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I. Introduction

In 1970, Pennsylvania adopted comprehensive legislation affording public employees the right to organize and bargain collectively. Act 195,[1] also known as the Public Employee Relations Act, extends the right to strike to most public employees,[2] including teachers. Since Act 195's implementation, there has been recurrent debate concerning the appropriateness of teacher strikes as a means of resolving bargaining impasses in public education. For example, State Senator Michael Fisher, Chairman of a Senate task force commissioned in 1984 to study the impact of Act 195 on public schools observed that "[t]here is . . . a very real concern for how disruptive school strikes have been on those who can least afford the disruption, that is, our children in school."[3]

At present, forty-one states and the District of Columbia have legislation or regulations providing for public employee bargaining.[4]

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1. Act of July 23, 1970 (Public Employe Relations Act) Pub. L. No. 195-563 (codified as amended at PA. STAT. ANN. tit. 43 §§ 1101.101-.2301 (Purdon Supp. 1985)) [hereinafter cited as "Act 195"].

2. *See infra* notes 16-18 and accompanying text.

3. Harrisburg Patriot, June 20, 1984, at A1, col. 5 (statement of Senator Michael Fisher, R-Allegheny).

4. For an examination of the development of bargaining legislation as of 1977, see Schneider, *Public-Sector Labor Legislation — An Evolutionary Analysis* [hereinafter cited as *Public-Sector Legislation*] in PUBLIC-SECTOR BARGAINING (B. Aaron, J. Grodin & J. Stern, ed. 1979) [hereinafter cited as PUBLIC SECTOR BARGAINING]. A current compilation of state bargaining laws is contained in the summary of state and local programs, [Reference File] GOV'T. EMPL. REL. REP. (BNA) 51:1011 *et seq.* (1985). New Mexico permits bargaining under regulations issued by the State Personnel Board. *Id.* at 51.4011. The most recent bargaining statutes were enacted in 1984, when Illinois and Ohio adopted comprehensive legislation, *see also* ILL. ANN. STAT. Ch. 48, §§ 1601-1627 (Smith-Hurd Supp. 1984); OHIO REV. CODE ANN., §§ 4117.01-.23 (Baldwin 1983 & Supp. 1985). Arizona, Arkansas, Louisiana, Mississippi, North Carolina, South Carolina, Utah, Virginia and West Virginia have no affirmative provisions concerning public negotiations. GOV'T. EMPL. REL. REP., *supra*. Colorado authorizes bargaining by two groups of public employees, transit workers and sewage district

Only ten states, however, authorize strikes by government workers to resolve bargaining impasses.[5] The remaining states mandate alternative methods of dispute resolution, such as binding interest arbitration.[6] Despite its prevalence in bargaining systems, however, arbitration remains an unsatisfactory means of resolving impasses in public sector negotiations. Most important, arbitration is undemocratic in operation and deprives the citizen of any meaningful voice in the outcome of the bargaining process.

Public sector bargaining, particularly when it involves a subject as sensitive and critical as public education, has an inherent political dimension. Existing techniques for resolving negotiation impasses are inadequate to accommodate this political dimension, and strikes as well as arbitration can thwart the process of democratic decision-making. Pennsylvania's teacher strike experience convincingly demonstrates the detrimental consequences of lengthy teacher strikes.

This article advances a model of impasse resolution which offers a preferable alternative to teacher strikes and binding arbitration. The "Referendum Model" corrects the political distortion intrinsic to the strike and arbitration methods of dispute resolution by eliminating the threat of strikes while simultaneously providing an opportunity for public participation in the negotiations process.

The article first reviews the impasse techniques adopted in Act 195. Next, it examines the public controversy surrounding teacher strikes and their effect on students and parents. The arbitration alternative is then criticized from the perspective of political theory.

Part IV of the article presents the Referendum Model with accompanying commentary. Part V analyzes the Model in theoretical terms, with particular emphasis on political governance in local school systems. In conclusion, it is argued that the Model is a superior means of accommodating the interests of teachers in collective bargaining and the interests of citizens in quality public education.

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employees. COLO. REV. STAT. §§ 81-1-4(12) (supp. 1982), 32-4-502(25) (1973). The statute arguably permits strikes by those employees. Originally, the law did not contemplate *public* employee collective bargaining, having been enacted in 1946 in response to the Wagner Act. *See* Hogler, *The Regional Transportation District Strike and the Colorado Labor Peace Act: A Study in Public Sector Collective Bargaining*, 54 COLO. L. REV. 203 (1983) [hereinafter cited as *Regional Transportation District Strike*].

5. Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, Vermont, Wisconsin, Ohio, and Illinois permit strikes by designated public employees. For a summary of the statutory provisions in the first eight states, see Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1079 (1982). The statutes governing public employee strikes in Ohio and Illinois are cited at *supra* note 4.

6. For an overview of impasse procedures, see Kochan, *Dynamics of Dispute Resolution in the Public Sector*, in PUBLIC-SECTOR BARGAINING, *supra* note 4 at 150 [hereinafter cited as *Dispute Resolution*].

II. Impasses Under Act 195

A. An Overview of the Dispute Procedures

In authorizing public employee strikes, Act 195 adopted a highly innovative approach to collective negotiations.[7] Legislation enacted in other states prior to 1970 prohibited strikes but substituted alternative methods of dispute resolution.[8] Typically, those procedures relied on mediation, factfinding and binding interest arbitration, all of which involve the intervention of a third party in the bargaining process.[9] The Pennsylvania legislature incorporated mediation, factfinding and arbitration into Act 195 and further determined that a right to strike as the final step of impasse resolution would strengthen the negotiations process.[10]

The resolution of impasses under Act 195 involves a series of mandatory procedures followed by several voluntary options available to the parties.[11] The first step in impasse resolution is mediation, which the parties must invoke if an agreement is not reached within a specified period after commencement of negotiations. Mediation is initiated by written notice to the Pennsylvania Bureau of Mediation, which thereupon furnishes the services of a mediator at no cost to the parties.[12] The procedure is mandatory. Once begun, mediation continues until the parties reach an agreement. After a specified period of time, however, the Bureau of Mediation notifies the Pennsylvania Labor Relations Board of the impasse. The Board may appoint

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7. *See Public-Sector Legislation, supra* note 4 at 200-03, in which Schneider describes the historical context underlying the no-strike approach, such as New York's, and the Pennsylvania strike model. The Pennsylvania legislation was a radical departure from the conventional collective bargaining practices then prevailing in public employment.

8. In 1962, Wisconsin enacted a bargaining statute covering municipal employees. Between 1965 and 1967, six additional states adopted legislation modeled after the federal National Labor Relations Act, but without the right to strike. Schneider describes this as the "watershed" period of public sector bargaining. *Public-Sector Legislation, supra* note 4, at 197-200.

9. *See Dispute Resolution, supra* note 6, at 170-87 for a description and evaluation of these third party procedures. *See also*, T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 272-305 (1980) [hereinafter cited as COLLECTIVE BARGAINING].

10. "The collective bargaining process will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employee that there are limits to the hardships that he can impose." GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYEE LAW OF PENNSYLVANIA, REPORT AND RECOMMENDATIONS, *reprinted in* 251 GOV'T. EMPL. REL. REP. (BNA) E-1, E-3 (1968) [hereinafter cited as GOVERNOR'S COMMISSION].

11. PA. STAT. ANN. tit. 43 §§ 1101.801-.806a (Purdon Supp. 1985). The statute also contains explicit safeguards to prevent undue danger to the public welfare in the event of a work action.

12. *Id.* Mediators perform a variety of functions in assisting the parties to reach a voluntary agreement. A detailed treatment of the process is set forth in W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (1971). For a comparison of mediation in the private and public sectors, see D. KOLB, THE MEDIATORS (1983). Kolb concludes that public sector mediators involved in private sector negotiations are primarily "orchestrators" concerned with the procedural aspects of bargaining. KOLB at 23-45.

a factfinding panel, which is empowered to conduct hearings and issue subpoenas. The panel will issue a written report recommending disposition of impassed items, but the recommendations are not binding on the parties.[13]

Within ten days from the date of the panel's decision, a party must accept or reject the factfinder's recommendations and promptly notify the Board and the opposing party of its choice. If the parties reject the recommendations, the panel "shall publicize its findings of fact and recommendations."[14] The parties then have an additional ten days in which to reconsider the rejection. Failure by a party to submit to the mediation or factfinding procedures "shall be deemed a refusal to bargain in good faith," and constitutes grounds for issuance of an unfair practice complaint.[15] Nothing in the mandatory procedures precludes an agreement to submit the impasse to voluntary binding arbitration.

Following exhaustion of the mandatory procedures, disputes are governed by Article X of the Act.[16] This article prohibits strikes by guards at prisons or mental hospitals and by employees "directly involved with and necessary to the functioning of the courts." It also prescribes appropriate employer actions in the event of such strikes.[17] Act 111[18] regulates police officers and firefighters not specifically covered by Act 195. These public employees, while denied the right to strike under Act 195, are nevertheless afforded a right to arbitrate bargaining impasses.

Provided the employees are not explicitly prohibited from striking, and the parties have exhausted the Act's mediation and factfinding procedures, a strike "shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public."[19] If the public employer believes that the strike exceeds the ambit of legislative tolerance, the employer may initiate an action for appropriate relief in the court of

13. PA. STAT. ANN. tit. 43, § 1101.802 (Purdon Supp. 1985). For an evaluation of the factfinding process in dispute resolution, see COLLECTIVE BARGAINING, *supra* note 9, at 292-297.

14. PA. STAT. ANN. tit. 43, § 1101.802(2) (Purdon Supp. 1985).

15. *Id.* at § 1101.803. With respect to unfair practices arising out of the impasse procedures, the board "shall be empowered to petition the court of competent jurisdiction for appropriate relief or restraining order." *Id.* at § 1101.1401.

16. *Id.* at § 1101.1001.

17. *Id.* at § 1101.1001. In the event of a strike by guards or court employees, "the public employer shall forthwith initiate in the court of common pleas of the jurisdiction where the strike occurs, an action for appropriate equitable relief including but not limited to injunctions." If the strike involves Commonwealth employees in the designated occupations, the chief legal officer or attorney general shall initiate the action.

18. Act of June 24, 1968, Pub. L. No. 111-237 (codified as amended at PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1985).

19. PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1985).

common pleas where the strike occurs. An injunction, however, will not issue simply because the strike disrupts routine procedures, or because the employer cannot furnish services.[20] Moreover, the strike must actually be in progress before issuance of an injunction.[21] Typically, the court will consider a number of factors in determining the merits of the action, including the population percentage affected by the strike, its interference with other statutorily mandated objectives, loss of wages of nonstrikers, and potential and actual violence.[22] If the court enjoins the strike, refusal of the employee or the labor organization to comply with the injunction may result in a variety of sanctions for contempt. The employee may be subject to discharge, a fine, or imprisonment, and the organization may be fined for each day it is in contempt.[23]

In general, Act 195 accommodates the various interests affected by public negotiations. It is premised on the assumption that a "limited and carefully defined right to strike [acts] as a safety valve that will in fact prevent strikes."[24] Nevertheless, despite Pennsylvania's example, the overwhelming majority of states permitting public bargaining reject the strike as a means of impasse resolution.[25] In the view of legislators in most states, work stoppages by public employees are unconscionable.[26] Legislative reluctance to endorse public employee strikes lies in the nature of our governmental system. Impasse resolution methods, including the strike, have significant consequences for the citizens of a community, and any proposed modification of bargaining legislation must consider the implications for the political process.

B. The Political Impact of Teacher Strikes

The ten-year period following the enactment of Act 195 in 1970

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20. *See, e.g.*, Armstrong Educ. Ass'n. v. Armstrong School Dist., 5 Pa. Commw. 378, 91 A.2d 120 (1972) (danger must be real or actual; disruption of routine school administrative procedures and sports activities, and community unrest did not justify issuance of an injunction).

21. *E.g.*, Division 85, Amalgamated Transit Union v. Port Auth. of Allegheny County, 16 Pa. Commw. 50, 329 A.2d 292 (1974) (court lacks jurisdiction to grant equitable relief until strike is in being).

22. *See generally* Decker, *Right to Strike for Pennsylvania's Public Employees—Its Scope, Limits, and Ramifications for the Public Employer*, 17 DUQ. L. REV. 755 (1978-79).

23. PA. STAT. ANN. tit. 43, §§ 1101.1007-.1008 (Purdons 1985 supp). The statute also sets forth various factors courts consider in assessing penalties for contempt, including unfair labor practices committed by the employer during bargaining, the extent of "wilful defiance" by the employee or organization, the harm caused to the public by the strike, and the ability of the employee or the union to pay.

24. GOVERNOR'S COMMISSION, *supra* note 10, at E-3 (emphasis omitted).

25. *See supra* note 4.

26. *See, e.g.*, IOWA CODE § 20.12 (1977) ("It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify, or participate in a strike against any public employer.").

witnessed an average of 31 school district strikes per year, with an average strike length of 13.1 days.[27] The 1972-73 school year was the peak year of strike activity in terms of direct impact on students and teachers. During that period, public school strikes affected 421,782 pupils and 19,438 teachers.[28] Measured in terms of number of work stoppages, activity was greatest in 1975-76, when 54 strikes occurred.[29] The number of days lost to strikes was highest in 1976-77, with a total number of 762.[30] While strike activity generally has declined from those levels, in 1984 Pennsylvania experienced 16 per cent of school strikes nationwide. Furthermore, since the enactment of Act 195, Pennsylvania has had a total of 22.9 per cent of school strikes in the United States.[31]

To evaluate Act 195, the Commonwealth sponsored a Commission, which issued its final report in 1978.[32] Although the Commission majority recommended no change in the law regarding teacher strikes, the minority proposed elimination of the teachers' right to strike and substitution of compulsory binding arbitration as the method of impasse resolution.[33] The minority reasoned that:

> There is no way to resolve the inherent conflict between the right of teachers to strike and the right of students to "a thorough and efficient system of education."[34] The ability of teachers to disrupt the educational process and interfere with the students' constitutionally guaranteed right to an education must be removed . . . . Eliminating the right of teachers to strike is consistent with the [express statutory] public policy of Pennsylvania insofar as the collective bargaining process must not be allowed to supersede the right of the citizens of this Commonwealth to "a thorough and efficient system of education."[35]

The minority report underscores the point that educational bar-

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27. H. BENEDETTO & P. VAN BRIGGLE, SUMMARY OF STRIKES, 1970-1980 1983 (supplemented through 1981/82 school year).

28. *Id.* at 14-15. In both the 1980-81 and 1981-82 school years, the total number of *teachers* affected by strikes (27,899 and 24,387, respectively) exceeded the 1972-73 figure. However, the combined number of students and teachers affected by strike activity is greater for the 1972-73 year than for any other year.

29. *Id.* at 18.

30. *Id.* at 19. The least number of days lost due to strikes was 278 during the 1970-71 school year.

31. PENNSYLVANIA SCHOOL BOARDS ASS'N, 23 INFORMATION LEGISLATIVE SERVICE 2, 4 (chart 8) (Aug. 30, 1985).

32. GOVERNOR'S STUDY COMMISSION ON PUBLIC EMPLOYEE RELATIONS, RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE CHANGE TO THE PUBLIC SECTOR COLLECTIVE BARGAINING LAWS OF PENNSYLVANIA (1978) [hereinafter cited as RECOMMENDATIONS].

33. *Id.* at 31-32.

34. PA. CONST. art. III, § 14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.").

35. RECOMMENDATIONS, *supra* note 32, at 31-32.

gaining occurs in a politically sensitive environment and that teachers, students, parents and school administrators represent different interest groups with different and often conflicting goals.

An analysis in the *Harrisburg Patriot-News* on September 4, 1983 reported that "[t]he target of the legislative mood to revise Act 195 is clearly aimed at public school teachers. What has lawmakers most upset is the fact that during the 13 years that Act 195 has been the law, there have been about 600 teacher strikes."[36] The *Patriot* article indicates that teachers are more prone to strike activity than other municipal employees. Albert Unger, Director of Governmental Relations for the Pennsylvania School Boards Association, was interviewed for the report. Unger claimed that salary and fringe benefit gains for teachers in states without collective bargaining laws or without the right to strike were equal to or greater than those in Pennsylvania. Unger described the belief that unions required the strike weapon to attain bargaining goals as a "fallacy."[37]

During the 1983 legislative session, fifteen bills proposing modifications to Act 195's negotiations process were introduced in the General Assembly.[38] The bills proposed altering the bargaining timetable, abolishing strikes and substituting binding arbitration, prohibiting strikes unless more than fifty percent of the union membership votes to strike, and permitting *residents* of affected school districts to seek injunctions, against teachers' strikes.[39] The legislature failed to enact any of these proposals.

In June 1984, a Senate task force created to study the impact of Act 195 on public schools issued a report recommending changes in educational bargaining procedures.[40] The recommendations included shortening the bargaining period from 150 days to 90 days, strengthening the mediation and factfinding procedures and restricting the school district's opportunities to make up school days lost due to strikes in order to meet the 180 day standard school year.[41] None of these measures were enacted during the 1984 legislative session.

In August, 1984, the Conemaugh Valley Board of School Directors adopted a resolution requesting the state legislature to eliminate the right of teachers to strike. Anthony Moran, Superintendent of

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36. Harrisburg Patriot-News, Sept. 4, 1983, at D1, col. 1.

37. *Id.* at col. 2. Notably, Unger's assertion runs contrary to the philosophy underlying both the National Labor Relations Act and public sector labor laws.

38. *Id.* The American Federation of State, County and Municipal Employees (AFSCME) and the Pennsylvania State Education Association (PSEA) were the major unions lobbying against any proposed modifications to Act 195.

39. *Id.* at cols. 2-5 ("There May Be 15 Ways to Change 195"). At present, residents do not have standing to petition a court for injunctive relief.

40. Harrisburg Patriot-News, June 20, 1984, at A1, col. 1.

41. *Id.* at A7, col. 1.

the Conemaugh Valley School District, also contacted other school districts to solicit support for the Conemaugh resolution.[42] Moran contends that Act 195 is unconstitutional as it pertains to teachers since teacher strikes are inconsistent with the constitutional mandate that the Commonwealth provide a "thorough and efficient system of public education."[43] Leon Hickman, the principal author of the 1968 Report that lead to the enactment of Act 195 shares this view.[44]

Empirical evidence suggests that work stoppages in the state's educational system are negatively correlated with student achievement. A 1981 study analyzed student achievement as measured by the Educational Quality Assessment instrument (EQA) in 134 school districts, 46 of which experienced strikes.[45] The study population included 538 elementary schools, 183 junior high/middle schools and 148 senior high schools. The results indicated that students in districts in which teacher strikes lasted between nineteen and twenty-four days achieved significantly lowered reading scores at all grade levels. Students in districts with strikes lasting more than thirteen days tended to have "significantly lower mathematics scores than students in districts with strikes lasting twelve days or less, or no strikes."[46] Thus, lengthy strikes adversely affected both reading and math achievement, while shorter strikes consistently had a more negative impact on mathematics scores. The authors concluded that "[r]egardless of the differences . . . both test areas indicate a negative effect of strikes on overall achievement and in respect to the length and timing of the strike."[47]

In summary, teachers' strikes have a substantial political impact. They generate considerable tensions within the educational system, tensions that may intensify when the collective bargaining process is resistant to citizen influence. Taxpayers within a school district may well conclude that the system is beyond their direct or indirect control and that they have little meaningful recourse from

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42. Letter by Anthony Moran (December 18, 1984) (copy of resolution attached). The letter suggests that other school boards adopt a similar resolution and forward it to the appropriate legislators, the Pennsylvania School Boards Associations, and the Governor.

43. *Id.*

44. The 1983 Harrisburg Patriot-News article reported that Hickman supports the abolition of teachers' right to strike. Hickman also reportedly has stated on another occasion that "[t]he constitutional right of our children to an education is on a collision course with competing demands of school teachers for adequate salaries and the need of school boards to balance their budgets without unacceptable demands upon the taxpayers." Harrisburg Patriot-News, Sept. 4, 1983, at D1, col. 3.

45. Caldwell & Moskalski, *The Effects of School District Strikes on Student Achievement*, 2 GOV'T. UNION REV. 3 (1981).

46. *Id.* at 13.

47. The authors argue that state legislatures should consider the relationship between strikes and student achievement: "Although collective bargaining is a useful vehicle for reaching contract agreement, impasse resolution techniques need to be improved to lessen the number and intensity of public school strikes." *Id.* at 14.

the results of negotiations.

III. Arbitration as an Alternative to Strikes

A. The Arbitration Process

Arbitration, a method of impasse resolution relatively effective at preventing strikes,[48] may appear to be the preferable means of dispute resolution in educational bargaining. Like factfinding, arbitration involves a hearing before an arbitrator or a panel of arbitrators. The parties present evidence and arguments, following which the arbitrator makes a written disposition of each impassed item. The arbitrator's determination is final and binding and constitutes the terms of the parties' labor agreement. Typically, the award will not be set aside by a court unless it is arbitrary, capricious, or lacking a rational basis.[49]

One variation of arbitration used in several states is "final-offer" arbitration. Under this method, the arbitrator's choice of substantive provisions is limited to the last offer made by one of the parties. The arbitrator may select the final offer on either an issue-by-issue or package basis, but the arbitrator does not have the discretion to compromise.[50]

In theory, final-offer arbitration precludes an arbitrator from "splitting the difference" between the parties' positions and is intended to encourage bargaining by forcing the parties to offer their best package prior to proceeding to arbitration. As one commentator observed:

> [F]inal-offer arbitration attempts to increase the costs of disagreement by eliminating arbitral discretion. Since the arbitrator must select one or the other final offer, the parties are induced to develop ever more reasonable positions in the hope of winning the award, and these mutual attempts to win neutral approval should result in the parties being so close together they will create their own settlement. The convergent movements should result because of the fear that the arbitrator will select the other side's offer.[51]

Thus, the "potentially severe costs of disagreement" assure that final-offer arbitration functions as a "strikelike" mechanism.[52]

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48. *Collective Bargaining*, *supra* note 9, at 295.

49. *See, e.g.*, Caso v. Coffey, 41 N.Y. 2d 153, 359 N.E.2d 683 (1976); *see also* Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C.L. REV. 557 (1980).

50. For a study of the method in three states, see J. STERN, et al., FINAL OFFER ARBITRATION: THE EFFECTS ON PUBLIC SAFETY EMPLOYEE BARGAINING (1975).

51. Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 INDUS. REL. 302, 304-05 (1975).

52. *Id.* at 305.

In settling disputes, the arbitrator's role is to formulate an agreement which as nearly as possible approximates that which the parties would have reached. One eminent arbitrator explained that:

> Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon considerations of policy, fairness, [sic] and expediency, of what the contract rights ought to be. In submitting this case to arbitration, the parties have merely extended their negotiations — they have left it to this board to determine what they should, by negotiations, have agreed upon. We take it that the fundamental issue is: What should the parties themselves, as reasonable men, have voluntarily agreed to?[53]

In order to arrive at a reasoned settlement, arbitrators rely on standards developed through prior adjudications in the field, although they are not bound to previous decisions. These standards "are not pulled out of the air — nor are they artificially created. They are, generally speaking, the very same ones that are used by the parties in their negotiations."[54] Furthermore these standards include prevailing practices within an industry or area, the nature of the work under consideration, the employer's ability to pay, productivity and general economic conditions. In some instances, the standards are incorporated into the enabling legislation. Michigan, for example, adopted specific legislation pertaining to arbitration for police and firefighters.[55] Michigan's statute establishes a panel of qualified arbitrators, from which the parties select arbitrators. The statute mandates the arbitrators' consideration of certain enumerated factors in resolving economic issues. These factors include the interests and welfare of the public, the financial ability of the governmental unit, comparable wages and working conditions of other similarly situated public and private employees in comparable communities, the consumer price index or cost of living and the overall present compensation of the employees.[56]

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53. Twin City Rapid Transit Co., 7 Lab. Arb. & Dispute Res. 845, 858 (McCoy, 1947).

54. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 745 (3d ed. 1972).

55. MICH. COMP. LAWS §§ 423.231-.246 (1976).

56. *Id.* at § 423.239. For an examination of Michigan's arbitration experience under the statute, see Kruger, *Interest Arbitration Revisited*, 36 LAB. L.J. 497 (1985). Kruger's study substantiates the thesis that arbitration is not an acceptable method of resolving public sector bargaining disputes. For example, Kruger notes that:

> The City of Detroit has released a position paper detailing its criticism of Act 312 [cited *supra* at note 55] and requesting that it be repealed. The city, possibly by sheer exposure, has been the most arbitrated public employer since the adoption of Act 312. It believes that Act 312 "has been a failure, not so much because it has failed to prevent strikes, but rather because it has caused greater problems than those it was meant to eliminate." The city favors the com-

Generally, then, arbitration appears to be a well-developed, established procedure which produces outcomes similar to the results of successful negotiations. In addition to preventing strikes, arbitration may contribute other positive aspects to the bargaining system. For example, arbitration may bring a measure of "expertise" to the relationship. Arbitrators are objective, impartial, knowledgeable experts capable of drafting agreements which may be superior to those the parties might themselves have devised. Further, the presence of a neutral arbitrator assures a level of fairness and stability in negotiations, since neither party is permitted to overwhelm the other.[57]

Given the positive attributes of arbitration, it would seem an appropriate solution to the problems arising out of teacher bargaining under the strike system. Despite its superficial attractiveness, however, arbitration's weaknesses render it more politically untenable than teachers' strikes. Arbitration is antithetical to the basic concept of collective negotiations and to precepts of democratic government.

B. The Weaknesses of Arbitration

1. Arbitration and Bargaining.—When assessed from the ideal of a mutual, voluntary resolution of differences, arbitration has a pronounced tendency to inhibit genuine bargaining because, rather than engaging in realistic negotiations, the parties select the less painful alternative of arbitration. One critic argues that:

> Arbitration will be invoked because one or both sides believe that an arbitration award may be more favorable than a negotiated agreement *and* because one or both believe the costs of using arbitration are comparatively low (none of the trauma and costs of a work stoppage and none of the uncertainty of using other forms of political influence). As a result of this cost-benefit calculus, the availability of arbitration may have a "chilling effect" upon the parties' efforts to negotiate an agreement, and over time there may be a "narcotic effect" as the parties become arbitration addicts who habitually rely on arbitrators to write their labor contracts.[58]

It may be argued that the chilling and narcotic effects of arbitration are an unavoidable consequence of the process itself. Unlike strikes, which result in deprivation to the parties, arbitration is rela-

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plete repeal of Act 312, or, alternatively, substantial modification. *Id.* at 512.

57. Horton, *Arbitration, Arbitrators and the Public Interest*, 28 INDUS. & LAB. REL. REV. 497 (1975) [hereinafter cited as *Arbitration*].

58. Feuille, *Selected Benefits and Costs of Compulsory Arbitration*, 33 INDUS. & LAB. REL. REV. 64, 73 (1979).

tively inexpensive and entails virtually no risk of loss. At worst, the arbitrator will simply decline to grant a particular demand, and the "losing" party remains in substantially the same position. Further, once the procedure is invoked, reliance on the process becomes predictable behavior in future negotiations.[59] Thus, while arbitration minimizes strikes, it does little to encourage the parties to bargain for agreement. The only means by which it might do so would be to increase the costs of disagreement incurred by the parties in invoking the arbitration process.

For example, in Pennsylvania police officers and firefighters are exempted from Act 195. Bargaining for these employees is governed by Act 111,[60] which provides for arbitration to resolve impasses in negotiations. Data pertinent to Pennsylvania's experience support the contention that arbitration produces a "narcotic" effect. According to a recent study of arbitration under Act 111:

> Pennsylvania's police and firefighters' arbitration system has had by far the highest proportion of negotiations ending in arbitration awards of any system under review in this volume. Consistently, over a fifteen-year period, a quarter or more of all negotiations for a new contract have been resolved by a binding arbitration award. An especially high percentage of all disputes arriving at arbitration each year comes with no issues settled beforehand, which is a clear indication that bilateral collective bargaining is not being used effectively.[61]

The 1978 Commission Report which evaluated public sector bargaining legislation in Pennsylvania echoed these conclusions.[62] After reviewing the arbitration method and its results, a minority of the Commission concluded that:

> The arbitration process is not conducive to good faith collective bargaining. When both parties know binding arbitration is the final impasse procedure, little bargaining will take place. Instead, each side will put forth maximum proposals and refuse to make concessions for fear of eroding their bargaining positions when the impasse ultimately goes to arbitration.[63]

The minority recommended elimination of binding arbitration as a means of dispute resolution.

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59. Studies tracking successive rounds of negotiations in the same bargaining units "have concluded that (1) an increasing pattern of dependence on impasse procedures is observed overtime, and (2) the reliance on a particular procedure in one round of bargaining increases the probability that the same procedure will again be invoked in subsequent rounds." COLLECTIVE BARGAINING, *supra* note 9, at 296.

60. *See supra* note 18.

61. R. LESTER, LABOR ARBITRATION IN STATE AND LOCAL GOVERNMENT 24 (1984).

62. RECOMMENDATIONS, *supra* note 32.

63. *Id.* at 32.

Academic studies of the chilling and narcotic effects of arbitration, while not altogether conclusive, generally tend to support such criticisms of the process. One early study found that, in states providing for arbitration, a consistently greater number of firefighter negotiations ended in impasse as compared with impasses in states providing only for mediation and factfinding.[64] The author concluded that the findings "would appear to lend some support to the argument that arbitration has a 'narcotic effect' on bargaining."[65] Subsequent studies confirm that conclusion.[66]

A recent survey of research on the subject analyzed the results of thirty-two nonlaboratory studies dealing with the impact of arbitration on negotiations.[67] The survey distinguishes between the "chilling" effect and the "narcotic" effect. The former assumes that if arbitration is available to resolve impasses, the parties will be less inclined to make concessions in bargaining. The latter suggests that there will be an "increased probability of using arbitration given previous use of the procedure."[68]

With respect to arbitration as an inhibitor of bargaining, the survey suggests that most research tests the "chilling" effect by examining the percentage of settlements at each stage of the impasse procedure. A relatively higher proportion of settlements through arbitration indicates the chilling effect.[69] However, if the chilling effect is tested by examining movement in bargaining prior to arbitration, the effect is significantly diminished. Under that criterion, "it is difficult to conclude that a chilling effect actually exists."[70]

The survey concludes that the effectiveness of compulsory arbitration is unknown.[71] Since available research is limited not only in terms of the criteria used to evaluate effectiveness, but also in terms of design and methodology, "the weight of evidence supporting the chilling and narcotic effects rests on a few quasi-experimental studies

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64. Wheeler, *Compulsory Arbitration: A "Narcotic" Effect?* 14 INDUS. REL. 117 (1975).

65. *Id.* at 120.

66. *See* COLLECTIVE BARGAINING, *supra* note 9, at 296. *See also Dispute Resolution, supra* note 6, at 171-75.

67. Anderson, *The Impact of Arbitration: A Methodological Assessment*, 20 INDUS. REL. 130 (1981).

68. *Id.* at 131.

69. *Id.* at 134. Anderson found that "[b]y far the most popular hypothesis tested [in the studies] was the chilling effect of arbitration on collective bargaining. Twenty-one studies used the proportion of cases resolved at arbitration as a measure of the chilling effect, and most concluded that the effect was present."

70. *Id.*

71. *Id.* at 144. A recent study, echoing this conclusion, asserts that "[t]he empirical evidence on this important issue [the narcotic effect] is quite unclear." Chelius & Extejt, *The Narcotic Effect of Impasse Resolution Procedures*, 38 IND. & LAB. REL. REV. 629 (1985). *But cf. infra* note 78 (other authorities are to the contrary).

of a small number of jurisdictions."[72]

Despite the somewhat ambiguous and inconclusive evidence of the empirical investigations, the tendency of arbitration to deter genuine bargaining can be established on a theoretical level by deductive modeling. One expert proposes a negotiations model based on the hypothesis that whether arbitration provides an incentive to negotiation "can only be determined by a comparison of uncertain and costly arbitrated settlements with uncertain and costly negotiated settlements."[73] The assumption underlying the model is that a party's estimation of cost relative to its certainty is the motivator of bargaining.

"The chilling effect arises when arbitration reduces the uncertainty surrounding the outcome of a labor dispute or when arbitration yields an expected savings in the direct cost of reaching a settlement."[74] Thus, increasing the costs of arbitration relative to the costs of negotiation will serve to overcome the chilling effect. Since the parties will have an incentive to negotiate when there is less uncertainty regarding the outcome and costs of negotiation than when there is uncertainty concerning the outcome and costs of arbitration:

> Perhaps the most important conclusion that can be drawn for policymakers from [the results of the model] is that the implementation of compulsory arbitration is likely to subvert and attenuate collective bargaining when the parties view this mechanism as the least costly alternative for establishing a contract. Especially in situations where the arbitration mechanism replaces the strike as the instrument by which the parties can impose costs of disagreement on each other, it would not be at all surprising to observe a lower incidence of voluntarily negotiated settlements.[75]

Moreover, legislators who desire to protect the public from the expense of strikes by enacting arbitration provisions should recognize that arbitration may only serve to insulate the negotiating parties from the costs of their disagreements.[76]

The above model does not contemplate the option of final-offer arbitration, which might provide an alternative by which to avoid the

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72. Anderson, *The Impact of Arbitration: A Methodological Assessment*, 20 INDUS. REL. 130, 145 (1981).

73. Bloom, *Is Arbitration Really Compatible with Bargaining?*, 20 INDUS. REL. 233, 235-36 (1981).

74. *Id.* at 240. Bloom also argues that the chilling effect does not arise from the parties' assumption that an arbitrator will "split the difference" between the respective positions, but rather from the parties' "maximizing behavior," activity which is reduced to the extent that uncertainty is reduced.

75. *Id.* at 243.

76. *Id.*

problem of disagreement's relatively low costs. The final-offer method may entail potentially greater costs because it forces the arbitrator to choose between extreme positions. Presumably, in this event the parties will sufficiently moderate their demands to reach agreement, but as one arbitrator has observed:

> Although [final-offer arbitration] would appear to stimulate the parties to set forth their true final demands, it need not in fact elicit such honesty. Each side is bound to frame its last offer in the light of what it believes will be forthcoming from the other side. And indeed, the "last offer" from both might be little different from their initial positions, placing the arbitrator in an untenable position if he wishes to issue an award which is most likely to provide the greatest assurance of the parties' continuing in a good ongoing relationship. Additionally, the number of issues which traditionally constitute an impasse make a simple choice of one side's last offer by the arbitrator not only weighty but, more importantly, conducive to destruction rather than improvement in the parties' relationship.[77]

Thus, final-offer arbitration fails as a panacea for arbitration's inherent weaknesses as a method of impasse resolution.

In summary, arbitration is inconsistent with the ideal of negotiated settlement of bargaining impasses. Empirical evidence supports the chilling and narcotic effects of arbitration,[78] and the relatively trivial cost of arbitration encourages negotiators to rely on that procedure rather than engaging in realistic bargaining. At best, arbitration provides a strike substitute rather than a device for motivating the parties to reach a negotiated labor agreement.

2. The Arbitrator and the Political Process.—Mediation and factfinding have no binding effect on the parties, who remain free to accept or reject any recommendations. Since arbitration results in a final and binding disposition of disputed issues, it is both a substitute

77. Zack, *Impasses, Strikes and Resolutions*, in PUBLIC WORKERS AND PUBLIC UNIONS 120 (S. Zagoria ed. 1972). *See also*, Feigenbaum, *Final Offer Arbitration: Better Theory Than Practice*, 14 INDUS. REL. 311 (1975) (final-offer arbitration plausible only in theory; has no greater deterrent effect than conventional interest arbitration; final-offer arbitration awards are significantly almost inevitably worse than conventional ones).

78. A recent survey concludes that "[a]lthough there has been no methodologically perfect study proving or disproving the existence of the chilling effect, the substantial experience of many employers and employees suggests that such an effect does exist." Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1710 (1984). The available data on the narcotic effect of arbitration leads "both friends and foes of arbitration" to acknowledge a demonstrable tendency towards increasing reliance on the process. *Id.* at 1711. Thus, "although arbitration initially seems to offer a fair and practical alternative both to the strike and to the unilateral resolution of impasses by public employers, it is an alternative with serious drawbacks — drawbacks that are intensified by the chilling and narcotic effects." *Id.* at 1712.

for strikes and a significant method of strike prevention. Nevertheless, arbitration may be inconsistent with our system of democratic government because arbitration involves decision-making by private citizens who are not accountable to the public.

In contrast, democratic decision-making is premised upon procedures by which duly elected representatives enact laws and implement policies. These representatives are regularly accountable to the public through the election process. Additionally, democracy's participatory nature and the substantive distribution of benefits achieved through this system have a value independent of the decision-making accountability.[79]

Several commentators argue against arbitration from the standpoint of political theory. One of the more forceful articulations recognizes that decisions made during collective bargaining negotiations vitally affect the public.[80] If an arbitrator makes these decisions, citizens lose the right to influence the final result in the dispute. It deprives them of a meaningful opportunity to participate in the resolution process. While some degree of delegation is a necessary ingredient in democratic government, the power afforded arbitrators to affect decision-making far exceeds the permissible limits of delegation.[81]

This rationale uses the political theory criticism as a basis for rejection of public sector unionism. An inherent conflict between public bargaining and democratic decision-making arises because the negotiations process requires the "sharing" of power with a private group:

> [T]he statutes do not *obligate* the public employer to agree with any particular union proposals for the exercise of this authority. But if the public employer refuses to agree to union proposals within the scope of bargaining, the statutes generally provide for "impasses resolution" procedures in which third-party neutrals intervene. For this intervention to be effective, that is, for it to lead to "settlements," these third parties must work out accommodations that inevitably effectuate *some* union proposals. Where statutes provide for compulsory arbitration to determine "terms and conditions of employment," as they increasingly do, democracy is diminished even further, for the arbitrator is the

79. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

80. R. SUMMERS, COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE (1976) [hereinafter cited as PUBLIC BENEFIT CONFERRAL].

81. Summers' argument commences with the proposition that "[b]efore the enactment of bargaining laws, public employing bodies had exclusive power (subject to the control of or accountable to the public) to make and administer laws and policies about personnel [decisions]." *Id.* at 3. The derogation of democratic decisionmaking, he contends, is thus to be measured from the perspective of complete employer discretion, subject only to electoral restraints.

> decision maker — a private party who does not even share public power with a public employer.[82]

Thus, in terms of democratic ideals, arbitration is an unacceptable method of conflict resolution, regardless of its effectiveness in minimizing strikes.

A similar attack on arbitration asserts that "interest arbitration is inimical to a basic precept of political democracy, namely, that authoritative political decisions should be reached by government officials who are accountable to the public."[83] This formulation suggests that the fundamental defect of arbitration lies not in the nature of arbitrators' decisions, but in the process by which arbitrators reach those decisions. To assure continued employment, arbitrators "must consider the personal as well as labor relations consequences of their arbitration decisions."[84] Arbitrators are "politically" motivated. The arbitrator is not unlike "political leader[s] who must dispense patronage in an environment where more than one claimant to patronage exists."[85] The alleged "expertise" of the neutral thus fails to justify arbitration as a method of dispute resolution.

It is argued that an adequate theory of the "public interest" must consider three propositions. First, there are conflicts of interest among groups affected by the labor relations process. The basic conflict arises between labor and the public, not between labor and management.[86] Second, the labor relations process redistributes resources. Third, all groups do not benefit equally from that redistribution. Following these theoretical premises, arbitration is an inappropriate vehicle for allocating public resources. To strengthen the labor relations process and minimize reliance on arbitration, the legislature should legalize certain public employee strikes. If arbitration must be employed, arbitrators should be selected at random and should meet minimal levels of competence before admission to the arbitration panel.[87] In general, however, "[n]o readily foreseeable re-

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82. *Id.* at 4 (emphasis in original).

83. *Arbitration, supra* note 57, at 499. Horton also observes that arbitrators are by design shielded from accountability.

84. *Id.* at 500-01.

85. *Id.*

86. *Id.* at 502-03. Horton's perception of the tension between labor and the public is significant in the context of educational bargaining. In some instances, public officials, rather than aligning their labor relations objectives with those of the public, pursue re-election strategies. Current impasse resolution mechanisms, including the strike, fail to provide the public direct control over the negotiations process, and cannot impose the costs of disagreement on the union (for example, by replacement of striking teachers). Only designated public officials can initiate action; elected school board members are not necessarily responsive to the desires of the individual citizen because political change in school districts occurs only when groups oppose board policies. *Id. See also infra* notes 96-103 and accompanying text. Thus, as Horton contends, existing dispute resolution procedures may actually impede the public interest.

87. *Arbitration, supra* note 57, at 506-07.

forms could overcome the objection to interest-arbitration based on political democracy, short of eliminating arbitration or electing arbitrators."[88]

From the perspective of resource allocation by means of democratic procedures, the above commentaries appear unassailable. If accountability forms the touchstone of democratic decisionmaking, then arbitration is conceptually repugnant to that process. While theoretical clarity is not typically a criterion of acceptability in our political system, the conflict between arbitration and democracy remains intractable.

IV. The Referendum Model

This section proposes an alternative dispute resolution framework that incorporates various features of the impasse techniques previously discussed. The Referendum Model[89] presents each step of the procedure with an accompanying commentary. The procedure assumes integration within a larger statutory scheme such as Act 195. While the Model is applicable to all public employees, its particular relevance to teacher bargaining is developed in Part V.

Step 1. Notification of Impasse.—The parties engaged in negotiations for a public sector labor agreement are required to notify the Board of a bargaining impasse. Notification will be in the form of a summary statement of the issue or issues in dispute and the respective positions of the parties with regard to the dispute. If the parties cannot agree on the contents of the notification, each party may submit its own statement. Either party may declare an issue or the ne-

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88. *Id.* at 507.

89. *The Regional Transportation District Strike*, *supra* note 3 first proposed the Model. It was subsequently developed in Hogler & Krisciun, *Impasse Resolution in Public Sector Collective Negotiations: A Proposed Procedure*, 6 INDUS. REL. L.J. 481 (1984) [hereinafter cited as *Impasse Resolution*]. For a treatment of the Model in relation to the educational system generally, *see* Hogler & Thompson, *Collective Negotiations in Education and the Public Interest: A Proposed Method of Impasse Resolution*, 14 J. LAW & EDUC. 443 (1985). Certain perceived weaknesses in the theory were pointed out in Hansen & Allen, *Public Referendum: Is it an Effective Mechanism for Resolving Collective Bargaining Impasses? A Union Response*, 14 J. LAW & EDUC. 471 (1985). The present work responds to those criticisms by focusing on the specific collective bargaining experience in education in one state. The viability of the Model thus becomes much more apparent.

One empirical study concludes that public referenda are not an effective means of resolving collective bargaining impasses. Barnum & Helburn, *Influencing the Electorate: Experience with Referenda on Public Employee Bargaining*, 35 INDUS. & LAB. REL. REV. 330, 342 (1982). The study, however, examined elections involving collective bargaining legislation rather than impasses in negotiations. Therefore, the authors' conclusions are of limited validity relative to the Model proposed here. A more pertinent example is the case study of the Denver Firefighters' referendum election described in *Impasse Resolution*, *supra* at 500-503.

gotiations to be at impasse.

Comment

Although either party may declare one or more issues or the entire negotiations to be at impasse, the Model encourages bargaining by making the consequences of impasse extremely onerous. Once the parties reach impasse neither has the power unilaterally to terminate the process of resolution. Since both parties must proceed to the final step unless they agree otherwise, impasse will occur only when a party is prepared to incur the costs of disagreement.

The written notification is also an important feature. The parties may submit a statement of their positions on each impassed item either jointly or separately. In either case, unless the parties agree otherwise, the notification fixes certain ballot options available under Step Four.

Step 2. Mediation.—Within ten days, the Board will appoint a mediator to mediate the dispute at no cost to the parties. The parties, alternatively, may select and compensate their own mediator, if approved by the Board. The parties will be given a ten-day period to attempt, with the assistance of the mediator, to resolve the impasse. Following the mediation period, the mediator will report in writing concerning the impasse. The Board in its discretion may make the mediator's report public.

Comment

Mediation has proved a useful tool in resolving disputes when the parties have a genuine desire to reach agreement and the negotiations are within a "zone" of contract.[90] Under the Model, mediation will also prove valuable, since the parties here have a greater incentive to bargain than under other formulations.

The mediator's report may contribute to bringing the parties toward agreement. Since the report may figure in a referendum election described in Step Four, the parties will be encouraged to moderate their positions in anticipation of a vote. Sufficient movement might thus lead to settlement. Additionally, the Board's actual or threatened publication of the report offers the parties further incentive to justify their demands.

Step 3. Factfinding.—If mediation is not successful, the Board will direct the parties to engage in factfinding. The Board will appoint the factfinder, including, in its discretion, a factfinder jointly requested by the parties. The proceeding will include a hearing with

90. *See generally* COLLECTIVE BARGAINING, *supra* note 9, at 272-284.

the introduction of evidence, examination of witnesses, and argument. At the conclusion of the hearing, the factfinder will issue a written report resolving each impassed matter, with a statement of reasoning in support of the recommendation. The report shall be made public. On a designated date no later than ten days following issuance of the report, the parties shall simultaneously serve notice on the Board indicating acceptance or rejection of any or all of the findings. The parties shall have an additional five-day period thereafter to engage in bargaining.

Comment

The factfinding process maximizes the risk of a detrimental outcome for both parties. The most basic risk is that the loser may reject the factfinder's disposition of any or all issues, thus forcing the winner to either capitulate to the loser's demands or proceed through another step in the Model's procedure. Since both parties decide whether to accept or reject before learning the other's decision, the negotiator will tend to adopt a conservative strategy, accepting the factfinder's disposition if possible. A rejection of the factfinder's determination, particularly if one party has accepted it, will push the dispute into the next phase of the procedure and might lead to economic or political trauma. Since neither side will desire to attribute an irrational mentality to the other, factfinding might result in a voluntary resolution, the parties electing to abide by the factfinder's report as a disposition in their best interests. Thus, in practice, factfinding will remain consistent with its theoretical assumptions.[91]

Step Three also contains one final inducement to agreement. After the report is made public, the parties have an additional period in which to negotiate. If either party wishes to reconsider its previous position in light of public opinion, it has the opportunity to do so. However, the factfinding winner retains an advantage, since the loser has the burden of initiating the next phase.

Step 4. Referendum.—If the collective bargaining representative rejects any or all of the factfinder's recommendations, it may submit the impasse to a referendum of the electorate. The choices on the ballot shall be the factfinder's recommendation on the particular issue and the proposal which the representative submitted to impasse. The cost of the election shall be borne by the representative, and the election commission may require adequate funds to be

91. Theoretically, the factfinder's report should generate such public pressure that the parties will accept the recommendations. McKelvey, *Factfinding: Promise or Illusion*, 22 INDUS. & LAB. REL. REV. 543 (1969). However, "[e]very study of factfinding in the public sector has concluded . . . that it has not had this effect." COLLECTIVE BARGAINING, *supra* note 9, at 293.

placed in escrow.

If the representative and the employer both reject any or all of the factfinder's recommendations, a referendum shall be held. The choices on the ballot shall be the respective positions of the parties prior to factfinding, as contained in the mediator's report. Alternatively, the parties may mutually agree to the specific language of the ballot. In the event of a joint referendum, the cost of the election shall be shared equally between the representative and the employer.

Comment

The Model's key feature is the referendum election,[92] a device providing for direct public participation. However, the public employer may not, at its option, invoke the referendum mechanism. Otherwise, public officials could refer every difficult question to an electoral vote and thus avoid the responsibility of controversial decisions. If the union representative rejects the factfinder's report, it can appeal to the public and assume the costs for exercising that right.[93] If both sides disagree, the election costs are shared equally. Presumably, employer representatives who expend public funds on a referendum and suffer defeat may be threatened with loss of position in the next general election.

Step 5. Strike.—If the employer rejects any or all of the factfinder's recommendations, the labor organization shall be permitted to undertake a strike, provided it furnishes notice of its intent to do so at least ten days prior to the commencement of the action. Once the strike is actually in progress, the employer may petition the Board for an order declaring the strike to be an immediate and significant hazard to the public welfare and enjoining employees from further strike activity. If the employer seeks and obtains such an order, the factfinder's disposition of the impasse shall be implemented as the terms of the labor agreement.

Comment

The Model proposes that all public employees, including police officers and firefighters, be afforded a right to strike. Three specific safeguards in the system protect the public interest. First, the union cannot strike unless the employer rejects the factfinder's award. If officials believe a strike would cause serious harm to the public, they can prevent a strike by implementing the award. Thus, the employer

92. The concept of a referendum election to resolve bargaining impasses originated in Englewood, Colorado. *See Impasse Resolution, supra* note 89, at 500 n. 117.

93. Denver, Colorado's city charter authorizes referendum elections to resolve bargaining impasses. On one occasion, a local firefighters union used the procedure at a cost of $160,000, or approximately $360 per union member. The citizens voted in favor of the union's position. *See Impasse Resolution, supra* note 89, at 500-503.

has the exclusive control of the strike option.

Second, citizens threatened with a strike who make their views known to the appropriate officials have an opportunity to influence the strike decision and to choose whether to suffer the hardship of a strike in exchange for lower service costs. Presumably, the more vital the service, the more vociferous and animated the public debate. If it appears that the strike will enjoy little or no public support, only foolhardy unions will proceed.[94] Conversely, if there is support for the strike, the employer may choose to offer concessions, thus avoiding the work stoppage.

Third, the public employer can attempt to enjoin the strike once it has commenced on the ground that it poses an immediate and substantial hazard to the public welfare. The disincentive for obtaining an injunction is that the factfinder's disposition is enforced as the terms of the contract. Officials risk suffering a substantial loss of public esteem if, by forcing a harmful strike on the electorate, they gain nothing from the tactic.

These features eliminate any serious objections to affording public employees, including teachers, an opportunity to strike. The strike does not generate undue political pressure because the public decides whether to accede to the factfinder's award or to suffer the work stoppage, and because the threat of a strike is removed from union control.[95] Additionally, a harmful strike may be enjoined. Thus, a community can be threatened by a public employees' work stoppage only if the employer determines that a strike is in the public's best interests.

V. The Model and School Governance

A. A Theory of Political Change in Local School Districts

To determine whether the theory of democratic governance operates successfully in the educational system, it is first necessary to formulate a coherent theory to test the presence or absence of demo-

94. For an analysis of the importance of public support to unions engaged in a public sector work stoppage, *see Impasse Resolution, supra* note 89, and *Dynamics of Dispute Resolution, supra* note 6, at 163-69.

95. The political impact of public sector strikes has occasioned substantial debate. One contention is that public strikes exert undue pressure on public officials and distort the political process. Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969). *But see* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970). The California Supreme Court recently held that public employees are not prohibited at common law from engaging in work stoppages against a public employer. County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n Local 660, 38 Cal.3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985) (little empirical evidence to demonstrate that governments generally capitulate to unreasonable demands by public employees to resolve strikes). For a further analysis, see Hogler, *The Common Law of Public Employee Strikes: A New View in California*, 37 LAB. L.J. ____ (forthcoming February 1986).

cratic control. Three major concepts of control have been developed.[96] The first theory of democratic control in school districts is based on the concept of "continuous competition." Underlying the theory is "the general belief that democracy is especially concerned with universal citizen participation."[97] The theory is based on the "essential criterion position" that "democracy requires the regular, continuous political competition and opposition among a wide range of informed groups with diverse interests in policy decisions."[98] Since voter turnout in school board elections is relatively low, incumbents are usually re-elected, and few issues attract widespread community attention, adherents of this theory conclude that "present school district governments are fundamentally and perhaps unredeemably undemocratic," and board members tend to function as mere figureheads for school superintendents.[99]

The second theory of school governance is the "decision output" theory, which defines democracy as a congruence between the desires of citizens and the response of the school system. This theory places emphasis on board members' reactions to public demands, and "[t]he correspondence between what officials do and what their constituents or clients would have them do or need is the key criterion value for judging the democratic character of local school politics."[100] Unfortunately, the "decision output" theory lacks any capacity to predict or explain democratic control on a general level. Each case must be examined on its own merits to determine whether the school district met the expectations of the electorate and thereby satisfied the criterion of democracy.

A third theory of school governance finds our educational system highly democratic in quality and subject to meaningful control by interested citizens, provided democracy is understood as the power of the electorate to oust incumbents. This model is based on a theory of "dissatisfaction." Change occurs in school districts only when there is such a divergence between the desires of the governing elite and the popular will that public frustration with educational policy reaches a critical level. A predictable pattern of political upheaval then produces the change. "[D]issatisfaction theory identifies democratic control with episodic adjustment of school district policy to the will or value of the larger community, rather than with any minimum level of continuous competition or correspondence in ad-

96. F. LUTZ AND L. IANNACCONE, PUBLIC PARTICIPATION IN LOCAL SCHOOL DISTRICTS: THE DISSATISFACTION THEORY OF DEMOCRACY (1977) [hereinafter cited as DISSATISFACTION THEORY].

97. *Id.* at 126.

98. *Id.*

99. *Id.*

100. *Id.* at 128.

ministrative decisions to client needs."[101] To adequately understand the politics of local school districts, it must first be realized that "the political myth of regular widespread participation in self-government is unrealistic and unsupported by empirical evidence in any representative or democratic society on which we have data, from Athens to date."[102]

Viewed as the capacity of one group to unseat those in power, democracy flourishes in local school districts. Control is effectuated in a well-defined progression beginning with citizen dissatisfaction (DIS), which results in the incumbent board member's defeat (ID), followed by involuntary superintendent turnover (STO) and outside succession (OS). This theory is now well established in over a decade of research across the United States, and "whatever the room for improvement, the American school district is fundamentally a successful democratic government. Thus the most important practical implication is to strengthen the local school district."[103]

B. The Educational Theory and the Model

If the dissatisfaction theory is correct, and democratic control in school districts arises through episodic adjustment prompted by citizen dissatisfaction, the Referendum Model is an ideal mechanism for resolving conflict within school districts. Initially, it would be advantageous to provide for political intervention in educational policy at routine intervals. Affording voters an opportunity to approve or disapprove the negotiations process would produce change on an institutionalized basis. The knowledge that they would participate in resolving bargaining impasses would encourage citizens to follow collective negotiations with interest, endorsing or rejecting school board members' views in a referendum election. Rejection of a member's position might contribute to the member's defeat in the next school board election, replacement of superintendent, and a change in educational policy.

Similarly, if the democratic process in school systems originates in conflict, the Referendum Model will focus and confine conflict to clearly defined channels of resolution. For example, an impasse in

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101. *Id.* at 130.

102. *Id.* This conclusion contrasts sharply with Summers' position in PUBLIC BENEFIT CONFERRAL, *supra* note 80; "In nearly all aspects of local educational decision making, powerful interest groups did not hold sway. There are usually substantial citizen interest and participation in school policy at local levels, and elected officials were by law accountable and frequently responsive." *Id.* at 2. From this observation, which is unsupported by authority, Summers concludes that educational bargaining is incompatible with the democratic control of education. The theory developed by Lutz and Iannaccone, however, would tend to strengthen the role of collective bargaining in education. *See* Part V (B) of this article.

103. DISSATISFACTION THEORY, *supra* note 96, at 131-32.

negotiations might involve an issue with significant implications for the public interest.[104] The Model assures the issue's presentation in a specific context, with both parties attempting to clarify their positions and gain public support.[105] Moreover, citizens may express their views through a mechanism with direct and immediate impact, rather than through the attenuated procedure of electing a board member sympathetic to those views. Both the parties and the public benefit because the conflict is resolved in an orderly fashion with a minimum of trauma.

Finally, and perhaps most significantly, the Model assures the citizen a voice in educational bargaining. The structure of bargaining systems demands that the employer negotiate exclusively with the designated bargaining representative.[106] No other group has either a statutory[107] or a constitutional[108] right to participate in negotiations. The Referendum Model preserves the concept of exclusive representation while providing formal public access in the event of impasse. Thus, the Model has an important advantage over both striking and arbitration.

C. Implementation Through Local Option

In view of past unsuccessful attempts to modify Act 195 as it pertains to teacher strikes, any future efforts at reforms would seem certain to fail. For example, the State's two major teachers' unions opposed the 1984 Senate task force report in several crucial respects. Both the Philadelphia Federation of Teachers and the Pennsylvania State Education Association disagreed with the recommendation that school days lost to strikes should not be made up after June 15 in any school year.[109] In addition to this opposition, three task force members disagreed at least partially with the report.[110] Senator

104. For example, in 1984, the Chicago, Illinois school board attempted to cut employee pay and benefits by $37 million. A total of 40,000 school employees, including 24,000 teachers, commenced a work stoppage which closed 596 public schools with an enrollment of 430,000 students. Chicago Tribune, Dec. 4, 1984, at 1, col. 2 and at 2, col. 1.

105. For a treatment of the parties' campaigns in the Denver referendum, see *Impasse Resolution, supra* note 89, at 500-03.

106. *E.g.*, Lullo v. Fire Fighters, Local 1066, 55 N.J. 409, 262 A.2d 681 (1970) (upholding the constitutionality of the state's collective bargaining law providing for exclusive representation by one bargaining agent).

107. *E.g.*, PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1985) ("Representatives selected by public employes in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employes in such unit . . . .").

108. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (rejecting attack on state collective bargaining law as violative of U.S. Constitution with respect to exclusive representation). *See also* Minnesota State Bd. of Community Colleges v. Knight, 465 U.S. 271, 104 S.Ct. 1058 (1984) (the U.S. Constitution does not grant the public a right to be heard by public bodies making decisions of policy).

109. The Pittsburgh Press, June 20, 1984, at B4, col. 1.

110. *Id.*

Michael Fisher, the Chairman, observed that "it was difficult to get a consensus among legislators for changes in the state public employee law."[111] Thus, a different approach to the problem of legislative change is necessary.

Since education is regarded as a matter particularly within the province of local control,[112] any modification of educational bargaining should be effected at the school district level. One strategy would afford local school districts the option of resolving bargaining impasses through the Referendum Model rather than by means of the strike model. An amendment to Act 195 allowing for the dispute resolution alternative would accomplish this. If the community selected the Referendum Model during a general election, the Model's procedures, rather than those of Articles VII and X of Act 195 would govern school negotiations. Thus, districts could experiment with impasse procedures to determine which is more suitable to local conditions.[113]

Neither organized labor nor any other group would have tenable grounds to oppose the legislative strategy just described. Even if labor did not generally favor the Referendum Model, it could hardly argue that the community should not have an opportunity to express its opinion at the voting booth. Rejecting the local option concept would be tantamount to rejecting the principle that local democratic control is the foundation of our educational system.[114] By exerting political pressure, however, teachers in the district could defeat the Referendum Model.[115]

Furthermore, the state legislators could not rationally vote against such a measure, since the local option provision would merely refer a legislative choice to the electorate. The general electorate is as capable of making a choice in this particular instance as

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111. *Id.*

112. *See* PUBLIC BENEFIT CONFERRAL, *supra* note 80. According to Summers, public sector bargaining has pernicious consequences in the field of education because local school districts are democratic institutions.

113. Specifically, the framework set forth in steps 1-5 in Part IV of this article could be added as § 1101.808 of title 43, PA. STAT. ANN. The section would contain a proviso that, during a general election, the voters within a school district could choose to implement the Referendum Model rather than the procedures of Act 195. Thus, the substantive provisions of Act 195 would not be altered at the state level.

114. As Lutz and Iannaccone conclude, the implication of their research is that local school districts should be strengthened through enhancement of democratic tendencies. *See supra* notes 96-103 and accompanying text. Arguably, the major defect of Act 195 with respect to teacher bargaining is that it precludes any local control over negotiations.

115. In the Denver referendum election discussed in *Impasse Resolution*, *supra* note 89, the union persuaded a majority of voters to support is position. That study demonstrates the political effectiveness of a labor organization conducting an intense grass-roots campaign within a community. Presumably, a group of teachers could defeat any measure demonstrably contrary to the goal of quality education.

the elected representative.[116] Moreover, since legislators would not be advocating any position, but merely permitting their constituents to do so, they would avoid antagonizing powerful pressure groups.[117]

A final advantage supporting the local option strategy is the benefit to the public generally. The repeated criticisms of teacher strikes have yet to result in legislative change, and such inactivity prompts further dissatisfaction with the bargaining system. By permitting a local option, citizens will at least be afforded a voice. Even a vote to retain the strike procedures under Act 195 is the public's expression of its opinion on educational negotiations—a vote to maintain the status quo is a vote. In either case, the community debate over the issue would lead to greater concern for the school system.

VI. Conclusion

Public sector collective bargaining in this country is characterized by diversity and innovation. Pennsylvania's adoption of Act 195 in 1970 placed the state in the forefront of public sector labor relations. With the exception of educational bargaining, Act 195 has proved a satisfactory accommodation of the interests of employer, employee and citizen. School systems, however, are unique entities, and work stoppages by teachers are not regarded with the same degree of equanimity as those of other public employees. Opposition to teacher strikes has been persistent and vociferous. The numerous legislative proposals concerning teacher bargaining attest to the pressures for change, and their predictable defeat attests to the political forces arrayed against modification of Act 195.

The Referendum Model discussed in this article proposes a workable alternative to teacher strikes. It permits greater citizen involvement than the strike model, and it comports with a recognized

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116. Act 195 is based on policies which affect the Commonwealth as a whole, and the statute intends to promote "orderly and constructive relationships between all public employers and their employes . . . ." PA. STAT. ANN. tit. 43, § 1101.101 (Purdon Supp. 1985). Nevertheless, the General Assembly also expressly recognized "the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare." *Id.* The legislative action proposed here is consistent with Act 195's policies since it decentralizes decisions affecting education, thus permitting both the community as a whole and the individual citizens to express a choice.

117. Arguably, organized labor would vigorously oppose any modification of the strike weapon afforded by Act 195, including the right as it pertains specifically to teachers, but it would be far less tenable for organized labor to oppose a local option. First, since it does not substantively modify Act 195, the option does not directly implicate labor's interests. Second, neither organized labor nor the elected state representative has the expertise in *local* educational affairs of teachers and citizens within the district. Third, if the Referendum Model is in fact detrimental to the interests of unionized teachers, then those teachers would undoubtedly enlist the support of labor at the local level to defeat the option. Regardless, the members of the community, who have the greatest stake in the matter, should make the choice.

theory of political control in local school districts. Further, its implementation might avoid strenuous political opposition at the state level. It thus might succeed where other measure have failed. The Model offers a unique approach to a problem of political magnitude and consequence for the state's educational system.