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WELLINGTON'S LABORS

MICHAEL H. GOTTESMAN*

I. TEACHING LABOR

My first class as a student at Yale Law School was the first class Harry Wellington taught there. It was the Fall of 1956. The course was Contracts. Harry entered the classroom, looking no older than the students (in truth, he wasn't much older), but surely better dressed. He settled himself on the corner of the desk, and the magic began.

Without introduction or fanfare, Harry embarked on a monologue about a magazine that kept arriving, uninvited, in his mailbox each month. He confessed to leafing through the pages from time to time, and wondered if this obligated him to pay for it.

We, of course, presumed to know full well what magazine he was talking about. Playboy had begun publication just two years before, and leafing through the pages seemed a sensible strategy, at least to the 95% of us who were men. We were probably wrong, but our assumption that Playboy was the subject of inquiry fueled our interest, and Harry didn't dampen enthusiasm by making full disclosure.

We discussed Harry's quandary—did he have to pay?—throughout the course. But we didn't arrive at an answer, and Harry didn't proffer one. The joy was in the inquiry, not the answer. Thus did Harry whet our appetite for the legal enterprise.

I was so exhilarated by this experience that when it came time to pick courses for our second semester (Yale even then allowed first year students to elect one of their Spring courses) my sole interest was finding out "what's Harry teaching?" The answer was "Labor Law," and I enrolled. I had no idea what the course was about: I had no union members in my background, and no awareness of even meeting a union member. The clashes of labor and management had never before engaged my interest. But if Harry was teaching, I was taking. And so were many of my classmates.

That course determined my career. I learned that this was a field where there were "sides," and I realized, notwithstanding my prior indifference, that I was fully committed to one of those sides. What

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Harry added—what made this field downright irresistible—was intellectual richness. This was not a course, as so many labor law courses are, in which the focus is on the strategic use of the law by contending economic forces. This was a course in federalism, in separation of powers, in legal process, in reconciling a national commitment to competition with a preference for allowing unions to end competition in the sale of one of the raw materials of production (that is, labor). To pursue a “cause” in so rich an intellectual arena was a calling too good to resist.

In the late ‘50s, Yale experimented with a “divisional program,” in which students pursued a “major” during their fourth and fifth semesters of law school. One of the options was a major in Labor Law, and many of us chose it. We had the happy experience of two very different mentors: intellectualizing with Harry, real-world strategizing with Clyde Summers. The divisional program didn’t survive long, but its demise surely was not attributable to the labor law division. We all loved it!

We didn’t know, of course, that private sector unionization in America—then at its zenith, with nearly 40% of private sector workers unionized—was about to experience a mammoth free-fall. That began in earnest with the increase in global competition in the 1960’s, as Europe and Asia finally rebounded from the devastation of World War II. Today, union density in the private sector hovers at about 10%.¹ Nor did we realize that *public sector* unionism, then hardly noticeable, would soon explode to fill the void. The social activism of the late 1960’s marked the onset of that phenomenon.

At all odds, I graduated Yale in 1959, and began a near thirty-year career as a union lawyer, riding the escalator down in the private sector, and up in the public sector. In the first few years, I would proudly send copies of my more ambitious briefs to Harry. In each case, I would get a polite letter back, saying that he had read the brief with interest, although of course he didn’t agree with the position I had taken. (The “of course” was a bit of a surprise: Harry, the ultimate teacher, had not tipped his hand in the classroom as to where he stood.) After a while, I took the hint, and stopped sending. But Harry was always there as I drafted those briefs: his was the standard of intellectual rigor those briefs had to meet.

1. See Press Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Table 3, *Union Members in 1999* (Jan. 19, 2000), available at <http://www.bls.gov/news.release/union2.nr0.htm>. [hereinafter *Union Members*].

And, of course, when I began teaching, for a decade as an adjunct, and then full-time, my goal was to emulate what I remembered most fondly about my own law school career: Harry's teaching. Indeed, I even volunteered to teach Contracts, so that I could confront my students with Harry's unsolicited magazine hypothetical. Somehow, it didn't spark the same excitement in my classroom. Was it the different era, or just an insufficiency of magic on the corner of the desk?

II. WRITING ABOUT LABOR

Though he later went on to become an important constitutional scholar, Harry's early scholarship was predominantly about labor law. Between 1955 and 1976, he authored or co-authored three books on labor law, and more than a dozen law review articles. There aren't many people who could co-author one book with Ralph Winter and another with Clyde Summers, yet another testament to the subtlety and disinterestedness of Harry's intellectual reach.

Given today's predominance of public sector unionism, I want to recall briefly the book Harry co-authored with Ralph Winter in 1971, *The Unions and the Cities*.² They saw that public employment was the emerging growth area for unionization. In the decade before their book, the number of public employees in America had increased more than 50%³, and the number represented by unions had grown exponentially to nearly two million. As this rise coincided with the start of the decline in private sector unionism, public sector employees had risen in that decade from 5% to 11% of America's unionized workers.⁴

I wonder whether Wellington and Winter envisioned how enormous would be the future growth of public sector unionism. Today, there are nearly eight million public employees represented by unions—four times the number when they wrote their book. Public employees now constitute 43.6% of the nearly 18 million union-represented employees in America, compared to 11% then.⁵ Despite a crazy-quilt of state laws that regulate public employee unionization, union density in the public sector has surpassed the peak attained in

2. See HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNION AND THE CITIES* (1971).

3. See *id.* at 33-34.

4. See WELLINGTON & WINTER, *supra* note 3, at 34.

5. See *Union Members*, *supra* note 2. Table 3 shows 10,104,000 private wage and salary workers represented by unions, and 7,815,000 government workers represented by unions.

the private sector in the 1950's. Today, 42.1% of all the public employees in America are represented by unions.⁶

The Unions and the Cities was prompted by what Wellington and Winter saw as troubling signs in the public sector: politicians' capitulations, in the face of strike threats, to what they (the authors) thought were extravagant union demands. States and cities were then considering what set of legal rules and institutions would regulate public sector collective bargaining, and the authors feared that they would unthinkingly adopt those that had long prevailed in the private sector. Their book undertook to show that differences in the public sector justified radically different legal rules and institutions.

The Wellington-Winter thesis was rooted in public choice theory, although it wasn't called that then. Their central insights can be discerned by examining their position on two important issues.

A. *Should Public Employees Be Allowed To Strike?*

The right to strike is the centerpiece of national labor policy in the private sector. As Justice Brennan explained for the Supreme Court, in *Insurance Agents v NLRB*:⁷

[C]ollective bargaining . . . cannot be equated with an academic collective search for truth. . . . The parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. *The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.* . . . [A]t the present statutory stage of our national labor relations policy, the two factors — necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms — exist side by side.⁸

But Wellington and Winter urged that strikes in public employment be banned, and their argument for that position diverged radi-

6. See *Union Members*, *supra* note 2.

7. See 361 U.S. 477 (1960).

8. *Id.* at 488-89 (emphasis added).

cally from that of others who then opposed public sector strikes. The usual argument advanced for banning such strikes was that public employees perform vital services that can't be interrupted. But as Wellington and Winter showed, that argument is ultimately unpersuasive, and if that was all that could be advanced in opposition, the union's quest for a right to strike was likely to carry the day. They recognized that some public employees do indeed perform services so vital that the public cannot afford their interruption: police and fire are the paradigmatic examples. But the case cannot be made that a strike by most other categories of public workers—park employees, tax collectors, or even teachers—would be more harmful to society than lawful strikes in some parts of the private sector (*e.g.*, transportation and basic manufacturing industries).

Wellington and Winter opposed public sector strikes for quite a different reason. Public employees, in their quest for higher wages, are competing against other citizens with other claims on what is ultimately a limited public fisc. If, alone among the citizen claimants, public employees can rely not only on their lobbying power (the weapon enjoyed by all claimants) but also their capacity to disrupt public services, they will enjoy an inflated arsenal that will give primacy to their demands over competing claimants, and the end result may be a socially-undesirable allocation of public resources. This is especially so, Wellington and Winter argued, because public officials will be more likely to surrender to unreasonable union demands backed by strike threats than will their private sector counterparts. Public officials are motivated by electoral concerns, not the bottom line. If satisfying worker's immediate demands and thus avoiding strikes keeps the public happy in the short run, elected officials are unlikely to stand fast against union demands and unleash a strike that disrupts public services and may rebound to their political disadvantage. They will instead take the short-term expedient route: yield to the union's extravagant demands, and visit the ultimate public price for that surrender—reduced expenditures on other government services, or increased taxes—in later omnibus bills where the causal role of the earlier surrender will be undetectable.

B. What Should Be the Scope of Bargaining in the Public Sector?

Wellington and Winter assumed, appropriately on the basis of federal labor law at the time they wrote, that unions in the private sector have a right to bargain over every issue that directly affects employees'

interests.⁹ They urged that a narrower stance be adopted in laws regulating public employee bargaining. As they explained, many issues that directly affect employees also have larger implications for society as a whole. Two examples: should there be public review boards to resolve police misconduct claims? Should class size in public schools be reduced, and if so by how much?

Remitting these issues to collective bargaining, they warned, would provide unions a forum in which their voices would be heard to the exclusion of other citizens, and in which if bargaining was to succeed decisions would be reached without a chance for the input of others. As a next-best alternative, they argued that if these subjects were to be bargainable, the usual procedures for bargaining should be changed so that there could be meaningful input by all other interested citizens before decisions were made.

Wellington and Winter did not stop with alarms about the right to strike and the scope of bargaining. They went on in their book to examine every other aspect of private sector labor law, including, for example, the shaping of bargaining units and the means for enforcing collective bargaining agreements once reached. In virtually every instance, they saw problems with automatic importation to the public sector, suggesting instead modifications of private sector doctrine to meet their concerns about public sector differences. Their methodology throughout was built upon their central premise, reiterated provocatively in their postscript:

[T]he principal issue in public employee unionism is the distribution of political power among those groups press-

9. Section 8(a)(5) of the National Labor Relations Act requires employers to bargain with unions chosen as employees' exclusive bargaining representatives over wages, hours, and terms and conditions of employment. At the time they wrote, prevailing Supreme Court decisional law indicated that any matter falling within the broad meaning of those terms is a mandatory subject of bargaining. See *Fiberboard Paper Products Corp. v NLRB*, 379 U.S. 203 (1964) (contracting out of bargaining unit work a mandatory subject of bargaining). It was not until a decade after Wellington and Winter wrote their book that the Supreme Court, for the first time, declared that employers were not invariably required to bargain over entrepreneurial decisions that directly impacted on terms and conditions of employment, such as closing a plant. See *First National Maintenance Corp. v NLRB*, 452 U.S. 666 (1981). Holding that an employer need not bargain over a decision to close part of its business - a decision that may cost many employees their jobs - the Court created a presumption against employer obligation to bargain over entrepreneurial decisions, which could be overcome only by showing that the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

ing claims on government. . . . [It] would seem that every responsible union leader must be committed to the proposition that what's good for public employees is good for the cities, counties, and states of the nation. Our rejection of that proposition has served as the major normative premise of this book. We believe that in the cities, counties, and states there are other claimants with needs at least as pressing as those of the public employees. Such claimants can never have the power the unions will win if we mindlessly import into the public sector all the collective bargaining practices developed in the private sector. Make no mistake about it, government is *not* just another industry.¹⁰

At this gathering celebrating Harry, I will refrain from propounding my reactions to the book's proposals. Let me just say that I read them with interest, although, *of course*, I didn't agree with them.

But, in the end, we can all be pleased. The law has developed much as Wellington and Winter proposed. Yet, despite these departures from the private sector legal rules, public sector unionism has prospered beyond anything ever achieved in the private sector.¹¹

Most states forbid strikes by public employees, and the rest impose limits on the right to strike that minimize the prospects of its exercise.¹² The states vary widely on the scope of mandatory bargaining, but, in general, issues of paramount societal interest are not entrusted to bargaining and/or are hedged around with safeguards such as Wellington and Winter proposed to assure that other citizens' voices are heard before the decision is made.

It is quite possible that public sector unionism has thrived precisely *because* the right to strike is denied. The past two decades have shown that the private sector right to strike is a paper tiger, if employers are prepared to hire permanent replacements for the strikers.¹³ The prospect of job loss through striking, and the absence of any other mechanism for inducing an employer's submission to a collective bargaining agreement, have rendered unionization futile in most parts of

10. See WELLINGTON AND WINTER, *supra* note 3, at 202.

11. See *Union Members*, *supra* note 2.

12. In the handful of states permitting strikes, the allowance does not extend to jobs deemed too critical such as police and fire, and those who are permitted to strike must first run a procedural gauntlet that maximizes the chance that agreement will be reached thereby obviating the occasion for striking.

13. See Michael H. Gottesman, *Union Summer: A Reawakened Interest in the Law of Labor?*, 1996 Sup. Ct. Rev. 285, 293-96.

the private sector.¹⁴ But the denial of a strike right in the public sector is usually accompanied by the creation of some dispute-resolution mechanism for settling the parties' differences: mediation, arbitration, or the like.¹⁵ Even where these do not exist, an organized constituency's lobbying power has proved sufficient to give public employees enhanced leverage in competition with the more diffuse, and more diffusely represented interests of the larger citizenry.

I learned legal process theory and public choice theory from Harry. That education enabled me to understand why my public sector union clients prospered in a world of inhospitable legal rules.

14. *Id.*

15. See WELLINGTON & WINTER, *supra* note 3, at 170 (these alternatives are discussed therein).