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The Multiemployer Concept in the Public Sector

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THE MULTIEMPLOYER CONCEPT IN THE PUBLIC SECTOR

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Many state public employee statutes impose a legal duty upon the public employer to bargain collectively with the representative of its employees in an appropriate unit.[1] Under such laws, each city, town, village, and school district, as a public employer,[2] is obligated to negotiate individually with all its employees or some part thereof concerning "wages, hours and other terms and conditions of employment."[3] Thus, implicit in this statutory scheme is the premise that the "appropriate unit" can never exceed a single public employer and all its employees.[4]

The negotiations which result between thousands of public employers[5] of all sizes and resources and their employees, who are increasingly represented by national unions,[6] generate pressures for a larger appro-

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1. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 7-469, -470(a) (1972); MINN. STAT. ANN. §§ 179.61 *et seq.* (Supp. 1975); 43 PA. STAT. ANN. tit. 43, §§ 1101.101 *et seq.* (Supp. 1975).

2. "Public employer" is defined in the statutes to include political subdivisions and instrumentalities of the state. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-467 (1972); MINN. STAT. ANN. § 179.63 (Supp. 1975); PA. STAT. ANN. tit. 43, § 1101.301(1) (Supp. 1975).

3. PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1975). *See also* CONN. GEN. STAT. ANN. § 7-468(a) (1972); MINN. STAT. ANN. § 179.65(2) (Supp. 1975).

4. Under these statutes, certification of an "appropriate unit" involves solely the determination of how many employees will bargain together in a group, as it is assumed that the other party in the negotiations will always be the public employer of these employees. The Pennsylvania Public Employee Relations Act provides that the unit of employees appropriate for bargaining "shall be the public employer unit or a subdivision thereof." PA. STAT. ANN. tit. 43, § 1101.604 (Supp. 1975). Similarly, the Connecticut Municipal Employee Relations Act requires that the "unit appropriate for purposes of collective bargaining shall be the municipal employer unit or any other unit thereof." CONN. GEN. STAT. ANN. § 7-471(3) (1972). The Minnesota Employment Relations Act actually limits the right of employees to bargaining in an appropriate unit "with the employer of such unit." MINN. STAT. ANN. § 179.651(2) (Supp. 1975).

5. In 1972 there were 78,218 separate governmental entities in the United States. This figure is composed of 3,044 counties, 18,517 municipalities, 16,991 townships, 23,885 special districts, and 15,781 school districts. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973, Table 659 (94th ed.).

6. A study made by the National Education Association (NEA) indicates that, during 1970-71, the membership of the NEA included 49 percent of all instructional staff in the public schools and that the membership of the NEA and of other NEA affiliated state educational organizations together exceeded 75 percent of the profession. 49 NEA,

priate unit. Disparities in bargaining power and expertise, as well as the time and expense consumed by collective bargaining, create incentives for public employers to seek areawide settlements.[7]

I. PRESSURES FOR EXPANDING THE APPROPRIATE UNIT

Commentators insist that municipalities cannot now match the experience and expertise of unions in labor relations.[8] When the public employer enters contract negotiations with policemen, firemen, and teachers, the resolution of which will have significant budgetary consequences,[9] it often confronts organizations with interests well beyond the appropriate unit.[10] These groups of public employees display an increas-

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RESEARCH BULL. 47, 57 (1971).

Unions which have organized policemen claim memberships totaling 375,000 persons out of the total of 547,000 state and local police personnel reported in the 1972 census. This represents union organization of 65 percent of the profession. J. BURPO, THE POLICE LABOR MOVEMENT; PROBLEMS AND PERSPECTIVES 6-10 (1971); M. MOSKOW, J. LOEWENBERG & E. KOZIARA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 178-79 (1970) [hereinafter cited as MOSKOW, COLLECTIVE BARGAINING]. A survey conducted by the Advisory Commission on Intergovernmental Relations indicated that of the 1,500 cities reporting, 73 percent of their police employees were represented by labor unions. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT Table C-3 (1969).

The 1968 membership in the International Association of Firefighters, the principal union of firemen, included 132,000 persons. This represented 48 percent of the total number of state and local fire protection employees in 1972. However, this percentage fails to reflect two important factors: the existence of a large number of independent firemen unions, especially in small cities; and, in cities where a union organization does exist, its tendency to represent all the firemen of the municipality. MOSKOW, COLLECTIVE BARGAINING, *supra* at 178-79. Thus, the Advisory Commission on Intergovernmental Relations' survey revealed that 82 percent of the fire protection employees in 1,317 cities reporting were represented by labor organizations. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT Table C-4 (1969).

7. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND GOVERNMENT 109-10 (1969); Hastings, *Coordinated Public Employer Collective Bargaining*, 28 PUB. EMPL. REL. LIBRARY 13, 15-16 (1970) [hereinafter cited as Hastings]; Landhold, *Negotiating Union Contracts—A General View*, 36 NIMLO MUN. L. REV. 302, 303, 307 (1973).

8. MOSKOW, COLLECTIVE BARGAINING, *supra* note 6, at 217; D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE 136 (1972); Hastings, *supra* note 7, at 16; Landhold, *Negotiating Union Contracts—A General View*, 36 NIMLO MUN. L. REV. 302, 303 (1973).

9. According to 1972 census statistics, the salaries paid to policemen, firemen, and teachers constituted 47 percent of the total state and local payrolls in the nation. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973, 433 (94th ed.). Since one-half to three-fourths of local government expenditures go to wages and benefits, the consequences of municipal negotiations with policemen, firemen, and teachers can have significant budgetary consequences. *See* D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE 120 (1972); *cf.* A. MELTSNER, THE POLITICS OF CITY REVENUE 17 (1971).

10. These characteristics are by no means exclusive to policemen, fire fighters, and teachers. However, the high degree of professional organization among these employees and the fact that all municipalities must bargain with them make unit determination with respect to these groups an important issue for all public employers.

ing professionalism, as manifested by union organizations on the local, statewide, and even national levels which disseminate information about contract developments throughout the country to their members.[11] In addition to providing data valuable in formulating contract demands, national unions have staff members or attorneys to assist in the local negotiation process.[12] Consequently, while public employee statutes seem to equate the public employer unit with the unit appropriate for bargaining, the substantive demands of the unions are often formulated on a regional or statewide basis. The employer may find itself with less knowledge and less bargaining skill than the representative of its employees.

Employee organization also provides leverage in dealing with the many separate public employers. The union confronts each individual municipality with demands that have been or will be presented to other public employers. By focusing initially on those public employers which are financially able to improve contract terms or which are desirous of attracting employees from other municipalities, the union may be able to secure a model contract that can be used tactically in other negotiations. As soon as one municipality accedes to these contract terms, the union can often gain acquiescence from neighboring municipalities which may fear losing their competitive position. Such a situation diminishes the prospects of meaningful bargaining.

A union representing employees throughout an area may also be particularly able to use the fear of a strike as a means of exerting widespread pressure. Where negotiations with one employer over a model contract appear stalled, the union can strike or threaten to strike only that municipality and none of its neighbors. This strategy can in turn be used to whipsaw other municipal employers.[13] Since only a small portion of the union membership need to be on strike at a given time, the union can inflict the full consequences of a strike upon the individual employer without severely depleting its total resources. Much of the effect of such a technique derives from the damage to the municipality's reputation and desirability as an employer that would ensue if it were the only employer in an area to suffer a strike. These pressures can force municipalities into accepting contract terms upon which they have not actually negotiated.

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11. J. BURPO, THE POLICE LABOR MOVEMENT: PROBLEMS AND PERSPECTIVES 8 (1971); MOSKOW, COLLECTIVE BARGAINING, *supra* note 6, at 151, 179; NEA, RESEARCH REPORT 1970-R12, SALARY SCHEDULES FOR TEACHERS, 1970-71 (1970); NEA, RESEARCH REPORT 1973-R2, SALARY SCHEDULES AND FRINGE BENEFITS FOR TEACHERS, 1972-73 (1973); 48 NEA, RESEARCH BULL. 100-02 (1970); 50 NEA, RESEARCH BULL. 16-21 (1972).

12. MOSKOW, COLLECTIVE BARGAINING, *supra* note 6, at 151; D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE 65-66 (1972).

13. Hastings, *supra* note 7, at 16.

Broadening the appropriate unit for contract negotiations would therefore improve the relative position of public employers in the bargaining process. Employers would be able to assemble broader informational resources for negotiations. Moreover, since such organization would give all participating employers a voice in the bargaining, regional unions would be unable to pressure individual employers into acceding to terms agreed to by a neighboring municipality.

Regardless of respective bargaining strength, both employers and employees would be positively affected by the financial and time savings of an expanded appropriate unit. Under the present system, public employers may add professional labor relations personnel to their staffs or occasionally may seek assistance from labor lawyers or negotiators in order to compensate for their bargaining inexperience.[14] Costs incurred may be unnecessarily duplicated by neighboring municipalities. The union's financial resources are similarly taxed by the need for negotiators in municipalities throughout an area. Since the bargaining process, from the research for drafting proposals to the actual ratification of a contract, takes so much time, these personnel are continually involved in either current or future negotiations. A decrease in the number of necessary settlements by consolidating the professional negotiating efforts of various municipalities and its concomitant effect of reducing the number of union personnel involved in negotiating would result in efficiencies economical to both parties.

II. THE MULTIEMPLOYER CONCEPT

Despite the potential benefits to the public employer by a broadened appropriate unit,[15] no serious attention has been given to the potentialities of the multiemployer concept in the public sector.[16]

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14. MOSKOW, COLLECTIVE BARGAINING, *supra* note 6, at 217.

15. The advantages of an employer organization were perceived in 1970 when the Regional Council of Elected Officials of South Central Connecticut sought to create a regional committee to control municipal salaries, particularly those of teachers, in member communities. In suggesting the appointment of a single negotiator for all the member towns, Wallingford Mayor Joseph Carini commented: "'I think it's time that our superintendents get together and find a way to really sock it to them.'" BNA 1970 GOV'T EMPL. REL. REP. NO. 347, at B-11 (May 4).

16. Informal arrangements which are designed to create a broader unit for negotiation already exist. For example, so-called "pattern bargaining" occurs where one employer's collective agreement creates a pattern for all employers in an area. Although this permits many small municipalities to defer to the research and bargaining expertise of the pattern-setter, it also deprives these employers of any input into the model agreement. Decisions affecting an entire area may be made by the employer best able to afford a more generous settlement.

Where employers consult informally regarding labor negotiations, they have more knowledge with which to confront their unions. However, this information does not substantially effect any imbalance in bargaining nor reduce the expense of collective bargaining by each individual employer and its employees. The multiemployer concept suggests a more comprehensive solution to the problems of public employer bargaining than do the informal approaches.

In the private sector, a multiemployer unit consists of a group of employers who have unequivocally manifested an intention to be bound in collective bargaining by group rather than individual action. Each of the employers in the unit must confer upon the joint bargaining agent the power to bind it in the negotiation process.[17] This type of bargaining has been traditional in industries characterized by a large number of small employers. By aggregating their resources, such employers are able to confront the industry-wide union on an equal basis. The multiemployer concept offers a possible model for public employers seeking to improve their bargaining position vis-à-vis public employees.

The following subsections examine the present doctrinal and statutory obstacles to the multiemployer concept in the public sector. The last section explores both the practical impediments to its future use as well as its possible utility.

A. *The Delegation of Legislative Powers Doctrine*

State constitutions divide all the powers of government into three distinct departments—the legislative, executive, and judicial. As a consequence, municipalities are devoid of any inherent powers. A municipality is a mere department of the state, "created as a convenient agency for the exercise of such governmental powers as may be entrusted to it."[18] Municipalities exist dependent upon and subordinate to the state legislature. Within the limits set by the state constitution, the legislature may modify or withdraw any powers granted to a municipality, exercise such powers itself, or vest them in some other agency.[19] Even where the constitution enables any city or village to adopt a charter for self-government, this charter must be "consistent with and subject to the laws of th[e] state."[20]

Establishing the wages of public employees and securing the revenues necessary to meet this obligation involve the exercise of legislative power. This power is vested in the legislative branch of the state government and may be granted to municipalities.[21] However, courts

17. *See, e.g.*, NLRB v. Hart, 453 F.2d 215, 217, 218 (9th Cir. 1971); NLRB v. Dover Tavern Owners' Ass'n, 412 F.2d 725, 727 (3d Cir. 1969); Western States Reg. Coun. No. 3 v. NLRB, 398 F.2d 770, 773 (D.C. Cir. 1968); Bennett Stone Co., 139 N.L.R.B. 1422, 1424 (1962); Andes Fruit Co., 124 N.L.R.B. 781, 783 (1959).

18. Rimarcik v. Johansen, 310 F. Supp. 61, 70 (D. Minn. 1970), *vacated*, 403 U.S. 915 (1971); *see* Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966); Village of Brooklyn Center v. Rippen, 255 Minn. 334, 335-36, 96 N.W.2d 585, 587 (1959); Monaghan v. Armatage, 218 Minn. 108, 112, 15 N.W.2d 241, 243 (1944); MINN. CONST. art. 11, § 1.

19. *E.g.*, Monaghan v. Armatage, 218 Minn. at 112, 15 N.W.2d at 243.

20. MINN. CONST. art. 4, § 36.

21. This delegation of legislative power by the state legislature to municipalities represents an exception to the prohibition against the delegation of legislative powers. See text accompanying notes 18-20 *supra*. *See* 1 T. COOLEY, CONSTITUTIONAL

have not upheld all wage statutes and ordinances enacted pursuant to this authority.[22] Over the years, the judiciary has used the delegation of legislative power doctrine to scrutinize the manner in which states and municipalities have exercised the legislative power.[23] As usually expressed, the so-called "delegation" doctrine prohibits any legislative body from delegating to another department of the government, or to any other authority, the power, either generally or specially, to enact laws.[24] The apparent conflict between this doctrine and the multiemployer concept is plain enough; on its face the doctrine prohibits a municipality from relinquishing its power to establish wages to other municipalities or groups thereof. The development of the delegation doctrine in the case law suggests that this is the most serious theoretical obstacle to public multiemployer bargaining.

The courts consider the delegation doctrine to be derived from three provisions of a state's constitution: First, the section which divides the powers of government into three departments; second, the prohibition against any department exercising the powers of the other departments; and third, the provision which vests the legislative power in the legislature.[25] The delegation doctrine serves to make the power granted to the

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LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 235-36 (8th ed. W. Carrington 1927) [hereinafter cited as COOLEY] ("We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organization certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority."). *See also* Nelson v. DeLong, 213 Minn. 425, 434, 7 N.W.2d 342, 348 (1942); T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 111 (3d ed. 1898); 2 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 4.09 (3d ed. 1966).

22. *See, e.g.*, Walker v. Pendarvis, 132 So. 2d 186 (Fla. 1961); Sawyer v. Town of Kearney, 85 N.J.L. 625, 90 A. 306 (E. & A. 1914); Lynch v. Faris, 189 Tenn. 657, 227 S.W.2d 17 (1950).

23. *See* Nash Eng'r Co. v. City of Norwalk, 137 Conn. 235, 239, 75 A.2d 496, 498 (1950); City of Rockford v. Hey, 366 Ill. 526, 533-34, 9 N.E.2d 317, 321 (1937); Pearson v. City of Washington, 439 S.W.2d 756, 760-61 (Mo. 1969); State *ex rel.* Prichard v. Ward, 305 S.W.2d 900, 902 (Mo. Ct. App. 1957); Lazich v. City of Butte, 116 Mont. 386, 390, 154 P.2d 260, 261 (1944); Luongo v. Flanagan, 230 App. Div. 71, 73-74, 243 N.Y.S. 385, 387 (1930); City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 291 (Tex. Ct. Civ. App. 1968); Adamczyk v. Town of Caledonia, 52 Wis. 2d 270, 275, 190 N.W. 137, 140 (1971).

24. T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 111 (3d ed. 1898); 2 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 10.39 (3d ed. 1966); 1 J.F. DILLON, MUNICIPAL CORPORATIONS § 244 (5th ed. 1911).

25. Holgate Bros. Co. v. Bashore, 331 Pa. 255, 259-60, 200 A. 672, 674 (1938). In *Commonwealth v. Associated Industries*, 370 S.W.2d 584, 586-87 (Ky. 1963), the Kentucky Court of Appeals rejected the proposition that the delegation doctrine was implicit in the state constitution. The court argued that the "vesting" of legislative power in one department did not preclude the divesting of that power.

legislature nontransferable, thus ensuring that the legislature will be unable to alter the allocation of public power agreed to by the people in the constitution. Furthermore, the courts have argued that the doctrine safeguards the political process embodied within the constitution. Allowing legislative judgment and discretion to be exercised by groups other than the local legislative body would divorce public decisionmaking from the political control of the electorate.[26]

The force of the delegation doctrine and the problems which it has generated stem from the ambiguity of the word "power." Legislative "power" is the authority to make and change laws. Clearly, this entails the resolution of fundamental policy decisions for the citizenry. But most courts regard legislative power as involving not only policy determination, but the exercise of judgment and discretion[27] by the legislating body over the details of the enactment. Thus serious questions arise when a legislative body makes a policy decision to incorporate as its own the policy decisions of another jurisdiction or of a private group.

Courts have considered a legislature's policy determinations unaccompanied by its retention of discretion over the details of the policy as an abdication of the legislative power. As a rule, decisions by states and municipalities to adopt the existing laws or regulations of other governmental bodies do *not* violate the delegation doctrine,[28] for the legislating body has the opportunity to review the exact provisions of the statute or regulation incorporated. Efforts, however, to adopt all

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In searching for the origin of this doctrine, the court ultimately arrived at Judge Cooley's classic formulation: "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed." 370 S.W.2d at 587, *citing* COOLEY, *supra* note 21, at 224. The court noted that Cooley did not cite any constitutional provisions as authority for the delegation doctrine. Instead he referred to the following quotation from John Locke: "[T]he legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." 370 S.W.2d at 587, *citing* COOLEY, *supra* note 21, at 225, *quoting* J. LOCKE, ON CIVIL GOVERNMENT § 142 (1690).

26. State *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295, 299-300 (Wyo. 1968); Uhls v. State *ex rel.* City of Cheyenne, 429 P.2d 74, 85 (Wyo. 1967).

27. *See* Featherstone v. Norman, 170 Ga. 370, 394, 153 S.E. 58, 70 (1930).

28. Featherstone v. Norman, 170 Ga. 370, 394, 153 S.E. 58, 70 (1930) (net income for state tax purposes based on federal method of calculation); Dawson v. Hamilton, 314 S.W.2d 532, 535 (Ky. 1958) (state time standards based on acts of Congress); People v. DeSilva, 32 Mich. App. 707, 714, 189 N.W.2d 362, 365 (1971) (standard for device measuring retail sales of motor fuel that of National Bureau of Standards); Seale v. McKennon, 215 Ore. 562, 572, 336 P.2d 340, 345 (1959) (U.S. Department of Agriculture standards incorporated as to livestock disease); State v. Johnson, 84 S.D. 556, 557-58, 173 N.W.2d 894, 895 (1970) (definition of dangerous drug in State Drug Abuse Control Act according to Federal Food, Drug Control Act); State v. Urquhart, 50 Wash. 2d 131, 135, 310 P.2d 261, 264 (Wash. 1957) (incorporated medical society standards in state law); State v. Grinstead, — W.Va. —, 206 S.E.2d 912, 919 (1974) (definition of dangerous drugs in state criminal statute incorporated from federal regulations).

future enactments of another legislative entity may fail to represent a complete exercise of the legislative power. When the incorporating legislature has no voice in the formulation of these future provisions or does not review such provisions before they take effect, courts have considered this surrender of discretion to be in conflict with the delegation doctrine.[29]

29. Cheney v. St. Louis S.W. Ry., 239 Ark. 870, 872, 394 S.W.2d 731, 733 (1965); Hutchins v. Mayo, 143 Fla. 707, 713-14, 197 So. 495, 498 (1940); State v. Intoxicating Liquors, 121 Me. 438, 443, 117 A. 588, 590 (1922); *In re* Opinion of the Justices, 239 Mass. 606, 610, 133 N.E. 453, 454 (1921); People v. DeSilva, 32 Mich. App. 707, 714, 189 N.W.2d 362, 365 (1971); Wallace v. Commissioner, 289 Minn. 220, 228, 184 N.W.2d 588, 593 (1971); Seale v. McKennon, 215 Ore. 562, 571-72, 336 P.2d 340, 345 (1959); Holgate Bros. Co. v. Bashore, 331 Pa. 255, 263, 200 A. 672, 678-79 (1938); State v. Johnson, 84 S.D. 556, 558, 173 N.W.2d 894, 895 (1970); Nostrand v. Balmer, 53 Wash. 2d 460, 471, 335 P.2d 10 (1959), *vacated on other grounds*, 362 U.S. 474 (1960); State v. Urquhart, 50 Wash. 2d 131, 135, 310 P.2d 261, 264 (1957); State v. Grinstead, — W.Va. —, 206 S.E.2d 912, 920 (1974). *Contra*, Alaska S.S. Co. v. Mullaney, 180 F.2d 805, 815-17 (9th Cir. 1950); Independent Elec. & Elec. Contractors Ass'n v. New Jersey Bd. of Examiners, 54 N.J. 466, 483, 256 A.2d 33, 42 (1969); State v. Hotel Bar Foods, 18 N.J. 115, 126-27, 112 A.2d 726, 732-33 (1955) (dictum).

This conflict between the delegation doctrine and the incorporation of future laws of another jurisdiction is illustrated by the Supreme Court of Minnesota's recent holding in *Wallace v. Commissioner*, 289 Minn. 220, 184 N.W.2d 588 (1971). The suit concerned the legality of certain exclusions taken by the taxpayers from their income. The taxpayers contended that under Minnesota income tax law Section 290.08 amounts received as compensation by a sick or injured taxpayer could be excluded from gross income up to the amount of $100 a week. 289 Minn. at 223 n.1, 184 N.W.2d at 590 n.1, *citing* MINN. STAT. ANN. Sec. 290.08, § 5(a) (1965). The Commissioner argued that this exclusion could not be allowed because the federal Internal Revenue Code, present and future, had been made a part of Minnesota law, under the provision that "[t]he term gross income in its application to individuals, estates and trusts means the adjusted gross income as computed for federal income tax purposes as defined in the laws of the United States for the taxable year . . . ." 289 Minn. at 224, 184 N.W.2d at 590, *quoting* MINN. STAT. ANN. § 290.08, § 5(a) (1965). Since enactment of the Minnesota statute, the Internal Revenue Code had been amended to prevent the exclusion from gross income of amounts received during the first thirty calendar days of sickness or injury. 289 Minn. at 224, 189 N.W.2d at 590-91. The Commissioner claimed that this amendment governed the calculation of gross income because it represented the definition of gross income "as defined in the laws of the United States for the taxable year." *Id.*

A unanimous court, relying exclusively on the delegation doctrine, rejected the Commissioner's contention that the Minnesota statute automatically incorporated changes in federal law. *Id.* at 225-28, 184 N.W.2d at 591-93. The court stated that the adoption of future changes in the Internal Revenue Code posed basic dangers to the people of Minnesota; primarily, the revision of the federal tax law might not correspond with the policy of the Minnesota legislature. This seemed particularly relevant in the case of exclusions from gross income, which are often based on political and social considerations different from those relevant to the state's tax policy. *Id.* at 225-26, 184 N.W.2d at 591. The delegation doctrine, therefore, protected taxpayers from being subjected to laws which had not received the considered judgment of the state legislature. Furthermore, incorporation violated the principle that laws should be made by elected representatives who are responsible to the electorate for their acts.

Therefore, the court held that, although the Minnesota statute adopted federal law as it existed at the time of the enactment, the state legislature could not empower Congress "to make future modifications or changes in Minnesota law." *Id.* at 228, 184 N.W.2d at 593.

1. The Constitutionality of "Prevailing Wage" Legislation

Curiously enough, the courts have not found the delegation doctrine to be in conflict with legislative efforts to adopt, as a minimum public wage, present and future levels prevailing in the private sector. Early cases tended to ignore the obvious inconsistency of this attitude with the judicial stance toward incorporating the future acts of another legislative entity. In these jurisdictions, the continuing viability of the delegation doctrine as a rule against a municipality relinquishing to another body the power to make binding decisions is a possible obstacle to multiemployer bargaining. However, several recent cases, discussed in the next subsection, have reevaluated the delegation doctrine so as to obviate these doctrinal restraints.

Minimum or prevailing wage laws enacted by states or municipalities typically provide that

> [n]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed . . . shall be paid to all laborers, workmen and mechanics employed by or on behalf of the State . . . or on behalf of any county . . . city, town, district or other political subdivision . . . .[30]

The courts have emphasized that these laws require a legislative body or group of public officials to determine what the prevailing wage is. However, it is clearly the future decisions of employers in the private sector which shall establish the minimum wage payable by the state and its subdivisions, for as the hourly rates paid by private employers change so does the "prevailing wage rate" in the locality.

The courts have not even suggested that such a prevailing wage law might constitute a delegation of legislative power to private groups. Rather, the factor relied upon in deciding whether to uphold or strike down such statutes has been merely the manner by which the prevailing wage is ascertained.[31] In a typical case, *Baughn v. Gorrell &*

In articulating the dangers arising from the adoption of future changes in the federal tax law, the court ignored two considerations: the fact that the Minnesota legislature had determined that administrative efficiency and convenience required adoption of the same definition of gross income as found in the Internal Revenue Code; and the fact that the legislature had retained power to change at any time the Minnesota tax law so as to achieve a policy different from that embraced by the federal law.

Some states have avoided the problem created by the delegation doctrine by amending their constitutions. These amendments authorize the enactment of a state income tax based upon the federal tax law. See N.Y. CONST. art. 3, § 22; COLORADO CONST. art. X, § 19; *cf.* Anderson v. Tiemann, 182 Neb. 393, 398, 155 N.W.2d 322, 325-27 (1967).

30. *See* Metropolitan Water Dist. v. Whitsett, 215 Cal. 400, 404, 10 P.2d 751, 753 (1932), *quoting* Public Wage Rate Act of 1931, ch. 397, § 1, [1931] Cal. Gen. Laws 49th Sess. 910, *codified as* CAL. LAB. CODE § 1771 (West 1971). *See also* N.J. STAT. ANN. § 34:10-1 (1965).

31. In *Metropolitan Water District v. Whitsett*, 215 Cal. 400, 10 P.2d 751 (1932), the California public wage act, Public Wage Rate Act of 1931, ch. 397, § 1, [1931] Cal. Gen. Laws, 49th Sess. 910, *codified as* CAL. LAB. CODE § 1771 (West 1971), provided

Riley,[32] the Kentucky prevailing wage law was challenged for delegating legislative power to private groups. The statute provided that the public works authority could not pay to its employees a wage less than that prevailing privately in the same trade and same locality. In addition the statute required that there be a "sufficient number" of employees in the locality paid at that rate to establish a reasonable basis for the rate to be considered "prevailing."[33] The attack focused on the provision requiring the public authority to adopt as the prevailing wage the rate set in the trade through collective bargaining.

The Kentucky Court of Appeals rejected the contention that the reference to private collective bargaining agreements amounted to an unconstitutional delegation of legislative power to private persons. Rather, the court addressed only the issue of whether the means established for determining the prevailing wage was constitutional. In answering this question, the court emphasized that the authority was obligated to adopt the collective agreement rate only if it found that the agreement applied to a sufficient number of employees in that locality. On this basis, the court determined that the public authority retained a certain discretion and thus was "vested with the ultimate decision of what shall be the prevailing wage."[34]

In other such cases, courts have similarly ignored the rudimentary question of how prevailing wage legislation could be reconciled with the delegation doctrine, instead concentrating on the means of determining the prevailing wage. Where a public body or official was entrusted with the decision of what was the prevailing wage, the statutes have been upheld.[35] However, where a statute adopted the wage of a particular group, the courts have invalidated such legislation as an unconstitutional delegation of legislative power.[36]

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that the public body awarding any contract would ascertain the wage prevailing in the locality for similar work. In *Roland Electric Co. v. Mayor and City Council*, 210 Md. 396, 124 A.2d 783 (1956), a Maryland statute, Act of April 23, 1945, ch. 653, § 1 [1945] Md. Acts 719, and Baltimore ordinance authorized the Board of Estimates of each municipality to calculate the prevailing wage. Neither case considered whether the incorporation of wage decisions made by private employers and employees constituted a delegation of legislative power.

See also Mahin v. Myers, 108 Ill. App. 2d 416, 247 N.E.2d 812 (1969); City of Jopelin v. Industrial Comm'n, 329 S.W.2d 687 (Mo. 1959); Union School Dist. v. Commissioner of Labor, 103 N.H. 512, 176 A.2d 332 (1961); City of Albuquerque v. Burrell, 64 N.M. 204, 326 P.2d 1088 (1958).

32. 311 Ky. 537, 224 S.W.2d 436 (1949).

33. KY. REV. STAT. tit. xxvii, § 337.520 (1948), *as amended*, KY. REV. STAT. ANN. tit. xxvii, § 337.520(3)(a), (b) (1974).

34. 311 Ky. at 542, 224 S.W.2d at 439.

35. *See, e.g.*, Mahin v. Myers, 108 Ill. App. 2d 416, 247 N.E.2d 812 (1969); City of Jopelin v. Industrial Comm'n, 329 S.W.2d 687 (Mo. 1959).

36. *Cf., e.g.*, Parrack v. City of Phoenix, 86 Ariz. 88, 340 P.2d 997 (1959); Crowly v. Thornbrough, 226 Ark. 768, 294 S.W.2d 62 (1956); Green v. City of Atlanta, 162 Ga. 641, 135 S.E. 84 (1926); Bradley v. Casey, 415 Ill. 576, 114 N.E.2d 681 (1953); Adams v. City of Albuquerque, 62 N.M. 208, 307 P.2d 792 (1957).

Such analysis is evident in the Supreme Court of Wisconsin's decision in *Wagner v. City of Milwaukee*.[37] The case involved the constitutionality of a Milwaukee ordinance which provided that all laborers employed on city jobs would be paid a sum "not less than the prevailing wage in [that] city for such skilled labor."[38] The prevailing wage was to be "determined by the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor."[39] The city thereby obligated itself to pay a minimum wage equal to that wage achieved by any union in the trade. No discretion was granted to any public body to determine what wage prevailed.

A majority of the court concluded that the ordinance constituted an unlawful delegation of legislative power to private parties. The court acknowledged that a municipality could enact a valid prevailing wage law, but held that this ordinance

> in effect declare[d] that some body or organization outside of, and independent from, the common council, and other than a state or local administrative body, [would] exercise the judgment required to fix and determine a prevailing wage scale. It amount[ed] to nothing less than a surrender by the members of the common council of the exercise of their independent individual judgments in the determination of a matter of legislative concern . . . . The action and judgment of determining the wage scale [was] that of the unions, not that of the common council.[40]

By incorporating the wage decisions of private groups, the common council of Milwaukee had abdicated, rather than exercised, its legislative power.[41]

A more recent attempt to base the salaries of public employees upon existing and future wages in the private sector evoked a similar analysis by the South Dakota Supreme Court. In *Schryver v. Schirmer*,[42] the electorate of Sioux Falls, South Dakota, adopted in April 1968 an ordinance establishing a compensation formula for first class firemen

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37. 177 Wis. 410, 188 N.W. 487 (1922).

38. *Id.* at 411, 188 N.W. at 487.

39. *Id.*

40. *Id.* at 416-17, 188 N.W. at 489.

41. For the view that this ordinance was essentially similar to other prevailing wage statutes, see the dissenting opinion of Judge Owen, *id.* at 420-23, 188 N.W. at 490-91:

> I cannot agree that the ordinance under consideration contains any delegation of legislative power. The legislative declaration is that skilled laborers employed on any work done by or for the city or for any contractor or subcontractor performing work for the city shall be paid a sum which shall not be less than the prevailing wage in the city for such skilled labor. That is the legislative declaration, and as legislation it is full and complete. . . .
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> . . . .
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> . . . The influence of labor unions upon the prevailing wage of a given community is well understood. There is no other one factor that contributes as much to establish the prevailing wage in a large city as the labor unions.

42. 84 S.D. 352, 171 N.W.2d 634 (1969).

and patrolmen. These public employees were to receive a salary based upon the average hourly rate paid in the eight local building trades as of September 1, 1968. Thereafter, the wages of first class firemen and patrolmen were to be altered each year in an amount equal to the increase in the average rate earned in these skilled trades as of September 1.[43]

The South Dakota Court struck down this ordinance as an unlawful delegation of legislative power.[44] As the principal basis for its decision, the court emphasized that this legislation adopted on the day of enactment a wage to be determined in the future by specific private groups. The court held that, in relying on future developments in private industry, Sioux Falls "unlawfully delegated, in this instance, to the trade unions and those who employ tradesmen, the future determination of what is a purely legislative power and function and in our opinion this rendered the entire ordinance invalid."[45] The court noted that even if the ordinance were regarded as a prevailing wage law,[46] it still constituted an unlawful delegation of legislative power because it "delegate[d] to private persons and agencies the absolute power to fix salaries."[47]

In emphasizing the means of determining the prevailing wage, courts, as illustrated above, have failed to draw meaningful distinctions between the statutes.[48] Since every prevailing wage law adopts present and future wage agreements made by private persons outside the control of the legislating body,[49] the courts have arbitrarily distinguished among basically similar statutes. The South Dakota statute held unconstitutional in *Schryver* was in essential respects similar to the Kentucky statute held valid by the *Baughn* court.[50] Both adopted as the salary for public employees a wage established through collective bargaining in the private sector. Both deprived the legislative body in question of any power or discretion in determining those wages. The only difference between the two statutes was that in *Schryver* an average wage of eight trades was taken to be the prevailing wage, while in *Baughn*, the

43. *Id.* at 353 n.1, 171 N.W. at 634-35 n.1.

44. *Id.* at 357, 171 N.W. at 637.

45. *Id.*

46. *Id.* at 358, 171 N.W. at 637. The court believed that this ordinance could not be considered a prevailing wage law because public employees were not to be paid a wage commensurate to that paid nonpublic employees for the same work. Whether this was a prevailing wage law or not, the delegation of legislative powers doctrine would be equally applicable. *Id.*

47. *Id.*

48. *See* text accompanying notes 30-41 *supra.*

49. All prevailing wage laws are subject to abuse in that unions may deliberately bid up wages in private industry so as to achieve greater wages from public employers. This is especially true where most of the union's members are involved in public works. Whether a public official ascertains the "prevailing wage," or the union wage is directly adopted, this same danger exists.

50. *See* text accompanying notes 32-34 *supra.*

prevailing wage was that earned by a "sufficient number" of employees in the locality. Although, as in *Baughn*, a legislating body may have to ascertain what wage is prevailing, this is merely an administrative task and is not an exercise of discretion determining the wage itself. Certainly any attempts by the legislating body to adopt a wage different from that paid in private industry would violate the prevailing wage law.

Judicial preoccupation with the minor differences among these laws has obscured the fundamental question of whether any one of the prevailing wage laws is consistent with the delegation doctrine. The prevailing wage legislation enacted by states and municipalities violates the traditional view of the delegation doctrine.[51] Whether the statute directly incorporated the union rate or required the legislating body to determine the prevailing wage, the result was the same: future actions of private groups set the public wage. Those wage statutes upheld and those rejected appear equally infirm under the delegation doctrine. Although the failure of the courts to apply the delegation doctrine to all prevailing wage laws may have reflected a belief that the incorporation of future wage decisions in private industry constituted a valid legislative choice, no court so stated. Thus the traditional view of the delegation doctrine remained intact. Within this framework, prevalent in most jurisdictions, serious constitutional objections could meet an attempt by a municipality to delegate binding authority to a multiemployer bargaining group.

2. Reinterpretations of the Delegation Doctrine

The interpretation of the delegation doctrine which prohibits the adoption of all future determinations of other groups is by no means compelled by the terms of the principle, which merely prohibits the legislature from surrendering its "legislative power." If "legislative power" may be defined as simply the authority to formulate and implement basic policies for a political body, then a legislature's determination that public wages should be identical to those paid in private industry would constitute a complete exercise of that power. As the wages negotiated between private employers and employees changed, they would be made binding upon the public employer by virtue of the legislative policy.

Nor do the purposes served by the doctrine prevent a reinterpretation of the meaning of "legislative power." The delegation doctrine ensures that fundamental policy decisions are made by public officials responsible to the people through the political process. Where the legislative body enacts a statute adopting the salary paid by private employers as the public wage, a fundamental decision has been made by representa-

51. See text accompanying notes 21-26 *supra*.

tives politically accountable to the people. If at any time the public and private interests no longer coincide, the legislative body may adopt another wage policy merely by passing new legislation. Redefining the power which states and municipalities are prohibited from delegating will not threaten the principles served by the delegation doctrine.

In recent cases some state courts have abandoned the interpretation of the delegation doctrine which prevents the incorporation of future wage policies of other employers. In *Kugler v. Yocum*,[52] the California Supreme Court considered the legality of a proposed municipal ordinance which would establish as the minimum salary for firemen of the City of Alhambra the average salary of firemen of similar grade in the City and County of Los Angeles. Each year Alhambra was to set the wage for its firemen no lower than the average paid in Los Angeles and Los Angeles County as of January 1st of that year. The ordinance made existing and future salary decisions by neighboring public employers determinative of the minimum wage for firemen in Alhambra.[53]

Rejecting the argument that the ordinance constituted an unlawful delegation of legislative power, the court looked to the purposes served by the doctrine.[54] The court stated that the prohibition on the delegation of legislative power existed to assure that the " 'truly fundamental issues [will] be resolved by the Legislature' " and that a " 'grant of authority [is] . . . accompanied by safeguards adequate to prevent its abuse.' "[55] The proposed ordinance fulfilled both of these criteria, and thus represented a complete exercise of the legislative power.[56]

Adopting the average wage paid in Los Angeles as a minimum resolved a fundamental policy with respect to salaries in Alhambra. All that remained was the administrative determination of salaries in Los Angeles as of January 1st of each year. The court argued[57] that this ordinance was in all respects identical to the prevailing wage law approved in *Metropolitan Water District v. Whitsett*.[58] Indeed, the Alhambra ordinance merely represented a "prevailing rate" law for firemen.[59] In both cases the legislating body could not know in advance nor control the prevailing wage. But this did not invalidate the statute in *Metropolitan Water District* nor the ordinance here. The delegation doctrine only

52. 69 Cal. 2d 371, 445 P.2d 303, 71 Cal. Rptr. 687 (1968).
53. *Id.* at 373-74, 445 P.2d at 304, 71 Cal. Rptr. at 688.
54. *Id.* at 376, 445 P.2d at 306-07, 71 Cal. Rptr. at 690-91.
55. *Id.* at 376, 445 P.2d at 306, 71 Cal. Rptr. at 690, *quoting* Wilke & Holzheiser, Inc. v. Department of Alcoholic Bev. Control, 65 Cal. 2d 349, 369, 420 P.2d 735, 748, 55 Cal. Rptr. 23, 36 (1966).
56. 69 Cal. 2d at 377, 445 P.2d at 306-07, 71 Cal. Rptr. at 690-91.
57. *Id.* at 377-78, 445 P.2d at 307, 71 Cal. Rptr. at 691.
58. 215 Cal. 400, 10 P.2d 751 (1932). See notes 30, 31 and accompanying text *supra*.
59. 69 Cal. 2d at 379, 445 P.2d at 308, 71 Cal. Rptr. at 692.

required the legislative body to formulate basic decisions for the municipality.[60]

Furthermore, reliance upon the salary decisions of neighboring public employers did not seem likely to endanger the fiscal interests of the City of Alhambra.[61] Under the ordinance, future salaries in the City and County of Los Angeles directly influenced minimum wage expenditures for firemen in Alhambra. Yet the court believed that this incorporation of other employers' decisions was not dangerous to the citizens of Alhambra because

> Los Angeles is not more anxious to pay its firemen exorbitant compensation than is Alhambra. Los Angeles as an employer will be motivated to avoid the incurrence of an excessive wage scale; the interplay of competitive economic forces and bargaining power will tend to settle wages at a realistic level.[62]

For the court, reliance upon the collective bargaining of other public employers provided adequate safeguards that the interests of Alhambra would not be harmed. Since the proposed ordinance fully resolved the wage policy for firemen and did not appear liable to abuse, it represented a constitutional exercise of the municipality's legislative power.[63]

A more innovative approach to the problem posed by the delegation of legislative powers doctrine has been taken by the New Jersey Supreme Court. In *Male v. Ernest Renda Contracting Co.*,[64] the court considered the constitutionality of the New Jersey Prevailing Wage Act.[65] This statute declared that the public policy of the state was to establish a prevailing wage for all workmen engaged in public works.[66] "Prevailing wage" was defined as

> the wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workmen of that craft or trade sub-

60. *Id.* at 377, 445 P.2d at 306-07, 71 Cal. Rptr. at 690-91.

61. *Id.* at 382, 445 P.2d at 310, 71 Cal. Rptr. at 694.

62. *Id.*

In making this statement the court assumed that neither Los Angeles City or County sought to attract public employees from neighboring municipalities through increased wages. However, if such competition did exist, Alhambra might be compelled to raise its wages in order to attract and keep employees.

63. The Ohio courts adopted a similar interpretation of the delegation doctrine in the case of *Fuldauer v. City of Cleveland*, 30 Ohio App. 2d 237, 285 N.E.2d 80 (1972). The citizens of Cleveland passed a charter amendment that required the city council to pay first grade policemen and firemen "at a rate three percent (3%) higher than the highest rate paid of first grade in any city of Ohio with a population of 50,000 or more." *Id.* at 238, 285 N.E.2d at 81. The court of appeals, acknowledging that the delegation doctrine limited the actions of the citizenry in amending the city charter, upheld the validity of the amendment. Since the people of Cleveland had "chosen the way in which their police and firemen [would] be paid, . . . [they had] determined the fundamental issue . . . [and] delegated nothing." *Id.* at 239, 285 N.E.2d at 82. A unanimous supreme court affirmed. 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972).

64. 64 N.J. 199, 314 A.2d 361, *cert. denied*, 419 U.S. 839 (1974).

65. N.J. STAT. ANN. §§ 34:11-50.25 to -67 (1965).

66. N.J. STAT. ANN. § 34:11-56.25(1) (1965).

> ject to said collective bargaining agreements, in the locality in which the public work is done.[67]

The wage paid by the state of New Jersey and its subdivisions for public works was to be that achieved through collective bargaining in private industry.[68]

A unanimous court upheld the constitutionality of the statute in an opinion which abandoned the traditional view of the delegation doctrine. Unlike other approaches to this issue, the New Jersey court recognized that, under the prevailing wage law, the private parties negotiating collective agreements were also setting the public wage in the area. Acknowledging that this represented "some form of delegation of legislative power to private parties," the court nevertheless held that this was *not* unconstitutional per se. Rather, "[t]he test is whether the particular delegation is reasonable under the circumstances considering the purpose and aim of the statute."[69]

The New Jersey Supreme Court did not attempt to redefine the meaning of the delegation doctrine as had the California Court.[70] Rather, it rejected the notion that legislative power could not be delegated and held that statutes transferring legislative power are to be judged solely on the basis of whether the delegation is "reasonable."[71] This "reasona-

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67. N.J. STAT. ANN. § 34:11-56.26(9) (1965).

68. N.J. STAT. ANN. § 34:11-56.27 (1965).

69. 64 N.J. at 201, 314 A.2d at 362.

70. *See* text accompanying notes 54-56 *supra.*

71. 64 N.J. at 201, 314 A.2d at 362. However, the cases relied upon by the court as supporting the reasonableness test suggest that the New Jersey courts will consider the same factors as the California courts in determining statutory validity.

In *State v. Hotel Bar Foods*, 18 N.J. 115, 112 A.2d 726 (1955), the Supreme Court upheld the constitutionality of a state statute that incorporated future federal regulations concerning weight requirements for packaged goods. The court insisted that "[t]he ultimate and controlling policy decision—as to whether there shall be uniformity of federal-state regulation in the field—rests always with the Legislature and it does not in any vicious sense abdicate its legislative judgment or authority." *Id.* at 125, 112 A.2d at 732.

In *Independent Electricians & Electrical Contractors' Association v. Board of Examiners*, 54 N.J. 466, 256 A.2d 33 (1969), the court considered whether a statute requiring the performance of electrical construction in the state in accordance with the standards of the National Electrical Code constituted an illegal delegation. Although the National Electrical Code bore "no formal government aegis, the manner of its adoption and revision and the universality of its acceptance indicates to us that it should be accorded the same standing for present purposes as if it were adopted and revised by some non-New Jersey governmental agency within the rationale of *Hotel Bar Foods*. . . ." *Id.* at 483, 256 A.2d at 41. The court considered whether the legislature had made a basic policy decision and whether the reliance on another body was accompanied by adequate safeguards.

Considering these same factors, the court invalidated a provision that in effect gave a private corporation the power to license medical service corporations in the state. Group Health Ins. v. Howell, 40 N.J. 436, 193 A.2d 103 (1963). The court concluded that "such a power to determine who shall have the right to engage in any otherwise lawful enterprise may not validly be delegated by the Legislature to a private body which, unlike a public official, is not subject to public accountability, at least where the exercise of

bleness" standard constitutes the normal due process test of statutory validity.[72] Thus statutes that delegate legislative powers are to be evaluated as any other law, and delegations are henceforth "entitled to the presumptions of constitutionality"[73] that attach to all legislation. To invalidate such a statute, the challenging party bears the burden of showing that it was arbitrary and unreasonable; and, in *Male*, no such evidence was presented. Furthermore, the court below had found that the adoption of the union wage was reasonable under the circumstances.[74] On this basis, the New Jersey Supreme Court concluded that the statute complied with the requirements of due process.[75]

These recent cases have settled, for some states at least, the constitutionality of statutes incorporating future wage determinations of other groups, either public or private. Although the California law has reinterpreted the meaning of "legislative power" so as to preserve the delegation doctrine, New Jersey has simply rejected the doctrine in toto. But the result has been the same: these courts have accorded greater deference to legislative decisions concerning wages. Although reliance upon decisions made by private employers and employees or other public employers involves a degree of risk, these courts have recognized that this judgment is one within the discretion and power of the legislature.

In states rejecting the traditional interpretation of the delegation doctrine,[76] multiemployer bargaining is a viable concept for public employers. Although practical obstacles may still exist, at least the delegation of binding authority to a multiemployer group will be insulated from constitutional objections. Such a bargaining unit could be created by each public employer enacting an ordinance setting the wage for a particular group of employees at the rate negotiated by the multiemployer group. This legislation would constitute a fundamental policy with regard to the terms and conditions of employment. Once the multiemployer negotiations result in a contract, the wage ordinance of each member municipality would become operative. Furthermore, reli-

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such power is not accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action on the part of such private body." *Id.* at 445, 193 A.2d at 108.

Reliance on these cases in *Male v. Ernest Renda* suggests that the New Jersey courts will rely upon the purposes of the delegation doctrine in evaluating the reasonableness of each delegation of legislative power.

See also Commonwealth v. Associated Indus., 370 S.W.2d 584, 588 (Ky. Ct. App. 1963) (where the court of appeals stated that "[t]here is nothing wrong with [the delegation of legislative power] so long as the delegating authority retains the right to revoke the power.").

72. *See generally* Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398 (1954).

73. 64 N.J. at 201, 314 A.2d at 362.

74. 122 N.J. Super. 526, 301 A.2d 153 (App. Div. 1973).

75. 64 N.J. at 202, 314 A.2d at 362.

76. See text surrounding note 51 *supra*.

ance upon the agreement reached by the multiemployer group would protect the interests of each employer from abuse. All members of the unit would share in the decisionmaking process during the course of negotiations. At any time that a municipality sought to sever itself from the group, it would retain power to repeal the multiemployer ordinance. Under this formulation, legislation adopting the future decisions of a multiemployer bargaining group would comport with both the California and New Jersey requirements of constitutional validity.[77]

B. *Public Employee Bargaining Statutes*

Even where the passage of a multiemployer bargaining ordinance would not conflict with the delegation doctrine, it might infringe upon the rights of employees guaranteed by state public employee bargaining statutes. Many of these laws impose a duty upon the public employer to bargain collectively with its employees in an "appropriate unit."[78] This right of public employees seems to guarantee bargaining in a unit which cannot exceed the public employer unit.[79] Some statutes explicitly state that the unit appropriate for bargaining is either the "public employer unit or a subdivision thereof."[80] Attempts by municipalities to adopt the collective agreement arrived at by a multiemployer group would deny their employees the right to bargain in an "appropriate unit." Such a denial would constitute an unfair practice remediable by a state's labor relations board.[81]

Multiemployer bargaining in the private sector has flourished despite this conflict between employees' right to bargain in an appropriate unit and the employers' desire to enlarge that unit.[82] Under Section 9 of the Labor Management Relations Act,[83] the representative designated by a majority of the employees in a "unit appropriate for such purposes" is the exclusive representative of all members of the unit for collective bargaining purposes. The act specifies that the appropriate unit shall be "the employer unit, craft unit, plant unit, or subdivision thereof."[84] Since the statute does not explicitly approve the creation of a multiemployer group, an employer's insistence upon bargaining in a multiemployer unit would seem to violate the employees' rights to bargain in an "appropriate unit" as defined by the statute.

77. See text surrounding notes 54-56, 70, 71 *supra.*

78. See note 4 *supra.*

79. See note 4 *supra.*

80. *See, e.g.*, PA. STAT. ANN. tit. 43 § 1101.604 (Supp. 1975).

81. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-470(4) (1972); MINN. STAT. ANN. § 179.68(5) (Supp. 1975); PA. STAT. ANN. tit. 43, § 1101.1201(b)(3) (Supp. 1975).

82. STAFF OF HOUSE SUBCOMM. ON LABOR OF THE COMM. ON EDUCATION AND LABOR, 88TH CONG., 2D SESS., MULTIEMPLOYMENT ASSOCIATION BARGAINING AND ITS IMPACT ON THE COLLECTIVE BARGAINING PROCESS (Comm. Print 1964).

83. 29 U.S.C. §§ 159 *et seq.* (1970).

84. 29 U.S.C. § 159 (1970).

The National Labor Relations Board has resolved this problem by insisting that a "single-employer unit is presumptively appropriate."[85] Any larger bargaining unit "is consensual in nature and all parties must assent before such a relationship can exist."[86] In determining whether both parties have consented to this arrangement, the Board has usually looked to their collective bargaining history as a manifestation of intent. Since the relationship is based on the "mutual consent"[87] of the union and employers, the Board has also recognized that the relationship may be terminated.[88] Any of the employers or the union may withdraw its consent to being bound by the decision of the group as long as notification is unequivocal and is sent to the other parties prior to the date for negotiations. The Board has deferred to the practice of the parties in construing the statutory language, thus virtually eliminating any apparent conflict between the statute and the multiemployer concept.

The experience in the private sector provides a model for solving the same problem in the public sector. The state labor relations board could exercise its duty of certifying an appropriate unit in precisely the manner that the National Labor Relations Board has. Based upon the statutory definition of "appropriate unit," the public employer unit would be presumptively appropriate. Any expansion would necessitate the assent of all parties involved. The actual dealings of the employers and employees and their history of concluding collective agreements on a multiemployer basis would be the most persuasive proof of their consent. Withdrawal from the unit at any time prior to the commencement of negotiations would ensure that the employees had not permanently waived their statutory rights and that employers had not abdicated their legislative power.

III. Impediments to Multiemployer Bargaining

The legal barriers to the creation of a multiemployer unit cannot be minimized. Recent cases have marked a clear departure from the traditional view of the delegation doctrine. But some jurisdictions remain committed to the prohibition against the incorporation of future decisions of other bodies. A more serious practical impediment lies in the apparent need for employee consent to the creation of an expanded bargaining unit.

It is unlikely that employees will want to agree to the formation of a bargaining structure that will destroy their existing advantage over each

85. 26 N.L.R.B. Ann. Rep. 58 (1961); 23 N.L.R.B. Ann. Rep. 36 (1958).

86. NLRB v. Dover Tavern Owners' Ass'n, 412 F.2d 725, 727 (3d Cir. 1969).

87. NLRB v. Hart, 453 F.2d 215, 217-18 (9th Cir. 1972); Andes Fruit Co., 124 N.L.R.B. 781, 783 (1959). *But cf.* Steamship Trade Ass'n, Inc., 155 N.L.R.B. 232 (1965).

88. *See* The Evening News Ass'n, 154 N.L.R.B. 1494, 1495 (1965).

individual employer. The only apparent benefit for employees in consenting to a larger unit would be the financial savings that result from a single negotiation replacing the separate negotiations with each employer. Where the theoretical bargaining advantages of unions over unorganized employers have not materialized or are not perceived, the financial benefits of consolidating and simplifying the bargaining process may invite the needed agreement for expanding the appropriate unit. Once these problems have been surmounted, however, public employers may legally structure a multiemployer unit.

In fashioning a multiemployer unit, each municipality would surrender a degree of independence in adopting the contract negotiated by a multiemployer group. This would be done willingly as long as each employer believes that the unit is furthering its interests. For this reason the selection of which municipalities should join together is important. Mutuality of interest should serve as an organizing principle for the multiemployer unit. In an area where the contract negotiated by one municipality sets a regional pattern, other employers should seek to join with this municipality. All participating employers would thereby obtain a voice in negotiations that ultimately affect them. Public employers should also consider territorial proximity, financial resources, and bargaining goals in selecting other members of the unit. Where the participants approach negotiations with a community of interest, the resulting contract should be fundamentally acceptable to all. This is essential to prevent the disintegration of this voluntary group.

Where employee consent has been received and employer interest is present, municipalities can structure a multiemployer unit in a manner that builds upon the constitutionality of legislation incorporating future wage decisions of other groups. To create the multiemployer group each employer would enact an ordinance empowering its executive to enter into a multiemployer bargaining agreement with other public employers. Thereafter representatives of each participating municipality could negotiate an agreement constituting the basis for the bargaining unit. This agreement should create a joint bargaining council on which each participating municipality would be represented. Collective bargaining decisions for the multiemployer group should be made by the vote of less than all but more than a simple majority of the council.[89] Special provision should also be made for council ratification of the contract that has emerged from bargaining with the unions. Implementation of these suggestions would protect the interests and views of all members of the bargaining group, thus safeguarding against the group's disintegration.

89. The consensus among participating employers must be of a high degree. This is necessary to prevent members from feeling that their interests are being sacrificed and from, therefore, withdrawing from the unit. However, requiring unanimity on all matters may paralyze the group and ultimately destroy it.

After the drafting of the multiemployer agreement, each participating employer would need to enact an ordinance adopting, as the present and future terms of employment for certain groups of employees, the contract ratified by the multiemployer council. Approval by the requisite majority of the joint bargaining council would thereafter establish the employment contract for all members of the group.

Each of the participating municipalities must of course yield some of its control over important political and financial decisions in joining a multiemployer unit. Questions concerning the cost and level of services desired by the residents of a municipality will no longer be resolved in negotiations between that municipality and the unions. Instead, the requisite majority of employers in the bargaining unit would make these decisions. This process would reduce the influence of the political leaders as well as residents of each municipality on their ultimate contract with public employees.

The multiemployer concept can only take root where municipalities and their inhabitants are willing to forego a degree of autonomy for the perceived benefits of a larger bargaining unit. This choice is made more easily where the financial cost of individual collective bargaining is growing unmanageable. Where the contract negotiated by a neighboring municipality sets the pattern for an area, joining a larger unit may actually increase the participants' influence in the bargaining process. Yet shared desires for increased bargaining strength and reduced cost are just a beginning; common bargaining goals are necessary to sustain the multiemployer unit. Members will yield a degree of independence to the group as long as collective action furthers their interests. When this community of interest and trust breaks down the unit becomes no longer viable.

IV. CONCLUSION

The multiemployer concept in the public sector is subject to both legal and practical obstacles. Municipalities must surmount the delegation of legislative powers doctrine as well as receive employee consent to expand the unit appropriate for bargaining. If these can be achieved serious questions still remain as to whether separate municipalities can maintain the common purpose needed to function as a group. Where, however, the legal and practical difficulties can be solved, the multiemployer concept offers public employers an opportunity for achieving organization and bargaining strength comparable to that possessed by public employees.[90]

90. Even where the legal or practical problems prevent the creation of a larger bargaining unit, employers can improve their bargaining position through informal techniques. Municipalities can create associations which foster communication and

organization with respect to labor policies. This may alleviate the isolation of each employer as it commences negotiations with the unions.

Public employers can also hire the same negotiator to represent them in collective bargaining. In so doing, they may be able to duplicate the organization that the multiemployer unit would otherwise provide. *See* note 15 *supra.*

However, these alternatives cannot provide the sharing of cost, participation in decisionmaking, and organizational strength that can be achieved through multiemployer bargaining. *See* McKelvey, *Multi-employer Bargaining in the Municipal Field—the British Columbia Experience*, 28 PUB. EMPL. REL. LIBRARY 1, 2-12 (1970).

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