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Public Sector Bargaining in a Democracy - An Assessment of the Ohio Public Employee Collective Bargaining Law

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ARTICLES

PUBLIC SECTOR BARGAINING IN A DEMOCRACY—AN ASSESSMENT OF THE OHIO PUBLIC EMPLOYEE COLLECTIVE BARGAINING LAW

T. MERRITT BUMPASS, JR.*
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I. INTRODUCTION

Public employee labor in the United States has had a history quite different from that of labor in the private sector.¹ For example, while private sector employees not covered by collective bargaining agreements only now are gaining the right to be free from discharge at the will of their employers,² public employees have had civil service protection since the late nineteenth Century and have also had certain constitutional protections.³ Acceptance of the use of economic strikes has also differed. At the same time as the Roosevelt administration was actively protecting private sector unionization, including the right to strike, thereby providing the impetus for a dramatic increase in private sector union membership, President Roosevelt expressed adamant opposition to strikes by

¹ For general history of private sector labor, see U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN 10000, A BRIEF HISTORY OF THE AMERICAN LABOR MOVEMENT (1976) [hereinafter cited as BRIEF HISTORY].

² C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS 115-79 (1983).

³ See *infra* note 111.

public employees.⁴ Finally, while the pace of private sector unionization has decelerated to the point of reversal in recent years,⁵ public sector unionization has dramatically increased, both in terms of absolute numbers of members and in terms of the percentage of public sector employees belonging to unions.⁶

These facts provide an indication that there may be fundamental differences between public and private sector employment. At the same time, however, they reveal at least one striking similarity—the dependency of unionization upon favorable governmental policies.

Thus, while part of the growth in *numbers* of public sector union members is due simply to the rapid recent growth of the public sector itself, the growth in the unionization *rate* is due to the positive response of many public entities to unionization. Since 1959, when Wisconsin became the first state to enact a public employee bargaining bill, thirty-nine states have passed similar measures,⁷ and the federal government has rec-

⁴ In a 1937 letter to the President of the National Federation of Federal Employees, President Roosevelt 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." Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 604, 612 (1950)(quoting letter from Franklin Roosevelt to President of National Federation of Federal Employees (Aug. 16, 1937)). This statement was in accordance with the traditional view that collective bargaining and the corresponding right to strike in the public sector were antithetical to the doctrine of sovereign authority. Two other presidents have delivered sweeping condemnations of the notion that public employees should be permitted to engage in strike activity against the sovereign. President Wilson characterized the 1919 Boston police strike as "'an intolerable crime against civilization.'" Vogel, *supra*, at 612 (quoting Wilson); then-Governor Coolidge, when he refused to reinstate the Boston policemen who had struck in 1919, declared, "'[t]here is no right to strike against public safety by anybody anywhere at any time.'" *Id.* (quoting Coolidge).

⁵ During the fiscal year 1982, there were only 3,929 representation elections conducted by the National Labor Relations Board, the lowest total in almost twenty years. Of these, unions won only 1,668, again the lowest total in almost twenty years. NATIONAL LABOR RELATIONS BOARD, N.L.R.B. ELECTION REPORT, ER-250 (Nov. 18, 1983). The percentage of union members in the civilian work force declined from 38.1% in 1956 to 22.3% in 1978, and to 17.9% in 1982. DIRECTORY OF U.S. LABOR ORGANIZATIONS 1984-85 EDITION BNA 2 (1984); U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN 2070, HANDBOOK OF LABOR STATISTICS 412 (1980) [hereinafter cited as HANDBOOK OF LABOR STATISTICS].

⁶ The number of state and local governmental employees in April, 1957 was 5,608,000 while in October, 1979, it was 13,102,000. HANDBOOK OF LABOR STATISTICS, *supra* note 5, at 201. The percentage of organized employees in state and local government went from 28% in 1972 to 49% by 1980. U.S. BUREAU OF THE CENSUS, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1980 SPECIAL STUDIES No. 88 (1981); U.S. BUREAU OF THE CENSUS, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1976, SPECIAL STUDIES No. 88 (1978); HANDBOOK OF LABOR STATISTICS, *supra* note 5, at 400-09.

⁷ R. LARSON, T. BUMPASS, K. ASHMUS & D. WARD, PUBLIC SECTOR COLLECTIVE BARGAINING: THE OHIO SYSTEM 1-5 1984 [hereinafter cited as R. LARSON & T. BUMPASS]; Mulcahy & Ruesch, *Wisconsin's Municipal Labor Law: A Need for Change*, 64 MARQ. L. REV. 103, 105 (1980); 1 PUBLIC EMPLOYER BARGAINING REP. (CCH) ¶ 600 (June 1978).

ognized collective bargaining.⁸ While most of this legislative activity occurred during the 1960s and 1970s, the strong Democratic showing in the nonpresidential election year of 1982 provided a climate for passage of major new laws in Illinois and Ohio.⁹

These statutes were enacted against a background of both actual experience in other states and a considerable body of legal thought about public employee bargaining. The purpose of this Article is to examine the Ohio Act in terms of its accommodation of the major theoretical considerations in favor of, or opposed to, public sector collective bargaining. In other words, is the Ohio Act structured so as maximally to achieve the benefits asserted to be available from collective bargaining and to avoid the costs asserted to arise from it?

In order to accomplish this task, this Article will briefly summarize major provisions of the Act. An overview of some of the major arguments for and against public sector unionization will then be provided. Once this background has been established, the Act will be analyzed, focusing upon its effect upon individual employees, labor organizations, and the democratic process. The conclusions reached are that the Act is not structured so as to protect public employees to the degree that private sector employees are protected, that the Act will assist labor organizations, and that the Act strikingly fails to provide a structure that can minimize damage to the processes of democracy.

II. PERTINENT PROVISIONS OF THE ACT

A. *Background of Legislative and Judicial Actions*

Until the passage of the Act, Ohio's public employee labor relations were governed primarily by two relatively short and simple statutes: 1) the Ferguson Act, chapter 4117 of the Revised Code, which prohibited strikes and provided severe penalties for those individuals who did participate in a strike; and 2) section 9.41 of the Code, which authorized public employers to allow dues checkoffs for labor organizations. In the early seventies, a public sector labor law, backed by Governor John J. Gilligan and closely patterned after Pennsylvania's Public Employees Re-

⁸ Exec. Order No. 10,988, 3 C.F.R. 521 (1959-63 Compilation), *revoked*, Exec. Order No. 11,491, 3 C.F.R. 254 (1974), *reprinted in* 5 U.S.C. § 7101 app. at 793 (1982). This was a comprehensive order which guaranteed the right to negotiate a written contract, established election procedures and unfair labor practices, contained a strong management rights clause, placed wages and hours outside the scope of collective bargaining, and established advisory arbitration for grievances. The order has been superceded by the Federal Labor Relations Act, Pub. L. No. 89-554, 80 Stat. 378 (1966)(current version at 5 U.S.C. §§ 7101-71035 (1982)).

⁹ ILL. ANN. STAT. ch. 48, §§ 1601-1627 (Smith-Hurd Supp. 1984); OHIO REV. CODE ANN. § 4117.01-.23 (Page Supp. 1983).

lation Act,¹⁰ was introduced in the General Assembly.¹¹ For a variety of reasons, however, the bill never left the Committee on Agriculture, Commerce and Labor.¹² In 1975, a comprehensive public employee bargaining bill, Senate Bill 70, was passed by the General Assembly but vetoed by Governor James A. Rhodes.¹³ The legislature again attempted to grant public employees the right to organize and to bargain collectively with public employers in 1977.¹⁴ This effort failed when Governor Rhodes vetoed Senate Bill 222.¹⁵

Throughout this period, however, the judiciary limited some of the earlier doctrines that had hindered public employee unionization, such as the notion that a public employer could not enter into a collective bargaining agreement with its employees. In *Dayton Classroom Teachers Association v. Dayton Board of Education*,¹⁶ the Ohio Supreme Court held that public employers could meet and negotiate binding collective bargaining agreements with groups of workers. At the same time, however, the court reaffirmed the principle that public employees had no constitutional right to require their employers to bargain collectively.¹⁷ Yet, even without the benefit of legal compulsion, public employee bargaining was taking place in Ohio, and, even with the official prohibition of strikes contained in the Ferguson Act,¹⁸ public employee strikes occurred frequently.¹⁹ Additionally, civil service and constitutional due process protections effectively prohibited public employers from discharging public employees for engaging in non-strike union activity. Ohio public employees were thus, in practice, able to enjoy many of the same rights as those provided to employees in the private sector.

On January 8, 1983, Governor Richard Celeste came to office promising a public employee bargaining bill. Senate Bill 133, sponsored by Senator Eugene Branstool (D-Utica) and encouraged by the Celeste administration, was introduced in the Ohio Senate on March 17, 1983.²⁰ The measure, affecting nearly 580,000 state, county, and local workers,²¹ cleared

¹⁰ PA. STAT. ANN. tit. 43, § 1101.101-2301 (Purdon Supp. 1984).

¹¹ H. B. 881, 109th Gen. Assembly, 134 Ohio H.J. 348 (1971).

¹² 143 Ohio H.J. 837 (1971).

¹³ S.B. 70, 111th Gen. Assembly, 136 Ohio S.J. 1179, 1197 (1975).

¹⁴ S.B. 222, 112th Gen. Assembly, 137 Ohio S.J. 312 (1977).

¹⁵ 137 Ohio S.J. 1359 (1978).

¹⁶ 41 Ohio St. 2d 127, 132, 323 N.E.2d 714, 717 (1975).

¹⁷ *Id.*

¹⁸ OHIO REV. CODE ANN. § 4117.01-.05 (Page 1980).

¹⁹ There were 56 public sector strikes in the twelve months ending in October of 1980. U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, RELEASE CB 82-4, 1/13/82.

²⁰ S.B. 133, 115th Gen. Assembly, 1983 Ohio Legis. Serv. 3-16 (Baldwin).

²¹ Daily Labor Report (BNA) No. 208, (Oct. 26, 1983). The Act does not apply to municipal corporations and townships with populations of under 5,000. See OHIO REV. CODE ANN. § 4117.01(B)(Page Supp. 1983). Thus, the number of public employees affected by the Act may be less than the number of employees referenced in the text.

the Senate virtually untouched on April 21, 1983: it then was sent to the House of Representatives, and, after certain changes, was reported out by the House Commerce and Labor Committee on June 21, 1983.²² Nine days later, after bitter debate and some behind-the-scenes amendments, the House passed the bill.²³ On the same day, the Senate approved the House version of the bill.²⁴ On July 6, 1983 Governor Celeste signed into law Amended Substitute Senate Bill No. 133 (the "Act").²⁵

The Act, which for the most part took effect on April 1, 1984, is lengthy and complicated. Among other things, it grants to Ohio's public employees a qualified right to strike and imposes upon public employers a duty to bargain with labor organizations that have been certified as representatives of a majority of employees in appropriate units. While it is not the purpose of this Article to analyze each section of the Act,²⁶ a summary of its major points follows as a prelude to the analysis described earlier.

B. *The Administrative Framework of the Act*

1. The State Employment Relations Board

The Act is administered by a State Employment Relations Board, comprised of three persons appointed by the Governor and confirmed by the Senate for staggered six-year terms.²⁷ These members serve on a full-time basis; no more than two of them may belong to the same political party, and each of them must have knowledge and experience in either personnel or labor relations.²⁸

The principal functions of SERB are: (1) to resolve questions and controversies concerning claims for recognition by public employee organizations; (2) to investigate and, when necessary, hear and remedy claims that unfair labor practices have been committed; (3) to create and oversee a Bureau of Mediation designed to assist public employers and labor organizations when their negotiations reach an impasse; (4) to make determinations regarding certain aspects of public employee strikes; and (5) to collect and serve as a clearing-house for information about public employees' wages, hours, benefits, and other terms and conditions of employ-

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Am. Sub. S.B. 133, 115th Gen. Assembly, 1983 Ohio Legis. Serv. 5-237 (Baldwin). While the effective date of the Act was October 6, 1983, the substantive provisions regarding recognition, bargaining, impasse resolution, and strikes did not go into effect until April 1, 1984. OHIO REV. CODE ANN. §§ 4117.05-.10, .11-.23 (Page Supp. 1983).

²⁶ For a detailed analysis of the Act, see R. LARSON & T. BUMPASS, *supra* note 7.

²⁷ OHIO REV. CODE ANN. § 4117.01(A) (Page Supp. 1983). The initial terms of office are one, two, and three years respectively.

²⁸ *Id.*

ment, and to act as qualified mediators and factfinders.

In order to carry out these functions, SERB is vested with the power to hold hearings and administer oaths, examine witnesses and documents, and issue subpoenas to compel the attendance of witnesses and the production of records.²⁹ SERB is also empowered to adopt rules and regulations to carry out the purposes of the Act.³⁰

2. The Public Employer Negotiators

The Act established a three-tiered system for the negotiation of collective bargaining agreements by the state's public employers. The Office of Collective Bargaining, a subdivision of the Department of Administrative Services, negotiates collective bargaining agreements on behalf of state agencies, departments, boards, and commissions.³¹ Other state elected officials, and boards of trustees of state institutions of higher education are charged with individual responsibility for their respective negotiations—although they may elect to use the services of the Office of Collective Bargaining.³² Finally, officials at the local level are to negotiate their own collective bargaining agreements; the Act does not permit them to designate the Office of Collective Bargaining as their bargaining representative.

3. The Personnel Board of Review

Prior to the Act's implementation, the Personnel Board of Review (PBR) served as the sole tribunal for the adjudication of disputes be-

²⁹ *Id.* § 4117.02(H)(3); OHIO ADMIN. CODE § 4117-1-09(D) (1984).

³⁰ OHIO REV. CODE ANN. § 4117.02(H)(8)(Page Supp. 1983). The manner in which SERB exercises this power will play a significant role in the Act's evolution. SERB may eventually choose to generate detailed substantive rules to govern the most critical labor relations and collective bargaining situations, or it may simply use its rule-making power to fine-tune procedures under the Act and allow individual disputes to generate their own substantive rules. If the federal experience and the practices in states with similar acts are any indication of what will happen in Ohio, SERB will choose the latter course. SERB's initial rules follow that format, being mostly procedural. OHIO ADMIN. CODE 4117-1-01 to -25-02 (1984). With respect to the National Labor Relations Board's rule-making power, see Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Peck, *A Critique of the National Labor Relations Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968).

³¹ OHIO REV. CODE ANN. § 4117.10(D)(Page Supp. 1983). In addition to its principal function of negotiating collective bargaining agreements on behalf of state-level public employers, the Office of Collective Bargaining is charged with a number of other duties. These include: 1) assisting the Director of Administrative Services in formulating management's philosophy and strategies for collective bargaining; 2) coordinating state efforts in mediation, factfinding, and arbitration cases; 3) coordinating the completion of data needed for negotiations; and 4) reporting to the Governor and the General Assembly on the implementation of the Act and its impact on the state. *Id.*

³² *Id.*

tween employees and the state over the terms and conditions of classified state service jobs. The PBR was a subdivision of the Department of Administrative Services, and was vested with exclusive and plenary power to hear appeals of final decisions of appointing authorities or the Director of Administrative Services concerning reductions in a classified service employee's pay or grade, job abolishment or other employment termination, reassignment or nonreassignment, or classification or reclassification.³³

Under the new statutory scheme, the PBR's duties remain the same; however, its reporting relationship, and likely its caseload, have been changed. Under the Act, the PBR is considered to be part of SERB for administrative purposes—although by express proviso, there is no line of appeal from a PBR ruling to SERB.³⁴ The more significant change is likely to lie in the number of appeals which the PBR will hear. The Act requires inclusion of a grievance procedure in collective bargaining agreements and specifies that, in the event that this procedure includes binding arbitration as its final step, arbitration must be used and there can be no resort by either party to the PBR.³⁵ Thus, the jurisdiction of the PBR will become residual; it will hear only those appeals involving either classified employees who are exempt from the Act's coverage or classified employees who, although covered by the Act, are not subject to collective bargaining agreements that provide for the ultimate step of binding grievance arbitration.³⁶

The Act also forecloses appeals to local civil service commissions in cases involving discipline for employees covered by collective bargaining agreements containing arbitration clauses.³⁷

³³ OHIO REV. CODE ANN. § 124.03 (Page 1978)(amended by the Act effective as of December 5, 1983).

³⁴ *Id.* § 124.05 (Page 1984)(effective as of December 5, 1983).

³⁵ *Id.* § 4117.10(A)(Page Supp. 1983).

³⁶ This provision will result in nonexempt employees (and their employers) whose agreements specify binding arbitration as the ultimate grievance step for the issue in question having the benefit of the presumably more expeditious procedures set forth in their agreements. Where the grievance procedure lacks this final step, or where the issue in question is not subject to the procedure, concurrent jurisdiction and the possibility of "forum-shopping" between the Board and the contractual grievance procedure may inject unnecessary confusion into the dispute resolution process.

³⁷ OHIO REV. CODE ANN. § 4117.10(A)(Page Supp. 1983). The Act prevails over other conflicting laws, resolutions, or provisions with certain limited exceptions. See *id.* Collective bargaining agreements govern wages, hours, and terms and conditions of employment for all employees covered by them. For further discussion of this issue, see *infra* text accompanying notes 204-06.

C. Certification of Appropriate Bargaining Units

1. Certification

The Act accords to public employees the right to be represented in collective negotiations by the employee organizations of their choice. Certification of a bargaining representative may be obtained in either of two ways. First, the employee organization, if it believes that it has been selected by a majority of public employees to be their representative, may seek voluntary recognition by filing a formal request with the employer and sending a copy of the request to SERB.³⁸ The request must describe the bargaining unit and be supported by substantial evidence that a majority of the employees in the proposed unit have selected the employee organization as their exclusive bargaining representative.³⁹

Upon receipt of the request, the public employer may refuse to recognize the employee organization and may request a Board-conducted election.⁴⁰ Where, however, the public employer does not doubt the union's majority status and does not dispute the appropriateness of the proposed bargaining unit, the employer must immediately inform SERB and the affected employees that a request for recognition has been made.⁴¹ The employer must also advise its employees that any objections to certification of the organization must be filed with SERB within twenty-one days

³⁸ OHIO REV. CODE ANN. § 4117.05(A)(2)(Page Supp. 1983).

³⁹ *Id.*

⁴⁰ *Id.* Franklin Local School Dist. Bd. of Educ., 1 OHIO PUB. EMPLOYEE REP. ¶ 1308 (SERB Nov. 7, 1984). In *Franklin*, SERB went beyond simply deciding that an employer's election petition precluded the issuance of a certification without an election. SERB discussed the procedures that would be set in motion upon the filing of an employer's petition for an election. A hearing on the employer's election petition would be held in which the issue would be whether a question of representation exists. "[T]he petitioning employer has the burden of proving the existence of a representation issue by a preponderance of the evidence." *Id.* at 235. Surprisingly, SERB then stated that the employer's proof of the existence of a representation issue would fail if the employer "fails to show that substantial questions exist respecting the appropriateness of the unit or introduces no evidence to demonstrate that that basis of the union claim of majority status is without foundation." *Id.* In light of the language of section 4117.07(A)(2) dealing with the filing of employer petitions, a question of representation would by definition be present whenever a union has presented a claim of majority status, whether by a voluntary recognition petition under section 4117.05, or otherwise. Should SERB certify a union without an election in spite of the filing of an employee petition, it would be in the paradoxical position of saying that there is no question of representation for purposes of an election but that there is a question of representation for purposes of SERB's issuance of the certification order in the voluntary recognition proceeding.

⁴¹ The employer must inform the employees by posting a notice at their place of employment. Each notice must reveal the name of the organization seeking to represent the employees, the date of the recognition request, and a description of the proposed unit. See OHIO REV. CODE ANN. § 4117.05(A)(2)(a)-(b).

of the date of the request for recognition.⁴²

SERB is required to certify the organization as the exclusive bargaining agent of employees in the bargaining unit on the twenty-second day after the filing of the request for recognition unless an election has been demanded by the employer within twenty-one days of the request or unless SERB has received substantial evidence that: 1) the proposed bargaining unit is inappropriate; 2) a majority of the employees in the proposed unit do not wish to be represented by the organization which filed the request; or 3) at least ten percent of the employees in the unit wish to be represented by another employee organization.⁴³

The second route to certification is by secret ballot election. An election petition may be filed by an employee, a group of employees, an employee organization acting on their behalf, or an employer.⁴⁴ Where a petition is filed by employees or an employee organization, the petition must contain a statement that thirty percent of the employees in the proposed bargaining unit desire to be represented by an exclusive representative for the purpose of collective bargaining.⁴⁵ After conducting an investigation and, if necessary, a hearing, SERB may direct an election in a unit which it has determined is appropriate for bargaining. If the employee organization receives a majority of the votes cast, the Board will certify it as the exclusive bargaining representative of all employees in the unit.⁴⁶

2. Appropriate Bargaining Units

Under any orderly procedure for resolving disputes over recognition of an employee organization, a question of utmost importance is whether the group of employees the organization seeks to represent is an appropriate bargaining unit. The scope of the unit determined to be appropriate may significantly affect both the ability of a petitioning employee organization to win an election and the effectiveness of any subsequent bargaining and/or strikes that take place.

The Act provides that SERB is charged with selecting an appropriate unit for collective bargaining;⁴⁷ however, SERB is not required to select the most appropriate or the best unit.⁴⁸ In discharging its responsibilities, SERB is directed under the Act to consider a variety of factors, including: the existence of a community of interest among employees; the history of

⁴² *Id.*

⁴³ *Id.* § 4117.05(A)(2)(b)(i)-(iv).

⁴⁴ *Id.* § 4117.07(A)(1)-(2).

⁴⁵ *Id.* § 4117.07(A)(1).

⁴⁶ *Id.* § 4117.07(C)(3).

⁴⁷ *Id.* § 4117.06(A).

⁴⁸ *Id.* § 4117.06(C).

collective bargaining; the effect of "over-fragmentation";⁴⁹ the administrative structure of the public employer; the wages, hours, and other working conditions of the public employees; and the desires of the employees.⁵⁰

Although the Ohio legislature conferred upon SERB broad discretion in defining units appropriate for collective bargaining, the Act does limit that discretion in several important respects.⁵¹ In addition to completely excluding certain classes of employees from coverage and, therefore, from inclusion in a bargaining unit,⁵² the Act also specifies that SERB may mix certain categories of employees in the same unit either not at all or only in certain narrowly prescribed situations.⁵³

The Act provides that SERB's unit determination may not be appealed.⁵⁴ However, it is not clear whether this proscription may be

⁴⁹ *But see In re Corrections, Law Enforcement and Safety Employees of Ohio, Local 740, No. 84-RC-05-0924 (SERB May 1, 1985).*

⁵⁰ OHIO REV. CODE ANN. § 4117.06(B)(Page Supp. 1983).

⁵¹ In addition, SERB, as a matter of its own policy, has decided that "[n]o petition for unilateral clarification or amendment in a deemed certified, 'voluntarily recognized,' or 'agreed' unit will be entertained unless made during the window period and directed at the exclusion of statutorily proscribed classification." *In re Akron Educ. Assoc., No. 84-UC-10-2130, p.2 (SERB June 14, 1985).*

⁵² See OHIO REV. CODE ANN. § 4117.01(C)(1)-(14).

⁵³ Section 4117.06(D) provides that SERB may not include in a unit with other employees guards or correction officers at penal or mental institutions or any public employee employed as a security guard. *Id.* § 4117.06(D)(2). A unit including both professional and non-professional employees is deemed to be inappropriate unless both a majority of the professional employees and a majority of the nonprofessional employees vote for inclusion in such a unit. *Id.* § 4117.06(D)(1). SERB may not certify a unit that mixes uniformed members of the police or fire department or members of the State Highway Patrol with other classifications of public employees in those departments. *Id.* § 4117.06(D)(3). Members of a police department with the rank of sergeant or above must also be separated from members below that rank. *Id.* § 4117.06(D)(6). See *In re Fraternal Order of Police and City of Loveland, 2 OHIO PUB. EMPLOYEE REP. ¶ 2340 (SERB March 28, 1985).* Additionally, SERB is prohibited from placing the employees of more than one institution of higher education together or from establishing a unit that would be inconsistent with the accreditation standards of an institution. OHIO REV. CODE § 4117.06(D)(4). Finally, SERB may not designate a unit which includes employees under the jurisdiction of more than one county elected official unless the elected official and the Board of County Commissioners approve such a unit. *Id.* § 4117.06(D)(5). SERB has given indications that it will apply these restrictions flexibility so as to avoid nonsensical results or results that are inconsistent with the general statutory mandates. For example, in *Northern Ohio Patrolmen's Benevolent Ass'n v. Seneca County Sheriff, 1 OHIO PUB. EMPLOYEE REP. ¶ 1202 (SERB Sept. 28, 1984),* SERB ordered a nonuniformed dispatcher included in a unit with uniformed deputy sheriffs. While SERB had to strain for a legal justification for doing so in light of § 4117.06(D)(3), the result avoided a vestigial classification. Since dispatchers, as well as members of police departments, are prohibited from striking and are able to go to conciliation, the decision makes sense. *Cf. Fraternal Order of Police v. City of Reading, 1 OHIO PUB. EMPLOYEE REP. ¶¶ 1063, 1070, 1071 (SERB July 12, 1984)* (only civilian clerk included in unit with dispatchers in order to avoid overfragmentation).

⁵⁴ OHIO REV. CODE ANN. § 4117.06(A)(Page Supp. 1983)("[SERB's] determination is fi-

avoided through a refusal to bargain which would present the issue to a court for review.⁵⁶ If neither such an appeal nor the remedy of mandamus is available, the constitutionality of this aspect of the Act may be in doubt.⁵⁶

D. *Bargaining Obligation and Procedures*

The Act defines bargaining collectively as the obligation of public employers and employee representatives to negotiate in good faith at reasonable times and places with respect to terms and conditions of employment with the intention of reaching an agreement.⁵⁷ The Act's definition also includes the duty to execute any agreement reached and the qualification that a party is not required to agree to a proposal or to make any concession.⁵⁸

Where there is no preexisting agreement, either the public employer or the employee representative may serve notice to the other and to SERB offering to meet for a period of ninety days with the other party in order to negotiate an agreement.⁵⁹ Where a collective bargaining agreement is already in existence, either party may invoke the duty to bargain by serving written notice to the other party and to SERB of the proposed termination or modification of the existing agreement or of a proposed successor agreement. This notice must be served no less than sixty days before the termination date of the existing agreement or, where there is no such date, sixty days before the proposal is intended to become effective.⁶⁰

The parties to the negotiations may choose between a statutory impasse resolution mechanism or any other agreed method, which will then override the statutory procedures.⁶¹ To take this second course of action,

nal and conclusive and not appealable to the court.").

⁵⁶ Under the National Labor Relations Act an employer may obtain judicial review of the propriety of the NLRB's unit determination by raising the issue as a defense in a refusal to bargain charge. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941); *American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940).

⁵⁷ In *Indiana Educ. Employment Relations Bd. v. Benton Community School Corp.*, 266 Ind. 491, 499-507, 365 N.E.2d 752, 756-60 (1977), the Supreme Court of Indiana held that the Indiana Public Employment Relations Act violated the state's constitution because it precluded judicial review of unit determinations made by an administrative agency. *Id.* at 507, 365 N.E.2d at 756-60.

⁵⁸ OHIO REV. CODE ANN. § 4117.01(G)(Page Supp. 1983).

⁵⁹ *Id.*

⁶⁰ *Id.* § 4117.14(B)(2).

⁶¹ *Id.* § 4117.14(B)(1)(a).

⁶¹ See, e.g., *In re City of Columbus*, 2 OHIO PUB. EMPLOYEE REP. ¶ 2125 (SERB February 6, 1985), *rev'd in part on other grounds*, No. 85-CV-02-797 (C.P. Franklin County 1985), *on remand*, 2 OHIO PUB. EMPLOYEE REP. ¶ 2383 (SERB March 20, 1985). In *City of Columbus* SERB indicated that an agreement to engage in mediation is not sufficient to constitute a mutually agreed dispute resolution procedure ("MAD") because mediation lacks finality. Writing for the Board, Chairman Day stated the following:

The statute is quite clear that supersession becomes a factor only when there is an

the parties may, at any time prior to forty-five days before the expiration date of the applicable collective bargaining period, agree upon any mechanism for resolving an impasse in negotiations.⁶² The Act enumerates some of the possibilities available, most of them having to do with forms of arbitration.

The statutory impasse resolution procedure is complex. If, at or after fifty days prior to the expiration of the bargaining period, the parties have not reached an agreement, either party may request that SERB intervene and determine whether both parties have indeed been bargaining collectively.⁶³ If an impasse exists, or if the bargaining period for the parties will expire in forty-five days, SERB will appoint a mediator, selected either from its own Bureau of Mediation or from the Federal Mediation and Conciliation Service, to assist the parties.⁶⁴

If the mediator determines that his assistance cannot break the impasse and so notifies SERB, or if no agreement has been reached by thirty-one days prior to the end of the bargaining period, SERB is required to appoint a factfinding panel.⁶⁵ In essence, the panel engages in advisory arbitration, though it may elect to mediate at any time during the factfinding process. Within fourteen days of its appointment, the panel must issue its findings of fact and recommendations—unless the parties stipulate to an extension.⁶⁶ The panel's recommendations are deemed agreed upon if neither the members of the labor organization nor the employer's governing legislative body rejects the recommendations by a three-fifths vote of their respective total membership within seven days after service of the recommendations.⁶⁷ If either party rejects the recommendations, they are published for such influence on public opinion as

alternative *settlement* procedure which the parties have mutually agreed upon.

The statutory purpose obviously contemplates finality. That prerequisite to a suspension of the statutory impasse procedure is not present in the instant case.

2 OHIO PUB. EMPLOYEE REP. at 85 (emphasis in original). This case involved safety forces prohibited by statute from striking, and the supposed MAD was no more than a provision contained in a pre-Act collective bargaining agreement, so that its result is perhaps defensible. However, the statute says nothing about finality; indeed, it specifically does not compel either party to agree to a proposal or make any concessions in bargaining. OHIO REV. CODE ANN. § 4117.01(G). All the statute requires of a MAD is that the parties agree to it, and that it does not itself require or permit unfair labor practices (i.e. a safety forces' MAD could not authorize the union to engage in a strike).

⁶² *Id.* § 4117.14(C)

⁶³ *Id.* § 4117.14(C)(2).

⁶⁴ *Id.*

⁶⁵ *Id.* § 4117.14(C)(3).

⁶⁶ *Id.* § 4117.14(C)(5).

⁶⁷ *Id.* § 4117.14(C)(6). If read literally, this provision would seem to require that each bargaining unit have a separate labor organization. Otherwise, nonbargaining unit persons who are members of the labor organization would be able to vote on the factfinding panel's recommendations. The Board's rules, however, sensibly require voting only by a labor organization's members in the unit. OHIO ADMIN. CODE § 4117-9-5(K)(1984).

they may have, while the parties resume bargaining in the original manner.

Seven days after the publication of the factfinding panel's recommendations, if no agreement has yet been reached, or if the current agreement has expired before that time, one of three events will take place: 1) in the case of safety forces, SERB will issue an order directing the parties to settle their dispute through final-offer arbitration;⁶⁸ 2) in the case of units of other employees, the parties may continue to bargain; or 3) the employee organization may furnish the employer and SERB with ten days notice of its intent to exercise its right to strike in the event no agreement is reached within the ten-day period.⁶⁹ After issuing such a notice and waiting for the ten-day period to expire, an employee organization which represents employees other than safety forces may engage in a strike.

If an agreement is reached through negotiation, its monetary aspects and any other aspects requiring legislative approval must be submitted as a whole to the appropriate legislative body within fourteen days of either the date on which agreement between the parties is finalized or the later date on which the legislature reconvenes.⁷⁰ If the legislature votes to disapprove the submission, the agreement will not take effect on those economic and other issues that are contained in the submission. If the legislature fails to act within thirty days of the package's submission, it is deemed to have been approved.⁷¹ The legislature thus possesses only a veto power. The Act also requires no submission of the legislative action or inaction to the executive branch. This procedure raises constitutional questions concerning the legislative process and the allocation of authority between the legislative and the executive branches, similar to those which led the Supreme Court to find the legislative veto unconstitutional in *Chadha v. Immigration & Naturalization Service*.⁷²

In the case of safety forces, impasses must be submitted upon the order

⁶⁸ OHIO REV. CODE ANN. § 4117.14(D)(Page Supp. 1983). The term "safety-related employees," as used in this Article, includes public employees who are members of police or fire departments, members of the State Highway Patrol, police, fire, sheriff's department, or State Highway Patrol dispatchers, dispatchers of emergency medical or rescue personnel and units, members of exclusive nurses' units, employees of the State School for the Deaf and of the State School for the Blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special policemen or police-women, psychiatric attendants at mental health forensic facilities, and youth leaders employed at juvenile correctional facilities—in short, all those public employees listed in § 4117.14(D)(1).

⁶⁹ *Id.* § 4117.14(D)(2).

⁷⁰ *Id.* § 4117.10(B).

⁷¹ *Id.*

⁷² 103 S. Ct. 2764 (1983). In *Chadha* the United States Supreme Court held that a one-house legislative veto provision violated both the bicameralism and the presentment clauses of the Constitution. *Id.* at 2780-88.

of SERB to interest arbitration, referred to in the Act as conciliation.⁷³ Under the Act the conciliator must select one or the other party's final offer on an issue-by-issue basis but may not impose economic changes affecting the fiscal year in which he or she is appointed.⁷⁴ The conciliator is directed to consider a variety of factors⁷⁵ and is empowered to hear evidence, including any factfinding report.⁷⁶ The legislative body is not empowered to veto the conciliator's award.⁷⁷ That award is reviewable by the courts only pursuant to Ohio's general arbitration statute,⁷⁸ which strictly limits the grounds upon which arbitration awards may be vacated or modified.

E. Protected, Unprotected, and Unlawful Activity

1. Protected Activity

The Act declares that public employees are entitled to "form, join, assist, or participate in . . . any employee organization of their own choosing,"⁷⁹ and are equally entitled to refrain from any such involvement. Those who do elect to associate have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."⁸⁰ Additionally, public employees have the right to present grievances and have them adjusted without the intervention of the bargaining representative, as long as any adjustment comports with the collective bargaining agreement, and the bargaining representative is permitted to be present at the adjustment.⁸¹

Workers are protected in the exercise of these rights largely by the unfair labor practice prohibitions contained in the Act. Public employers, public employee organizations, and other employees are forbidden to coerce or obstruct employees in the exercise of enumerated rights, and are forbidden to cause or seek to cause others to act in derogation of such rights.⁸² Apart from these rights, and as previously noted,⁸³ the Act also grants to nonsafety force employees the right to strike. This right is limited, however, in several respects. A strike is illegal if it takes place during the term of a valid collective bargaining agreement, if it occurs before the

⁷³ OHIO REV. CODE ANN. § 4117.14(G)(1)(Page Supp. 1983).

⁷⁴ *Id.* § 4117.14(G)(7).

⁷⁵ See *infra* text accompanying notes 210 & 211.

⁷⁶ OHIO REV. CODE ANN. § 4117.14(G)(6)(Page Supp. 1983).

⁷⁷ *Id.* § 4117.14(I).

⁷⁸ *Id.* § 4117.14(H).

⁷⁹ *Id.* § 4117.03(A)(1).

⁸⁰ *Id.* § 4117.03(A)(2).

⁸¹ *Id.* § 4117.03(A)(5).

⁸² See *id.* § 4117.11(A)(1), (B)(1).

⁸³ See *supra* text accompanying notes 68 & 69.

expiration of a statutorily prescribed bargaining period, if it is not preceded by adequate notice, or if it has been enjoined because it constitutes a clear and present danger to the public health or safety.⁸⁴

2. Unprotected Activity

Unprotected activity of employees or the employees' organization falls into two basic categories: activity that the Act does not affirmatively protect and activity that the Act "carves out" from the general scope of employees' rights to engage in concerted activity and makes an unfair labor practice even if the activity is concerted and involved with terms and conditions of employment. Activity that is simply unprotected but is not in violation of the Act includes nonconcerted activity of all kinds, concerted activity not related to wages, hours and terms and conditions of employment, and concerted activity related to terms and conditions of employment that is deemed to be sufficiently disruptive of employer functions that it may be prohibited by an employer. Examples of the latter type of unprotected activity include solicitation of fellow employees while they are supposed to be working and political campaigning by uniformed police officers for issues related to terms of employment.⁸⁵

3. Prohibited Activity

Unprotected activity that also constitutes an unfair labor practice generally falls into one of three categories: 1) actions which interfere with the exercise of protected rights; 2) actions which improperly involve "neutrals"; or 3) the utilization of methods that are deemed improper for exerting pressure on one party or the other. The prohibitions specified in the Act are as follows: 1) restraint or coercion of other employees in the exercise of their rights guaranteed by the Act; 2) pressuring an employer

⁸⁴ See OHIO REV. CODE ANN. § 4117.18(C)(Page Supp. 1983). In addition to injunctive relief, the Act provides a variety of penalties for illegal strikes. The employees involved are not entitled to be paid for the period of the strike. Moreover, if unlawful strike activity persists for more than one day after notice of a SERB decision that the strike is indeed illegal, the employees involved in the continued activity are subject to permanent removal or suspension followed by reemployment with limited compensation, if the public employer so elects. These penalties, if assessed, are appealable to SERB. Additionally, the employer must deduct from each illegally striking employee's wages two days' pay for each day the employee was on strike beyond the day's notice of the SERB decision—if SERB determines that the employer did not cause the strike. Finally, in cases of particularly heinous strike activity, SERB may grant an employer's petition to make any penalty retroactive to the date of commencement of the unlawful strike. See *id.* § 4117.23(A)-(B).

⁸⁵ This type of conduct frequently occurs in the public sector. For example, due to recent police layoffs in the city of Cleveland, Ohio, the Cleveland Police Patrolmen's Association initiated a petition drive to place a charter amendment on the May 8, 1984 ballot requiring a minimum number of police officers. Police officers solicited petition signatures during their working hours, despite a provision in the city's charter prohibiting such conduct. See *Cleveland Plain Dealer*, Feb. 23, 1984, at 4-A.

to interfere with, coerce, or discriminate against public employees; 3) boycotts in the course of jurisdictional work disputes; 4) striking unlawfully, or encouraging individuals to strike unlawfully, or refusing to handle certain goods or perform certain services; 5) pressuring any person in an effort to force or require any public employee to cease doing business with any other person, or to force or require a public employer to recognize an uncertified union as a representative of a group of employees; 6) encouraging the picketing of the private residence of a public official or public employer representative during the course of a labor dispute; 7) failing to represent fairly all employees in a bargaining unit; and 8) engaging in any picketing, striking, or other concerted refusal to work without first giving ten days' written notice to the employer and SERB.⁸⁶

F. Synopsis

As is apparent from the above discussion, many of the Act's most important provisions are substantially similar to those of the most familiar private sector model—the National Labor Relations Act (NLRA). The legislature has chosen, through the Act, to accord employees and labor organizations most of the same rights, including in many cases the right to strike, that are given to private sector employees and unions. Most of the obligations that are imposed upon private sector employers by the NLRA are imposed upon public employers by the Act.

III. THEORETICAL BACKGROUND

A. Introduction

The propriety of authorizing employees of a public entity to join together and bargain collectively has been the subject of a great deal of thoughtful commentary, most focused upon asserted similarities and differences between private and public sector labor relations.⁸⁷ While it is

⁸⁶ OHIO REV. CODE ANN. § 4117.11(B)(Page Supp. 1983). This provision applies not only to unions but also to public employees; its private sector counterpart, § 8(b) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1982), is applicable only to unions and their agents. However, § 4117.11(C) of the Act provides that a public employee may not be disciplined on the basis that an unfair labor practice has been committed by the employee. See *infra* text accompanying notes 148-50.

⁸⁷ See, e.g., H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* (1971); Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973); Imundo, *Some Comparisons Between Public Sector and Private Sector Collective Bargaining*, 24 LAB. L.J. 810 (1973); Petro, *Public-Sector Bargaining: An Assessment*, 3 GOV'T UNION REV. 3 (Winter 1982); Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 UCLA L. REV. 867 (1972); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970)[hereinaf-

not the purpose of this Article to take a position on whether public employee bargaining is good or bad, it is the goal of this Article to assess the Ohio Act. That assessment will be based upon how well the Act is structured to achieve the benefits claimed by the advocates of public employee bargaining and to avoid the problems cited by critics. The asserted benefits and problems fall into three broad categories: rights of employees; rights and duties of labor organizations; and effects upon democratic political processes. Accordingly, the analysis of the Ohio Act will be accomplished by scrutinizing its impact in these three areas. In order to focus the subsequent discussion, the arguments that have been made concerning the subject of public employee bargaining will first be set forth summarily.

B. Considerations Favoring Public Employee Bargaining

1. The central argument in favor of public employee bargaining is that public employees should not be denied rights that are enjoyed by employees in the private sector.⁶⁸ Proponents argue that without a collective voice of their own, public employees will always be short-changed. The eventual result will be less qualified, less motivated, and less active employees, who will then be seen as less deserving of future wage increases.

2. Another major argument in support of public sector collective bargaining is that the institution of collective bargaining is a good one and that the public sector can derive benefits from it. In relation to private sector bargaining, Congress has found:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of

ter cited as *Structuring Collective Bargaining*]; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969)[hereinafter cited as *Limits*].

⁶⁸ Robert Brindza, president of the American Federation of State, County and Municipal Employees, Ohio Council 8, and International Vice President of the American Federation of State, County and Municipal Employees, stated that: "Senate Bill 133 will bring Ohio's public employees out of the dark ages. It will finally give them some rights that begin to equal the same rights of workers in the private sector, the federal sector, and other public sectors across this nation." *Hearings on S.B. 133 Before the Commerce and Labor Subcomm. of the Ohio Senate* Mar. 28, 1983, at 4 (statement of Robert Brindza). See also *Hearings on S.B. 133 Before the Commerce and Labor Subcomm. of the Ohio Senate*, Apr. 19, 1983 (statement of James Monroe, Executive Director of the Ohio Civil Service Employees Association); *Hearings on S.B. 133 Before the Commerce and Labor Subcomm. of the Ohio Senate*, Mar. 28, 1983 (statement of Douglas J. Holmes, Director of Governmental Affairs for the Communication Workers of America, Council of Public Workers).

differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.⁸⁹

Since after fifty years of federally-mandated collective bargaining in the private sector, Congress has not felt strongly enough that the system of collective bargaining has not worked to change it in any substantial way, it may be concluded that private sector collective bargaining does provide these benefits to society and should be protected. Extending collective bargaining to the public sector would appear to be a means of extending such benefits to that sector.⁹⁰

Perhaps chief among those alleged benefits would be more orderly labor relations. The result of unionization is generally a regularization of employee relations and a channelling of frustration and illwill into a relatively safe outlet.⁹¹ Poor relationships between unions and employers may result in difficult bargaining sessions and possibly strikes, but will not generally erupt into violence and revolution. Strikes tend to occur, if at all, at predictable times and under generally expected and accepted conditions (e.g., limitations upon the numbers and activities of pickets). In the long run, providing the outlet of organized unionization has preserved a private capitalistic economy rather than threatened it. Public sector unionization will accomplish the same ends. As collective bargaining rela-

⁸⁹ 29 U.S.C. § 151 (1982).

⁹⁰ In connection with the enactment of the Federal Labor Relations Act, Pub. L. No. 89-554, 80 Stat. 378 (1966)(current version at 5 U.S.C. §§ 7101-7135 (1982)), the following findings were made:

§ 7101. *Findings and purpose*

(a) The Congress finds that -

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

5 U.S.C. § 7101 (1982).

⁹¹ According to the Supreme Court: "[A] fundamental aim of the National Labor Relations Act is establishment and maintenance of industrial peace to preserve the flow of interstate commerce. . . . Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 667 (1980).

tionships become more regularized and of longer duration, strikes will become less frequent.

With or without legislation, public employee unionization is a fact of life.⁹² Without legislation, the dealings between employers and employee organizations will often be unstructured, chaotic, and disruptive. Employees not only may be saddled with a union they do not want but they may have no effective way of switching to another.⁹³ Legislation would protect these employee concerns and would regularize the process of determining wages, hours, and terms and conditions of employment of unionized public sector employees.

3. An evident goal is also to advance unions. Unions are vital institutions in our society at large. Moreover, because they provide a unique means for workers to exert political pressure to counter the political clout of "big business," unions should be preserved and strengthened. Private sector employers, however, have developed such sophisticated anti-union techniques that private sector employees are no longer increasing their support to unions. Permitting public sector employees to bargain collectively will open the field of public employment for unions, and will undoubtedly improve their membership and financial strength.

4. A general argument in favor of unionization is that unions provide a good training ground for democracy.⁹⁴ Since most unions feature a constitution, elections, and, more or less, due process in their proceedings, union members can gain "hands on" experience with a democratic institution. Public employees can benefit from this experience.

5. Finally, the argument is made that collective bargaining can result in better decisionmaking by public authorities.⁹⁵ The process of collective bargaining provides an especially good method for imparting expertise to public employers. In the private sector, most managers and boards are assumed to be knowledgeable about their businesses. In the public sector, this assumption may often be invalid. For instance, a school board may have no expertise in education and, in the absence of a collective bargaining agent, would rely almost exclusively upon the recommendations of the school superintendent. A teachers' union, presenting an alternate "expert" view, would enable the lay board members to make a more informed decision.

C. Considerations Opposing Public Employee Bargaining

1. The major argument against public employee collective bargaining is that collective bargaining in the public sector inherently conflicts with

⁹² Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 931-32 (1969).

⁹³ Ass'n of Cuyahoga County Teachers v. Cuyahoga County Bd. of Mental Retardation, 6 Ohio St. 3d 190, 451 N.E.2d 1215 (1983).

⁹⁴ A. COX & D. BOK, CASES AND MATERIALS ON LABOR LAW 140-41 (5th ed. 1962).

⁹⁵ See *supra* note 90.

political democracy.⁹⁶ In a democracy, the kind and scale of governmental activities are to be determined by democratic processes—elections and acts of legislative and executive authorities. Various interest groups and individuals are free, and indeed are encouraged, to attempt to exert influence on political decisions. This sharply contrasts with the private sector where wages are set by economic forces. It is one thing to decide that market forces produce an unsatisfactory result and to attempt to restructure the relative strength of economic actors,⁹⁷ and quite another to decide that political forces produce an unsatisfactory result and to attempt to change the democratic process itself by giving preferred economic and political status to one of many interest groups. To require the public entity to deal with one particular interest group in a closed, or at least fundamentally different, forum subverts the normal process. Collective bargaining inherently grants disproportionate power to the interest group that has access to the collective bargaining forum at the expense of other groups. To the extent that public employees are permitted to engage in strikes to support their demands, the democratic process is even further distorted; to the extent that authority is given in the course of this process to private mediators, conciliators or arbitrators, democracy is simply not present. Since the procedure of going through democratic political steps to reach a decision has value apart from the decision itself, collective bargaining, being antidemocratic, should not be sanctioned in the public sector.

2. Public employment is different in kind from private employment. The services performed by public employees (e.g., policemen, firemen, waste collectors, prison guards) are unique and irreplaceable. Market constraints that operate to limit the conduct of private employers and private employee unions do not apply, or apply only partially, to the public sector.⁹⁸ Indeed, it is the very ineffectiveness of the market and price mechanisms in allocating such necessary goods and services as police and fire protection that causes the need for the services to be provided by government in the first place. Therefore, it is incorrect to assume that public sector collective bargaining will result in the societal benefits that have attended private sector bargaining.

Moreover, from the employees' standpoint, the public sector has civil service and constitutional protections against employer actions that the private sector lacks.⁹⁹ Therefore, public employees do not have the same need to band together for protection.

3. An argument which is closely related to the two preceding ones is

⁹⁶ *Structuring Collective Bargaining*, *supra* note 87, at 809,819.

⁹⁷ Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999-1005 (1984).

⁹⁸ *Structuring Collective Bargaining*, *supra* note 87, at 807.

⁹⁹ See *infra* note 111; see also OHIO REV. CODE ANN. §§ 124.01-.99 (Page 1984)(containing statutory protections for public employees).

that the sanctions which are regarded as legitimate and fundamental supports for collective bargaining in the private sector—particularly the strike and the lockout—have very different purposes and effects in the public sector.¹⁰⁰ Ordinarily, a private sector strike is designed to put economic pressure on the employer by keeping the employer from providing to customers the goods or services produced by the striking employees. Such strikes are intended to restrict completely, or at least curtail sharply, the employer's ability to earn money. The employer's customers will find alternate sources of supply and thereby effectively put pressure on the employer to settle. A private sector union hopes that such factors will lead the employer to decide that the costs of enduring the strike are greater than those of acceding to the union's demands.

At the same time their employer is weighing the costs and benefits of a strike, private sector employees are doing much the same thing. They and their union must consider analogous factors, including: the cost of the strike compared with the gains that might flow from a successful strike; the possibility that they will be replaced permanently; and the potential that the employer will go out of business, move, or scale down the work force. Further, customer pressure may not be supportive of the union's position, as where such pressure takes the form of resistance to higher prices.

In the public sector, a strike is usually not intended to impose an economic sanction upon the employer. The employees certainly stop providing services, but that action puts little, if any, financial pressure on the public employer. Taxes must be paid whether or not the police or teachers are striking. Indeed, the strike can result in the public employer's having more financial ability to pay higher wage—precisely because the employer has fixed revenues and does not have to pay employees any wages while they are striking.

The public strike sector does, however, have as its purpose the bringing to bear of *political* pressure on the public employer, by harming those who depend upon the services provided by the striking employees. In a private sector strike, where there is almost always present either an alternate source of supply, an opportunity to stockpile, a high degree of automation, or a combination of these factors, customers are usually able to avoid the effects of a strike. In contrast, the consumers of public sector services are particularly vulnerable. They are usually in no position to secure an alternative supply of the services being withheld or, without great delay, difficulty, and expense, to relocate to another jurisdiction. Moreover, while private sector consumers provide the revenue for the private employer, the primary recipients of public services may not be the same as the primary financial supporters of those services. Welfare pro-

¹⁰⁰ Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 733-46 (1983).

vides a good example.

From the point of view of both the public employer and the public sector union, a strike is won or lost on the basis of politics, not economics. A private employer would probably be inclined to believe it could win a strike if it maximized the economic harm to the strikers while it minimized the disruption of its own operations. A public employer might perversely see that the political sentiment adverse to the union's position might best be mobilized if the strikers suffered very little while essential public services were disrupted to the maximum extent. The public is thus the focus of every public sector strike, not as a participant in the process, but as a pawn. The public sector strike is by nature designed to hurt innocent people who have no means of protecting themselves;¹⁰¹ it is an unfair, disproportionately powerful and antidemocratic political weapon.

4. An additional argument focuses upon the effect of bargaining on the number of such strikes.¹⁰² As a practical matter, there are few, if any, strikes by unorganized employees. Unionization itself results in more pressures for strikes, and collective bargaining provides an adversarial framework that further encourages impasses and strikes. Public employee bargaining thus increases the number of strikes. Unlike the situation that existed in the private sector prior to the passage of the Wagner Act, there is no widespread public sector labor unrest that needs to be channeled into socially acceptable forms. There is thus no great societal benefit, such as preservation of a free enterprise economy, to be obtained from enduring strikes.

5. A further argument is that the process of bargaining actually changes the quality, quantity, and cost of services.¹⁰³ Group demands, particularly when formulated as part of an initially unreasonable bargaining position, tend to be more extreme than individual demands. Some demands such as dues checkoffs would never be made or considered without unionization. Further, the collective bargaining process often involves trading off or swapping demands. These trades often will be made on the basis of the trading value of the demands, not on their intrinsic merit.

Administrative flexibility is almost invariably eroded in the collective bargaining process, and therefore whatever efficiency the public employer has achieved will be diminished. Also often reduced is the ability to provide new or improved services, such as more police patrols in public hous-

¹⁰¹ The drafters of the Act showed sensitivity to this point in at least one interesting situation. They denied the right to strike to employees of any public employee retirement system, lumping them in the same category as safety forces. OHIO REV. CODE ANN. § 4117.14(D)(1)(Page Supp. 1983). A strike by such employees would not inconvenience the general public at all, but would create great difficulty for retired public employees (including those elected public office holders who are receiving pensions for past service as public employees).

¹⁰² Anderson, *supra* note 87, at 944; Kheel, *supra* note 92, at 931-32.

¹⁰³ K. AULETTA, *THE STREETS WERE PAVED WITH GOLD* 45-51 (1979).

ing projects in response to tenant organization requests.

While private sector managers must take into account the long term effects of concessions to union demands (if they do not, the market surely will, in one form or another, e.g., lower stock prices), public sector executives operate under no such constraint. The goal of private sector managers is thought to be maximizing factors such as profitability, growth, and stability so as to maximize stock values and their own job security and income. The goal of political office holders is thought to be reelection or election to higher office. Thus, their tendency may be to balance this year's books at the cost of the future financial health of the public entity.¹⁰⁴

The remainder of this Article will consider how the Act is structured to handle the foregoing notions— notions which underlie the three basic areas alluded to earlier. Has the Act given Ohio's public employees appropriate and necessary rights? Has it provided unions with effective and appropriate organizational and bargaining tools? Has it minimized the potential antidemocratic effects of collective bargaining?

IV. ANALYSIS OF THE ACT

A. *Employees' Rights*

A manifest goal of the Act is to provide public employees with the "rights" enjoyed by their private sector counterparts.¹⁰⁵ The language of the Act and of its sponsors indicates clearly that the model for the public employee rights established in the Act was the NLRA.¹⁰⁶

Before considering how closely the Ohio Act tracks the grant of rights to private employees by the NLRA, it is appropriate to consider what those "NLRA rights" are and why they are needed in legislation. In reviewing these rights, it is assumed that they are coupled with a remedy.¹⁰⁷ For example, in the private sector the right really is not "to join a union"; rather it is "to join a union without getting fired." In these terms, the relevant employee rights in the private sector are as follows:

1. The right to form, join or assist labor organizations or to engage in

¹⁰⁴ Summers, *supra* note 87.

¹⁰⁵ See *supra* note 88.

¹⁰⁶ See 29 U.S.C. § 157 (1982). All further citations and references to the National Labor Relations Act (NLRA) will be to sections of the Act as currently codified in scattered sections of 29 U.S.C. (1982).

¹⁰⁷ Protection of the affirmatively stated employees' rights is substantially identical under the NLRA and the Ohio Act. Since no right is assured without some remedy for its infringement, each act sets out a number of "unfair labor practices" that may be committed by employers or labor organizations and empowers its respective board to furnish remedies. See 29 U.S.C. §§ 158, 160 (1982); OHIO REV. CODE ANN. §§ 4117.11-12 (Page Supp. 1983). For a discussion of the remedies provided by the Act, see *infra* note 148.

concerted activity for mutual aid or protection without being discriminated against, or interfered with by either the employer or a labor organization.¹⁰⁸ 2. The right to refrain from forming, joining, or assisting labor organizations, or to engage in concerted activity for mutual aid or protection, again without discrimination or interference, except to the extent authorized by a lawful union security agreement.¹⁰⁹

These rights basically encompass the first amendment rights of free expression and freedom of association. Absent their inclusion in the statute, these rights would not otherwise be assertible by private employees against their employers or unions, because private entities are not generally constrained by the first amendment.¹¹⁰ However, public employers are generally so governed through the incorporation of the first amendment protections by the fourteenth amendment.¹¹¹ At first glance, therefore, it appears that no statutory recognition of workers' rights is necessary for public employees. However, the true worth of general

¹⁰⁸ See 29 U.S.C. § 157 (1982).

¹⁰⁹ See *id.*

¹¹⁰ Compare *Marsh v. Alabama*, 326 U.S. 501 (1946)(employer owning company town may impose no greater time, place, and manner restrictions upon speech than may a city or state government with respect to publicly owned or dedicated areas) with *Hudgens v. NLRB*, 424 U.S. 507 (1976)(shopping center owner may ban picketing upon entire commercial property).

Unless private sector workers work in a highly isolated setting, their employers' plants are generally treated under the NLRA more like shopping centers than like company towns—at least with respect to outsiders. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)(since other channels of communication were available, employer could exclude nonworker union organizers from plant and parking lots without violating NLRA protection of workers' right to self-organize).

¹¹¹ With respect to the right of association, see *Shelton v. Tucker*, 364 U.S. 479 (1960)(state statute requiring state-supported teachers and professors to file affidavit listing all memberships held unconstitutional). Cf. *NAACP v. Alabama*, 357 U.S. 449 (1958)(state may not obtain membership list of civil rights group). With respect to the freedom of speech, see *Grayned v. Rockford*, 408 U.S. 104, 116 (1972)(operative test of public regulation of expression in public places is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time).

The first amendment rights of public employees are not unfettered by virtue of these decisions; these rights are, in fact, qualified freedoms rather than unqualified powers. See, e.g., *Minnesota State Bd. for Community Colleges v. Knight*, 104 S. Ct. 1058 (1984). In *Knight*, the Supreme Court held that a publicly employed professor's rights of speech and association did not entitle him—either as a member of the general public, as a college instructor, or as a state employee—to be heard by the state's boards governing community colleges, notwithstanding a state-created statutory right for exclusive bargaining representatives of such employees to meet and confer with their employers. According to the Court, an individual's exclusion from "meet and confer" sessions does not deny him equal protection of the laws as his interests are served by the faculty's exclusive representative. *Id.* at 1069-70.

For further discussion of exclusive representation, see *infra* notes 175-81 and accompanying text. Cf. *Galer v. Board of Regents*, 239 Ga. 268, 236 S.E.2d 617 (1977)(public employees subject to greater restrictions on first amendment rights than private citizens).

constitutional rights cannot be assessed without considering how those rights are implemented in practice.

In this regard, it is important to note several specific ways in which the basic employee rights are implemented in the private sector:

1. Within certain limits, supporters of particular views may communicate, and those wishing to learn may receive communications, in the employer's plant or on private property.¹¹² 2. Individual redress of grievances may be accomplished, if not inconsistent with the labor contract and if the union is represented.¹¹³ 3. Employees must be fairly represented by a labor organization.¹¹⁴ 4. Employees may vote in elections of three types: certification,¹¹⁵ decertification¹¹⁶ and deauthorization.¹¹⁷ 5. Employees may engage in collective bargaining and require their employers to do so.¹¹⁸ 6. Employees may withhold their labor (strike), but they may also, except in certain circumstances, claim a job after the strike is over.¹¹⁹

Because there is no constitutional restraint on public employers or, where applicable, on labor organizations concerning these areas of implementation—communications, grievances, fair representation, voting, bargaining, and work stoppage—statutory treatment is required. As will be seen in the remainder of this section, the Act does provide Ohio public employees with most of the rights given to private employees by the NLRA. However, the Act goes beyond the NLRA in some respects, and in others does not give employees all of the NLRA rights.

The Act adopts the NLRA's basic scheme of enumerated worker rights with a few adjustments. Section 4117.03(A) of the Act provides that public employees have the right to:

1. Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided

¹¹² As indicated in the text, this is a limited right. Union membership solicitation by fellow employees may be banned by the employer during working time. See *Our Way, Inc.*, 268 N.L.R.B. No. 61, 1983-84 NLRB Dec. (CCH) ¶ 16,3 (1983). However, a private employer may not ban or punish such activity in the workplace during nonworking time, unless there is some extraordinary justification. Compare *Republican Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)(employer must tolerate some inconvenience caused by union organizing activity to safeguard employees' NLRA § 7 rights) with *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952)(retail store employer may more stringently limit an employee's prounion solicitation in retail store environment because high degree of contact with general public). The "right" to distribute prounion literature in the private sector workplace is even more restricted. See, e.g., *Erie Marine, Inc.*, 192 N.L.R.B. 793 (1971), enforced 465 F.2d 104 (3d Cir. 1972).

¹¹³ See 29 U.S.C. § 159(a)(1982).

¹¹⁴ This entitlement has gradually been implied under the NLRA. See *infra* text accompanying note 147.

¹¹⁵ 29 U.S.C. § 159(c)(1)(A)(i)(1982).

¹¹⁶ *Id.* § 159(c)(1)(A)(ii).

¹¹⁷ *Id.* § 158(a)(3).

¹¹⁸ See *id.* § 157.

¹¹⁹ See *id.*

in Chapter 4117 of the Revised Code, any employee organization of their own choosing;

2. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection;

3. Representation by an employee organization;

4. Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements;

5. Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.¹²⁰

Section 4117.03 is clearly derived from the enumeration of employee rights in section 7 of the NLRA; there are only minor differences between the sections and they appear to involve no divergence from the underlying NLRA policy or practice. In one case, that of the employees' right to grieve, the Act simply imports a stray provision of the NLRA¹²¹ into the employees' rights section where it thematically belongs.

The rights accorded employees under section 7 of the NLRA and under section 4117.03 of the Act are protected in the first instance by general clauses in both acts which declare that conduct by either employers or labor organizations that obstructs or coerces employees in the exercise of their enumerated rights constitutes an unfair labor practice.¹²² After establishing these blanket prohibitions, the respective unfair labor practice provisions list specific disfavored employer and union tactics as additional unfair labor practices.¹²³ Some of these specific prohibitions are designed, at least in part, to vindicate individual employee rights, while others serve such purposes as protecting the machinery of the Act itself, minimizing labor unrest, or fostering collective bargaining in a noncoercive atmosphere, thereby protecting interstate commerce (the NLRA) or the delivery of public services (the Act). Of course, it is difficult to identify precisely where employees' rights as individuals end and their collec-

¹²⁰ OHIO REV. CODE ANN. § 4117.03(A)(Page Supp. 1983).

¹²¹ 29 U.S.C. § 159(a)(1982).

¹²² See *id.* § 158(a)(1)(1982) (regulating employers); *id.* § 158(b)(1)(A) (regulating labor organizations and their members); OHIO REV. CODE ANN. § 4117.11(A)(1) (Page Supp. 1983)(regulating employers and their agents or representatives); *id.* § 4117.11(B)(1)-(2)(regulating public employee organizations, their agents or representatives, and public employees).

¹²³ See 29 U.S.C. § 158(a)(2)-(5)(1982); *id.* § 158(b)(2)-(4); OHIO REV. CODE ANN. § 4117.11(A)(2)-(8); *id.* § 4117.11(B)(3)-(8).

tive rights begin, given both acts' promotion of collective bargaining as a means of vindicating individual entitlements through a pooling of efforts. Accordingly, there will be some overlap between this section and that dealing with unions as institutions.

1. Employer Unfair Labor Practices

As noted above, both acts protect the worker's right to engage in self-organization activities and to participate in the operation of the resulting union, if any. Section 8(a)(2) of the NLRA makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."¹²⁴ Expanding on this NLRA language, section 4117.11(A)(2) of the Act adds the verbs "initiate" and "create" to the prohibition. This additional language supplies nothing, however, that has not already been read into the NLRA clause by NLRB and Supreme Court interpretations.¹²⁵ Both clauses prohibit an employer from using his financial resources or occupational control over the workers to create a sham, "company" union, as well as from buying off a union once it has won employee support.¹²⁶ Moreover, these clauses severely restrict the employer in acting on any temptation to favor one union over another in a representation campaign.

Although the danger of employer domination might appear somewhat less threatening in the public sector than in the private sector, the Act contains an antidomination provision which, along with related provisions, seeks to assure employee autonomy at both the representation election¹²⁷ and bargaining¹²⁸ stages. Such autonomy certainly is desirable from the standpoint of public employees and, in the final analysis, probably limits the potential for collusion between management and labor that

¹²⁴ 29 U.S.C. § 158(a)(2)(1982).

¹²⁵ See e.g., *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938)(sustaining NLRB finding of employer unfair labor practice for promoting organization of "company union").

¹²⁶ Section 4117.11(A)(2) provides that a public employer may pay employees for time spent conferring with a union during working hours. Additionally, a public employer may allow the exclusive representative to use its facilities for membership or other meetings or use the internal mail system or other internal communication system. The denial of similar access to rival unions has been found not to violate the first and fourteenth amendments. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

¹²⁷ OHIO REV. CODE ANN. § 4117.07(A)(2)(Page Supp. 1983). Under this section, SERB may certify a union as the exclusive representative if it finds that the employer's unfair labor practices have made a "free and untrammelled" election impossible, provided that the union, at one time, had the support of a majority of the employees. *Id.*

¹²⁸ *Id.* § 4117.20. This section disqualifies employee organization members from participating in the collective bargaining process on the employer's behalf and directs the employer to remove any such person from the bargaining team (or any other role in the process).

would disrupt the democratic process even more than would collective bargaining alone.

Both acts also protect the right to self-organization by forbidding employers from using their otherwise lawful powers to control hiring, firing, and discipline in order to influence workers' choices as to membership in a labor organization. In section 4117.11(A)(3), the Act expands upon the language of section 8(a)(3) of the NLRA by making it unlawful for an employer to "discriminate in regard to any term or condition of employment on the basis of the exercise of any of the rights guaranteed by the Act."¹²⁹ However, under the NLRA, section 8(a)(1) covers any discrimination based upon the exercise of protected rights that Section 8(a)(3) might otherwise not encompass, so that the Act's coverage is essentially the same as that of the NLRA.¹³⁰

Under the NLRA, this antidiscrimination clause has been most frequently invoked to remedy discipline given for union-related activity.¹³¹ This will also be the likely result under the Act.¹³²

In protecting the right of employees to associate in labor organizations, section 4117.11(A)(3) supplements protections already furnished to public employees as citizens by virtue of the state¹³³ and federal¹³⁴ constitutions. While the constitutional guarantee of freedom of association protects an employee against employer discipline for supporting a labor organization, the means for vindicating such rights—a lawsuit, such as one in federal court under 42 U.S.C. § 1983 or § 1985—is in practice suitable only for substantial injuries. There is also no constitutional right at all to engage in certain activity such as striking. Section 4117.11(A)(3) addresses this issue by permitting public employees to exercise any rights afforded by the Act without interference from public employers. In addition, the Act's

¹²⁹ *Id.* § 4117.11(A)(3). The narrower NLRA prohibition forbids such employer discrimination "to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3)(1982).

Note that both acts carve out an exception to their respective antidiscrimination clauses for "union security" arrangements. The NLRA clause provides that an employer may agree to a union shop clause, requiring union membership as a condition of employment, subject to certain restrictions. *Id.* The Ohio Act's antidiscrimination clause permits an employer to agree to an agency shop clause which requires nonunion employees to pay a periodic "fair share fee" to the union in lieu of membership dues. OHIO REV. CODE ANN. § 4417.09 (Page Supp. 1983); *id.* § 4117.11(A)(3). For discussion of the significance of the Act's treatment of union security, see *infra* text accompanying notes 151-62.

¹³⁰ See 29 U.S.C. § 158(a)(1)(1982).

¹³¹ See, e.g., *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

¹³² See *NLRB v. Transportation Management Corp.*, 103 S. Ct. 2469 (1983); see also *SERB v. Akron Bd. of Educ.*, 2 OHIO PUB. EMPLOYEE REP. ¶ 2606 (SERB May 28, 1985).

¹³³ See OHIO CONST. art. I, § 3. Section 3 provides that "[t]he people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their Representatives; and to petition the General Assembly for the redress of grievances."

¹³⁴ See *supra* note 111 and accompanying text.

procedures for remedying unfair labor practices offer public employees an expedited and costfree method of obtaining relief from employers whose discriminatory actions would otherwise chill the exercise of guaranteed rights.¹³⁵

Both acts also secure employee rights by expressly forbidding the discharge of or any discrimination against any employee for having filed charges provided for by the acts or having testified in the proceedings.¹³⁶ Even before the enactment of the Act's pertinent provision, section 4117.11(A)(4), public employers were arguably precluded from disciplining employees for testifying at public proceedings.¹³⁷ Section 4117.11(A)(4) will solidify this protection; moreover, in all likelihood it will expand it because it will probably be interpreted as precluding employers from discriminating against employees who merely cooperate with SERB personnel. Such protection has been held to exist under the corresponding NLRA section and has been frequently invoked with respect to NLRB investigations.¹³⁸

Although the Act closely tracks section 8(a) of the NLRA in the prohibition of employer conduct in derogation of workers' rights, it also takes some further steps. Under the Act it is an unfair labor practice for an employer to "[e]stablish a pattern or practice of repeated failures to timely process grievances and requests for arbitration of grievances."¹³⁹ Whether this specific language, which is not contained in the NLRA, will add anything to employee rights is not apparent.

The Act goes another step further than the NLRA in protecting workers' rights by expressly declaring that an employer's causing or attempting to cause an employee organization to commit an unfair labor practice is an unfair labor practice.¹⁴⁰ A number of the prohibitions imposed upon

¹³⁵ Presumably, SERB will remedy employer unfair labor practices more quickly than the federal courts respond to actions brought, for instance, under the civil rights acts. Moreover, SERB's jurisdiction over unfair labor practice claims will save public employees and their counsel the procedural difficulties of confronting the ripeness, standing, mootness, and justiciability hurdles traditionally associated with constitutional adjudication.

¹³⁶ 29 U.S.C. § 158(a)(4)(1982); OHIO REV. CODE ANN. § 4117.11(A)(4)(Page Supp. 1983).

¹³⁷ In *Bates v. City of Little Rock*, 361 U.S. 516 (1960), the Supreme Court of the United States stated that first amendment freedoms, such as the right of association, "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id.* at 523. *Accord* *Britt v. Superior Court*, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978). Under this line of reasoning, a state employer's discharge of an employee for testifying at public proceedings regarding his employment would be as constitutionally impermissible as a discharge for affiliation with an employees' organization.

¹³⁸ *See, e.g.,* *NLRB v. Scrivener*, 405 U.S. 117 (1972)(sworn statement to Board investigator); *Sinclair Glass Co. v. NLRB*, 465 F.2d 209 (7th Cir. 1972)(employee filing affidavit with Board).

¹³⁹ OHIO REV. CODE ANN. § 4117.11(A)(6)(Page Supp. 1983).

¹⁴⁰ *Id.* § 4117.11(A)(8).

labor organizations are designed to protect employee rights.¹⁴¹ This provision enhances employees' protection from indirect interference by employers and appears to serve an appropriate purpose.

2. Union Unfair Labor Practices

The Act also defines certain actions of labor organizations, their agents, or representatives, or of public employees as unfair labor practices.¹⁴² In most cases, the Act tracks the NLRA fairly closely. However, certain provisions of the Act differ enough to merit brief comment.

The NLRA makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of section 8(a)(3) or to discriminate against an employee with respect to whom membership in the labor organization has been denied or terminated on some grounds other than a failure to tender the initiation fees and dues uniformly required.¹⁴³ Because the language of section 8(a)(3) is limited, decisional law has been necessary to make it clear that a union may also not cause an employer to discriminate against an employee because of the employee's filing of grievances of which the union disapproves, or for testifying adversely to the union in unfair labor practice proceedings.¹⁴⁴ The Ohio Act makes it clear that a labor organization violates the law if it tries to cause the employer to commit any unfair labor practice.¹⁴⁵ In view of the gaps in the NLRA provision, the Act's drafters in this instance correctly expanded the statutory language setting forth the protection afforded to public employees.

Unlike the NLRA, the Act expressly makes it an unfair labor practice for an employee organization to "[f]ail to fairly represent all public employees in a bargaining unit."¹⁴⁶ A duty of fair representation was not contained in the NLRA's language and was not recognized by the NLRB until nearly a decade after the law was first passed.¹⁴⁷ Although the Act leaves open the question of just how zealous union representation of an employee must be in order to be "fair," it at least assures that SERB's

¹⁴¹ Among the union unfair labor practices proscribed by 4117.11(B) of the Act are: 1) restraining or coercing employees in the exercise of their § 4117.03(A) rights, *id.* § 4117.11(B)(1); and 2) failing to represent fairly all of the public employees in the bargaining unit, *id.* § 4117.11(B)(6).

¹⁴² *Id.* § 4117.11(B).

¹⁴³ 29 U.S.C. § 158(b)(2)(1982).

¹⁴⁴ *See, e.g.,* Partin v. NLRB, 356 F.2d 512 (5th Cir. 1966), *cert. denied*, 385 U.S. 829 (1966).

¹⁴⁵ OHIO REV. CODE ANN. § 4117.11(B)(2)(Page Supp. 1983).

¹⁴⁶ *Id.* § 4117.11(B)(6).

¹⁴⁷ *Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944); *see also* *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945). *See generally* *Cox, The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); *Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

energies will not be spent on a threshold question as to whether unfair representation is prohibited conduct.

3. Employee Protection from Disciplinary Action

Perhaps the most unusual protection afforded individual employees by the Act is embodied in a section which provides that a public employer may not discipline a public employee for committing an unfair labor practice.¹⁴⁸ However, it is assumed that this provision would not preclude discipline of an employee for committing an act that is both an unfair labor practice and a violation of a valid rule, statute, or commonly accepted standard of conduct. For example, if a public employee assaulted a fellow employee for failing to join a union, presumably the imposition of discipline would not violate the Act. This provision of the Act has no analogue in private sector labor law, and its existence may encourage unlawful action by public employees unless and until its parameters have been appropriately limited by SERB and the courts. In addition, employees who have committed unfair labor practices are rendered immune by the Act from suits for damages based upon such unlawful conduct.¹⁴⁹ Individual striking firemen, for example, would be free from responsibility to pay anyone for damages caused by their illegal strike. Similar protection for private employees has been developed pursuant to court decisions.¹⁵⁰

4. Right to Refrain from Undesired Associations

One difference between the Act and the NLRA with respect to employee rights lies in the extent to which they protect workers from undesired associations. Both of the acts accord to their respective workers the right to refrain from associating—except as otherwise provided¹⁵¹—but the “provisions otherwise” differ. The NLRA expressly permits a bargaining unit to negotiate its way to “union shop” status.¹⁵² A private employer may thus agree to require, as a condition of employment within the bargaining unit, that each employee join the union within the later of thirty days from the effective date of the agreement, or thirty days from the beginning of his or her employment.¹⁵³

¹⁴⁸ OHIO REV. CODE ANN. § 4117.11(C)(Page Supp. 1983). As is the case under the NLRA, remedies available under the Act for unfair labor practices include cease-and-desist orders, reinstatement and/or back pay awards to wrongfully discharged employees, and such other relief as is appropriate to fulfill the purposes of the Act. Like the NLRB, SERB is empowered to seek injunctive relief in the courts in cases in which the usual remedies would not by themselves suffice. See *id.* §§ 4117.12, .15, .16.

¹⁴⁹ *Id.* § 4117.11(C).

¹⁵⁰ See, e.g., *Complete Auto Transit v. Reis*, 451 U.S. 401 (1981).

¹⁵¹ 29 U.S.C. § 157 (1982); OHIO REV. CODE ANN. § 4117.03(A)(1)(Page Supp. 1983).

¹⁵² See 29 U.S.C. § 158(a)(3)(1982).

¹⁵³ The NLRA does require, however, that for an employer to be able lawfully to so agree, the labor organization must be the lawful representative of the employees. The NLRA fur-

The Act, on the other hand, expressly forbids the inclusion of "union shop" provisions in collective bargaining agreements.¹⁵⁴ The Act does, however, permit "agency shops" to be created through the collective bargaining process.¹⁵⁵ In an "agency shop," unit members are not required to join the union or to pay union dues, but the organization's representation of nonmembers in the unit is recognized and required, through the agreement, to be paid for. Agency shop provisions are designed to deal with the "free rider" argument: in the absence of such provisions, unit workers could withhold financial support from the labor organization, thus placing an unfair burden on the employees who do belong to the union which has expended the energies and resources necessary to obtain "benefits" for all and which has a statutory duty to represent everyone in the unit, member or not. The Act permits agency shops by authorizing the inclusion of a contractual provision requiring, as a condition of employment, that within a certain period after the effective date of either the agreement or the individual's employment, each unit employee who is not a union member may be required to begin paying a "fair share fee" which is supposed to be the pro rata actual cost incurred by the union in representing the unit.¹⁵⁶

The "fair share fee" is regulated in a number of ways. Unlike union dues, which may be payroll-deducted only upon the employer's receipt of the individual worker's authorization,¹⁵⁷ fair share fees may be deducted automatically on the basis of the agreement alone;¹⁵⁸ however, a limited exception allows a worker with religious convictions against financial support to unions to divert the fee to a nonreligious charitable organization.¹⁵⁹ Additionally, there is a dual ceiling on the fair share fee that may be assessed. One ceiling forbids the assessment of a fair share fee higher than actual union dues.¹⁶⁰ What may be a lower ceiling is the amount it actually costs the union to perform its representation functions, as distinguished from political or other activities not germane to representation.¹⁶¹

ther provides that the employer's agreement is void if, within the year preceding it, a majority of the employees had voted to rescind the union's authority to make such an agreement. *Id.*

¹⁵⁴ OHIO REV. CODE ANN. § 4117.09(C)(Page Supp. 1983).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ OHIO REV. CODE ANN. § 4117.09(B)(2)(Page Supp. 1983) requires that a provision obligating the employer to check off union dues be included in every collective bargaining agreement under the Act.

¹⁵⁸ OHIO REV. CODE ANN. § 4117.09(C)(Page Supp. 1983) provides that *if* a fairshare provision is negotiated, the fee is to be deducted automatically without obtaining individual authorizations from the affected workers.

¹⁵⁹ *Id.* See also *In re John H. Miller*, No. 84-CE-09-1923 (SERB June 10, 1985).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* For an example, see *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), in which the Supreme Court held that nonunion public employees may stop their bargaining unit's

Since unions will make the determination of how much of their dues income is expended on activities that are germane, and since that determination is final absent a SERB finding that it was arbitrary and capricious,¹⁶² it is to be expected that there will be little difference between dues of members and the fair share fee of nonmembers.

In sum, the Ohio Act provides public employees with greater freedom from mandatory association than the NLRA does for private employees, inasmuch as private employees may be required through a contract to join a union and public employees may not, although the financial burden on nonsupporters of the union in organized bargaining units may not be much different.

5. Right to Participate in Elections

Probably the most fundamental rights that can be accorded to public employees in the context of labor relations are the rights to choose whether to secure union representation and to decide whether to retain such representation. What the Act grants to individual workers by way of a right to choose in its "enumerated rights" and "unfair labor practice" sections, it may—absent thoughtful interpretation by SERB and the courts—all but take away.

The Act does not contain any clause which is equivalent of section 8(c) of the NLRA. Since its amendment in 1947 by the Labor Management Relations Act,¹⁶³ the NLRA has included in that section the following qualification upon its unfair labor practice provisions:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.¹⁶⁴

The absence of such a clause in the Act raises a question about the scope of free expression, the resolution of which will significantly affect Ohio public workers' freedom of choice respecting representation election campaigns.

Perhaps the Act's noninclusion of a provision similar to section 8(c) reflects a legislative intention to permit a "pure" constitutional standard in the realm of public employment, thus allowing an employer to promise, for instance, that innumerable benefits will flow from nonunionization, or

union from spending any part of their agency shop fees on political contributions unrelated to the union's representation of their interests.

¹⁶² OHIO REV. CODE ANN. § 4117.09(C)(Page Supp. 1983).

¹⁶³ Ch. 120, sec. 101, § 8(c), 61 Stat. 136, 142 (1947).

¹⁶⁴ 29 U.S.C. § 158(c)(1982).

to threaten reprisals if a union is selected.¹⁶⁵ On the other hand, the General Assembly's omission of such a clause could be argued to reflect a legislative intention that Ohio's public employers confronting representation campaigns be constrained by a standard akin to that applied by the NLRB in its interpretation of the original Wagner Act. Under the "8(c)-less" Wagner Act, the NLRB broadly read the prohibition of employer coercion to require strict neutrality of the employer during union organizational drives.¹⁶⁶ Since the whole structure of Ohio's Act (like that of the NLRA) contemplates periodic representation campaigns and a widespread regimen of collective bargaining, unions would certainly not be expected to be neutral, so that such an interpretation would skew the information and arguments reaching employees.

If SERB and the courts utilize this omission from the Act to "stack the deck" in representation campaigns in favor of unionization by requiring employer neutrality, countervailing ideas will have to be voiced outside the workplace, in general public forums, and only by nonemployers. In most cases, ideas expressed at such a distance from the workplace could hardly be expected to have much impact at the scene of a representation election. Under such an interpretation of the Act, the ability of employees to acquire as much information as they otherwise might about the consequences of the choices they must make will be impaired. In other words,

¹⁶⁵ Cf. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977)(commercial speech promoting contraception protected from total prohibition); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(Ku Klux Klan threats, through news media, of "revengeance" [sic] protected).

Although an employer's promises of benefit or threats of reprisal are likely to be far more personalized than the communications found to be protected in the foregoing examples, the employer's speech—if assessed solely under the Constitution—would be given broad latitude.

¹⁶⁶ The early NLRB summarized its approach to employer speech as follows:

Apart from discrimination against union members . . . the most common form of interference with self-organization engaged in by employers is to spread propaganda against unions and thus not only poison the minds of workers against them but also indicate to them that the employers are antagonistic to unions and are prepared to make this antagonism effective.

NLRB, 1 ANNUAL REPORT 73 (1936)(footnote omitted).

In upholding the Board's prophylactic approach, Judge Learned Hand articulated its rationale in terms so broad as to silence employers altogether: "What to an outsider will be no more than vigorous presentation of a conviction, to an employee may be the manifestation of an intention which it is not safe to thwart." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

Although the Supreme Court furnished indications that the strict neutrality standard might impinge upon employers' first amendment protections, see *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941)(employer's anti-union remarks evidence of unfair labor practice if coercive under the circumstances), the NLRB was slow to adjust its approach accordingly. Consequently, Congress included section 8(c) in its 1947 amendments to the NLRA. Although the new section did not go so far as to articulate a general first amendment standard, it did and does protect employers' anti-union speech falling short of threats of reprisal or promises of benefit. See S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947).

their effective right to make an informed choice would be diminished.

The evenhanded approach of the NLRA in this area clearly appears to be more desirable, especially from the standpoint of enhancing public employee rights, than either requiring employer neutrality or placing no limits on employer speech. The omission of a clause such as section 8(c) from the Act, while regrettable, does not preclude SERB and the courts from interpreting the Act in such manner.¹⁶⁷ There is no other policy consideration which requires a different result. In sum, there is no reason why the employees' right to abstain from organizing should not be coextensive with their right to organize.

Other points also deserve mention here. The voluntary recognition clause in the Act at first glance appears to protect employees from imposition of a representative upon them by agreement between the employer and a union, based only upon a union's colorable claim of majority status. The Act's procedure seems to provide that if such an agreement is contemplated, notice, an opportunity to object, and involvement by an administrative agency are required before a union can be foisted upon employees.¹⁶⁸ In practice, however, SERB has interpreted the Act in a way that gives public employees less protection than they would have as private employees.

SERB has accomplished this by establishing several different rules. First, it has determined that it must certify a union if the employer fails to do anything in response to the voluntary recognition petition.¹⁶⁹ This means that employees are deprived of their right to notice of the petition, and thus of the right to file objections to the certification. Second, it has determined that "substantial evidence" that a majority of employees do not wish to be represented by any union is constituted by the signatures

¹⁶⁷ SERB has given an indication that it will follow such an approach, at least as far as speech by unions is concerned. *Stark County Engineer v. Am. Federation of State, County and Municipal Employees, Council 8*, 2 OHIO PUB. EMPLOYEE REP. ¶ 2333 (SERB April 4, 1985). In dismissing an unfair labor practice charge that the union had violated the Act by distributing false campaign leaflets, SERB stated:

The Board can find no violation of Section 4117.11(B)(1). The letter did not contain language that would be determined to have a restraining or coercive effect. Nor was it found to be misleading, the charge made by the charging party, which in and of itself is not an unfair labor practice within Ohio Revised Code Section 4117.11.

Union campaign materials is unlikely to cast the employer in a favorable light, but it does not form the basis for an unlawful charge.

Distribution of leaflets and flyers is an activity protected by the first amendment and is not a violation of Ohio statutes.

In the absence of evidence that the union engaged in a restricting or coercive manner, the Board dismisses the charge for lack of probable cause.

Id. at 188.

¹⁶⁸ OHIO REV. CODE ANN. § 4117.05(A)(2)(Page Supp. 1983).

¹⁶⁹ See, e.g., *Laborers' and Mechanics' United, Local 1 City of Parma (NOPBA)*, 1 OHIO PUB. EMPLOYEE REP. ¶ 1043 (SERB June 20, 1984).

of a majority of employees in the requested unit, in contrast with the test for objecting to certification on the basis that another labor organization should be certified, which requires the signatures of only ten percent of the unit members.¹⁷⁰ Third, it has indicated that, even where an employer objects to certification by petitioning for an election, the union must still be certified without an election unless the employer's petition establishes a question of representation, which, if there is no dispute about the appropriateness of the unit, would require substantial evidence that a majority of employees do not want to be represented by the petitioning union.¹⁷¹ This third approach is particularly unjustifiable. Not only does it prevent employees from having a chance to vote by secret ballot, it encourages—even requires—employers to engage in polling or interrogation of employees about their union sentiments after a petition has been filed. Such polling or interrogation may itself be disruptive of employee rights. Hopefully, upon further reflection, SERB will change this view.

The Act's treatment of the decertification process constitutes another deprivation of employee rights. Employees or unions seeking to obtain an election to gain representation need to provide evidence of support from only 30% of the employees in the unit.¹⁷² Employees seeking an election to decertify an incumbent representative must not only allege that a majority of employees no longer desire representation, but must, under SERB's forms, provide proof of that fact to SERB in the form of signatures of more than 50% of the employees in the unit or equivalent evidence. In contrast is the requirement in the private sector, where only a 30% showing of interest is required for a decertification election.¹⁷³ The 30% test preserves more rights to employees—they are able to exercise a greater right to choose, and more of them are able to exercise their choice solely by secret ballot, rather than by having to sign a petition in front of another employee and then make a choice in an election.

Finally, section 4(A) of the Act, if read literally, would prohibit any individual from filing a decertification petition in a situation where a public employer had recognized a labor organization as exclusive representative through a written instrument prior to the effective date of the Act. Section 4(A) provides that such a labor organization is deemed certified until it is challenged by another labor organization and SERB has

¹⁷⁰ OHIO REV. CODE ANN. § 4117.05(A)(2)(Page Supp. 1983). For further discussion of this point, see *supra* notes 38-46 and accompanying text.

¹⁷¹ See *Franklin Local Teachers Ass'n v. Franklin Local School Dist.*, 1 OHIO PUB. EMPLOYEE REP. ¶ 1308 (SERB Nov. 7, 1984), also discussed *supra* note 40. SERB has also assumed the authority to certify a union without an election even where the employer objects to the unit and the objections are found to have merit. *In re Central State University*, 2 OHIO PUB. EMPLOYEE REP. ¶ 2596 (SERB June 5, 1985).

¹⁷² OHIO REV. CODE ANN. § 4117.07(A)(1)(Page Supp. 1983).

¹⁷³ Compare SERB Form ERB 2001 with NATIONAL LABOR RELATIONS BOARD CASE-HANDLING MANUAL (PART TWO) REPRESENTATION PROCEEDINGS § 11022.3 (1984).

certified an exclusive representative.¹⁷⁴ This complete deprivation of the right to oust an incumbent union is without any justification, especially when it is kept in mind that these pre-Act representation situations were unlikely to have been entered into with any of the safeguards of employee rights provided in the Act.

6. Synopsis

The Act has largely defined the scope of the individual public employee's rights in terms drawn from the NLRA. Assuming that there is to be a system of collective bargaining through exclusive representation by labor organizations in the public sector, these rights are appropriately granted. The Act, however, through its failures to include a free speech provision and to protect the rights of employees to obtain elections on the same terms as unions can obtain them, fails to provide public employees with all of the key rights enjoyed by private sector employees.

B. Union Rights

The Act is not intended solely to provide individual workers with rights enjoyed by their private sector counterparts; it is also intended to institutionalize a system of collective bargaining that is based upon exclusive representation by a labor organization. Moreover, the Act is further intended to help unions. This section will explore some of the ways in which the Act seeks to accomplish these goals.

1. The Use of Exclusive Representatives

As was outlined earlier, under the Act an employee representative certified by SERB is the exclusive representative of all employees in a bargaining unit. While the private sector also employs the system of exclusive bargaining representatives, whereby each appropriate bargaining unit is represented by only one labor organization, it is not unthinkable that other approaches could be used. Indeed, in the public sector in Ohio, nonexclusive representation, whereby a labor organization negotiates only for such persons in the unit as may be its members, has existed in many units of employees. In some cases, two or more unions have each represented some of the employees in a particular unit. These arrangements

¹⁷⁴ See Am. Sub. S. B. No. 133, § 4, 1983 Ohio Legis. Serv. 5-245 (Baldwin). SERB has applied section 4 to prohibit an employer from seeking to modify a unit formulated before the Act's passage. *In re University of Cincinnati Hospital*, 2 OHIO PUB. EMPLOYEE REP. ¶ 2603 (SERB May 25, 1985). The unit sought to be modified contained supervisors who, of course, are not employees under the Act. See also *New Miami Loc. School Dist. Bd. of Educ.*, 2 OHIO PUB. EMPLOYEE REP. ¶ 2661 (SERB Nov. 15, 1985) (only a rival union, and not an employee had standing to file a decertification petition concerning a "deemed certified" bargaining unit that had been "grandfathered" under the Act).

are recognized in the Act and are "grandfathered."¹⁷⁵

In the public sector particularly, the "members only" approach has several things to be said for it. First, it avoids "free rider" problems for the union and thereby obviates any basis for imposing agency fees upon nonmembers with the attendant difficulties of staying within the constitutional limits of *Aboud v. Detroit Board of Education*.¹⁷⁶ Second, it does not foreclose the employer and nonmember employees from discussing matters of mutual concern. While such discussions may not be constitutionally required under *Minnesota State Board for Community Colleges v. Knight*,¹⁷⁷ they are certainly not prohibited. If the employer and non-union employees or a "minority" union wish to engage in such discussion, it is not necessarily inappropriate to permit them to do so. Third, if strikes are to be permitted, as they are under the Act, complete disruption of public services may be avoided if there is a group of employees who owe no allegiance to the striking labor organization, either through membership or through a history of financial support. Such employees would be less likely to strike.

On the other hand, exclusive representation makes it easier for management to deal with the bargaining unit. Once a deal is struck with the exclusive representative, management need not consider other arrangements for other labor organizations or for individual employees. There is only one labor organization that can strike, and there are no interunion rivalries creating extra pressures for strikes. Finally, exclusive representation, especially when coupled with union security arrangements,¹⁷⁸ strengthens unions. The exclusive representative becomes the only entity that can negotiate. Employees who would have their voices heard must, for the most part, operate through the union.¹⁷⁹ The employer cannot negotiate with employees even if it wants to, for to do so would be a refusal to bargain in good faith with the exclusive representative.¹⁸⁰ Requiring employees to join the union or support it with agency or "fair share" fees creates a pressure on those employees to support the union, otherwise the employees will perceive that they are simply throwing their money away to no purpose.¹⁸¹

¹⁷⁵ Am. Sub. S.B. No. 133, § 4, 1983 Ohio Legis. Serv. 5-245 (Baldwin).

¹⁷⁶ See *supra* note 161.

¹⁷⁷ 104 S. Ct. 1058 (1984). See *supra* note 111.

¹⁷⁸ See *supra* notes 154-61 and accompanying text.

¹⁷⁹ See *e.g.*, *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (concerted protest activity by minority subgroup of private sector union not protected under NLRA § 7 from employer reprisals; subgroup must rely on union's representation through bargaining and grievance processes and act in concert with union to obtain protection).

¹⁸⁰ See, *e.g.*, *NLRB v. West Sand & Gravel Co.*, 612 F.2d 1326, 1328 (1st Cir. 1979).

¹⁸¹ Many psychologists have noted the power of a phenomenon called cognitive dissonance in shaping behavior. Generally, the theory of cognitive dissonance holds that disharmony among one's beliefs, feelings, and behavior tends to create a strong internal pressure

In conclusion, the exclusive representation system will, to some extent, diminish individual employee rights. However, it will significantly strengthen labor organizations. The system will make it easier for such organizations to obtain the monetary support and emotional allegiance of employees. Such support should result in both the reaching of collective agreements which are more favorable to employees and their unions than might otherwise be possible and, in turn, enhanced employee support for their unions. Thus, in this instance, the diminution of individual rights may be justified.

2. The Granting of Differential Rights to Unions

A second major way the Act assists unions is by setting up systems and procedures that are available only to unions or are available on better terms to unions than to individual employees. While there are several examples of this, two are of special note.

The first example is found in the recognition process. If a union demands recognition from an employer, the employer may request an election, or, if it does not do so, SERB may certify the union unless one of three conditions prevail,¹⁸² two of which are relevant to this discussion. One condition is that SERB receives substantial evidence that a majority of employees in the unit do not wish to be represented by the employee organization requesting recognition.¹⁸³ The other relevant condition is that SERB receives substantial evidence that at least 10% of the employees in the unit wish to be represented by another employee organization.¹⁸⁴ Thus, employees who wish to avoid a certification without an election must obtain and submit, within twenty-one days from the date of an employee organization's request for recognition, signatures from *over 50%* of the employees. Employees or other labor organizations seeking to secure union representation, but by another union, need only obtain *at least 10%* support.

This disparity has no discernible basis in logic. Unlike the situation in the private sector, where the 10% figure is used for purposes of intervening in an election, the question is not simply one of who gets on a ballot for an election that is going to be held anyway. The question is whether there will be an election at all. If an employer does not seek an election, a union has a dramatically easier time preventing certification of another union without an election than do employees who want no union at all.

to bring them into alignment. When external controls on behavior make that behavior difficult to change, discomfort with cognitive dissonance will often lead to a conforming realignment of beliefs and feelings. See generally L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); cf. G. ORWELL, *ANIMAL FARM* (1946) ("Four legs good, two legs bad!").

¹⁸² OHIO REV. CODE ANN. § 4117.05(A)(2)(b)(ii)-(iv) (Page Supp. 1983).

¹⁸³ See *id.*

¹⁸⁴ See *id.*

Again, this clearly increases the chances that there will be some union representing a unit, thereby increasing overall union strength.

The second example is found in the area of strike activity. Nonsafety related public employees have a right to strike, but not until their exclusive representative has completed the Act's impasse procedures and given a ten-day prior written notice of an intent to strike to the public employer.¹⁸⁵ Individual employees are prohibited from committing unfair labor practices, one of which is to "engage in any picketing, striking or other concerted refusal to work" without the ten days' advance written notice having been given.¹⁸⁶ The notice must be given by the exclusive representative and must follow exhaustion of the impasse procedures. Accordingly, it is to be concluded that the Act does not authorize strikes by unrepresented employees, since, by definition, they cannot meet the prerequisites for a legal strike.

This approach differs from that of the NLRA system, where protected concerted activity includes strikes by private employees even if they are not represented by a union.¹⁸⁷ In Ohio, public employees must now "purchase" a right to strike by selecting an employee organization as their exclusive representative. While there is justification for protecting employers from unpredictable strikes, or from strikes occurring before avenues of settlement have been tried, those concerns could have been satisfied without making selection of a union a necessary precondition to the exercise of a right otherwise granted by the Act.¹⁸⁸

3. The Structure of Bargaining Power

The third major way in which the Act assists labor organizations is by adjusting the parameters of the bargaining process to make it easier for labor organizations to obtain their institutional bargaining objectives and thereby to make it more attractive for employees to choose to be represented. One example of this is the Act's provision which makes employer lockouts an unfair labor practice.¹⁸⁹ This proscription has two effects, both favorable to unions. First, it removes a risk faced by an employee who is deciding whether to join a labor organization. He simply does not

¹⁸⁵ *Id.* § 4117.14(D)(2).

¹⁸⁶ *Id.* § 4117.11(B)(8).

¹⁸⁷ *See* 29 U.S.C. § 157 (1982).

¹⁸⁸ The legislature could have enabled all public employees to provide notice of a collective dispute along with a specification of the reasons therefor. In the case of a controversy that does not concern the negotiation of a collective bargaining agreement, the legislature could have provided for a brief (not to exceed 30 days) period of mediation, followed by the issuance of the 10-day notice. In this way, unorganized employees could have been accorded the right to take collective action. As an incidental effect, employees would also have been able to have the option of selecting union representation without having to pursue a collective bargaining agreement as an eventual goal.

¹⁸⁹ OHIO REV. CODE ANN. § 4117.11(A)(7)(Page Supp. 1983).

have a worry about being locked out. Thus, organizing is facilitated. Second, public employers have been denied the use of a sanction that can be used by private sector employers to help secure the acceptance of their proposals or the withdrawal of union proposals. Thus, it is more likely that public sector unions will be successful in pressing their demands. This will also aid unions in selling themselves to employees.

Another example is that the Act requires certain specific contract provisions that are of institutional importance to employee organizations. These provisions involve grievance procedures¹⁹⁰ and dues check-off.¹⁹¹ In the absence of a legal compulsion, unions would have to use some of their bargaining strength to obtain these items. The Act, however, hands them to unions, thereby leaving union bargaining power available for other items.

For safety organizations, the Act's prohibition of strikes and lockouts and imposition of compulsory arbitration make joining a union essentially risk free. Moreover, arbitration is available only for represented employees. Accordingly, unless the public employer establishes some equivalent mechanism for unrepresented employees, union efforts to organize safety employees are likely to be extremely successful, once again resulting in increased labor organization strength.

Finally, a discussion of the Act's treatment of union rights would not be complete without at least some mention of its special handling of certain labor organizations. In several instances, the Act makes special rules, or creates exceptions to general rules, for the obvious purpose of satisfying the desires of particular unions. For instance, the Act provides a general definition of the term "supervisor," based upon an employee's duties, coupled with a general prohibition against supervisors being considered employees. The Act then declares, however, that no one in a police or fire department, except the chief, is a supervisor, no matter what his duties are.¹⁹² The sole reason for this exception is the fact that existing police and fire unions represent, and want to continue to represent, supervisory employees in those departments. Similarly, a "management level employee" is defined in the Act as an individual who formulates or directs the implementation of policy, and such employees are excluded from the Act's definition of employees.¹⁹³ However, the Act then states that faculty members in institutions of higher education are not management level employees even if they formulate and implement academic or institution policy.¹⁹⁴ Again, this provision was attached because existing faculty un-

¹⁹⁰ *Id.* § 4117.09(B)(1). This is coupled with an unfair labor practice provision forbidding employers from engaging in a pattern or practice of refusing to process grievances. See *supra* note 139 and accompanying text.

¹⁹¹ OHIO REV. CODE ANN. § 4117.09(B)(2)(Page Supp. 1983).

¹⁹² *Id.* § 4117.01(F)(2).

¹⁹³ *Id.* § 4117.01(K).

¹⁹⁴ *Id.*

ions want two things: 1) to represent faculty even if the faculty has policy-making responsibility; and 2) to retain such policy-making responsibility for the faculty.¹⁹⁶

Other examples are the Act's special rules for police (but not fire) department units, separating employees by rank;¹⁹⁶ academic units;¹⁹⁷ and uniformed employee units.¹⁹⁸ All of these provisions were designed in accordance with the desire of existing labor organizations.

4. Synopsis

The various factors discussed in this section demonstrate that the Act is structured so as to increase the ability of unions to organize public employees, to make it easier for them to realize bargaining goals, and to make them more fiscally sound and therefore politically influential. The Act, as drafted, will undoubtedly be successful in its aim of assisting unions. Public employee unions will become a much more powerful force in Ohio.

A number of the structural aids for unions carved into the Act do not appear to have been appropriate and necessary. The limiting of the right to strike to represented employees, the requiring of certain contract provisions, and the carving out of exceptions from general rules simply to meet the desires of certain unions are not clearly justified.

C. *The Act's Effect on the Democratic System*

The NLRA has been widely hailed from its inception as a kind of national insurance policy for democratic institutions and ideals. The arguments to this effect run as follows:

- a) The NLRA has permitted many who would otherwise lead down-trodden lives to gain an economic stake in our society and its political institutions that is worthy of defending, and thus has kept the disaffected underclass confined to manageable numbers.¹⁹⁹
- b) The NLRA has substituted for industrialist hegemony in the

¹⁹⁶ Many private sector faculty unions undoubtedly share the same wishes, but that did not stop the Supreme Court of the United States from holding that faculty members at private institutions who participate in institutional governance are within the NLRA's exemption for managerial employees, largely on the basis of the inseparability of their professional interests and the interests of their institution. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 688 (1980). The Act's treatment of comparable public sector faculty members appears to be designed to foreclose a SERB or Ohio court decision along the lines of that in *Yeshiva*.

¹⁹⁶ OHIO REV. CODE ANN. § 4117.06(D)(6)(Page Supp. 1983).

¹⁹⁷ *Id.* § 4117.06(D)(4).

¹⁹⁸ *Id.* § 4117.06(D)(2).

¹⁹⁹ See generally Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

workplace a brand of industrial democracy that gives workers experience in, and abiding trust for, the democratic institutions of American society at large.²⁰⁰

c) Even if the two prior generalizations are false, the NLRA was enacted just in time to prevent labor strife from erupting into general social upheaval and has succeeded in keeping private sector workers adequately preoccupied with the politics of the workplace ever since.²⁰¹

Any or all of these statements may be adequate to justify the regime of the NLRA without regard to its effects upon commerce, income distribution, and productivity. Where the Ohio Act is concerned, however, none of the three foregoing statements can be said to be applicable. As of 1983, Ohio's public employees could not fairly have been characterized as economically downtrodden and lacking an economic stake in society. They were not segregated from the workings of democratic institutions; instead, they were a part of them. Additionally, in 1983 and the years immediately prior thereto, they were not threatening, or engaged in, strikes sufficiently massive so as to threaten to destroy Ohio's democratic institutions. The question now is what *the Act* has done to Ohio's democratic institutions.

Perhaps the most important issue in the area of public employee bargaining is the extent to which collective bargaining is antithetical to the democratic process. The model of the democratic process usually envisioned for such an analysis is one in which competing interest groups attempt to influence governmental decision making. This influence is accomplished by providing information to decision makers, by forming coalitions, and by pursuing compromise processes, all of which are ultimately based upon actual or threatened use of the ballot box to support friends and oust foes. Within constitutional limits, the outcome of the process is thought to result not necessarily from any inherent "right" or "wrong" or from any efficiency or inefficiency in economic terms, but from the ballot box, including anticipated, imagined, and real results.

A collective bargaining system in the public sector can be said to be inconsistent with this democratic system because it gives one type of interest group two distinct advantages over other interest groups. The first advantage is access to government in a forum not available to other groups—namely the collective bargaining table. The second advantage is

²⁰⁰ See generally Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. 1), 61 HARV. L. REV. 1 (1947).

²⁰¹ For a brief account of the volatile state of labor-management relations between 1890 and 1935, see BRIEF HISTORY, *supra* note 1, at 13-25.

For a study of contemporary labor unrest in both the private and the public sectors, see A. THIEBLOT & T. HAGGARD, *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB* (1983).

the ability to exert pressure in ways that are not ultimately dependent upon the ballot box—namely, work stoppages or interest arbitration.

1. Management Rights

One particular aspect of the functioning of collective bargaining in the public sector is of special note. As indicated, the common vision of democracy is that of the office holder as something of a reed in the wind, responding to outside political pressures and internal principles without a strong personal stake in any particular outcome. (If there is a personal stake, the cry of “conflict of interest” is heard.) In a system of collective bargaining, it will be this public official who responds not only to conventional political pressure, but also to a variety of demands from employee representatives. Significantly, some of the latter demands may involve the removal of items from the political arena almost entirely. There is very little incentive to resist such demands, particularly when there is no current “live” issue.

An example may illustrate this point. Assume that a city has a practice of using two police officers per patrol car. A crime wave leads to a public outcry for a more visible police presence. In the absence of any bargaining impediment, one possible response of the city would be the deployment of a number of one-officer patrol cars. While the police would perhaps object, the citizenry would have the ability to urge this approach on their elected officials as being preferable to raising taxes for new police officers. Suppose, however, that in negotiations concluded prior to the crime wave, the police patrolmen’s union had obtained a contract provision to the effect that current manning arrangements would be maintained until such time as mutually otherwise agreed by the employer and the union. Under such circumstances the issue of moving from two-officer to one-officer patrols cannot be resolved in the political process, but must be handled in a collective bargaining setting where the union holds a veto power.²⁰²

The foregoing example illustrates the special importance of “management rights” in the public sector. The choice of what rights are reserved to management is not simply one of which subjects may be discussed in bargaining or may be acted upon unilaterally by management; rather, the choice becomes one between bargaining on the one hand and political accountability on the other. A rejection of one option by a mayor on an issue such as police manning is one for which the mayor can be held to answer to the electorate. However, not choosing an option that does not exist, due to its having been excluded from the realm of unilateral action,

²⁰² This example illustrates why bargaining is needed, as well as why it is undemocratic. The choice of one-person patrols maximizes police presence and minimizes costs to taxpayers; it may also have an adverse impact on the safety of police officers. The voting public may “undervalue” police safety and thus be willing to yield it in exchange for more police visibility and no new taxes—though one might question whether this is a good result.

is not likely to be a political issue at all.

The Act does give attention to this issue; it contains a provision which purports to establish management rights.²⁰³ However, it is doubtful that the provision, as written, will in fact preserve very many issues for the political arena.

The Act's provision indicates that where a collective bargaining agreement is silent, nothing in the agreement impairs the right and responsibility of the public employer to take action in nine broadly defined areas, generally regarded as involving management rights.²⁰⁴ This provision thus putatively adopts the "reserved rights" doctrine, often employed by arbitrators²⁰⁵ in interpreting contracts to allow unilateral action, rather than the "clear and unmistakable waiver" doctrine employed by the NLRB.²⁰⁶

The Act also initially provides that the public employer need not even bargain over these issues.²⁰⁷ However, the Act then sets forth an exception. Bargaining is required on subjects "reserved" to management *if they affect wages, hours, terms and conditions of employment, or the continuation, modification, or deletion of an existing term in a collective bargaining agreement.*²⁰⁸ It is difficult to conceive of an issue that would concern

²⁰³ See OHIO REV. CODE ANN. § 4117.08(C)(Page Supp. 1983), which provides:

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer to:

- (1) Determine matters of inherent managerial policy which include, but are not limited to, areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
- (2) Direct, supervise, evaluate, or hire employees;
- (3) Maintain and improve the efficiency and effectiveness of governmental operations;
- (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
- (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
- (6) Determine the adequacy of the work force;
- (7) Determine the overall mission of the employer as a unit of government;
- (8) Effectively manage the work force;
- (9) Take actions to carry out the mission of the public employer as a governmental unit.

The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as they affect wages, hours, terms, and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement.

²⁰⁴ See *id.*

²⁰⁵ See, e.g., *Albertson's, Inc.*, 71 Lab. Arb. (BNA) 632 (1978)(Ross, Arb.).

²⁰⁶ See, e.g., *Laredo Packing Co.*, 254 N.L.R.B. 1 (1981).

²⁰⁷ OHIO REV. CODE ANN. § 4117.08(C)(Page Supp. 1983).

²⁰⁸ *Id.*

employees enough to create a desire for bargaining but would not fall within the exception. In the prior example concerning the manning of police cars, the determination would be a management right, under several of the nine areas. However, the impact of the decision on safety of the police would clearly place it within the scope of the exception. Accordingly, the union could compel bargaining over the issue.

Similarly, the union could compel bargaining over a proposal to include in a contract a provision perpetuating past practices. This proposal could be pressed to impasse or arbitration. Assuming that the public employer has no desire to change current practices, there is little incentive for the employer to resist such a proposal vigorously. On the other hand, if the employer resists the union demand, it will be in a position of defending a position to the electorate or the arbitrator that goes something like: "I do not want to agree to continue existing practices, even though there is nothing I want to change now, because I may want, at some time in the future, to alter them, increasing the hazards faced by the police, so as to avoid hiring new police and raising taxes." On the other hand, if the employer goes along with the union, it can hope to gain some immediate concession, take a step toward resolving the current negotiations with the union, and perhaps just as important for the employer, establish a situation in which it will not have to make a difficult choice in the future, since the labor agreement has foreclosed an option.

Accordingly, due to its exception to the management rights clause and the inherent incentives facing public employers, the Ohio Act does not remove, in an effective way, management rights (or, in this context, the right to "take actions to carry out the mission of the public employer as a governmental unit") from the scope of mandatory or permissive bargaining. Therefore, it encourages the removal of vital political issues from the political arena.

This scope of bargaining problem is even more troublesome in Ohio than it might otherwise be because, under the Ohio Act, as has been alluded to earlier and will be discussed in more detail later,²⁰⁹ collective bargaining agreements may supersede inconsistent local and state laws. Thus, when the parties sit down to bargain about virtually whatever they please, they will, to the extent of the bargaining unit, be deciding what the law will be in their community.²¹⁰

²⁰⁹ See *infra* text accompanying notes 241-43.

²¹⁰ This very thing has occurred in the city of Cleveland, where a charter amendment establishing a civilian police review board was passed on November 6, 1984. The amendment was voided, however, on December 19, 1984 by Judge James Kilcoyne on the basis that the police review board introduced an additional step into the disciplinary process for police and thereby conflicted with the collective bargaining agreements covering police patrolmen and other police officers. *Jurcisin v. Cuyahoga County Bd. of Elections* No. 82509 (C.P. Cuyahoga County Dec. 19, 1984). The decision is currently being appealed. *Jurcisin v. Cuyahoga County Bd. of Elections*, No. 49764 (Ohio 8th Dist. Ct. App. filed Jan. 22, 1985).

The Ohio legislature would have better served the public if it had made some real effort to determine what subjects should have been effectively removed from the bargaining table—rather than purporting to remove items from the table with one hand while placing them back on the table with the other. Certainly, the legislature would have altered the democratic process less if it had limited collective bargaining to wages, hours, and other “traditional” subjects of bargaining. Absent such approach, the legislature would have served the democratic process by requiring, within reasonable limits, public notice of certain aspects of bargaining and requiring the bargaining parties to accept public input regarding those aspects.²¹¹

2. The Right to Strike

a. Permitted Strikes

Since one of the usually-cited goals of bargaining statutes is labor peace, it seems paradoxical that such a statute would grant employees the right to strike. However, it is thought, at least in the private sector, that the collective bargaining process regularizes labor relations and channels unrest into the bargaining process. Collective bargaining thus reduces pressures for strikes. However, the argument goes, meaningful collective bargaining cannot exist without being attended by some ultimate sanction which may be invoked when agreements are not otherwise reached.²¹² The basic choices for this sanction are strikes and arbitration. Viewed in this way, the right to strike is a tool that is used only so that collective bargaining will be an acceptable, useful system.

In the public sector, there has been unwillingness to legitimize the strike weapon.²¹³ Often it is felt that forcing the parties to get together at a bargaining table is enough incentive to produce agreement or labor peace in most situations without the disruption of the processes of government that strikes entail. The Act's basic system, however, is to permit the strike as an ultimate sanction in all but units of safety related em-

²¹¹ See H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES*, *supra* note 87 at 868-69. The Act specifically exempts collective bargaining meetings from “open meetings” laws. OHIO REV. CODE ANN. § 4117.21 (Page Supp. 1983).

²¹² A. COX, D. BOK & R. GORMAN, *LABOR LAW* 483-85 (9th ed. 1981).

²¹³ Only the following states have enacted legislation permitting public employees a limited right to strike: Alaska, ALASKA STAT. § 23.40.200 (1984); California, CAL. LAB. CODE § 1962 (West 1971); Hawaii, HAWAII REV. STAT. § 89-12 (Supp. 1983); Illinois, ILL. ANN. STAT. ch. 48, § 1617 (Smith-Hurd Supp. 1984); Minnesota, MINN. STAT. ANN. § 179A.18 (West Supp. 1985); Montana, MONT. CODE ANN. § 39-31-201 (1983); Ohio, OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1985); Oregon, OR. REV. STAT. § 243.726 (1983); Pennsylvania, PA. STAT. ANN. tit. 43, § 215.1 (Purdon Supp. 1984); Vermont, VT. STAT. ANN. tit.21, § 1730 (1978); and Wisconsin, WIS. STAT. ANN. § 111.06 (West 1974).

ployees,²¹⁴ while also providing enough alternative dispute resolution systems so that the strike will be used only as a last resort. The issue is whether the Act's grant of a right to strike will ensure that collective bargaining works, increase labor peace, and thereby minimize interference with democracy.

In this regard, the following points can be made:

1. The Act will probably succeed in eliminating or channeling pressures for strikes over "procedural" issues—such as recognition, jurisdiction, etc.—because it provides effective and expeditious ways of resolving them;

2. Prior to the Act's enactment in 1983, Ohio did experience a number of public employee strikes each year.²¹⁵ There is room for improvement in this record, so there is some justification for a legislative effort to reduce strikes;

3. The procedural hurdles should result in the issues being clear and fixed by the time any strike could occur;

4. The ten-day notice provision, if not permitted to be abused, may help public employers avoid some of the most harmful effects of strikes on their constituents;

5. By providing several dispute resolution methods, and at early points in negotiations, the Act reduces the odds that any of them will produce agreement. For example, one of the ways mediators "lead" parties to make concessions is the use of the pressure of the threat of an imminent strike.²¹⁶ The Act, however, uses mediation so early in the procedure (and then replaces it with factfinding) that it is unlikely that mediation will result in real concessions on the very tough issues.

6. The Act will probably reduce the number of strikes in instances in which the Act makes strikes illegal because it has provided the alternative of SERB administrative procedure and mandatory arbitration.

One aspect of the impasse procedure—factfinding—deserves special consideration. Factfinding is to take place beginning thirty days prior to the expiration of the bargaining period.²¹⁷ Factfinders are required to conduct a hearing at which they will receive the positions of the parties and the parties' arguments in support of them. They then are to issue a report containing recommendations as to settlement.²¹⁸ As previously

²¹⁴ See *supra* text accompanying notes 68-69.

²¹⁵ O'Reilly and Gath, *Structure and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891 (1983).

²¹⁶ Buckingham, *Variables Affecting Mediation Outcome*, 3 PEACE & CHANGE 55 (Summer 1982).

²¹⁷ OHIO REV. CODE ANN. § 4117.14(C)(3)(Page Supp. 1983).

²¹⁸ *Id.* § 4117.14(C)(3)(a).

noted, the employer's legislative body then has only seven days to reject the recommendation, and it must do so by a supermajority of three fifths. The seven-day period runs even if the body is not in session, and the three-fifths vote required is of the entire membership of the body, not just of those present and voting. Only if the factfinders' recommendations are rejected are the positions of the parties and the factfinders' recommendations made public.²¹⁹

Not only is the public kept ignorant of the key factors until after it is too late to prevent adoption of the factfinders' report, it is also prevented from having any input to the factfinders. The Act specifically prohibits any member of the factfinding panel from having any discussion of its possible recommendations with anyone other than parties to the dispute.²²⁰ The legislature's imposition of such a system clearly exacerbates the antidemocratic effects of the collective bargaining process; it is difficult to discern any justification sufficient to outweigh the harm involved.

After factfinding, certain strikes are authorized by the Act. Where the Act makes strikes legal, it will increase the power of unions, in comparison with both the public employer and nonunion interest groups. As already noted,²²¹ the Act also facilitates organizing, meaning that more employees will join unions, and reduces the risks faced by employees and unions that go on strike. Thus, it seems inevitable that the Act will make unions more willing to back up their demands with strike actions. When these factors are coupled with the Act's misguided attempt to reduce areas of discord by employing a very complex and ineffectual impasse resolution scheme, which will leave major issues clear but uncompromised, the conclusion that there will be more public sector strikes in Ohio seems unavoidable, unless of course, public employers simply capitulate. In any case, the ultimate post-Act points of settlement will undoubtedly be substantially more favorable to unions than were the pre-Act points.

Of course, this does not mean that unions will win every battle. As noted earlier,²²² the strike in the public sector is a political weapon, not an economic one. Therefore, it is susceptible to political counterattack, or even to backfiring. If the union does not succeed in generating public support for its position, but instead generates public resistance, the union may not "win" the strike.

Whether unions win or lose their battles with public employers, the fact of the matter is that they have been granted access to a unique field of conflict, one from which other groups are barred as direct combatants, but into which those groups are compelled to enter for purposes of enduring the pain caused by the strike. A neighborhood group cannot go on

²¹⁹ *Id.* § 4117.14(C)(6).

²²⁰ *Id.* § 4117.14(C)(4)(f).

²²¹ See *supra* text accompanying notes 175-98.

²²² See *supra* text accompanying note 101.

strike in support of its demand for better waste collection service, but it can be required to put up with piles of refuse during a garbage strike. The people with the most at stake in a strike are not the employer and the union involved in the strike. Ironically the parties with the most at stake—the citizens of a community—may be excluded even from obtaining any information more recent than the factfinder's report about the positions of the parties.

The Act's legitimization of the strike weapon thus places labor organizations at a distinct advantage over other interest groups and alters the democratic process. Checks upon a labor organization's use of this power do exist. They consist of some level of public resistance to taxes and to union tactics that will come to be reflected in management positions—inspired by the threat of being ousted by voters—and the existence of other labor organizations also seeking a greater share of the employer's budget (some of whom have the ability to go to interest arbitration). Those checks will probably not be encountered until the union has gone some distance, and will be exercised basically as "vetos," rather than as parts of the process of formulating positions. The effectiveness of those checks would have been enhanced and the Act's alteration of the democratic process diminished if the legislators had incorporated into the Act's terms some provision requiring that employers and striking unions make available to the public at appropriate times information concerning the parties' positions. Individual citizens and community groups would then have had at least some of the information necessary to enable them to attempt to coalesce wider public support and exert influence upon the employer and the union. As alluded to earlier, as the Act stands, community groups may well have available to them as a strike proceeds no meaningful information concerning potential costs of an employer's capitulation to a union's demands.

b. Prohibited Strikes and Their Substitutes

The prior lack of legislative authorization for public sector strikes has not prevented them from occurring. Such strikes have ranged from half-day walkouts by city of Cleveland Municipal Light & Power employees over a request to string Christmas lights,²²³ to the recordsetting strike by Ravenna teachers,²²⁴ to the devastating strike by Dayton firefighters.²²⁵ They have included slowdowns, "blue flu," sick outs, and other measures. An interesting feature of these illegal strikes is that the Ferguson Act's sanctions, consisting principally of the employer's right to discharge all striking employees, were only rarely used. In most cases, the response of the public employer was to seek an injunction on the basis that strikes

²²³ Cleveland Plain Dealer, Nov. 15, 1983, at 18.

²²⁴ *Id.*, Dec. 13, 1980, at 3-B.

²²⁵ *Id.*, Aug. 10, 1977, at 1-A, 13-A.

were unlawful at common law as well as by statute, and that the statutory framework was not exclusive.²²⁶ This unwillingness to employ the Ferguson Act stemmed from its political unpalatability, due in part to its severe penalties. Now, since organized labor has so strongly supported the new Act, it may not be politically suicidal for politicians to utilize its sanctions.

Because of this factor of greater palatability, it is likely that the sanctions of the Ohio Act will be invoked. In the two specific areas where the Act prohibits economic strikes—1) any strike by safety related employees; and 2) any strike not following exhaustion of the impasse procedures and a ten-day notice from the involved union²²⁷—it will probably be more effective in punishing strikes than the Ferguson Act would have been in those identical situations. That the Act will not have as much deterrent effect as did the Ferguson Act upon strikes that the Act now makes legal is perhaps too obvious to state.

i. Strikes by Safety Related Employees and the Alternative of Conciliation

Even in the case of "safety forces" where the Act accords no right to strike, and even if the Act is completely successful in eliminating all strikes by such employees, the Act enhances their position relative to parent groups, welfare rights organizations, corporate lobbies, and all other interest groups. The Act does so by: 1) requiring collective bargaining, and 2) requiring arbitration over contract terms. The effect of requiring collective bargaining has already been discussed. However, a few additional points can be made in this context. The basic conflict in this area concerns the direction of the expenditure of public funds. Money spent on higher salaries for state employees is not available for grants to local boards of education. Money spent on police officers is not available to purchase new fire trucks. Money spent on raises for current clerks is not available to hire more of them. As the overall tolerance of taxpayers for new taxes decreases, the total amount of funding available to public entities becomes limited, with the result that money spent by one public employer may affect the amount of money available for use by a completely different public employer. When this inherent conflict over public money is coupled with potential conflicts over noneconomic items, and one interest group is then given the opportunity to compel bargaining in a forum from which competing groups are excluded, the balance of power is

²²⁶ *Goldberg v. City of Cincinnati*, 26 Ohio St. 2d 228, 271 N.E.2d 284 (1971).

²²⁷ There is another important category to consider—strikes that are otherwise legal but are enjoined for a period of time upon a showing of a danger to health and safety. See OHIO REV. CODE ANN. § 4117.16 (Page Supp. 1983). The Act, however, does not provide sanctions for violating the injunction. Presumably it would be up to the court to utilize its contempt power as in any instance of disobedience of an injunction.

altered.

For employees who do not have the right to strike, the Ohio Act provides the strike substitute of compulsory interest arbitration.²²⁸ This process not only gives the advantage of yet another separate forum to the labor organization, but also insulates the gains achieved there from attack. A mayor who takes a strong public stand opposing pay raises for city workers, because of his desire to advance a politically popular program to reduce existing taxes, can hardly be attacked by the electorate if an arbitrator grants the raises. Most probably the mayor will denounce the arbitrator, take credit for fighting the good fight, and leave taxes where they are. What then can the voters do? They can achieve nothing by removing the incumbent because the incumbent is on their side; they cannot seek a tax reduction and receive the same service, because the raises are in place and the city could react to a revenue reduction only by reducing employees and services; and they cannot pass an initiative ordinance rescinding the agreement resulting from the arbitration award, because the Act makes the award a "binding mandate" on the employer to take all steps necessary to implement the award.²²⁹ In this way, matters of key political importance are simply removed from the political process.

An arbitrator does not function as a part of the political process normally used to run government. The Ohio Act specifies the factors that the arbitrator is to consider: a) past agreements between the parties; b) the terms and conditions of employment of public and private employees doing comparable work; c) the interests and welfare of the public, including the ability of the public employer to finance the settlement proposed; d) the "lawful authority of the public employer"; and e) the stipulations of the parties.²³⁰ Arbitrators may also consider such other factors as are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement.²³¹ Nowhere in the statute is there a direction to consider what the electorate would vote for if faced with the choice. Of course, in some ways, that may be a good thing. The late president of the American Federal of State, County and Municipal Employees, AFL-CIO, Jerry Wurf, commented about arbitration as follows:

The results haven't always been great, but we have found that

²²⁸ *Id.* § 4117.14(D)(1). For articles addressing the merits of compulsory binding arbitration, see Clemow & Mooney, *Impasse Resolution in Local Government Labor Relations: The Connecticut Approach*, 9 CONN. L. REV. 579 (1977); Lampke, *Binding Arbitration and the New Massachusetts Bargaining Law*, 11 NEW ENG. L. REV. 137 (1975); McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1205 (1972); Sullivan, *Binding Arbitration in Public Employment Labor Disputes*, 36 U. CIN. L. REV. 666 (1967).

²²⁹ OHIO REV. CODE ANN. § 4117.14(I)(Page Supp. 1983).

²³⁰ *Id.* § 4117.14(G)(7)(a)-(e).

²³¹ *Id.* § 4117.14(G)(7)(f).

arbitration has frequently been able to deal with problems that might have been very difficult to deal with at the bargaining table. One interesting thing we found is that management was more worried about arbitration than the unions, because management found that arbitrators often dealt with the equities of the situation instead of the politics of it.

. . . Arbitrators look at ability to pay, not whether a Republican or Democrat should look good for the next election.²³²

The Ohio Act has clearly adopted the approach of seeking the supposed "equity" as between the positions of unions and public employers in preference to "the politics" of them. This choice may be expected to result in decisions that are acceptable in most instances, at least once the parties realize the decisions are final. However, it is also likely that there will be a small minority of decisions that are totally unacceptable and these will be the ones that receive disproportionate attention. The lack of an effective means to address them, even through some extraordinary process such as initiative or referendum, is likely to strengthen feelings of powerlessness or disenfranchisement in political groups who generally have little influence but could generate enough support to overturn an unfavorable award, if only it were possible under the Act.

While it may be assumed that arbitrators will do their best to apply the statutory criteria to the facts of each controversy so as to arrive at a good result, it must be remembered that democracy is not designed to achieve results that some individual might perceive as good. Rather, it is designed to provide a process whereby the results reached are those that, within constitutional limits, reflect the will of the majority.

All this having been said, however, it is also true that the Act does not write on a blank slate. In providing an arbitration alternative, the legislature was aware that many of the individuals denied the right to strike in the Act are organized.²³³ They have exercised the strike method, and as noted, have not always suffered Ferguson Act sanctions. Since the employees denied the right to strike in the Act are the employees most able to cripple governmental operations and create "pain" in the citizenry through a strike, and since nothing but arbitration was seen as sufficient to avoid strikes over impasse issues, the legislators apparently felt they faced the alternatives of 1) arbitration, 2) punishment for striking, and 3) allowing strikes. Punishment, standing alone, would likely have been no more effective in deterring strikes than the Ferguson Act was. That alternative was rejected. As between strikes and arbitration, the choice was

²³² Burnett, *Jerry Wurf*, SKEPTIC MAG., May-June 1976, at 10, 14.

²³³ See *Transcript of the Hearings Before the Subcomm. on S.B. 133 of the Senate Commerce and Labor Committee of the Ohio Senate*, 115th Gen. Assembly (1983)(testimony given in the second and third hearings on March 28, 1983, and in the fifth and sixth hearings on April 6, 1983).

arbitration. While arbitration is undemocratic, so is the settlement of issues through strikes. Strikes by safety forces are particularly undemocratic, because the population affected is so vulnerable. Welfare mothers, for example, might have more left to them in arbitration proceedings involving fire fighter pay than they would if there were a fire fighter strike. The use of a strike, however, does preserve to the voters the theoretical possibility of voting out the officials who agree to any settlement, and of having the legislative body reject the agreement reached.

As has been demonstrated, the democratic process has been completely altered where the Act employs its system of interest arbitration. The democratic process would have been less diminished, and the Act's system of interest arbitration sustained nonetheless, if the legislature had established, within prescribed general limits, public participation in the arbitration proceedings. The legislature might have established basic qualifications for individual citizen and community group intervenors and have required that arbitrators permit such persons to present evidence at arbitration hearings, with the arbitrator retaining the same control and discretion with respect to the evidence presented by such persons as with respect to that presented by employers and unions. In order for such citizen participation to be meaningful, the legislators would also have had to require that information about the positions of employers and unions be made available to intervenors prior to the commencement of formal hearings.

ii. Strikes Without Advance Notice

Another type of strike that the Act prohibits is one that occurs without exhaustion of impasse procedures and the provision of a ten-day notice by the labor organization. Those impasse procedures have already been discussed.²³⁴ Only a few points need to be discussed concerning the requirement of advance notice of strikes. Although the notice period can help the public employer prepare to mitigate the likely worst effect of a strike, the requirement of a notice before a strike does not diminish the power of the labor organization. In some ways, it enhances it. The threat of a strike can, in some cases, be nearly as effective in inducing concessions as an actual strike. An actual strike can harden positions and can make residents unhappy with the striking employees. A strike threat, however, can lead to pressure on public officials to settle without a strike.²³⁵ Further, as the Act is drafted, the notice requirement can give the union the opportunity to time its strike to its advantage, rather than striking at the conventional time of the contract expiration date. While the Act seems to contemplate employer agreement for extensions of strike

²³⁴ See *supra* notes 63-78 and accompanying text.

²³⁵ See *supra* text accompanying note 188.

deadlines, it is silent as to what is to occur if the union wants to extend the strike deadline and the employer does not agree. If the eventual resolution of this question is that the union can withdraw strike notices, the union would possess the additional weapon of being able to give repeated notices—forcing the employer each time to ready itself for the strike, only to have it called off at the eleventh hour. Once again, the Act gives power to labor organizations that is not available to other groups.

c. Enjoinable Strikes

Strikes by employees other than safety employees may also be particularly harmful to the community, and thus particularly destructive of the political process. Examples might be strikes by bridge tenders, waste treatment plant employees, or garbage collectors. The Act does not prohibit such strikes, but it provides a procedure for enjoining them if they endanger public health or safety.²³⁶ The employer may seek a temporary restraining order from the court of common pleas. The court may grant the order, but only for a period of up to seventy-two hours.²³⁷ During that time, the employer is to seek authorization from SERB to extend the injunction. If the authorization is obtained, the court may enjoin the strike for up to sixty more days.²³⁸ The “price” paid by the employer is a requirement that the employer continue bargaining for the entire sixty days.²³⁹

This provision gives some leverage to the employer. By using it, the employer can reduce its vulnerability to strikes by affecting their timing. For example, this provision might enable a city to avoid having to suffer a garbage strike during summer heat waves. The provision may also have the effect of blunting some of the enthusiasm of public employees for striking, particularly if the employer lets the strike continue for a period of time before seeking the injunction. If garbage collectors are off work for a month, during which time garbage accumulates to the point of posing a health hazard, and are then called back for sixty-three days to work on the piles of refuse not collected during their strike, they may not be especially anxious to go through it all again.

As far as the political process is concerned, the injunction procedure that applies to strikes that threaten public health or safety does preserve a degree of political accountability—but only a degree, since such strikes can be enjoined for just sixty-three days in spite of their impact upon public health or safety.²⁴⁰ In a democratic system it seems anomalous that a strike that has been held both by SERB and by a court to endanger

²³⁶ OHIO REV. CODE ANN. § 4117.16(A)(Page Supp. 1983).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* § 4117.16(B).

²⁴⁰ *See id.* § 4117.16(A).

public health or safety must be allowed to continue.

In this regard, even if other interest groups had the same degree of raw power as a union to prevent performance of essential public services, the exercise of that power by those other groups surely would be enjoined. For example, a union could prevent garbage pickups in summertime by striking and picketing. A highly organized and motivated group of welfare mothers might be able to do the same thing by physically blocking garbage trucks from leaving garages. Clearly, the welfare mothers would be permanently enjoined, and perhaps jailed for interference with public services, while the union would be free to start a strike and to recommence it after, at most, sixty-three days.

3. The Law of the Act in Ohio's Legal System

The Ohio Act provides that collective bargaining agreements are to govern the terms and conditions of employment of public employees.²⁴¹ These agreements are subordinate to laws pertaining to civil rights, affirmative action, unemployment compensation, worker's compensation, retirement of public employees, residency requirements, minimum educational requirements for certain public education employees, and minimum standards promulgated by the state board of education.²⁴² The Ohio Act itself prevails over any conflicting laws, with the exception of a few enumerated sections, including arrangements necessary to comply with requirements of the Urban Mass Transportation Act of 1964.²⁴³

A request for funds to implement any negotiated agreement, as well as any other matter requiring legislative approval, is to be submitted for approval to the legislative body.²⁴⁴ The legislature is to accept or reject the submission as a whole. If the legislature does not act within thirty days, the submission is approved.²⁴⁵ This effectively means that an appropriation can be passed without actual approval by the legislative body—and without any legislator having to make a decision for which he or she may be held accountable. Also, rejection of a factfinding report by a legislative body requires a supermajority and must be accomplished before the public is even informed of what the legislative body is voting on.²⁴⁶

²⁴¹ *Id.* § 4117.10(A).

²⁴² *Id.*

²⁴³ *Id.* But see *State, ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382 (1985). In *Wells*, the Ohio Supreme Court limited this "supremacy clause" to avoid "unreasonable or absurd consequences." *Id.* at 384. In refusing to enforce a confidentiality provision of a collective bargaining agreement between the city of Logan, Ohio and its police force, the court stated that if it were to enforce the provision, "private citizens would be empowered to alter legal relationships between a government and the public at large via collective bargaining agreements." *Id.*

²⁴⁴ OHIO REV. CODE ANN. § 4117.10(B).

²⁴⁵ *Id.*

²⁴⁶ *Id.* § 4117.14(C)(6).

Even the safeguard of submission to the legislative body is absent if interest arbitration is applicable and is invoked. The statute provides that: "The issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award."²⁴⁷

Interestingly, there is no distinction between management and union proposals with regard to the finality of arbitration awards. For example, a mayor may advance a proposal to a union that both know would not receive approval from the city council. However, if the union rejects that offer, goes to arbitration, and "loses," the agreement is immune from legislative disapproval. Conversely, a mayor who has opposition in the council may be willing to accept a union's final position but would anticipate a fight in the council. The mayor could simply refuse to agree to the union position, go to arbitration, and lose. The mayor thus cannot be blamed for the agreement, the agreement cannot be rejected, and the council is bypassed.

4. Synopsis

For the reasons discussed above, it must be concluded that the Act does not avoid the problem of altering the process of government. As noted earlier, the results of the altered process in terms of the actual settlements are likely to be acceptable in most cases. In terms of the costs to public employers, it is likely that the altered process will result in an increase in the strength of claims by public employee unions on employer funds. Here again, however, the results are not likely to be totally unacceptable. There is, however, another price. It is in the diminution of the ability of competing and less powerful interest groups to achieve their goals through the democratic process. The price is in the substitution, in this single but critically important area, of supposed "equities" for "the politics of the thing."

V. CONCLUSION

The Act creates a new public employment system for Ohio and its political subdivisions. In doing so, it has affected the rights of public employees, the rights of labor organizations, and the political system.

In the area of employee rights, the Act has codified certain rights of employees that were otherwise enforceable only through constitutional litigation. Also, it has enabled employees, if they join a labor organization, to strike and to force their employer to bargain collectively. However, to the extent that the Act seeks to provide public employees with rights identical to their private sector counterparts, it does not succeed. Unlike the NLRA system, the individual rights provided in the Act are in many

²⁴⁷ *Id.* § 4117.14(D).

cases not exercisable except when the individual acts through an employee organization.

In the area of union rights, the Act seeks to enhance the position and rights of unions. In this effort it succeeds. The Act will enable employee organizations to gain new members, obtain bargaining goals, and receive financial support from members and nonmembers alike. In turn, this will increase the power and influence of public employee unions in Ohio.

In the area of the political system, the Act quite simply changes the rules of the game. Democratic processes now will have only tangential effects on personnel matters. The main influence will be collective bargaining in which unions can use either a powerful strike weapon or the even more unchecked power of an arbitrator to achieve their goals. Public sentiment and voting power can be circumvented. Given the fact that personnel costs constitute the major portion of almost every public employer's budget, the effect of the Act upon the democratic process cannot be taken lightly.

Even if, because they can achieve their goals without striking, unions do not strike and the Act is thus successful in increasing the level of "labor peace" among Ohio's public employees, other interest groups will lose power. As more and more issues are taken from the political arena and made the subject of binding contract provisions, this loss of power will continue. The Act, therefore, does have a very major cost—the effective disenfranchisement of competing interest groups. Whether that cost will be surpassed by the benefits sought by the Act—more public employee rights, more union power, and more labor peace—is doubtful.

