more easily achievable and more effective.

Second, the formation of a single federal agency would avoid "duplicative costs" only if (1) the agency completely preempted all state involvement *and* (2) it operated at a lower cost than the preempted state agencies. Unfortunately, experience suggests that neither projection would prove accurate. The experience of the private sector does not indicate that state agencies would become expendable; to the contrary, many states, despite the existence of the National Labor Relations Board, have their own agencies to deal with private companies not subject to the NLRA, or to provide mediation and arbitration services. Nor can we assume that a single

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<sup>95</sup> McCann & Smiley, *supra* note 3, at 519 (footnote omitted). Closely related to this is the suggestion by two other authors that diversified authority prevents adequate training of labor relations experts for the public sector and limits the transferability of their experience. See Mass & Gottlieb, *supra* note 3, at 278. Although plausible at first glance, the suggestion is not very convincing. It assumes that adequate training and experience can be gained only within the bounds of a single statutory system, and rejects the possibility that the professional could apply training in fundamental principles and issues to a different labor relations system. In any event, the authors cite no evidence for their assertions, and casual observation of the employment of labor relations experts does not support them.

<sup>96</sup> National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-167 (1970 & Supp. V 1975)).

<sup>97</sup> Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-187 (1970 & Supp. V 1975)).

<sup>98</sup> Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1970 & Supp. V 1975)).

federal agency would cost less than numerous state agencies. Although only one board would be necessary, it would presumably require a significant number of lesser officials, and the generally higher federal pay schedules could negate any economies of scale.

These points are minor, however, compared to the fundamental difficulty posed by the uniformity argument. Federalism rests upon the proposition that local government agencies best handle local problems. In public sector labor relations, it is not unreasonable to assume that the needs of New York, heavily influenced by a tradition of private sector unionization, differ from those of Mississippi, which lacks such a tradition.<sup>99</sup> The lack of uniformity among the states might, in other words, reflect rational and appropriate responses to variances in local conditions. If so, the lack of uniformity in the current system is a benefit that we should preserve, not a deficiency that we should eliminate.

Opponents of federal legislation go even farther, and argue that premature imposition of a single federal system could actually impede the resolution of public sector disputes. Public sector labor relations is still in its infancy, most of its growth having come only within the last decade. There is still little agreement over such fundamental issues as unit determination, scope of bargaining, and dispute resolution procedures. States have tried some twenty-five different approaches to impasse resolution alone because of the mix of advantages and disadvantages in each of the available models.<sup>100</sup> Until we reach a consensus on this and other crucial issues by examination of the results of differing state approaches, it would be foolhardy to stifle experimentation.<sup>101</sup>

#### D. *Summary*

To persuasively demonstrate the need for federal legislation, bargaining advocates must show that the states have failed to guarantee collective bargaining rights of public employees, that the states are inherently incapable of treating their employees fairly, and that the greater nationwide uniformity stemming from a single federal act would result in administrative simplicity and sig-

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<sup>99</sup> Cf. 1972 *House Hearings*, *supra* note 17, at 457-58 (statement of Robert T. Thompson, member, U.S. Chamber of Commerce Lab. Rel. Comm.) (diversity of approaches to public employee regulation represents considered wisdom of each state).

<sup>100</sup> Clark, *State Sovereignty and the Proposed Federal Public Sector Collective Bargaining Legislation*, in AMERICAN ARBITRATION ASSOCIATION, *supra* note 92, at 112.

<sup>101</sup> See 1972 *House Hearings*, *supra* note 17, at 283-85 (statement of Secretary of Labor James D. Hodgson).

nificant cost savings. Thus far, they have not established any of these points. The guarantee-of-rights argument amounts to little more than an assertion that public sector bargaining is good and that states opposing it are bad. That state-administered collective bargaining is inherently biased has not been demonstrated either in theory or practice. Finally, the alleged advantages of uniformity are neither so clear nor so overwhelming as to justify the abolition of diverse approaches.

### III

#### THE CONSTITUTIONAL PROBLEM

Even if Congress found the arguments in favor of federal legislation persuasive, it is by no means clear that it has the constitutional power to act. In *Maryland v. Wirtz*<sup>102</sup> the Supreme Court held that Congress could extend the wage and hour provisions of the Fair Labor Standards Act<sup>103</sup> (FLSA) to certain state and local government employees under its power to regulate interstate commerce. Following that decision, proponents of federal collective bargaining legislation assumed that this same power could support federal regulation of local government labor relations.<sup>104</sup> Eight years later, the Court took another look at the question and in *National League of Cities v. Usery*<sup>105</sup> reversed its course. Because it appears to condemn the type of public employee bargaining legislation currently before Congress, the case deserves analysis.

*National League of Cities* involved a challenge to the constitutional validity of 1974 FLSA amendments that completely abolished the exemption previously provided to states and their political subdivisions. Basing its decision not so much upon the specific language of the Constitution as upon the nature of the federal system, a majority of the Court upheld the challenge. In the Court's words, the essential question was whether the wage and

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<sup>102</sup> 392 U.S. 183 (1968).

<sup>103</sup> 29 U.S.C. §§ 201-219 (1970).

<sup>104</sup> See, e.g., Bilik, *supra* note 3, at 471-72; Brown, *supra* note 3, at 692-95; Chanin & Snyder, *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*, 3 FLA. ST. U.L. REV. 236, 240-41 (1975); McCann & Smiley, *supra* note 3, at 539-41. *Maryland v. Wirtz* did not discourage opponents of federal legislation, since four of the six justices in the majority were soon replaced by more conservative Nixon appointees, while the two dissenters remained on the Court. Justice Marshall took no part in the case. See Clark, *supra* note 100, at 112-13. See generally Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35, 37-48 (1976).

<sup>105</sup> 426 U.S. 833 (1976).

hour determinations limited by the FLSA were "functions essential to [the states'] separate and independent existence' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them."<sup>106</sup> The Court noted that applying FLSA standards would increase the costs of some governmental services, reduce the quantity or quality of others, and displace state policies concerning the delivery of public services.<sup>107</sup> The conclusion followed easily from these findings:

If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence." . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.<sup>108</sup>

In even broader language, the Court stated without qualification that "Congress may not exercise that [commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."<sup>109</sup>

These are strong words with potentially wide ramifications, for the Court held the FLSA amendments invalid insofar as they "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."<sup>110</sup> This language seems at least as applicable to a public employee bargaining bill regulating all aspects of employer-employee relationships as to a law setting minimum standards for wages and hours.

Nevertheless, *National League of Cities* may not settle the question. A bare majority of the Court agreed on the holding over the bitter, unrestrained protests of three justices<sup>111</sup> and the more moderate dissent of another.<sup>112</sup> One new appointment could thus alter the result, and an appointee of President Carter would probably be more liberal than the Court's present majority. Moreover, the five-member majority itself is not solid. The deciding vote was cast

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<sup>106</sup> *Id.* at 845-46 (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911)).

<sup>107</sup> 426 U.S. at 846-52.

<sup>108</sup> *Id.* at 851-52.

<sup>109</sup> *Id.* at 855.

<sup>110</sup> *Id.* at 852. The Court stated that Congress could continue to regulate nonintegral government activities, but the only example it provided was railroads. *Id.* at 854 n.18.

<sup>111</sup> *Id.* at 856 (dissenting opinion, Brennan, J., joined by White and Marshall, JJ.).

<sup>112</sup> *Id.* at 880 (dissenting opinion, Stevens, J.).

in a separate concurrence by Justice Blackmun. He interpreted the Court's opinion as simply requiring a balancing approach that would allow federal regulation in areas "where the federal interest is demonstrably greater."<sup>113</sup> Under this view, legislation imposing bargaining procedures on the states rather than substantive terms of employment might be less offensive.<sup>114</sup>

Further, the Court carefully left open other routes for attaining congressional objectives, expressing no view "as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment."<sup>115</sup> This remark took on added significance shortly afterward when the author of the *National League of Cities* decision, Justice Rehnquist, wrote for the Court in *Fitzpatrick v. Bitzer*<sup>116</sup> that section 5 of the fourteenth amendment granted Congress sufficient power to apply Title VII of the Civil Rights Act of 1964<sup>117</sup> to a state government. Several lower courts thereafter upheld application of the Equal Pay Act<sup>118</sup> and the Age Discrimination in Employment Act<sup>119</sup> to state and local governments, at least in part on the fourteenth amendment rationale.<sup>120</sup> Although collective bargaining has not been judicially recognized as a fourteenth amendment right, it is at

<sup>113</sup> *Id.* at 856 (concurring opinion, Blackmun, J.).

<sup>114</sup> See Chanin, *Can a Federal Collective Bargaining Statute for Public Employees Meet the Requirements of National League of Cities v. Usery?: A Union Perspective*, 6 J.L. & Educ. 493, 496-99 (1977).

<sup>115</sup> 426 U.S. at 852 n.17. See Fox, *Federal Public Sector Labor Relations Legislation: The Aftermath of National League of Cities v. Usery*, 26 U. KAN. L. REV. 105, 118-19 (1977) (discussing use of spending power as authority for Congress to enact federal collective bargaining statute).

<sup>116</sup> 427 U.S. 445 (1976).

<sup>117</sup> 42 U.S.C. § 2000e (1970 & Supp. V 1975).

<sup>118</sup> Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1970).

<sup>119</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975).

<sup>120</sup> See, e.g., *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1976) (Equal Pay Act applies to states as employers on basis of Congress' power under § 5 of fourteenth amendment), *cert. denied*, 430 U.S. 946 (1977); *Usery v. Board of Educ.*, 421 F. Supp. 718 (D. Utah 1976) (Age Discrimination in Employment Act applies to states as employers on basis of Congress' power under commerce clause or § 5 of fourteenth amendment). Both Acts relied on Congress' power to regulate commerce as the basis for their enactment. See Pub. L. No. 88-38, § 2(b), 77 Stat. 56 (1963) (Equal Pay Act); 29 U.S.C. § 621(a) (1970) (Age Discrimination in Employment Act). Also, both Acts borrow the enforcement provisions of the FLSA. See 29 U.S.C. § 216(b)-(d) (1970 & Supp. V 1975) (FLSA enforcement provisions apply to Equal Pay Act); 29 U.S.C. § 626(b) (1970) (Age Discrimination in Employment Act).

least conceivable that Congress could declare it so, thereby justifying bargaining legislation.<sup>121</sup> Alternatively, Congress' broad power to attach conditions to its existing programs might support a carefully drafted bargaining act.<sup>122</sup>

Finally, it might be possible to draft a bargaining bill that skirted the *National League of Cities* proscription against "withdraw[ing] from the States the authority to make those fundamental employment decisions upon which their systems for performance of [essential] functions must rest."<sup>123</sup> This would presumably permit action under the commerce power. The National Education Association (NEA) has taken this approach by including provisions in its proposed bill that would allow states to prohibit public employee strikes, make dispute resolution procedures advisory rather than binding, and declare valid state statutes setting certain substantive terms and conditions of public employment.<sup>124</sup> The revised NEA bill has not yet been introduced, however, and the Court's opinion in *National League of Cities* is not specific enough to assure that the NEA approach, or any approach based on the commerce power, could survive constitutional attack.

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<sup>121</sup> See Brown, *Federal Regulation of Collective Bargaining By State and Local Employees: Constitutional Alternatives*, 29 S.C. L. REV. 343 (1977).

<sup>122</sup> See *id.* at 372-78; Fox, *supra* note 115, at 118-19. Justice Brennan, in his *National League of Cities* dissent, suggested that Congress could constitutionally condition the receipt of federal funds by the states on compliance with the FLSA. 426 U.S. at 880. Cf. *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947) (upholding application of Hatch Act to state employees whose principal employment activity financed in part by federal loans or grants). One proposed bill relies on just this theory. See H.R. 4293, 93d Cong., 1st Sess. § 5(a) (1973) (discussed in text accompanying notes 129-33 *infra*). The federal government has used this approach at least twice before. In the Depression years, the Public Works Administration conditioned some loans to municipalities on the extension of collective bargaining rights. See *Memphis Power & Light Co. v. City of Memphis*, 172 Tenn. 346, 362-64, 112 S.W.2d 817, 823 (1937). More recently, Congress conditioned federal aid for mass transit programs on the preservation of collective bargaining rights held by employees of private companies acquired by public entities. See *Urban Mass Transportation Act of 1964*, 49 U.S.C. § 1609(c) (1970); *City of Macon v. Marshall*, 439 F. Supp. 1209 (M.D. Ga. 1977). See generally Barnum, *National Public Relations Legislation: The Case of Urban Mass Transit*, 27 LAB. L.J. 168 (1976); Nolan, *supra* note 6, at 249-53.

<sup>123</sup> *National League of Cities v. Usery*, 426 U.S. at 851.

<sup>124</sup> See text accompanying notes 142-49 *infra*. See generally Chanin, *supra* note 114. The NEA's theory, as expressed by Chanin, is that Justice Blackmun's interpretation of *National League of Cities* is correct. Blackmun viewed the decision as adopting a balancing test that would "not outlaw federal power . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *National League of Cities v. Usery*, 426 U.S. at 856 (concurring opinion). According to Chanin, all that is necessary to meet that test is legislation that "establishes a procedural framework for decision-making, but reserves to the states the plenary authority to make the ultimate determination in regard to wages, hours, and other substantive terms and conditions of employment." Chanin, *supra* note 114, at 499.

Utilizing one of these methods, Congress could probably develop a constitutional statutory scheme for regulating the labor relations of state and local governments.<sup>125</sup> As Professors Wellington and Winter remind us, however, "the existence of a power is not by itself the justification for its exercise. That depends on a demonstration of federal responsibility and a congressional capacity to fashion workable policies."<sup>126</sup> *National League of Cities* raises a new and extremely important consideration in this regard—the proper functioning of the federal system. Deference to the Court and concern for the magnitude of the issues involved require that Congress not regulate state and local labor relations unless it is convinced that some action is necessary, that the states will not take this action, and that it can fashion workable remedies not outweighed by their tangible and intangible costs.

#### IV

##### PROPOSED LEGISLATION

Advocates of public employee bargaining have introduced a wide variety of bills in Congress during the last few years. This diversity reflects disagreement among competing employee groups over the goals of regulation and the best method of achieving them. Each bill falls into one of three categories: the minimum standards approach, the NLRA approach, and the National Public Employment Relations Act (NPERA) approach. The first two of these are straightforward and can be quickly described. The third is more complex, with some extremely important policy changes embodied in seemingly innocuous language. Accordingly it merits more detailed treatment.

##### A. *The Minimum Standards Approach*

The flexibility and experimentation made possible by the federal system have convinced a number of observers that the best federal legislation would be the least—a bill establishing certain minimum guarantees of employee rights but leaving the states free to protect those rights and establish additional ones as they see fit. This approach has received strong support, not surprisingly, from officials of existing state and local government labor relations

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<sup>125</sup> See Brown, *supra* note 121, at 395.

<sup>126</sup> Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, *supra* note 71, at 811.

agencies<sup>127</sup> and some labor relations scholars<sup>128</sup> but has not attracted the more powerful unions or any significant number of legislators.

Whatever political support there is for the minimum standards approach seems almost an accidental by-product of other concerns. Thus the Assembly of Governmental Employees (AGE), which represents state and county civil service employees, has advocated the minimum standards approach primarily to protect the civil service system from the consequences of collective bargaining. A bill entitled the National Public Employee Merit System and Representation Act,<sup>129</sup> drafted by AGE and introduced on its behalf in the 93rd Congress, seems chiefly aimed at requiring the states to adopt and protect the merit system.<sup>130</sup> Although the bill mandates that the states engage in collective bargaining under penalty of loss of all federal funds,<sup>131</sup> it carefully insulates the merit system from the effects of such bargaining.<sup>132</sup>

Congress is unlikely to pass the AGE bill for a number of reasons. First, the bill's primary emphasis on the integrity of the merit system would deprive politicians of the advantages of the spoils system and unions of the advantages of the seniority system. Second, the bill does not respond to the demands for equality and uniformity urged by supporters of public sector bargaining. Since some jurisdictions are likely to extend only the mandatory minimum rights to employees, the strongest supporters of congressional action will not be satisfied. Finally, the bill does not grant public employee unions some of the important rights promised by the other bills, such as the right to strike and the right to insist on compulsory membership or financial contribution provisions.<sup>133</sup> The minimum standards approach has had some influence, how-

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<sup>127</sup> See, e.g., 1972 House Hearings, *supra* note 17, at 403 (statement of Arvid Anderson, Chairman, Office of Collective Bargaining of New York City); AMERICAN ARBITRATION ASSOCIATION, *supra* note 92, at 6-37 (remarks of Robert G. Howlett, Chairman, Mich. Employment Rel. Comm'n); *id.* at 168-75 (remarks of Robert D. Helsby, Chairman, New York State Pub. Employment Rel. Bd.).

<sup>128</sup> See, e.g., Brown, *supra* note 3; Horton, Lewin, & Kuhn, *supra* note 63, at 511; AMERICAN ARBITRATION ASSOCIATION, *supra* note 92, at 53-61 (remarks of Arnold R. Weber, Provost, Carnegie-Mellon Univ.).

<sup>129</sup> H.R. 4293, 93d Cong., 1st Sess. (1973).

<sup>130</sup> See *id.* §§ 2(a), (c), (e), 5(a)(1).

<sup>131</sup> See *id.* § 5(a)(4), (b).

<sup>132</sup> See *id.* §§ 5(a)(1), 8.

<sup>133</sup> The AGE bill is silent on the strike and affirmatively protects the right to refrain from union activities. See *id.* §§ 4, 5(a)(2), 6(a)(3), (b)(2).

ever, in that at least one of the proposed NPERA bills<sup>134</sup> provides exemptions for states with legislation "substantially equivalent" to the NPERA.<sup>135</sup>

### B. *The NLRA Approach*

By far the most simplistic answer to the public employee bargaining dilemma is that offered by Representative Frank Thompson, Jr. In its entirety, it reads: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of section 2 of the National Labor Relations Act (29 U.S.C. 152(2)) is amended by striking out 'or any State or political subdivision thereof.'*"<sup>136</sup> The Thompson bill would subject public employees to the NLRA immediately and without qualification. Support for the bill has for the most part been limited to those private sector unions that are beginning to organize public employees.<sup>137</sup> Scholarly commentary has criticized the bill because it contains no special provisions to deal with the recognized differences between the public and private sectors.<sup>138</sup>

The Thompson bill offers powerful incentives to unions. It would grant them, for example, the right to strike and the right to negotiate for compulsory union membership and dues payments clauses—rights possessed by private employees but usually denied to public employees. Nevertheless, the NLRA approach has some drawbacks for unions, too. Simple incorporation into the NLRA means subjection to the Taft-Hartley<sup>139</sup> and Landrum-Griffin<sup>140</sup>

<sup>134</sup> See notes 151-204 and accompanying text *infra*.

<sup>135</sup> H.R. 8677, 93d Cong., 1st Sess. § 12 (1973).

<sup>136</sup> H.R. 777, 95th Cong., 1st Sess. (1977). Rep. Thompson's bill has previously been identified by different numbers. See H.R. 77, 94th Cong., 1st Sess. (1975); H.R. 9730, 93d Cong., 1st Sess. (1973); H.R. 12532, 92d Cong., 2d Sess. (1972).

<sup>137</sup> See, e.g., 1973-1974 *House Hearings*, *supra* note 17, at 75 (statement of Richard E. Murphy, Service Employees' International Union); *id.* at 205 (statement of Henry Wilson, Assoc. Gen. Counsel, Laborers' International Union). The bill has had steady support from only one union composed primarily of public employees, the American Federation of Teachers. See *id.* at 189 (statement of David Selden, President, Am. Fed'n of Teachers). More recently, the NEA somewhat reluctantly endorsed the bill as the only one likely to pass Congress. See 1975 *House Hearings*, *supra* note 17, at 3, 42-43 (statement of Terry Herndon, Executive Director, NEA).

<sup>138</sup> See, e.g., Brown, *supra* note 3, at 713, 716. Even academic supporters of the NLRA approach have recognized the need for some amendments to reflect the unique aspects of public sector relations. See McCann & Smiley, *supra* note 3, at 544-47.

<sup>139</sup> Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1970 & Supp. V 1975).

<sup>140</sup> Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1970 & Supp. V 1975).

Acts as well—laws that many unions are still fighting many years after passage.<sup>141</sup>

The NEA has recently prepared a somewhat more sophisticated version of the NLRA approach.<sup>142</sup> While following the NLRA pattern closely, the NEA proposal makes some concessions to the unique circumstances of public employment, and to the constitutional problems presented by the *National League of Cities* decision.<sup>143</sup> The NEA proposal differs from Representative Thompson's in four key respects:

(1) The NEA proposal includes government supervisors in the definition of "employee"<sup>144</sup> and would in some circumstances allow these supervisors to be included in a single bargaining unit with nonsupervisors.<sup>145</sup>

(2) It establishes a new type of impasse resolution procedure utilizing "factfinding with recommendations" by the Federal Mediation and Conciliation Service.<sup>146</sup> The recommendations would be advisory unless state law makes them binding.<sup>147</sup>

(3) It imposes two main limitations on public employees' right to strike. First, the states could enact laws after passage of the NEA bill prohibiting public sector strikes; second, a federal district court could enjoin a public sector strike upon a finding that it presented a "clear and present danger to the public health or safety" or that the union failed to utilize the impasse resolution procedures provided in the act.<sup>148</sup>

(4) It allows states to set substantive terms and conditions of public employment by constitution or statute.<sup>149</sup>

Although the importance of these concessions should not be underestimated, the NEA proposal still bears a much closer resemblance to the industrial model which underlies the NLRA than it does to the public sector model upon which state legislation and the NPERA approach are patterned. This will guarantee opposi-

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<sup>141</sup> Thus, drafts of the union-oriented NPERA have excluded the more odious provisions of the amended NLRA while otherwise adhering closely to the original statute. See text accompanying notes 155-204 *infra*.

<sup>142</sup> See NEA PROPOSALS, *supra* note 2, at 9-14.

<sup>143</sup> See notes 105-26 and accompanying text *supra*.

<sup>144</sup> See NEA PROPOSALS, *supra* note 2, § 2(b).

<sup>145</sup> See *id.* § 4. This could only happen in bargaining units of firefighters, educational employees, and public safety officers. See *id.*

<sup>146</sup> *Id.* § 6(b).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* § 7(b).

tion from many public employers, some public employee unions, and virtually all state public sector labor relations officials.

It is difficult to predict the chances for success of the NLRA approach. Perhaps its greatest hope lies in its sponsor and chief proponent. Representative Thompson is chairman of the Special Subcommittee on Labor of the House Committee on Education and Labor—the subcommittee with jurisdiction over public employee bargaining matters—and ranking majority member of the full committee. Despite Representative Thompson's efforts and position, however, his bills have failed repeatedly in previous years.<sup>150</sup>

### C. *The NPERA Approach*

The proposed National Public Employment Relations Act (NPERA),<sup>151</sup> supported by unions composed primarily of public employees,<sup>152</sup> draws its inspiration from the NLRA, but differs from that Act in a number of significant respects. It merits extended analysis for several reasons. First, the differences between the NPERA and the NLRA reflect marked departures from existing federal labor policies. Second, the superficial resemblance between the two Acts might obscure the importance of these differences.<sup>153</sup> Finally, congressional discussion, as evidenced in the

<sup>150</sup> See note 136 *supra*.

<sup>151</sup> Like the Thompson bill, the NPERA has been introduced in successive Congresses since 1970. See [1970-1977] 1 GOV'T EMPL. REL. REP. (BNA) (Reference File) 51:181. A revision including several new provisions strengthening the position of unions was introduced in 1973 as H.R. 8677, 93d Cong., 1st Sess. (1973). H.R. 8677 was supported by a number of important unions composed primarily of public employees. Four of these, the American Federation of State, County and Municipal Employees, the NEA, the International Association of Fire Fighters, and the National Treasury Employees Union, formed a group called the Coalition of American Public Employees (CAPE), which endorsed H.R. 8677. See 1973-1974 House Hearings, *supra* note 17, at 22 (statement of Ralph J. Flynn, Executive Director, CAPE).

In the next Congress, however, this support seemed to disappear. A somewhat weakened NPERA was introduced by Rep. Roybal as H.R. 1488, 94th Cong., 1st Sess. (1975), but CAPE remained silent. Meanwhile, the NEA reluctantly endorsed H.R. 77, 94th Cong., 1st Sess. (1975), the NLRA bill sponsored by Rep. Thompson. See 1975 House Hearings, *supra* note 17, at 42-43 (testimony of Terry Herndon, Executive Director, NEA). This indicated that the NEA still favored separate legislation for public employees but felt it politically expedient to unite behind the NLRA approach. Rep. Roybal reintroduced his bill in 1977 as H.R. 1987, 95th Cong., 1st Sess. (1977).

The following discussion of the NPERA is based on H.R. 8677, since that is the latest widely supported version. Occasional reference will be made in the notes to significant differences in Rep. Roybal's most recent offering, H.R. 1987.

<sup>152</sup> See note 151 *supra*.

<sup>153</sup> Indeed, union proponents of the NPERA frequently emphasize its similarity to the

public hearings on the NPERA, has focused almost exclusively on the *desirability* of federal action, at the expense of consideration of what *form* such action should take.<sup>154</sup>

### 1. *Expanded Definitions*

The NPERA greatly expands two important NLRA terms, and would thereby work major changes in national labor policy. The term "employee," as defined in the NPERA, exempts only the chief executive officer of the employer and elected or appointed policymakers.<sup>155</sup> This would have the effect of covering, and requiring collective bargaining with, several classes of workers exempted from the NLRA, such as supervisors,<sup>156</sup> managerial employees,<sup>157</sup> and confidential employees who assist managerial employees in the field of labor relations.<sup>158</sup> Additionally, the NPERA broadens the scope of collective bargaining by enlarging the NLRA's list of mandatory subjects ("wages, hours, and other terms and conditions of employment"<sup>159</sup>) to read "terms and conditions of employment and other matters of mutual concern relating thereto."<sup>160</sup> The difference may not seem significant at first, but in practice the new language could require public employers to bargain with unions over many matters traditionally resolved by elected or appointed public officials,<sup>161</sup> such as tenure provisions, pension plans, and merit hiring and promotion systems. The Act might even force bargaining on subjects over which private sector employers do not have to negotiate. For example, the NPERA might require bargaining on curriculum decisions in schools, while on an analogous private sector issue such as an industrial employer's choice of product lines, the NLRA does not require bargaining.<sup>162</sup>

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NLRA. *See, e.g., 1973-1974 House Hearings, supra* note 17, at 22, 24, 26 (statement of Ralph J. Flynn, Executive Director, CAPE); *id.* at 46, 59-71 (statement of Jerry Wurf, President, AFSCME); *1972 House Hearings, supra* note 17, at 24, 32-33, 36 (statement of Jerry Wurf, President, AFSCME).

<sup>154</sup> *See 1973-1974 House Hearings, supra* note 17; *1972 House Hearings, supra* note 17.

<sup>155</sup> *See* H.R. 8677, 93d Cong., 1st Sess. § 3(c) (1973).

<sup>156</sup> *See* National Labor Relations Act, 29 U.S.C. § 152(3) (1970).

<sup>157</sup> *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-90 (1974).

<sup>158</sup> *See id.*

<sup>159</sup> 29 U.S.C. § 158(d) (1970).

<sup>160</sup> H.R. 8677, 93d Cong., 1st Sess. § 3(m) (1973). H.R. 1987 follows the NLRA definition with the addition of the phrase "or any question arising thereunder" after "terms and conditions of employment." H.R. 1987, 95th Cong., 1st Sess. § 5(c) (1977).

<sup>161</sup> *See generally* Lieberman, *Impact of Proposed Federal Public Employee Bargaining on State Legislation*, 4 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 133 (1975).

<sup>162</sup> *Compare 1974 Senate Hearings, supra* note 17, at 130-31 (statement of James A. Harris,

## 2. *Rights and Responsibilities*

The NPERA substantially increases union rights at the expense of rights of individual employees and employers, while drastically reducing union responsibilities. For example, in 1947 the Taft-Hartley Act<sup>163</sup> amended the list of protected concerted employee activities to include "the right to refrain from any or all of such activities" except as limited by a valid union security agreement.<sup>164</sup> This provision is conspicuously absent from the NPERA.<sup>165</sup> Additionally, under the NLRA, employers may in most circumstances prohibit access by nonemployee union officials to the employer's property,<sup>166</sup> and may restrict other union activities to nonwork time.<sup>167</sup> The NPERA, in contrast, would guarantee unions access "to areas in which employees work, the right to use the employer's bulletin boards, mailboxes, and other communications media, subject to reasonable regulation, and the right to use the employer's facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this Act."<sup>168</sup> Moreover, under the NLRA, dues checkoff and agency shop provisions are mandatory subjects of bargaining;<sup>169</sup> that is, employers must bargain over them upon union request, but need not agree to a union proposal or make any concession on those issues.<sup>170</sup> Under the NPERA, the employer would be obliged to grant the checkoff to the exclusive representative<sup>171</sup> and to require all nonmember employees in the bargaining unit to pay to the exclusive representative "an amount equal to the dues, fees, and assessments that a member is charged."<sup>172</sup>

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President, NEA) (expressing view that NPERA language would give teachers right to bargain over curriculum content), *with Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1954) (concurring opinion, Stewart, J.) ("Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales" are not mandatory subjects of bargaining).

<sup>163</sup> Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-187 (1970 & Supp. V 1975)).

<sup>164</sup> 29 U.S.C. § 157 (1970).

<sup>165</sup> H.R. 1987, however, retains the NLRA's "right to refrain." H.R. 1987, 95th Cong., 1st Sess. § 3 (1977).

<sup>166</sup> See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

<sup>167</sup> See *Republic Aviation Co. v. NLRB*, 324 U.S. 793, 802-03 (1945).

<sup>168</sup> H.R. 8677, 93d Cong., 1st Sess. § 5(b)(1) (1973). H.R. 1987 does not contain this provision.

<sup>169</sup> See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

<sup>170</sup> See 29 U.S.C. § 158(d) (1970).

<sup>171</sup> See H.R. 8677, 93d Cong., 1st Sess. § 5(b)(2) (1973).

<sup>172</sup> *Id.* § 5(c). This provision would allow public sector unions to collect more money

Still more important is the failure of the NPERA to include the broad range of protections for individual employees contained in the Landrum-Griffin Act.<sup>173</sup> In that Act, Congress sought to protect employees from oppressive, illegal, or discriminatory union action by creating certain legally enforceable rights for union members. Among these were the right to fair and equal treatment and to freedom of speech and assembly,<sup>174</sup> the right to require unions to report on finances<sup>175</sup> and to hold secret ballot elections,<sup>176</sup> and the right to bind union officers and agents to high standards of fiduciary responsibility.<sup>177</sup> Neither these rights nor any of the other remedial provisions of the Landrum-Griffin Act appear in the NPERA. The NPERA also omits several union unfair labor practices added to the NLRA in 1947, such as forcing employers to discriminate against employees in order to encourage or discourage union membership,<sup>178</sup> and imposing excessive or discriminatory initiation fees.<sup>179</sup>

### 3. *Union Security*

The issue of union security, fraught with the tension between two highly prized principles—freedom of association of individual employees and the solidarity of employees against their employers—has long been a controversial issue in labor relations. Federal labor law reflects this tension by permitting the “union shop” and the “agency shop” but prohibiting the “closed shop.”<sup>180</sup> Fed-

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from employees than private sector unions could, for the NLRA does not permit agreements requiring payment of “assessments.” See 29 U.S.C. § 158(b)(1)(A), (2) (1970).

<sup>173</sup> Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1970 & Supp. V 1975).

<sup>174</sup> See *id.* §§ 411-415.

<sup>175</sup> See *id.* §§ 431-441.

<sup>176</sup> See *id.* §§ 481-483.

<sup>177</sup> See *id.* §§ 501-503.

<sup>178</sup> See National Labor Relations Act, 29 U.S.C. § 158(b)(2) (1970).

<sup>179</sup> See *id.* § 158(b)(5). The following types of union conduct, prohibited by the NLRA, are also not mentioned in NPERA: featherbedding (*see id.* § 158(b)(6)); engaging in strikes, threats, or coercion for secondary boycott or jurisdictional dispute objectives (*see id.* § 158(b)(4)); entering into “hot cargo” agreements (*see id.* § 158(e)); and certain picketing for organizational or recognition purposes (*see id.* § 158(b)(7)).

<sup>180</sup> See *id.* § 158(a)(3), (b)(2). The union shop exists where the union and the employer negotiate an agreement requiring union membership within 30 days after employment. In an agency shop, non-union employees are required to pay money to the union in lieu of dues and fees. The closed shop exists where the employer and the union agree that union membership is required before employment begins. See *id.* 29 U.S.C. § 158(f) (1970) allows “prehire” agreements only in the construction industry. See generally Haggard, *A Clarification of the Types of Union Security Agreements Affirmatively Permitted by Federal Statutes*, 5 *RUT.-CAM. L.J.* 418 (1974).

eral law also allows individual states to outlaw any or all of these agreements.<sup>181</sup> Union security agreements are further limited by section 9(e) of the NLRA, which allows employees to rescind the union's authority to negotiate union security agreements,<sup>182</sup> and by the fact that the only condition of "membership" that can be required by lawful agreements is the tendering of "the periodic dues and the initiation fees uniformly required."<sup>183</sup> Thus, the required membership is "whittled down to its financial core,"<sup>184</sup> or to the equivalent of the agency shop.

Public sector union security agreements raise more significant problems than those in the private sector. Although the agency shop is constitutional in the public sector,<sup>185</sup> it raises troublesome first amendment issues.<sup>186</sup> Moreover, the ultimate penalty under such agreements—dismissal of otherwise competent employees for failure to support a union—blatantly contravenes the merit principle followed in most state public employment systems.<sup>187</sup> These factors, together with the public's general antipathy toward union security agreements,<sup>188</sup> explain why relatively few states allow the union shop or agency shop in the public sector.<sup>189</sup>

Given this background, the NPERA provisions dealing with

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<sup>181</sup> See 29 U.S.C. § 164(b) (1970).

<sup>182</sup> See *id.* § 159(e).

<sup>183</sup> *Id.* § 158(a)(3)(ii)(B).

<sup>184</sup> *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

<sup>185</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

<sup>186</sup> See *id.* at 244-64 (concurring opinion, Powell, J.).

<sup>187</sup> See *Helburn & Bennett, supra* note 64, at 622-23. Although union security agreements are usually enforced by dismissal or the threat thereof, these are not the only means available. State law permitting, public sector unions could negotiate provisions for dues deductions by the employer without authorization by the affected employees. Alternatively, the contract could simply give the union a cause of action against bargaining unit employees for dues or agency shop fees. Such provisions are extremely rare, however, since most unions prefer to rely upon the threat of dismissal.

<sup>188</sup> According to a recent Gallup poll, 63% oppose the union shop and only 31% favor it. This differential has increased markedly since 1966, when 49% were opposed and 42% in favor. See 95 LAB. REL. REP. (BNA) 78-79 (1977). Another poll reached similar results, 58% believing that the law should be changed to prohibit compulsory membership or dues payment requirements, and only 30% opposing such a change. OPINION RESEARCH CORP., PUBLIC ATTITUDES TOWARD RIGHT TO WORK LAWS 7 (1976). Public opposition to compulsory unionism in the public sector is even more pronounced. In February of 1977, for example, 69% of the persons questioned in one poll opposed compulsory union support rules for public employees, while only 17% favored such requirements. THE ROPER ORGANIZATION, INC., PUBLIC ATTITUDES TOWARD RIGHT TO WORK . . . , Question 24 (1977).

<sup>189</sup> As of 1976, only 15 states permitted union security agreements to apply to any of their public employees (and several of these permitted them only for certain types of public employees), while 32 states prohibited such agreements for at least some classes of public employees. See [1976] GOV'T EMP. REL. REP. (BNA) No. 655, at D-1 to D-2.

union security are surprising. The NPERA proposes a radical change that would limit the rights of individual public employees far more than the NLRA does in the private sector. Under the NPERA, states could not prohibit compulsory unionism and employees could not rescind the union's authority in this regard. The NPERA would *require* the agency shop in all contracts negotiated by the exclusive representative<sup>190</sup> and would attempt to legalize the true union shop by authorizing agreements requiring employees to "become and remain a member of the recognized organization."<sup>191</sup>

#### 4. *Establishment of Representative Status*

Under the NLRA, the secret ballot election is the key element in the determination of a union's right to represent a group of employees. A union claiming to represent a majority of the employees in an appropriate unit may request recognition from an employer, but the employer may refuse the request and force the union to prove its majority status in a secret ballot election.<sup>192</sup> Moreover, even if the employer chooses to grant the union's request for recognition, dissenting employees may obtain a secret ballot election to test the union's representative status.<sup>193</sup> Finally, a union can be certified by the National Labor Relations Board only after winning a secret ballot election.<sup>194</sup>

The NPERA provides several ways for public sector unions to obtain recognition and certification without providing employees an opportunity to vote. An employer faced with a union demand for recognition supported by "credible evidence" must recognize the union absent current recognition of another union, an election within the past year, or a "good faith doubt" about the union's majority status in an appropriate unit.<sup>195</sup> Once recognized, the union may request and must receive certification by the Commission set up to administer the NPERA without an election un-

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<sup>190</sup> See H.R. 8677, 93d Cong., 1st Sess. §§ 5(c), 10(a)(3) (1973).

<sup>191</sup> *Id.* §§ 5(d), 10(a)(3). Subsections 5(c) and (d) clearly imply that more may be required of public employees than mere "financial core membership," but the issue is clouded by § 10(a)(3)(ii), which prohibits employer discrimination against employees for nonmembership if membership was denied or terminated for reasons other than failure to tender dues, fees, and assessments to the union.

<sup>192</sup> *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

<sup>193</sup> See 29 U.S.C. § 159(c)(1) (1970).

<sup>194</sup> *Id.* § 159(c).

<sup>195</sup> H.R. 8677, 93d Cong., 1st Sess. § 6(b) (1973). H.R. 1987 follows the NLRA pattern and protects the right to an election. H.R. 1987, 95th Cong., 1st Sess. § 6 (1977).

less another *employee organization* objects.<sup>196</sup> Non-union employees are given no absolute right to an election to determine the union's status prior to recognition, although there may be an election after the fact if the Commission deems it necessary.<sup>197</sup> The Commission may certify the union without an election even where the employer has denied the employees' request for an election or where dissenting employees have filed a petition with the Commission.<sup>198</sup> Decisions of the Commission in favor of the union's position—unlike those opposed—“shall not be subject to judicial review or other collateral attack.”<sup>199</sup>

### 5. *Dispute Resolution*

In the private sector, disputes over the terms or interpretation of a contract are resolved by resort to economic weapons, such as strikes, unless the parties agree to turn unresolved issues over to an arbitrator for decision. Because public sector strikes are generally prohibited, a number of state public sector bargaining laws mandate arbitration of disputes over contract terms (“interest arbitration”) or over the interpretation or application of existing terms (“grievance arbitration”).<sup>200</sup> Employers and unions in both sectors, however, have been suspicious of, if not completely opposed to, mandatory arbitration. This opposition rests upon the belief that the collective bargaining system can function effectively only when the parties themselves bear complete responsibility for the results of collective bargaining. Public employers object to compulsory arbitration on the additional ground that it removes matters of public policy from the hands of duly elected or appointed representatives of the people and allows arbitrators not responsible to the public to make decisions binding upon the public.<sup>201</sup>

The NPERA provisions dealing with arbitration favor public sector unions. Most significantly, they contravene the nearly uniform policy of federal and state governments against public

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<sup>196</sup> H.R. 8677, 93d Cong., 1st Sess. § 6(d), (e)(iii) (1973).

<sup>197</sup> See *id.* § 6(d).

<sup>198</sup> *Id.* § 6(d), (e)(ii).

<sup>199</sup> *Id.* § 6(g).

<sup>200</sup> On the use of arbitration in the public sector, see Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971); Note, *The Strike and Its Alternatives: The Public Employment Experience*, 63 KY. L.J. 430 (1975); Note, *The Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549.

<sup>201</sup> On the objections to compulsory arbitration, see Loewenberg, *The Effect of Compulsory Arbitration on Collective Negotiations*, 1 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 177, 177-79 (1972).

employee strikes and legalize such strikes over contract term disputes.<sup>202</sup> The NPERA also mandates arbitration of disputes over the interpretation or application of agreements,<sup>203</sup> and gives the union an unusual option regarding disputes over the terms themselves. If the mediation efforts are unsuccessful, either party may have the dispute submitted to fact finding with recommendations; such recommendations are merely advisory, however, unless the union—and only the union—decides beforehand that it wants them to be binding.<sup>204</sup> The public employer does not have this option.

### 6. Summary

The foregoing discussion indicates that the NPERA is a grossly one-sided bill. Federal legislation should not grant public employee unions much more power than their private sector counterparts, while simultaneously imposing upon them far fewer responsibilities. As presently written, the NPERA would create a serious imbalance in public sector labor relations that would work to the detriment of society. Congress should pass it, if at all, only after root-and-branch amendment to make the bill more representative of current views on labor policy as embodied in the NLRA, the Landrum-Griffin Act, and existing state and federal public sector legislation.

## CONCLUSION

The debate over federal legislation on public sector collective bargaining continues unabated. The issues raised are not frivolous, nor are they smokescreens set up by devious employers to maintain the subjugation of their employees. To the contrary, many of the issues cast doubt upon the essential equity of the proposals in Congress and others raise fundamental questions about the operation of government in a free society.

Given the magnitude of these problems, the public has every right to demand convincing evidence that public sector collective bargaining contributes to the common good, that the existing state laws and court decisions on the subject are inadequate, that federal

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<sup>202</sup> See H.R. 8677, 93d Cong., 1st Sess. § 9(a) (1973). A court may enjoin a strike if it is in violation of the binding recommendations of a fact-finder (*see id.* § 7(c)(i)); in violation of a valid collective bargaining agreement (*see id.* § 9(c)); if the court finds that the strike "poses a clear and present danger to the public health or safety" (*see id.* § 9(b)(i)); or if the union fails to utilize the specified impasse resolution procedure (*see id.* § 9(b)(ii)).

<sup>203</sup> *See id.* § 8(a), (b).

<sup>204</sup> *Id.* § 7(b).

legislation is essential, and that the proposed legislation would strike a fair balance among competing concerns in labor relations policy. To date, proponents of federal action have been woefully remiss in supplying such evidence.

Notwithstanding widespread experience with public sector collective bargaining, there has been no indication that it benefits the public at large. It does not eliminate any demonstrated inequity between the working conditions of public and private employees. It does not reduce the incidence of strikes, and may, in fact, do the opposite. It is not essential to protect public employees from callous and indifferent employers. Most important, public sector bargaining may create more problems than it will remedy by increasing the cost and reducing the quality of public services, by interfering with the merit system, and by threatening the delicate balance of the political order in our pluralistic society.

Even assuming that the benefits of public sector bargaining offset its drawbacks, its proponents have not shown the need for federal legislation. There is no evidence that state and local governments currently violate rights of their employees or that they are incapable of impartially administering their own labor relations statutes. Bargaining advocates have also failed to demonstrate any clear advantage to uniformity among the states on labor relations questions. On the contrary, there is good reason to believe that an imposed uniformity would stifle the creativity and flexibility offered by a decentralized system.

The Constitution also provides a potential roadblock to the enactment of federal public sector bargaining legislation. Although it might be possible to draft a bill without violating the Constitution, the spirit of that document as interpreted by the Supreme Court in *National League of Cities v. Usery* would suffer a major blow if the federal government were to proclaim the method of handling labor relations in every fire department, school district, and city hall in the land.

Finally, each of the three proposals for federal legislation is at best inadequate, at worst pernicious. The least offensive of the three, the minimum standards approach, would force all local governments into the adversarial relationship of collective bargaining, exclusive representation, and mandatory grievance arbitration, and would create a federal agency controlling local government actions by litigation over representation issues, bargaining obligations, and unfair labor practices. The other approaches, far more likely to be adopted, would restrict local governments to an even greater ex-

tent. The NLRA approach would impose the industrial collective bargaining model on a vastly different enterprise. At its extreme, it would authorize strikes by police and firemen with no attempt to protect the public from resulting problems. The NPERA approach, while making some concessions to the unique aspects of governmental employment, would more than offset those concessions by distorting the balance reached in the NLRA on such issues as union security, union responsibilities, and scope of bargaining. The balance struck would favor public employee unions not at the expense of the employer, but at the expense of the individual employee and the taxpaying public.

An analysis of the current arguments for federal legislation reinforces the conclusion reached several years ago by Professors Wellington and Winter: the subject, at best, should be "a matter of very low priority on the federal agenda."<sup>205</sup> An examination of the proposals presently under consideration leads to an even harsher conclusion: until proponents of federal legislation can draft a bill with consequences less inimical to the common good, the problem ought to be left to local regulation. State and local programs may not provide a panacea for public sector labor problems, but they more accurately reflect local concerns. More importantly, errors of state and local governments are of limited impact and capable of correction without a continuing national debate.

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<sup>205</sup> Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, *supra* note 71, at 811.