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STRIPPING PUBLIC EMPLOYEES' RIGHTS FOR THE SAKE OF WISCONSIN BUDGET REPAIR: REALITY OR RHETORIC?

HAROLD DATZ*

We are condemned to live in interesting times, I suppose. I'd like to take a few moments to give some general concepts about labor law and the public sector, including exploring the intersection of unions and collective bargaining in the public sector. This intersection has constituent parts, and I'd like to talk about each of them briefly.

First of all, in terms of breaking it down, I suppose we start with the fundamental notion of whether one has a right to be a member of a union at all. I think that there is at least some law and it certainly reflects my own view.

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Freedom of association, as guaranteed by the federal constitution² and by the state constitutions as well,³ protects individuals from criminal prosecution on the basis of union membership.⁴

Of course, we know in the private sector, ordinarily one would not have any right to a state lawsuit on this,⁵ but under the National Labor Relations Act (NLRA)—the Magna Carta of labor law in the United States—there is a section seven right to be a member of a union.⁶

But in the public sector, we are dealing with state, rather than federal action. And, at least at that base level, there is a right to be a member of a union. but it does not necessarily follow that there is a constitutional right to engage in collective bargaining, i.e. have your union be the exclusive bargaining representative, or have your state employer constitutionally obligated to bargain with you.⁷ Of course, there is a constitutional right to petition the government for redress of grievances.⁸ And, at one level, one could not criminalize employees who come together and seek collective bargaining with their employer.⁹

In terms of whether the government has a constitutional obligation to bargain collectively with the union, one should note an older case: *Smith v. Arkansas*, which seems to suggest that there is no constitutional obligation or duty on the part of the government to bargain with the union.¹⁰ Of course, we do have

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1. Directors in cases involving novel and complex issues and matters of national importance. 29 U.S.C. § 157 (2006) (“[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations”).

2. U.S. CONST. AMEND. I.

3. See, e.g., K.Y. CONST. § 1; VA CONST. art. 1, § 12; N.H. CONST. art. 12, § 1; W.V. CONST. art. 3, § 16.

4. 29 U.S.C. § 157 (2006).

5. See *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 293 (S.C. 2000) (excluding public sector employers from the meaning of “employer” for the purpose of a right to work statute, and basing the decision on traditional differences between the rights of public and private sector workers to collectively bargain).

6. 29 U.S.C. § 157 (“[e]mployees shall have the right to self-organization, [and] to form, join, or assist labor organizations”).

7. See, e.g., TEX. GOV'T CODE ANN. § 617.002 (West 2012) (“[A]n official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees.”).

8. U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the . . . right of the people . . . to petition the Government for a redress of grievances.”).

9. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) (holding that retaliation against employees who wrote a critical letter together is a violation of the First Amendment right to free speech).

10. See *Smith v. Ark. State Highway Emp., Local 1315*, 441 U.S. 463, 464-65 (1979) (warning that although public employees who associate for collective bargaining purposes

statutory rights that guarantee and give the obligation to the state employer: eighty percent of the states have statutes that authorize collective bargaining to some extent—with the majority of the states having a statutory obligation or some other obligation short of the constitutional obligation to bargain with the union.¹¹ Therefore, even though an entity could not criminalize efforts on the part of employees to ban collectively and seek collective bargaining, in a constitutional sense, there probably is no obligation on the part of the state employer to bargain back.

And then, of course, the next component is the right to make and enforce the collective bargaining contract. Yet, sometimes collective bargaining does not result in a contract, resulting in industrial strife. In the private sector, that strife can take the form of weapons, strikes and lockouts—and God forbid in football—that can occur.¹² But again, speaking constitutionally, there is no constitutional right on the part of public employees to engage in the strike.¹³

Whether there is a statutory right or a common law right to engage in a strike is a more difficult question. In most of the states, and in most instances, there exists a ban on strikes by public-sector workers.¹⁴ One can argue, that there should be sanctions for police officers and firefighters who strike, or that these individuals should be denied the right to strike.¹⁵ But on the other hand, would a strike of individuals in a state licensing office, cause the world to come to an end?

Of course, even if there was a right to strike, would a government employer have the right to replace as exists in the private sector? The right to replace on the part of the employer in the private sector is undermined to a certain extent by the right to strike.¹⁶ So the private employer cannot discharge the striking

are constitutionally protected, “the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.”)

11. See *State Bargaining Rules Interactive Map*, NAT’L COUN. ON TEACHER QUALITY, <http://www.nctq.org/tr3/scope/#interactiveMap> (last visited Sep. 4, 2012) (comparing collective bargaining legislation in each state).

12. See generally Alexander M. Bard, Note, *Strength in Numbers: The Question of Decertification of Sports Unions in 2011 and the Benefit of Administrative Oversight*, 1 Am. U. Lab. & Emp. L.F. 347 (2011) (examining the causes and ramifications of NFL lockouts).

13. See *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926) (holding that “[n]either the common law, nor the Fourteenth Amendment, confers the absolute right to strike.”; *United States v. United Mine Workers of Am.*, 330 U.S. 258, 274 (1947) (discussing the rationale for legislation granting private workers to strike, and finding that “[th]ese considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.”)

14. See *Right to Strike State Bargaining Rules Interactive Map*, *supra* note 11.

15. See *Bd. of Ed. of Martins Ferry City Sch. Dist. v. Ohio Ed. Ass’n*, 235 N.E.2d 538, 543 (Com. Pl. 1967) (considering the opinions of several past presidents regarding strikes by public workers, including President Franklin D. Roosevelt, who wrote, “Since their own services have to do with the functioning [sic] of the government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable.”)

16. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (affirming

worker, but it can permanently replace the employee.¹⁷ Could you, or would you take that body of law and transpose it to the public sector?¹⁸ In lieu of the right to strike, there are other avenues to resolve a collective bargaining impact, including mediation, fact-finding arbitration, and perhaps other ways, to resolve the matter.¹⁹ At least for some, these peaceful ways of resolving a collective argument conflict that exists in the public sector may be an adequate substitute for the right to engage in the use of weaponry.²⁰

Another component of what we mean by labor unions and collective bargaining is the whole matter of union security as well. Union security, in the private sector means that except for the so-called right-to-work states, employees can be required to join the union or at least pay dues as a condition of employment—the idea being that if a union has the obligation to represent fairly everybody in the unit, then everybody should pay their fair share, preventing free-riders.²¹ And so, everyone represented by a unit, even if an employee had voted against representation in a union, is represented.²² Thus, under the union security concept, all members of the union ought to pay for the cost that the union undergoes in representing employees.

So in the private sector, except in right-to-work states, you do have union security that can exist in a collective bargaining contract.²³ It takes the consent of the employer, but you can obligate employees to pay dues. Now transposing that to the public sector, there are some who are offended by the notion that one must pay dues to a union in order to get a public job, in order to serve the government.²⁴ But again, the counter-argument is that if the union is the exclusive representative, the union ought to be recompensed for the services that it performs.²⁵

It is a bit of a debate in the public sector as to whether it is a good idea or a bad idea to compel employees to support the union financially as a condition

the right of private employers to permanently replace striking workers).

17. *Id.*

18. See generally Rona Pietrak, *Some Reflections on Mackay's Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87 (1989) (considering whether the *Mackay* doctrine should apply in the public sector).

19. See *IAMAW v. General Elec. Co.*, 406 F.2d 1046 (1969) (identifying the national policy of encouraging arbitration of labor disputes).

20. See Neil Fox, *Patco and the Courts: Public Sector Labor Law As Ideology*, 1985 U. ILL. L. REV. 245, 262-63 (1985) (“Numerous statutes provide for binding interest arbitration for certain classes of employees as a substitute for strikes, while a few states that have followed the private sector model very closely allow public employees to strike.”).

21. See *Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. N.L.R.B.*, 347 U.S. 17 (1954) (recognizing the “free-rider” issue as legitimate concern).

22. See *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963) (discussing the agency shop union model).

23. See *id.* (finding union security clauses to be lawful).

24. See *Seidemann v. Bowen*, 499 F. 3d 119 (2d Cir. 2007) (claiming that agency procedures are inconsistent with the First Amendment and the duty of fair representation)...

25. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 553 (1991) (noting that mandatory dues compensate the union for benefits that nonmembers necessary accrue).

of public employment.²⁶ Even if an employee is required to pay dues, the employee can always get back, so to speak, that portion of his dues that may go for non-representation or political purposes.²⁷

Related to that is the check-off, which is a means of paying one's union dues.²⁸ Again, in the private sector, if the employer agrees to deduct union dues from payroll, then those dues will be deducted and paid over to the union.²⁹ Again, the check-off takes the consent of the governmental employer—yet, now several states seem to want to do away with check-off.³⁰

26. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

27. See, e.g., *Locke v. Karass*, 555 U.S. 207 (2009); *Lehnert*, 500 U.S. at 507; *Ellis v. BRAC*, 466 U.S. 435 (1984).

28. See *N.L.R.B. v. W. Kentucky Coal Co.*, 116 F.2d 816 (6th Cir. 1940) (Allen, J., concurring) (observing that nothing before or in the NLRA suggests that check off arrangements are illegal); *Wirtz v. Local 191, Teamsters*, 226 F. Supp. 179 (D. Conn. 1964) (discussing the check-off).

29. See *Comm'n Workers v. Beck*, 487 U.S. 735 (1988) (holding that under the NLRA, employees may lawfully be required to pay periodic union dues and certain fees as a condition of employment regardless of their union membership so long as those dues and fees are related to collective bargaining activities).

30. See *City of Charlotte v. Local 660, Int'l. Ass'n of Firefighters*, 426 U.S. 283 (1976) (holding that a public employer's refusal to withhold union dues is lawful).