

FEDERAL LEGISLATION FOR PUBLIC SECTOR COLLECTIVE BARGAINING: A MINIMUM STANDARDS APPROACH

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I. INTRODUCTION

In the field of labor relations, the decade of the seventies will almost certainly be hailed as the time public sector unionism came of age. Unprecedented growth of public employees, from 10 to 15 million in the last decade,¹ has been accompanied by a 600 percent

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1. *Hearings on H.R. 12532, H.R. 7684, and H.R. 9324 Before the Special Sub-*

growth rate of public employee union membership over that of private union membership.² Presently, of the over 10 million persons employed by state and local governments, about 28 percent are covered by union agreements and over 2.6 million belong to unions.³

Numerous reasons exist for this organizational revolution and although historians can trace its origin to several dominant factors such as traditionally low government pay, paternalistic personnel practices, and collective bargaining legislation, the present reality suggests that it has become institutionalized and self-sustaining in its own right.⁴ Individual public employees have come to believe that they are not fully participating in the benefits of society. They have found individual petition to their government employer too often ineffective, and so, these individuals, like their private sector counterparts, have banded together to form a power base from which they seek to gain as a group that which they could not gain as individuals. The depth of their resolve is reflected by their increasing militancy.

Authority for dealing with this rising militancy of public employees and increasing public concern over conflicts affecting labor relations in the public sector has been vested over the years with the states.⁵ And, as expected, the states have responded in diverse ways, with approximately 36 states having enacted some form of affirmative bargaining legislation covering public employees.⁶ This statistic, however, tends to overstate the degree of response of the states in that only 20 have enacted reasonably comprehensive stat-

committee on Education and Labor, 92d Cong., 2d Sess. 70, 71 (1972) [hereinafter cited as *Hearings*].

2. Public sector union membership has grown by 88 percent, while private industry membership increased by 12 percent. Ross, *Those Newly Militant Government Workers*, *FORTUNE*, Aug. 1968, at 104.

3. *Hearings*, *supra* note 1, at 71.

4. See, e.g., Weisenfeld, *Public Employees Are Still Second Class Citizens*, 20 LAB. L. J. 138 (1969).

5. Public employers are exempt from the provisions of the National Labor Relations Act. 29 U.S.C. § 152(2) (1964).

6. For a summary of state labor laws, see BNA's GOV'T EMPLOYEE REL. REP. RF-63 51:501-521 (1973) [hereinafter cited as GERR]; and see, Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1, 3-4 & n. 18 (1973); and see *Hearings*, *supra* note 1, at 132-34.

utes.⁷ The remaining legislation is of the piecemeal, gap-plugging variety covering special interest groups such as teachers and firemen and passed in direct response to the political pressure of these groups. Interestingly, the remaining states without legislation are not without public sector collective bargaining. Though the state deliberative bodies with grave solemnity continue to debate the propriety of government bargaining, aggrieved public employees have taken their case to the courts and have been accorded recognition of an increasing number of rights. These rights include the right to form unions, to be free from employer interference with those rights, and to have enforced those labor agreements to which a public employer has entered even absent statutory authorization.⁸ Thus, extra-legal, de facto bargaining arrangements exist and are on the increase. It is this development in public sector labor relations that presents the most disturbing challenge to the public interest. Unregulated public sector labor relations inherently becomes a play of power politics with the stronger party imposing its terms on the employment relationship without statutory guidance or limitation. The attempted accommodations of conflicting interests too easily present the opportunity for compromised employer or employee rights with obvious and adverse consequences visited upon the public interest through inconsistent and perhaps improper state or local personnel policies or distortion of public budget allocations.⁹

Explanation for the different approaches and lack of approaches by the states is readily found in the nature of the public employer. The proposition that government is not "just another industry"¹⁰ avails itself inevitably of lively debate as opponents of public employee unionism point out the differences between private and public employers whereas proponents emphasize the similarities of the employees' needs in both sectors of the economy.

With controversy and concern growing over the degree of the

7. See Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57, 63-78 (1973).

8. *Id.* at 78-82.

9. See H. WELLINGTON & R. WINTER, JR., *THE UNIONS AND THE CITIES* 26 (1971); and Wellington & Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

10. See generally SORRY . . . NO GOVERNMENT TODAY, UNIONS v. CITY HALL (R. Walsh ed. 1969).

states' involvement in the labor relations of public employees, and with Congressional hearings on national legislation giving the controversy a national dimension, the issue has certainly become ripe for debate as to whether there is a present need for federal intervention into the area.

Past experience with minimum wage laws, occupational safety and health laws, unemployment compensation, civil rights legislation, and private sector labor relations clearly illustrate that when the states fail to meet a public need, the federal government will move to fill the vacuum.¹¹ Therefore, it is the objective of this article to examine the public need and determine whether or not the states have defaulted in any responsibility to regulate the labor relations needs of public employers and employees, and to explore the feasibility and desirability of federal legislation.

Analysis will focus on the difficulties—conceptual and legal—of national legislation, the minimum essentials of effective legislation, state labor laws, and emerging patterns which upon examination should suggest whether the states have defaulted. Finally, federal legislative alternatives will be discussed and a proposal for national minimum standards legislation will be offered.

II. PRELIMINARY CONSIDERATIONS TO FEDERAL INTERVENTION

A. *Conceptual Difficulties: Issues of Debate*

1. *Private versus Public: A Valid Distinction?*

Is government just another industry? Debate continues whether sufficient differences exist between private and public *employers* to justify disparate treatment of public *employees* in the labor-management relationship. Concern has been voiced that if the mechanisms of industrial collective bargaining, including the strike weapon, were to be transplanted into the public sector it would provide public employee unions a disproportionately large capacity for power. This economic power when combined with its inherent political power could adversely affect the normal political decision-making process by permitting unions to divert public funds away

11. For an example of federal involvement due to state inaction in unemployment compensation, see Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 185 (1955).

from public services into employee benefits.¹² More precisely, it is feared that collective bargaining could transfer public decision-making authority away from the legislative bodies to special interest groups and in large measure affect the legitimacy of government itself. To judge the validity of this argument it is appropriate to note the characteristics that distinguish public from private employment.

The most obvious differences between the industrial and the public sector are the inherent limitations placed on the government employer. Constitutional, legislative, financial, political, and market constraints all affect the extent to which an employer may act in a bargaining relationship.¹³ For example, legislation may limit bargainable subjects for civil service employees and financial realities may be such that the public treasury will not support a union demand. Yet the evidence mounts that this has not proved a bar to bargaining over an increasing number of subjects¹⁴ nor dissuaded employees from seeking redistribution of allocated funds.¹⁵

Natural market differences, encompassing the "service motivation" of government in contrast to the "profit motive" operative in the private sector, appear to be a valid distinction. The public employer due to political, legislative and financial constraints, is less able or willing to "pass on" higher costs to its "consumers" and since it cannot go out of business it likewise is theoretically less responsive to economic pressures by the union. However, notwithstanding the fact that government is unique in having a monopoly on services, in lacking a reflexive nature vis-a-vis market conditions, and in being service-oriented, public employee unions maintain that public employees may well be victims rather than beneficiaries of such an economic system. This further demonstrates the need for legislation.

12. See note 9 *supra*.

13. *Id.*, and see Rhemus, *Constraints on Local Governments in Employee Bargaining*, 67 MICH. L. REV. 919 (1969) [hereinafter cited as Rhemus].

14. See Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973) [hereinafter cited as Edwards].

15. An overt example was reported in a Michigan public school district where plans for an expanded vocational educational program were abandoned to meet salary demands of teachers who were threatening to strike. Rhemus, *supra* note 13, at 919-20.

Additionally, competitive pressures for federal legislation (present in prompting passage of the National Labor Relations Act in the private sector to minimize the competitive advantage that states without bargaining legislation were able to offer their industries) is arguably absent in the case of public employees. Government services are local and intrastate in nature and since, for example, sanitation services in Detroit cannot be transported to Chicago, there are really no competitive pressures to which a government employer needs to respond.

Though the thesis that a non-competitive market does not disadvantage a unionized public employer does have a compelling ring of truth, it is somewhat misleading. A public employee labor dispute has an undeniable impact on the local economy, and with one of every six employees being a public employee, a clear impact on the national economy can be statistically substantiated.¹⁶ Few would argue that a disruption of municipal services in San Francisco would in any way have less of an effect on commerce than would a disruption of services by employees of many private employers presently found to be "affecting" commerce under the National Labor Relations Act.¹⁷

Again, one cannot help but notice the different focus of the arguments, with those disfavoring legislation emphasizing the nature of the public employer and those favoring legislation emphasizing the needs of the employees. On that issue it has been suggested that "... difficulties in developing viable systems of labor relations . . . stem from an almost slavish adherence to the notion that the public and private sectors cannot be treated alike."¹⁸ Resolution of the issue will come more quickly, in the author's opinion, if the question is approached from the perspective of what best serves the public interest.

16. For a detailed treatment of the economic consequences of strikes on strikers and on the community, see Thiebolt & Cowin, *Welfare and Strikes, The Use of Public Funds to Support Strikers*, in LABOR RELATIONS AND PUBLIC POLICY SERIES, Report No. 6, Wharton School of Finance and Commerce (1972). Additionally, state and local government expenditures for goods and services are big business, accounting for 12.4 percent of the GNP in 1970. Thus any labor disruptions have obvious effects on commerce. *Hearings, supra* note 1, at 34.

17. 29 U.S.C. § 152(7)(1964).

18. Edwards, *supra* note 14, at 886-87.

2. *Is Federal Legislation Premature Due to Lack of State Experience?*

A recurring argument against federal legislation is the relative lack of significant experience at all levels of government in public sector labor relations. Former Secretary of Labor Hodgson, in Congressional testimony on the question of federal legislation, stated:

This lack of experience makes it impossible to adequately evaluate the efficiency and effort of various statutory provisions upon the governmental unit, public employees, and public interest.¹⁹

The argument continues that states have a myriad of political subdivisions with varying personnel practices, legislative and political structures, and fiscal arrangements that make them resistant to any quick solutions or uniform legislation. Moreover, special occupational categories such as policemen, firefighters, and teachers may need special treatment which can best be accommodated by thorough, if not lengthy local decision-making processes.

A corollary argument is that since an urgency does not exist, such as existed in 1935 prior to passage of the Wagner Act, it would be ill-advised to "stunt" the continued rich legislative experimentation presently taking place in public labor-management relations by passing federal legislation.²⁰

Responses to the above arguments include the claim that employees' basic rights to freedom of choice and stable collective bargaining relations ought not be compromised by contentions of prematurity of experience. In fact, if experience is to be the guide, a moment's reflection clearly indicates that continued delay of state action, whether due to governmental structure or lack of political pressure to obtain special legislation, has resulted in national employee safety laws, unemployment insurance and civil rights legislation. Additionally, proponents argue, an improper assumption is made that meaningful labor-management bargaining experience can be built up absent protections of important employee rights such as freedom from union or employer coercion in exercising free choice. Proponents of legislation also take issue with the contention that urgency similar to that preceding passage of the Wagner Act is not present, arguing instead that in both situations legisla-

19. *Hearings, supra* note 1, at 281.

20. *Id.* at 282.

tion is and was urgently needed to provide a balancing mechanism to protect labor from the employer's superior bargaining position.

The debate as to whether the experience under state regulation is such as to suggest that no useful model has yet emerged and that federal intervention is premature may soon become academic due to a flurry of judicial and statutory developments discussed below.

3. *Federalism: Diversity versus Uniformity*

The appropriate relationship between federal and state governments is a matter of continuing debate, and the arguments against federal legislation pick up on its theme that public employee labor relations is a matter best left to the control of the states. The thesis is that even if model legislation could be fashioned from the states' experience in public sector labor-management relations it would be inappropriate to devise national uniform legislation and in a blanket-like fashion impose it on the states. This, it is argued, would strike a fatal blow to the basic tenets of federalism which guarantees needed diversity and experimentation in reaching solutions to very different and complex problems in state and local government. Again the issue arises whether legislation would or should interfere with the intricate balances of state and local government structures.

Those who oppose waiting for the states' further "experimentation" raise the question how long the period of gestation is to be when important employee rights are being sacrificed in the interim. Although debate may remain on diverse and controversial approaches used on some issues such as impasse resolution and the propriety of interest arbitration and the right to strike, general principles of public sector labor-management relations have evolved to a point where the evidence is in on the need for elections, employee free choice, and prohibited practices. State legislation has existed for fourteen years, and one must question the bona fides of the diversity-experimentation argument.

The depiction of federal legislation as bringing bland uniformity and non-innovative collective bargaining practices and procedures likewise appears tenuous. The National Labor Relations Act illustrates that fear of uniformity is not based on fact. Divergent practices have developed in particular industries such as trucking,

construction, and the garment industry. Negotiation strategies, structures and subject matter have likewise been as diverse as the parties involved and there is no reason to believe that certain public sector occupational groups such as teachers and firefighters would not also be accorded treatment which would distinguish and recognize the unique aspects of the occupations on questions of appropriate units and bargaining structures. Federal legislation would have the further benefit of providing its protective and right-recognizing powers to all public employees rather than only those possessing sufficient lobbying strength.

The conceptual difficulties advanced by those disfavoring federal legislation appear on balance to be unconvincing, although that is not necessarily to say that proponents of legislation effectively make their case. Certain deficiencies do appear in the arguments relating to lack of experience, need for diversity-experimentation, and the differences inherent in public employers. Yet there are important concepts of sovereignty and unique characteristics of public employers that may necessitate special statutory recognition. Therefore, wholesale transplantation of industrial relations concepts into the public sector could well be an error. The better approach lies with accommodating those competing interests while still providing basic protections to public employees such as "minimum standards" legislation might provide.

B. Legal Difficulties

1. Sovereignty

The concept of sovereignty is a loosely-defined doctrine used in a variety of situations for a variety of purposes. Its basic relevance to the debate of federal public sector collective bargaining legislation is that state sovereignty ought to be insulated from federal intervention and that state or local legislative bodies as co-equal branches of their governments cannot and ought not bargain on matters over which they have been constitutionally entrusted with responsibility, that is, the general welfare of its citizens, including their employees. In those states without enabling legislation, union opponents maintain that the state is without implied authority to negotiate and to do so would constitute an illegal delegation of pow-

ers.²¹ Even in states with statutory schemes, the authority issue may again arise over the question of delegation.

In such states, for example, if impasse occurs, may its resolution be delegated to a third party?²² Furthermore, may the doctrine of exclusive recognition legally preclude government employees or petitioning citizens from presenting their views and grievances on bargainable subjects to the governing body?²³ The legal difficulties of the delegation argument are of fading importance as the courts continue to uphold the propriety and legality of impasse resolution procedures, binding arbitration in statutory states, and implied authority in non-statutory states.²⁴

2. Constitutional Considerations

Even in non-statutory states, the issue of public sector collective bargaining rights persists and bargaining often flourishes in de facto arrangements. This is due in part to the well established constitutional right to free association which includes the right to form and join unions.²⁵ The Seventh Circuit Court of Appeals summed up the proposition as follows:

There is no question that the right . . . to associate for the purpose of collective bargaining is a right protected by the First and Fourteenth Amendments to the Constitution. . . . Nor can it be doubted

21. Cases which support this proposition are *Mugford v. Mayor & City Council*, 185 Md. 266, 44 A.2d 745 (1945); *Communications Workers v. Arizona Board of Regents*, 17 Ariz. App. 398, 498 P.2d 472 (1972). Also see Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authority*, 54 IOWA L. REV. 539 (1969) [hereinafter cited as Dole].

22. See McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972).

23. The constitutional and non-constitutional implications of exclusivity are discussed in Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004 (1970).

24. See Dole, *supra* note 24; and e.g., *Gary Teachers Local 4 v. School City of Gary*, 284 N.E.2d 108 (Ind. App. 1972). Also a collection of state attorneys general opinions in many states indicates approval of the implied right to bargain. Cited in D. WOLLETT and R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 1:17 n.54 (1974).

25. *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilen-dis*, 398 F.2d 287 (7th Cir. 1968); *Melton v. Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971); *Atkins v. Charlotte*, 296 F. Supp. 1068 (W.D. N.C. 1969). Additionally, the Supreme Court while upholding the right of states to prohibit strikes also indirectly upheld the constitutional right of public employees to form and join unions. *United Fed. Postal Clerks v. Blount*, 404 U.S. 402, *aff'g mem.* 325 F. Supp. 879 (D. D.C. 1970).

that actions under color of law which infringe upon this fundamental right may be properly enjoined by a federal court.²⁶

The courts have not, however, recognized any constitutional right of employees nor duty of employers to bargain, though case law is developing which suggests that the right to associate may be empty and meaningless without a corresponding grant of recognition from the public employer.²⁷ The law then in its present state does not compel a public employer to bargain, but under concepts of implied statutory authority it may negotiate even absent enabling legislation, though that matter is still litigated.²⁸ The point to be made here is that with or without legislation, public employers are bargaining with some of their employees which raises an additional constitutional question of whether those employees who are not accorded the right to bargain are being denied equal protection of the law under the Fourteenth Amendment.

The issue of denial of equal protection is raised by those seeking to require the government to pass bargaining legislation. The argument is that when a government (state or federal) establishes a scheme of private sector bargaining, but none for the public sector, it is a denial of equal protection. The correlative but narrower issue is whether a state or local government can select different categories of public employees and provide bargaining rights for some but not others. Years of traditional distinction between private and public employment have resulted in a disparity in statutory benefits and protections, but courts have overwhelmingly upheld the distinction.²⁹ Also, courts have generally upheld a government's right to accord different benefits and protections to different categories of public employees.³⁰ The Fifth Circuit Court of Appeals

26. *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071, 2072 (7th Cir. 1969); *accord*, *Hanover Twp. Fed. Teachers v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972); *Beauboeuf v. Delgado College*, 428 F.2d 470 (5th Cir. 1970).

27. *Richmond Educ. Ass'n v. Crockford*, 55 F.R.D. 362 (E.D. Va. 1972); *cf. Williams v. Rhodes*, 393 U.S. 23, 41 (1968); *NAACP v. Button*, 371 U.S. 415 (1963).

28. For a discussion of this issue, see Brown, *supra* note 7, at 81-82.

29. *United Fed. Postal Clerks v. Blount*, 404 U.S. at 882-83, reaffirmed the principle that the Equal Protection Clause does not forbid discrimination if any state of facts reasonably may be construed to justify it. *See also McGowan v. Maryland*, 366 U.S. 420 (1961); and *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

30. *Beauboeuf v. Delgado College*, 303 F. Supp. 861, *aff'd in part* 428 F.2d 470 (5th Cir. 1970).

had the issue presented to it whether a city could negotiate with some groups of public employees, but not teachers.³¹ The court found that teachers had been legislatively classified differently from other public employees in many ways and it was not unreasonable nor unconstitutional to exclude teachers from a public employees' labor relations act.³²

The court added that "[i]t would appear that equal latitude may be exercised by executive officials in determining whether they should bargain collectively with school teachers as well as with various other classes of public employees."³³

Under traditional equal protection analysis, a legislative classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest.³⁴ The "strict scrutiny" constitutional analysis, whereby a government may interfere with fundamental rights only upon a showing of a compelling state interest, would appear inapplicable to the question of legislation covering only private versus public employment due to the fact that courts have found there is no fundamental right to bargain.³⁵ In the *Beauboeuf* case, discussed above, which examined the right of government to negotiate with selected categories of employees, the court applied the "rational relationship" standard in sustaining the constitutionality of the statute and that would appear to be the standard that will be used on this question for the foreseeable future. Therefore, it can safely be predicted that the absence of federal public sector labor legislation will continue to remain unaffected by claims of constitutional deficiency.

3. Constitutional Basis of Federal Legislation

Paramount to any discussion as to the propriety of federal legislation is a decision on its legality. Assuming *arguendo* that such

31. *Id.*; and see *Minneapolis Fed. Teachers Local 59 v. Obermeyer*, 275 Minn. 347, 147 N.W.2d 358 (1966).

32. 303 F. Supp. at 866.

33. *Id.*

34. 16A C.J.S. *Constitutional Law* § 505(b) (1956).

35. See, e.g., *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071 (7th Cir. 1969); and, for a comprehensive discussion of developments under the Equal Protection Clause, see Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071 (1974).

legislation is proper, the question remains whether it is constitutionally permissible. The conceptual difficulties presented by concepts of federalism and sovereignty, wherein it is argued that state and local governments should retain control over matters relating to its employee relations, are of fading import. The federal government has often rejected the position that these matters are of only local concern and without effect on interstate commerce and has passed far-reaching legislation under its authority to regulate commerce.³⁶

The evolution of judicial interpretation of the commerce clause has been one of steady expansion as applied both to private and public employment. In the private sector the Supreme Court has ruled that federal regulation of labor relations is a proper constitutional exercise of congressional power under the commerce clause.³⁷ The courts have thereafter consistently held that matters which have the potential of obstructing the interstate flow of goods, even though involving an employer engaged solely in intrastate activities, are subject to federal regulation.³⁸

An increasing number of cases indicate that federal regulation of public sector employment relations is likewise constitutionally permissible under the commerce clause. In 1968, the United States Supreme Court upheld congressional extension of the Fair Labor Standards Act to certain classes of public employees.³⁹ The Court found that "[s]trikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent,

36. U.S. CONST. art. I, § 8, cl.3.

37. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court stated that

stoppage of operations by industrial strife would have a most serious effect upon interstate commerce . . . Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.

Id. at 41-42.

38. *Perez v. United States*, 402 U.S. 146 (1971); *NLRB v. Reliance Fuel*, 371 U.S. 224 (1963); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941). The United States Supreme Court noted that, "Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish Alliance v. NLRB*, 322 U.S. 643, 647-48 (1944).

39. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

obviously interrupt and burden this flow of goods across state lines."⁴⁰

In 1971 President Nixon issued Executive Order 11615 ordering stabilization of wages, salaries, prices and rents.⁴¹ No one would deny the far reaching effect that such an order had on the internal employment relations of state and local governments, yet the courts have upheld the authority of Congress to pass the legislation which enabled the President to act.⁴² And in 1972, Congress passed the Equal Employment Opportunity Act which extended the coverage of Title VII of the Civil Rights Act of 1964 to state and local government employers.⁴³

Clearly, interstate commerce is substantially affected by government employers, both in terms of purchasing power and in the potential impact on the economy caused by labor disputes. As to the former, testimony adduced at Congressional hearings on federal labor legislation stated that interstate purchases made for all state and local governments amounted to an estimated \$121 billion in 1970, or 92 percent of total state and local government expenditures, and accounted for over 12.4 percent of our national GNP.⁴⁴

An additional constitutional consideration involves sovereignty. The Supreme Court in *Maryland v. Wirtz* rejected the claim that the federal legislation improperly infringed upon the sovereignty of public employers. The Court stated: "If a state is engaging in economic activities that are validly regulated by the Federal government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."⁴⁵ The Court

40. *Id.* at 195.

41. 36 Fed. Reg. 15727 (1971); 2 U.S. Code Cong. & Adm. News 2575 (1971), promulgated pursuant to 12 U.S.C. § 1904 (1969).

42. The United States Temporary Emergency Court of Appeals upheld the constitutionality of the Economic Stabilization Act of 1970 in *United States v. Ohio*, 487 F.2d 936 (1973). See also *California Teachers Ass'n v. Newport Mesa Unified Sch. Dist.*, 333 F. Supp. 436 (C.D. Cal. 1971).

43. 42 U.S.C. § 2000e (1965), as amended. This Act sets forth minimal standards under which a public employer must deal with its employees.

44. *Hearings, supra* note 1, at 34.

45. 392 U.S. at 197. The Court added: "It is clear that the Federal Government, when acting within a delegated power may override countervailing state interest whether these be described as 'governmental' or 'proprietary' in character." *Id.* at 195. See also *Parden v. Terminal R.R.*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 1975 (1936). In 1973, the Supreme Court reaffirmed the power of the Federal government to regulate the employee rela-

in commenting on the permissibility of such regulation may have signaled the future course of federal legislation on public sector labor relations: "It is therefore clear that a 'rational basis' exists for congressional action *prescribing minimum labor standards . . .*"⁴⁶ It is now beyond question that such "minimum standards" legislation would be constitutional. In the future, opponents of federal intervention must, of necessity, concentrate their arguments on the wisdom rather than the constitutional permissibility of such legislation.

III. FEDERAL LEGISLATION: A PLAN WHOSE TIME HAS COME?

Many commentators have predicted that federal legislation is inevitable and that its passage is only a question of time and strife.⁴⁷ If this thesis has any realistic viability, then present decision-makers might responsibly wish to minimize the strife and shift the focus of at least a portion of their attention from the question of whether there should be legislation, to what form the legislation should take. In undertaking this task it is important to examine the legislative accomplishments of the states and to determine whether essential minimum standards of bargaining legislation are identifiable and are being provided or alternatively whether the states have defaulted.

A. *Overview of the Current Status of Public Sector State and Local Bargaining Law: Diversity and Uniformity*

1. *Legislative Developments*

Due to the differing political, economic and social circumstances present in each state, it was inevitable that no single statutory

tions of the states where legislative intent is clear: "Where employees in state institutions, not conducted for profit, have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act." *Employees of Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279, 284 (1973).

46. *Maryland v. Wirtz*, 392 U.S. at 194 (emphasis added).

47. Representative Frank Thompson (D. N.J.), Chairman of the House Special Subcommittee on Labor reported in GERR, *supra* note 6, No. 548, at B-17 (1974).

solution would emerge. Yet regardless of the actual forms of the statutes, certain elements of coverage can be identified and provide a useful frame of reference against which evaluations can be made as to the extent to which a state has responded to the issue of public sector collective bargaining. These elements include coverage, administrative machinery, representation questions, bargaining obligations, impasse procedures, strike resolution, and union security agreements.

In addition to examining the provisions of the reasonably comprehensive statutes of general applicability which have been enacted by some 20 states⁴⁸ it is also relevant to note the common patterns of bargaining provisions which have emerged in non-comprehensive state laws. Today, 36 states including the District of Columbia have enacted some form of bargaining legislation with some or all of its public employees.⁴⁹ Most of these laws were developed in the late 1960's in response to pressures from particular occupation groups such as teachers,⁵⁰ firefighters, and policemen.⁵¹ While many of these same states permit bargaining for its non-covered employees even absent statutory authorization,⁵² there remain nine states which have no legislation for any of their employ-

48. Those states with legislation covering all or most public employees with one or more statutes include Alaska, Delaware, Florida, Hawaii, Iowa, Kansas (with local option as to coverage), Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, Wisconsin. Statutes covering many but not all employees, e.g., all local government employees, include Connecticut, Nevada, New Hampshire, Oklahoma, Washington. GERR, *supra* note 6, RF-1 51:1011 *et seq.* (1974). For a dated, but broader, discussion see Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1969) [hereinafter cited as Smith].

49. For more detailed analysis, see Brown, *supra* note 7, at 62-82.

50. Fifteen states have separate statutes granting the right to bargain collectively to teachers: Alaska, California, Connecticut, Delaware, Idaho, Indiana, Kansas, Maryland, Montana, Nebraska, North Dakota, Oklahoma, Rhode Island, Vermont, Washington. GERR, *supra* note 6, RF-1 51:1011 *et seq.* (1974).

51. Ten states have bargaining laws covering most firefighters and/or policemen: Alabama, Georgia, Idaho, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Wyoming. *Id.*

52. See text accompanying note 24, *supra*, and see Alley & Facciolo, *Concerted Public Employee Activity in the Absence of State Authorization*, 2 J. LAW & EDUC. 401 (1973) [hereinafter cited as Alley & Facciolo]; Green, *Concerted Public Employer Collective Bargaining in the Absence of Explicit Legislative Authorization: II*, 2 J. LAW & EDUC. 423 (1973) [hereinafter cited as Smith].

ees⁵³ and only nine states which mandate collective bargaining for all public employees.⁵⁴

An initial question in any bargaining legislation is the extent to which coverage is provided. Should all or only some employees be granted bargaining rights and under one or several laws? The states' approaches clearly differ on this question⁵⁵ with about ten state statutes covering all state and local employees in omnibus bills, eight others covering all public employees excepting certain occupations such as teachers, policemen, or firefighters, and some providing total coverage contingent on local option. A few statutes cover only state employees, while five others include only local employees. Special categorical legislation is also common among state laws, with fifteen covering teachers and five covering police and firefighters.⁵⁶ It can be appropriately noted that the apparent haphazard coverage more likely reflects the political pressures of particular public sector employee groups than the deep wisdom of state legislators responding to the unique needs of the different classes of employees.

The practice of most states in establishing administrative machinery to implement the bargaining legislation is to place its administration with an agency which has or can develop an expertise in labor relations, rather than leaving enforcement to the courts. Some eight states and the District of Columbia have created new agencies to administer the legislation, while fifteen others have

53. There is, however, some legislative activity in several of the following states without legislation: Arizona, Colorado, Louisiana, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, West Virginia. There are other states without positive legislation but they have some authorization for bargaining such as a state attorney general opinion, e.g., Virginia (1969-70 Va. Att'y Gen. Op. 231). GERR, *supra* note 6, at RF-63. In Illinois, a more ambitious program is being attempted by creating comprehensive bargaining rights for state employees pursuant to an executive order by the governor. GERR RF-63 51: 2211 (1974), and the promulgated rules and regulations are found in GERR No. 558, at E-1 (1974).

54. See *infra* note 56. Although some fourteen states cover all public employees by one or more statutes, only eight states mandate bargaining; these are, Hawaii, Iowa, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, and South Dakota. GERR RF-63, *supra* note 6. Some other states have *permissive* bargaining for *all* employees, e.g., Alaska, while some have *mandatory* bargaining for *categories* of employees, e.g., Wyoming mandates bargaining for firemen. *Id.* With such subtle and not so subtle legislative distinctions, it is clear that one must closely examine statistics that are offered on the issue of state involvement in public sector collective bargaining.

55. For a general description of the categories of laws, see *Hearings*, *supra* note 1, at 283; for more detailed analysis see GERR, *supra* note 6, at RF-63, RF-1.

56. *Id.*

utilized existing agencies such as a state labor department.⁵⁷ Ten states have placed responsibilities with specialized employer agencies like state boards of education and health for teachers and nurses, respectively.⁵⁸

Most states in dealing with representation questions have followed the precedents of private sector labor relations in deciding the appropriate bargaining unit and by what method it should be determined. Under procedures for permitting selection of representatives, most state statutes permit secret ballot elections under the auspices of a state agency as well as the frequently employed alternative of voluntary recognition which can avoid the election.⁵⁹

In deciding the appropriateness of a bargaining unit, both the scope and the composition of the unit must be determined. At least 19 states provide that a state agency will make those determinations, whereas 7 states permit local employers to determine the appropriate bargaining unit.⁶⁰ While a number of state statutes contain little or no guidance on unit determination, most agencies commonly apply the community of interest standard employed in the private sector under the NLRA.⁶¹ Special limitations on the scope and composition of bargaining units appear, however, which are designed to take into consideration the special needs of the public sector. For example, to avoid the potential disruption of efficient government, several statutes provide that larger units, which avoid over-fragmentation, be given every consideration in determining appropriate units,⁶² and two statutory provisions require consideration of existing personnel classification systems.⁶³ A broader limitation is found under the laws of New York and New York City which require consideration of the *impact* of unit struc-

57. See Smith, *supra* note 52; and see *Hearings, supra* note 1, at 284.

58. *Id.*

59. *Id.*

60. *Id.*

61. The test under the NLRA is reviewed in *Sheffield Corp.*, 134 N.L.R.B. No. 122, 49 L.R.R.M. 1265 (1961); and in the public sector see, *e.g.*, *City of Warren*, 61 L.R.R.M. 1206, 1207 (Mich. LMB 1966). For a more thorough discussion, see Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 152 (1971) [hereinafter cited as Shaw & Clark].

62. See, *e.g.*, PA. STAT. ANN. tit. 43, § 1101.604 (Cum. Supp. 1973-74) and KAN. STAT. ANN. § 75-4327 (c) (Supp. 1972).

63. MINN. STAT. ANN. § 179.71(3) (Supp. 1973); and L.A. MUN. CODE § 4.822 (5) (19—).

ture on the public interest.⁶⁴ The ultimate limitation, however, can be found in the Hawaii and Wisconsin statutes where bargaining units are statutorily established.⁶⁵

In ascertaining the composition of the appropriate unit, state statutes have generally adhered to the NLRA principle that excludes supervisors from the appropriate unit.⁶⁶ This concept has met with some resistance as respects certain types of professional or white collar employees, for example, department heads and principals in the school system⁶⁷ and sergeants in the police and firefighter departments. The argument for special treatment of these employees is that they have traditionally worked as colleagues with those employees subject to their responsibility, and to artificially segregate them may create an unnecessary adversary relationship which adversely affects the public interest. On that rationale, some state statutes have eased the rule of automatic exclusion of "nominal" supervisors from the bargaining unit and, additionally, have granted special negotiating rights to "true" supervisors.⁶⁸

A final representation question deals with the private sector labor relations concept of exclusive representation. This concept, adopted by every state but California, requires that all employees within the unit accept representation by the union selected by the majority.⁶⁹ Interesting implications of the exclusivity doctrine are presented in the public sector in that minority unions, non-union members, and non-employees under constitutional principles should retain their right to petition their government regarding grievances. However, competing public sector bargaining law principles

64. N.Y. CIV. SERV. LAW § 207 (McKinney Supp. 1972); and N.Y.C. CODE § 1173-5.0 (19—).

65. HAWAII REV. STAT. § 89-6 (Supp. 1971); and WISC. STAT. ANN. § 111.81 (3)(a) (Supp. 1973).

66. See Smith, *supra* note 52; and Shaw & Clark, *supra* note 65.

67. For a discussion of the problem in education see Comment, *The Bargaining Unit Status of Academic Department Chairmen*, 40 U. CHI. L. REV. 442 (1973).

68. See, e.g., PA. STAT. ANN. tit. 43, § 1101.704 (Cum. Supp. 1973-74), which permits first-level supervisors to form their own unit to meet and discuss.

69. CAL. EDUC. CODE § 13085 (West Supp. 1972). In states without legislation, courts often hold that there is no implied authorization for an employer to grant *exclusive* recognition. See, e.g., Board of Regents v. United Packing House & Allied Workers Local 1258, 175 N.W.2d 110 (Iowa 1970). For a contrary view, see Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App.2d 456, 222 N.E.2d 243 (1966).

are developing which would limit those rights at least as respects minority unions.⁷⁰

Common to most state negotiating laws are provisions defining the nature and extent of the bargaining obligation as well as suggesting or stating the proper subjects for bargaining. As to the nature of the obligation the states have developed both permissive and mandatory bargaining provisions.⁷¹ Some states have imposed a meet and confer obligation,⁷² but the clear majority have established a bargaining duty. The basic theoretical difference is that meeting and conferring, unlike the more strict bargaining duty, does not mandate that negotiations be carried to an impasse. Whether that theoretical difference is put into practice is a matter of differing professional opinion. It has been observed, on the one hand, that since "unions in the public sector have pressed for the same type of demands and with the same vigor under both models . . .," the distinction has become blurred.⁷³ A contrary position is taken by Robert Howlett, chairman of the Michigan Employment Relations Commission, who in a recent speech concluded that in the meet and confer states, "[r]eports . . . lead me to believe that meet and confer employers have been successful in maintaining the distinction intended by the meet and confer legislators."⁷⁴ The obvious shortcoming of a non-compulsory duty to bargain is the possibility for sham bargaining. To overcome this difficulty most states have

70. For example, in Wisconsin it has been held that minority unions may not address school boards in a representative capacity during public meetings on issues under negotiation by the majority union. *Board of School Dir. v. Wisconsin Emp. Rel. Comm'n*, 42 Wisc.2d 637, 168 N.W.2d 92 (1969). A further exploration of the implications of the exclusivity doctrine can be made in Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004 (1970). On the related question of the right of individual employees to present grievances to their employer, all state statutes are modeled after § 9(a) of the NLRA, 29 U.S.C. § 159(a)(1970), which retains that right. Most laws also permit that a union has a right to be present at the grievance and that no settlement shall be inconsistent with the terms of the collective bargaining agreement. See, e.g., MICH. COMP. LAWS ANN. § 423.26 (1967).

71. See GERR *supra* note 6, at RF-63; and *Hearings*, *supra* note 1, at 132-34.

72. See, e.g., ALA. CODE tit. 37, § 450(3) (19—); CAL. EDUC. CODE § 13085 (West Supp. 1973); CAL. GOVT. CODE §§ 3505, 3530 (West Supp. 1973); IDAHO CODE § 33-1272 (Supp. 1973); MO. ANN. STAT. § 1505.510 (1966); ORE. REV. STAT. §§ 342.440, 342.710 (1971). Illustrations of bargaining laws can be found *supra* note 58.

73. Edwards, *supra* note 14, at 896. He also maintains that only Alabama, California, and Missouri have "pure" meet and confer statutes. *Id.*

74. GERR No. 548, at E-3 (1974).

followed the example of the NLRA and imposed a "good faith" bargaining obligation.⁷⁵

Probably the fastest developing body of law in public sector collective bargaining is the scope of bargainable subjects.⁷⁶ Most states have adopted the broad language of the NLRA which requires good faith bargaining over "wages, hours, and other terms and conditions of employment"⁷⁷ and with regard to *mandatory* subjects, the parties must bargain until either impasse or an agreement is reached. Without any statutory limitations, bargaining public employers have found, often to their dismay, that like their private sector counterpart, "conditions of employment" is broadly interpreted to include most matters affecting employees.⁷⁸ For example, a recent decision interpreting New York's statute expanded the scope of bargaining by requiring public employers to bargain over all mandatory subjects "except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment."⁷⁹

To avoid such open-ended interpretations, some states, perhaps in recognition of perceived differences in bargaining in the public and private sectors, place specific statutory limits on the scope of bargainable subjects through a management rights provision.⁸⁰

75. 29 U.S.C. § 158(d)(1970). See Shieber, *Surface Bargaining: A Problem and a Proposed Solution*, *supra*.

76. See Edwards, *supra* note 14, at 908-27.

77. 29 U.S.C. § 158(d)(1970). See also *NLRB v. Wooster Div. Borg-Warner Corp.*, 356 U.S. 342 (1958).

78. See, e.g., Note, *The Scope of Collective Bargaining*, 74 YALE L.J. 1472 (1965); and Oldham, *Organized Labor, The Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935 (1973).

79. *Board of Educ. v. Associated Teachers*, 30 N.Y.2d 122, 129, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23 (1972).

80. For an illustration, see HAWAII REV. STAT. § 89-9(d)(Supp. 1971). States with management rights provisions, covering some employees in one or more statutes, include Alaska, California, Connecticut, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Washington, and Wisconsin. GERR, *supra* note 6, at RF-1. The Advisory Commission on Intergovernmental Relations (ACIR) recommends inclusion of such clauses. ACIR Report, GERR RF 51:101, 112 (1970). Robert Howlett, Chairman of Michigan's Employment Relations Commission has commented

clearly if the Advisory Commission's advice were followed, collective bargaining could become a nullity. . . . Experience in the private sector warrants an opinion that the place for management rights clauses is in the collective agree-

Those who oppose such a narrowing of scope argue that in the public sector, economic and non-economic policy questions are often intermingled and indiscernible, and to restrict the scope would inhibit if not prohibit employees, especially professionals, from making valuable contributions to the formulation of institutional policies.⁸¹

A final source of limitation on the scope of bargaining is existing law, primarily civil service legislation, which covers many subjects over which unions wish to bargain. Most states which have considered the problem of potentially conflicting statutory provisions have provided that civil service legislation will take precedence over public sector bargaining statutes. This will preclude any possibility that these statutory provisions will be the subject of bargaining.⁸²

The totality of the bargaining relationship is governed by unfair labor practice provisions which seek to guide the conduct of the bargainers. Some 24 state statutes are patterned after section 8 of the NLRA whereby both employer and employee conduct is controlled.⁸³ However, two statutes regulate only employer con-

ment; not in the statute. . . . Our world is too complex and fast moving to limit the subject of bargaining by statutory itemization.

GERR No. 548, at E-6 (1974).

81. Statutory recognition of this argument whereby certain employees are given the right to bargain over economic matters and meet and confer over non-economic matters is being tried by some states including Maine, Montana, and Minnesota. ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1972); MONT. REV. CODE ANN. § 75-6119 (2d Repl. Vol. 1971); MINN. STAT. ANN. § 179.73 (Supp. 1973). Illustrations of statutes limiting employers from bargaining over non-economic matters are Vermont, Wisconsin, and Oregon. ORE. REV. STAT. § 342.440 to .480 (1971); VT. STAT. ANN. tit. 3, § 905(b) (1972); WISC. STAT. ANN. § 111.91 (2)(a) (Supp. 1973).

82. See, e.g., CAL. GOV'T CODE § 3500 (West 1966) § 3525 (West. Supp. 1972); KAN. STAT. ANN. § 75-4330(a) (Supp. 1972); ME. REV. STAT. ANN. tit. 26, § 969 (Supp. 1972-73); MASS. GEN. LAWS ANN. ch. 149, § 178L (1971); PA. STAT. ANN. tit. 43, § 1101.703 (Supp. 1973-74); VT. STAT. ANN. tit. 3, § 904 (Supp. 1973); WASH. REV. CODE ANN. § 41.56.100 (1972); WIS. STAT. ANN. § 111.91(2) (Supp. 1973). For contrary views, see *Civil Service Comm'n v. Wayne Bd. of Super.*, 384 Mich. 363, 184 N.W.2d 201 (1971). Also see CAL. PUB. UTIL. CODE § 70124 (West 1965) (transit workers); CONN. GEN. STAT. ANN. § 7-474(f)(1972)(municipal employees); MASS. GEN. LAWS ANN. ch. 162 App. § 1-19 (1958)(transit workers). For a discussion of the problem, see Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826 (1971).

83. States having both employer and employee unfair labor practices covering some employees in one or more of their statutes include Alaska, Connecticut, District of Columbia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Washington and Wisconsin.

duct,⁸⁴ and six statutes include no unfair labor practices.⁸⁵ In some states which have unfair labor practices, the legislators have gone beyond the typical prohibitions and experimented with provisions barring political activities,⁸⁶ interfering with managements' rights,⁸⁷ and extortion.⁸⁸

Public sector legislation emphasizes impasse resolution procedures so as to ensure that the government can continue to function smoothly in dispensing its services.⁸⁹ The pattern, adopted by at least 24 states, is mediation and conciliation followed by fact-finding procedures.⁹⁰ If impasse exists after these persuasive procedures are utilized, the question of an acceptable dispute settlement mechanism arises. The alternatives available include unilateral action by the employer, strikes by the employees, or some form of binding arbitration.⁹¹ Since final resolution of the issue by either party by strike or unilateral action is always an available option, it is reassuring to note that *interest* arbitration, which may be either compulsory or voluntary, as well as advisory or binding, is increasingly being tried by the states.⁹² At least fifteen states are experimenting with volun-

GERR, *supra* note 6, at RF-1; and see Ogawa & Najeta, *Guide to Statutory Provision in Public Sector Collective Bargaining* (Univ. of Hawaii, 1973).

84. Rhode Island and Montana (covering nurses). *Id.*

85. California, New Hampshire, North Carolina, North Dakota, Texas, and Wyoming. *Id.*

86. Kansas and Montana. *Id.*

87. New Hampshire. *Id.*

88. Vermont. VT. STAT. ANN. tit. 3, § 962(7) (1972).

89. See generally Barrett, *Governmental Response to Public Unionism and Recognition of Employee Rights: Trends and Alternatives for Resolving Issues*, 51 ORE. L. REV. 113 (1971).

90. Certain employees under various statutes have these procedures in the following states. California, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, and Wisconsin. See generally GERR, *supra* note 6, at RF-63.

91. See generally McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972); and Bernstein, *Alternatives to The Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971); and Howlett, *Contract Negotiations Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47 (1973).

92. It should be recalled that "interest" arbitration which settles bargaining impasses by formulating new terms of an agreement is quite different from "grievance" arbitration, which merely calls for an interpretation of an existing agreement. For general discussion, see Note, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 43 CORNELL L. REV. 129 (1968); and Com-

tary interest arbitration,⁹³ while at least five statutes establish compulsory interest arbitration for police and firefighters.⁹⁴ Only Nevada has experimented with compulsory interest arbitration legislation of general applicability, but here the Governor must affirmatively trigger the mechanism before it applies.⁹⁵

If dispute settlement mechanisms do not resolve the bargaining impasse, the strike issue comes to the forefront. In the private sector it is an accepted premise that there can be no genuine collective bargaining without the right to strike. The possibility of a cessation of services is the catalyst which helps induce agreement by the parties. For the most part state legislatures and courts have not acceded to accepting the above premise and for decades have prohibited strikes by public employees.⁹⁶ However, the penalties and methods of enforcement vary among the states with some states providing self-executing provisions which apply sanctions up-

ment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260 (1969).

93. Alaska, Connecticut, Delaware, Iowa, Maine, Minnesota, New Jersey, New York, Oregon, Hawaii, Pennsylvania, Texas, Vermont, Washington, and Wisconsin are all experimenting with the procedure. See generally McAvoy, *supra* note 91. Iowa, for example, has "final offer" arbitration, GERR RF:2416 (1974).

94. Michigan, Pennsylvania, and Rhode Island statutes cover police and firefighters, while Vermont and Wyoming cover firefighters only. See McAvoy, *supra* note 91, at 1194-96. It should be noted that the Michigan legislature liked it so well, it recently extended its self-expiring legislative provision. MICH. COMP. LAWS ANN. § 423.245 (Supp. 1973-74). The constitutionality of such provisions has consistently been upheld. See, e.g., *Warwick v. Regular Fireman's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969) and *Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387 (1973).

95. NEV. REV. STAT. § 288.150 (1971).

96. Jerry Wurf, President of AFSCME, takes the following position:

Debate over whether workers have a "right" to strike obscures the more important consideration—namely, how to resolve labor relations problems without strikes. For all of the headlines and verbiage, public employee strikes each year affect only a tiny percentage of the organized public work force. According to the Labor Department, the work time lost in 1971 (the latest year available) because of strikes for government [including federal employees] amounted to only .03% of this total work time, compared to .26% for the total economy and .32% for the private, non-farm economy.

Statement by Wurf on October 4, 1973, before the Special Subcommittee on Labor of the House Committee on Education and Labor in a booklet prepared by the Coalition of American Public Employees 33-34 (Wash. D.C., 1973). The constitutionality of strike prohibitions has been consistently upheld by the courts. See *United Fed. of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971), *aff'g. mem.*, 404 U.S. 802 (1971); and *Anderson Fed'n of Teachers Local 519 v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15 (1969), *cert. denied*, 399 U.S. 928 (1970). For general discussion, see Shaw & Clark, Jr., *Public Sector Strikes: An Empirical Analysis*, 2 J. LAW & EDUC. 217 (1973); and Lightenberg, *Some Effects of Strikes and Sanctions—Legal and Practical*, 2 J. LAW & EDUC. 235 (1973).

on the occurrence of strikes,⁹⁷ and others which require some prior affirmative enforcement action by the employer.⁹⁸ Penalties also vary from discharge and ineligibility for a period of years⁹⁹ to fines¹⁰⁰ and imprisonment.¹⁰¹

Only recently, perhaps in view of the fact that strike prohibitions do not necessarily prevent strikes and that all government services are not "essential," has state legislation begun to permit strikes under certain conditions. Seven states presently permit a limited right to strike for certain employees after exhaustion of impasse-resolving procedures specified in the statutes¹⁰² and all of the statutes limit the right by providing that an injunction may be obtained upon proof of danger to the general welfare.¹⁰³ In light of this clear trend, it has become evident that statutory authorization of strikes under certain conditions combined with impasse provisions will become increasingly prevalent in public sector collective bargaining legislation.

The final area requiring attention in evaluating state legislative treatment of important elements of bargaining is that of union security devices. State statutes typically prohibit union shop agreements because they require an employer to discriminate on the basis

97. But even with automatic provisions, procedural deficiencies may negate its self-executing nature. See, e.g., *Goldberg v. Cincinnati*, 26 Ohio St.2d 228, 271 N.E.2d 284 (1971); and for a general discussion of the problem, see Smith, *supra* note 52.

98. For example, in Delaware, Michigan, Rhode Island, and Washington, strikes are merely declared illegal and the state must act to enforce the statute by injunction or other means. Difficulties can also arise in this situation. E.g., in *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W. 2d 206 (1968), the court refused to issue an injunction absent a showing of violence, irreparable injury or breach of the peace, notwithstanding the fact that the strike was in violation of state law. See Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260 (1969).

99. See, e.g., VA. CODE ANN. § 40.1-55 (Supp. 1973).

100. See Seidman, *State Legislation on Collective Bargaining by Public Employees*, 22 LAB. L.J. 13, 19-20 (1971); Smith, *supra* note 52, at 910-14.

101. *Id.*, and see Iowa's new statute which uses a variety of penalties. GERR No. 553, at 8-10 (1974). Also, a federal employee who strikes is guilty of a felony. 18 U.S.C. § 1918 (1970).

102. Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, and Vermont have legislation permitting some categories of public employees to strike under restricted circumstances. GERR, *supra* note 6, at RF-1.

103. E.g., Hawaii requires exhaustion of certain impasse procedures and a notice of intent before a strike may legally occur, and even then it is subject to an injunction if it impairs the general welfare. HAWAII REV. STAT. § 89-12 (Supp. 1971). And see generally Symposium, *Limited Right to Strike Laws—Can They Work When Applied to Public Education?*, 2 J. LAW & EDUC. 673 (1973).

of union membership. For that reason, the use of dues check-off is becoming increasingly prevalent.¹⁰⁴

Most of the recent union activity in this area is directed at negotiating agency shop provisions which, while not requiring union membership, do require payment of a fee to cover a "fair share" portion of the services provided by the exclusive bargaining representative.¹⁰⁵ Several state statutes have taken the initiative and headed off certain litigation on this controversial issue by permitting agency shop or service fee provisions.¹⁰⁶

2. *Judicial Developments*

Even in those states without public sector bargaining legislation, bargaining by public employers and employees flourishes.¹⁰⁷ Unfortunately, the resulting extra-legal, de facto bargaining relationships and bargained results are not subjected to state supervision. This continued absence of a statute covering all public employees has given an implicit mandate to the courts to develop a common law of public sector labor relations. In response, the courts have created a mosaic of recognizable rights of public employees to form and join unions, to seek recognition for purposes of bargaining, to be free from improper employer discrimination or interfer-

104. Although many states have followed the NLRA model in prohibiting employer discrimination for union activities or union membership, they have not added the NLRA provisos which expressly *permit* union shops, 29 U.S.C. § 158(a)(3) (1970). Express prohibition of union shops is found in 19 states which have right-to-work legislation. These include Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. For a compilation of the statutes and case law interpretations, see NATIONAL RIGHT TO WORK COMMITTEE, *STATE RIGHT-TO-WORK LAWS* (1972).

105. See generally Comment, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547 (1970); Note, *Labor Law—Public Employment—Arbitration and Agency Shops as Mandatory Subjects of Bargaining*, 14 WAYNE L. REV. 1238 (1968); Ward, *Union Security in Teacher Contracts*, 22 LAB. L.J. 157 (1971).

106. E.g., MICH. COMP. LAWS ANN. § 423.210 (1973); HAWAII REV. STAT. § 89-4(a) (Supp. 1971); PA. STAT. ANN. tit. 43 § 1101.705 (Supp. 1973); WIS. STAT. ANN. § 111.70(2) (Supp. 1973). For an elucidation of arguments on the legality of agency shops absent legislative authorization and case law which prompted legislation in Michigan, see *Smigel v. Southgate Community School Dist.*, 24 Mich. App. 179, 180 N.W.2d 214 (1970), *aff'd mem.*, 388 Mich. 531, 202 N.E.2d 305 (1972).

107. See Brown, *supra* note 7, at 79-82. See also Alley & Facciolo, *supra* note 56; and Green, *Concerted Public Employee Activity in the Absence of State Statutory Authorization: II*, 2 J. LAW & EDUC. 419 (1973).

ence while engaging in those activities, and to have labor agreements judicially enforced.

It has been established that there is a constitutional right to form and join unions,¹⁰⁸ although thus far that right has not given rise to a constitutional right to bargain.¹⁰⁹ However, aside from constitutional considerations, judicial precedent is building that permits a public employer, if it wishes, to engage in collective bargaining and to negotiate an agreement absent statutory authorization.¹¹⁰ But notwithstanding the fact that an employer may choose to negotiate with its employees, judicial approval is still somewhat of a sporting proposition due to entrenched arguments of sovereignty and illegal delegation of powers.¹¹¹

B. *Evaluation of State Involvement in Public Sector Labor Relations*

1. *Emerging Patterns of Minimum Standards Legislation*

It has been argued that federal legislation is yet inappropriate because there is in the words of former Secretary of Labor Hodgson:

[A] lack of consensus among the states on the critical issues in public sector labor relations; [and therefore, this diversity and] haphazard mixture of statutes, local executive orders, resolutions, ordinances, court decisions, and civil services statutes and procedures [indicate the] lack of any common pattern in current State legislation dealing with public employee bargaining [upon which federal legislation can be based].¹¹²

Whether or not a "model system" has emerged, it would seem only appropriate, after over a decade of state experience with public sector bargaining, that an assessment be made of how well the

108. See Brown, *supra* note 7, at 79-80; and see text accompanying notes 28-31 *supra*.

109. *Id.*

110. See, e.g., Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); IBEW Local 611 v. School City of Gary, — Ind. App. —, 284 N.E.2d 108 (1972); Board of Regents v. United Packinghouse Food & Allied Workers, 175 N.W.2d 110 (Iowa 1970). See Dole, *supra* note 24; and Alley and Faciolo, *supra* note 56; and Green, *supra* note 56.

111. E.g., see Mugford v. Mayor and City Council, 185 Md. 266, 44 A.2d 745 (1945).

112. *Hearings, supra* note 1, at 283.

states have responded to the essential needs of public sector labor relations. And, in a broader perspective, inquiries need to be made as to whether discernible patterns of legislation are emerging, *not* for the purpose of identifying some never to be found "model system," but for the purpose of ascertaining whether some minimum standards protecting what can be categorized as the essential needs of public sector labor relations are detectable. An identification and summary of those emerging standards are given below.

Basic to any bargaining bill is the protection of employee free choice of whether to organize and join unions. Virtually all states have come to recognize this right. However, it remains an unsettled matter among the states as to whether all or only selected groups of public employees should be provided bargaining legislation. Thus far, the emerging pattern of legislation indicates a piecemeal approach is being used by the states. Legislation is being passed in *response* to a perceived need which often is coincident with intense political pressure from the group seeking legislation. It would seem preferable for a government to *act* rather than *react* to a situation of such vital concern to its citizens and to affirmatively prescribe statutory guidelines applicable to all public employees under an omnibus bill. This satisfies basic elements of fairness and contributes to a more economical, smoother functioning labor-management relations process by precluding the possibility of conflicting rulings and procedures of different tribunals.¹¹³

Most state legislation has adopted the position that responsibility to administer the statute should be placed in an agency which is empowered to resolve and enforce issues of representation, unfair practices, and bargaining impasses. It follows that states with separate agencies presently enforcing separate statutes, for example, a teachers bill, might profit from combining their administrative functions and jurisdictions.

In deciding the representation issues of selection of the representative and the composition of the bargaining unit, most states have adopted the private sector approach and provided statutory guidelines for elections, agency determination of bargaining units,

113. The Advisory Commission on Intergovernmental Relations (ACIR) has urged this approach. ACIR, LABOR MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENTS 103-04 (1969) in GERR RF-1 51:101, 112 (1970).

and exclusive representative status. Most state legislation follows the NLRA's prescriptive guideline of looking for a community of interests in ascertaining the appropriate bargaining unit and a few states, in addition, require specific consideration of public interest needs such as non-fragmented units and a flexible approach on whether to automatically exclude all "supervisors" from any negotiating activities.¹¹⁴

Bargaining legislation most often is premised on the concept that labor disputes are best resolved through structured, if not always peaceful, negotiation; and for a bargaining structure to be fully effective, it must be viewed by both sides to be a fair system. Therefore, on the debate between meet and confer versus bargaining legislation, the clear body of state law shows an acceptance of the latter as the preferable system, with duties of good faith imposed to ensure its fairness.

Any bargaining obligation in the private or public sector, over wages, hours, and other conditions of employment is an open ended proposition with a predictable expanding scope of bargainable subjects, absent some type of limitation. In the private sector such limitations as management rights clauses are negotiated by the employers. In the public sector similar restrictions on the scope of bargaining have been reserved by specific statutory provisions. There is no reason to believe that bona fide boundaries on the scope, if carefully drafted into legislation, cannot appropriately take into account unique characteristics of public sector employment.¹¹⁵ Another limit on the scope of bargainable subjects has been the competing and conflicting civil service laws. Thus far, those states which have confronted the problem have rather uniformly reserved the precedence of such laws over bargaining legislation.

On the issue of dispute settlement mechanisms, the state legislation has paralleled, if not gone beyond, the private sector obligations, by institutionalizing mediation, conciliation, and fact-finding services as a catalyst to break up bargaining impasses. However, the issue remains; how, when impasse persists beyond the procedures designed to persuade a settlement, is the matter to be decided. Most

114. See text accompanying notes 64-74.

115. In the author's opinion, management rights clauses are better left to negotiation and not legislative prescription. See discussion on this issue at text accompanying notes 84-85 *supra*.

states continue to prohibit strikes and most legislation does not provide for interest arbitration; therefore, at the present time although the body of state law can be identified, it must also be noted that the evidence is mounting that state experiments in interest arbitration and the limited right to strike have presented alternative solutions which merit continued testing and detailed evaluations as to their efficacy.

As to the question of union security devices in the public sector, the practices of the states vary enough on the issues of agency shops, dues check-offs, etc., that no pattern can be identified except that they are increasingly found to be subjects of negotiation, a place where, as in the private sector, they should most likely be found.

2. *Default by States?*

What is evident from the above analysis is that in public sector collective bargaining there has developed a great diversity of legislative solutions to a myriad of local problems peculiar to the special needs of the public community under scrutiny. However, it is equally clear that this diversity flourishes within an identifiable and uniform framework of essential bargaining provisions!

Although progress has been made over the past decade and a half toward more state involvement in public sector labor relations, the current legislative patterns show that for the most part piece-meal and non-comprehensive statutes are yet too common. In addition to this underregulation, too many public employees are still forced to litigate the establishment of bargaining rights. These litigated rights then provide a platform from which a public employer, absent statutory authorization, may or may not enter into extra-legal, de facto bargaining relationships. It is this bargaining, in the absence of comprehensive legislation, that presents, in the author's opinion, a situation with the potential for a far more devastating effect on our public institutions than does the specter of federal legislation.

It should also be noted that proponents of federal legislation do not really seek to establish the point that federal rather than state legislation is needed to regulate public sector labor relations. Rather, it is in their view, the lack of substantial state involvement into the area that creates a need for legislation—state or federal, and

since the states have not, with over 15 years of opportunity, established comprehensive legislation, they conclude that the states have *defaulted* and have now turned to the federal government to act. AFSCME President Jerry Wurf, representative of the proponents of federal legislation, in lamenting over the current lack of comprehensive state legislation has declared:

No pattern prevails among the 50 states and 80,000 local government units save one—that public employees are always in an inferior, secondary class status compared to workers in private industry.¹¹⁶

He notes further that public employees have tired of being the “white rats in a labor-management laboratory” and they want the stability and equity of a federal law.¹¹⁷

In summary, it can be stated that to date an evaluation of current legislative developments in public sector labor relations, while showing an encouraging attempt by some states toward innovative solutions to pressing problems, mostly reveals *underaction* by the states toward providing all public employees the essential elements of public sector bargaining rights. In view of this apparent default by many states, and in light of the recent statement by the chairman of the Congressional subcommittee conducting hearings on federal legislation that it is “inevitable” and that he intends to enact such a law “as soon as possible,”¹¹⁸ it would be useful to explore federal legislative alternatives which are available.

IV. FEDERAL LEGISLATIVE ALTERNATIVES

A. Current Federal Proposals

Whether or for how long Congress will permit the states to experiment legislatively with public sector labor relations is a matter of concern that has reached a national dimension. This concern is evidenced by the fact that Congress is conducting hearings on the issue of federal legislation.

Presently, there are five bills pending in Congress, two of which relate to public employees of state and local governments and three which deal with federal employment. Over the years there

116. GERR No. 548, at B-16 (1974).

117. *Id.*

118. *Id.* at B-17.

have been three types of bills introduced with coverage of: (a) all non-federal public employees under the NLRA,¹¹⁹ (b) all non-federal employees under a newly created federal law, for example, National Public Employees Relations Act,¹²⁰ and (c) all teachers under a special teachers law—for example PNA.¹²¹ The three approaches represent two differing philosophies, with the PNA (formerly sponsored by the National Education Association) and the NPERA (endorsed by AFSCME) representing the position that differences in private and public employment justify separate legislation for public employees,¹²² whereas, the American Federation of Teachers, affiliated with the AFL-CIO, on the other hand has long taken the position that any differences between public and private employment are minimal and that therefore the NLRA should be amended so as to include public employees.¹²³

In 1973, serious legislative deliberation began to focus on two of the above bills, H.R. 9730 which would amend the NLRA to include public employees,¹²⁴ and H.R. 8677 (NPERA), sponsored by the Coalition of American Public Employees, which would establish a separate national public employment relations program.¹²⁵

H.R. 9730, introduced by Representative Thompson of New

119. H.R. 12532, 92d Cong. 2d Sess. (1972).

120. H.R. 7684, 92d Cong. 2d Sess. (1972).

121. H.R. 9324, 92d Cong. 2d Sess. (1972).

122. See, e.g., *Hearings, supra* note 1, at 127, statement of Donald Morrison, President, Nat'l Educ. Ass'n.

123. See, e.g., *Hearings, supra* note 1, at 191, statement of David Selden, President, Am. Fed. Teachers, AFL-CIO.

124. H.R. 12532, 93d Cong. 1st Sess. (1973). This is the same as H.R. 12532, *supra* note 123. On April 2, 1974, an identical bill was introduced into the Senate by Senator Williams (D. N.J.), Chairman of the Senate Labor and Public Welfare Committee. S. 3294. GERR No. 549, at B-8 (1974).

125. GERR RF 51:181 (1973). This is the same bill introduced in 1971 (H.R. 17383) and 1972 (H.R. 7684). An identical bill was introduced in the Senate on April 2, 1974 (S. 3295) by Senator Williams. GERR No. 549, at B-8 (1974). The NEA has shifted its support from categorical to the omnibus legislation of H.R. 8677. Its President, Dr. Wise, in a statement before the House Committee said: "Our experience has convinced us that similarities among the various categories of public employees outweigh the dissimilarities and that there are certain well-recognized principles and procedures that should be uniformly applied to all public employees." Contained in booklet on recent testimony on H.R. 8677 prepared by Coalition of American Public Employees 24 (Washington, D.C. 1973). The final day of hearings on the federal legislation ended March 7, 1974, and the subcommittee is now assessing the testimony which began in October, 1973 as it might bear on the proposed legislation. GERR No. 545, at B-3 (1974).

Jersey, chairman of the committee conducting the hearings, seeks to remove the exemption presently possessed by state and local governments from the provisions of the National Labor Relations Act.¹²⁶ This would preempt state legislation and provide public employers and employees the same rights and responsibilities obtained by private employers and employees including the use of the NLRB in enforcing the bargaining relationship, adherence to the prior decisions of the NLRB, and the right to strike. Noticeably absent of course is any requirement of exhaustion of comprehensive impasse machinery prior to striking,¹²⁷ or any limits or alternatives to the strike as have been tried at the state level.

The other bill under discussion, H.R. 8677, introduced by Representative Clay of Missouri, having many co-sponsors, and endorsed by the powerful Coalition of American Public Employees would apply a new law to state and local labor relations throughout the nation.

Jerry Wurf, President of AFSCME, whose union is a member of the Coalition, has acclaimed H.R. 8677 as a "workable system for extending to government employees the rights which their private sector counterparts have enjoyed for many years."¹²⁸

However, not everyone agrees with that appraisal. One commentator has observed:

It is no exaggeration to state that AFSCME's bill [H.R. 8677], if enacted, would provide organized labor in the public sector with far greater rights, and far fewer responsibilities, than are presently possessed by their private sector counterparts under existing federal labor relations legislation.¹²⁹

In more direct terms, public employer attorney R. Theodore Clark, Jr. calls the bill "the most one-sided partisan piece of legislation

126. 29 U.S.C. § 152(2)(1947), which reads in part that the term employer "shall not include . . . any State or political subdivision thereof . . ."

127. Of course the services of the Federal Mediation and Conciliation Service (FMCS) are available. For a comprehensive treatment as to what is involved in the mediation process, see W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (BNA 1971).

128. See booklet containing testimony of October 4, 1973, before the Special Subcommittee on Labor of the House Committee on Education and Labor prepared by the Coalition of American Public Employees 31 (Wash. D.C. 1973).

129. Baird, *National Legislation For Public Employees: "End Run" On the Wagner Act?*, 61 ILL. B.J. 410, 411 (1973).

I've ever seen . . . [it] corrects what union officials find wrong with the NLRA."¹³⁰

After such diverse testimonials, it is useful to take a closer look at the major provisions in H.R. 8677. Though patterned after the National Labor Relations Act, the bill differs in important substantive respects from it and from present state legislation. Its coverage extends to all public employees except "officers appointed or elected pursuant to a statute to policymaking positions"¹³¹ and is administered by an impartial agency which is empowered to enforce the statute and to make determinations on representation issues. Opponents suggest it provides the five-member labor commission more powers than any other state or federal labor board has had. It permits that the Commission "may" review decisions of trial examiners or regional directors but, if review is declined, such decisions will be final; and, in addition, it severely limits the authority of the federal courts to review bargaining unit determinations.¹³²

Representation sections provide for elections, exclusive recognition, and unit determinations based on community of interest and designed to minimize over-fragmentation.¹³³ Supervisors (who are permitted to bargain) and non-supervisors are required to have separate bargaining units except as regards firefighters who can combine supervisors and rank and file employees into a single unit. Likewise, policemen, educational employees, and professional and non-professional employees can combine their units if a majority in each category votes for inclusion into a single unit.¹³⁴

Bargaining obligations are mandatory and must be met in good faith.¹³⁵ The scope of bargaining is broad, including wages, hours, and other terms and conditions of employment. In addition there is a duty to negotiate about matters which are or may be the subject of a statute, ordinance or regulation promulgated by the state

130. GERR No. 539, at AA-3 (1974).

131. Section 3(c) of the Act. GERR RF 51:181, 182 (1973).

132. See Baird, *supra* note 133, at 412; and see §§ 11(d) and 6(g), GERR RF 51:181, 193 and 188-89 *resp.* (1973). For discussion of these powers as they relate to the private sector, see Bartosic, *Labor Law Reform—The NLRB and a Labor Court*, 4 GA. L. REV. 647, 664 (1970).

133. Section 6(f), GERR RF 51:181, 188 (1973).

134. *Id.*

135. Section 5, GERR RF 51:181; § 10(a) (5), GERR RF 51:185; § 10(b) (3), GERR RF 51:192 (1973).

or local subdivision, and if legislative action is necessary, to submit any agreement reached on these matters to the appropriate legislature.¹³⁶ It has been suggested that this broad scope may well lead to an undesirable alteration of established political relationships between branches of government and "even between government and the private interest groups seeking to influence its decisions."¹³⁷

Both public employers and employee organizations are subject to unfair labor practice prohibitions but, interestingly enough, the latter group has a noticeably shorter list of prohibitions. Such private sector regulations as secondary boycotts, recognition picketing, featherbedding, and hot cargo provisions are conspicuously absent.¹³⁸

Bargaining impasses under this law would be resolved through mediation, under the auspices of FMCS, and fact-finding, which can be either binding or advisory. If binding arbitration is agreed upon, the right to strike is forfeited; whereas, if advisory fact-finding is followed, strikes are permitted after exhaustion of statutory impasse procedures, and are enjoinable only upon a showing of a clear and present danger to the public health or safety.¹³⁹

On the issue of union security devices, the statute certainly does not equivocate, as it mandates authorized dues check-off¹⁴⁰ and agency shop fees,¹⁴¹ and permits union shops.¹⁴² It is interesting to note that the drafters of the law protected the interests of the employee organization but did not provide provisions similar to the Landrum-Griffin Act which seek to protect *employees* by guaranteeing internal union democracy and union fiscal responsibility, and protecting against union corruption.¹⁴³

136. Section 3(m) GERR RF 51:181, 183 (1973).

137. Baird, *supra* note 133, at 412.

138. Section 10(b) GERR RF 51:181, 192 (1973).

139. Sections 7 and 9, GERR RF 51:181, 189-91 (1973).

140. Section 5(b)(2) GERR RF 51: 181, 185 (1973).

141. Section 5(c) *Id.*

142. Section 5(d) *Id.*

143. See Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) 29 U.S.C. §§ 401-531 (1964). For a discussion of the benefits which come from such protective provisions, see Affeldt, *The Labor Bill of Rights—Its Impact Upon Personal Rights*, 37 U. DET. L. J. 500 (1960); and Griffin, *The Landrum-Griffin Act: Twelve Years of Experience in Protecting Employee Rights*, 5 GA. L. REV. 622 (1971). The Advisory Commission on Intergovernmental Relations recommends inclusion of such legislative provisions. GERR RF 51:101, 107-08 (1970). See also ACIR model bill § 15, GERR RF 51:122 (1970).

In dealing with the federal-state relationship, the statute stipulates that the federal law will preempt all state and local legislation except where it is "substantially equivalent" to the federal system as determined by a federal commission.¹⁴⁴ On the basis of the above summary it is doubtful whether any current state or local law could qualify in the present form as substantially equivalent.

Shock waves would be felt by state and local officials by passage of either of the two federal legislative proposals under consideration, yet passage of some federal law becomes more realistic each year. Unless careful and serious consideration is now given to the most desirable form of such legislation, public officials and the public may find the decision has been made for them in a manner different from what it would have been had they participated in shaping it. To encourage responsible government officials to take the first step beyond debating the propriety of public sector bargaining legislation, a suggested alternative to either of the above provisions is presented below. The suggestion is a form of "minimum standards" legislation which by federal law will mandate the minimum essential bargaining rights while permitting states and their subdivisions to continue to incorporate innovative approaches and solutions to their particular needs.

B. A Time for Legislative Creativity:

A Federal-State Approach Using Minimum Standards

It would be unfortunate when drafting legislation for public sector labor relations not to take into account many of the unique characteristics of public employment in state and local governments, and to fail to utilize the many possibilities for creative legislation which have been suggested by current state laws. To merely place public employees under the NLRA and preempt state and local laws ignores the possibility that continued creative legislative experimentation can continue to improve and make more effective systems of public sector labor relations. It also increases the possibility that further legislative innovations will be stunted. On the other hand, legislation, such as the NPERA, which goes beyond the composite profile of most current state comprehensive statutes, probably is premature due to state inexperience on some

144. Section 12, GERR RF 51:181, 196 (1973).

of its more controversial provisions and is more likely destined for extended and spirited debate in Congress.

However, as the debate over appropriate legislation continues, the fact remains that most public employees are not subject to bargaining legislation. Of the 36 states which have made some type of legal response to the issue, relatively few have what could be considered comprehensive statutes. The remaining statutes, which have relatively limited coverage, leave vast numbers of public employers and employees without any negotiating authorization or restraints on the extra-legal *de facto* bargaining relationships which arise. In sum, on the issue of state involvement in public sector labor relations, the current situation can be assessed as one of state *underregulation* and *non-regulation* except in a minority of jurisdictions.

Therefore, to meet the essential needs of these public employees and to accommodate some of the legitimate state interests of sovereignty and retained local control of labor relations by those most familiar with its needs, a system of federal regulation is proposed which within that framework would leave great flexibility with the states.

The federal-state system would define basic guidelines governing public sector labor relations reserving ultimate administrative authority with the federal government, but permitting the states broad discretion to fashion rules of implementation and to experiment with innovative provisions in substantive areas such as scope of bargaining and impasse resolution.¹⁴⁵ Under this system, a federal statute would provide all public employees at the state and local levels with certain "minimum standards" of essential bargaining rights, discussed below, and any state with a law in "substantial conformity" would be given the authority to administer its own law, subject only to federal administrative review. On the other hand, any state failing to act or acting in non-conformity would be subject to the comprehensive federal statute administered by a federal agency. Most preferably this same federal-state approach would be applied to the states' political subdivisions on a local op-

145. This type of approach to "state problems" is not new and has been suggested in various forms over the years. *E.g.*, see statement by Arvid Anderson, Chairman, New York City Office of Collective Bargaining, *Hearings, supra* note 1, at 403.

tion basis, with local laws needing to be in substantial conformity with the state law.¹⁴⁶

The minimum standards approach attempts to separate the issues of basic bargaining rights from the more diverse and controversial issues of impasse resolution, union security, etc., and provide a basic legal framework in which the parties may seek mutual accommodation of competing interests within predictable and regulated boundaries.

The essential minimum standards embodied in a nonpreemptive federal statute should include at least the following provisions: (1) Recognition of the right to organize and engage in collective bargaining by all public *employees* save elected or high policy-making officials. (2) Creation of a federal agency fully empowered to administer the statute and make determinations on representation, unfair labor practice, and impasse resolution issues and be authorized to approve or disapprove state labor relations programs seeking exemption under a substantial conformity provision which requires a similarly equipped state agency. (3) Representation issues should be decided under guidelines which permit secret ballot elections, exclusive recognition, with appropriate units to be determined using a minimum standard criteria employing a community of interest and minimum fragmentation basis. (4) Federal guidelines on bargaining obligations should include a mandatory duty to bargain in good faith over wages, hours, and other terms and conditions of employment and permit binding grievance arbitration. Debatable topics such as management rights provisions, union security devices, and bargaining rights of supervisors would be left for negotiations between the parties and the state legislatures. The guidelines should also require prohibition of unfair practices by both public employers and public employee organizations on such important areas as, for example, duties of bargaining and fair representation. (5) Dispute settlement mechanisms should require methods of persuasion such as mediation, and fact-finding, but leave to the state the resolution of whether to use a limited right to strike, binding interest arbitration, or some other fair and accommodating method.

It should be emphasized that these "minimum standards" would

146. This approach has worked very well in New York where New York City has developed its own substantially equivalent law. GERR No. 557, at E-3.

provide only what *must* be contained in an acceptable statute and do not in any way reflect upon additional provisions which the parties may agree upon if not inconsistent with the federal standards. This proposal, then, permits a basic uniformity of essential bargaining principles, while at the same time encouraging continued diversity and experimentation by the states. Perhaps, to begin the process, a model state statute could be drafted and circulated to the states, suggesting innovations such as are currently being employed in the private sector.¹⁴⁷ Also the federal agency could provide technical assistance to the states and administrative grants to implement and administer the state acts. And finally, to encourage continued creativity and innovation and protect against entrenchment and stagnation, an automatic periodic review, for example every five years, could be conducted by the federal agency to reevaluate the federal guidelines looking toward embodiment into the minimum standards of those innovations which have proved successful.

This federal-state system is not a new concept, rather it is an adaptation from other federal guidelines legislation such as unemployment compensation.¹⁴⁸ This type of a system has proven successful over many years experience. Whether the "no man's land" in public sector collective bargaining caused by state inaction will be filled by federal regulation or whether discussion of that possibility will stimulate and encourage sufficient state action is still debated. It is nevertheless clear, in the author's opinion, that if legislators have a serious intention of providing a statutory framework for public sector labor relations, then the federal-state approach with minimal standards is the most feasible federal alternative available. It provides minimum antagonism to opponents and proponents of federal regulation of public sector bargaining. It establishes uniform essential rights and responsibilities for the

147. For a discussion of this area, see H. WELLINGTON & R. WINTER, JR., *THE UNIONS AND THE CITIES* 88-89 (1971). For an illustrative statute, see WIS. STAT. ANN. § 111.70 (Supp. 1972).

148. For graphic description of how and why the federal government entered this area, see Larson & Murray, *supra* note 11; and De Vyver, *Federal Standards in Unemployment Insurance*, 8 VAND. L. REV. 411 (1955). Title Seven of the Civil Rights Act approaches the problem somewhat differently by having its federal agency "defer" to factual determinations by a properly constituted state agency. 42 U.S.C. § 2000e, as amended, and see implementing regulations, 29 C.F.R. § 1601.12. This deferral arrangement was specifically upheld in *Love v. The Pullman Co.*, 404 U.S. 522 (1972).

bargaining parties while encouraging continued diverse and innovative solutions to be found for immediate and pressing public sector labor relations problems.¹⁴⁹

149. The viability of this approach was highlighted when at a recent conference on public employment Robert Helsby, Chairman of the New York State Public Employment Relations Board called for consideration of the federal-state approach, "... there seems to be a clear need for federal minimum standards." GERR No. 557, at E-3 (1974).

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