

# The Yale Law Journal

Volume 78, Number 7, June 1969

## The Limits of Collective Bargaining in Public Employment<sup>†</sup>

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Good lawyers are good critics. The nature of their discipline makes this skill necessary, and the content of their work brings it inevitably to bear upon doctrines and concepts laboriously constructed by their predecessors. In approaching questions involving collective bargaining and public employment, union lawyers and academic commentators have for some years been criticizing the concept of the sovereignty of the public employer, and its offspring, the doctrine of the illegal delegation of power. These two lawyer-made constructs once had imposed formidable obstacles to collective bargaining in the public sector

† This paper was prepared as part of a larger project on Collective Bargaining and Public Employment which is being conducted by the Brookings Institution with financial support from the Ford Foundation. The views are the authors' and are not presented as those of the officers, trustees, or staff members of the Brookings Institution or of the Ford Foundation.

An earlier draft of this paper was read by several of our social science colleagues. We are grateful to Professors Ward S. Bowman, Herbert Kaufman, Stanley Lebergott, Charles E. Lindblom, Peter M. Mieszkowski and Martin Shubik for their helpful comments.

The writing on strikes in public employment is recent but extensive. See, e.g., Taylor, *Public Employment: Strike or Procedures*, 20 IND. & LAB. REL. REV. 617 (1967); Hildebrand, *The Public Sector* in FRONTIERS OF COLLECTIVE BARGAINING 125 (J. Dunlop & N. Chamberlain eds. 1967); Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service*, 22 S.W.L.J. 585 (1968); Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969). The most interesting of the recent cases on the subject are, *City of New York v. DeLury*, 23 N.Y.2d 175, 243 N.E.2d 128 (1968), *appeal dismissed*, 89 S. Ct. 1223 (1969); *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968).

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of our economy.<sup>1</sup> But this criticism, vastly strengthened by the changing nature of government employment and the ever visible example of collective bargaining in the private sector, has led to a liberalized common law and a growing body of enacted law and has reduced to a whisper the counsel of restraint voiced by these constructs.<sup>2</sup>

Consider sovereignty, that concept so elusive as an analytical tool, yet so fundamental to all notions of government. A law dictionary advises that it is the "supreme, absolute, and uncontrollable power by which any independent state is governed . . ."<sup>3</sup> Since collective bargaining in the private sector is believed by many to be a system of countervailing power—a means, that is, by which the power of employees is increased to offset that of employers—one might easily see its establishment in the public sector as an infringement on governmental power and the sovereignty of the state itself. Viewing the "supreme, absolute, and uncontrollable" sovereign in its role as an employer, therefore, Franklin Roosevelt understandably said, "A strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable."<sup>4</sup>

But, to the lawyer-critics, sovereignty seems a weak reed when the private analogy is pressed. It was 1836 when a judge observed that if collective bargaining in the private sector were "tolerated, the consti-

1. For the flavor of the rhetoric, see *Railway Mail Ass'n v. Murphy*, 180 Misc. 868, 875, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on other grounds sub nom. Railway Mail Ass'n v. Corsi*, 267 App. Div. 470, *aff'd*, 293 N.Y. 315, 56 N.E.2d 721, *aff'd*, 326 U.S. 88 (1945):

To tolerate or recognize any combination of civil service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the State can dictate to the government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that government employees have power to halt or check the functions of government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.

180 Misc. at 875.

2. The most important of the "liberal" common law decisions is the early Connecticut case of *Norwalk Teachers Ass'n v. Bd. of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951). Among the states recently enacting comprehensive public employee relations acts are Massachusetts, MASS. ANN. LAWS ch. 149 §§ 423.201-216 (1967); and New York, N.Y. CIVIL SERV. LAW §§ 200-12 (McKinney Supp. 1967).

3. BLACK'S LAW DICTIONARY 1643 (3d ed. 1933).

4. Letter from Franklin D. Roosevelt to L. C. Stewart, President, National Fed'n of Fed. Employees, Aug. 16, 1937, cited in Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 604, 612.

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tutional control over our affairs would pass away from the people at large, and become vested in the hands of conspirators. We should have a new system of government, and our rights [would] be placed at the disposal of a voluntary and self-constituted association."<sup>5</sup> Such sovereignty-related assertions are no longer thought to have applicability to the private sector, for private collective bargaining has served as the nation's labor policy for more than a generation—not without criticism, but surely without any sign of the apocalypse. And so, conclude the critics, the notion of sovereignty as a bar to collective bargaining is not a concept peculiar to the public employer, but is merely an anti-union make-weight left over from an earlier day when the law was hostile to all collective bargaining.

Sovereignty must also seem to the critics too elusive and too remote a concept to be of practical significance in the fashioning of labor policy. The issue is not, they say, whether government's power is "supreme," but how government as an employer ought to exercise that power. And the concept of sovereignty, while it locates the source of ultimate authority, does not seem to speak to that issue.

The doctrine of the illegal delegation of power, however, does address itself to that question, for it is a constitutional doctrine which sometimes forbids government from sharing its powers with others.<sup>6</sup> The doctrine of illegal delegation commands that certain discretionary decisions be made solely on the basis of the judgment of a designated official. And because a great deal of shared control is implicit in any scheme of collective bargaining, the delegation doctrine has been employed in the past to prevent all bargaining between government and its employees. Even today it serves as a basis for establishing limits on the scope of collective bargaining in public employment. Often subjects of vital interest to employees are subjects that cannot be resolved through the collective bargaining process, because they are by law non-delegable.<sup>7</sup> In some jurisdictions, moreover, the delegation doctrine places in doubt the binding force of bargains struck;<sup>8</sup> and in

5. *The Case of the Twenty Journeymen Tailors, People v. Faulkner*, N.Y. (1836), *Courier and Enquirer*, May 31, 1836, reproduced in 4 COMMONS & GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 315, 322 (1910).

6. See *Muford v. Mayor and City Council of Baltimore*, reprinted in C. RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 161, 163 (1946), *aff'd*, 185 Md. 265, 44 A.2d 745 (1946).

7. See, e.g., Executive Order 10988, Employee-Management Cooperation in Federal Service, 27 Fed. Reg. 551 (1962). Cf. *In re Farmingdale Classroom Teachers*, 68 L.R.R.M. 2761 (Sup. Ct. N.Y. 1968).

8. See *Transit Union v. Public Transit Bd.*, 430 S.W.2d 107 (Texas Ct. Civ. App. 1969).

others it is employed as an excuse for not bargaining even though such bargaining is legally permissible.<sup>9</sup>

Again, however, the lawyer-critics press the analogy of the private sector and again find the limiting doctrine an inadequate basis for a distinction. Private employers from the beginning of American labor history have insisted upon management prerogatives. Certain decisions—their rhetoric claims—must be made by management alone and cannot be subject to shared control.<sup>10</sup> While the decisions at issue have changed over the years—from wage rates to subcontracting, from hours of work to automation—the assertion of management prerogatives has been the private sector's analogue to the illegal delegation of power:<sup>11</sup> management is charged with the lawful responsibility for making management decisions; the decision in question is a management decision; it cannot be shared, for to share would be to give control to those without legal responsibility.<sup>12</sup>

In the private sector the establishment of collective bargaining is itself a rejection of these arguments. Based on a belief that bargaining is likely to be unfair when the individual employee is ranged against the employer, and that "industrial democracy" is necessary to rescue the employee from the psychological emasculation of modern industry, collective bargaining inevitably entails shared control of "wages, hours, and other terms and conditions of employment."<sup>13</sup> And there is nothing in any realistic description of the management function to

9. Compare *Regents v. Packing House Workers*, 68 L.R.R.M. 2677 (Dist. Ct. Iowa 1968), with *Fort Smith v. Council No. 33, AFSCME*, 433 S.W.2d 153 (Ark. 1968).

10. Consider the following statement of Charles E. Wilson made in 1948 when he was President of General Motors:

If we consider the ultimate result of this tendency to stretch collective bargaining to comprehend any subject that a union leader may desire to bargain on, we come out with the union leaders really running the economy of the country; but with no legal or public responsibility and with no private employment except as they may permit.

Under these conditions, the freedom of management to function properly without interference in making its every-day decisions will be gradually restricted. The union leaders—particularly where they have industry-wide power—will have the deciding vote in all managerial decisions, or at least, will exercise a veto power that will stop progress.

Only by defining and restricting collective bargaining to its proper sphere can we hope to save what we have come to know as our American system and keep it from evolving into an alien form, imported from East of the Rhine . . .

N. CHAMBERLAIN, *THE LABOR SECTOR* 342 (1965).

11. See, e.g., *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

12. The earliest American labor cases sometimes contained rhetoric of this sort. Compare *State v. Clidden*, 55 Conn. 46, 72, 8 A. 890, 894 (1887), with *The Philadelphia Cordwainers Case*, *Commonwealth v. Pullis* (1806), 3 COMMONS & GILMORE, *A DOCUMENTARY HISTORY OF THE UNITED STATES* 59, 229 (1910).

13. Labor-Management Relations Act § 8(d), 29 U.S.C. § 158(d) (1964).

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require that the quoted language be given anything other than an expansive reading.<sup>14</sup> Given the conservative ideology of the American labor movement, we need not fear that the unions will intrude on matters which in fact are "solely of interest to management." They are hardly likely to expend their limited power in disputes over issues having no impact on the worker. Nor are there lines to be drawn on grounds of economic efficiency. Since the efficiency of an employer is reflected in the cost of his product, whether that cost is imposed through high wages or a restriction on the introduction of machinery, is a matter of indifference to society. Thus, in our system of private collective bargaining, economic power and the parties' desires are the only rational determinants of what matters should be subjects of bargaining.<sup>15</sup>

Therefore, ask the lawyer-critics, is not the doctrine of illegal delegation in the public sector to be treated in the same way as the management prerogatives question in the private?<sup>16</sup> And are not the reasons for collective bargaining in the public sector the same as those in the private?

While there seems to be considerable justification for viewing the public employee as the functional equivalent of the private employee, we believe collective bargaining cannot be fully transplanted from the private sector to the public. The reasons why this is so are reasons, moreover, that should lead lawyers to a rather more sympathetic treatment of delegation and sovereignty. Our argument begins with the rationale for collective bargaining in the private sector.

### I. The Claims for Collective Bargaining in the Private Sector

Those who deny the validity of the claims for collective bargaining in the private sector will surely not find those claims to have merit in the public. We do not intend to debate the merits of these claims. We must, however, if we are fully to test our thesis that a full transplant of collective bargaining to the public sector is inappropriate, assume a minimal validity of the claims that are made for it in the private.

14. See generally H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 63-90 (1968).

15. See Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950); COMMITTEE FOR ECONOMIC DEVELOPMENT, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 82 (1961).

16. In the private area, many subjects, in fact, have been held not to be mandatory subjects of bargaining. As to non-mandatory subjects, neither employer nor union has a duty to bargain. Indeed, to press bargaining about such a subject is itself an unfair labor practice. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

Four claims then, are made for private-sector collective bargaining. First, it is a way to achieve industrial peace. The point was put as early as 1902 by the Industrial Commission:

The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other.<sup>17</sup>

Second, collective bargaining is a way of achieving industrial democracy—that is, participation by workers in their own governance. It is the industrial counterpart of the contemporary demand for community participation.<sup>18</sup>

Third, unions that bargain collectively with employers represent workers in the political arena as well. And political representation through interest groups is one of the most important types of political representation that the individual can have. Government at all levels acts in large part in response to the demands made upon it by the groups to which its citizens belong.<sup>19</sup>

Fourth, and most important, as a result of a belief in the unequal bargaining power of employers and employees, collective bargaining is claimed to be a needed substitute for individual bargaining.<sup>20</sup> Monopsony—a buyer's monopoly,<sup>21</sup> in this case a buyer of labor—is alleged to exist in many situations and to create unfair contracts of

17. FINAL REPORT OF THE INDUSTRIAL COMMISSION 844 (1902).

18. *See, e.g.*, testimony of Louis D. Brandeis before the Commission on Industrial Relations, Jan. 23, 1915, S. DOC. NO. 415, 64th Cong., 1st Sess. 8, 7657-81 (1916).

19. *See generally* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 215-38 (1968).

20. *See, e.g.*, FINAL REPORT OF THE INDUSTRIAL COMMISSION 800 (1902):

It is quite generally recognized that the growth of great aggregations of capital under the control of single groups of men, which is so prominent a feature of the economic development of recent years, necessitates a corresponding aggregation of workmen into unions, which may be able also to act as units. It is readily perceived that the position of the single workman, face to face with one of our great modern combinations, such as the United States Steel Corporation, is a position of very great weakness. The workman has one thing to sell—his labor. He has perhaps devoted years to the acquirement of a skill which gives his labor power a relatively high value, so long as he is able to put it to use in combination with certain materials and machinery. A single legal person has, to a very great extent, the control of such machinery, and in particular of such materials. Under such conditions there is little competition for the workman's labor. Control of the means of production gives power to dictate to the workingman upon what terms he shall make use of them.

21. Our use of the term monopsony is not intended to suggest a labor market with a single employer. Rather we mean any market condition in which the terms and conditions of employment are generally below that which would have existed if the employers behaved competitively.

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labor as a result of individual bargaining. While this, in turn, may not mean that workers as a class and over time get significantly less than they should—because monopsony is surely not a general condition but is alleged to exist only in a number of particular circumstances<sup>22</sup>—it may mean that the terms and conditions of employment for an individual or group of workers at a given period of time and in given circumstances may be unfair. What tends to insure fairness in the aggregate and over the long run is the discipline of the market.<sup>23</sup> But monopsony, if it exists, can work substantial injustice to individuals. Governmental support of collective bargaining represents the nation's response to a belief that such injustice occurs. Fairness between employee and employer in wages, hours, and terms and conditions of employment is thought more likely to be ensured where private ordering takes the collective form.<sup>24</sup>

There are, however, generally recognized social costs resulting from this resort to collectivism.<sup>25</sup> In the private sector these costs are primarily economic, and the question is, given the benefits of collective bargaining as an institution, what is the nature of the economic costs? Economists who have turned their attention to this question are legion, and disagreement among them monumental.<sup>26</sup> The principal concerns are of two intertwined sorts. One is summarized by Professor Albert Rees of Princeton:

If the union is viewed solely in terms of its effect on the economy, it must in my opinion be considered an obstacle to the

22. There is by no means agreement that monopsony is a significant factor. For a theoretical discussion, see F. MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 333-79 (1952); for an empirical study, see R. BUNTING, *EMPLOYER CONCENTRATION IN LOCAL LABOR MARKETS* (1962).

23. See, e.g., L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 18-19 (3d ed. 1961).

To the extent that monopsonistic conditions exist at any particular time one would expect them to be transitory. For even if we assume a high degree of labor immobility, a low wage level in a labor market will attract outside employers. Over time, therefore, the benefits of monopsony seem to carry with them the seeds of its destruction. But the time may seem a very long time in the life of any individual worker.

24. See, e.g., Labor-Management Relations Act § 1, 29 U.S.C. § 151 (1964).

25. The monopsony justification views collective bargaining as a system of countervailing power—that is, the collective power of the workers countervails the bargaining power of employers. See J. K. GALBRAITH, *AMERICAN CAPITALISM* 121 *et seq.* (1952). Accepting the entire line of argument up to this point, however, collective bargaining nevertheless seems a crude device for meeting the monopsony problem, since there is no particular reason to think that collective bargaining will be instituted where there is monopsony (or that it is more likely to be instituted there). In some circumstances collective bargaining may even raise wages above a “competitive” level. On the other hand, the collective bargaining approach is no cruder than the law's general response to perceived unfairness in the application of the freedom of contract doctrine. See H. WELLINGTON, *supra* note 14, at 26-38.

26. Compare, e.g., Simons, *Some Reflections on Syndicalism*, 52 *J. OF POL. ECON.* 1 (1944), with, e.g., Lester, *Reflections on the “Labor Monopoly” Issue*, 55 *J. OF POL. ECON.* 513 (1947).

optimum performance of our economic system. It alters the wage structure in a way that impedes the growth of employment in sectors of the economy where productivity and income are naturally high and that leaves too much labor in low-income sectors of the economy like southern agriculture and the least skilled trades. It benefits most those workers who would in any case be relatively well off, and while some of this gain may be at the expense of the owners of capital, most of it must be at the expense of consumers and the lower-paid workers. Unions interfere blatantly with the use of the most productive techniques in some industries, and this effect is probably not offset by the stimulus to higher productivity furnished by some other unions.<sup>27</sup>

The other concern is stated in the 1967 Report of the Council of Economic Advisors:

Vigorous competition is essential to price stability in a high employment economy. But competitive forces do not and cannot operate with equal strength in every sector of the economy. In industries where the number of competitors is limited, business firms have a substantial measure of discretion in setting prices. In many sectors of the labor market, unions and managements together have a substantial measure of discretion in setting wages. The responsible exercise of discretionary power over wages and prices can help to maintain general price stability. Its irresponsible use can make full employment and price stability incompatible.<sup>28</sup>

And the claim is that this "discretionary power" too often is exercised "irresponsibly."<sup>29</sup>

Disagreement among economists extends to the quantity as well as to the fact of economic malfunctioning that properly is attributable to collective bargaining.<sup>30</sup> But there is no disagreement that at some point the market disciplines or delimits union power. As we shall see in more detail below,<sup>31</sup> union power is frequently constrained by the fact that consumers react to a relative increase in the price of a product by purchasing less of it. As a result any significant real financial benefit, beyond that justified by an increase in productivity, which accrues to workers through collective bargaining, may well cause significant unemployment among union members. Because of this employment-benefit relationship, the economic costs imposed by

27. A. REES, *THE ECONOMICS OF TRADE UNIONS 194-95* (1962).

28. COUNCIL OF ECON. ADVISORS, *1967 ANNUAL REPORT* 119 (1967).

29. *See id.* at 119-34. *See generally* J. SHEAHAN, *THE WAGE-PRICE GUIDEPPOSTS* (1967).

30. *See, e.g.*, H. G. LEWIS, *UNIONISM AND RELATIVE WAGES IN THE UNITED STATES* (1963), and earlier studies discussed therein.

31. *See* pp. 1117-19 *infra*.



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collective bargaining as it presently exists in the private sector seem inherently limited.<sup>32</sup>

### II. The Claims for Collective Bargaining in the Public Sector

In the area of public employment the claims upon public policy made by the need for industrial peace, industrial democracy and effective political representation point toward collective bargaining. This is to say that three of the four arguments that support bargaining in the private sector—to some extent, at least—press for similar arrangements in the public sector.

Government is a growth industry, particularly state and municipal government. While federal employment between 1963 and 1968 has increased from 2.36 million to 2.73 million, state and local employment has risen from 6.87 to 9.42 million,<sup>33</sup> and the increase continues apace. With size comes bureaucracy, and with bureaucracy comes the isolation and alienation of the individual worker. His manhood, like that of his industrial counterpart, is threatened. Lengthening chains of command necessarily depersonalize the employment relationship and contribute to a sense of powerlessness on the part of the worker. If he is to share in the governance of his employment relationship as he does in the private sector, it must be through the device of representation, which means unionization.<sup>34</sup> Accordingly, just as the increase in the size of economic units in private industry fostered unionism, so the enlarging of governmental bureaucracy has encouraged public employees to look to collective action for a sense of control over their employment destiny. The number of government employees, moreover, makes it plain that those employees are members of an interest group which can organize for political representation as well as for job participation.<sup>35</sup>

The pressures thus generated by size and bureaucracy lead inescapably to disruption—to labor unrest—unless these pressures are recognized and unless existing decision-making procedures are accommodated to them. Peace in government employment too, the argument

32. See generally J. DUNLOP, *WAGE DETERMINATION UNDER TRADE UNIONS* 28-44 (1944); Friedman, *Some Comments on the Significance of Labor Unions for Economic Policy*, in *THE IMPACT OF THE UNION* 204 (D. Wright ed. 1951).

33. *LABOR RELATIONS YEARBOOK—1968*, at 451 (1969).

34. See *FINAL REPORT OF THE INDUSTRIAL COMMISSION* 805 (1902); Summers, *American Legislation for Union Democracy*, 25 *MOD. L. REV.* 273, 275 (1962).

35. For the "early" history, see S. SPERO, *GOVERNMENT AS EMPLOYER* (1948).

runs, can best be established by making union recognition and collective bargaining accepted public policy.<sup>36</sup>

Much less clearly analogous to the private model, however, is the unequal bargaining power argument. In the private sector that argument really has two aspects. The first, which we have just adumbrated, is affirmative in nature. Monopsony is believed sometimes to result in unfair individual contracts of employment. The unfairness may be reflected in wages, which are less than they would be if the market were more nearly perfect, or in working arrangements which may lodge arbitrary power in a foreman, *i.e.*, power to hire, fire, promote, assign or discipline without respect to substantive or procedural rules. A persistent assertion, generating much heat, relates to the arbitrary exercise of managerial power in individual cases. This assertion goes far to explain the insistence of unions on the establishment in the labor contract of rules, with an accompanying adjudicatory procedure, to govern industrial life.<sup>37</sup>

Judgments about the fairness of the financial terms of the public employee's individual contract of employment are even harder to make than for private sector workers. The case for the existence of private employer monopsony, disputed as it is, asserts only that some private sector employers in some circumstances have too much bargaining power. In the public sector, the case to be proven is that the governmental employer ever has such power. But even if this case could be proven, market norms are at best attenuated guides to questions of fairness. In employment as in all other areas, governmental decisions are properly political decisions, and economic considerations are but one criterion among many. Questions of fairness do not centrally relate to how much imperfection one sees in the market, but more to how much imperfection one sees in the political process. "Low" pay for teachers may be merely a decision—right or wrong, resulting from the pressure of special interests or from a desire to promote the general welfare—to exchange a reduction in the quality or quantity of teachers for higher welfare payments, a domed stadium, etc. And we are limited in our ability to make informed judgments about such political decisions because of the understandable but unfortunate fact that the science of politics has failed to supply us with either as elegant or as reliable a theoretical model as has its sister discipline.

36. See, *e.g.*, GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 9 (State of N.Y. 1966).

37. See, *e.g.*, N. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 94 (1948).

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Nevertheless, employment benefits in the public sector may have improved relatively more slowly than in the private sector during the last three decades. An economy with a persistent inflationary bias probably works to the disadvantage of those who must rely on legislation for wage adjustments.<sup>38</sup> Moreover, while public employment was once attractive for the greater job security and retirement benefits it provided, quite similar protection is now available in many areas of the private sector.<sup>39</sup> On the other hand, to the extent that civil service, or merit, systems exist in public employment and these laws are obeyed, the arbitrary exercise of managerial power is substantially reduced. Where it is reduced, a labor policy that relies on the individual employment contract must seem less unacceptable.

The second, or negative aspect of the unequal bargaining power argument, relates to the social costs of collective bargaining. As we have seen, the social costs of collective bargaining in the private sector are principally economic, and seem inherently limited by market forces. In the public sector, however, the costs seem to us economic only in a very narrow sense and are on the whole political. It further seems to us that, to the extent union power is delimited by market or other forces in the public sector, these constraints do not come into play nearly as quickly as in the private. An understanding of why this is so requires further comparison between collective bargaining in the two sectors.

### III. The Private Sector Model

While the private sector is, of course, extraordinarily diverse, the paradigm case is an industry which produces a product that is not particularly essential to those who buy it and for which dissimilar products can be substituted. Within the market or markets for this product, most—but not all—of the producers must bargain with a union representing their employees, and this union is generally the same through the industry. A price rise of this product relative to others will result in a decrease in the number of units of the product sold. This in turn will result in a cutback in employment. And an increase

38. This is surely one reason which might explain the widely assumed fact that public employees have fallen behind their private sector counterparts. See Stieber, *Collective Bargaining in the Public Sector*, CHALLENGES TO COLLECTIVE BARGAINING 63, 69 (L. Ulman ed. 1967).

39. See Taylor, *Public Employment: Strike or Procedures*, 20 IND. & LAB. REL. REV. 617, 623-25 (1967).

in price would be dictated by an increase in labor cost relative to output, at least in most situations.<sup>40</sup> Thus, the union is faced with some sort of rough trade-off between, on the one hand, larger benefits for some employees and unemployment for others, and on the other hand, smaller benefits and more employment. Because unions are political organizations, with a legal duty to represent *all* employees fairly,<sup>41</sup> and with a treasury that comes from per capita dues, there is pressure on the union to avoid the road that leads to unemployment.<sup>42</sup>

This picture of the restraints that the market imposes on collective bargaining settlements undergoes change as the variables change. On the one hand, to the extent that there are non-union firms within a product market, the impact of union pressure will be diminished by the ability of consumers to purchase identical products from non-union and, presumably, less expensive sources. On the other hand, to the extent that union organization of competitors within the product market is complete, there will be no such restraint and the principal barriers to union bargaining goals will be the ability of a number of consumers to react to a price change by turning to dissimilar but nevertheless substitutable products.

Two additional variables must be noted. First, where the demand for an industry's product is rather insensitive to price—*i.e.*, relatively inelastic—and where all the firms in a product market are organized, the union need fear less the employment-benefit trade-off, for the employer is less concerned about raising prices in response to increased costs. By hypothesis, a price rise affects unit sales of such an employer only minimally. Second, in an expanding industry, wage settlements which exceed increases in productivity may not reduce union employment. They will reduce expansion, hence the employment effect will be experienced only by workers who do not belong to the union. This means that in the short run the politics of the employment-benefit trade-off do not restrain the union in its bargaining demands.

In both of these cases, however, there are at least two restraints on the union. One is the employer's increased incentive to substitute machines for labor, a factor present in the paradigm case and all other

40. The cost increase may, of course, take some time to work through and appear as a price increase. See A. REES, *THE ECONOMICS OF TRADE UNIONS* 107-09 (1962). In some oligopolistic situations the firm may be able to raise prices after a wage increase without suffering a significant decrease in sales.

41. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

42. The pressure is sometimes resisted. Indeed, the United Mine Workers has chosen more benefits for less employment. See generally M. BARATZ, *THE UNION AND THE COAL INDUSTRY* (1955).

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cases as well. The other restraint stems from the fact that large sections of the nation are unorganized and highly resistant to unionization.<sup>43</sup> Accordingly, capital will seek non-union labor, and in this way the market will discipline the organized sector.

The employer, in the paradigm case and in all variations of it, is motivated primarily by the necessity to maximize profits (and this is so no matter how political a corporation may seem to be). He therefore is not inclined (absent an increase in demand for his product) to raise prices and thereby suffer a loss in profits, and he is organized to transmit and represent the market pressures described above. Generally he will resist, and resist hard, union demands that exceed increases in productivity, for if he accepts such demands he may be forced to raise prices. Should he be unsuccessful in his resistance too often, and should it cost him too much, he can be expected to put his money and energy elsewhere.<sup>44</sup>

What all this means is that the social costs imposed by collective bargaining are economic costs; that usually they are limited by powerful market restraints; and that these restraints are visible to anyone who is able to see the forest for the trees.<sup>45</sup>

### IV. The Public Sector Model

The paradigm case in the public sector is a municipality with an elected board of aldermen, and an elected mayor who bargains (through others) with unions representing the employees of the city. He bargains also, of course, with other permanent and *ad hoc* interest groups making claims upon government (business groups, save-the-park committees, neighborhood groups, etc.). Indeed, the decisions that are made may be thought of roughly as a result of interactions and accommodations among these interest groups, as influenced by perceptions about the attitudes of the electorate, and by the goals and programs of the mayor and his aldermanic board.<sup>46</sup>

43. See *Trends and Changes in Union Membership*, 89 MONTHLY LAB. REV. 510-13 (1966); Bernstein, *The Growth of American Unions 1945-1960*, 2 LAB. HIST. 131 (1961).

44. And the law would protect him in this. Indeed, it would protect him if he were moved by an anti-union animus as well as by valid economic considerations. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

Of course, where fixed costs are large relative to variable costs, it may be difficult for an employer to extricate himself.

45. This does not mean, of course, that collective bargaining in the private sector is free of social costs. See pp. 1113-14 *supra*. It means only that the costs are necessarily limited by the discipline of the market.

46. See generally R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961). On interest theory generally, see D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1955).

Decisions that cost the city money are generally paid for from taxes and, less often, by borrowing. Not only are there many types of taxes, but also there are several layers of government which may make tax revenue available to the city; federal and state as well as local funds may be employed for some purposes. Formal allocation of money for particular uses is made through the city's budget, which may have within it considerable room for adjustments.<sup>47</sup> Thus, a union will bargain hard for as large a share of the budget as it thinks it possibly can obtain, and beyond this to force a tax increase if it deems that possible.

In the public sector too, the market operates. In the long run, the supply of labor is a function of the price paid for labor by the public employer relative to what workers earn elsewhere.<sup>48</sup> This is some assurance that public employees in the aggregate—with or without collective bargaining—are not paid too little. The case for employer monopsony, moreover, may be much weaker in the public sector than it is in the private. First, to the extent that most public employees work in urban areas, as they probably do, there may often be a number of substitutable and competing private and public employers in the labor market. When that is the case, there can be little monopsony power.<sup>49</sup> Second, even if public employers occasionally have monopsony power, governmental policy is determined only in part by economic criteria, and there is no assurance, as there is in the private sector where the profit motive prevails, that the power will be exploited.

As we have seen, market-imposed unemployment is an important restraint on unions in the private sector. In the public sector, the trade-off between benefits and employment seems much less important. Government does not generally sell a product the demand for which is closely related to price. There usually are not close substitutes for the products and services provided by government and the demand for them is inelastic. Such market conditions are, as we have seen, favorable to unions in the private sector because they permit the acquisition of benefits without the penalty of unemployment, subject to the restraint of non-union competitors, actual or potential. But no

47. See, e.g., W. SAYRE & H. KAUFMAN, *GOVERNING NEW YORK CITY* 366-72 (1960).

48. Cf. M. MOSKOW, *TEACHERS AND UNIONS* 79-86 (1966).

49. This is based on the reasonable but not unchallengeable assumption that the number of significant employers in a labor market is related to the existence of monopsony. See R. BUNTING, *EMPLOYER CONCENTRATION IN LOCAL LABOR MARKETS* 3-14 (1962). The greater the number of such employers in a labor market, the greater the departure from the classic case of the monopsony of the single employer. The number of employers would clearly seem to affect their ability to make and enforce a collusive wage agreement.

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such restraint limits the demands of public employee unions. Because much government activity is, and must be, a monopoly, product competition, non-union or otherwise, does not exert a downward pressure on prices and wages. Nor will the existence of a pool of labor ready to work for a wage below union scale attract new capital and create a new, and competitively less expensive, governmental enterprise. The fear of unemployment, however, can serve as something of a restraining force in two situations. First, if the cost of labor increases, the city may reduce the quality of the service it furnishes by reducing employment. For example, if teachers' salaries are increased, it may decrease the number of teachers and increase class size. However, the ability of city government to accomplish such a change is limited not only by union pressure, but also by the pressure of other affected interest groups in the community.<sup>50</sup> Political considerations, therefore, may cause either no reduction in employment or services, or a reduction in an area other than that in which the union members work. Both the political power exerted by the beneficiaries of the services, who are also voters, and the power of the public employee union as a labor organization, then, combine to create great pressure on political leaders either to seek new funds or to reduce municipal services of another kind. Second, if labor costs increase, the city may, even as a private employer would, seek to replace labor with machines. The absence of a profit motive, and a political concern for unemployment, however, may be a deterrent in addition to the deterrent of union resistance. The public employer which decides it must limit employment because of unit labor costs will likely find that the politically easiest decision is to restrict new hires, rather than to lay off current employees.

Even if we are right that a close relationship between increased economic benefits and unemployment does not exist as a significant deterrent to unions in the public sector, might not the argument be made that in some sense the taxpayer is the public sector's functional equivalent of the consumer? If taxes become too high, the taxpayer can move to another community. While it is generally much easier for a consumer to substitute products than for a taxpayer to substitute communities, is it not fair to say that, at the point at which a tax increase will cause so many taxpayers to move that it will produce less total revenue, the market disciplines or restrains union and public employer in the same way and for the same reasons that the market

50. Organized parent groups, for example.

disciplines parties in the private sector? Moreover, does not the analogy to the private sector suggest that it is legitimate in an economic sense for unions to push government to the point of substitutability?

Several factors suggest that the answer to this latter question is at best indeterminate, and that the question of legitimacy must be judged not by economic, but by political criteria.

In the first place, there is no theoretical reason—economic or political—to suppose that it is desirable for a governmental entity to liquidate its taxing power, to tax up to the point where another tax increase will produce less revenue because of the number of people it drives to different communities. In the private area, profit maximization is a complex concept, but its approximation generally is both a legal requirement and socially useful as a means of allocating resources.<sup>51</sup> The liquidation of taxing power seems neither imperative nor useful.

Second, consider the complexity of the tax structure and the way in which different kinds of taxes (property, sales, income) fall differently upon a given population. Consider, moreover, that the taxing authority of a particular governmental entity may be limited (a municipality may not have the power to impose an income tax). What is necessarily involved, then, is principally the redistribution of income by government rather than resource allocation,<sup>52</sup> and questions of income redistribution surely are essentially political questions.<sup>53</sup>

For his part, the mayor in our paradigm case will be disciplined not by a desire to maximize profits, but by a desire—in some cases at least—to do a good job (to effectuate his programs), and in virtually all cases either to be reelected or to move to a better elective office. What he gives to the union must be taken from some other interest group or from taxpayers. His is the job of coordinating these competing claims while remaining politically viable. And that coordination will be governed by the relative power of the competing interest groups. Our inquiry, therefore, must turn to the question of how

51. See generally R. DOREMAN, *PRICES AND MARKETS* (1967).

52. In the private sector what is involved is principally resource allocation rather than income redistribution. Income redistribution occurs to the extent that unions are able to increase wages at the expense of profits, but the extent to which this actually happens would seem to be limited. It also occurs to the extent that unions, by limiting employment in the union sector through maintenance of wages above a competitive level, increase the supply of labor in the non-union sector and thereby depress wages there.

53. In the private sector the political question was answered when the National Labor Relations Act was passed: the benefits of collective bargaining (with the strike) outweigh the social costs.



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much power public employee unions will exercise if the full private model of collective bargaining is adopted in the public sector.

### V. Public Employee Strikes and the Political Process

Although the market does not discipline the union in the public sector to the extent that it does in the private, the paradigm case, nevertheless, would seem to be consistent with what Robert A. Dahl has called the “‘normal’ American political process,” which is “one in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision,”<sup>54</sup> for the union may be seen as little more than an “active and legitimate group in the population.” With elections in the background to perform, as Mr. Dahl tells us, “the critical role . . . in maximizing political equality and popular sovereignty,”<sup>55</sup> all seems well, at least theoretically, with collective bargaining and public employment.

But there is trouble even in the house of theory if collective bargaining in the public sector means what it does in the private. The trouble is that if unions are able to withhold labor—to strike—as well as to employ the usual methods of political pressure, they may possess a disproportionate share of effective power in the process of decision. Collective bargaining would then be so effective a pressure as to skew the results of the “‘normal’ American political process.”

One should straightway make plain that the strike issue is not *simply* the essentiality of public services as contrasted with services or products produced in the private sector. This is only half of the issue, and in the past the half truth has beclouded analysis.<sup>56</sup> The services performed by a private transit authority are neither less nor more essential to the public than those that would be performed if the transit authority were owned by a municipality. A railroad or a dock strike may be much more damaging to a community than “job action” by teachers. This is not to say that governmental services are not essential. They are, both because the demand for them is inelastic and because their disruption may seriously injure a city’s economy and occasionally the physical welfare of its citizens. Nevertheless, essentiality of governmental services is only a necessary part of, rather than

54. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956).

55. *Id.*

56. *See, e.g.*, S. SPERO, GOVERNMENT AS EMPLOYER 1-15 (1948).

a complete answer to, the question: What is wrong with strikes in public employment?

What is wrong with strikes in public employment is that because they disrupt essential services, a large part of a mayor's political constituency will press for a quick end to the strike with little concern for the cost of settlement. The problem is that because market restraints are attenuated and because public employee strikes cause inconvenience to voters, such strikes too often succeed. Since other interest groups with conflicting claims on municipal government do not, as a general proposition, have anything approaching the effectiveness of this union technique—or at least cannot maintain this relative degree of power over the long run—they are put at a significant competitive disadvantage in the political process. Where this is the case, it must be said that the political process has been radically altered. And because of the deceptive simplicity of the analogy to collective bargaining in the private sector, the alteration may take place without anyone realizing what has happened.

Therefore, while the purpose and effect of strikes by public employees may seem in the beginning merely designed to establish collective bargaining or to "catch up" with wages and fringe benefits in the private sector, in the long run strikes must be seen as a means to redistribute income, or, put another way, to gain a subsidy for union members,<sup>57</sup> not through the employment of the usual types of political pressure, but through the employment of what might appropriately be called political force.

As is often the case when one generalizes, this picture may be thought to be overdrawn. In order to refine analysis, it will be helpful to distinguish between strikes that occur over monetary issues and strikes involving non-monetary issues. The generalized picture sketched above is essentially valid as to the former. Because there is usually no substitute for governmental services, the citizen-consumer faced with a strike of teachers, or garbage men, or social workers is likely to be seriously inconvenienced. This in turn places enormous pressure on the mayor, who is apt to find it difficult to look to the long-run balance sheet of the municipality. Most citizens are directly affected by a strike

57. Strikes in some areas of the private sector may have this effect, too. See note 45 *supra*. The difference in the impact of collective bargaining in the two sectors should be seen as a continuum. Thus, for example, it may be that market restraints do not sufficiently discipline strike settlements in some regulated industries, or in industries that rely mainly on government contracts. If this is so—and we do not know that it is—perhaps there should be tighter restraints on the use of the strike in those areas.

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of sanitation workers. Few, however, can decipher a municipal budget or trace the relationship between today's labor settlement and next year's increase in the mill rate. Thus, in the typical case the impact of a settlement is less visible—or can more often be concealed—than the impact of a disruption of services. Moreover, the cost of settlement may be borne by a constituency much larger—the whole state or nation—than that represented by the mayor. It follows that the mayor usually will look to the electorate which is clamoring for a settlement, and in these circumstances, the union's fear of a long strike, a major check on its power in the private sector, is not a consideration.<sup>58</sup> In the face of all of these factors other interest groups with priorities different from the union's are apt to be much less successful in their pursuit of scarce tax dollars than is the union with power to withhold services.<sup>59</sup>

With respect to strikes over some non-monetary issues—decentralization of the governance of schools might be an example—the intensity of concern on the part of well-organized interest groups opposed to the union's position would support the mayor in his resistance to union demands. But even here, if union rank-and-file back their leadership, the pressures for settlement from the general public, which may be largely indifferent as to the underlying issue, would in time become irresistible.<sup>60</sup>

## VI. Sovereignty and Delegation Revisited

As applied to public employment, there is a concept of sovereignty entitled to count as a reason for making strikes by public employees illegal. For what sovereignty should mean in this field is not the location of ultimate authority—on that the critics are dead right—but the right of government, through its laws, to ensure the survival of the

58. Contrast the situation in the private sector:

[M]anagement cannot normally win the short strike. Management can only win the long strike. Also management frequently tends in fact to win the long strike. As a strike lengthens, it commonly bears more heavily on the union and the employees than on management. Strike relief is no substitute for a job. Even regular strike benefits, which few unions can afford, and which usually exhaust the union treasury quite rapidly (with some exceptions), are no substitute for a job.

Livernash, *The Relation of Power to the Structure and Process of Collective Bargaining*, 6 J. LAW & ECON. 10, 15 (1963).

59. A vivid example would seem to be provided by recent experience in New Jersey. After a twelve hour strike by Newark firefighters on July 11, 1969, state urban aid funds, originally authorized for helping the poor, were diverted to salary increases for firemen and police. See N.Y. Times, Aug. 7, 1969, at 25, col. 7. Moreover, government decision-makers other than the mayor (e.g., the governor) may have interests different from the mayor, interests which manifest themselves in pressures for settlement.

60. Consider also the effect of such strikes on the fabric of society. See, e.g., M. MAYER, *THE TEACHERS STRIKE*: NEW YORK, 1968 (1969).

“‘normal’ American political process.” As hard as it may be for some to accept, strikes by public employees may, as a long run proposition, threaten that process.<sup>61</sup>

Moreover, it is our view—although this would seem to be much less clear—that the public stake in some issues makes it appropriate for government either not to have to bargain with its employees on these issues at all<sup>62</sup> or to follow bargaining procedures radically different from those of the private sector. It is in this respect that the judicial doctrine of illegal delegation of power should have relevance.

Consider, for example, the question of a public review board for police; or, for that matter, the question of school decentralization. These issues, viewed by the unions involved primarily as questions of job security, engage the interest of so many disparate groups in a relevant population, that it may be thought unfair to allow one group—the police, the teachers—to exert pressure through collective bargaining (quite apart from the strike) in which competing groups do not directly participate as well as through the channels (*e.g.*, lobbying) open to other interest groups.<sup>63</sup>

Our hesitation in this area is caused by two factors. First, models of the political process have trouble with fine-grained distinctions about too much power. Given the vulnerability of most municipal employers, one can say with some confidence that the strike imparts too much power to an interest group only because the distinction addressed there is not fine-grained at all. Second, it is difficult indeed for any governmental institution to make judgments about the issues that should be included in the non-bargainable class. The courts are badly suited to this task; and the legislature is not well constituted to come in after the fact and effect a change. Nevertheless, limits will have to be set or bargaining procedures radically changed, and this will in a sense be giving content to the doctrine of delegation as it bears upon the subject of public employment.

While there is increasing advocacy for expanding the scope of bargaining in public employment and in favor of giving public employees the right to strike—advocacy not just by unionists but by disinterested

61. It should be understood that this claim is with respect to the employment of the strike once collective bargaining is established. In our opinion the opportunity for public employees to organize and bargain through a union is compelled by the private sector analogy and is consistent with the survival of the “normal American political process.”

62. Compare Executive Order 10988, Employee-Management Cooperation in the Federal Service, 27 Fed. Reg. 551 (1962).

63. See also note 59 *supra*.

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experts as well<sup>64</sup>—the law generally limits the scope of bargaining and forbids strikes.<sup>65</sup> This is often done with little attention to supporting reasons. Ours has been an attempt to supply these reasons and thereby to give some legitimate content to sovereignty and delegation.

We do not, however, mean to suggest that legislatures should abdicate to the courts the task of constructing a new system of collective bargaining for the public sector through the elaboration of sovereignty and delegation. Legislation is needed, for the problems we have explored require solutions beyond the power of the courts to fashion. In the future, if strikes are to be barred, sophisticated impasse procedures must be established. If, on the other hand, some strikes are to be tolerated, changes in the political structure which will make the municipal employer less vulnerable to work stoppages must be developed. And, in any event, legislative action will be necessary either to separate out those non-monetary issues which might not be decided solely through collective bargaining, or to change bargaining procedures so that all interested groups may participate in the resolution of such issues. These legislative choices and legal procedures will be the subject of a forthcoming article.

64. See, e.g., Wollett, *The Taylor Law and the Strike Ban*, in *PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING* 29 (H. Anderson ed. 1968).

65. See, e.g., case and statutes cited in note 2 *supra*.