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PRIVATIZATION AND THE "PRIMARILY RELATED" TEST: A CASE FOR CLARIFICATION

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The recent adoption of a program allowing a small number of poor parents to send their children to private schools in Milwaukee has renewed interest and debate surrounding the decade-long controversy centering on privatization and delivery of public services by private providers.

The enormous controversy generated by this program and the strength of opposition posed by unionized public school teachers¹ is the latest instance of the clash between the public's interest in selecting the best method of delivering municipal services and the private interests of employees in continuing their employment.

What are the interests at issue in the Milwaukee School Choice Program (MSCP) and privatization in general? And, to the extent that privatization is a valid way of meeting the public's need for governmental services, does Wisconsin law make it a viable option for municipalities? This Article will examine limitations now found in Wisconsin's public sector labor law known as the Municipal Employment Relations Act (MERA).² We conclude that future efforts to improve public services by use of private providers, such as the MSCP, will be fatally hampered by the expansive manner in which the employer's duty to bargain basic decisions has been defined in existing doctrine created under MERA. To the degree that Wisconsin law leads broader national trends, these limitations may be of national significance.

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1. The school choice program was challenged in court by several special interest groups attempting to prevent the program from starting. The Wisconsin Court of Appeals issued a decision temporarily halting the program on the grounds it was a local law which was improperly included in the 1989 executive budget bill. *Davis v. Grover*, 159 Wis. 2d 150, 464 N.W.2d 220 (Ct. App. 1990). The Wisconsin Supreme Court reversed the court of appeals, sustaining the validity of the program. N.W.2d 220 (Ct. App. 1990).

2. Wis. STAT. § 111.70 (1989-90).

THE SCHOOL CHOICE PROGRAM: PRIVATIZATION
OF PUBLIC EDUCATION

The MSCP represents both an admission of the failure of public schools and a lack of hope that continuation of the public school monopoly³ can ever lead, by itself, to a quality education for minorities. Created at the instance of State Representative Annette Polly Williams,⁴ the MSCP⁵ applies to children living in households whose incomes are 1.75 times the poverty line or less.⁶ Total participation is limited to no more than one percent of the school district population.⁷

The MSCP comes in response to a widespread perception of a crisis in the Milwaukee Public Schools (MPS).⁸ The school system, battered by social problems in the deteriorating central city of Milwaukee, has struggled to maintain an educational program in the face of urban realities such as crack cocaine, teenage pregnancy, and chronic delinquency. Because the MSCP gives parents the opportunity to have their children educated at public expense in a private school, the program represents a classic example of

3. The MSCP is not the first program allowing parents to choose the school to which their children will be sent. It is, however, unique in that it allows parents to send their children to private schools at public expense. Other school choice experiments have allowed choices to be made only among public schools.

4. Rep. Williams blurred ideological distinctions by making her proposal. A two-time chairperson of the Wisconsin presidential campaigns of Jesse Jackson, Ms. Williams' strong support for privatization of education endeared her to an odd admixture of conservatives and minority advocates. Columnist William Raspberry, an African-American commentator on social issues, described the paradox:

Williams and Patrick are black, and it matters. As long as white conservatives were the driving force behind vouchers, tax credits and other choice mechanisms, the mostly liberal education establishment found it easy to discredit them as not really interested in the education of poor children but only interested in their own arcane doctrines.

No such charge can stick against Williams, an inner-city single mother who twice headed the Rev. Jesse Jackson's presidential campaign in Wisconsin. Her interest, she insists, is not in undermining public schools but in educating poor black children. They aren't being educated now, she says, because the school hierarchy has been more interested in perpetuating its own power and promoting racial integration. Like Patrick, her goal is not to empty the public schools but to force them to improve.

William Raspberry, *Blacks Shift Hope to School 'Choice'*, WIS. ST. J., July 22, 1990, at 21 A.

5. The School choice program was created in 1989 by Wisconsin Act 336, §§ 25, 228, 2332. It is codified in WIS. STAT. § 119.23 (1989-90).

6. WIS. STAT. § 119.23(2)(a)1 (1989-90).

7. *Id.*

8. Representative Williams described her concern about the public school system as follows: We have to be saved from our saviors. Our liberal friends have built their whole lives around taking care of us and they still want to feed us with pabulum. At some point, we want real food. We want to make our own decisions whether our liberal friends like it or not.

Teachers vs. Kids, WALL ST. J., June 6, 1990, at A14.

privatization.⁹ The same governmental service is being provided and the same responsibility is still being met. The government, however, is no longer the provider of the service, it is only the financier.¹⁰

The MSCP includes a provision requiring private schools to demonstrate quality in their programs by proving that they meet at least one of four criteria.¹¹ Private schools failing to satisfy any of the criteria are ineligible to enroll pupils in the MSCP.

While the State does impose a host of standards that public schools are required to meet in order to obtain state aid,¹² the schools are not required to prove affirmatively that they have complied with these standards. In theory, a local public school's state aid can be withheld for failure to meet these standards, but the decision to do so is at the sole discretion of the State Superintendent of Public Instruction.¹³ The superintendent is not required to suspend state school aid even when a public school blatantly fails

9. Indeed, this unique feature of the Milwaukee School Choice Program aroused the strongest resistance. Morris Andrews, Executive Director of the Wisconsin Education Association Council, wrote in a special pamphlet issued by WEAC on school choice:

We believe the concept of parental choice transforms public education into consumer purchasing where the parent becomes the consumer, the student becomes the product and the teacher the technician. Schools become subject to the whims of the marketplace, as defined by individual parental preferences, rather than working to meet the needs of all students.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, *SCHOOL CHOICE 4* (1990).

10. The Legislature appropriated a sum sufficient to make necessary payments for the program. WIS. STAT. § 20.255(2)(fu) (1989-90).

11. The criteria are:

- A. At least 70 percent of students advance on grade level each year.
- B. The school's average attendance rate is at least 90 percent.
- C. At least 80 percent of the students demonstrate significant academic progress.
- D. At least 70 percent of the families of pupils in the program meet parental involvement criteria developed by the school.

WIS. STAT. § 119.23(7)(a) (1989-90).

12. See, e.g., WIS. STAT. §§ 118.01, 121.02; WIS. ADMIN. CODE § PI 8 (Feb. 1991).

13. The incumbent State Superintendent of Public Instruction strenuously opposed the School Choice Program. He went so far as to invite litigation to overturn it. In a statement released to the press, Superintendent Herbert Grover stated:

For all practical purposes, the private schools that are targeted to receive the funds authorized by this legislation are subject to no effective controls or standards related to pupils whose education is funded by the state. As private schools in Wisconsin, they are not subject to the educational standards that apply to public schools. There is nothing in the legislation that directly requires the schools to be certified or the teachers employed to have any training in the education process itself or in particular disciplines or subject areas. Thus, there is no way of assuring that state funds earmarked for the education of our children will be accomplishing the intended purpose.

....

I am pleased that the legal issues have been raised in the Wisconsin Supreme Court. I urge the Court to address these issues as soon as possible.

to meet a state performance standard.¹⁴ In essence, the public school system can keep operating, year after year, without meeting defined goals or children's needs.

By contrast, under the terms of the MSCP, only schools that affirmatively demonstrate that they can meet one of four specific criteria can retain their public scholarship students. Thus, the State and municipality have neither ownership of the private school program nor an investment (emotional or fiscal) in the operation. The State's role changes from senior partner in an enterprise that directly provides the service to that of an objective purchaser of educational services, able to distinguish between programs which work and those that do not, and to discontinue purchasing the services of the latter.

The driving force behind the privatization movement is precisely this enhancement in accountability.¹⁵ Advocates of privatization point out that it is hard for government to deal with a bureaucracy that has grown over time. Discharging incompetent employees is believed to be much more difficult in the public sector¹⁶ given the existence of entrenched employee unions able to take advantage of grievance arbitration before the Wisconsin Employment Relations Commission (WERC).¹⁷ In addition, constitutional due process rights make it hard to fire even nonunion public employees.¹⁸ The concept of privatization is based on faith in competition—the ability to select the best of several providers vying for an opportunity to sell their

Statement of State Superintendent Herbert Grover, Wisconsin Legislative Reference Bureau (June 1990).

14. WIS. STAT. § 121.006 (1989-90). In an interview with one of the co-authors, Wisconsin Deputy Superintendent of Public Instruction Roger Sundby, whose duties included oversight of state school aid programs, stated that the State Superintendent has never suspended a school district's state aid for failure to meet state standards. Interview with Roger Sundby, Wisconsin Deputy Superintendent of Public Instruction in Madison, Wisconsin (June 1991).

15. Clint Bolick, Director of the Landmark Legal Foundation's Center for Civil Rights in Washington, D.C., argued in an editorial in the *Milwaukee Sentinel*:

The public school monopoly has had more than its share of chances to provide quality educational opportunities for economically disadvantaged children. The time is long overdue to try something different.

What terrifies the establishment is the one innovation that makes this program truly radical: the transfer of power from educational bureaucrats to parents. And what that means is, for the first time, public schools will have to compete for low-income students.

Clint Bolick, *Choice: A Breakthrough for Low-Income Kids*, MILWAUKEE SENTINEL, Aug. 15, 1990, at 14.

16. HENRY H. PERRIT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* 323-65 (2d ed. 1987).

17. WIS. STAT. § 111.70(4)(c)(2) (1989-90).

18. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

services to a government buyer. Needless to say, the concept is strongly opposed by public employees.¹⁹

Not surprisingly, the Milwaukee School Choice Program has engendered tremendous controversy, a pattern seen nationwide when school choice programs are considered. As has happened nationally, the issue has divided the public and political leaders along unusual lines. Liberals tend to oppose school choice even though they generally favor maximizing individual liberties.²⁰ Some conservatives, who ordinarily argue for greater reliance on the private sector, part company when the issue is school choice.²¹

The debate surrounding the MSCP echoes previous debates on privatization of other local government services. The interests at stake are similar. Proponents of school choice are in the position of service consumers. Dissatisfied with the results of the services, proponents seek to use the polit-

19. There is a large volume of work prepared by advocates for and against privatization. A good example of literature in opposition to privatization is Am. Fed'n of State, County & Mun. Employees, *Passing the Bucks: The Contracting Out of Public Services* (1983).

20. The *Madison Capital Times*, a leading liberal voice in Wisconsin, editorialized against school choice, stating the proposal tears at the fabric of society. The *Capital Times* wrote:

In the midst of all the whoops of joy this week from proponents of the idea that public dollars ought to pay for the education of students in private schools, listen for the quiet sound of the social fabric of this nation tearing.

.....

If the private school choice is expanded in years to come — and there is certainly a push in that direction on both the state and the federal level — this means that the more expensive and challenging job of educating youngsters with disabilities will be left to the public schools. It also means that children in private schools will have less exposure to the diversity of people in this society. Hear that fabric tearing?

School Choice Tears at Fabric of Society, Wis. St. J., Aug. 12, 1990, at 10 A.

21. William Kraus, iconoclastic Chief of Staff to former Wisconsin Superintendent of Public Instruction Bert Grover, wrote in opposition to the Milwaukee School Choice Program, characterizing the program as "the skimming of public education." In a column printed in *The Capital Times*, Kraus stated:

Let us concede at the outset that public education doesn't work well everywhere, doesn't work at all in some places. Let us concede that monopolistic bureaucracies do need some shaking up and a competitive free market is often an effective vibrator. Let us also concede that the fact that [Wisconsin Superintendent of Public Instruction] Bert Grover is connected at the hip to Morrie Andrews and his Wisconsin Education Association, and Morrie's agenda may not be quite as altruistic as we all hope Bert's is, is a cause for concern if not alarm. Let us concede as well that public education is not doing all the things we assign it half as well as it thinks it is or as we think it should.

A lot of things need fixing.

.....

The important thing now is to make sure there is a viable, universal public education institution for the next generation to improve. If we strip public schools of the students who make it whole and as good as it can be, a lot of things will become academic, including education.

William Kraus, *We Must Stop Stripping Our Public Schools*, THE CAPITAL TIMES, July 29, 1990, at 5 A.

ical process to change the way services are provided. The goal of educating all children remains the same. However, the means desired to achieve this goal change radically. Opposing these voices of consumerism, labor organizations representing school teachers and employees have formed a marriage of necessity with school superintendents more accustomed to fighting it out with these employees. Whatever their past differences may have been, teachers and superintendents alike are threatened by school choice programs. This is not to suggest that either side is acting solely out of selfishness. Clearly, all involved ultimately advocate for the best interests of the children—quality education. However, getting to that point is highly problematic.

In fighting proposed privatization of municipal services, municipal employees in Wisconsin enjoy a powerful position.²² They often have political muscle resulting from being represented by well-organized, politically active unions.²³ They also have the protection of a well-settled body of case law concerning privatization. The remainder of this Article will review the development of Wisconsin law and privatization in an attempt to show that replicating the MSCP or any other privatization plan will be very difficult or impossible as the law now stands in Wisconsin with respect to a public employer's duty to bargain.

THE DUTY TO BARGAIN WITH UNION EMPLOYEES

From the very beginning of statutorily recognized collective bargaining in the United States under the National Labor Relations Act,²⁴ one of the most difficult conceptual issues in developing labor law has been the scope of mandatory bargaining. Collective bargaining has embodied, from its inception, an evolving balance of weighing employees' economic interests and power against employers deploying and re-deploying their capital.

22. The *Wall Street Journal*, commenting editorially on the Milwaukee program, characterized the issue as "Teachers vs. Kids." The *Journal* commented:

The time has come to ask just whose side the teachers' unions, school bureaucracies and some civil rights groups are on: their own or the kids who endure the dismal state of education in some many parts of this country. In Wisconsin, the answer is becoming very clear.

There, officials of the state's largest teacher union and officials of the NAACP are suing to have the nation's first experiment in school vouchers for low-income children declared unconstitutional. If they win, the losers will be hundreds of inner-city children who expect to attend a school of their own choosing in September.

Teachers vs. Kids, *supra* note 8, at A14.

23. See *infra* note 75.

24. 29 U.S.C. § 151 (1990).

In the American system of labor relations, the determination that a particular matter is a mandatory, as opposed to a permissive, subject of bargaining leads to restrictions on an entrepreneur's presumptive freedom to control operations or to redirect investment.²⁵ Consequently, defining the scope of the duty to bargain has been no easy task.²⁶ Indeed, a black letter definition has eluded the National Labor Relations Board (NLRB).²⁷

When collective bargaining spread into the public sector, beginning with Wisconsin's pioneering MERA,²⁸ there arose an entirely new and different dimension to the problem of balancing the interests of labor and management. In the private sector, the tension was between the interests of employees in their wages, hours, and conditions of employment, versus the "core of entrepreneurial control"²⁹ which is the heart of a market economy. But, in the public sector, management was driven by a different constraint

25. It is important to note the divergence between private and public sector labor law with respect to mandatory subjects. In the private sector, the employer is required to bargain a mandatory subject to the point of impasse—where neither party is willing to make further concessions. At that point, the private employer is free to unilaterally impose the employer's final offer. The union can strike in an attempt to coerce the employer to back down.

By contrast, in the public sector employers are required to bargain mandatory subjects, but are prohibited from unilaterally implementing their positions when impasse is reached. Instead, disputes over mandatory subjects are resolved by third-party interest arbitration. Statistics compiled by the Wisconsin Employment Relations Commission in 1984 showed that unions won 50.6 percent of arbitrations, employers 49.4 percent. *Collective Bargaining*, 52 THE WISCONSIN TAXPAYER 8 (1984). Given a situation in which employees have an even chance of prevailing by going to arbitration, the employer has much less control or power than exists in the private sector. In private sector labor disputes, the employer can bargain to an impasse. If the employer is willing to accept an employee strike, the employer can implement its final offer. The private sector employer is allowed to permanently replace striking employees. In Wisconsin municipal employment relations, however, management cannot implement its final offer unilaterally. Interest disputes must be resolved through final binding arbitration. WIS. STAT. § 111.70 (4)(CM) (1989-90); see *Collective Bargaining*, 52 THE WISCONSIN TAXPAYER 8 (1984).

26. A "mandatory subject of bargaining" is a matter which concerns the wages, hours, and conditions of employment of union employees. Under sections 8(a)5 and (d) of the National Labor Relations Act, employers are required to bargain in good faith with their employees toward agreement on these matters. Employers cannot make changes in matters subject to the duty to bargain without first attempting to negotiate changes with the union. *NLRB v. Katz*, 369 U.S. 736 (1962).

27. With respect to the kinds of major business decisions which would be involved in privatization (i.e., subcontracting, relocation, partial closings, leasing, etc.), the terminology used as the standard to define what should be a mandatory subject has evolved slowly and not without confusion. The standard has changed from an initial phraseology that employer decisions which lie "at the core of entrepreneurial control" should be non-mandatory to a concept that employer decisions which "turn on labor cost" should be mandatory subjects of bargaining. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Fibreboard Paper Prod. v. NLRB*, 379 U.S. 203 (1964); *Dubuque Packing Co.*, 303 NLRB 66 (1991); *Otis Elevator Co.*, 269 NLRB 891 (1984).

28. The Wisconsin Municipal Employment Relations Act was first created by Chapter 509, Laws of 1959, and has been substantially revised since then. See WIS. STAT. § 111.70 (1989-90).

29. See *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964).

— the will of the people. Thus, where private sector labor disputes fell into a more quantifiable (and in the eyes of some, Manichaeian) struggle between labor and management, public sector bargaining pitted employees' desires to influence their working conditions against the public's right to govern itself.

As happened earlier in the private sector, the standards for mandatory bargaining have evolved in the public sector. Wisconsin, the first state to adopt statutes recognizing public sector collective bargaining,³⁰ has contributed a number of interesting cases in its struggle to rationalize union self-interest with the public interest. A review of these cases will show that Wisconsin has attempted to follow the lead of federal labor law in defining the duty to bargain. Unfortunately, the development of federal law in this area has been based on the entirely different set of economic realities found in the private sector.

Wisconsin's case law defining the scope of the duty to bargain passed through an initial period in which the supreme court interpreted Wisconsin Statutes section 111.70 to lend guidance to both parties involved in the bargaining process and the WERC. The first product of this definitional stage was the "primarily related" standard initially described in *Beloit Education Ass'n v. WERC*,³¹ which is discussed at greater length below.

Venturing beyond the initial stage of definition, the Wisconsin Supreme Court and the Wisconsin Court of Appeals have now decided several cases which, by applying the "primarily related" standard, have defined the parameters of the duty to bargain and have identified the policy considerations deemed significant. Useful as these cases are, the emerging issue of privatization poses a new conceptual challenge, one to which the "primarily related" standard, as now stated, seems at best irrelevant and at worst a fatal obstacle to a valuable option for elected policy makers.

"Privatization" may be implemented by any of several creative strategies to reduce or contain the cost of government by transferring public serv-

30. While Wisconsin was the first state to adopt legislation legitimizing collective bargaining with public employees, many other states have acted since 1959. Several states, notably Oregon, Massachusetts, and Hawaii, have public sector laws similar to Wisconsin. *See, e.g.*, HAW. REV. STAT. § 89-3 (1985); MASS. GEN. LAWS ANN. ch. ISOE, § 2 (West 1982); OR. REV. STAT. § 43.656 (1989).

31. 73 Wis. 2d 43, 242 N.W.2d 231 (1976). The test defines a matter to be a mandatory subject of bargaining if it relates more fundamentally or basically to the interests of employees in their wages, hours, and conditions of employment than to the interests of employers in managing the enterprise. The test, in essence, requires weighing the significance of each party's interest in the outcome of negotiations on a given issue. The interests which seem to the determining party to be the most significant will prevail. Quite evidently, more than a small amount of subjectivity is present.

ices or operations to private sector management. The legal device utilized may be, for example, a sale, subcontract, purchase of services, or sale/lease-back. The essential element is the substitution of nonelected managers who enjoy both freedom from political micro-management and flexibility to meet service demands effectively. The conceptual underpinning of privatization, one which is far from universally accepted,³² is that private sector managers can provide services more efficiently and effectively than their public sector counterparts. Advocates see privatization as a panacea for the multiple inadequacies of government.³³ Opponents, on the other hand, re-vile privatization as an unmitigated disaster.³⁴ The truth lies somewhere in between.

It is probably accurate to say that there are some services that a given private sector manager can operate more efficiently and effectively than can public sector leadership. The purpose of this Article is not to engage in the debate over the merits of privatization of any particular service; that has been richly explored elsewhere.³⁵ Rather, our purpose is to question

32. See, e.g., JOHN D. HANRAHAN, *GOVERNMENT FOR \$ALE: CONTRACTING OUT-THE NEW PATRONAGE* (1977).

33. A typical quote from the hagiographic literature endorsing privatization is the following excerpt:

Perhaps the ultimate symbol of the worldwide trend toward privatization took place in December in Bucharest. Just days after the overthrow of the Ceaucescu dictatorship, students at the Bucharest University conducted a demonstration. Their demands? Neutrality, a bill of rights, and a *stock market*. Bucharest hotel staff stopped work to demand immediate privatization.

The wholesale rejection of socialism in Eastern Europe was the most dramatic of the many, continuing shifts away from government production of goods and services and toward a greater role for the private sector during 1989. Around the world, another \$25 billion in state-owned assets were sold to private enterprise in 1989, bringing the total figure for the 1980s to some \$185 billion.

Virtually no government function is exempt from being considered for privatization. At year-end, Britain's Ministry of Defence announced that it would be seeking bids from universities and colleges for taking over the academic functions of the famed Sandhurst military academy.

REASON FOUNDATION, *FOURTH ANNUAL REPORT ON PRIVATIZATION: PRIVATIZATION: 1990*, 5 (1990).

34. A representative critical excerpt from the polemic John D. Hanrahan:

When businesspersons say, 'Private enterprise can perform government services more efficiently than public workers,' they too often are not displaying civic-mindedness, but are rather seeking additional legalized raids on the public treasury. Public employees are being made scapegoats for the current problems of state and local governments, and some of the leaders of the anti-public employee chorus are businessmen who are trying to get their hands on more government dollars through lucrative contracts.

HANRAHAN, *supra* note 32, at 9.

35. HANRAHAN, *supra* note 32 (arguing against privatization). See generally 4 PRIVATIZATION COUNCIL, *THE PRIVATIZATION REVIEW* (1989) (arguing in favor of privatization); JOHN

whether it is possible to implement any privatization decision under the present "primarily related" standard that defines the scope of the duty to bargain in the Wisconsin public sector. We also discuss whether such an option should exist as a matter of sound public policy.

For the reasons developed herein, the "primarily related" standard needs modification to be viable in dealing with the emerging challenge of privatization. In order to explore the issue, we will first review the evolution of the scope of the duty to bargain under MERA. Although MERA has been the law since 1959, it was not until 1976 that a case turning on the scope of the duty to bargain under that statute was decided by the Wisconsin Supreme Court.

In *Beloit*, the WERC was called upon to resolve a "prohibited practices" complaint filed by the Association alleging that the Beloit School District unlawfully refused to bargain a number of issues, including class size. The union had submitted a number of proposals which would have greatly reduced the school board's prerogatives in managing the district. Resisting the proposals, the district contended that many of them were not properly resolved through contract negotiations, but rather, were best decided in the public policy process.

In reviewing the WERC's decision on the individual proposals, the court formulated a standard to be used as the touchstone for evaluating issues as mandatory or permissive subjects. The court's decision crafted a standard out of the language of Wisconsin Statutes section 111.70 (1)(a) (1989-90). The court focused on the sentence of subsection (1) that reads in part:

The employer shall not be required to bargain on subjects reserved to the management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees.

In formulating the standard, the court did not develop a test which tracked economic realities of the employer-employee relationship. Instead, it simply reviewed and supplemented the terms used in the "primarily related" test adopted by the WERC. Referring to a dictionary, the court concluded the term "primarily" meant "basically" or "fundamentally."

The court reasoned that the statute requires a balancing of the interests of the employer against those of the employee. If, on balance, the subject appears to relate more fundamentally to the interests of the employees in their wages, hours, and conditions of employment, the subject is a

D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* (1989) (giving a thorough and balanced analysis of privatization).

mandatory subject of bargaining. If, however, the balance is struck the other way and the subject appears to basically or fundamentally involve the management and direction of the municipal employer—the will of the people as manifested through their elected officials—then the subject is permissive.

This distinction is extremely important in collective bargaining and public administration. Once a subject has been found to be a mandatory subject of bargaining, the matter must not only be bargained for with employees at their demand, but it also cannot be unilaterally altered without the prior agreement of the employer and employees. Obviously, public employees gain tremendous leverage whenever a matter becomes a mandatory subject of bargaining.³⁶ In the public sector, an employer can implement only proposals that the employer can persuade either the union or an arbitrator to approve.

The preclusion of the public sector management and, indirectly, the electorate from acting unilaterally poses the central challenge in the public sector. Recognizing that challenge, the Wisconsin Supreme Court has attempted to accommodate our society's high premium on self-rule.

Two cases, decided in the 18 years since *Beloit*, are illustrative of the implications and application of the "primarily related" standard for school choice programs or privatization in general. Read together, these cases define the duty to bargain concerning reassignment of work by the public sector. First, case law came down that arguably subjected virtually any reassignment of work from public to private employees to the duty to bargain. Somewhat later, a case was decided holding that a public employer may take unilateral action to terminate public services. Since school choice and other privatization programs will inherently involve reassignment of work from public to private employees, these cases are illustrative of the current legal framework with which school choice programs will have to contend.

THE *RACINE* CASE: A CHANGE IN MEANS, NOT ENDS, IS BARGAINABLE

In 1973, the Racine Unified School District decided to subcontract its food service program for student lunches in order to save money. The district contracted with a private vendor to provide food service. The operation remained essentially the same, except that food service employees of the school district were laid off and became employees of the private ven-

36. WIS. STAT. §§ 111.70(3)(a)(4), (5) (1989-90).

dor. The vendor was obligated to provide food service to the district's students. The union representing the displaced food service workers commenced a prohibited practice complaint³⁷ alleging the district unlawfully refused to bargain the decision to substitute the private food service for the former public food service, in violation of Wisconsin Statutes section 111.70 (3)(a)(4) (1989-90).³⁸

The WERC found that the district committed a prohibited practice and ordered the subcontract arrangement undone. In *Racine Unified School District v. WERC*,³⁹ the Wisconsin Supreme Court sustained the WERC's result, but on different legal grounds. The WERC had sought to apply the test used in the federal law to define the duty to bargain, which at the time was a "basic directions" test, applied in Wisconsin by the Wisconsin Supreme Court in *Libby, McNeil and Libby v. WERC*,⁴⁰ a private sector Wisconsin case arising under the Wisconsin Employment Peace Act.⁴¹ The court rejected the WERC's approach. The court rejected the private sector standard which rendered subcontracting a mandatory subject of bargaining on the grounds that the nature of municipal employment relations was far different from that of the private sector. To the court, some issues that would be mandatory subjects of bargaining in the private sector had to be permissive in the public sector to accommodate the political process. As the court stated:

In the private sector, collective bargaining is limited by the need to protect the 'core of entrepreneurial control,' particularly power over the deployment of capital. If resources are to be employed efficiently in a market economy, capital must be mobile and responsive to market forces . . . *Libby*, therefore recognized the importance of the employer's ability to 'change the direction' of his enterprise, and to redirect his capital.

Different concerns are present in the public sector, however, and the 'change of direction' test is not responsive to those concerns. In

37. Under the Wisconsin MERA, the term "prohibited practices" is used in lieu of "unfair labor practices." WIS. STAT. §§ 111.70 (1)(m), (3), (4)(a) (1989-90).

38. It should be noted that when the *Racine* case arose, there was no interest arbitration provision under the Wisconsin MERA. Ironically, the employer might have been able at that time to achieve the subcontract it sought by bargaining to impasse on the subject and implementing its final offer. See 1977 Wis. Laws ch. 178 (amendment establishing interest arbitration provisions in Wisconsin).

39. 81 Wis. 2d 89, 259 N.W.2d 724 (1977).

40. 48 Wis. 2d 272, 179 N.W.2d 805 (1970).

41. WIS. STAT. § 111.01 (1990). It should be noted that the WEPA applies only to private sector employers whose operations are not engaged in interstate commerce. Since *Libby*, the NLRB has expanded its jurisdiction to include virtually any private employer in the United States.

the public sector, the principal limit on the scope of collective bargaining is concern for the integrity of political processes.

. . . .

In municipal employment relations the bargaining table is not the appropriate forum for the formulation or management of public policy. Where a decision is essentially concerned with public policy choices, no group should act as an exclusive representative; discussions should be open; and public policy should be shaped through the regular political process. Essential control over the management of the school district's affairs must be left with the school board, the body elected to be responsible for those affairs under state law.⁴²

Applying the "primary relationship" standard as established in *Beloit*, the court nonetheless found that the school district acted unlawfully by subcontracting its food operations without first bargaining with its employees because the effect of the district's decision was primarily on the wages, hours, and conditions of employment of the employees, not on the district's services or policies. District food services remained, as before, delivered by means of a contract requiring the same services to be provided. The major changes were in the benefits and wages of employees. The court wrote, "the same work will be performed in the same places and in the same manner. The services provided by the district will not be affected."⁴³ Thus, the *Racine* case established that a municipal employer cannot unilaterally subcontract a service to reduce the cost of the service to the governmental unit unless it first meets its duty to bargain. Where a decision has no impact on the governmental services provided by the municipality, the decision's impact on the wages, hours, and conditions of employment of the employees makes it subject to bargaining.

The *Racine* case is not surprising to students of federal labor law. After all, the employer's decision appeared on the record to implicate neither the "core of entrepreneurial control" standard relied on by the WERC nor the more modern NLRB standard,⁴⁴ which looks to whether the decision was motivated by labor costs. Clearly, the Racine Unified School District neither redeployed its capital assets nor sought to do anything other than reduce labor costs. To the Wisconsin Supreme Court, the decision did not appear to involve the "management and direction" of the district at all, but only the means by which the district achieved unaltered goals. The state of the law after *Racine* was that public employers cannot unilaterally change the means by which public services are provided. Such decisions are subject

42. *Racine*, 81 Wis. 2d at 99-100, 259 N.W.2d at 30.

43. *Id.* at 102, 259 N.W.2d at 732.

44. *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984).

to the approval of the employees; the only way a proposal can be imposed involuntarily is through binding interest arbitration.⁴⁵ Considering that the heart of school choice programs is making the very decision which was at issue in the *Racine* case, its holding appears to be a serious, if not a fatal, obstacle.

A case arising with different facts a few years later carved out the only area for public management discretion, namely, deciding on the "ends." Examination of this case will further illustrate the limitations of the current "primarily related" test.

THE *BROOKFIELD* CASE: CARVING OUT A ROLE FOR THE PUBLIC PROCESS

In 1979, the Wisconsin Supreme Court defined a narrow zone of discretion for municipal employers in the case of *City of Brookfield v. WERC*.⁴⁶ *Brookfield* involved a decision by the City Council of Brookfield to hold down property taxes by laying off five firefighters. The firefighters' union filed a prohibited practice complaint, alleging that the city could not lay off the firefighters without first bargaining the decision with their union. The WERC agreed, ordering the city to reinstate the firefighters and bargain with the union before laying off firefighters. The Waukesha County Circuit Court reversed the WERC. The Wisconsin Supreme Court subsequently affirmed the circuit court, holding that the subject of layoffs was not a mandatory subject of bargaining.

The court in so holding noted initially that the statutes authorized the city to reduce its firefighting force. The court further noted that the city's home rule power to determine its local affairs gave the city the presumptive right to make the decision at issue. The court then considered whether the city's presumptive power to reduce its firefighting force could be exercised unilaterally, or only as a result of agreement in the collective bargaining process. The court observed:

To decide the issue to be a mandatory subject of bargaining would destroy the equal balance of power that insures the collective bargaining rights of the union and protects the rights of the general

45. The official statistics on interest arbitration suggest that employers and employees each prevail roughly 50 percent of the time. However, the raw statistics are not the full story. The prevailing arbitral policy in Wisconsin municipal interest arbitration is that arbitrators will only rarely and with great reluctance impose changes in contract language or working conditions on employees. See, e.g., *Manitowoc Police Dep't Employees, Local 731*, WERC Dec. No. 26003-A (Oct. 18, 1989) (arbitrator refused to support the city's demand for a nominal employee contribution to the cost of health insurance).

46. 87 Wis. 2d 819, 275 N.W.2d 723 (1979).

public to determine the quality and level of municipal services they consider vital.⁴⁷

The court, in discussing the balance of equities involved, noted that the union had made a conscious effort to lobby the common council against the proposed layoff. The court quoted from one of the political leaflets targeted at the Brookfield Common Council by the union, which made the point that policy decisions affecting employees can be, and often are, influenced by the political efforts of the employees. This opportunity to influence policy decisions gives unions a chance to counter even those decisions that are not mandatory subjects of bargaining. The political rights of public employees give them some measure of power to offset the broader managerial prerogatives of municipal employers. Indeed, public employees enjoy the unique position of being able to control not only the position of their union as to a given labor-management issue, but also to influence the management position. Taking that factor and the language of the statute into consideration, the court struck the balance in favor of the employer, stating, "We hold that economically motivated layoffs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government."⁴⁸

As a result, *Brookfield*, on its face, establishes an important policy which is highly relevant to the discussion herein: the integrity of the democratic process requires giving a governmental body the power to make a unilateral decision to forego the benefits of the services of public employees through an economically motivated layoff without first bargaining that decision with those employees. This result was not limited to cities by the language of *Brookfield*. The history of the case since 1979 shows that the holding is not narrowly confined to home rule cities. The Wisconsin Supreme Court applied the holding of *Brookfield*, which it stated in a later case to be "that a budgetary layoff decision is not a subject of mandatory bargaining"⁴⁹ to other units of government. In *West Bend*, the *Brookfield* holding was used in the context of a school district. School districts, like counties, townships, and vocational, technical, and adult education districts, are creatures of statutes and have no home rule powers.

Thus it is apparent that the holding in *Brookfield* did not result from the fact that the city enjoyed home rule, rather, it resulted from the fact that the city was responsible to the will of the electorate. The essence of the

47. *Id.* at 833, 275 N.W.2d at 730.

48. *Id.* at 830, 275 N.W.2d at 728.

49. *West Bend Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 10, 357 N.W.2d 534, 538 (1984).

Brookfield case is that the people, acting through their elected representatives, must be free to reduce the level of municipal services without being restricted by collective bargaining. The Wisconsin Supreme Court identified and valued for the first time the interests of municipal employers in determining whether a subject was mandatory or permissive. These interests, the court held, should be weighed in determining whether a given issue is primarily related to the management and direction of a municipal employer or to the wages, hours, and conditions of employment of the employees.

After *Brookfield*, it became clear that the interests on the public employer's side were nothing less than the need to accommodate the political process of self-rule. Where the political process decides to forego the benefits of a service, the managerial dimensions of the issue predominate, regardless of the implications for the affected employees. Conversely, in the case of decisions by employers to subcontract work or otherwise seek to maintain public services using substitutes for bargaining unit employees, the managerial or policy dimension has been viewed by the WERC and court as minimal. They have regarded the decision involved as not altering the services provided by the employer, but only the manner in which they are provided.

Therefore, *Brookfield* has carved out only one narrow area of privatization that is viewed by the court and WERC as, on balance, predominantly managerial in nature and therefore not a mandatory subject of bargaining. Recently, a series of cases involving the emerging trend toward privatization have raised a substantial question concerning the validity of such measures in protecting the integrity of the political process. They squarely present a conceptual problem that could not have been addressed in the seminal cases that have produced the current "primarily related" test. To the extent that privatization is a useful tool for municipal employers, these cases show why the test should be re-examined.

These cases are of great significance and relevance for proponents of school choice programs. They highlight the extent to which current case law, by frustrating the discretion of municipal employers, in effect ends up frustrating the political process. The inevitable result of the existing case law is a serious impediment to the future of school choice programs.

THE WAUKESHA, CHIPPEWA, AND MANITOWOC COUNTY CASES: PRIVATIZATION MEETS THE "PRIMARILY RELATED" TEST

Several Wisconsin counties have recently undertaken the same effort involved in school choice programs—transfer of an ongoing public service to private management and operation. The transfer involved privatization of

fiscally troubled county nursing homes. These cases provide useful precedent on both the legal and political level. As legal precedent, they have further defined the law of privatization in Wisconsin. As political case studies, they document the strength of the political process in grappling with difficult, emotionally charged issues about how we serve special and vulnerable members of our society. The fervor attendant to discussions of care for the elderly is already being replicated in the debate over the education of children.

The legal issues related to privatization have been most vigorously joined recently in several cases involving county nursing homes. Wisconsin's counties own fifty-two homes licensed under the Wisconsin Administrative Code⁵⁰ These institutions are successors to a system of county institutions which have existed for more than a century. The fifty-two county nursing homes, though constituting only one-ninth of Wisconsin nursing homes, house more than one-seventh of the State's nursing home residents. They also serve a highly disproportionate share of the State's skilled care and Medicaid residents. County nursing homes evolved from institutions founded in the 19th century as county homes for relief of the needy, an institution for which statutory reference still can be found in Wisconsin Statutes section 49.14 (1989-90). County homes were typically located on a county farm which produced the food eaten by the home's residents. The homes were started to provide relief to the poor, operating on the belief that it was unwise and immoral to support the poor in the community.⁵¹ County homes for the poor have been supplanted by general relief payments under Wisconsin Statutes section 49.02 (1989-90).

As this century began, however, the counties began to open what proved to be their most durable institutions, the county mental hospitals. These institutions, funded by state and local taxes, cared for thousands of men-

50. Wis. Admin. Code § HSS 132 (1990). These figures are derived from WIS. DEPT. OF HEALTH AND SOCIAL SERVICES, WISCONSIN NURSING HOME DIRECTORY AND FACT BOOK (1990).

51. Nineteenth century Americans feared that making relief too attractive by dispensing it in the community would encourage shiftlessness and immorality. In consequence, counties developed homes to provide "indoor" relief for children and women who were not expected to work. For able-bodied men, the program was called "outdoor" relief because relief was earned through hard labor on county roads, forests, or institutions. An excellent historical analysis of the rise of county homes and other eleemosynary institutions in the United States is found in DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (Little Brown) (1971).

tally ill patients⁵² in the era before revolutionary anti-psychotic medications made community treatment and support of the mentally ill a reality.⁵³

Even as those community alternatives began to emerge in the early 1970s, Wisconsin, however, followed the lead of other states by adopting legislation mandating re-licensure of all county mental hospitals as nursing homes.⁵⁴ The State's decision turned former mentally ill patients into nursing home residents—garnering hundreds of millions of dollars of federal medical assistance as the result.⁵⁵

Medical assistance, however, proved to be a fiscal nightmare for the State in the late 1970s. Wisconsin was not alone in that experience; it affected every state and the federal government. By 1980, the burden of paying medical assistance providers for the cost of serving patients had become more than the federal government wished to bear. Senator David Boren of Oklahoma successfully promoted an amendment to 42 U.S.C. section 1396a (13)(A) (1980), requiring states to reimburse medical assistance providers only the amount "that an efficiently and economically operated" facility would need to deliver services.⁵⁶ The change in federal law allowed the states to cap reimbursement at the rates charged by the providers at the 60th percentile of costs. The State of Wisconsin implemented the federal law by amending Wisconsin Statutes section 49.45.⁵⁷ The county nursing homes found themselves, generally, with high costs that were mostly the result of high patient care standards, high labor costs, and little or no additional reimbursement for those costs.

With medical assistance serving as the major source of revenue for county nursing homes and the State unwilling to pay the counties their costs of providing services, the result was, predictably, that the counties experienced substantial operating deficits. With revenue increases averaging less than one-fourth of cost increases, the gap between income and expenses widened annually to the point where counties reported deficits totalling \$31 million in 1986. There was little prospect of major relief given the fiscal constraints limiting the State's resources.

52. Linda Reivitz, *The Future Of County Nursing Homes*, WISCONSIN COUNTIES, Nov. 1986, at 7.

53. Community support programs for the mentally ill are provided for by WIS. STAT. § 51.421 (1990).

54. 1973 Wis. Laws 90, §§ 241, 540m; 1973 Wis. Laws 333 § 104.

55. See Chad McGrath, *County Homes Outstanding*, WISCONSIN COUNTIES, Dec. 1983, at 13.

56. Pub. L. No. 96-499, 94 Stat. 2650 (codified at 42 U.S.C. § 1396a(a)(13)).

57. 1981 Wis. Laws ch. 20 §§ 839-854 (1981).

Looking at large deficits, while at the same time fearing large federal cut backs from the Gramm-Rudman-Hollings Budget Reduction Act,⁵⁸ counties began to actively consider leaving the nursing home business. In 1986, consideration ended and decisions were made in three counties—Waukesha, Chippewa, and Manitowoc.

Waukesha County was experiencing an annual operating deficit of \$1 million while confronting a need to reconstruct its inefficient and outdated nursing home building. Rather than accept those consequences, the county decided to sell the going concern in its nursing home to a nonprofit corporation created by two local hospitals and lease the home's building until the nonprofit corporation could construct its own new facilities. Chippewa County, experiencing annual operating losses in excess of \$1.5 million, decided to sell its nursing home, building, and operations. The sale was financed with a forty-year land contract. Manitowoc County, advised by an outside financial consultant that its Park Lawn Home would likely run deficits in excess of \$350,000 per year, approved an agreement under which it sold the nursing home operation to a private for-profit operator and leased the home's building.

All three decisions were bitterly opposed by the affected employees. After political mobilization failed to stop the counties from acting, the unions involved filed prohibited practice complaints.⁵⁹ Each complaint alleged that the county acted unlawfully in unilaterally deciding to sell or lease their nursing homes.

An interesting aspect of the three complaints is that they probably never would have been filed had the employers involved been subject to the National Labor Relations Act (NLRA). After all, private concerns frequently sell all or part of their businesses. Absent some explicit anti-union motivation, the decision by an employer to sell is generally not a mandatory subject of bargaining under the NLRA.⁶⁰

With a different statute, of course, the complaining unions sought to establish a different result. The focus of the unions' arguments was the *Racine* case, where the court had held that a change in the means by which services were provided, which did not change the level of the services, was a mandatory subject of bargaining.

58. Pub. L. No. 99-177, 99 Stat. 1038 (1985).

59. Local 2490 AFSCME, AFL-CIO v. Waukesha County, WERC Dec. No. 24110-B (March 29, 1988); Local 913, AFSCME, AFL-CIO v. Manitowoc County, WERC Dec. No. 23591-A (Feb. 19, 1986); Local 2236, AFSCME, AFL-CIO v. Chippewa County, WERC Dec. No. 24521 (May 28, 1987).

60. Local 2179, United Steelworkers of Am. v. NLRB., 822 F.2d 559 (5th Cir. 1987).

In each of the three sales, the union argued, the nursing home which had been sold continued to operate as a nursing home. Although no subcontract or other provision required the new owners to operate the nursing homes at any particular level of service, the unions argued that the counties had entered into arrangements with the same result as a subcontract — continuation of the prior service. Because the counties were selling a highly specialized asset supported by third-party revenues and regulated by the state, the unions argued that the sales amounted to a constructive subcontract.

On review, the unions' contention was rejected by both WERC and the Wisconsin courts. The dispositive element in the three cases was the absence of any requirement that the new owner of each home continue to operate the facility at all, let alone at any particular level of quality.

The first decision came in the *Waukesha* case. There, as in the two other cases, the union filed both a prohibited practices complaint under Wisconsin Statutes section 111.70(5) (1989-90) and a civil action seeking an injunction to prevent the sale from happening. Since Wisconsin Statutes section 111.07(1) (1989-90), gives the circuit courts and the WERC concurrent jurisdiction over allegations of prohibited practices, the Waukesha local union went to the circuit court to obtain injunctive relief that the WERC could not give summarily.

Waukesha County decided that it preferred the forum of the circuit court and, relying on the statutory provision giving the court concurrent jurisdiction, asked the court to hear the merits of the prohibited practices complaint. The court agreed and granted the county's motion for summary judgment, holding that the county's decision to sell Northview Home was not a mandatory subject of bargaining.⁶¹ In so deciding, the court relied on the *Brookfield* case. The circuit court's decision holding that the decision was not a mandatory subject of bargaining was not appealed. The county then moved the WERC to dismiss the union's complaint case, a motion the WERC granted on the ground of *res judicata*.⁶²

61. In granting the county's motion for summary judgment, Judge Willis J. Zick held: "It then becomes pretty clear that this is a total divestment of any involvement by the county in this operation. They have sold all this stuff and sold — basically their licenses, and so on, is really what they sold, I guess. And they leased this building." Transcript of decision, Local 2490, AFSCME, AFL-CIO v. Waukesha County, Case No. 86-CV-3597 (March 30, 1987) (Waukesha County Circuit Court).

62. Local 2490, AFSCME, AFL-CIO v. Waukesha County, WERC Dec. No. 24115-B (March 29, 1988).

Soon after *Waukesha* was decided, the WERC issued its decision in *Chippewa County*.⁶³ There, the WERC ruled that the decision to sell a nursing home was related to the level of services of the county where there was no contractual mandate that the home continue to operate or serve the residents of the county. The WERC stated that it viewed the *Brookfield* case as standing for the proposition that a county need not bargain over such a "level of services" decision.

In the third decision, after an examiner's decision that Manitowoc County should have bargained the decision to lease Park Lawn Home,⁶⁴ the full WERC reversed, holding that the lease was not a mandatory subject of bargaining.⁶⁵ Again, the WERC relied on the holding in *Brookfield*. The Commission explained its rationale:

Here, the record demonstrates that Section 5.01 of the lease does not limit the use of the leased facility to the operation of a nursing home but rather permits use for any lawful purpose. The lease does not contain a requirement that the lessee give any preference to county residents if it continues to operate the premises as a health care facility. . . . Under these circumstances, and where, as here, the term of the lease is of sufficient length so as to satisfy us that the transaction does indeed represent a bona fide decision to *cease providing the services in question* we conclude that Manitowoc County did indeed get out of the business of being a health care provider through the instant sale/lease transaction. Under *Chippewa County* and our understanding of the Wisconsin Supreme Court's decision in *City of Brookfield*, the County need not bargain over such a 'level of services' decision despite the substantial impact on employee wages, hours and conditions of employment.⁶⁶

The union appealed the WERC decision to the Manitowoc County Circuit Court, which affirmed the WERC position on November 4, 1988. In turn, the court of appeals affirmed the circuit court in an unpublished decision in June 1989. The Wisconsin Supreme Court rejected the union's petition for review, letting the WERC decision stand.

Finally, proving the biblical adage that the first shall be last and the last first, in late 1990, Chippewa County won a published court of appeals decision upholding the WERC's finding that there was no duty to bargain the

63. WERC Dec. No. 24521 (May 28, 1987).

64. WERC Dec. No. 23591-A (Feb. 19, 1987).

65. WERC Dec. No. 23591-B (Feb. 29, 1988).

66. *Id.* at 13 (emphasis added).

sale of a county nursing home.⁶⁷ District III of the Wisconsin Court of Appeals assessed *Chippewa* as follows:

In the present case, the county surrendered all control of the physical plant and operations of the center when the sale to Heyde was completed. They retained only the interest of a secured party in a land contract. No other rights were reserved to the county as a result of this sale. The union argues that the operation continues essentially as before (except for the center's relationship with its employees). While Heyde has continued the operation, that fact represents only his management decision as to the operation of this center and not proof of a subcontracting relationship between the county and him. It is clear that power is vested in Heyde and that he is under no obligation to run the center in any particular way or to offer any particular services as a result of his purchase of this property. The commission specifically found that the control of the operation of the center did not remain directly or indirectly with the county. In the absence of such a finding, no subcontractual relationship exists between these parties.⁶⁸

Since the employers won these three cases, it may appear that they establish a way for municipal employers to consider and implement privatization. However, none of the cases involved the central assumption about privatization — that a private concern operates a continuing public service on behalf of a unit of government. In each of the cases discussed above, the employers prevailed precisely because there was no evidence of intent to privatize the nursing homes. Indeed, in each case, the municipality painstakingly structured the transaction to avoid any implication of an obligation to continue the nursing home's operations.

As the decisions in each of the three cases made clear, it was the absence of contractual provisions making the private vendees the agent or alter ego of the county which allowed the commission and courts to find that the sale did in fact alter the services provided by the county. Given the restrictions in the current understanding of the "primarily related" test, it is inconceivable that any of the counties would have prevailed had they actually privatized the nursing home in question. The essence of privatization is, after all, that through a contract the public continues to derive benefits from a par-

67. Local 2236, AFSCME, AFL-CIO v. WERC, 157 Wis. 2d 708, 461 N.W.2d 286 (1990). The *Chippewa* case took longer to wind through the system because the first decision issued by the WERC failed to satisfy Circuit Judge Gregory Peterson, Eau Claire County Circuit Court. Judge Peterson felt the original decision did not adequately display exercise of administrative discretion and remanded the case. On remand, the Commission affirmed its holding but expanded upon its reasoning.

68. *Id.* at 716, 461 N.W.2d at 289-90.

ticular service—the service is simply provided through a private contractor. It is exactly the continued assurance of public benefits which makes the privatization arguably bargainable under the *Racine* case.

The complaining unions argued that proof of less than a formal subcontract was sufficient. The unions argued that any reasonable prospect of continued public benefits demonstrated the transactions were intended to maintain services through private operators, and, therefore, the cases fell within the ambit of *Racine*. To the unions, the sales or leases by the counties were constructively subcontracts because the economics and legal realities of the sales made it highly likely that the nursing homes would continue to operate in the counties as nursing homes.

The cases came down to fine points. In each case, the employer successfully demonstrated the absence of any formal obligation by the new home owner to continue to operate a nursing home, let alone to serve the county's residents. Absent some formal requirement, the employers argued that the continued operation of the homes could not be imputed to the counties. That argument succeeded in persuading the WERC and courts that the employers had made a bona fide decision to reduce their levels of service as sanctioned by the *Brookfield* case.

Therefore, the nursing home cases show that it is permissible for a municipal employer to unilaterally decide to discontinue a particular service by transferring it to a private concern, but only if the employer is willing to completely forego control over that service and have no assurances the service will be continued in the future. This harsh limitation of current law shaped the nursing home decisions, forcing the counties to forego any provisions which would have assured continued quality of health care for the homes' residents. The absence of such a requirement gave rise to heated political rhetoric. Proponents of sales were characterized as indifferent to the needs of the elderly. As in the *Brookfield* case, the employers prevailed because they were willing to make the extreme sacrifices involved—sell the homes with no assurances as to their future operation.

IMPLICATIONS FOR SCHOOL CHOICE PROGRAMS

Quite clearly, any attempt by a school district to privatize all or part of its school operations through a school choice program will run headlong into the announced case law under MERA. The counties that privatized their nursing homes succeeded in doing so only because those institutions were capable of operating on their own as proprietary institutions without continuing financial support, management, and control from the county.

Schools, of course, are radically different. They are a governmental service and have classically been deemed a public good, one whose benefits

cannot readily be withheld from anyone.⁶⁹ While the goal of universal free education originated by Horace Mann⁷⁰ is beyond debate, the means to attain that end should be debatable. Under current Wisconsin law, the public has but one choice to educate its children without paying tuition — the public school monopoly.

It is a safe assumption, if school operations cannot be privatized without permission of the affected employees, that privatization will never happen. The only circumstances under which privatization has been found permissible under the existing “primarily related” standard are when it is not truly privatization at all.

It can be seen that true privatization is impossible in a recently reported case involving a municipal employer, Brown County, which more overtly attempted to privatize a local service. That county decided to lease the building formerly occupied by its juvenile shelter care home, contracting with a private provider to purchase similar services. The county employees who had provided the youth home services were laid off in the process.

The employees and their union charged Brown County with refusing to bargain in violation of Wisconsin Statutes section 111.70(3)(a)(4) (1989-90). The WERC found that Brown County had unlawfully refused to bargain and ordered the county to reinstate youth home services, offer reemployment to the employees and make them whole for lost wages and benefits. The circuit court upheld the WERC’s finding that the county had a duty to bargain with respect to its decision to privatize the operation of the youth home.⁷¹

In other words, but for the fact that the MSCP is a special legislative initiative that arguably overrides the dictates of MERA,⁷² the initiative’s very existence would depend on the grace of the school employees. The

69. A good can be classified as a public good if its consumption is necessarily shared by all members of a community. The existence of public goods is an important justification for governments to engage in some form of economic activity.

A principle of *nonexclusion* applies to public goods, in two senses: (1) because one person’s use of the good does not interfere with or exclude another person’s use, and (2) because it is impossible to exclude any member of the community from benefiting from the good. See WERNER SICHEL and PETE ECKSTEIN, *BASIC ECONOMIC CONCEPTS* 236 (1979).

70. See JONATHAN MESSERLI, *HORACE MANN* 340-43 (1st ed. 1971).

71. *Brown County v. WERC*, 138 Wis. 2d 254, 405 N.W.2d 752, *petition for rev. denied*, 140 Wis. 2d 873, 416 N.W.2d 66 (1987).

72. This is an assumption based on the doctrine of harmonization of statutes which on their face, are in conflict. There is authority for the proposition that the later statute controls over a prior law. *In re Frederick’s Estate*, 247 Wis. 268, 19 N.W.2d 248 (1945). However, one could well argue that the School Choice Program law does not relieve the Milwaukee Public Schools of their duty to bargain the decision to transfer children to the private sector. See, e.g., *Glendale Professional Police Ass’n v. City of Glendale*, 83 Wis. 2d 90, 264 N.W.2d 594 (1978) (holding that the

only way a school district could privatize part of its program would be to divest itself of all control over the operation — an abdication of responsibility which would be not only politically untenable, but constitutionally doubtful.⁷³

This leads to the ultimate question: Did the legislature intend to grant municipal employers the power to act unilaterally only where the locality decides to completely abandon its responsibilities? Or did the legislature intend the political process to have the power to determine how best to provide local services?

In adopting the *Racine* holding, the Wisconsin Supreme Court said it was rejecting federal law on subcontracting in order to arrive at a broader range of discretion for local employers. If the issue before a municipal employer is privatization, however, the supreme court's intention has not been realized. Privatization would seem, ultimately, to be a choice about quality, accountability, and efficiency—values that are classic choices that the democratic process should make. Under current law, there is no choice that can be made about it at all.

PRIVATIZATION AND THE DEMOCRATIC PROCESS

The *Racine* holding assumes that a decision by local elected officials to contract out a service does not primarily relate to the level or quality of services provided by the municipality. Actually, the decision to privatize a service has far-reaching consequences for the services themselves. For every perceived benefit of economy, flexibility, and efficiency, there are at least as many offsetting disadvantages of loss of direct control and potential for monopoly power on the part of the contractor. Privatization is a difficult choice to make even without considering the labor relations implications. There will always be sacrifices when a municipality transfers an operation from public to private management.⁷⁴

The *Racine* holding assumes that decisions about the means by which a goal is to be reached are unimportant. Experience suggests quite the oppo-

MERA takes precedence over the police chief's power to appoint police officers under WIS. STAT. § 62.13. Certainly any impact on the public school teachers would be bargainable.

73. The Wisconsin Constitution provides: "The legislature shall provide by law for the establishment of district schools which shall be as nearly uniform as practicable; and such schools shall be free and without tuition to all children between the ages of 4 and 20 years . . ." WIS. CONST. art. X, § 3.

74. Indeed, the thrust of opposition to privatization from public employees is precisely the claim that private services are very different in character—and inferior—to services directly provided by the municipality.

site; that whether a given public policy goal is attainable *at all* depends on the means selected to attain it more than anything else.

These considerations appear to have been given short shrift by the *Racine* court, perhaps because the record before it showed little evidence of any trade-offs weighed by the school district in making the decision to contract out the school lunch program. But even if we evaluate the *Racine* holding in light of the facts of that case, the policy result remains inadequate.

The law of privatization cannot be decided in isolation from the remainder of the labor relations system. Yet, that is precisely what happened in *Racine*, where the supreme court rather uncritically accepted the same result as would have been obtained in the private sector under a straight subcontract. The problem is that we are not dealing with a private sector employer.

The federal law on subcontracting developed in a labor-management relationship that has two major differences from the municipal employment relationship in Wisconsin. First, private sector employers, unlike public employees, have a legal right to impose their will on their employees. While private sector law requires that bargaining be pursued first, a private sector employer can implement its final offer after reaching impasse in negotiations. At this point, the union can use its strike weapon to exact a price for the employer's action. Even then, though, private sector employers can permanently replace economic strikers. Second, private sector employers' management is not subject to influence or control by its employees, other than through economic warfare. Private sector management is controlled by the enterprise's owners. Public sector employers, however, are controlled by elected officials. Public employees vote — and have mobilized themselves into a formidable political force.⁷⁵

75. Figures compiled by the Wisconsin State Elections Board in its Biennial Report show the following ranking of political action committees in total expenditures and contributions to state candidates during 1987-88, the latest period for which information is available:

1. Wisconsin Education Association Council PAC:	\$640,832.82
2. Realtors PAC	191,083.04
3. Wisconsin Bankers PAC	162,276.78
4. Wisconsin Savings Association PAC	63,079.39
5. Council of Auto & Truck Retailers PAC	57,329.90
6. Wisconsin Truck Operators (W-TON) PAC	54,878.36
7. Lawyers Active in Wisconsin (PAC)	54,608.80
8. Banc One Corporation PAC	50,465.00
9. Wis. Credit Union Legislative Activity PAC	49,022.99
10. 1st Wisconsin Civic Affairs PAC	47,877.00

The other major public employee union, the American Federation of State County and Municipal Employees had PAC spending totalling \$63,567.87 when all its related PACs are included.

The equities and balance of power in public sector labor relations, therefore, are radically different from those found in the private sector. While private sector employees are generally protected from unilateral subcontracting by the NLRA, their employers can ultimately implement their will and can counter the employees' power by using economic weapons such as the lockout or permanent replacements.

In the public sector, employees are protected from unilateral subcontracts as well. The employer, however, has no effective means to implement a subcontracting or privatization proposal without the consent of the employees. The public employer cannot effectively press employees on the issues that are involved in and often give rise to privatization—excessive wages and benefits. In Wisconsin, public employers cannot impose their last offer at the point of impasse, decide to take a strike, or lock out their employees.⁷⁶ A strike can occur only by an agreement between the employer and the union.⁷⁷ In thirteen years under the revised MERA, not one legal public employee strike has occurred.

The public employer's position is even worse than this, however. Any decision by a municipal employer to use even the limited power it possesses under MERA is subject to political challenge by the affected employees. In other words, employees control their own position and have a shot at controlling that of the employer.

Privatization would serve a highly valuable purpose in Wisconsin municipal employment relations by giving management an economic weapon that could discipline the collective bargaining process. Under the current MERA, negotiations on wages, hours, and conditions of employment go on and on, culminating in a fantasy land where the value of an employee's services in the real world free market is almost ignored. Instead, the negotiation and arbitration process is driven by wages, hours, and conditions of employment relative to other public employers.⁷⁸ Naturally, such a process is subject to manipulation by employees—an advantage they utilize.

76. WIS. STAT. § 111.76(4)(cm) (1989-90).

77. WIS. STAT. § 111.70(4)(cm)(7) (1989-90).

78. The factors considered by interest arbitrators are:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services.

Privatization poses a competing method of getting the job done with operating costs based on real world market conditions. Those are the conditions with which the entrepreneur proposing to serve a municipality has to contend. The resulting proposal to a municipality serves as a benchmark for comparison to the costs of providing services directly. This may be the discipline needed to help municipal employers hold down operating costs. As property taxes continue to escalate to record levels each year despite the provision of record amounts of state funds,⁷⁹ which are supposed to defray tax increases, serious cost containment is becoming more imperative.⁸⁰ In the context of public education, where the welfare of the next generation is at issue, privatization in the form of school choice programming may be a way out of the intractable mess of deteriorating quality, uncontrolled conditions, and skyrocketing expenses being experienced in the public schools.

Ultimately, municipal labor relations have to pass a fundamental fairness test: Are those whose employment is financed by taxation, working for

e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost of living.

h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pension, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or private employment.

WIS. STAT. §§ 111.70(4)(cm)(7) (A-J) (1989-90).

79. In 1990-91, the State of Wisconsin's total budget was \$11,721,213,000. Of that total, \$4,476,176,100, or 38.1 percent, was paid to school districts, cities, towns, villages, counties, and other local governments to reduce property taxes. STATE OF WISCONSIN, BLUE BOOK 808 (1991-92).

80. In 1989, local units of government levied a record \$4.1 billion of property taxes to be collected in 1990. The 1989 property tax levy was an 84 percent increase over the 1980 property tax levy. Wisconsin Taxpayers Alliance, *Property Tax Levies*, 58 THE WISCONSIN TAXPAYER 4 (1990).

substantially better wages, hours, and conditions of employment than the people who are paying taxes to finance government? Studies can determine whether or not this is the case; giving municipal employers the power to privatize would allow them to respond to the problem.

While the existence of the power to privatize would enhance employers' positions, it certainly would not lead to a wholesale contracting out of government functions. Even in the United Kingdom, where consideration of privatization was mandated by legislation enacted at the instance of the conservative Thatcher government,⁸¹ local councils continue to provide many services directly.

In Wisconsin, it is safe to assume that political pressure will do much to prevent municipalities from wielding the power to privatize, even if it exists. But at least the decision will be made in the proper forum — the elected governing body. The existence of the power to privatize would give municipalities the power to set limits on how much they are willing to allow tax dollars to provide above-market compensation to their employees. It would also give local officials a chance to select a provider of services that can get the job done instead of being tied to inefficient in-house operations.

If nothing else, the power to experiment or innovate may be a powerful incentive to improve performance and motivation of government bureaucracy. The private sector has developed a plethora of creative strategies to successfully meet the needs of consumers in the economy.

Not insignificantly, privatization will allow the elected representatives of the public to decide whether to abandon service providers in areas such as education where costs are considered excessive or results unacceptable. The driving force behind privatization, therefore, is as much quality and efficiency as economics. There may be some services which public organizations are too burdened by political limitations to effectively provide.

All of these desirable consequences of privatization, however, remain unavailable to municipalities. The *Racine* court struck a balance which it felt was even-handed, but which in practice has left municipal employers without control over their operations. As the law now stands, a narrow special interest group in society, unionized public employees, has virtual immunity from real-world economic considerations.

Under the existing definition of the duty to bargain and the collective bargaining process, quality of services, whether schools or nursing homes

81. Local councils in the United Kingdom are required by the Local Government Act of 1988 to competitively contract for six local services: refuse collection, food services, street cleaning, janitorial, grounds/building maintenance, and vehicle maintenance. Under Mrs. Thatcher, Britain led the world in privatization efforts. See REASON FOUNDATION, *supra* note 33.

are involved, is virtually irrelevant. The law of Wisconsin, as construed in the *Racine* case, locks the electorate into a monopoly relationship with its employees—a grip that no private sector employer would tolerate.

Fortunately, *Racine* is a case of statutory interpretation, not constitutional rights. The holding can be reversed by amending Wisconsin Statute section 111.70 (1989-90). The Wisconsin legislature should promptly consider such an amendment. Failure to do so will result in the continued lack of a real choice in public services.