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Impasse Resolution in Public Sector Collective Negotiations: A Proposed Procedure

Raymond L. Hogler†
Curt Kriksciun‡

I
INTRODUCTION

This Article argues that existing techniques for resolving public-sector collective bargaining impasses such as mediation, fact-finding, arbitration and strikes all have substantial weaknesses. After examining the policy problems inherent in each of these methods, the authors propose a new model for resolution of impasses. Their proposed model combines mediation, fact-finding, strikes and public referendums to avoid the deficiencies inherent in any one technique.

The growth of public-sector unionism in the past two decades has been a significant feature of public employment.1 As public employees have sought and obtained rights to bargain at the federal, state, and local levels,2 numerous issues have arisen in connection with the bargaining process. While the National Labor Relations Act (NLRA), which covers employees in the private sector3 provides a frequent analogy for public-sector legislation,4 differences between public and private-sector employment prevent the NLRA from serving as a complete model for public employment. One of the most important differences

† Assistant Professor, Department of Labor Studies, Pennsylvania State University. B.A. Fort Lewis College, 1967; Ph.D., University of Colorado, 1972; J.D. University of Colorado, 1976.
‡ Staff Attorney, Rocky Mountain District Joint Board, Amalgamated Clothing and Textile Workers, AFL-CIO. B.A. University of New Haven, 1972; J.D. University of Colorado, 1983.
1. For a study of union penetration in the public sector, see Burton, The Extent of Collective Bargaining in the Public Sector, in PUBLIC-SECTOR BARGAINING 1-43 (B. Aaron, J. Grodin & J. Stern eds. 1979) [hereinafter cited as PUBLIC-SECTOR BARGAINING].
2. The development of protective legislation is reviewed in Schneider, Public-Sector Labor Legislation—An Evolutionary Analysis, in PUBLIC-SECTOR BARGAINING, supra note 1, at 191.
4. See, e.g., Detroit Police Officers Ass’n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974) (state provision pertaining to scope of bargaining is patterned after federal law; federal interpretations are persuasive precedents).
involves the right to strike.  

Historically, common law has not afforded workers in the United States an absolute right to withhold their services from their employer. Such action may be subject to judicial restriction. The NLRA, however, expressly protects this right, and prohibits an employer from discriminating against private employees engaged in strike activity. In contrast, the majority of public employees do not have a statutory right to undertake economic sanctions as a means of resolving bargaining impasses, and constitutional protections do not extend to legitimize such conduct.

Various legislative schemes other than the strike method have been adopted to resolve disputes arising out of public negotiations. None of these procedures, however, has been universally accepted as a satisfactory method of impasse resolution. In each instance, the permitting of intervention by a third person not a party to the agreement impedes the original parties' resolution of the labor contract. Further, several jurisdictions have declared one common method of im-

5. Compare, e.g., 29 U.S.C. § 163 (1976) ("Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitation or qualifications on that right") with IOWA CODE § 20.12 (1977) ("It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify, or participate in a strike against any public employer.").


9. Schneider, supra note 2, at 203 n.32, concludes that eight states provide legislative protection for strikes (Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, Vermont and Wisconsin). Effective in April, 1984, Ohio will provide bargaining rights for broad categories of public workers. The statute also affords employees right to strike, with the exception of certain designated groups. The text of the statute is reprinted in 51 GOVT EMPL. REL. REP. (BNA) 4411 (August 15, 1983). Illinois, in addition, has adopted legislation effective in 1984 allowing public employee bargaining. The legislation consists of two separate acts, one covering teachers and the other covering general groups of public workers. Each act is to be administered by its particular agency. With the exception of security personnel and workers in essential services, employees have a right to strike. See 51 GOVT EMPL. REL. REP. (BNA) 1954 (Oct. 3, 1983).


12. In the private sector, negotiation impasses are rarely submitted to arbitration. Where the procedure is utilized, "it functions within fairly narrow parameters." Grodin, Political Aspects of Public Sector Interest Arbitration, 1 INDUS. REL. L.J. 1, 6-7 (1976). Thus, the preferred method of private-sector bargaining is based on consent rather than on the mandate of a disinterested individual.
passe resolution unconstitutional as a matter of state law.\(^1\)

The strike model utilized in private-sector bargaining has the primary advantage of imposing significant hardship on recalcitrant parties. A strike is an undertaking of such magnitude that it is rarely employed as a means of settling disputes in negotiations; the threat of a strike itself is usually an adequate incentive to settle differences.\(^4\) Common methods of public-sector impasse resolution are, in contrast, relatively inexpensive and readily available.\(^5\) Both features detract substantially from the effectiveness of the methods.\(^6\)

This article proposes a new procedure for dispute resolution. The suggested procedure combines legislative approaches currently in effect, including the strike option, with a novel alternative used by several municipalities in Colorado: the submission of impasses to a vote of the electorate. Such a submission was successfully utilized to resolve an impasse in negotiations between Denver and the International Association of Firefighters, Local 858. The proposed procedure will encourage realistic, meaningful bargaining and will avoid the lack of political accountability inherent in other impasse-resolution techniques.

To provide a framework for the proposed "Referendum Model," this article first describes current methods of dispute resolution. It then discusses a critical distinction between public-sector and private-sector collective bargaining, the inherently political nature of public negotiations, and explores this distinction in the context of both judicial decisions and theory. Next, the feasibility of dispute resolution by public election is demonstrated through an examination of the Denver and Local 858 experience. Finally, a legislative model is proposed, incorporating third-party intervention, strikes, and elections.

13. \textit{E.g.}, Greeley Police Union v. City Council of Greeley, 191 Colo. 419, 553 P.2d 790 (1976) (invalidating a provision of a city charter providing for final and binding arbitration as a means of impasse resolution, on the basis that the ordinance results in an unconstitutional delegation of legislative power). The case is discussed infra notes 45-48 and accompanying text.

14. One measurement of strike activity is the loss of working time. According to one authority, "The total working time lost due to strikes . . . continues to range well below one half of one percent; the range in recent years has been between 0.14 and 0.37 percent." \textsc{T. Kochan, Collective Bargaining and Industrial Relations} 249 (1980).


16. Without the threatened hardship of the strike, neither party will have much incentive to give anything away in negotiations. And if one assumes that the arbitrator will split the difference between opposing positions, the process will reward the obdurate, rather than those who modify their positions during negotiations. Thus, while compulsory arbitration can settle disputes, it can also undermine and supplant the bargaining process.

\textit{Feigenbaum, Final Offer Arbitration: Better Theory Than Practice}, 14 \textsc{Indus. Rel.} 311, 312 (1975).
II
IMPASSE RESOLUTION TECHNIQUES AND ATTENDANT PROBLEMS

A. Third-Party Intervention

The most common forms of dispute resolution involving intervention by a party outside the bargaining process are mediation, factfinding, and arbitration. Each method has its distinctive features and particular disadvantages.

1. Mediation

Mediation is based upon the theory that the injection of a neutral, but knowledgeable, third party into the negotiation process will assist the employer and the union in reaching a voluntary settlement. The mediator, who may be either a private citizen or a professional government employee, performs a variety of functions designed to facilitate a harmonious resolution of the dispute. Those functions have been categorized as procedural, communicative, and substantive. The procedural function includes activities such as scheduling and conducting meetings, developing agendas, and arranging deadlines.

It is the substantive function which lies at the heart of mediation. Acting as a catalyst, the mediator encourages settlement through strategies such as discerning priorities, offering specific proposals for consideration, realistically evaluating respective positions, and helping to formulate bargaining "packages." The end result is the parties' attainment of mutually beneficial understandings which would have been unattainable without the mediator's assistance.

Mediation is the most frequently used method of dispute resolution. It is most effective when an impasse derives from procedural rather than substantive elements of bargaining. Among the variables

17. See Kochan, Dynamics of Dispute Resolution in the Public Sector, in Public Sector Bargaining, supra note 1, at 177-182.
18. For example, Congress created the Federal Mediation and Conciliation Service (FMCS), an independent federal agency, under Title II of the Labor Management Relations Act, 29 U.S.C. § 171 (1976). Through mediation, the agency aids in preventing and minimizing labor disputes affecting commerce, and will provide the services of a mediator to parties upon request. State agencies may offer similar services. See, e.g., Pa. Stat. Ann. tit. 43, § 1101.801 (Purdon 1977-78).
20. See id. at 77-94.
21. Id. at 98-106.
23. Id. at 283-84.
Conductive to successful mediation are inexperienced negotiators, overcommitment to a given position, few sources of impasse, parties motivated to reach settlement, and an aggressive, experienced mediator. Conversely, mediation is least effective where impasse results from an employer's inability to pay, where the parties habitually rely on the impasse procedure, and where impasse occurs in large jurisdictions.

2. Factfinding

Factfinding is predicated on the utility of rational persuasion rather than the exercise of power. It shares formal characteristics with both mediation and arbitration.

A factfinder or factfinding panel gathers information through a hearing process. Parties to the hearing introduce evidence and argue the merits of their respective proposals. The factfinder subsequently issues an advisory award. Each impasse is tentatively resolved and supported by an appropriate rationale. Theoretically, the award is sufficiently fair and reasonable to form the basis for voluntary settlement.

The assumption of the factfinding process is that once an award is put before the parties and the public, it will be clothed with sufficient authority to force the parties to acquiesce in its conclusions. The public will regard the award as a just settlement and bring pressure on the parties to accept it. But as one commentator observes,

Every study of factfinding in the public sector has concluded . . . that it has not had this result. In most cases the interest and concern of the public is not aroused sufficiently to activate the pressure needed to produce a settlement. Public interest is apparently aroused only when a strike threatens or actually imposes direct hardship.

Moreover, the effectiveness of factfinding has declined over time in regard to several important objectives, including the ability to avoid strikes, to induce settlements, and to attain increased acceptability.

Nevertheless, factfinding remains a popular component of dispute resolution. It may be used in conjunction with mediation or as a prelude to arbitration. When an impasse poses a significant risk to the parties, such as a strike, factfinding can become a viable intermediate stage in the resolution process.

24. T. Kochan, Dynamics of Dispute Resolution in the Public Sector, in Public-Sector Bargaining, supra note 1, at 179.
25. Id.
26. T. Kochan, supra note 14, at 293.
27. Id.
28. The experience in New York State indicates that fact-finding, as a preliminary to arbitration, may result in substantial duplication of effort. Kochan, Dynamics of Dispute Resolution, in Public-Sector Bargaining, supra note 1, at 183-85.
3. Arbitration

The most formalized of dispute-resolution procedures, arbitration conclusively determines all impasses subject only to limited judicial review. As a result of its conclusive nature, arbitration achieves the highest level of avoidance of strikes.

As with factfinding, arbitration operates by means of a hearing before an arbitrator or panel of arbitrators. Evidence and argument are presented, after which the arbitrator makes a final and binding disposition of each impasse. A popular modification known as “final-offer” arbitration limits the arbitrator to a choice of one of the final negotiating packages of the parties.

The arbitrator’s role in dispute resolution is to formulate an agreement which approximates as nearly as possible the settlement which the parties themselves would have reached. As one eminent arbitrator explained:

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

In order to arrive at reasonable settlements, arbitrators rely on standards developed through prior adjudications. Those standards, as one authority points out, “are not pulled out of the air—nor are they artificially created. They are, generally speaking, the very same ones that are used by the parties in their negotiations.” Such standards include prevailing practices within an industry or area, the nature of the work under consideration, the employer’s ability to pay, productivity, and general economic conditions. In some instances, standards are provided by the enabling legislation.

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29. The extent to which a court will examine the merits of an interest arbitration award is discussed in Grodin, Judicial Response to Public-Sector Arbitration, in PUBLIC-SECTOR BARGAINING, supra note 1, at 224, 248-253. See also Morris, supra note 11, at 492-94; Caso v. Coffey, 41 N.Y.2d 153, 359 N.E.2d 683 (1976).
30. T. KOCHAN, supra note 14, at 295.
31. Final-offer arbitration is based upon the assumption that it will encourage realistic bargaining and limit the discretion of the arbitrator. For a detailed study of the systems in Pennsylvania, Michigan and Wisconsin, see J. STERN, FINAL-OFFER ARBITRATION: THE EFFECTS ON PUBLIC SAFETY EMPLOYEE BARGAINING (1975).
34. See id. at 749-96.
As a means of resolving disputes, arbitration is typically viewed as the most effective substitute for public-sector work stoppages. There is substantial empirical evidence to support the conclusion that far fewer strikes occur where arbitration is mandated. In addition, arbitration may serve to redress inequalities in bargaining power and to provide social and political stability. This feature, however, is antithetical to the established concept under the NLRA that bargaining outcomes are determined by the economic strength of the parties.

One frequent criticism of arbitration is that it tends to inhibit genuine bargaining. Rather than engage in realistic negotiations, parties select the less painful alternative of arbitration. According to Feuille, Arbitration will be invoked because one or both sides believe that an arbitration award may be more favorable than a negotiated agreement and because one or both believe the costs of using arbitration are comparatively low (none of the trauma and costs of a work stoppage and none of the uncertainty of using other forms of political influence). As a result of this cost-benefit calculus, the availability of arbitration may have a “chilling effect” upon the parties’ efforts to negotiate an agreement, and over time there may be a “narcotic effect” as the parties become arbitration addicts who habitually rely on arbitrators to write their labor contracts.

A more fundamental attack on arbitration derives from the structure of our democratic society. The perceived weakness of interest arbitration is that it is “inimical to a basic precept of political democracy, namely that authoritative political decisions should be reached by governmental officials who are accountable to the public. Arbitrators are not accountable to the public.” This lack of political accountability has led some courts to reject arbitration, finding it to be an unconstitutional delegation of legislative power.

B. Constitutional Analysis and Policy Issues

The majority of courts have upheld statutes that provide for binding interest arbitration for public employees. Nevertheless, such stat-
utes have been attacked on various constitutional grounds, including the violation of the fourteenth amendment. The most compelling argument, however, challenges these statutes as unconstitutional delegations of legislative authority. This argument is significant for purposes of this article because it focuses attention on the relations between the arbitrator and the processes of public decision-making.

_Greeley Police Union v. City Council of Greeley_ illustrates the minority position. In that case, the Colorado Supreme Court invalidated a city charter amendment that provided for binding arbitration of unresolved police union disputes. The court held that delegation of legislative power to politically unaccountable persons is unconstitutional. The court observed that certain basic principles of representative government cannot be contravened:

Fundamental among them is the precept that officials engaged in governmental decision-making (e.g., setting budgets, salaries, and other terms and conditions of public employment) must be accountable to the citizens they represent. Binding arbitration removes these decisions from the aegis of elected representatives, placing them in the hands of an outside person who has no accountability to the public.

The court’s chief concern was to preserve the process mandated by the state’s constitution, which provided that “[e]very person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers.” The court found that binding arbitration would unacceptably attenuate the link between the electorate and the decision-makers.

In another case typical of this trend, the Utah Supreme Court reached a similar conclusion regarding binding interest arbitration for

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45. _Id._ at 422, 553 P.2d at 793.

46. _COLO. CONST. art. XXI, § 4._

47. In _City of Denver v. Denver Firefighters Local No. 858, AFL-CIO, No. 81SC70_, slip op. (Colo. May 9, 1983), the Colorado Supreme Court recently reaffirmed that _Greeley Police Union_ stands for the proposition that “the ultimate responsibility for the establishment of . . . terms and conditions of public employment . . . are legislative matters, and the ultimate responsibility for the establishment of such terms must rest with elected officials.”
firefighters. According to the Utah court,

The power conferred on the panel of arbitrators is not consonant with the concept of representative democracy. The political power, which the people possess under Article I, Sec. 2, and which they confer on their elected representatives is to be exercised by persons responsible and accountable to the people—not independent of them. The act is designed to insulate the decision-making process and the results from accountability within the political process; therefore, it is not an appropriate means of resolving legislative-political issues.

Once again, the perceived threat to the representative government motivates the court to invalidate the binding arbitration provisions.

Conversely, a majority of courts have held that lack of political accountability does not *ipso facto* invalidate binding interest arbitration statutes. For example, in *Milwaukee County v. District Council* the Wisconsin Supreme Court upheld the constitutionality of a statute that mandated the appointment of a mediator-arbitrator by the Wisconsin Employment Relations Commission (WERC) after a reasonable period of negotiation, if settlement procedures fail to break a deadlock. Under the statute, parties to the deadlock submit their final offers to the mediator-arbitrator, who arranges a public meeting if so petitioned by at least five citizens. This meeting allows the parties to explain and justify their positions, and affords the public the opportunity to offer comments and suggestions. Following this, the mediator-arbitrator attempts to mediate the dispute for a reasonable time; if unsuccessful, the mediator-arbitrator notifies the parties that the dispute will be resolved through binding arbitration. If both parties then withdraw their final offers, the labor organization may strike. Otherwise, binding arbitration would apply.

In finding the statute constitutional, the court outlined three requirements for a valid delegation of legislative authority. First, the legislative purpose of the statute must be ascertainable. Second, specific standards must limit the exercise of the arbitrator's statutory power. And third, judicial and procedural safeguards must exist to ensure that the legislative purpose is satisfied.

The Wisconsin court conceded that the statutory system does not provide for the mediator-arbitrator's direct accountability to the electorate. It concluded, however, it must defer to the legislature:

49. *Salt Lake City v. International Ass'n of Firefighters, Locals 1645, 593, 1654 and 2064, 563 P.2d 786 (Utah 1977).*

50. *Id.* at 790.

51. *See also* *Sioux Falls v. Sioux Falls Firefighters, Local 814, 89 S.D. 455, 234 N.W.2d 35 (1975); Town of Berlin v. Sataquida, 98 L.R.R.M (BNA) 3259 (Conn. Super. Ct. 1978).*

52. 102 Wis. 2d 14, 325 N.W.2d 350 (1982).

53. *Id.* at 20-29, 325 N.W.2d at 354-58.
In this case the legislature struggled with the difficult problem of arriving at a fair dispute resolution system for both the public employer and the public employees. It determined that the unilateral determination of employment matters by the employer gave little weight to the rights of employees. It also determined that the right to strike, a traditional employee right, posed too great a threat to the smooth operation of essential public services. It was in this context that the legislature devised a system for binding arbitration through an impartial arbitrator.

The underlying premise of public employer-employee arbitration is that communities will forego the consequences of embittered economic warfare if there is a process to resolve disputes under fair and neutral principles. Consequently, the legislature must be allowed some flexibility in formulating a procedure to resolve the conflict between direct electoral accountability and the independence afforded through insulation from the political process.54

Thus, the court recognizes that some degree of political accountability may need to be sacrificed in order to attain the legislative ends sought. That determination is arrived at by legislative balancing.

Other courts have reached similar conclusions. In *City of Detroit v. Detroit Police Officers*,55 the Michigan Supreme Court found that an amended statute which provided for binding interest arbitration was constitutional despite limited accountability of the decision-maker. After an extended discussion of the problems of accountability, the court suggested that the elected officials who devised the scheme provided a sufficient link between the electorate and the decision-maker. In the court’s view: “Should the people be dissatisfied with the accountability aspect of the engineered scheme which must necessarily transcend local boundaries, the onus is upon the state’s electorate, including the locally affected voting population, to exercise its political will.”56 The accountability of the elected officials thus adequately safeguards representative democracy. Although it recognizes that particular decisions by individual arbitrators remain insulated from the political process, the Michigan court’s view minimizes the political consequences of that fact.57 Further, it tends to obscure the substantial policy issues implicit in the matter of accountability.

Dissenting in *Detroit Police Officers*, Judge Levin forcefully delineates the theoretical basis of the delegation doctrine. Judge Levin

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54. *Id.* at 30-31, 325 N.W.2d at 357-58.
56. *Id.* at 477, 294 N.W.2d at 94.
57. The opinion suggests that such insulation may actually be a virtue. It quotes approvingly from Richfield v. Local No. 1215, Int’l Ass’n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979), to the effect that the legislature may have deliberately isolated the arbitrators from public pressure to protect their decisions from undue influence. City of Detroit v. Detroit Police Officers, 408 Mich. 410, 473 n.55, 294 N.W.2d 68, 91 n.55 (1980).
states that the policy matter at stake is not simply the degree of control imposed on the decision-maker, but rather the integrity of the mechanism through which power is apportioned. He writes,

A court reviewing a challenged delegation of legislative power should, we agree, examine whether adequate checks have been provided against arbitrary or uncontrolled official action. Such an inquiry cannot, however, supplant the basic inquiry whether the legislatively devised framework for official action—considered in its application—secures the fundamental goal of the delegation doctrine: preserving legislative responsibility for the determination of public policy. Thus, Judge Levin finds that accountability is a necessary element of any delegation, serving not so much to correct occasional aberrational rulings as to ensure that the legislature and the electorate maintain control over the formulation of coherent policies. Regarding the statute under consideration, Judge Levin concludes that “Act 312 arbitration is novel in that the policy-making power is dispersed among ad hoc arbitrators, which prevents the emergence of visible and intelligible principles.”

In the earlier case of Dearborn Fire Fighters, Judge Levin rejected the contention that accountability could be sacrificed in order to attain finality and efficiency in dispute resolution. He asserted that maintenance of governmental processes should be the focal point of judicial inquiry and that no substantial diminution of electoral power should be tolerated. He concluded,

While delegation of authority to resolve the dispute to an independent outsider may resolve the immediate crisis and relieves the public employer and union officials of the need to justify the result, this approach to legislative decision-making, precisely because it is designed to insulate the decision-making process and the results from accountability within the political process, is not consonant with proper governance and is not an appropriate method for resolving legislative-political issues in a representative democracy.

Although Judge Levin's view reflects the minority judicial trend, it adumbrates concerns which are central to the theoretical framework of public negotiations and which must be addressed in a system of dispute resolution.

Binding interest arbitration necessarily invokes questions concerning democratic values. Even though a majority of jurisdictions have upheld binding arbitration, judicial opinions have shown considerable
sensitivity to the proper functioning of the political process. In a system of dispute resolution that compromises the framework of democratic decision-making, the problem of inadequate accountability will remain intractable for both legislatures and courts. Similar problems may also arise in the resolution of disputes through strikes.

C. Public Strikes and the Public Interest

1. Theoretical Considerations

One of the most significant distinctions between private and public sector bargaining systems is the use of strikes as a means of impasse resolution. In the private sector, employees may freely apply economic sanctions against the employer in order to extract concessions. A weak employer will be forced to grant the concessions. On the other hand, a strong employer may permanently replace the striking employees, thereby forcing employees who desire to keep their jobs to accept the employer's terms. Regardless of the outcome, the terms and conditions of the contract are reached on a strictly voluntary basis.

In the public sector, employee and employer interests are not sharply delineated in an economic context. Public employers are primarily responsible for the delivery of services which are often not readily obtainable outside the public sector, as in the case of police and fire protection. These services are evaluated in terms of intangibles such as quality of service and public image rather than on profit-generation. As a "servant" of the public, the public employee is held to a different standard of conduct than that applied to the private sector worker. Consequently, in work stoppages, the economic consequences to both the public employer and employee may be secondary to the political consequences involved.

The topic of public sector work stoppages has generated a substantial body of commentary exploring the relationship between strike activity and the political process. The commentary is inconclusive on the issue of whether public employees should be allowed to strike. Nevertheless, academic discussion has illuminated one major difference between private and public bargaining: the political implications of public negotiations and impasse resolution.

In the influential The Unions and the Cities, Professors Wellington and Winter propose the thesis that public sector strikes distort the

62. For a discussion of some of the political concerns which may arise from the arbitration process, see Grodin, supra note 12.


64. Id. at 345.

normal political process by focusing disproportionate pressure on public officials. The Wellington-Winter argument holds that because strikes in public employment disrupt important services, a large part of a mayor's political constituency will, in many cases, press for a quick end to the strike with little concern for the cost of settlement. This is particularly so where the cost of settlement is borne by a different and larger political constituency, the citizens of the state or nation. Since interest groups other than public employees, with conflicting claims on municipal government, do not, as a general proposition, have anything approaching the effectiveness of the strike—or at least cannot maintain that relative degree of power over the long run—they may be put at a significant competitive disadvantage in the political process.

Thus, the argument continues, public sector unions do not suffer the same constraints as their private sector counterparts, in that the public strike will be promptly settled with no significant economic sanctions against the union membership. The strike weapon in public employment, therefore, is qualitatively distinct from its function in the private sector.

The Wellington-Winter theory has been challenged on a number of grounds. An empirical study by Professors Burton and Krider suggests that effective market restraints on public employees do exist, such as the loss of wages, the threat of replacement, and public concern over possible tax increases. Moreover, it is clear that not all governmental services are unavailable outside of the public sector. Sanitation services, for example, are frequently provided by private contractors. A further argument in favor of economic resolution of impasses is that forcing labor unions to rely on traditional political strategies such as lobbying can distort the political process by leading to corruption and patronage. Accordingly, Burton and Krider conclude that [our field work suggests that unions which have actually helped their members either have made the strike threat a viable weapon despite its illegality or have intertwined patronage-political support arrangements. If this assessment is correct, choice of the No-Strike Model is likely to lead to patterns of decision making which will subvert, if not the "normal" American political process, at least the political process which the Taylor Committee and Wellington and Winter meant to embrace. We would not argue that the misuse of political power will be eliminated by legalizing the strike; on balance, however, we believe that, in regard to most governmental functions, the Strike Model has more virtues

than the No-Strike Model.68

The above discussion suggests two propositions essential to a theoretical analysis of public sector strikes. First, the inherent nature of public employment requires that focus be placed on the political consequences of strikes.69 Second, no conclusive argument has been offered which would justify prohibiting all public sector strikes under all circumstances. Indeed, justifications advanced in the past were, in many instances, dogmatic assertions aimed at preventing any form of public collective bargaining. As one scholar notes,

[the predominant view during the first half of the century was that strikes were a form of organized anarchy and, therefore, represented a direct assault on the sovereignty of government. Since strikes were viewed as a necessary component of any collective bargaining system, it followed that the collective bargaining process was inappropriate for public employees.70

In contrast, contemporary scholarship tends to regard strikes as a viable option among the mechanisms for public sector dispute resolution.71 In one recent study, for example, the author concludes that “the impact of strikes in the public sector has not been sufficiently detrimental to the interests of the public to justify the current presumption against their legality.”72 He continues,

[B]oth labor and management would benefit from the right to strike because it yields the bilateral determination of terms and conditions of employment. The importance of this outcome cannot be understated. Despite the high costs of strikes relative to the direct costs of hiring an arbitrator to resolve interest disputes, few parties in the private sector voluntarily agree to substitute interest arbitration for the right to strike, which indicates that the parties derive tremendous benefit from being able to determine their own future free from the unpredictable decisions of an arbitrator. Assuming that labor and management in the public sector have similar preferences, each side would benefit from the right to strike because the outcome under a strike threat is a bilateral settlement that reflects the preferences and bargaining power of the

68. Id. at 432.

69. Burton and Krider point out that “any scheme which differentiates economic power from political power faces a perplexing definitional task.” Id. at 429. That assertion may have some degree of validity insofar as it pertains to the exertion of pressure by a labor organization. Nevertheless, a functional distinction can be drawn between the individual as a consumer of goods and services and as a citizen of the municipality. As demonstrated by the case study discussed, citizens may in fact place civic concerns above their own economic self-interest. See infra notes 127-41 and accompanying text.

70. Kochan, Dynamics of Dispute Resolution in the Public Sector, Public-Sector Bargaining, supra note 1, at 151.

71. See id. at 157-69.

The desirability of voluntary agreement as the product of negotiation has also been emphasized by other authorities in the field. In sum, public sector strikes involve a political component which distinguishes public sector bargaining from the private sector. The arguments advanced both by Wellington and Winter and by Burton and Krider clarify the relationship between public employee strike activity and the political system. Certainly every public sector strike does not result in immediate capitulation by the public employer, even when the strike involves an important service such as mass transportation. At the same time, an impasse-resolution mechanism ideally should accommodate the potentially disproportionate application of political power described by Wellington and Winter. Some states have chosen to allow designated public employees to strike. The strike model adopted by Pennsylvania is considered as a viable example of the means by which public sector strikes can be authorized and regulated.

2. A Legislative Experiment

In 1970, the Commonwealth of Pennsylvania enacted the Public Employee Relations Act (Act 195) which permits strikes by certain groups of public sector workers. The amendment illustrates a reasoned and balanced treatment of employee, employer, and public interests. Moreover, a number of public sector strikes have proven that the system is workable.

Impasse resolution under Act 195 is based upon a series of mandatory steps, followed by several voluntary options. The statute also incorporates explicit safeguards to prevent undue danger to the public welfare.

The first step in impasse resolution is mediation, which the parties must invoke if an agreement has not been reached within a specified

73. Id. at 501 (emphasis in original).
74. See, e.g., Clark, A Discussion in INDUS. REL. RESEARCH ASSOC., PROCEEDINGS OF THE 1982 SPRING MEETING 508 (B. Dennis ed. 1982) "[I]f I were faced with the task of selecting one of the alternatives, I would unequivocally favor granting all non-essential public employees the right to strike in lieu of mandating compulsory arbitration as the terminal step of the bargaining process."
76. See supra note 9 and accompanying text.
79. Any strike may be enjoined if it threatens the public health, safety or welfare. See infra text accompanying notes 94-101.
Mediation is initiated by written notice to the Pennsylvania Bureau of Mediation. Once commenced, mediation continues as long as the parties are in disagreement. After twenty days, however, the Bureau of Mediation is required to notify the Pennsylvania Labor Relations Board of the impasse. The Board may thereupon, in its discretion, appoint a factfinding panel empowered to conduct hearings and issue subpoenas.

If the parties have not reached agreement during the factfinding process, the factfinding panel will make recommendations for resolution of the impasse. The parties must accept or reject the recommendations within ten days, and must promptly notify the board and each other of their choice. If the panel's recommendations are rejected, the panel "shall publicize its findings of fact and recommendations." The parties are then given an additional ten-day period to reconsider the recommendations. The failure of a party to submit to mediation or factfinding procedures "shall be deemed a refusal to bargain in good faith," and is grounds for issuance of an unfair-practice complaint. Nothing in the mandatory procedures precludes an agreement to submit the impasse to voluntary binding arbitration.

Following exhaustion of the mandatory procedures, disputes are governed by the strike clause. While generally permitting strikes, it prohibits strikes by guards at prisons or mental hospitals or by employees "directly involved with and necessary to the functioning of the courts," and prescribes appropriate actions in the event of such strikes. Police and fire personnel, not specifically covered by Act 195, are granted collective bargaining rights by a separate statute. These

80. PA. STAT. ANN. tit. 43, § 1101.801 (Purdon Supp. 1977-78). Impasse procedures are triggered by the "budget submission date." Mediation must commence if an agreement has not been reached 150 days prior to that date.
81. Id.
82. Id. at § 1101.802.
83. The Board is an administrative body legislatively authorized to implement Act 195 with the power to issue rules and regulations. Id. §§ 1101.501-1101.503.
84. Id. § 1101.802.
85. Id. § 1101.802(2).
86. Id. § 1101.802(2).
87. Id. § 1101.803(3).
88. Id. § 1101.803.
89. Id. § 1101.804.
90. Exhaustion is a necessary condition to a legally protected strike. If the condition is not satisfied, sanctions may be imposed against the labor organization and striking employees. United Transp. Union v. Southeastern Pennsylvania Transp. Auth., 22 Pa. Commw. 25, 347 A.2d 509 (1975).
91. PA. STAT. ANN. tit. 43, § 1101.1001 (Purdon Supp. 1977-78). The public employer is required to initiate an action "for appropriate equitable relief including but not limited to injunctions."
92. Id. §§ 217.1-217.10.
workers are afforded a right to arbitrate bargaining impasses.\textsuperscript{93}

Provided that it is not explicitly prohibited and that mediation and factfinding have taken place, a strike “shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.”\textsuperscript{94} A public employer who believes that this level has been reached may initiate an action for appropriate relief in the jurisdiction’s court of common pleas.\textsuperscript{95} An injunction, however, will not issue simply because routine procedures have been disrupted\textsuperscript{96} or because services cannot be furnished by the employer.\textsuperscript{97} Furthermore, the strike must actually be in progress before an injunction will be issued.\textsuperscript{98} The court typically will consider a number of factors in determining the merits of the action, including the population percentage affected by the strike, the strike’s interference with other statutorily mandated objectives, nonstriker loss of wages, and potential and actual violence.\textsuperscript{99} If the strike is enjoined, the public employee’s or the labor organization’s refusal to comply with the injunction may result in a variety of sanctions for contempt. The employee may be subject to discharge, a fine, or imprisonment\textsuperscript{100} and the organization may be fined for each day it is in contempt.\textsuperscript{101}

In general, Act 195 serves to accommodate the several interests that are affected by public negotiations. The Pennsylvania experience demonstrates that public sector strikes within the scope of municipal governance can be adequately regulated and can function effectively to resolve bargaining impasses. Nevertheless, the overwhelming majority of states that permit public bargaining have rejected the strike as a means of impasse resolution.\textsuperscript{102} To the legislators in such states public-employee work stoppages are simply unacceptable. Accordingly, the strike weapon in public negotiations must be appropriately circumscribed in order to attain any significant measure of support.

\textit{D. Evaluation and Summary}

As the foregoing analysis indicates, public-sector dispute resolution techniques exhibit certain obvious shortcomings. While some pro-
cedures may perform more effectively in particular respects than do others, no single system has been widely adopted in bargaining legislation. Ideally, a resolution mechanism should avoid undue disruption of and interference with necessary community services. It should also protect against any "chilling" or "narcotic" effects. Finally, the mechanism should move parties toward realistic bargaining and voluntary settlements.

Mediation to a certain degree satisfies the final criterion, assisting the parties to reach a voluntary settlement. Also, because mediation is not binding, chilling and narcotic effects are minimal. Mediation, however, has not proved to be a workable substitute for the strike weapon. Further, mediation is most frequently successful in those situations where the parties are not in disagreement regarding substantive contract issues.

Like mediation, factfinding does not impose a binding decision on the parties, and therefore is not significant in preventing strikes. It may tend, however, to persuade parties of the essential correctness of a given recommendation. Factfinding appears to have declined in popularity, thus indicating its undesirable quality as an impasse-resolution mechanism.

Arbitration has a better record of avoiding strikes than do other resolution procedures. Yet the features of arbitration which so effectively remove the strike incentive—availability, relative low cost, and finality—make arbitration an attractive diversion from genuine bargaining over difficult issues. There is a discernible tendency for arbitration to chill bargaining and to induce a soporific bargaining environment. Consequently, arbitration does little to motivate parties to reach a voluntary settlement; in fact, it severely detracts from that dimension of the bargaining process. Although final-offer arbitration may minimize these attributes, it does not remove them.

103. T. Koczak, supra note 14, at 291-292, Kochan advances five criteria for the evaluation of dispute resolution procedures, including the avoidance of strikes. Id. The procedure proposed here would permit strikes which do not involve substantial harm to the community.

104. In one study, for example, the author contends that a mediator's effectiveness derives in significant part from the mediator's ability to "bluff" the parties into a belief that their adversaries are desirous of a strike. Byrnes, Mediator-Generated Pressure Tactics, 7 J. OF COLLECTIVE NEGOTIATIONS 103 (1978).

105. See supra note 24 and accompanying text.

106. "Although the majority of states that have enacted bargaining legislation still have fact-finding as an important part of their impasse procedures for nonuniformed services, the bulk of the evidence suggests that its effectiveness, both in avoiding strikes and in achieving settlements, has atrophied over time." Kochan, Dynamics of Dispute Resolution in the Public Sector, in PUBLIC-SECTOR BARGAINING, supra note 1, at 183.


108. See supra text accompanying note 40.

109. Another approach which has some popularity is to limit the arbitrator to the full endorsement of either party's last offer. Although this would appear to stimulate the
Arbitration is also unacceptable in terms of legal and political theory: its delegation of legislative authority may be constitutionally invalid. Even if this hurdle is overcome, arbitration nevertheless removes important decisional processes from the direct control of the electorate.\textsuperscript{110} That consequence is in important respects incompatible with the notion of a pluralistic democracy.\textsuperscript{111}

The option of sanctioning public sector strikes as a means of dispute resolution has been utilized in a minority of jurisdictions and has attracted increasing support from commentators.\textsuperscript{112} As in the private sector, the strike threat constitutes the most viable incentive to bargaining.\textsuperscript{113} Practical experience in one state, at least, suggests that the strike option is feasible.

It must be recognized that public employment differs significantly from private-sector employment. Most importantly, determinations as to the appropriate terms and conditions of employment are ultimately made by the electorate. Those determinations, involving such intangibles as the quality of community life, differentiate the individual as a participant in the democratic process from the individual as a consumer of goods or services. Consequently, work stoppages by public employees evoke a response more complex than the economic self-interest which dominates individuals affected by a private sector strike. Accordingly, public sector impasse resolution procedures should accommodate the political implications of strikes as well as their economic impact. The model proposed in the next section does so.

\textsuperscript{110} See cases cited supra notes 44-62 and accompanying text.
\textsuperscript{111} See supra text accompanying note 41.
\textsuperscript{112} See supra note 71 and accompanying text.
\textsuperscript{113} "While strikes occur in only about two to three percent of all private sector negotiations, many of the remaining peacefully negotiated contracts would not be reached in a timely fashion if it were not for the threat of a strike." Olson, supra note 72, at 494 (footnote omitted).
III

Impasse Resolution Through a Referendum or a Strike

A. Submitting the Impasse to the Electorate: A Case Study of Local 858, International Association of Firefighters and the City of Denver, Colorado

In 1971, an amendment to the city charter gave Denver firefighters the right to bargain collectively. The amended charter provided that employment bargaining impasses would be resolved through binding arbitration. This method was successfully used in 1975 to resolve a wage dispute between the City of Denver and Local 858, International Association of Firefighters. The arbitration panel in that case awarded the firefighters a 9.5% pay increase, this validating the Union's belief in the fairness and efficiency of the arbitration process.114

The following year, the Colorado Supreme Court declared that a binding arbitration ordinance in Greeley, Colorado, was unconstitutional.115 Accordingly, Local 858 and the City of Denver discussed methods of impasse resolution to replace their own invalid contractual provision. Among the alternatives was a union proposal116 to submit impasses to a referendum of the electorate. The City of Englewood, Colorado, had approved such a method in 1972,117 although it never used the procedure to resolve an impasse.118

The union's proposal was adopted. Following negotiations concerning election timing and procedures, the parties agreed that the referendum would be through special election. The specifics of the agreement provided that

[upon the request of the employer or the sole and exclusive agent of the firefighters, after publication of the advisory fact-finder's report, and after the employer and the sole and exclusive agent of the

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114. Interview with Ron Moeder, current President of Local 858, International Ass'n of Firefighters, and member of the union's negotiating team at pertinent times, in Denver, Colorado (June 14, 1983) (hereinafter cited as Moeder Interview).

115. See supra note 13 and accompanying text.

116. Moeder Interview, supra note 114. The language of the proposal was framed by the attorneys representing Local 858.

117. The referendum process appears to have originated in Englewood as an amendment to the city charter. It was proposed by the city and adopted by the voters. City Manager Andy McCowan stated that the referendum is an effective method of avoiding strikes and is preferable to arbitration as a means of impasse resolution. McCowan observed, "The most damaging aspects of binding arbitration I believe are twofold: one, it often makes for unrealistic bargaining on the part of the unions since they have absolutely nothing to lose; and secondly, decisions often go far past wages and fringe benefits and get into areas preferably reserved for management." Andy McCowan, Referendum Impasse Plan Works in Englewood, Colo., 8 Lab. Mgmt. Rel. Serv. Newsletter 2-3 (June 1977).

118. According to McCowan, two impasses have been resolved under the procedure without resort to an election. Id. at 2.
firefighters have had five (5) days to further negotiate the disputed issues, the final offers of the employer and of the sole and exclusive agent of the firefighters on the issues remaining unresolved shall each be submitted as alternative single measures to a vote of the qualified electors of the City and County of Denver at a special election. The special election shall be held no later than August 31. The qualified electors shall select either the final offer of the employer or the final offer of the sole and exclusive agent of the firefighters, as presented to the advisory fact-finder. Issues agreed to during the five-day period shall not be included in the final offer of the employer or of the sole and exclusive agent of the firefighters. The cost of such special elections shall be borne by either the employer or the sole and exclusive agent of the firefighters, which ever refuses to accept the recommendations of the advisory fact-finder. If both refuse, the costs shall be borne equally by the employer and the sole and exclusive agent of the firefighters.\textsuperscript{119}

In March 1981, the parties commenced negotiations for a labor agreement to become effective January 1, 1982. A number of issues resulted in impasse, including the length of the firefighters' workweek. At the time, firefighters were scheduled on a 48-hour week with "Kelly" days. The city proposed to extend the workweek to 56 hours under the so-called "Berkeley" system.\textsuperscript{120} The union viewed the city's position as a retrenchment which was totally unacceptable.\textsuperscript{121}

The impasses proceeded to factfinding under the jurisdiction of a single impartial factfinder who had been selected by agreement. After five days of hearing, the factfinder issued an award containing recommended resolutions of various issues. Regarding the workweek issue, he ruled that the city's proposal should be adopted. The asserted justification for his ruling was that "the hard core matters of management of the fire suppression forces and the airport subdivision trend heavily in favor of the Berkley [sic] plan."\textsuperscript{122}

The union's president said he was shocked and outraged at the hours ruling.\textsuperscript{123} He reportedly indicated "little willingness to accept the recommendations,"\textsuperscript{124} and indicated that it was "highly probable" that the matter would be submitted to the electorate; the expense of this to the union was estimated at $175,000.\textsuperscript{125} In contrast, the city was "surprised and delighted with the recommendations,"\textsuperscript{126} and believed

\textsuperscript{120} For explanations of the "Kelly" and "Berkeley" Systems see infra text accompanying note 132.
\textsuperscript{121} Moeder Interview, supra note 114.
\textsuperscript{122} Fact-Finding Recommendations, Denver Fire Fighters Local 858 and City and County of Denver 24 (1981) (Sembower, Factfinder).
\textsuperscript{123} Denver Post, June 24, 1981, at 21, col. 5.
\textsuperscript{124} Rocky Mountain News, June 24, 1981, at 140, col. 2.
\textsuperscript{125} Denver Post, June 24, 1981, at 21, col. 5.
\textsuperscript{126} Id., June 23, 1981, at 13, col. 1.
that the city would have an advantage if the issue were placed before the electorate.\textsuperscript{127} The city publicly stated its intention to accept every recommendation of the factfinder.\textsuperscript{128}

Local 858’s membership voted “overwhelmingly” to reject two recommendations made by the factfinder, including the ruling concerning hours of work, and to exercise its right to an election.\textsuperscript{129} Subsequently the election was scheduled for August 15, 1981. Framing the language to appear on the ballot regarding hours of work proved to be difficult. The union accused the city of misrepresenting facts and of drafting submissions that were so complicated voters won’t understand them.\textsuperscript{130} The final form of the official ballot asked voters to select either the union’s or the city’s proposals. The work hours proposals appeared on the ballot as follows, as drafted by the union and the city, respectively:

Firefighters in the fire suppression force shall work a work schedule consisting of twenty-four (24) hour shifts for an average work week of forty-eight (48) hours. This will be implemented by the use of a three (3) platoon system with each firefighter working one (1) twenty-four (24) hour shift followed by two (2) days off, with a “Kelly” day to be taken within each twenty-one (21) calendar day cycle. A “Kelly” day shall not be counted as a working shift for any purpose.

\begin{equation}
\text{Firefighters in the Suppression Force and Airport Subdivision shall be on duty based on a scheduling system commonly known as the Berkeley System. The Berkeley System consists of a nine (9) day duty cycle in which the first twenty-four (24) hour day (shift) is on duty, the second day is off duty, the third day is on duty, the fourth day is off duty, the fifth day is on duty and the remaining sixth through ninth days are off duty. This schedule is implemented by the use of a three (3) platoon system. Thus, the firefighter is on duty for three (3) days of each nine (9) day cycle or nine (9) days in each twenty-seven (27) day period.}
\end{equation}

The substantive issues of the dispute received considerable publicity during the campaign period, and public officials expressed their positions vigorously. The Mayor of Denver, for example, warned that the union’s contract demands would cost the taxpayers $2.5 million annually, and urged voters to support the city’s contract plan.\textsuperscript{132} One Den-

\begin{itemize}
\item \textsuperscript{127} \textit{Id}. While the basis for the city’s belief is not elaborated, the context of the article indicates that the city felt the factfinder’s award would carry significant weight relative to public opinion.
\item \textsuperscript{128} \textit{Id.}, June 25, 1981, at 3, col. 1.
\item \textsuperscript{129} Rocky Mountain News, June 28, 1981, at 15, col. 3.
\item \textsuperscript{130} Denver Post, July 21, 1981, at 11, col. 1. Local President Moeder reportedly said, “As a final insult . . . the city’s proposed ballot language was written without consulting the firefighters, despite the fact we are paying for the Aug. 25 election.” \textit{Id.}
\item \textsuperscript{131} \textbf{OFFICIAL SAMPLE BALLOT} (Special Municipal Election, City and County of Denver, August 25, 1981).
\item \textsuperscript{132} Denver Post, August 8, 1981, at 2, col. 1.
\end{itemize}
ver newspaper supporting the city’s position observed that Local 858 “appears to be stretching Denverites a bit too thin”; the editorial concluded, “The outside arbiter’s recommendations were sound and should have been adopted by both sides in the first place.” And a group calling itself “Citizens for Fiscal Responsibility” sponsored advertisements attacking the union, characterizing the union’s bargaining demands as “an unfair and unreasonable burden on the city and Denver taxpayers.”

Local 858’s campaign consisted primarily of telephone contacts and door-to-door canvassing. Approximately 350 members actively participated in the campaign, each devoting approximately three or four days to campaign work. On election day, some 200 firefighters participated in a final campaign effort.

The electorate voted to approve the final offer of Local 858. The concluding tally showed 22,519 votes in favor of the union’s proposal and 22,403 in favor of the city’s proposal.

According to Local 858’s president, the cost of the election was defrayed through a two-year membership assessment of $15 per month. The assessment replaced $160,000 taken from the Local treasury to pay for the election. Thus, the total cost of the election amounted to $360 per union member. In the Local’s opinion, however, the benefit of retaining the shorter workweek clearly outweighed the effort and expense of the election.

Besides fulfilling the Local’s substantive goals, the election gave the union a sense of strength and purpose. The election victory generated an increase in union participation and improved morale among union members. Conversely, an election loss would have had a deleterious effect on the union and on the union’s bargaining power relative to that of the city. Thus, the election alternative imposed substantial costs on and posed significant risks to the union. But, as the Local 858 example shows, the referendum election was a viable option among impasse resolution techniques.

134. Id., August 19, 1981, at 83, col. 3.
135. Moeder Interview, supra note 114.
137. Moeder Interview, supra note 114.
138. Prior to the election, the Denver Election Commission had required Local 858 to put up a $160,000 surety bond or establish a cash escrow account. Denver Post, July 25, 1981, at 3, col. 1.
139. Moeder Interview, supra note 114.
140. Id. Moeder pointed out that the Local also had gained and demonstrated substantial expertise in political campaigning, a fact which appeared to have made some impression on Council members.
141. Id.
B. The Referendum Model: A Specific Proposal

The legislative framework for a proposed dispute resolution process (to be referred to as the "Referendum Model") is discussed below. The proposal incorporates various features of different impasse resolution processes, including the right to strike. For purposes of convenience, the existence of an administrative body ("Board") is postulated.

Step 1. Notification of Impasse. The parties engaged in public sector labor agreement negotiations are required to notify the Board of a bargaining impasse. Notification is in the form of a summary statement of the issues and the respective positions of the parties. If the parties cannot agree on the contents of the notification, each party may submit its own statement. Either party may declare an impasse.142

Step 2. Mediation. Within ten days, the Board will appoint an official to mediate the dispute at no cost to the parties. Alternatively, the parties may select and compensate their own mediator, upon the Board’s approval. The parties and the mediator have ten days in which to resolve the impasse. Following this period, the mediator will issue a written report to the Board. In its discretion, the Board may make the mediator’s report public.143

Step 3. Factfinding. If mediation is unsuccessful, the Board will direct the parties to engage in factfinding. The Board will appoint a factfinder who shall be compensated by the parties; the Board may, in its discretion, appoint a factfinder jointly requested by the parties. The factfinding process will include a hearing with the introduction of evidence, examination of witnesses, and argument. At the conclusion of the hearing, the factfinder will issue a written report resolving each area of impasse, supported by a statement of reasoning. The report shall be made public.144 On a designated date no later than ten days following issuance of the report, the parties shall simultaneously serve notice on the Board indicating acceptance or rejection of any or all of the findings.145 Following this, the parties shall have an additional five day period in which to engage in bargaining.

Step 4. Referendum. If the employees’ collective bargaining representative rejects any or all of the factfinder’s recommendations, the

142. By allowing either party to declare an impasse and invoke the next stage of the process, the Model will enhance genuine bargaining prior to impasse. Once that threshold is passed, only mutual agreement will prevent one party from progressing to the final stage.

143. If the Board determines that disclosure would lead to a positive result, it may make the report public. The threat of disclosure might itself encourage meaningful bargaining.

144. At this stage of the procedure, public opinion will prove valuable to the parties in evaluating further strategies.

145. The Model will generate maximum pressure on the parties by forcing both sides to reach a decision without knowledge of the adversary’s decision. Rejection of the award by only one party automatically results in grave risk or subsequent capitulation for that party.
representative may submit the impasse to a referendum of the electorate. The choices on the ballot shall be the factfinder's recommendation on the issue and the proposal which the representative submitted. The cost of the election shall be borne by the representative, and the election commission may require adequate funds to be placed in escrow.

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

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

**C. A Critical Evaluation of the Referendum Model**

On preliminary appraisal, certain objections might be directed toward the Referendum Model. First, it might be contended that the cost of an election renders the Model impractical in many instances, particularly in a large city such as New York or Los Angeles or where the bargaining unit is statewide. Second, the Model might allow public officials to manipulate the referendum process for purposes of political aggrandizement, rather than employ it for a legitimate collective-bargaining objective. Third, the Model ostensibly may not be conducive to the formulation of sound public policy, inasmuch as the electorate is

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146. By requiring a ballot submission consisting of respective positions as of impasse, the parties will be encouraged to moderate their demands so as to gain some strategic advantage in the event of a joint referendum. Likewise, a mutual formulation of the ballot language might conceivably lead to resolution of the dispute.

147. If the employer could successfully halt a work stoppage with no effective sanctions for doing so, the strike weapon would be significantly vitiated. Consequently, the Model provides a substantial disincentive for the employer to seek an injunction.

148. See, e.g., HAWAI'I REV. STAT. § 89-6 (Repl. Vol. 1976 & Supp. 1982), which states, "All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit," and then continues to list thirteen occupational groups. Likewise, there may be unique circumstances obtaining in the federal sector. Where the bargaining unit is nationwide, however, the Model could apply to it as feasible as to a state-wide model. See infra note 150. Moreover, in a situation such as the Air Traffic Controller's dispute, the Model arguably would have provided a result superior to that reached in the actual case.
not capable of understanding and choosing among complex issues of contract negotiations. Each of these points is considered below.

1. Election Costs and Union Incentives to Bargain

The Referendum Model forces a union which rejects a factfinder's award to make a substantial investment in the resolution process. For example, the cost of the Local 858 election was $160,000; the direct cost to each member was $360. In addition to monetary costs, the average union member donated approximately three to four days to campaign activity. These costs are not insurmountable in a large state. A union could conceivably afford an election in California.

Moreover, while the cost of an election can be predicted, the outcome of the election can not. The instrumentality of the Model is highly attenuated. In the case of Local 858, for example, 117 votes out of 44,922 total votes cast would have reversed the election outcome. Further, the consequences of losing an election entail the risk of severe loss of morale and commitment within the bargaining unit. In view of the calculable immediate costs and the incalculable but important long-term ones, a small local union in a large city might, as a practical matter, be precluded from seeking an election. However, this is more properly regarded as a strength of the Model than a weakness.

Under the private sector strike model, union power is a function of such variables as the union's willingness to strike, the degree of unionization within the industry, the percentage of union members within the enterprise, and the size of the particular operation. A union which lacks a sufficient measure of power will be deterred from undertaking a strike.

One of the salient deficiencies of the public sector arbitration process as a means of impasse resolution is that it imposes no meaningful costs on the participants, and thereby treats dissimilar unions alike. The only expense involved in arbitration is payment of the arbitrator's fee and any incidental costs of the hearing. Legal representation may be an additional cost, but it is not a requisite of arbitration. The most

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149. Moeder Interview, supra note 114.
150. The administrative cost of a statewide referendum in California is $15,000,000. Legislature v. Deukmejian, 34 Cal.3d 638, 194 Cal. Rptr. 781, 659 P.2d 17 (1983). There are 31,989 employees in California's largest bargaining unit. 3 CAL. PUB. EMP. REL. SPECIAL REPORTING SERIES NO. 17 (July 10, 1981). Each employee would thus have to pay $467. Alternatively, if the union, California State Employees Association (CSEA), created an "election fund" similar to a "strike fund" in the private sector, and the entire union membership contributed, the cost would be only about $163 for each of the union's 91,792 members. This membership figure was obtained in a telephone interview with Larry Bauman, Communications Specialist, California State Employees Association, Sacramento, California.
151. See supra text accompanying note 138.
serious risk incurred by either party is that its position will be rejected. Thus, it can be said with some justification that a union loses nothing when it opts for arbitration, and that a small, weak local stands to gain to the same extent as a large, strong one.\textsuperscript{153}

The Referendum Model corrects the distortion of power inherent in the arbitration method. The union’s ability to fund an election and the willingness of its members to do so are fairly comparable to the indicia of union strength that are significant in private-sector strike decisions.\textsuperscript{154} The public sector union is faced with a direct economic hardship in the expense of holding an election, and that hardship will be exacerbated if the election ends in defeat. Labor organizations in the private sector necessarily engage in a similar analysis of the costs and benefits of the strike weapon. Therefore, the public sector union operating under the Referendum Model will have the same incentives to engage in genuine bargaining as does its private sector counterpart under the pure strike model.\textsuperscript{155} Thus, the Referendum Model will reflect the economic strength of a local union in an accurate fashion. That effect in and of itself renders the Model superior to other impasse-resolution methods now in existence.

2. The Public Official’s Perspective

It can also be argued that the Referendum Model will lead to the abusive exercise of power by public officials. For example, an officeholder might refuse to bargain meaningfully with a weak local and thus provoke it into impasse and mediation. The official could then reject the mediator’s award, regardless of whether or not it was equitable, and force the union either to strike or to yield to the employer’s demands. In either event, the official’s political fortunes would be enhanced through a putative solicitude for the public fisc.

One response is that a private sector union, if it is the significantly weaker party, is routinely subjected to such indignities by the employer. It is well established that under the NLRA an employer’s duty

\begin{footnotesize}
\begin{enumerate}
\item[(153)] Clark, supra note 74, at 508, observes of the arbitration process that “its very availability tends to result in its over-usage.” He continues that arbitration awards necessarily have a broader impact than their effect on the immediate parties.
\item[(154)] For a general discussion of strike costs to a union, see D. Dilts & C. Deitsch, Labor Relations 140-142 (1983).
\item[(155)] Wellington and Winter argue than an important difference between private and public-sector strikes is duration. Because the latter interrupt services to the community, they will be settled more quickly than the former. Thus, public sector strikes are not restrained by the “unemployment trade-off.” See H. Wellington & R. Winter, Jr., supra note 65, at 25-26. The cost of an election to each member of a labor organization under the Referendum Model will vary according to the total membership. In some cases, the election option will fairly approximate the economic losses incurred in a protracted work stoppage.
\end{enumerate}
\end{footnotesize}
to bargain does not require the making of concessions.\textsuperscript{156} Provided the employer bargains in good faith,\textsuperscript{157} its legal obligation is satisfied, and a weak union must either accept the employer's offer or suffer the consequences of an unavailing strike. Public-sector unions logically should have no greater protection or advantages.

Furthermore, the Referendum Model militates against arbitrary employer conduct by means of political accountability. The union will presumably have an opportunity to present its version of the dispute to the media. If it persuasively demonstrates that the responsible public official is acting in a capricious, demeaning and patently unjust manner toward public workers, the official can be punished through the Model's election process or through general elections. Conversely, if it appears that the official has in fact acted in the best interests of the public, the official can be rewarded through public approbation. The Referendum Model assures a maximum of political accountability and thus avoids a severe policy shortcoming of the arbitration method.

3. Public Policy and the Electorate

Collective negotiations frequently involve issues of a sophisticated and complex nature, as the Denver Firefighters work hours issue demonstrates. In public presentation, a difficult issue can be distorted to the advantage of a particular party or reduced to a simplistic and inaccurate level.\textsuperscript{158} Arguably, therefore, the public's choice might not be effective in terms of important policy objectives.

However, the Referendum Model does not significantly detract from the authority or responsibility of the bargaining parties to engage in meaningful decision-making. The structure of the Model assures that policy options will in the first instance be selected by the appropriate official. Only when there is a dispute of sufficient magnitude as to lead to impasse will the public take part in the process. Accordingly, the election device serves primarily as a final check on decision-making, and not as a substitute for the myriad of functions performed by officials in shaping and directing policy during the formative stages.

Second, on a more theoretical level, one essential premise of our political process is that "an active and legitimate group in the popula-

\textsuperscript{156} Section 8(d) of the NLRA specifically provides that the obligation to bargain collectively "does not compel either a party to agree to a proposal or require the making of a concession. . . ." 29 U.S.C. § 158(d) (1976). \textit{See generally} \textit{1 THE DEVELOPING LABOR LAW} 553-58 (C. Morris, ed. 1983).

\textsuperscript{157} \textit{See} \textit{1 THE DEVELOPING LABOR LAW, supra} note 156, at 570-606.

\textsuperscript{158} For example, the newspaper advertisement of the "Citizens for Fiscal Responsibility" (CFR) characterized the dispute strictly in terms of economics. With no explanation of its data, the CFR concluded that the cost of the Union's plan to the taxpayer would amount to $2.5 million per year. It urged the citizen "to vote to save $2.5 million annually." There was no discussion of the unique working conditions in firefighting. Rocky Mountain News, \textit{supra} note 136, page 1.
tion can make itself heard effectively at some crucial stage in the pro-
cess of decision."159 Conceding Wellington and Winters' point that an
organization of public workers ought not to wield a "disproportionate" 
amount of power by means of strikes,160 there is nevertheless a political 
value in permitting workers to assert their claims in the democratic pro-
cess.161 That process, in fact, remains viable only through the reconcili-
ation of conflicting interests.162

The Referendum Model adjusts the unsatisfactory allocations of 
political power that inhere in the arbitration model and the pure strike 
model. Impasse resolution through arbitration shields the public offi-
cial from the power of the electorate. Similarly, a union potentially 
exercises an inordinate degree of political power where it is permitted 
to strike without substantial checks. Under the Referendum Model, 
the possibility of a strike can be controlled in significant measure by the 
public employer. Thus, when a strike would be unduly harmful, the 
public official can choose to accept the factfinder's award as the least 
destructive alternative, thereby preventing a powerful union from pur-
suing and attaining extreme demands by striking the relatively vulnera-
bale employer.163

Finally, the Referendum Model will reinvigorate the democratic 
system on the state and local level. Although an election campaign 
under the Model will necessarily focus only on a limited number of 
issues, the broader implications of public employment will probably be 
addressed in public debate. Citizens will be motivated to participate by 
reason of political and economic self-interest. The Referendum Model 
will serve to educate the electorate concerning public employment and 
will structure the relationship between the citizen and the public serv-
vant on a more intimate basis, a consequence that will inure to the 
larger public good.164

159. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956).
160. The political theory relied upon by Wellington and Winter is that expressed by Dahl, id., 
transposed to the collective bargaining context. Their assertion that public sector strikes provide 
unions with a "disproportionate share of effective power in the process of decision" is an inference 
drawn from Dahl's framework. See H. WELLINGTON & R. WINTER, JR., supra note 65, at 24-29.
161. Dahl observes, "The fundamental axiom in the theory and practice of American plural-
ism is, I believe, this: Instead of a single center of sovereign power there must be multiple centers 
of power, none of which is or can be wholly sovereign." R. DAHL, PLURALIST DEMOCRACY IN 
THE UNITED STATES: CONFLICT AND CONSENT 24 (1967).
162. Id. Dahl contends that "constant negotiations among different centers of power are nec-
necessary refine and perfect methods of conflict resolution."
163. Arguably, the employer may be afforded some tactical advantage by retaining control 
over the strike weapon. See Gallagher, The Use of Interest Arbitration in the Public Sector, INDUS. 
REL. RESEARCH ASSOC., PROCEEDINGS OF THE 1982 SPRING MEETING, supra note 72, at 501, 506-
507. However, under the Referendum Model, the union is afforded the choice of an election, 
thereby minimizing any power accruing to the employer by virtue of its strike/no-strike option.
164. See Macy, The Role of Bargaining in the Public Service, in PUBLIC WORKERS AND PUB-
LIC UNIONS 5, supra note 109.
IV
Conclusion

The Referendum Model avoids the major obstacles confronting other impasse resolution procedures currently in effect. It has, further, two positive attributes of importance to public-sector bargaining. First, it insures that negotiations will be conducted in a pragmatic, realistic environment where the parties have a genuine incentive to reach agreement and where the risks of failing to do so are too substantial to be disregarded. Second, the procedure motivates citizens to take an active interest in matters of public employment, including a broad range of issues beyond the merely economic. It thus will enhance productivity and the quality of work in the public sector. Ultimately, of course, the efficacy of the Referendum Model can be established only through practical experimentation. But experience has already proved the weaknesses of present methods, and legislative innovation is necessary to develop more viable strategies.