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Collective Bargaining Rights of Illinois Public School Teachers

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COMMENT

COLLECTIVE BARGAINING RIGHTS OF ILLINOIS PUBLIC SCHOOL TEACHERS

Legislation enacted over the past forty years has enhanced the collective bargaining rights of many private sector employees.[1] Public employees, however, have derived little benefit from the progressive changes made in the private sector. For example, the Illinois General Assembly has failed to enact comprehensive legislation regarding the collective bargaining rights of public school teachers. Moreover, traditional legal obstacles to teacher collective bargaining rights have prevented the Illinois Supreme Court from recognizing the attitudinal and educational benefits that can flow from increased teacher participation in the negotiation process. Many jurisdictions have responded either judicially or legislatively to mounting dissatisfaction among public employees, particularly teachers.[2] To improve the quality of its public education, Illinois must respond similarly.

Although Illinois teachers' collective bargaining problems might be attributed exclusively to legislative inaction, the absence of comprehensive legislation is not the sole cause of the current unsatisfactory conditions. These conditions exist primarily because the Illinois Supreme Court has ignored available mechanisms that are capable of protecting teachers. Using the "illegal delegation" doctrine, the court has substituted its own political and social values for those provided by the General Assembly.[3]

This Comment will review the significant decisions restricting the collective bargaining rights of Illinois teachers, and discuss available legislative and judicial options. Additionally, this Comment will argue that legislative reform is necessary to overcome judicial hostility to the rights of Illinois public school teachers. Clear statutory language, mandating bilateral decision making and expressly delineating the scope of negotiable issues, must replace judicial lawmaking in the collective bargaining area. Comprehensive legislation has the potential to reduce teachers' dissatisfaction over wages and working conditions, enable teachers to utilize their professional expertise more effectively, and stimulate progress in the development of educational practices.

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1. Collective bargaining is defined as open and fair dealing between an employer and an employee representative to exchange views and proposals, and to strive to reach agreement on matters of wages, hours, and other conditions of employment. 29 U.S.C. § 158(5) (1976).

2. J. WEITZMAN, THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT 19-52 (1975) [hereinafter cited as WEITZMAN].

3. *See infra* notes 68-69 and accompanying text.

BACKGROUND

A. Historical Review

The seeds of American unionism were planted around 1786, when Philadelphia journeymen planned to strike for a minimum wage of one dollar per day.[4] From its inception, the American labor movement was hindered by the courts.[5] The criminal conspiracy doctrine, which prohibited employees' concerted efforts to achieve better working conditions and higher compensation, was used to foster industrial growth at the expense of the employees. When the judiciary abandoned this doctrine, unions began lobbying for protective legislation. The success of this lobbying effort was demonstrated by legislation that immunized unions from prosecution under the Sherman Antitrust Act,[6] made yellow dog contracts unenforceable,[7] permitted employee self-help measures after exhaustion of statutory mediation procedures,[8] and granted employees the right to organize and bargain collectively without employer interference.[9]

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4. M. SCHNAPPER, AMERICAN LABOR: A BICENTENNIAL HISTORY 24 (1975).

5. Feldman, *The Illinois Judiciary and Public Employee Labor Disputes: A Return to an Imperial Judiciary?*, 53 CHI.[-]KENT L. REV. 619, 620 (1977) [hereinafter cited as *Public Employee Labor Disputes*]. *See generally* 3 J.R. COMMONS, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59, 620-21 (1910). In 1842, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842), initiated a shift from criminal liability to civil liability for controlling union activity. *Hunt* held that a finding of criminal conspiracy required proof of either an illegal purpose or illegal means and was, therefore, inapplicable to union activity.

After *Hunt*, courts increasingly relied on both the tort of intentional infliction of economic harm and the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), to discourage union activity. *See, e.g.*, United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922) (a labor organization that gave its officers authority to order a strike was held liable in tort for injuries resulting from the strike); Loewe v. Lawlor, 208 U.S. 274 (1908) (a union's instigation of a boycott violated the Sherman Antitrust Act and subjected individual union members to liability for treble damages). Section 301 of the Labor Management Relations Act now shields individuals from liability for damages that result from a strike, whether or not the activities were authorized by a union. Labor Management Relations (Taft-Hartley) Act, § 301, 29 U.S.C. § 185(a) (1976); *see* Complete Auto Transit v. Reis, 451 U.S. 401 (1981) (the legislative intent of § 301 was to ensure that individuals would not be held liable for damages arising from violations of collective bargaining agreement no-strike provisions, even if such violations were authorized by a union).

6. Clayton Act, 29 U.S.C. § 15 (1976). The Clayton Act was passed in 1914, but the Supreme Court reduced its impact by construing it narrowly in the context of labor unions. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

7. Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976). A yellow dog contract is one in which the employee agrees, as a condition of employment, not to be a member of a union. *Public Employee Labor Disputes*, *supra* note 5, at 628.

8. Railway Labor Act, 45 U.S.C. §§ 154-164, 181-188 (1976). This act directs that disputes between railroads and their employees are to be considered and, if possible, decided in conference between the representatives of the parties involved. If the dispute cannot be settled in this manner, it may be referred by petition of either party to the National Railroad Adjustment Board, created by the Act. *See Public Employee Labor Disputes*, *supra* note 5, at 631.

9. National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151-168 (1970) (NLRA). Section 7 of the NLRA provided employees with the right to form unions, enter into collective bargaining agreements, and engage in activities for their mutual aid and protection. Section 8 prohibited employer interference with the rights conferred on employees in § 7. The Labor

Due to the doctrine of state sovereignty, legislation securing private sector collective bargaining rights was inapplicable to public employees.[10] Under traditional notions of government, an individual is precluded from suing the state without its consent.[11] For this reason, public employees have not enjoyed the same legal remedies in enforcing contractual agreements as their private sector counterparts.[12] The very notion of collective bargaining has been regarded as inimical to the unilateral decision-making power of the sovereign unit.[13] At the heart of the sovereignty doctrine lies the fear that government will be disabled from performing its unique responsibility to balance the interests of *all* its citizens if certain groups are permitted to negotiate in their own self-interest. The New York Supreme Court articulated this fear in 1943:

> Nothing is more dangerous to public welfare than to admit that hired servants of the State can dictate to the government the hours, wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that government employees have power to halt or check the functions of government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.[14]

Although the sovereignty doctrine has been judicially and legislatively eroded since the New York decision,[15] the related doctrine of "illegal delegation" has provided an alternative barrier to public employee collective bargaining. While the sovereignty doctrine emphasizes the supremacy of the government's power, the illegal delegation doctrine emphasizes the exclusivity of that power. The doctrine of illegal delegation precludes governmental power from being entrusted to, or shared with, private associations.[16] Col-

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Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-167, 171-197 (1976), amended § 8 of the NLRA by forbidding unions from engaging in secondary boycotts, jurisdictional strikes over work assignments, and strikes to force an employer to discharge an employee because of his or her union affiliation or non-affiliation. *See Public Employee Labor Disputes*, *supra* note 5, at 631.

10. The concept of "sovereignty" derives from English common law notions that "the king can do no wrong" and no individual could sue the state without its consent. WEITZMAN, *supra* note 2, at 7.

11. Democratically elected officials have invoked this doctrine in the name of the people to protect the public interest. *Id.*

12. *Id.*

13. W. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 44 (1961).

14. Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607, 180 Misc. 868, 875 (1943), *aff'd*, 326 U.S. 88 (1945). Appellants maintained that article 20 of the New York labor law, which excluded public employees from organizational and collective bargaining rights conferred on the private sector, denied them equal protection of the laws. The Supreme Court rejected this contention, stating that "[t]he state may well have thought that the problems arising in connection with private employer-employee relationships made collective bargaining legislation more urgent and compelling than for government employees." 326 U.S. at 95.

15. WEITZMAN, *supra* note 2, at 8-10. Legislation passed by Congress and the states gradually has given individuals the right to sue the government for various injuries. Also, court decisions have eroded the doctrine in areas, such as tort claims, in which the government formerly was immune from suit. *Id.*

16. *Id.* at 10.

lective bargaining agreements have been considered improper, or illegal delegations of governmental authority, because they limit the discretionary power of the government and its agencies.[17]

B. Progress in the Public Sector

Since 1959, when Wisconsin became the first state to enact comprehensive collective bargaining legislation,[18] there has been wide acceptance of public employee collective bargaining rights. By the mid-1970's, forty states had followed Wisconsin's lead and enacted similar legislation.[19] These statutes, however, extend varying amounts of power to public employees.[20] In the ten states lacking legislation authorizing public sector collective bargaining, public employers have complete unilateral control over the terms of employment.[21] Statutes authorizing collective bargaining limit this control. Two types of statutory models have been designed to create public employee bargaining power; yet hybrid variations of these models also exist.

"Meet and confer" legislation guarantees public employees the right to present their opinions prior to employer policy making.[22] Although public employees have the right to communicate their views to their employers under

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17. *See* Comment, *Non-Salary Provisions in Negotiated Teacher Agreements: Delegation and the Illinois Constitution, Article VII, Section 10*, 24 DEPAUL L. REV. 734 (1975) (agreements invalid as delegation of legislative powers and arbitration improper as delegation of school board's authority) [hereinafter cited as Comment, *Negotiated Teacher Agreements*].

18. *See* WIS. STAT. § 111.70 (1959). This law gives municipal employees the right to form a union and bargain collectively, prohibits coercion or interference with union membership, provides a method for peaceful dispute settlement, and establishes procedures for selecting representatives and determining appropriate units for collective bargaining. *Id.*

19. WEITZMAN, *supra* note 2, at 40. The following states do not have collective bargaining legislation for public employees: Arizona, Arkansas, Colorado, Louisiana, Mississippi, North Carolina, Ohio, South Carolina, Tennessee and West Virginia. *Id.*

20. In Indiana, for example, certain issues must be bargained collectively, whereas others may be bargained collectively at the sole option of the employer. Those issues that must be bargained are salary, wages, hours, and salary and wage-related fringe benefits. Optional issues are: working conditions; curriculum development and revision; textbook selection; teaching methods; selection, assignment, and promotion of personnel; student discipline; expulsion and supervision of students; pupil-teacher ratio; class size; and budget appropriations. IND. CODE §§ 20-7.5-1-1 to 20-7.5-1-4 (1975).

Rhode Island is much more restrictive in the subjects it allows to be bargained collectively. Employers are only required to meet and confer with teacher representatives on the issues of hours, salary, working conditions, and all other terms and conditions of professional employment. R.I. GEN. LAWS §§ 28-9.3-1 to 28-9.3-16 (1979).

On the other end of the spectrum, Nebraska allows collective bargaining of any subjects requested to be bargained by employee organizations. However, Nebraska provides that employers *may* meet with employee organizations if they so choose. If they do meet and negotiate, the parties are required to execute a written agreement. NEB. REV. STAT. §§ 79-1287 to 79-1295 (1976).

21. *See* McClintock, *Guideline Considerations to Help Resolve 'Scope' of Bargaining Questions: Identifying the Shifting Demarcation Between 'Negotiable' and 'Nonnegotiable' Subjects*, 1980 GONZ. PUB. LAB. L. REP. 57, 73 [hereinafter cited as McClintock].

22. *See, e.g.*, CAL. GOV'T CODE § 3517 (West 1980); MO. ANN. STAT. §§ 105.500-.530 (Vernon 1966); N.J. REV. STAT. § 34:13A (1965); WASH. REV. CODE § 41.59 (1974); WIS. STAT. § 111.70 (1959).

this model, public employers retain authority to make all ultimate decisions. The advisory participation encouraged under this statutory model falls far short of what is meant by collective bargaining in the private sector.[23] Public employees' dissatisfaction with management has resulted in a trend away from the "meet and confer" approach, and toward the more bilateral "negotiations" model.[24]

Most states have enacted "negotiations" or "collective bargaining" laws.[25] Patterned after the private sector's National Labor Relations Act,[26] these statutes create an arms-length relationship between employer and employee; such a relationship requires shared decision making.[27] Although this statutory model appears to expand greatly the bargaining power of public employees, restrictions on the scope of what may or must be bargained can render this power illusory. A brief examination of Michigan and California case law demonstrates that the range of power possessed by public employees is determined by the judiciary's construction of the "negotiations" statute.

In *Central Michigan University Faculty Association v. Central Michigan University*,[28] the Michigan Supreme Court noted that the statutory "duty of a public employer to bargain collectively with employees' representatives" was patterned after section 8(d) of the National Labor Relations Act.[29] Accordingly, the court interpreted the mandatory collective bargaining subjects, "wages, hours, and other terms and conditions of employment," to include any "aspect of the employment relationship" that has an "effect on employees' status . . . even if it may be said to be only minimally a condition of employment."[30] As a result of this expansive interpetation of the phrase "other terms and conditions of employment," Michigan requires the following subjects to be bargained collectively: salaries, overtime pay, shift differentials, holiday pay, pensions, no-strike clauses, profit-sharing plans, grievance procedures, sick leave, seniority and promotion, work rules, compulsory retirement age, employee evaluation procedures, and management rights.[31]

By contrast, the Alaska Supreme Court, in *Kenai Peninsula Borough v. Kenai Peninsula Education Association*,[32] interpreted "wages, hours and other terms and conditions of employment" as words of limitation in the public

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23. McClintock, *supra* note 21, at 73-74. Collective bargaining laws in the private sector provide for shared decision making between employer and employee. *Id.*

24. R. DOHERTY & W. OBERER, TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD 84-90 (1967) [hereinafter cited as DOHERTY & OBERER].

25. WEITZMAN, *supra* note 2, at 41.

26. 29 U.S.C. § 141 (1976).

27. McClintock, *supra* note 21, at 74.

28. 404 Mich. 268, 273 N.W.2d 21 (1978).

29. *Id.* at 276, 273 N.W.2d at 24. The Labor Management Relations (Taft-Hartley) Act imposes a mutual obligation on employer and employee to bargain collectively. 29 U.S.C. § 8(d) (1973).

30. 404 Mich. at 280, 273 N.W.2d at 26.

31. *Id.* at 278, 273 N.W.2d at 25 (citing Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974)).

32. 572 P.2d 416, 422 (Alaska 1977).

sector. The *Kenai* court held that the more a matter deals with the economic interests of employees, and the less it concerns professional goals and methods, the more susceptible it is to bargaining.[33] Accordingly, the court determined that the number of hours to be worked, salaries, and fringe benefits were negotiable issues. Nevertheless, the following matters remained nonnegotiable and were to be determined unilaterally by the school board: relief from nonprofessional chores, elementary planning time, paraprofessional tutors, teacher specialists, teacher's aides, class size, pupil-teacher ratio, teacher ombudsman, teacher evaluation of administrators, school calendar, selection of instructional materials, use of secondary department heads, secondary teacher preparation and planning time, and teacher representation on school board advisory committees.[34]

The disparate results of litigation arising from various statutes which are based upon the same model suggest that judicial philosophy, ultimately, may be more crucial to teachers' collective bargaining rights than the type of statute enacted, its wording, or even the absence of legislative collective bargaining authorization. A review of the judicial philosophy in Illinois proves this point and highlights the inadequacy of the legislature's piecemeal approach to the problem.[35]

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33. *Id.* at 423.

34. The court stated that because teacher, student, and community interests are not always coextensive, allowing teachers to bargain on matters of educational policy could "threaten the ability of elective government officials and appointive officers subject to their authority, in this case the school boards and administrators, to perform their functions in the broad public interest." *Id.* at 419. The Michigan and Alaska experiences demonstrate that broad statutory language may result in judicial interpretations that are inconsistent with legislative intent. To prevent this result, some states define the scope of collective bargaining in the legislation itself. For example, New Hampshire's statute provides that "the state retains the exclusive right . . . to direct, . . . appoint, promote, discharge, [and] transfer . . . employees . . . and take whatever actions are necessary to carry out the mission of the agency or department in situations of emergency." N.H. REV. STAT. ANN. § 98-c:7 (Supp. 1969). In other jurisdictions, specific collective bargaining restrictions derive from civil service systems or executive orders. *See* WEITZMAN, *supra* note 2, at 42-43.

Although most states include public school teachers in general collective bargaining legislation, a number of states have promulgated statutes specifically applying to teachers. These statutes permit a broad range of issues to be subject to collective bargaining. By 1974, 17 of the 29 states that had enacted legislation authorizing teacher negotiations adopted statutes specifically applying to teachers. *Id.* at 50-51.

Irving Sabghir suggested that the fact that there is more legislation applicable to teachers than to any other type of public employee reflects the reality that in recent years teachers have become the most militant public employee group. I. Sabghir, The Scope of Bargaining in Public Sector Collective Bargaining (Oct. 1970) (discussed in WEITZMAN, *supra* note 2, at 50 n.*). Weitzman postulated that such laws reflect legislative recognition of the professional status of teachers. WEITZMAN, *supra* note 2, at 51.

35. The Illinois General Assembly has authorized collective bargaining for Chicago Transit Authority employees, ILL. REV. STAT. ch. 111⅔, § 328a (1981), and school board employees, *id.* ch. 122, § 10-22.40a (1981). Governor Dan Walker created collective bargaining rights for all state employees. *See* WEITZMAN, *supra* note 2, at 48. Yet, these actions have failed to achieve the results of the Labor Management Relations Act. There is no comprehensive teacher bargain-

COLLECTIVE BARGAINING AGREEMENTS IN ILLINOIS:
THE RIGHTS OF PUBLIC SCHOOL TEACHERS

The public sector doctrine of illegal delegation is similar to the corporate doctrine of ultra vires; acts of government outside the scope of its authority are void. Courts often rely on the illegal delegation doctrine, also known as the "Dillon Rule,"[36] to void contracts that exceed the scope of a school board's authority.[37] The Illinois Supreme Court adopted this doctrine in 1831,[38] and first applied it to public education seventy-five years later in *Lindblad v. Board of Education*.[39] In *Lindblad*, the Normal School District was authorized by statute[40] to manage and "control the common . . . schools and transact all business which may be necessary in relation to [the] common schools and [to exercise] all the rights, power and authority necessary for the proper management of the schools and school funds. . . ."[41] A contract between the school district and the State of Illinois permitted a state university, in conjunction with the superintendent of schools, to select university students to teach in the public schools under the supervision of a licensed teacher. Relying on the Dillon rule, the *Lindblad* court held this contract to be void as an unlawful delegation of the school board's authority to select student teachers.[42] *Lindblad*, the first of many cases presenting the issue of illegal delegation by a school board, established a negative judicial attitude toward such delegation that still exists.

Subsequent Illinois appellate court decisions have applied the illegal delegation doctrine to collective bargaining. In *Chicago Division of the Illinois*

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ing act, and no previous acts have altered the delegation posture of the school board-teacher relationship.

36. *See* 1 DILLON, MUNICIPAL CORPORATIONS 448-50 (5th ed. 1911). The Dillon Rule provides:

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others:* First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.

Id. (emphasis in original) (footnotes omitted).

37. *See infra* notes 39-85 and accompanying text.

38. *See* Betts v. Menard, 1 Ill. (Bresse) 395, 399-400 (1831). In *Betts*, the County Commissioners' Court of Randolph County, pursuant to a statute which authorized it to grant licenses to establish ferries, issued a ferry boat license to the trustees of the town of Kaskaskia. The Illinois Supreme Court stated that the statutory authorization extended only to individual licenses and not to a corporate body that could in turn determine who would exercise ferry privileges. Accordingly, *Betts* held that absent a legislative grant of direct or implied power, the lower court's licensing constituted an illegal delegation.

39. 221 Ill. 261, 77 N.E. 450 (1906).

40. 3 Ill. Priv. L. 321, 333 (1867).

41. 221 Ill. at 266-67, 77 N.E. at 452.

42. *Id.* at 271-72, 77 N.E. at 453. The court also held that because the school board lacked authority to substitute the personal services of its licensed teachers or to employ them in a critic-teacher function, payment to the licensed teachers under the contract resulted in an unlawful diversion of public money. *Id.* at 274, 77 N.E. at 454.

Education Association v. Board of Education,[43] a taxpayer sued to prevent a school board from honoring its collective bargaining agreement with teacher organizations. The plaintiff claimed that such bargaining constituted an illegal delegation of the school board's authority. Although the court upheld the validity of the bargaining agreement, it failed to delineate the scope of matters that could be bargained. Thus, while collective bargaining agreements were not held to be impermissible per se, the *Chicago Division* court's holding does not preclude a finding that if specific provisions of such agreements were too broad they would constitute illegal delegation.

Chicago Division appeared to increase the flexibility courts had under the Dillon rule to determine the existence of an illegal delegation. For example, while one Illinois appellate court held that the board of education has exclusive authority to determine job qualifications,[44] another upheld collective bargaining provisions that imposed procedural limitations on the board's authority to hire, discharge, or transfer employees.[45] The guidelines for determining what was permissible initially seemed to turn on whether the restriction on the board was procedural or substantive. The Illinois Supreme Court, however, rejected this procedural-substantive distinction in *Illinois Education Association v. Board of Education*.[46] In that case, a non-tenured teacher was terminated for cause, but without the benefit of an evaluation procedure required by a collective bargaining agreement. The trial court's

43. 76 Ill. App. 2d 456, 459, 222 N.E.2d 243, 244 (1st Dist. 1966).

44. *See* Board of Educ. v. Rockford Educ. Ass'n, 3 Ill. App. 3d 1090, 1094, 280 N.E.2d 286, 288 (2d Dist. 1972). The collective bargaining agreement in this case provided that all promotional positions be filled "on the basis of qualification for the vacant post." *Id.* A guidance counselor who was denied promotion to a vacant administrative position despite a recommendation from the superintendent of schools, sought arbitration to determine the meaning of the word "qualification." Staying arbitration, the trial and appellate courts held that the determination of administrative qualifications involved the board's non-delegable discretionary authority; the ultimate determination of the meaning of "qualification" was reserved exclusively to the board and could not be arbitrated.

Some commentators maintain that the delegation issue has been confused by ambiguous terminology. *See, e.g.*, L. Weiner & S. Katz, *Teacher Rights and Responsibilities*, 1 ILLINOIS SCHOOL LAW § 12.41 (IICLE 1980). A clearer understanding could result if the Illinois courts used "delegation" only with reference to the grant of power to another entity; "usurpation" only with reference to the taking of such powers and duties; and "limitation" only with reference to a board's limitation of its discretion through means other than delegation.

45. *See* Classroom Teachers Ass'n v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (3d Dist. 1973). The teachers association in this case challenged the involuntary change of status of a tenured counselor to that of a teacher without granting the hearing required by the existing collective bargaining agreement. The appellate court noted that the prior hearing required by the collective bargaining agreement did not restrict the board's ultimate power to hire, discharge, or transfer its employees. *Id.* at 228, 304 N.E.2d at 519. Accordingly, it held that the provision represented a voluntary agreement to follow reasonable evaluation procedures and, therefore, was consonant with public policy and enforceable. *Id.* at 229, 304 N.E.2d at 520.

Classroom Teachers Ass'n distinguished the right to a hearing prior to a determination of a teacher's qualifications from a challenge to the determination itself. The appellate court explained that because the former was merely a procedural limitation on the board's authority, it was not an illegal delegation.

46. 62 Ill. 2d 127, 340 N.E.2d 7 (1976).

reinstatement of the teacher was affirmed by the appellate court.[47] Holding that the terms of the collective bargaining agreement could neither expand nor contract the board's statutory powers, the Illinois Supreme Court reversed the teacher's reinstatement.[48] The supreme court reasoned that because the statute conferred discretion upon the school board to dismiss non-tenured teachers, any agreement limiting this discretion would constitute an illegal delegation of authority.[49]

Board of Education v. Johnson[50] represents another attempt by the Illinois Appellate Courts to establish a basis for distinguishing permissible collective bargaining agreements from illegal delegations. In that case, the First District established a major-minor dispute test to determine the existence of illegal delegation. The issue in *Johnson* was whether the school board could submit disputes over interpretation of collective bargaining provisions to an arbitrator. Distinguishing major from minor disputes, the court held that only the latter could be arbitrated.[51] While a major dispute involves a subject statutorily reserved to a school board's discretion,[52] a minor dispute merely involves an interpretation of collective bargaining agreement provisions that do not contravene the school code.[53]

The major-minor dispute test, established in *Johnson*, appeared to be a sensible and principled way to determine when the school board could delegate its authority. Yet, by broadly defining what constitutes a major dispute, the Illinois Appellate Court for the Fifth District drastically restricted the types of matters that could be bargained collectively. For example, the collective bargaining agreement in *Wesclin Education Association v. Board of*

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47. 23 Ill. App. 3d 649, 320 N.E.2d 240 (1st Dist. 1974). The appellate court was unable to distinguish *Classroom Teachers Ass'n.* *Id.* at 659, 320 N.E.2d at 247-48.

48. 62 Ill. 2d at 130, 340 N.E.2d at 9.

49. *Id.* at 131, 340 N.E.2d at 9. Because *Illinois Educ. Ass'n* did not involve the issue of arbitration, the supreme court's interpretation of the delegation doctrine emanated from the perceived contractual limitations of the board's discretionary authority, rather than from the procedural involvement of a third party. *Id.*

50. 21 Ill. App. 3d 482, 315 N.E.2d 634 (1st Dist. 1974). The *Johnson* court examined two grievances. The first grievance was filed by a teacher who maintained that she was transferred in violation of her contractual seniority rights. The second grievance was brought by a group of teachers seeking to enforce the collective bargaining agreement that exempted them from clerical duties. The teachers maintained that requiring them to record students' names on monthly attendance cards exceeded the statutory requirement that they keep daily registers, ILL. REV. STAT. ch. 122, §§ 18-12, 24-18 (1971), and violated the collective bargaining agreement that exempted them from clerical work. 21 Ill. App. 3d at 485, 315 N.E.2d at 637.

51. 21 Ill. App. 3d at 491, 315 N.E.2d at 641.

52. *Id.* The court stated that tacit approval of this test was given in Board of Educ. v. Champaign Educ. Ass'n, 15 Ill. App. 3d 335, 304 N.E.2d 138 (4th Dist. 1974), which held allegations of specific violations of the school code to be outside the proper scope of collective bargaining and arbitration.

53. 21 Ill. App. 3d at 491, 315 N.E.2d at 641. Employing this test, the court held that the first grievance could not be arbitrated because the transfer question involved a determination of qualifications, which was a duty expressly reserved to the Board by the Illinois School Code. Because the administration of attendance cards was not specifically dealt with in the code, it was classified as a minor dispute, properly subject to contractually mandated arbitration.

Education,[54] provided non-tenured teachers with procedural safeguards against dismissal. The school code, however, vested authority to dismiss non-tenured teachers in the school board. This authority was limited only by a requirement that a teacher be given sixty days notice of dismissal. Finding a major dispute, the *Wesclin* court held the bargaining agreement's provision unenforceable because it limited the discretionary power statutorily conferred upon the school board. Thus, the court's application of the major-minor dispute test caused the invalidation of a collective bargaining agreement that sought to protect teachers by requiring a more stringent dismissal procedure than was provided statutorily.

Although the Illinois Supreme Court never acknowledged the major-minor dispute test, it provided additional guidance in a series of cases involving arbitration. The supreme court examined the relationship between arbitration and illegal delegation in *Board of Trustees v. Cook County College Teachers Union, Local 1600.*[55] Three issues were presented in *Board of Trustees*. The first issue was whether an arbitrator could award teaching contracts to non-tenured teachers who were dismissed in violation of the collective bargaining agreement's procedural requirements.[56] The court reasoned that because the Board had exclusive authority to appoint teachers, the arbitrator lacked authority to renew employment contracts as a remedy for a collective bargaining agreement violation. Accordingly, the court vacated the arbitrator's award of reinstatement.[57]

The second issue in *Board of Trustees* was whether faculty promotions could be arbitrated.[58] The court maintained that the Public Community College Act, by empowering the Board "to employ such personnel as may be needed, to establish policies governing their employment and dismissal and to fix

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54. 30 Ill. App. 3d 67, 331 N.E.2d 335 (5th Dist. 1975).

55. 62 Ill. 2d 470, 343 N.E.2d 473 (1976).

56. The non-tenured teachers in *Board of Trustees* were dismissed without receiving the prior advisory faculty evaluations and recommendations required by a collective bargaining agreement. *Id.* at 473, 343 N.E.2d at 475.

57. *Id.* at 476-77, 343 N.E.2d at 476. The court also held that non-tenured teachers lacked a sufficient property interest to invoke due process protection. The *Board of Trustees* court cited Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), as support for its determination that non-tenured teachers were not entitled to a due process hearing prior to the Board's decision not to renew their contracts. In *Roth*, a non-tenured teacher filed suit against a Wisconsin state university for not retaining him after his initial one-year contractual term. Claiming that the unarticulated reason for the university's failure to rehire him was his criticism of the university administration, Roth alleged violations of his constitutionally guaranteed rights to freedom of expression and to procedural due process. The district court granted summary judgment to the Board of Regents on the procedural due process issue, 310 F. Supp. 972 (W.D. Wis. 1970), and the seventh circuit affirmed, 446 F.2d 806 (7th Cir. 1971). The Supreme Court upheld the lower court rulings on the basis that a non-tenured teacher lacks sufficient property or liberty interests to invoke the protection of fourteenth amendment procedural due process. 408 U.S. 564, 578 (1972). In *Perry v. Sindermann*, the Court held that tenure, established either by contract or by a de facto tenure policy, entitles a teacher to procedural due process safeguards prior to non-retention. 408 U.S. 593, 603 (1972).

58. 62 Ill. 2d at 478, 343 N.E.2d at 477.

the amount of their compensation,"[59] implicitly reserved to the Board the authority to grant or deny promotions. Consequently, the supreme court declared the collective bargaining agreement allowing arbitration of faculty promotions to be an illegal delegation.[60]

The final issue resolved in *Board of Trustees* was whether an arbitrator's back pay award was an illegal delegation.[61] The trial court had granted the Board's motion for summary judgment and modified the arbitrator's award by requiring teachers to perform extra work. The appellate court for the first district affirmed,[62] but the Illinois Supreme Court held that the back pay award did not constitute an illegal delegation because the Board retained the authority to select extra courses and to determine who was qualified to teach them.[63]

Board of Trustees is significant because it resolved the threshold question of the validity of binding arbitration provisions. Yet, while validating the inclusion of binding arbitration in collective bargaining agreements, the *Board of Trustees* court failed to delineate the scope of an arbitrator's authority. In establishing that an arbitrator could award back pay but could not order reinstatement, the court failed to explain why it distinguished between these enforcement mechanisms. If these remedies were distinguished because one is retroactive (back pay) and the other is prospective (reinstatement), it is difficult to reconcile the distinction with the court's holding that promotion determinations cannot be arbitrated. With respect to faculty promotions, an arbitrator could only require the school board to follow the evaluation procedures embodied in the collective bargaining agreement. This does not seem to be a retroactive remedy in the same sense as an award of back pay; nevertheless, both issues were declared to be beyond the scope of permissible arbitration.

Board of Trustees v. Cook County College Teachers Union, Local 1600[64] created additional confusion in defining the scope of permissible arbitration. As a result of a strike settlement, nonstriking teachers were unforeseeably disadvantaged in competing for summer school teaching opportunties. An arbitrator determined that the collective bargaining agreement's system of

59. ILL. REV. STAT. ch. 122, § 103-42 (1973).

60. 62 Ill. 2d at 478-79, 343 N.E.2d at 477.

61. The back pay award was the result of a grievance which alleged that certain teachers had been deprived of the opportunity to teach summer school because the Board failed to follow the rotational scale provided by the collective bargaining agreement. The matter was arbitrated and the teachers received retroactive compensation for the lost income. Dissatisfied with the result of arbitration, the Board filed suit in the circuit court seeking declaratory relief and a modification of the arbitrator's award. The complaint alleged that the arbitrator's award of back pay constituted an illegal expenditure in violation of article VIII, § 1 of the Illinois Constitution. 62 Ill. 2d at 479-80, 343 N.E.2d at 477-78.

62. 22 Ill. App. 3d 1066, 318 N.E.2d 202 (1st Dist. 1975).

63. 62 Ill. 2d at 480, 343 N.E.2d at 478. Consequently, the only remaining issue was whether the courts should have modified the arbitrator's award. Relying on United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) (holding that arbitrators may award back pay), the *Board of Trustees* court reversed and remanded the case. 62 Ill. 2d at 481, 343 N.E.2d at 478.

64. 74 Ill. 2d 412, 386 N.E.2d 47 (1979).

determining summer school teaching priority did not include special provisions for strike situations.[65] Thus, striking teachers were entitled to the windfall priority.

The Board of Trustees challenged the validity of this determination. The trial court issued a declaratory judgment and injunction in favor of the Board on the basis that the award favored "illegal actions contrary to public policy."[66] Determining that the matter was a proper subject of arbitration, the appellate court reversed.[67] The Illinois Supreme Court, however, reversed the appellate court on public policy grounds. Although the arbitrator's award drew "its essence from the collective bargaining agreement," the supreme court concluded that the extraordinary strike situation raised "an issue of overriding public policy" that dictated a reversal of the "unjust" award.[68] Thus, this case demonstrates that although arbitration is a judicially favored mechanism, the Illinois Supreme Court remains its moral overseer.[69]

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65. *Id.* at 418, 386 N.E.2d at 49.

66. *Id.* at 415, 386 N.E.2d at 48.

67. 55 Ill. App. 3d 435, 371 N.E.2d 66 (1st Dist. 1977).

68. 74 Ill. 2d at 423, 426, 386 N.E.2d at 52, 53. Initially, the supreme court adopted the deferential standard of review established in three decisions commonly referred to as the Steelworkers Trilogy. *Id.* at 418-19, 386 N.E.2d at 50 (citing and adopting United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960)). After noting that the deferential standard used in the Steelworkers Trilogy would not apply if there were an illegal delegation, the court announced that this case did not involve an illegal delegation. *Id.* at 419-20, 386 N.E.2d at 50.

69. *Id.* at 423-25, 386 N.E.2d at 52-53. The court cited White Star Mining Co. v. Hultberg, 220 Ill. 578, 601-10, 77 N.E. 327, 335-39 (1906), as the case that established the common law grounds for vacating an arbitration award. 74 Ill. 2d at 418, 386 N.E.2d at 49. According to *Hultberg*, the only circumstances in which court intervention is justified are fraud, corruption, partiality, misconduct, mistake, and failure to submit the question to arbitration. None of these grounds was found to exist in *College Teachers Union*. *Id.* at 420, 386 N.E.2d at 50. Thus, while the supreme court articulated strong support for the arbitration process, its substantive review of the result operates to undermine the very system it applauds. The *College Teachers Union* holding is irreconcilable with other Illinois Supreme Court decisions that expressly disavow any notion that courts are empowered to act as "super-arbitrators."

For example, in Board of Educ. v. Chicago Teachers Union, Local No. 1, 86 Ill. 2d 469, 427 N.E.2d 1199 (1981), an arbitrator allowed a teacher who had been attacked during school hours to receive double compensation for her injuries and absence. The Illinois Supreme Court upheld the arbitrator's award, not because it agreed with the arbitrator, but because of the narrow grounds upon which a court is free to vacate such an award. The arbitrator awarded $34,936.10 to the teacher, who had been beaten viciously by an unknown assailant in the hallway of a Chicago public elementary school. The teacher's collective bargaining agreement stated: "Teachers or other bargaining unit members whose absences result from school-related assault shall be paid full salary and medical expenses by the Board and no deduction shall be made from sick leave." The Board opposed the award on the basis that the teacher had already been compensated under the workers' compensation statute. *Id.* at 472, 427 N.E.2d at 1200. Considering the conflicting policies of double recovery and teacher safety, the court noted that:

> The problem of security in urban schools is a familiar and serious one. It is obvious that there can be no education where there is no security for students, teachers or staff. Article 44-8, by providing double recovery, is a positive step in this area that recognizes reality and provides extraordinary measures for teachers victimized by school related violence.

Id. at 476, 427 N.E.2d 1202.

More recently, in *Board of Education v. Chicago Teachers Union, Local 1*,[70] the Illinois Supreme Court retreated from the approval of arbitration announced in Board of Trustees. The dispute in *Chicago Teachers Union* involved an annual salary provision in a collection bargaining agreement. Although teachers and career service employees were entitled to an annual salary under the agreement, the Board decided to save money by closing the schools one day earlier than originally planned and deducting wages for that day from teachers' salaries.[71] Alleging that this deduction violated the agreement's salary provisions, the union sought arbitration. In response, the Board sued to enjoin the arbitration.[72] The circuit court granted the injunction but the appellate court reversed, holding that the agreement guaranteed teachers an annual salary for a thirty-nine week school year unless there was a lack of funds, a condition not supported by the evidence.[73] In reversing the appellate court, the Illinois Supreme Court observed that the Board's discretionary power under the school code enabled it to control budgetary considerations and to close schools earlier that the date established by the annual calendar.[74] The supreme court found these discretionary powers to be nondelegate and, accordingly, invalidated the collective bargaining agreement.[75]

Chicago Teachers Union is flawed in several respects. For example, the Board's power to close the public schools earlier than planned was unrelated to the agreement's annual salary provision.[76] Additionally, the statutory provisions enabling the Board to decrease teachers' salaries are limited to situations in which contractual expenditures exceed budgetary appropriations.[77] Moreover, the Illinois Supreme Court selectively enforced the school board's contractual obligations by relying on its own view of what best promotes the collective public good. In so doing, the court created uncertainty that "will only result in greater financial difficulty over time as creditors become wary of the school board and require better terms to compensate for the risk of extending credit under those circumstances."[78]

The preceding discussion demonstrates that the Illinois Supreme Court consistently has protected the exclusive authority of school boards to establish the terms and conditions of their teachers' employment. By invoking the doctrine of illegal delegation, the court denied public school teachers the same degree of control over establishing employment terms that was possessed by their counterparts in the private sector. Instead, the school board was held to have unilateral power to dismiss teachers without procedural safeguards, to decide whether to renew teacher contracts, and to grant or

70. 88 Ill. 2d 63, 430 N.E.2d 1111 (1981).

71. It would have cost the Board approximately $2,800,000 to pay the teachers' salary for one day. *Id.* at 67, 430 N.E.2d at 1113.

72. The union filed a counterclaim to compel arbitration. *Id.*

73. 89 Ill. App. 3d 861, 866-67, 412 N.E.2d 587, 591-92 (1st Dist. 1980).

74. 88 Ill. 2d at 72, 430 N.E.2d at 1116. The court analogized this power to the power to dismiss employees. *Id.*

75. *Id.*

76. *Id.* at 75, 430 N.E.2d at 1117 (Simon, J., dissenting).

77. *Id.* at 80-81, 430 N.E.2d at 1119-20 (Simon, J., dissenting).

78. *Id.* at 80, 430 N.E.2d at 1119 (Simon, J., dissenting).

deny promotions. Teachers were not allowed to participate in such matters, either directly through collective bargaining agreements or indirectly through binding arbitration.

THE IMPACT OF LEGISLATION

A. The Absence of Legislation as a Cause of Collective Bargaining Difficulties Among Teachers

At least one commentator has attributed the unsettled relations between Illinois public school boards and their teachers to the Illinois General Assembly's failure to enact comprehensive legislation providing for public sector collective bargaining.[79] The absence of such legislation, however, is not the cause of teachers' collective bargaining problems; moreover, if enacted such statutory provisions would not substantially expand teachers' collective bargaining rights. An examination of alternative judicial approaches indicates that the Illinois Supreme Court's continued reliance on the doctrine of illegal delegation is more a result of judicial predilection, than of the absence of statutory collective bargaining provisions.

The Illinois School Code of 1961 authorized the Chicago Board of Education to "exercise general supervision and management of . . . the public school system of the city . . . [and] all other powers that may be requisite or proper to the maintenance and development of the public school system."[80] Based on this broad delegation of authority, the Illinois Supreme Court could have recognized that the power to enter into a collective agreement is one which is "requisite and proper to the maintenance and development of the public school system."[81] By doing so, the court could have avoided the delegation problem entirely; all collective bargaining contracts would have been viewed as binding exercises of the school boards' statutory authority. Instead, Illinois' highest court employed the doctrine of illegal delegation to nullify only those contracts that were disadvantageous to school boards.[82]

The 1970 Illinois Constitution provided the Illinois Supreme Court with another vehicle to avoid the devastating effects of Dillon's Rule.[83] Article 20, section 10 of the Illinois Constitution provides that "[u]nits of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or ordinance."[84] This provision could have been used by the court to overrule the delegation doctrine. The constitutional convention debates clearly

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79. *See* Clark, *Public Employee Labor Legislation: A Study of the Unsuccessful Attempt to Enact a Public Employee Bargaining Statute in Illinois*, 20 LAB. L.J. 164, 173 (1969).

80. ILL. REV. STAT. ch. 122, § 34-18 (1961).

81. *Id.*

82. *See supra* notes 36-78 and accompanying text.

83. *See* Comment, *Negotiated Teacher Agreements*, *supra* note 17, at 742 (the purpose of the local government article of the 1970 Illinois Constitution was to reverse Dillon's Rule).

84. ILL. CONST. art. XX, § 10.

indicate that this provision was intended to overrule the delegation doctrine.[85] Moreover, other jurisdictions have demonstrated that such a result can be achieved through similar provisions.[86]

Thus, Illinois' continued reliance on the doctrine of illegal delegation is primarily due to its courts' protectionist political philosophy, rather than to the absence of statutory collective bargaining provisions. Nevertheless, the question remains whether comprehensive legislation would enhance the rights of public school teachers.

B. The Legislative Remedy

Employees in the private sector are prohibited from bargaining on issues within the sphere of management prerogatives.[87] This prohibition is justified by the belief that the only legitimate concerns of workers are wages, hours, and conditions of employment. The nature, design, quality and price of the product are issues reserved to the unilateral control of management because of its expertise in these areas, and because these issues involve the competitive, risk-taking initiative that distinguishes management from labor.[88]

The private sector model, based upon a profit-motive, production-oriented enterprise, is inappropriate in the area of public education. Because of the expertise teachers possess in areas beyond the terms of their employment, the private sector model of limited employee involvement should not be adopted in public education collective bargaining.[89] Both the National Education Association and the American Federation of Teachers support bilateral determination of issues beyond wages, hours, and conditions of employment.[90]

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85. While the condition "in any manner not prohibited by law" raises the question of whether the provision supercedes the delegation theory, an examination of the amendment debates reveals that such a result was intended. *See* Comment, *Negotiated Teacher Agreements*, *supra* note 17, at 742-46. The Mathis-Martin amendment, which reinstated the authority of school districts and non-home rule units to delegate power, presented the convention with a clear choice. The amendment passed 82 to 5. *See* 7 RECORD OF THE PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1603-04 (1970).

86. For example, in Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975), the Ohio Supreme Court interpreted a similar provision, OHIO REV. CODE ANN. § 3313.17 (Page 1973), and validated a collective bargaining agreement containing a broad range of teacher concerns including: teacher environment, salaries, payroll deductions, leaves of absence, promotions, enforcement of discipline, evaluation, transfers, paydays, academic freedom and binding grievance arbitration. In 1980, an Ohio appellate court reaffirmed this position by stating that "where a school board has benefitted from an agreement and seeks to have it upheld, the courts generally apply normal principles of contract law to test the contract's validity and binding effect." Cleveland City School Dist. v. Cleveland Teachers Union, 68 Ohio App. 2d 118, 121-22, 427 N.E.2d 540, 543 (1980) (citing *Dayton Classroom Teachers Ass'n*).

87. DOHERTY & OBERER, *supra* note 24, at 90 (concerns of the worker are distinguished from profit motive of the employer).

88. *Id.*

89. *Id.*

90. *Id.*

Legislation in some jurisdictions has successfully limited the traditional concept of managerial prerogatives. For example, the Pennsylvania Supreme Court held that by enacting a mandatory collective bargaining statute, the Pennsylvania legislature had demonstrated an intent to "[encroach] upon the former autonomous position of management" in order to "restore harmony within the public sector."[91] Accordingly, Pennsylvania courts have enforced collective bargaining agreements that provide benefits beyond those expressly authorized by the statute.[92] Minnesota courts have also deviated from the concept of managerial prerogatives although they have articulated a public policy rationale. In *International Brothers of Teamsters Local 320 v. City of Minneapolis*,[93] the Minnesota Supreme Court held that the provisions in a state mandatory bargaining act, severely restricting strikes, justified a broad construction of the statute's scope. The court maintained that a good working relationship between public employers and their employees could be accomplished best through a meaningful system of negotiation and bilateral dispute resolution procedures.[94]

Yet, unless a state statute contains a clause divesting the public employer of its management prerogatives,[95] courts usually presume that the legislature intended to preserve such prerogatives.[96] For example, an Alaska statute broadly provides for negotiation "in good faith on matters pertaining to [teachers'] employment and the fulfillment of their professional duties."[97] Nevertheless, the Alaska Supreme Court held that a broad number of sub-

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91. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 504-05, 337 A.2d 262, 267 (1975).

92. *See, e.g.*, Leechburg Area School Dist. v. Leechburg Educ. Ass'n, 24 Pa. Commw. 256, 259, 355 A.2d 608, 610 (1976).

93. 302 Minn. 410, 413, 225 N.W.2d 254, 256 (1975).

94. *Id.* at 415-16, 225 N.W.2d at 257; *see also* McClintock, *supra* note 21, at 66. California, Iowa, Michigan, Nebraska, New York, Rhode Island, Washington and Wisconsin have taken similar positions. *See* City and County of San Francisco v. Cooper, 13 Cal. 3d 898, 918, 534 P.2d 403, 416, 120 Cal. Rptr. 707, 720 (1975) (en banc); Barnett v. Durant Community School Dist., 249 N.W.2d 626, 630 (Iowa 1977); Central Mich. Univ. Faculty Ass'n v. Central Mich. Univ., 404 Mich. 268, 277, 273 N.W.2d 21, 25 (1978); American Fed'n of State, County, and Mun. Employees v. County of Lancaster, 200 Neb. 301, 302, 263 N.W.2d 471, 473 (1978); Board of Educ. v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 128, 282 N.E.2d 109, 112, 331 N.Y.S.2d 17, 22 (1972); Belanger v. Matteson, 115 R.I. 332, 339, 346 A.2d 124, 130 (1975), *cert. denied*, 424 U.S. 968 (1976); Glendale Professional Policemen's Ass'n v. City of Glendale, 83 Wis. 2d 90, 99, 264 N.W.2d 594, 599 (1978); Edmonds Educ. Ass'n v. Edmonds School Dist. No. 15, WASH. PUBL. EMPL. REL. REP., Dec. 207, EDUC (April 11, 1977).

95. *See, e.g.*, CAL. GOV'T CODE § 3543.2 (West 1980) (limiting the scope of collective bargaining issues to wages, hours, and other terms and conditions of employment, and defining terms and conditions of employment as "health and welfare benefits . . . , leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security . . . , [and] procedures for processing grievances"). *See generally* J. GRODIN, D. WOLLETT & R. ALLEYNE, JR., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 126 (3d ed. 1979) (questioning whether a "shopping list" approach is desirable).

96. McClintock, *supra* note 21, at 69.

97. ALASKA STAT. § 14.20.550 (1975).

jects pertaining to teacher working conditions were improper subjects of collective bargaining.[98] Considering the Illinois Supreme Court's similar predilection for preserving managerial prerogatives, in order to safeguard teachers' rights and utilize their resources fully, the General Assembly should enact a statute specifically delineating the scope of collective bargaining. Furthermore, in order to overcome judicial hostility to the rights of public school employees, such a statute should itemize those issues which must be bargained bilaterally. The legislature should expressly reject both the illegal delegation doctrine and the managerial prerogative principle. An elastic clause expressing legislative intent to favor bilateral decision making also may be necessary to remedy the mounting dissatisfaction of public school teachers with their employment relationship. Anything short of an unequivocal command is unlikely to overcome the ideological favoritism the Illinois Supreme Court has shown toward public school boards.

C. The Constitutional Problem

This Comment has advocated that the Illinois General Assembly should enact comprehensive legislation to overcome the judicial hostility to public school teachers' collective bargaining rights. It should be noted, however, that such legislation must be drafted carefully in order to avoid constitutional infirmity. Courts might interpret a statute authorizing binding interest arbitration as an unconstitutional delegation of the legislature's power, because only the legislature has the authority to determine certain matters.[99] Constitutional problems rarely exist when a constitution expressly authorizes the legislature to delegate its power to administrative entities.[100] When a constitution expressly prohibits such delegation, statutes authorizing arbitration often are declared unconstitutional.[101] Moreover, if a state constitution is silent as

98. Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416, 422 (Alaska 1977) (holding the following to be nonnegotiable: relief from nonprofessional chores, elementary planning time, paraprofessional tutors, teacher specialists, teacher's aides, class size, pupil-teacher ratio, teacher ombudsman, teacher evaluation of administrators, school calendar selection of instructional materials, the use of secondary department heads, secondary teacher preparation and planning time, and teacher representation on school board advisory committees).

99. An Illinois statute provides: "The school board may enter into agreements with employees or representatives to resolve disputes and grievances by binding arbitration before disinterested third parties." ILL. REV. STAT. ch. 122, § 10-22.4a (1981). It is unclear whether this act authorizes interest or merely grievance arbitration. Its failure to define the scope of arbitration renders it impotent, as any contractual agreement still would be subject to the delegation doctrine. Moreover, its broad language and undefined goals would present constitutional problems if it were given any impact at all. *See* State v. Traffic Telephone Workers' Fed'n, 2 N.J. 335, 66 A.2d 616 (1949) (legislature must prescribe standards that govern an administrative agency that was delegated limited legislative power on a specific subject or delegation is unconstitutional).

100. *See, e.g.*, Harvey v. Russo, 435 Pa. 183, 255 A.2d 560 (1969) (after Pennsylvania amended its constitutional prohibition of arbitration, the court held that the express acceptance of interest arbitration protected it from constitutional attack).

101. *See, e.g.*, Erie Firefighters Local 293 v. Gardner, 406 Pa. 395, 178 A.2d 691 (1962) (recommendations of a panel, established by an act providing a grievance procedure for employees forbidden by law to strike, are not binding on a municipal lawmaking body).

to the extent of the legislature's power to delegate its authority, courts usually require that the delegation be accompanied by narrow, detailed administrative guidelines.[102]

The Illinois Supreme Court requires that delegation of legislative power identify: "(1) [t]he *persons* and *activities* potentially subject to regulation; (2) the *harm* sought to be prevented; and (3) the general *means* intended to be available to the administrator to prevent the identified harm."[103] Accordingly, to either avoid or survive a constitutional challenge, a statute authorizing binding interest or grievance arbitration should articulate specifically the goals of improved employee relations and greater educational quality through increased teacher participation and bilateral decision making. Furthermore, specific administrative guidelines should be included to reduce administrative discretion to a constitutionally permissible scope. For example, an arbitrator might be required to remain within budgetary appropriations and to consider the municipality's financial resources, the public interest, educational research, wage comparison with comparable communities, and cost of living factors.[104] Binding arbitration and legally enforceable collective bargaining agreements should be pursued as the preferred methods of limiting strikes, satisfying employee demands, and upgrading the quality of public school education.

CONCLUSION

The illegal delegation doctrine, firmly established in Illinois, has been used to deprive public school teachers from enjoying the collective bargaining rights possessed by private sector employees. Although a collective bargaining agreement between a public school board and its teachers does not constitute an illegal delegation per se, the agreement's provisions will be invalidated if they impermissibly encroach upon the board's authority. The vague and inconsistent guidelines for determining the permissible scope of bargaining make it almost impossible to predict which collective bargaining agreement provi-

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102. *See, e.g.*, City of Warwick v. Warwick Regular Fireman's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969) (General Assembly's unconditional delegation of its legislative power is unconstitutional).

103. Stofer v. Motor Vehicle Casualty Co., 68 Ill. 2d 361, 372, 369 N.E.2d 875, 879 (1977) (emphasis in original). Delegation must also identify the persons and activities potentially subject to regulation. *Id.* Under these criteria, a statute allowing the State Director of Insurance to promulgate uniform insurance policies was upheld because the legislature indicated an intention to prevent the chaotic proliferation of disparate fire insurance policies and provided substantial safeguards which limited the Director's discretion. *Id.* at 373-74, 369 N.E.2d at 879-80. Yet, when the Director of Financial Institutions was empowered to set maximum rates currency exchanges could charge, the court struck the enabling legislation as unconstitutional because the legislature failed to define the problem and limit the administrator's discretion beyond a "reasonableness" requirement. Thygesen v. Callahan, 74 Ill. 2d 404, 409-10, 385 N.E.2d 699, 702 (1979).

104. These limiting criteria were approved in Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976). They protect the interests of the community while concurrently shifting the responsibility of providing quality education to the teachers.

sions will be declared void. While the major-minor dispute test, promulgated in *Johnson*, seems to prevail among the appellate districts, Illinois Supreme Court decisions do not consistently support the test's analysis. Moreover, by invoking the delegation doctrine in the name of public policy, the Illinois Supreme Court has further increased the uncertainty in public school teacher collective bargaining rights.

A comprehensive collective bargaining statute could alleviate the uncertainty, professional apathy, and wage-related militancy that currently plagues Illinois public schools. Legislation authorizing grievance arbitration for both procedural and substantive matters contained in collective bargaining agreements could prevent bargains made in good faith from being struck down by the Illinois Supreme Court and, accordingly, enhance respect for the educational system. Binding interest arbitration could benefit communities by allowing teachers to use their expertise in establishing the goals, methods and conditions of education. Additionally, it could stimulate educators to make greater contributions toward raising the quality of education. A statute expressing these goals and providing discretionary guidelines would encourage progress in education without violating the requirements of the Illinois Constitution.*

Robin Katz

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* On April 5, 1983, Senate bill 0536 was introduced in the Illinois General Assembly. If enacted, this bill would establish a comprehensive law governing labor relations between public employees, the State of Illinois, and its political subdivisions. Among other things, Senate bill 0536 provides for collective bargaining for public school teachers. If this bill becomes law, many of the problems identified in this Comment would be resolved.—*Ed.*