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BOOK COMMENTARY

THE UNIONS AND THE CITIES. By HARRY H. WELLINGTON AND RALPH K. WINTER, JR. Washington, D. C.: The Brookings Institute. 1971. xiii + 226 pages. $7.95.*

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In this short and very readable volume Professors Wellington and Winter discuss the political, economic, and legal problems faced by American cities and other local governing units as a result of the growing use of collective bargaining in the public sector. Although the book contains a considerable amount of general information about the current status and practices of public employment bargaining, the main significance of the work is the authors' thesis that the collective bargaining model—including strikes—that has developed in the private sector should not be fully extended into the public sector. In so stating, the authors take direct issue with what they accurately describe as "fast becoming the conventional wisdom"[1] concerning public employee labor relations. This conventional wisdom is represented by statements such as that of Mr. Theodore Kheel quoted in the first paragraph of chapter one of *The Unions and the Cities:*

> In the public sector, as in the private, Mr. Kheel argues, "the most effective technique to produce acceptable terms to resolve disputes is voluntary agreement of the parties, and the best system we have for producing agreements between groups is collective bargaining—even though it involves conflict and the possibility of a work disruption."[2]

In rejecting the Kheel argument about public employee bargaining, Wellington and Winter state that they do accept fully developed collective bargaining in the private sector.[3] However, this acceptance seems to be grudging and it is difficult to believe that their views as to collective bargaining in the public sector, particularly concerning the adverse effects of strikes, are not at least colored by their lack of enthusiasm for it generally. Be that as it may, their argument in this

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1. P. 7.
2. *Id.*
3. Pp. 2-3, 7-8.

book does not explicitly rest on a general dislike of full collective bargaining. Rather it relies on their distinctions between the public sector and the private sector concerning collective bargaining.

Wellington and Winter rely on two interrelated but analytically separate bases for limiting public sector bargaining as compared to private sector bargaining. The first is that the structure of the public market as compared to the strucure of the private market is such that public employee unions have potentially greater economic power than do private employee unions.[4] The second is that the decision-making process in the public arena is different from that in the private.[5]

In keeping with the theme of this special section on education and the law and with my professional field of interest in the law governing public education below the college level, I would like to explore the Wellington and Winter thesis in the context of collective bargaining in public education. I feel further justified in exploring their thesis in this context as Wellington and Winter themselves recognize teacher collective bargaining as an important component of public employee bargaining generally and, indeed, specifically discuss it at various points in their study.[6]

In terms of public education, collective bargaining must be viewed as a method of educational decision making, with teachers viewed as a group competing for educational decision-making power with such other groups as administrators, school boards, community leaders, parents, students, legislatures and, indeed, courts. From this perspective, the general thrust of Wellington and Winter to treat teacher collective bargaining differently from private employee bargaining and in so doing to limit it in scope and power seems correct. I reach this conclusion, however, on slightly different reasoning than do the authors, and also wish to suggest somewhat different mechanisms for limiting teacher collective bargaining.

In the Wellington and Winter *private* sector model, there are restraints on union demands produced by the need to maintain the employer's competitive posture. If wage increases result in higher product prices, decreases in consumer demand may result in employment reductions.[7] They do not, however, believe that similar restraints exist in the *public* employment model.[8] In so concluding, they necessarily reject

4. Pp. 15-24, 29-32.
5. Pp. 21-32, 59-65.
6. *E.g.*, pp. 27-29, 137-42.
7. Pp. 15-17.
8. Pp. 17-21.

the argument that taxpayer action to keep taxes low is analogous to consumer action in the private sector.

At least as applied to teacher collective bargaining, however, this dichotomy based on market restraints or their absence may well be inapposite. Although the percentages vary from state to state and the trend has been to greater state and federal financing of education, the the average local component of educational finance is still approximately 52 percent.

As the authors themselves recognize, school districts are not typical governmental units.[9] Most school districts in this country are independent of other political entities. They raise their own taxes with a specially designated property tax that is very visible to the taxpayer. Indeed, even when school districts are not fiscally independent, school taxes are often made highly visible by a special property tax levy for schools. Thus, the costs of education are not just another item in a complex municipal budget as is true, for example, with police, fire, sanitation, etc. Nor is the responsibility for local school taxes generally seen by the public as divided among different governmental entities. Most school boards are elected and their members held responsible by the electorate for school tax increases. Moreover, in many areas the taxpayers themselves vote on tax increases or bond offerings.

Finally, and most significantly, different groups of taxpayers view themselves differentially as consumers of educational services in a way not common to many other governmental services, particularly local government services. Thus, the pressure to settle a strike so as to restore the service and the acceptance of high taxes in order to retain the quality of service despite rising costs is not universally felt among the electorate. In terms of their perception of the value of public education, taxpayers may be distributed along the following continuum from highest to lowest perceived value: parents of children in public schools; people with no children of school age; and parents of children in private schools, particularly parochial schools. This last group particularly feels a "double taxation" burden in relation to private education costs and taxation and presents a strong consumer reluctant force. The consumer reluctance of the middle group, those without children in any school, particularly the retired on fixed incomes, is also increased by the perceived regressive nature of the property tax—a burden this group feels acutely.

9. *See* pp. 198-201.

These factors lead me to conclude that it is not at all clear that the economic structure leads to teachers' unions having greater economic power than private-sector unions.

Moreover, Wellington and Winter's reliance for their argument in favor of restricting public employee bargaining power on the greater monopsony power of the employer in the private sector and thus the greater need for union countervailing power in that sector[10] also does not seem applicable in terms of education, even if it is generally true. Specific teacher training is not easily transferable to other fields; nor is teacher experience. There is, of course, a private school teaching market, but this is presently quite limited in positions and underpaid in relation to public school teaching. It is also true that the public school system cannot go out of business as can a private business, but this fact would seem to be offset by the strong consumer reluctance interest operating in education.

There is, however, one unique aspect of teacher strikes not discussed by Wellington and Winter that does make them more effective than strikes by private employees, and, indeed, by other government employees. Teachers generally do not lose working time and wages by striking. This occurs because state laws require a minimum number of teaching days, either absolutely or in order for the school district to receive state funds. Since most school systems schedule only a few days over these minima, days lost by teacher strikes must generally be made up, with the teachers being paid for the make-up time. Thus, for example, despite a three-week teacher strike in Philadelphia this year, the teachers will receive their full salary since they will be paid for the sixteen extra days added to the school calendar to make up for school days lost during the strike.

Further, even without collective bargaining teachers have achieved a number of significant collective bargaining goals which decrease the need for increasing union power. Job security is well protected by tenure, concepts of academic freedom and the like. Teachers individually and collectively, even without collective bargaining, traditionally have had a significant input into educational decision making. Finally, in terms of a teacher's day-to-day control of his classroom, he has exerted, and continues to exert, enormous influence. This political reality of teacher control has even been further advanced by doctrines such as legal protection of academic freedom.

10. Pp. 15-24.

These facts of teacher protection and power not only diminish the need for powerful unions as compared with the private sector, they also raise the issue of whether it is politically and socially wise to augment that power with strong collective bargaining. This leads us to Wellington and Winter's second reason for restricting public employee bargaining: the nature of public body decision making. On this point, I am in general agreement: public employee bargaining should be restricted as compared to the private sector by the essentially political nature of the decision making in the public sector.[11] In this context, teachers compete for educational decision-making power with such other groups as administrators, parents, community leaders, and students.

As the authors so well put it, it is not whether teachers should participate in educational decision-making process, but how and with what power they should do so.[12] Collective bargaining on nonwage issues has often been seen as a situation in which teachers and administrators are adversaries. Yet in recent years, issues have often pitted teachers and administrators—the professionals—against lay groups. In such cases, the already significant power of teachers suggested above is augmented greatly. The fact that the professionals are on the scene daily as compared with all the lay adult groups, including the school board, gives them an important source of power in the realities of decision making and decision implementation. I share Wellington and Winter's concern about the wisdom of augmenting this with strong collective bargaining, particularly on nonwage issues. Thus, I would favor a number of their suggestions, such as third party involvement in bargaining.

My concerns, however, go beyond the issue of teachers having increased power through collective bargaining. I am concerned about the bargaining technique itself as a method of educational decision making. This concern exists whether or not there are additional parties particpating in the bargaining process.

The bargaining technique necessarily implies culmination in one contract of the different issues negotiated. This means trade-offs. I disagree with Wellington and Winter's contention that there are less trade-offs in teacher bargaining than in the private sector.[13] The prob-

11. *See* pp. 21-32, 59-65.
12. P. 24.
13. *See* p. 23.

lem is that there are too many. Many dissimilar issues can be reduced to economic terms and even noneconomic issues are subject to trade-offs. The normal union practice of describing an agreement in package terms, primarily economic, demonstrates and reenforces this tendency. I would suggest that this is not a good method of educational decision making no matter who the contracting parties are.

Moreover, the contract is a document, presumably of binding legal effect, that has a life that might extend to three or more years. Thus the effect of embodying a decision in a contract is to limit the ability of the school board to change direction, to adapt to new problems, to discontinue ideas that don't work. This is aggravated by the difficulty a school board has when it attempts to bargain out of a new contract a "gain" achieved by the teachers in a preceding one.

In my view, therefore, the issue is not predominantly that of the right to strike but the structure of collective bargaining. This structure could be discussed in terms of mandatory and permissible subjects of bargaining. In general, I would favor a relatively narrow range of mandatory subjects of bargaining. I will not attempt to define that range in the space of this review.

The issue of the scope of permissible subjects of collective bargaining and contract resolution is more complex. It essentially is the issue of the old delegation doctrine[14]—a doctrine that is being repudiated and, I believe, properly so, in terms of its absolutist legal theory which could preclude all teacher collective bargaining in the absence of explicit legislative authorization.[15] But the doctrine has an underlying core of validity in that it requires that those who have been selected by a given process and from a given constitutency retain the power to make ultimate policy decisions and override decisions made by others.[16] In terms of teacher collective bargaining there may be some subjects—acutely sensitive and quantitatively, if not qualitatively, removed from wages and hours—about which school boards

14. For discussion of the classic doctrine see LEGAL PROBLEMS OF SCHOOL BOARDS 7-18 (Rezny ed. 1966); K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 9 (1958, Supp. 1970); Jaffe, *Law Making By Private Groups,* 51 HARV. L. REV. 201 (1937).

15. *See* Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); K. DAVIS, *supra* note 14. *See also* pp. 41-43.

16. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 151-56 (1970); *cf.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-86 (1965); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis,* 117 U. PA. L. REV. 387-89 & n.60 (1967).

cannot contractually bind themselves for an extended period of time.[17]

In addition, a recent decision in New Jersey suggests the development of a doctrine limiting the effect of nonmandatory collective bargaining without reliance on a rigid delegation approach. *Porcelli v. Titus*[18] involved a three-year collective bargaining agreement entered into between the Newark Board of Education and the Newark Teachers Association, which provided, *inter alia,* for the filling of principalships by appointment in order of numerical ranking from a list determined by written and oral examinations. In the second year of the contract, the School Board abolished the numerical list and decided to appoint principals outside the list on the grounds that there were insufficient black and other minority group members on the list and that the Newark educational system required an increase in the number of black and other minority group principals in order to function properly. The New Jersey Education Commission upheld the School Board's action against a breach of contract claim brought by a group of teachers.[19] This decision was affirmed by the New Jersey Superior Court. In so doing, both the Commissioner and court considered the contract provision an appropriate subject of bargaining and agreement. They did not rely on the delegation doctrine[20] to uphold the School Board action apparently in violation of the contract. Rather, they based their decision on the fact that under the circumstances present in Newark continued adherence to the contractual provision created "a real threat or obstacle" to the proper administration of the school system, and this fact allowed the board to abrogate the otherwise lawful and binding contract provision.[21] In so deciding, the court cited the contract doctrine of impossibility of performance.

This reliance on the private contract doctrine of impossibility is questionable contract law, to say the least. Moreover, the decision is unclear as to the perimeters of the doctrine enunciated and the theory if any, of its public law basis. These and other aspects of the decision

17. See the discussion by Wellington and Winter of issues of class size, discipline, and curriculum, pp. 137-42.

18. 108 N.J. Super. 301, 261 A.2d 364 (1969).

19. Porcelli v. Titus, N.J. Commissioner of Educ. Decision [hereinafter cited as Commissioner's Decision]. (Copy on file in the offices of the *Buffalo Law Review.*) This decision is referred to extensively in the court's opinion.

20. Commissioner's Decision at 8-11; 108 N.J. Super. at 307-09; 261 A.2d at 367-68.

21. Commissioner's Decision at 11-12; 108 N.J. Super. at 309-13; 261 A.2d at 368-70. The court opinion explicitly refers to quotes from the Commissioner's opinion on these points.

are quite troublesome. However, the practical effect of the approach of *Porcelli* is quite attractive in light of the concerns I have expressed herein. *Porcelli* does not, of course, address itself to the concern of the nature of the negotiating and contracting process. It does, however, limit the effect of a school board being bound by a contract on sensitive issues during dynamic times. Moreover, it does so in a way that minimizes the theoretical and practical problems of the unrestrained delegation doctrine.

Both the Education Commissioner and the court emphasized the normally binding effect of collective bargaining agreements and treated the board's action here as highly exceptional.[22] The action was upheld on the basis of the persuasive need of Newark to do something to obtain a greater number of minority group principals. Although the existence and effect of the need did not seem to have been subject to significant review either by the Education Commissioner or the court in this case, the court did suggest that their doctrine requires review of the school board's determination of necessity in such cases.

Even if outside review of the school board's determination of necessity is minimal or nonexistent, the *Porcelli* doctrine is more protective of collective bargaining than is the old delegation doctrine. Under *Porcelli* the school board must act to set aside the contractual provision in question. The delegation doctrine allows outside groups to attack and enjoin enforcement of agreements. While it may be argued that an outside group would not gain anything by enjoining a contract provision that the school board wants to honor, this argument misses the real dynamics involved. It is much easier for an outside group to attack an agreement and the school board not to honor it after it has been enjoined from enforcing the contract, than it is for the school board itself to initiate abrogation of an agreement which it has signed. Not only is there the restraint of a school board's keeping its word generally, but the board has an ongoing relationship with the union that requires it to adhere to contracts except in the most extreme situations. The *Porcelli* rationale thus affords the school board an escape clause for extreme situations. It thus may present a practical compromise between the old delegation doctrine and one of no restraint on permissible subjects of bargaining or the duration of contractually binding agreements.

22. *Id.*