Reviews

The Politics of Public Sector Unionism

Robert H. Doherty†


Public sector collective bargaining, a phenomenon not quite a decade old in most jurisdictions, appears already to be an issue more profitably addressed by students of political science and public administration than by students of labor relations. Certainly the labor economists, most of whom do not usually think deep thoughts about the relationship between collective bargaining practices and the achievement of the common good, do not possess in their kit of analytical tools the means for directing us toward a sound public policy. Conventional wage theories, for example, do not fit, and application of the private sector concept of elasticity of demand as a restraint on wage increases adds little to our understanding of this new and explosive development. When one gets down to it, the essential questions raised by public employee bargaining have to do with the governmental process—how governments are influenced, how and on what grounds public decisions are made, how ordinary citizens' claims for publicly conferred benefits are met. The main thesis of this book is that by mindlessly and automatically transferring the practices and concepts of collective bargaining which prevail in private industry to the public sector we may be doing great mischief to the governmental decision-making process and frustrating our attempts to arrive at an orderly system of public benefit conferral. There is a need, therefore, for changing the structure of collective bargaining, as we presently know it, before we apply it to governments:

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The goal of such restructuring is to ensure that one particular interest group, the public employee union, does not gain a substantial competitive advantage over the other interest groups in pressing its claims on government. The point is not that there now exists some perfect balance among interest groups that must not be disturbed, but simply that it is a mistake to institutionalize through law techniques that have the promise of giving one group disproportionate power.1

Wellington and Winter do not argue that all features of private sector labor relations would be inappropriate transplants. Indeed, with the exception of the critical question of how the parties ought to be obliged under law to resolve negotiation impasses and disputes over the scope of bargaining, there is in the authors’ view as much meshing as gnashing of gears as we shift from one sector to the other. It might be instructive, therefore, to look at the various provisions and standards used for resolving disputes that arise from time to time in any collective bargaining arrangement to see which provisions suit the public field and which do not.

I

The threshold question in all collective bargaining situations is how the employees should be represented. Through a bargaining agent with both the authority and obligation to represent fairly all members of the bargaining unit both members and non-members alike? Or ought some proportional scheme prevail? The operational answer is that most state statutes governing public employee bargaining follow the National Labor Relations Act and provide for exclusivity. With this feature Wellington and Winter appear to concur, although they would add the proviso that employees not members of the union should, as individuals or in groups, consult with the employer “on the nonbudgetary aspects of matters of governmental policy, whether or not those matters are issues in, or likely to arise during, bargaining.”2

Likewise, the authors generally accept the National Labor Relations Board standards for determining an appropriate bargaining unit: a unit consistent with the locus of employer authority and one

1. H. Wellington & R. Winter, The Unions and the Cities 49 (1971) [hereinafter cited to page number only].
2. P. 93 (emphasis added).
which contains employees sharing a community of interest. They point to the pitfalls of balkanization, the establishment of a large number of bargaining units consisting of occupational or sub-occupational specialties when a single unit encompassing all such specialties would probably serve employees and employers alike almost as well. Proliferation of units, while enhancing freedom of employee choice, also engenders additional costs, blocks an internally consistent wage structure, and invites union whipsaw tactics.

Wellington and Winter also see merit in incorporating the gist of §§ 2 (3) and 2 (11) of the Taft-Hartley Act3 into the public sector. Supervisors, they argue, ought to be excluded from coverage by state public employment statutes. In this view they are at odds with most public employees unions and, if one can interpret indifference as tantamount to acceptance, with most public employers as well. Nor do most of the state statutes granting bargaining rights to public employees exclude supervisory personnel from coverage. The authors make an excellent case for exclusion, however, arguing in the main that if there is any public benefit to be derived from public sector bargaining it may come in the form of encouraging top officials to clarify the blurred distinction between supervisor and supervisee.4 One of the major problems with public service enterprises has been the absence of incentives for managers; top management had been reluctant to delegate and middle management reluctant to supervise. Collective bargaining may well force structural changes in public management that would almost fortuitously result in a more efficient delivery of public services. "The law should not discourage this trend by permitting the holders of these positions to organize or be in units with non-supervisory employees."5

There are then, in spite of the caveat quoted above, certain principles long recognized as valid in the private sector that perhaps ought to be transplanted in whole to government, the wishes of the parties and some legislatures to the contrary notwithstanding. In short, not all transplants are inappropriate.

On still another representation issue, if indeed it falls within that category, Wellington and Winter appear to opt more for the industrial model than prevailing public sector practices. Union security, a prac-

5. P. 114.
tice whereby employees are obliged either to join the union or render to it an equivalent in dues money as a condition of continuing employment—a benefit presently denied to public employee unions in most jurisdictions—is to the authors an issue that in the public sector "seems overblown in that it is fundamentally the same issue, with the same merits or demerits, as in the private sector. . . . [T]he stirring issues of principle—such as they are—disappear in the face of the 'free rider' contention . . . ."6

One might find these rather glib assertions more persuasive had the authors first considered the knotty matter of enforcement. As noted above, in the private sector union security provisions are enforced by threat of discharge, the employer obliging himself to tell a reluctant dues payer to either sign a dues deduction authorization card or pick up his pink slip. Certainly there is good reason to wonder if, in light of the evidence of unions' potential for mischief presented elsewhere in this volume, public employers ought to become potent organizers for the unions.

There is, moreover, the problem of enforcing a union security provision in the context of the job security afforded by state education and civil service laws. Are we to set aside this protection on the grounds that the presence of the "free rider" is more damaging to the public good than our admittedly antiquated civil service laws? Finally, union security provisions would tend to rob employees with occupational sub-specialties who are locked into a broader bargaining unit (counselors and librarians in a teacher unit, for example) of their ability to win concessions from their union. Blocked by the anti-balkanization principle from gaining representation of their own, and usually constituting a small minority in the unit, the only way in which employees so situated can persuade the union leadership to pay them any heed is to threaten to withdraw dues payments. A union security provision would deny these employees that opportunity.

II

As in the private sector, public sector bargaining statutes cope with the scope of bargaining problem with the wonderfully ambiguous notion of "terms and conditions of employment." While some states have attempted to limit the scope of negotiations by either specifying

the mandated subjects or by including a "management rights" clause, most follow the NLRA pattern of generality and ambiguity.

But are there peculiarities in public employment that make it wise public policy to place a limit on the subjects about which the parties are required to negotiate? Wellington and Winter believe that, if not now, then before too long, there shall have to be such limitations. "[T]he scope of bargaining in the public sector must be regulated in a manner that will adequately limit the role of unions in the political decision-making process." 

It is not sufficient to rely on the NLRA model of determining appropriate subject matter on a case-by-case basis. Most disputes over the scope of bargaining which come before the NLRB involve issues relating to job and economic security, caused either by technological innovations or the rationalization of production and maintenance techniques. And while it is true that disputes in the public sector are often over similar issues—proposed changes in work rules and manning schedules, such as the establishment of a fourth platoon for police officers—other important disputes will result from "social and political change."

Thus a teacher union's demand to modify school policy on student discipline, certainly a condition of employment if present policy does not in the union's view provide adequate methods of dealing with unruly students, is also a socio-political problem. Other members of the broader community share the teachers' concern about student behavior, and have suggestions as to how to handle recalcitrant students. Their voices ought also to be heard, which can happen only if the remedy is sought through the political process; they cannot be heard if the decision is made in the isolation of the bargaining room.

Secondly, the authors are concerned that the absence of market constraints, a characteristic of public sector bargaining, tends to reduce the limiting effect of trade-offs. Unlike the private sector, there is no effective self-regulating mechanism controlling the scope of bargaining in public employment. An expanded scope of bargaining in the private sector does not necessarily result in expanded contracts, since unions tend to trade off benefits in some areas in order to se-

8. P. 142.
secure them in others. Because they operate under a less effective “scope regulating” mechanism, public unions are inclined to push rather hard for the inclusion of all proposals in the collective agreement. If they are successful, and it would appear that they often are, this “expansion of the subjects of bargaining may entail an increase in the quantum of union power in the political process.” The authors are worried that this increase of power will come at the expense of the beneficiaries of these services.

There is a third reason for being concerned about applying NLRA principles to public sector subject matter disputes. It is one that, surprisingly, Wellington and Winter do not treat. The strike ban, a feature of all but two state comprehensive statutes, tends to encourage employee organizations to press any and all demands to impasse. While private sector union leaders must be reasonably assured that the membership would be willing to risk the sacrifice of a strike over an issue pressed to impasse, public sector union leaders suffer no such restraint. The only risk involved for them is the loss of sleep and psychic costs of a drawn-out fact-finding hearing. Thus it is not uncommon for a fact-finder in a public dispute to be faced with over a hundred issues on which he is asked to make recommendations. Since fact-finders are not always very perceptive, or at least not always familiar with the intricacies of public administration, a public employer is frequently faced with publicly-proclaimed recommendations on issues that probably ought not to have been on the table in the first place. Though in most instances the employer-legislative body has the final word, it is one thing to refuse to make a concession in the cloistered atmosphere of the bargaining table and quite another to say “no” in the face of a well-publicized fact-finder’s recommendation.

Without some better understanding than now exists of the appropriate role of public employee unions, we may over time witness the emergence of the union-management confrontation as an important policymaking forum. Even if an issue does not appear on the bargaining table, a municipal union may, if it has sufficient power, frustrate the action of a legislative body. In New York City, for example, the president of the Social Service Employees Union has announced that his union will “refuse to implement” the State of New York’s “Incentive for Independence” demonstration project, a program that

10. Id.
would deny certain welfare benefits to families unless able-bodied members engaged in some amount of useful public work. "It is," said the union president, "simply a case of not following illegal, fascistic orders." What the union leader's rhetoric demonstrates is that ideological as well as economic motives can become grist for the labor relations mill. The same might be said for the action of police unions which have consistently opposed, with considerable effectiveness, the institution of civilian review boards to hear citizen complaints regarding police misconduct. Thus the implementation of public policies of far-reaching importance may be coming to depend upon the wishes and political influence of "public servants," whose job is to carry out policies declared by elected officials, regardless of their own political views.

III

Does municipal bargaining actually frustrate citizen access to the decision-making apparatus? Wellington and Winter believe it has the potential for doing so, if it hasn't already. Certainly collective bargaining, whether or not accompanied by a meaningful strike threat, has succeeded in getting employers to change their minds, to force them to listen more attentively to employees than they would in the absence of negotiations. There seems little doubt that to some degree priorities have been re-ordered, allocations re-arranged, and tax rates changed in a fashion somewhat different from what public referenda might dictate. The chances are that in those cities where unions are strong there is less attention paid to other claimants, most of whom cannot be mobilized to put forward a similar show of strength. At least it seems as though unions now have the power to force changes in fiscal and administrative policies that would not have come about had there been no union and no bargaining. Government workers must believe this to be so—how else can one explain the phenomenal growth of public employee unions? In what other way can one account for the fact that in New York state, for example, the percentage of public employees covered by collective agreements grew from a mere handful in 1967, the year in which the state's public employment statute was passed, to over ninety per cent in 1972?12

Unfortunately, the impact of bargaining on the decision-making process, resource allocation, and tax rates is impossible to assess in precise terms. Are public parks and libraries in bad shape because the sanitation workers and the police won a substantial increase in wages and fringe benefits? One suspects, along with the authors, that something like this causal relationship may exist. But there is no known method of inquiry that can provide the answer. Nor can we expect to receive much aid in our investigations from public officials responsible for striking the bargain. In this respect, as the authors point out, public officials are allied with the union leadership, since it is not usually in their interest to speak out on the fiscal or internal allocative consequences of the bargain just struck.

Although we lack adequate measurement techniques, there remain strong theoretical grounds for being concerned about the impact of collective bargaining on government. The concern becomes more pointed when the impetus for reaching agreement is provided by the willingness and ability of the public employee union to strike. The strike and its threat contain the greatest potential for altering the benefit conferral process. And it is on this issue that Wellington and Winter make their most significant contribution. While they do not propose that the strike right be prohibited in all cases to all public employees under all circumstances, they nonetheless point to so many problems connected with public employee strikes that the reader cannot help but interpret their views as being somewhere between extreme caution and outright prohibition.

This is a departure from the “conventional wisdom” as expressed by perhaps most neutrals, journalists, academics, and a growing number of legislators. This “wisdom” was succinctly set forth in the recommendations of a 1971 American Assembly Conference on “Collective Bargaining in American Government.” The majority of the conferees—representing public unions, public employers, business, communications, academics, and lawyers—resolved that the strike ban gives rise to unequal treatment of public and private workers doing similar tasks. It relies on the mistaken view that every strike by governmental workers affects public health and safety. It does not recognize the realities of public employment labor relations in that a strike may often result in lost wages and no real discomfort for public employers whose revenues continue unimpaired. Therefore if all public workers are prohibited from strik-
ing, disrespect for law is encouraged and a feeling of lesser status is unnecessarily fostered. Finally, a ban on strikes does not guarantee there will be no strikes.¹³

There are implications in this statement that warrant some analysis. First, while it is true that a strike ban "gives rise to unequal treatment of public and private workers," it is also the case that the National Labor Relations Act affords at best a hollow equality among private employees. Construction workers and lamp shade workers both have the "right" to strike, but the Act does not attempt to manipulate the product market in such a fashion as to give as much meaning to that right for the latter as exists for the former. But let us take the unequal treatment argument on its face and apply that concept to all claimants on the public purse. Surely, as Wellington and Winter have made clear, granting the right to strike would deny equal treatment to such groups since it would give to only one a degree of power that could probably not be matched by all other groups combined. What persuasive power do users of parks, museums, and libraries have vis-à-vis a militant, strike-happy sanitation union, even though the former might outnumber the latter many times over? Which side would get the gravy if it ever came down to a choice between better parks, libraries, and museums on the one hand and employee wage and benefit improvements on the other? Granted, there is scant evidence as to what actually does happen. But what one can garner from recent developments in strike-prone municipalities suggests that improvements in worker benefits do sometimes come at the expense of more widely-shared public benefits.

Second, the view that "every strike by governmental workers affects health and safety" is of course a mistaken one. But it is doubtful that anyone with an I.Q. of more than 83 who is at all familiar with the field has ever "relied" on this argument to support the strike ban. What is central to the argument of those who propose a total ban on public employee strikes is the contention that it is virtually impossible to make the distinction between essential (health and safety) service and those services "peripheral" to the public good. A strike which is merely a nuisance to one segment of the population can be critical to another—a transit strike, as we shall see, is one example. Essentiality or health and safety considerations, moreover,

are probably less important in the long run than a consideration of the degree to which strikes have the potential of altering our system of public benefit conferral.

Third, the “reality” that a strike may result “in no discomfort for public employers” misses the point almost entirely. It is true, of course, that few mayors, city councilmen, or school superintendents have suffered any real discomfort because of a strike. Indeed, not a few have reaped political capital by “holding the line.” In those instances where wage payments lost due to the strike have exceeded the cost of the settlement, the strike may have itself served as the means for balancing the budget, perhaps even providing a surplus. But the effect of a work stoppage on employers is hardly the issue. It was never intended that they should be the primary cost bearers. The cost is borne instead by the public, and the union’s hope usually is that a “discomforted public” will pressure public officials to come to terms soon, regardless of the long-run consequences of the settlement.

Fourth, arguments that the strike ban encourages “disrespect for law” and does not “guarantee there will be no strikes” are curious and unpersuasive. Are we asked to believe that any law that violates a portion of the population’s sense of fair play, and which they therefore ignore, ought to be repealed? Does it follow that because a strike ban does not “guarantee” perfect compliance that the ban ought to be lifted? This is a peculiar standard to apply to lawmakers, since it is doubtful that there has ever been a statute that has not been violated on numerous occasions. Imperfect statutory compliance is not usually thought to constitute sufficient grounds for repeal.

Before supporters of the strike ban are placed in the camp of the reactionaries and considered kindred souls with those opposing the expansion of human freedoms and the struggle for equality, we ought to think more carefully about all the dimensions of the public employee strike. Strikes are permitted in the private sector because it is generally felt that the market mechanism serves as a brake on outright anti-social behavior. Union leaders are restrained in their demands by the knowledge that in most instances of a strike consumers can buy substitute products or simply delay purchase. Public sector services, however, tend to be monopolistic and the demand for them inelastic. They also tend to be labor intensive, which means there is little threat of technological displacement. Private workers, on the other hand, particularly in the manufacturing industries, are fre-
quently deterred in their demands by the employers' counter-pressure to introduce technological savings.

Because it is a characteristic of the private product market that both domestic and foreign produced substitutes are usually available, the general public rarely bears a heavy direct cost as a result of a strike. A Plymouth or a Volvo can substitute for a Chevy, a G.E. toaster for one made by Westinghouse. Moreover, in those few instances when strikes have robbed the consuming public of alternative services or commodities, *i.e.*, when they have inflicted a significant direct cost on the public, injunctions have rarely been met by union non-compliance. The public sector case has been different—most strikes have taken place in violation of a court order.

As a general rule, there is no readily available substitute for a publicly-conferred benefit. School children cannot ordinarily opt to attend classes in the next district or enroll in private school; welfare recipients cannot easily turn to private charities; citizens generally cannot contract with a private caterer to haul away their garbage. More specifically, public employee strikes tend to discriminate against the poor, who rely disproportionately on public services—schools, sanitation, welfare, transportation. The 1966 New York City transit strike is a clear illustration of the disproportionate cost borne by the poor in a public work stoppage:

Forty per cent of workers normally using the subway or bus to go to work lost one or more work days during the strike. Fifteen per cent did not get to work at all. Among low income workers (under $3,000 per year) the corresponding figures were 60 per cent losing some time and 30 per cent not working at all.\(^{14}\)

A final difficulty with the private sector transplant is that public sector unions often have two bites at the apple. What they fail to achieve through economic force alone they may be able to get through political influence. While a private sector union cannot hope to win concessions by threatening to unseat members of the board of directors at the next board election, public unions sometimes do entertain such hopes, often with good reason. The significance of this influence is, of course, unclear. But it is important to consider, against the background of the generous wage and fringe benefits received by

New York City workers in recent years, a New York Times estimate that the votes of municipal employees and those of their families total 1.2 million of the 2.3 million votes cast in municipal elections.\textsuperscript{15}

If strikes are so damaging, do meaningful alternatives exist that will allow employee organizations a measure of self-help while avoiding damage to the public interest? Fact-finding with recommendations is one such alternative. Wellington and Winter see some merit in this procedure, in that it allows the union to muster public support for its position while it keeps final authority with the legislative body. There are also problems with this approach that the authors do not see. First, fact-finding in practice is not much like the quasi-judicial procedure the authors imagine. It tends to be viewed by most fact-finders as a continuation of mediation, complete with all the faults of that mysterious art. Second, the process assumes a degree of sophistication on the part of the fact-finder that in the main is unrealizable. There is too much business, and the incentives are too small to induce fact-finders to familiarize themselves adequately with the intricacies of running a public enterprise. These may be the main reasons why fact-finders rarely seek facts but instead search for an accommodation. Third, fact-finding takes place in the crisis atmosphere engendered by a bargaining impasse: employees mutter about possible job action, citizens express contradictory worries about the possibilities of increased taxes and the temporary loss of public services. What is acceptable to the parties under these circumstances can turn out to be an unlivable arrangement when calm returns and there is an enterprise to run.

The authors also toy with the possibility of authorizing binding arbitration of bargaining disputes. The doctrine of illegal delegation, a potential legal obstacle, is seen as a "puny" threat. The authors quote approvingly a 1970 Rhode Island Supreme Court decision\textsuperscript{16} which held that when the legislature delegated to arbitrators authority to set salaries for public employees it was acting clearly within its legislative function. "Final offer" or "one-or-the-other" arbitration, however, in which the arbitrator is asked to select one or the other side's final offer, is dismissed by Wellington and Winter almost out of hand.\textsuperscript{17}

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Perhaps the most intriguing of the authors’ suggestions on dispute resolution urges submission of contract settlements to a public referendum: “The referendum device increases the visibility of a settlement’s cost and places it on those voters with the most power to resist.”

This might be a troublesome procedure, however, in that it assumes an unrealistic degree of sophistication on the part of the public. How might the public react, for example, to the announcement of a significant wage increase which, it turned out, was the price the employer willingly paid for the union’s agreement to surrender a costly work rule? Taxpayers would probably react negatively to the wage increase and find the work rule issue far too subtle to comprehend.

IV

*The Unions and the Cities* offers few prescriptions. It speaks rather to the dilemma engendered by the new and frequently unsettling phenomenon called public sector bargaining. On balance, Wellington and Winter see the extension of collective bargaining rights to sometimes oppressed groups of citizens as a social plus. But there is also a lot to worry about. Most of the worries have their origin in our concern about the impact which bargaining may be having on representative government and the quantity and quality of public services. As noted earlier, unions have the power to inflict damage on the public, making it difficult for governments to resist their demands. Other claimants, including those who simply want better services in exchange for their tax payments, cannot ordinarily compete effectively with militant public sector unions. These latter claimants may well feel disadvantaged when a municipality offers wages far in excess of what the local labor market requires, if the streets are no cleaner or safer, mass transportation is no more efficient, or children do not learn better at school.

Urban life appears to be worsening. And while it would be folly to attribute this apparent decline to the machinations of unions, it is likely that the advent of strong public sector unionism has increased the difficulty of reversing the deterioration. Certainly one cannot expect generous cooperation from the unions in an endeavor to achieve productivity savings or to secure a more rational scheme

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of resource allocation. Unions are essentially self-help organizations. It is too much to expect that they can be prevailed upon to abandon or even significantly modify this primary objective.

All this, of course, is largely speculation. There is not enough evidence contained in this book, or gathered elsewhere for that matter, to document the extent to which trade unions have in fact influenced the conduct of public affairs. Wellington and Winter think the potential for this influence is great. If they are correct, public officials had better begin to do their homework. *The Unions and the Cities* is an excellent place to start.
The Potential of Collective Bargaining in Public Employment

Lewis B. Kaden†


For lawyers, the connection between substance and procedure is easily understood. Our training and activities teach the extent to which rule influences outcome and the power this linkage gives to the law-maker. But we sometimes appreciate less well the potential of behavior to limit the rule-maker, the way in which popular expectations and norms of conduct restrict the freedom of rule-makers to impose their own notions of proper conduct on parties to group action.

The idea of the limitations of legal action is usually stated as an argument against judicial overreaching, where it finds roots in the undemocratic, unrepresentative character of the judicial branch. Judges must construe, not make law, although all of us know how faint is the line demarcating the passive from active function on the bench. Professor Harry H. Wellington is justifiably regarded as one of the most astute critics of a hyperactive judiciary. He describes his excellent book, *Labor and the Legal Process*, as "an inquiry into the limitations of law and of legal institutions, for it should provide insights into the disutility as well as the utility of employing law to attain social goals."¹

But his writings and others' arguing the case for judicial restraint tend to overlook another important aspect of the notion that conduct limits the effectiveness of law. That is the case for legislative restraint, not because legislative power need be constricted on grounds of political theory, but because we lawyers are inclined, as Professor David S. Shapiro wrote, "to overrate the significance of legal principles and rules as factors in determining how people behave."² We

tend to ask too much of laws in areas flushed by behavioral patterns which themselves make "law," though not perhaps the formal law of the legislative process.

All this is mere introduction to a discussion of The Unions and the Cities, Harry H. Wellington and Ralph K. Winter, Jr.'s substantial contribution to the proliferating literature on regulating the relations between public workers and their government employers. The burst of public employee unionism in the last decade has raised the difficult question of how to design legislation to meet the goals of promoting public employee participation in setting conditions of work, protecting the communal interest in continuous public services and preserving the political process. The question is troubling because it reaches deeply to issues of group behavior and political theory. It is troubling, too, because events do not await commission reports or scholarly reflections. With the aid of statutory procedures or without them, public workers are organizing, asserting collective interests and backing up their claims by concerted action against often baffled and hesitant public managers throughout the country. While shelves fill with polemics, proposals and commentary, government officials deal what seems a shrinking deck out to what seems a shrieking horde of competing interests, including the unions representing public employees. One suspects somehow that behavior, of unions or other groups, will not be too much influenced by the legislative framework. This is an area where legislatures may one day have to respond to the expectations of the people being regulated, rather than attempting to re-mold them.

I

Against the backdrop of political theory and cacophonous behavior, Professors Wellington and Winter bring their considerable skills of reflection and expression to assess the experience with unions in state and local government and to propose their own conclusions to the


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legislator's dilemma. As the first of a series of "Studies of Unionism in Government" sponsored by The Brookings Institution, the authors tackle the subject in four parts: first, the framework for regulating collective bargaining, where they review the theory of bargaining and the effects of its practice on the political process in cities; second, the preliminary issues of recognition, union security and unit determination in the public sector; third, the bargaining process itself, including the employer's organizational problems, scope of bargaining and problems of administering the collective agreement; and fourth, the critical matter of public employee strikes and impasse procedures.

If this book is meant to provide the analytic pins for the Brookings study of public unionism, it succeeds admirably. Both Wellington and Winter are at home with the kind of institutional analysis required to penetrate the clamor of activity in this area and perceive the promise and the risks of importing collective bargaining from corporate boardrooms into government chambers, and bringing the impact of strikes from the assemblyline to the classroom or the garbage truck. As will become apparent, the critique presented here stems not from a quarrel with the authors' analysis, but from a belief that their conclusions and proposals attempt to regulate too finely the conduct of unions and city governments—a legal overreaching at odds with at least Wellington's earlier warnings about the "dis-utility" of law.

But, before proceeding to a more detailed discussion, two points about this book, one trivial and another quite basic, are sufficiently troublesome that they should be noted at the outset. First, the trivial. Wellington and Winter insist on terming "traditional" the view that public strikes need not be uniformly prohibited. They write: "The traditional view, however, is that collective bargaining is not a factor tending to limit government's role because the nature of the function involved is such that it makes little difference whether a public or private employer performs it." 5 Earlier, the insistence upon a "full extension of collective bargaining—including strikes—to public employment" is characterized as "fast becoming the conventional wisdom." 6

All of us like to believe our efforts are bucking the tide of "con-

5. H. Wellington & R. Winter, Jr., The Unions and the Cities 62 (1971) [hereinafter cited to page number only].
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...ventional wisdom," that our own reflections embolden us to set correctness and sound thinking against the sweep of popular feeling. But unless Wellington and Winter have taken to heart their apprehension that unions control popular wisdom as well as public bargaining, there seems little foundation for the view that the "right to strike" advocates are winning the battle of commentary or the battle of law-making. The authors themselves note that except for the limited possibilities of legal strikes in Hawaii, Pennsylvania and Vermont, and the difficulty of obtaining an injunction against an illegal strike in Michigan, states "that have addressed the question through legislative act or judicial decision impose a legal prohibition, backed by the injunctive remedy, on strikes by public employees." Not only is the strike ban almost universal through local, state and federal government, but most legislative attention these days seems directed to stiffening penalties applied against striking unions and individual workers in a dubious effort to prevent stoppages by resort to the deterrent impact of criminal sanctions. It thus does not appear that the view taken here, that collective bargaining requires the possibility of strikes and therefore that strikes ought not to be uniformly prohibited, is either conventional or particularly influential.

A more fundamental difficulty with the authors goes to a point central to their analysis. A great deal of their theoretical discussion and proposals implicitly rests on an unexplored and unsubstantiated factual premise: that strikes by public workers "too often succeed." Those precise words appear in an earlier version and have been omitted from the full book, perhaps in partial anticipation of the sort of objection raised in this review. But the basic assertion—that the pain of strikes creates public pressure for concessions, makes public unions too strong and requires rules to curb their power—is essentially an empirical one. It pops up throughout the book, in

8. HAWAII REV. STAT. § 89-12 (Supp. 1971).
10. In Vermont, strikes by local government employees are prohibited if they "will endanger the health, safety or welfare of the public." VT. STAT. ANN. tit. 21, § 1704 (Supp. 1971).
12. P. 170.
slightly altered phrasings. Thus the authors write: "if unions are able to withhold labor—to strike—... they may possess a disproportionate share of effective power in the process of decision. ... A large part of a mayor's political constituency will in many cases, press for a quick end to the strike with little concern for the cost of settlement. Interest groups other than public employees ... may be put at a significant competitive disadvantage in the political process."\textsuperscript{14} Or, on the next page, "in the long run strikes may become too effective a means for redistributing income; so effective indeed that one might see them as an institutionalized means of obtaining and maintaining a subsidy for union members."\textsuperscript{15} In talking about scope of bargaining, they urge regulation "in a manner that will adequately limit the role of unions in the political decision-making process."\textsuperscript{16} There are still other examples: "Distortion of the political process is the major, long-run social cost of strikes in public-employment. The distortion results from unions obtaining too much power ... ."\textsuperscript{17} What is troublesome about all this is not that the assertion is demonstrably false, although it is at least doubtful as a uniform description of leverage in public sector bargaining, but that it is both fundamental and unsubstantiated. It is a \textit{theoretical} statement which Wellington and Winter employ as the basis for recommending a complex regulatory scheme. Now it may well be that an empirical inquiry into the outcome of public sector bargaining and strikes was outside the scope of the authors' study. Certainly I have no such analysis to advance. But I do have a theoretical statement to pose as an alternative to theirs: that in the early years of bargaining with government, ineffective bargaining by the employer or an inability of the employer to organize itself for effective bargaining, and in some instances the operation of third party procedures imposed by law, inflated the cost of settlements. This has, in turn, made more difficult the task of union leadership in subsequent bargaining sessions and has increased the risk of strikes.

II

Professor Wellington has throughout his writings illuminated our understanding of the way the institutions created for labor relations draw upon and in turn influence social, political and economic

\textsuperscript{14} P. 25.
\textsuperscript{15} P. 26.
\textsuperscript{16} P. 142.
\textsuperscript{17} P. 167.
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processes. Now, in the first part of *The Unions and the Cities*, he and Professor Winter have given us an exceptional view of the inevitable impact of public employment law on urban politics, public finance and social theory. It is in this first part that the authors set out their basic argument. The function of local government, they say, is to redistribute income, both directly through transfer payments and indirectly through the provision of services financed by progressive taxes. Public decisions involving the allocation of resources and income are made in the political process, which involves a competition for the attention of officials among a variety of interest groups. In the paradigm case, the responsiveness of public officials to these groups is assured by periodic balloting. The groups contending for a larger share include the poor, commercial interests, senior citizens, labor groups and public employees, among many others. Their membership rolls and the allegiances of members overlap. Each group makes claims on the elected public officials with legislative and executive authority. It falls to the public official, particularly the chief executive or mayor, to coordinate "competing claims while remaining politically viable. And that coordination will be governed by the relative power of the competing interest groups."\(^{18}\)

In this context, collective bargaining laws supply an institutionalized channel of participation for one type of group—municipal unions—to organize, select leaders, exclude others from their area of concern, and gain the attention of officials. Other groups are left to the various devices of political pressure without the benefit of exclusive recognition, dues check-off, mandatory subjects of bargaining and other familiar aspects of public employee relations machinery.

The authors take us through an instructive lesson in the differences between public and private sector bargaining—a lesson which is a refreshing alternative to the conventional catalogue of "essential services" and "public interest" which represent the outer limit of too many writings in this area. Wellington and Winter start with the proposition that in the private sector, "social costs imposed by collective bargaining are economic costs; that usually they are limited by powerful market restraints,"\(^{19}\) particularly the risk of unemployment if the cost of labor rises too much. Even where the employment-benefit tradeoff is undercut because product demand is inelastic or the industry is expanding, still the incentive to substitute machines

\(^{18}\) P. 21.

\(^{19}\) P. 17.

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for labor and the existence of a large unorganized sector restrains bargaining demands.\textsuperscript{20}

In the public sector, the bargaining constraints are fundamentally not economic but political. If public services are monopolies (and, though the authors do not stress this, if the skills are specialized) high benefits will not generally produce less employment. Nor will unorganized labor working for lower rates constrain the bargain. The authors' "paradigm mayor" is influenced primarily by a desire to survive in political life—either "to be re-elected or to move to a better elective office."\textsuperscript{21} Since his function is to coordinate competing claims on the budget, and thereby determine the distribution of income, the share he agrees to give to employees affects the share available for others. The authors expand on this with appropriate qualifications, noting that the reality, as is so often the case, is closer to a continuum from market to political constraints than a precise division between public and private activity.\textsuperscript{22}

Up to this point, I have little quarrel with Wellington and Winter. Though no summary can really be fair to the thrust of their argument, the linkage between bargaining as an institution and the process of urban politics is clearly correct. But the authors go on. Strikes by public employees, they argue, "skew" the political process in government "by concentrating too much power in one parochial interest group."\textsuperscript{23} In other words, to use their earlier phrase, strikes succeed too often. Further, an expansive scope of bargaining, touching on matters such as class size in education or manning requirements for policemen and fire fighters which affect not only conditions of employment but "controversial political issues," also distorts the political process by "drastically [reducing] the influence other groups will have on the decision-making process."\textsuperscript{24} This argument, premised on the assertion that strikes too often succeed, is then fitted into the classical theories of sovereignty and illegal delegation commonly used to oppose public unionism and bargaining. Wellington and Winter acknowledge that the traditional formulations of these doctrines—that governmental power is supreme and its authority to make political decisions cannot be shared or delegated—have been properly discredited as useful tools for deciding how to structure labor policy in government. The issue

\begin{footnotes}
\item\textsuperscript{20} P. 16.
\item\textsuperscript{21} P. 21.
\item\textsuperscript{22} P. 32.
\item\textsuperscript{23} P. 40.
\item\textsuperscript{24} P. 41.
\end{footnotes}
"is not . . . whether government's power is 'supreme,' but how government as an employer ought to exercise that power." The authors propose a new concept of sovereignty—"the right of government, through its laws, to insure the survival of the 'normal American political process.' " And the limiting influence of the delegation doctrine, while not available to invalidate agreements or support a refusal to bargain with employees, does bolster restrictions on the scope of bargaining.

This is somewhat puzzling. Are the authors providing the intellectual basis for a judicial attack on an expansive scope of bargaining or even a right to strike where it is legislatively assured? If so, the invitation to judicial activism would be extremely troublesome, and particularly uncharacteristic. More likely, they are merely supplying some extra baggage to add weight to their proposals for legislative restraint against "too powerful" unions. As such it is a make-weight—for the question is still the validity of the factual assumption about power and whether the government's unquestioned right to a "normal political process" is at all imperilled by public unions or strikes.

There is an ambivalence which runs throughout this section, about whether collective bargaining or strikes are the source of the "distortion" allegedly suffered by the political system. Wellington and Winter call the first chapter "The Limits of Collective Bargaining in Public Employment," which is the appropriate issue. But after exploring the public and private models of bargaining and the claims made for bargaining in each sector, it turns out that only a full transplant of collective bargaining into the government arena is offensive to the authors. What must be surgically removed is the strike weapon, or more fully, "the combination of the strike and the typical municipal political process, including the usual methods for raising revenue." The authors' prescriptions, of which I have more to say later, follow from this: either ban all strikes or "make cities less vulnerable to strikes and [thereby] reduce the potential power of public employee unions to tolerable levels."

The real issue in public employee relations is whether public workers should have the right to bargain collectively and, more precisely, whether because of the political process the employer can be expected to organize itself for effective bargaining. For the employer to be
effective requires first that the management lines of authority be clearly drawn so that the union can identify the employer and so that the employer can make the decisions necessary to reach agreement. Where the employer's authority is divided among executive and legislative officials, or independent agencies and boards, or varying levels of government, that requirement of effective bargaining is not easily met. Second, the employer, even if properly identified, must be able to make decisions in a sound manner; he must be able to resist at times and know how to accommodate at others. These are the issues to which commentators and legislators ought to address their attention. Instead, debate is obscured by controversy over the right to strike or the impact of strikes. Yet that is an irrelevant matter. If employees are granted the right to bargain collectively and participate in setting conditions of work, they will threaten to strike and will, on occasion, back up the threat. The basic question is whether or not they are to have that method of participation at all.

The logic of their analysis should have carried Wellington and Winter to a rejection of collective bargaining. Apparently they retreated from this logic out of an inability to find any satisfactory alternative which would bring to public employment the participation, equity and stability gained by bargaining over the terms and conditions of employment. They share that inability with countless others who wring their hands in dismay with collective bargaining but have no alternative to offer. The possibilities for impasse resolution are analyzed by the authors in Part IV, and will be discussed below. For now, it should be sufficient to note that their effort to separate out the strike from the bargaining process casts a lingering shadow throughout the book. The reader suspects that Wellington and Winter were several times on the verge of announcing that they had no confidence in bargaining as a method of setting terms and conditions of employment, and advocating another system. But each time they approached the brink, some little voice cried out, pulling them back, and sending them off into more complicated ways to "reduce union power."

Concerted pressure is, of course, an integral part of collective bargaining. The most common and probably the most stable method of applying pressure is the capacity to withhold labor through a strike.

More precisely, the potential to apply pressure, and the threat of it even more than the reality, is the key to making a bargain. This is so elementary that even the most extreme opponents of public strikes search through other impasse procedures to find substitute forms of pressure to produce agreement.

The most popular device in public sector laws today is fact finding with recommendations offered by a neutral in the hope that, while not binding, the neutral's evident wisdom and equity will command acceptance by both parties and marshal community support toward that end. But this procedure can do more harm than good, both by increasing the cost of settlements or hardening positions and making resolution of the dispute more difficult. Some kind of leverage is necessary to a voluntary agreement, as opposed to terms imposed on the parties from without. Otherwise the deal is a result of employer beneficence, and charity by any other name is a unilateral act.

Thus the possibility of a strike and the process of collective bargaining rise and fall together. The strike is not a fine-tuned weapon; it does not operate uniformly to equalize leverage or assure a fair deal. But it has the advantage, not to be easily scorned, of placing the emphasis on voluntary action to settle disputes and supplying a single confined form of leverage which, in the private sector, has just about eliminated more violent tactics to support employee claims. Some commentators, most notably Professor Merton Bernstein, propose tempering the pain of strikes which interrupt public services by adopting more refined techniques of mass pressure including the non-stoppage strike or the graduated strike. Whether it is necessary for law makers to attempt to set so precise a mold for workers' behavior may be doubted, but even these proposals start from the necessary assumption that some form of leverage is necessary if there is to be any bargaining.

A final comment on this theoretical section. What is involved in any discussion of public unions or politics is a matter of power. Everyone has some fixed notions about the locus of power in municipal affairs or bargaining, generally without much backing. Two

observations made in other contexts might be noted. Harold Lasswell in *Power and Personality* wrote that: “Power is an interpersonal situation; those who hold power are empowered. They depend upon and continue only so long as there is a continuing stream of empowering responses.”

That is fairly central to my presupposition about public sector bargaining—that more often than Wellington and Winter seem to realize, substantial settlements are gained not through clear power of the union in the economic or political sense, but through the empowering response of the government, usually translated into overzealous concessions or, at least, ineffective bargaining. After some initial harsh contact with the costs of bargaining inexperience, public managers tend to excess in the other direction, freezing up in fear of showing weakness by any accommodation. This pattern has led to some of the most difficult public disputes of the last few years.

Finally, the political power the authors fear is not newly come to the laboring classes or even to public employees, though public employee bargaining may provide a new means of articulating that power. Rather, city politics has usually been the private preserve of working class ethnic groups, which prompted William Shirley, the British Governor in Boston, to reflect in 1747 on the consequences of urban power in pre-revolutionary America:

> The principle cause of the mobbish turn in this town is in its Constitution; by which the management of it is devolved upon the populace assembled in their town meetings; where . . . the meanest inhabitants who by their constant attendance there are generally in the majority and outvote the gentlemen, merchants, substantial traders and all the better part of the inhabitants to whom it is irksome to attend.

Leverage in politics is certainly not new to labor organizations. Indeed, some would argue that the introduction of collective bargaining and the elimination of legislative determination of wages and benefits might actually reduce labor costs for some units of government.

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33. This comment is unavoidably subjective, drawn from my own experience in public bargaining, particularly in Newark where two long teachers' strikes have left deep scars on the city. See R. Braun, *Teachers and Power* (1972).
35. The postal service is one example where management actively sought bargaining over wages. As the President's Commission on Postal Organization reported, legislative determination of pay for postal employees left management frustrated and incapable of “buying union cooperation in improved management or productivity.” *Towards Postal Excellence* 20 (1968). See also *The Postal Dispute and Settlement*, in *Collective Bargaining Today* 361-78 (1970).
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In the rest of Part I, there are three additional issues that deserve notice: race relations, federal versus local legislation, and the question of diminishing the scope of government.

A. Race and Collective Bargaining in Public Employment

Wellington and Winter properly state that because public sector bargaining takes place in a political context, “it often touches society’s most sensitive nerves,”36 which in this society include the raw nerves of racial discord. Certainly the interaction between race and labor in all of American politics is one of the most critical issues of the day. In city government, questions of labor relations and race touch and rub constantly in the close proximity which only contemporary urban residents can appreciate. The authors note the many ways in which this interaction occurs—the extent of black employment in cities which makes unionism a technique of community or class organization (which, of course, it has always been for white workers); the emergence of black caucuses in either predominately white, or at least white-led unions; and the tenuous relationship between black residents suffering the plague of poor services and the white unionists who man the classroom, the garbage truck or the patrol car.

But the authors do little more than list these contexts and pass on. One wishes they had attempted more, for this question of the relation between black residents and unions is fundamental not only to the issues of municipal labor relations, but to such vast matters as the potential of urban government to address its problems and the future of progressive political coalitions in the nation as a whole. The hostility between blacks and unions demonstrated by the school decentralization struggle in New York and the civilian review board issue in many cities strains, as the authors say, the “social fabric.”

Unions and minorities have traditionally been a bulwark of social democracy in this country. If these groups are driven apart, the political process will truly be altered, to a degree greater than collective bargaining itself can accomplish. So far, the bitterest strikes in the public sector have been fought not over twenty year pensions, $10,000 salaries or even participation in policymaking, but over more basic and more difficult issues of status and recognition in fact after formal legal certification as a bargaining agent. And in many large cities, those battles have been partly racial, partly labor disputes. Any-

36. P. 45.
one who witnessed the lasting scars of these confrontations in New York and Newark must worry more about this issue than whether strikes will be made legal. The trouble with Newark schools is not the result of contractual grievance arbitration for teachers or the release of teachers from hall patrol and cafeteria duty. Yet two long strikes occurred, at least nominally over these issues. The poor performance of New York City schools is not really curable by giving local supervisors discretion to transfer teachers out of the district, but the disruptive 1968 New York strike was at least triggered by a dispute over Ocean Hill-Brownsville's attempt to order transfers.87

Behind these abrasions lie vital questions of labor policy. This is one area to which the authors could have applied their powers of analysis with lasting value.

They do return to the issue to suggest non-exclusive recognition of bargaining representatives to allow for minority caucuses in the work force. A similar suggestion has been advanced to deal with minority workers' interest in private industrial unions.88 However, before we abandon so fundamental a part of labor policy as the principle of exclusive recognition, and one so valuable to labor stability, we might test whether in fact the more important cleavage within the work force is not age or tenure rather than race. If unions have the tendency to look after the interests of senior members, that inclination is as common to all-white or all-black groups as it is to organizations with older white members and younger blacks.

B. Uniformity vs. Diversity in Legislation

Wellington and Winter come out strongly for state and local options in designing machinery for public employee relations, and against proposals currently pressed for federal action.89 They feel that this is one area ideally suited for federal deference to the "chambers


89. Pp. 49-58. Federal power to regulate the employment relationship of state and local workers has been acknowledged by the United States Supreme Court. Maryland v. Wirtz, 392 U.S. 183 (1968). Three bills have been introduced in the Congress to bring public workers under federal legislation. See also model laws proposed by various groups and collected in GOV. EMP. REL. Rptr. Ref. Files 51:201-251. Secretary of Labor James D. Hodgson submitted a statement to the House Special Subcommittee on Labor opposing federal regulation of state and local government employment relations. GOV. EMP. REL. Rptr. No. 446, B-6 (Apr. 3, 1972).
of experimentation” Brandeis saw in the state legislative role. More precisely, what they inveigh against most strenuously is any effort “to institutionalize through law techniques that have the promise of giving one group [the unions] disproportionate power.”40 They state: “No one structure, no one mechanism can be recommended for all municipalities.” Therefore, at least with respect to the “principal problems” of strikes and the scope of bargaining, “[f]ederal legislation seems . . . inappropriate”41 and “diversity in rules and structures [is] virtually a necessity.”42

In this they are correct, at least at this point in time. Collective bargaining in cities is part of the local political process, as the authors so well perceive, and it should be left to local politics to work out the rules of the game. The substance or impact of uniform rules bothers the authors, but more important, we should encourage the exercise and practice of local government if we are to strengthen its capacity. At least for a time, then, during which states and cities hopefully will benefit from their early experiences and improve the labor relations machinery they design, federal action should be deferred. If the states do not do better than they have, however, the need for federal action in establishing standards and procedures for public sector bargaining will be clear.

C. Scope of Government

Since the authors clearly view unions as an inhibition or threat to the effectiveness of city government, it is perhaps not surprising that they find appealing the notion that cities shed some functions by contracting out service responsibility to private firms. “[W]here the appropriateness of the government’s performing a function is in doubt,” they write, “the fact of public employee unionism should encourage government to decline to undertake it or cease to perform it.”43 Leaving aside the unproven factual premise that strikes too often succeed, Wellington and Winter may have misread the impetus for subcontracting. In large measure, use of private carting firms, for example, is impelled by the desire for improvements in administrative efficiency. While the result may be to reduce unit labor costs, private services do not necessarily pay lower wage rates. In addition, experi-

40. P. 49.
41. P. 51.
42. P. 53.
43. P. 61.
ence with subsidized industries indicates that government cannot easily escape the consequences or the practice of collective bargaining by relinquishing direct employer status. For example, voluntary hospitals depend on insurance carriers and government for funding; as a result both carriers and government officials are very much participants in collective bargaining for hospital workers. In the disputes which arise between workers and private contractors performing services at government expense, the city is no third party neutral but is instead an active participant as the de facto employer who pays the bill. If, on the other hand, the authors are urging government to shed some functions entirely, leaving rates and financing to the market, their proposal could result in a regressive distribution of the costs of essential services.

III

In Part II, involving the issues of "organization and the establishment of collective bargaining," Wellington and Winter review the experience with legal efforts to restrict public employees' rights to join a union, the procedures for representation elections, the question of union security in the public sector and criteria for unit determination. What they say on these matters is not troublesome, but one can be critical about the matters they emphasize and the allocation of their attention.

The increasingly important issue of structuring collective bargaining to match appropriate lines of government responsibility for policy and revenue raising is hardly mentioned. Yet one of the most difficult issues in New York City municipal labor relations today is the extent to which community school boards should participate in or control bargaining with teachers. State law now requires "consultation" between central and local boards in the bargaining process and the question of applying that requirement is interesting in itself, but a vital part of the decentralization debate revolves around

44. The authors do discuss, in Chapter 8, the difficult issue of locating the employer and giving him bargaining authority within a level of government when competing agencies, commissions and officials, each have an interest in policy, budget or administration and therefore, a stake in the bargaining outcome. They discuss ways to eliminate this confusing fragmentation. But they ignore the equally difficult issue of intergovernmental relations in public employment, particularly where fiscal responsibility is divided among state, local and federal government. See Rehmus, Constraints on Local Governments in Public Employer Bargaining, 67 Mich. L. Rev. 919 (1969).

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the demand of local boards, with some substantial political and academic support, to play a larger role. Beyond this matter lies the increasing discussion of general political decentralization and the question of bargaining structure in a decentralized city.

At the same time, across the Hudson River in New Jersey, the Governor's Tax Policy Commission has just recommended regional bargaining under state control to match its proposal for state assumption of the cost of public schooling. Add to this the recent series of court decisions upsetting universal reliance on property taxes and the unequal revenue per pupil they produce, and it is easy to predict that these developments may bring major changes in the structure of teacher bargaining. The prospect of regional or statewide bargaining, however distant, has already impelled teachers' organizations to explore merger possibilities and enter the political arena with new vigor.

While the authors' catalogue of criteria for unit determination is substantially correct—as is their plea to avoid the balkanization which New York suffers through over-reliance on the extent of organization as a basis for units—they might have spent less time on these standard considerations, and more on the truly distinctive structural problems in the public sector.

Perhaps the matter of structure is really closer to the discussion in Chapter 8, "Organizing the Public Employer for Bargaining," than it is to unit determination. Here the authors review the confusing array of forms which local government takes, and make a simple but persuasive suggestion—that legislation clearly identify one government body as employer and eliminate the interference of other bodies with that function. As the authors note, part of the parties' frustration which takes its toll in labor difficulties in the public sector can be traced to a confusion on the employer's side. Municipal unions frequently have a difficult time concluding who among the bewildering variety of commissions, departments and officials which seem to have

46. See New York City School Decentralization: Its Effect on Collective Bargaining (unpublished report of the Committee on Municipal Affairs and the Committee on Labor and Social Security, Association of the Bar of the City of New York). The Community School Board Association has demanded a veto over any agreement as well as representation on the negotiating committee.


48. See, e.g., GOV. EMP. REL. RPRR. No. 319, B-12 (Oct. 20, 1969); No. 331, B-6 (Jan. 12, 1970).
a voice in the process of determining working conditions is the proper party with whom to bargain. But the authors do not stop there. While they oppose union efforts to bypass the executive by asking the legislature for bigger increases, they believe legislative or even voter approval of agreements is necessary "to curb the power of the unions." Yet it is vain to expect any labor organization to ratify a package if they must then await a legislative or electoral determination to implement it. The authors' first instinct was better—to concentrate management authority in one body and empower that employer representative to make effective agreements. That may require prior consultation between branches of government or even inclusion of each branch in the management negotiating caucus. But the process of coordination is the employer's responsibility; when an offer is made to the other side, there should be no question of having it repudiated later, just as the employee group should be bound by its agreement and not permitted to improve upon it in other branches of the government.

The heart of Part III of the book is Chapter 9 on "The Scope of Bargaining." Wellington and Winter review the way in which issues intertwined with fundamental policy decisions come up in negotiations and collective agreements. Of this there can be no doubt. The number of children in a classroom is surely a "condition of employment" as that term is used in other contexts, but a contractual limitation on class size as surely amounts to a policy decision affecting the educational system in that city. The same can be said about the authors' other examples, including student discipline and curricular reform in education and manning requirements for police and firemen. To a much greater degree than in the private sector, the line between policymaking which should be the responsibility of officials and working conditions which should be set in negotiations is extremely hard to detect.

But Wellington and Winter are much more optimistic than I about the potential of law to resolve this dilemma. They suggest four possible approaches to check "excessive" extensions of union power into the policymaking area. The first is statutory restriction of the duty to bargain along the lines of the Maine public education statute, which limits bargaining to "wages, hours, working conditions and contract grievance arbitration" and urges "consultation" on "educa-

This plan is deemed more desirable than the “promising” New York City rule excluding managerial decisions but allowing bargaining over the “impact” of such decisions, a test recently adopted by the state Public Employment Relations Board for the class size issue.51 The second approach is the possibility of multi-party bargaining over policy matters, in which “affected groups” are given a place at the negotiating table or at least a chance to present their views and influence the bargaining through a public hearing. Third is a scheme for intervention on particular issues by a petition showing sufficient community interest in the outcome, or even a requirement that certain issues be submitted to referendum for public approval. The fourth approach is a strict limit on bargaining, with a public commission appointed in each service area and charged with recommending to the legislature special laws to permit bargaining on specific issues.

Without exploring the particular costs and inefficiencies of each alternative, it seems useful to begin by asking whether such intricacy is really necessary. Private sector experience teaches at least that court-drawn distinctions between mandatory and permissive subjects of bargaining are of doubtful importance to the parties. While the Supreme Court believes one should not insist to impasse on a permissive subject,52 it is obviously easy for a skilled negotiator to go to impasse and strike over other issues while making clear his interest in concluding agreement on the non-mandatory one. Similarly, one suspects that neither the New York City nor the Maine approach will affect parties who want to reach agreement on the “practical impact” of a decision or who want to include a provision in a collective agreement to deal with a subject raised in their consultation on policy matters.

The role of outside groups representing competing interests is important in public sector negotiations, but their proper place is in the government employer’s consultative councils or caucus, where its priorities are set. Whether that consultation comes through private meetings or public hearings should be open to local choice. Hearings to discuss the employer’s position have the advantage of opening government channels but they run the risk of raising expectations in groups unfamiliar with bargaining that the city will succeed or

produce on every point. But the root impulse here, that municipal government should involve all interests in its own preparation for bargaining and its own priority-setting, just as the union consults all factions in its membership, is sound. The employer must assume directly the responsibility for dealing with its constituency, molding a consensus, and adjusting priorities so that the agreement wins public backing, just as the union must do to win its members’ support. But the bargaining itself is a representative process: the greater the number of direct participants, the more open all steps are to scrutiny; the less candid and innovative the interchange, the more prone participants will be to posturing and the more difficult it will be to resolve the dispute. A logical extension of analogizing the employer’s responsibility to the union’s would be to support a referendum for public ratification of a contract. One stops short of recommending that because the practical difficulties seem enormous and perhaps unnecessary.

If laws and legal rules hold scant promise of responding to the authors’ fear that as the scope of bargaining widens, the political process loses its “normal” shape, where else is there to turn? We might look to the public employers’ bargaining tactics and decisions. Collective bargaining does after all produce a two-party agreement. If a school board agrees to limit class size it cannot really argue that it has surrendered policy control; it has merely exercised that control jointly, in this area, with the teachers. If the board believes such a decision is wrong, perhaps after other interest groups press that position effectively, the way is open to suggest alternatives or exceptions to the limitation or to frame some other provision to deal with the basic problem. Of course, Wellington and Winter would say the unions’ excess power makes such a suggestion illusionary. But that brings us back to the fundamental issue of impasses and strikes in public employment, to which the authors devote Part IV.

IV

To pick up on our earlier discussion, the question of collective bargaining and strikes in public employment at its roots involves elusive considerations of power in the political process. Power in

53. See Gotbaum, Collective Bargaining and the Union Leader, in ZAGORIA, supra note 3, at 77-88.
politics is usually the result of three types of resources: organization or the effective utilization of manpower; money; and persuasion or the ability to command attention through publicity. The three resources are to some extent interchangeable—an effective organization is a substitute for money if one can mobilize campaign workers without paying them, and the value of access to media is substantial, as we can tell by the amounts which candidates are willing to spend for it. Power is sought, in the most simple sense, in order to influence the distribution of the public budget and the services it supports. The wants of one group compete with those of another. Those groups which combine to elect officials in the city, especially the mayor, benefit from their political success.

While the working men, including those who work for the city, have always competed effectively in this process through their unions, churches, and civic or political clubs, there can be no question that the introduction of collective bargaining for municipal workers affects the political process. It gives public employees an impetus and rationale for organizing; in the dues check-off, even without an agency shop, it supplies a mechanism for raising funds; and in the bargaining sessions it supplies a vehicle for the regularized assertion of workers’ interests. The common interest in better conditions, which binds workers to their union, also enables them to exert political leverage more effectively than other groups. If they have sufficient leverage to make a credible threat to withdraw services, they will do so. But there is simply no data to indicate that strikes “distort the political process.” The issue must be whether collective bargaining—the institutionalization of employee access to the urban political process—gives union members too much advantage in spite of its benefits in meeting the demand for participation, self-government and stability which accompany labor relations with exclusive recognition, fixed term contracts and grievance machinery.

Yet Wellington and Winter shy from addressing this question. Rather, they assert that “the establishment of collective bargaining through principal and mandatory recognition procedures . . . is not inconsistent with the ‘usual American political process,’ for the danger to that process stems mainly from strikes.”

Having endorsed, so thoroughly, the organizational and “bargaining” rights of public workers, the authors face an awesome task: to
devise "alternatives to the strike" which will assure equity but not too much power, sanctions to make the ban on strikes stick, and to draft other measures to reduce the city's "vulnerability" to strikes since, as they acknowledge, the prohibition will not always work. This is a substantial undertaking, even for legal craftsmen of such considerable skill. Human behavior, particularly group behavior, has a way of outrunning such attempts at regulation.

But the authors cannot be faulted for lack of ingenuity. In Chapter 11, "The Illegal Strike Model," they review "mechanisms to temper the impact of the prohibition," including fact finding with recommendations, arbitration, and legislative finality. For commentators who start out with the premise that strikes should be banned wherever possible, the authors are not very sympathetic to these alternatives. They are clearly correct in suggesting that, whatever its original design, fact finding has become in too many places not a "post-impasse procedure" but a pre-negotiation device in which one party to a dispute seeks quick and automatic refuge to get things started in bargaining. Impartial fact-finders come in, apply standards primarily of their own making, sometimes acting like arbitrators, sometimes like mediators, and issue a report. As often as not, the result of an early recommendation is to make things worse, particularly if one side accepts and the other rejects. Yet this procedure is increasingly adopted by legislatures as the way to prevent strikes. In a difficult dispute, it does not help. In an easy dispute, any procedure will work. Fact finding lacks both the encouragement to voluntary settlement which comes from mediation, and the finality of arbitration.

To impose third party determination through arbitration or labor

55. Legislative finality refers to an impasse procedure in which the legislative body makes the final decision by enacting specific terms and conditions of employment. The suggestion of the Taylor Committee in New York in this regard was "that in the event of the rejection of a fact-finding recommendation, the legislative body or committee hold a form of show cause hearing at which the parties review their positions with respect to the recommendations of the fact-finding board. The appropriate budgetary allotment or other regulations are then to be enacted by the legislative body." Governor's Committee on Public Employer Relations, Final Report 39 (1966). Initially, the lawmakers omitted this provision from the Taylor Law, but a 1969 amendment added a requirement for formal submissions by the employer and employee organization of its position to the legislative body within ten days after receiving a fact-finding recommendation; the legislative body must then conduct a hearing and "take such action as it deems to be in the public interest including the interest of the public employees involved." N.Y. CIV. SER. LAW § 209, ¶ 3(e) (McKinney Supp. 1970).

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courts is no better a solution to these disputes. As Wellington and Winter write: "It does not prevent all work stoppages. . . . And it cannot help but chill the bargaining process . . . ."\(^{57}\) They also see some life in the legal objection that arbitration of disputes over the terms of a contract, as opposed to disputes over the application or interpretation of an existing contract, constitutes an improper delegation of power.\(^{58}\)

Even if constitutional, arbitration may not be effective and will impair bargaining. First, effectiveness means something more than merely the avoidance of strikes. Arbitrators or fact-finders are probably not capable of dealing with the variety of complex issues which arise in public sector negotiations. It is one thing to set a wage rate or vacation schedule, but there are disputes where the parties have submitted more than 200 issues to the fact-finder. If he had the obligation to make a decision on each, either hearings would be interminable or contracts would not regularly reflect local needs. Second, by restricting the incentives to agreement, arbitration alters the role and attitudes of representatives on both sides of the table. It changes the function of union officials from representative leadership to advocacy. It alters their obligation from molding the terms of their relationship to implementing the decision of an outsider. The significance of this change is not always appreciated by those, not including Wellington and Winter, who embrace the "rationality" of arbitration. Joint commitment to a contract imposes responsibilities which encourage strong leadership and in turn assures stability for the contract term. In a system of third party decisionmaking, that incentive to mutual commitment is missing.

This observation suggests that there are values to a bargaining system which ought not be overlooked. Periodic review of the contract in collective bargaining serves several purposes: (1) it requires that the parties confront jointly and intensively the problems in the workplace; (2) it permits each participant to bring the contract into harmony with changed conditions; (3) it brings workers together in a collective exercise, forces each side to determine priorities, reinforces responsibility and provides a unique outlet at periodic intervals; and most importantly (4) it supplies a justification for the system of self-

\(^{57}\) P. 177.

government through grievance machinery which assures stability during the contract term.\textsuperscript{60}

Wellington and Winter are also properly skeptical about the "last offer" method of arbitration where the arbitrator must choose the final position of one side or the other, a procedure President Nixon has proposed to Congress as the solution to emergency strikes in transportation. The idea behind this technique is that the prospect of all-or-nothing will impel the parties to adjust their position toward the center. That may work on some issues, but when a dispute involves a complex issue of job security and automation and the parties maintain opposing positions, the arbitrator has no choice but to impose one position with politically damaging effects to the entire community. Or a proposal submerged in a larger package may find its way into the final contract, with implications neither side foresaw.\textsuperscript{60}

After making the rounds with these unsatisfying alternatives to the strike, the authors come close to an endorsement of the "choice-of-procedures" approach, which would enable an impartial agency to tailor the impasse procedure to the particular situation and build a vital element of uncertainty into the dispute. This approach, they write, "will not stop all strikes—but it has the best chance of reducing their incidence. And that is all we have any right to expect."\textsuperscript{61}

If the authors had stopped there, including a presumption of voluntary settlement through collective bargaining with the possibility of a strike and primary reliance on mediation without other third-party procedures, they would have done well. But this discussion is placed in the chapter premised on a uniform strike ban. The emphasis as a result is on a choice of fact finding, arbitration in one form or another and legislative finality. But a set of ineffective or dangerous procedures are not improved by grouping them together and permitting an independent agency to select among them. Also, the presence of the strike prohibition forces the authors to enter the treacherous area of legal sanctions. "At best," they say, "this is a complicated business," and that is a deft bit of understatement to anyone who has followed the legislative perambulations in New York from rigid pen-


61. P. 186.
Altitudes on individuals to jailing for union leaders back to a combination of individual and collective sanctions. They favor flexibility in sanctions to avoid a harshness the community will not accept, and legislative sanctions rather than reliance on the contempt power in order to place "the imprimatur of the political process" behind the strike ban. Finally, the role of sanctions should be "more than hortatory but within the community's sense of fairness." The authors seem eager to abandon the issue without any greater specification, and with good reason. The complexity of finding the sanction which forces compliance without offending the communal sense of law and its limits has tripped up most legislative draftsmen, and this in itself suggests the need to try less law rather than more.

One need not like or encourage strikes to see that the choice is basically between collective bargaining and some other method of setting terms and conditions of work. If the benefits of bargaining, which Wellington and Winter acknowledge, are sufficient, we should allow the bargaining system some breathing space before encumbering and beclouding it with regulatory schemes to achieve some foreordained balance of power. In most cities, bargaining for public workers is not a decade old. These experimental years have been testing and strained, not least because of the complex mixture of third party procedures, judicial proceedings and sanctions grafted onto the process of dispute settlement. It is too early to say what the impact of collective bargaining will be on the political process. The problem may turn out to be not the excess of union power but the lack of it; that far from voters "tending to choose political leaders who avoid inconveniencing strikes over those who work to minimize the costs of settlements at the price of a strike," the urban electorate may more often be eager to oppose union demands. Particularly where racial differences exist, the dissatisfaction of urban residents with deteriorating services is often focused in hostility to unions. Further, the cost of settlements would be moderated by more effective and professional bargaining by city officials. The unions' success in public bargaining is as much a tribute to their employer's proclivity for concessions and mistakes as it is testimony to the workers' leverage.

The common response to suggestions that strikes be legal is that government must have the means to protect itself. But that capacity

62. P. 189.
63. P. 195.
always exists, through the legislative power. To create institutions
to exercise that power in each case, by uniformly imposing arbitra-
tion or other final impasse procedures, is to frustrate their effective-
ness by overuse. It would be better to exercise government power
sparingly, for example, by providing for temporary restraint to halt
a strike which presently jeopardizes health or safety. But, as the authors
note, the moment when health or safety is imperilled varies with the
situation. I would recommend giving this power to define an emer-
gency to an independent agency, perhaps a Board to Promote Collec-
tive Bargaining.\textsuperscript{64} I would also indicate that the existence of an
emergency should be strictly and narrowly defined; over-reliance on
the injunctive power, either by seeking restraint too often or too
early, will limit its effectiveness and the extent to which the resultant
court decrees will be obeyed. The authors accurately point out that
if the parties can predict the duration of the strike before it is re-
strained, bargaining may be chilled. They suggest that the independent
agency be given a choice of procedures. Uncertainty along with flex-
ibility is the motor force of bargaining: the uncertainty of what hap-
pens next if an accommodation is not reached supplies the incentive
to voluntary decisionmaking. But uncertainty is stymied if the pro-
cedures in the agency’s bag include arbitration, legislative finality,
or other forms of imposed decisions. It would be better to allow the
Board to Promote Collective Bargaining to provide mediation and,
occasionally, fact-finding (though not according to prescribed time-
schedules) and to seek a restraining order for a limited period if it
determines that a true emergency exists. Arbitration would only be
invoked by the Board asking the legislature to impose it in particular
cases where the exercise of such legislative power is vital to protect the
public and end the dispute.

It is surprising that Wellington and Winter suggest that law under-
take fine tuning of the employment relationship. Before we come
to that kind of legal tinkering, voluntary action should be given a
chance by allowing the bargaining process to operate without intru-
sion. My preference is based, as is the authors’ contrary view, squarely
on basic principles of the political process. That process works by
the competition for advantage between interest groups. The institu-
tional channels of access granted employees by the establishment of

\textsuperscript{64} L. Kaden, Special Inquiry on Public Employment Relations in New Jersey, 1971
collective bargaining are justified by the special nexus between public services, those who work to provide them, and the benefits gained from bargaining over conditions of work. Until the evidence more firmly establishes the distortion which the authors perceive, we should minimize the machinery imposed on the bargaining table to influence the outcome of negotiations.

As must be apparent, my differences with Wellington and Winter are considerable, both in terms of the subjects they emphasize and the conclusions they reach. But these differences are not intended to disparage the contribution they have made by this stimulating work. Their formulation should guide debate over this difficult subject for some time. Their proposition that the structure of rules for municipal labor relations should be viewed as a problem in political rulemaking should take hold and deter anyone from treating this issue as a simple matter of constitutional right or labor policy. Of course, the process of designing laws for public employment, as it is played out in the states, is itself a basic political contest. So far, almost without exception, the various legislatures have followed the authors' advice and prohibited strikes while attempting to provide alternative techniques which assure equity. Wellington and Winter fear a trend to less regulation and more importation of collective bargaining into the public sector. I hope their fear is well-founded. We may then discover not that bargaining unimpeded by much law distorts the political process, but that it provides the best means of minimizing disruption.