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The Illinois Judiciary and Public Employee Labor Disputes: A Return to an Imperial Judiciary

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I thought this was supposed to be a free country? I thought men had a right to stop work when they didn’t find conditions satisfactory? If their own elected government tells them it’s illegal to strike, that they must work under any terms the employers see fit to grant them or go to jail, then they’re not better than slaves. If this is really a democracy we live under, that injunction is illegal.¹

The failure of the Illinois legislature to enact a public employee collective bargaining law² is generally regarded as the fundamental cause of the current unsatisfactory status of labor relations in public employment.³ While there certainly is an urgent need for comprehensive legislation, the Illinois judiciary is at least equally responsible for the mess in public employment relations. Although the courts have proclaimed themselves reluctant participants in this arena, acting only to fill a legislative vacuum, they have nevertheless shaped public employee labor policy to fit their own social, political and economic views, regardless of existing legal doctrines and precedents, expressions of legislative and executive intent, and equitable maxims applied by high courts in other states.

The battle waged before the Illinois judiciary has related to two basic questions: (1) the right of public employees to better themselves through

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¹ I. Stone, CLARENCE DARROW FOR THE DEFENSE 3 (1941). From a conversation reconstructed by the author in which Darrow, in 1894, is advising Marvin Hughitt, President of the Chicago & North Western Railway, of Darrow’s decision to resign from his position as counsel for the railway and to join forces with Eugene Debs and his American Railway Union in their strike against the Pullman Company and the affected railways.

² On June 9, 1975, State Senator Richard M. Daley (Dem., Chicago) successfully moved to send the pending public employee collective bargaining bills to subcommittee for an ignominious burial. Previously, the Democrats had piously supported bills certain to be defeated by the Republican majorities which customarily control the two houses of the General Assembly. With the Democrats in firm charge of both chambers, however, a change of direction on their part was called for and they proved equal to the task. Chicago Sun-Times, June 10, 1975, at 24, col. 3. It has been suggested that the legislative impasse reflects a stalemate over the question of whether an act should contain a no-strike provision. Note, The Illinois Anti-Injunction Act is Not Applicable to Strikes by Public Sector Employees and Such Strikes are Illegal Per Se, 6 Loy. Chi. L.J. 187, 190-91 [hereinafter cited as The Illinois Anti-Injunction Act].

self-help, including the right to strike; and (2) the enforceability of public employee collective bargaining agreements. In the public sector, Illinois courts have both illegalized self-help and refused to enforce contracts. Public employee unions in Illinois are now in a pubescent period similar to that earlier experienced by private sector unions, and the role played by the Illinois judiciary over the past decade produces a sense of déjà vu.

American courts previously wrestled with the first issue, the right to strike, for more than a century in private sector labor cases, leaving behind a grotesque and ultimately discredited history. By ignoring common law limitations on judicial power, casually discarding legislation as unconstitutional, or interpreting it contrary to the intent of the framers, American courts became political institutions. They created unprecedented principles so vague as to permit individual judges to decide disputes according to their political or socio-economic philosophy. By and large, the judiciary served as the plenipotentiary of private industry. Long after private sector unions won to their side the executive and legislative branches of government, the judiciary remained their “political” adversary.

The second issue currently confronting public employee unions, enforceability of their contracts, lacks a clear counterpart in private sector judicial experience. This is because private sector unions waged and won their battle with the judiciary with respect to the right to strike before the more sophisticated issue of contract enforcement became legally significant. By the time Congress enacted comprehensive legislation which clearly established a policy of enforcing private sector collective bargaining agreements, the federal courts were no longer hostile to private sector unions and therefore interpreted and applied the Congressional policy according to its intent and terms.

The purpose of this article is to compare the evolving public sector Illinois labor cases with their earlier counterparts in the private sector. This comparison will demonstrate the marked similarity in underlying political and socio-economic philosophy which served as the cornerstone of the judicial decisions in both sectors. That philosophy essentially espouses the subordination of worker interests to those of their private or public employers. It is a philosophy which has been cloaked with judicial respectability and the force of law by the use of contrived and hollow legalisms. This comparison also will demonstrate the need for legislation which realistically and effectively addresses the problems which have arisen in the public sector.

**THE PRIVATE SECTOR**

A number of doctrines were developed successively in private sector cases, all calculated to serve the interests of private employers against their
employees. This trend continued until a change in the political climate of the nation ultimately caused a reversal and the triumph of the formerly minority views of Justices Holmes and Brandeis.

The Criminal Conspiracy Doctrine

In the first reported American labor case, the Philadelphia Cordwainers Case, the English doctrine of criminal conspiracy was manipulated to illegalize conduct on the part of American workers that was legitimate in other contexts. There the organized Philadelphia shoemakers demanded a raise in wages. The city’s businessmen foresaw that such concerted employee action could jeopardize the competitive position of Philadelphia shoe dealers bidding against unorganized dealers in other eastern cities for wholesale contracts with merchants in new cities in the expanding young country.

Public authority reflected the view of the Philadelphia property owners and businessmen, since they alone were eligible to vote. Hence, an indictment was obtained from the prosecutor and a criminal conspiracy conviction from the judge, Recorder Levy. He found that the shoemakers were illegally affecting wages and prices by "artificial regulation," and that a strike to raise wages was an "unnatural means" of raising the price of work above the "natural" level determined by competition between workers for available employment. Following the Philadelphia Cordwainers Case, the criminal conspiracy doctrine became an accepted tool to deny workers the right to engage in self-help activities.

By the middle of the nineteenth century, however, economic conditions in the New England states had changed with the introduction of new industries. The business community desired to calm the storm which had resulted from use of the criminal conspiracy doctrine to intimidate and control workers.

4. 3 Commons and Gilmore, Documentary History of American Industrial Society 59 (1910).
5. For a similar application of the criminal conspiracy doctrine to enforce these prevailing economic views, see People v. Fisher, 14 Wend. 9 (N.Y. Sup. Ct. 1835). Strikers, seeking to protect their wage standards, were convicted under a vague statute which made criminal a conspiracy to commit an act "injurious to trade or commerce." The underlying premise for proscribing concerted action by workers was the need to make workers compete against one another for jobs to assure that businesses would remain competitive. Yet, 15 years following the Philadelphia Cordwainers Case, a Pennsylvania court found no criminal conspiracy to exist when the shoe manufacturers acted concertedly to depress the wages of their respective employees. Such action was found to be a "natural" combination of the employers as contrasted to the "unnatural" combination by the workers. Thus the "sauce for the goose" theory was found to be hollow. Commonwealth v. Carlisle, Brightly's Rep. 36 (Pa 1821), as reported in E. Oakes, The Law of Organized Labor and Industrial Conflicts 209 (1927).
6. Organized workers in New England had virtually declared war on the courts. They rejected being labeled as criminals for pursuing their economic self-interest. New England was witnessing mock trials and hanging of judges in effigy. The press was highly critical of the
Chief Justice Shaw of Massachusetts, a well-known partisan of industry, disposed of the outmoded criminal conspiracy doctrine in a case involving a bootmakers' strike to force an employer to discharge a non-union journeyman. In Commonwealth v. Hunt, the conspiracy conviction was reversed on appeal in one of the most brilliant tongue-in-cheek opinions in American jurisprudence. Shaw found the indictment defective for failure to allege an illegal purpose, an allegation needed to prove a criminal conspiracy. Obviously, he said, employees could not strike for the purpose of requiring all workers to join their union in order to control the wage structure. He suggested, however, that as far as could be discerned from the indictment (although the evidence at trial clearly established otherwise), these workers might have struck for perfectly laudable purposes; for example, attempting to rid their shop of imbibers. How, asked Shaw, could an indictment leaving open this possibility be sufficient to allege an unlawful purpose?

This decision sounded the death knell for the criminal conspiracy doctrine in American labor cases. Shaw's message was not, of course, that prosecutors should draw clearer indictments. It was that industrial strife endangering the interests of the prevailing socio-economic class, rather than sound legal reasoning, led courts to reverse their anti-labor positions. The message was not lost on American workers.

The Illegal Purpose Doctrine

Despite the abandonment of the criminal conspiracy doctrine, a similar theory, the illegal purpose doctrine, continued to be employed to restrict labor unions in civil tort suits arising from concerted action by workers for their economic betterment. This doctrine defied definition. Standards were totally lacking and little or no consistency was apparent in the reasoning of the judges. The conduct declared illegal was neither criminal nor tortious under common law. It entailed acts that were indisputably legitimate if committed by an individual, but which could be declared tortious if done collectively by workers. In actuality, this doctrine reflected the understanding of the anti-labor establishment that collective, as opposed to individual, action afforded workers a realistic opportunity to advance their self-interest.

In the absence of controlling legislation, the illegal purpose doctrine was thrashed out in state courts during the late nineteenth and early twentieth centuries. The doctrine was enunciated by the Massachusetts Supreme courts. Juries were defying the courts by their refusal to convict regardless of clear evidence of violations of the law as interpreted by the courts. See, e.g., F. Frankfurter & N. Greene, The Labor Injunction 17 n.71 (1930) [hereinafter cited as Frankfurter & Greene].

7. 45 Mass. (4 Met.) 111 (1842).
8. Id. at 130.
Court majority, although that doctrine was not universally accepted. Some courts chose to follow the dissenting view of Mr. Justice Holmes, sitting on the Massachusetts court, while others preferred the more liberal view of the New York courts.

With the fall of the criminal conspiracy doctrine, many American courts came to concede the legitimacy of employees engaging in direct collective action against their employers, including strikes, for improved wages and working conditions. However, the Massachusetts majority, enunciating the illegal purpose doctrine, refused to extend to organized workers the right to protect their wages and work standards by using indirect action, such as economic coercion against unorganized workers and employers who could undercut their economic position. The court attempted to draw an analogy between business enterprises and workers, an analogy which still reflected the view of Recorder Levy. Under our free trade competitive system, businesses compete against one another for customers; hence, the court reasoned, workers should be required to compete against one another for work. To the Massachusetts court, expansion of unionism spelled monopoly and had to be curtailed. This conservative judicial view prevailed until the 1920's and the passage of the Norris-LaGuardia Act.

Mr. Justice Holmes was the first American jurist to take issue with the Massachusetts doctrine. Starting with the premise that "free competition means combination" Holmes stated:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

In a string of dissenting opinions, Holmes disapproved of courts determining what constituted justifiable competitive acts, declaring that such

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10. Thus, the illegal purpose doctrine was applied when a union sought to protect its work against sub-contracting, Carew v. Rutherford, 106 Mass. 1 (1870); to protect its work against scab labor, Vegelahn v. Gunntner, 167 Mass. 92, 44 N.E. 1077 (1896); to boycott employers in the industry of its trade who employed cheap labor, Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); and to attempt to enforce a closed shop, Berry v. Donovan, 188 Mass. 353, 74 N.E. 603 (1905).
11. Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906). Although the Massachusetts court based its distinctions in labor cases upon the free trade analogy, it had failed to apply this test earlier to a business combination which had eliminated its competition and monopolized its industry by boycotting customers who dealt with a target company. Bowen v. Matheson, 96 Mass. (14 Allen) 499 (1867).
12. See text accompanying notes 46-53 infra.
decisions are matters of public policy. He rejected the majority’s distinction between concerted action by workers for organizational purposes and concerted action for higher wages, explaining that one was necessary to achieve the other. Under free enterprise, Holmes reasoned, workers were justified in causing harm to others in pursuit of their own selfish economic ends so long as the motivation was not purely malicious.

Going one step beyond Holmes, the New York doctrine held that so long as the conduct of workers was not illegal under traditional common law standards, their motives were irrelevant. Years later, after the New York doctrine had been generally accepted, Mr. Justice Andrews of the New York Court of Appeals explicitly discarded the cornerstone of the Massachusetts majority view, the distinction between direct and indirect action. He recognized that "economic organization to-day is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory, but generally." Like Holmes before him, Justice Andrews found the unions’ determination as how best to serve their self-interest "sufficient to justify the harm . . ." that may result from union organizational efforts and boycotts.

Such legal reasoning, however, was not the primary cause of the eclipse of the illegal purpose doctrine in civil tort cases. Like its predecessor, the criminal conspiracy doctrine, the illegal purpose theory proved impractical to assist employers in combating and controlling union organization. Therefore, in the late nineteenth century, employers sought yet

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15. The immediate object and motive was to strengthen the defendants’ society as a preliminary and [sic] means to enable it to make a better fight on the questions of wages or other matters of clashing interests . . . . I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest. Plant v. Woods, 176 Mass. 492, 505, 57 N.E. 1011, 1016 (1900) (Holmes, J., dissenting).
17. Holmes’ narrow exception was probably intended to preserve only the “spiteful harm” tort doctrine. See, e.g., Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888).
20. Id.
21. Litigation generally was protracted beyond the duration of the strike, boycott or picketing which the employer desired to eliminate. Juries, sympathetic with workers, often refused to find for plaintiff employers, or returned only nominal money verdicts, and money judgments proved ineffectual against poorly-paid employees and financially-strapped unions. For these and other reasons, strikes, boycotts and picketing were not curbed. See generally R. Smith, Labor Law 2-20 (1950); Frankfurter & Greene, supra note 6, at 17-24.
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another legal instrument, one which might achieve what had not been accomplished by the earlier doctrines.

The Labor Injunction

The labor injunction proved more than adequate to the task of assisting employers in inhibiting union expansion. By reinterpreting prerequisites previously regarded as essential to the issuance of an injunction, American judges transformed an extraordinary remedy into a virtually automatic one. Through this new judicial tool, employers simply procured from chancellors orders prohibiting strikes and quickly caused workers to be jailed for contempt should any threat of union activity survive the issuance of the injunctive order. In ironic contrast to the "political" posture of jurists on behalf of employers, the two properly political branches of government, the executive and the legislative, as well as both political parties, sided with labor in deploving judicial use of the labor injunction.

22. It was born innocuously enough. Chancellors were appointing receivers to operate insolvent railroads; when the employees of one such railroad threatened to strike for higher wages, the receiver complained to the chancellor that the property entrusted to his management was endangered by the strike threat. The chancellor immediately put the union leaders in jail for contempt of court. Within hours, the workers' concerted action was dissipated. By 1890, the labor injunction was thoroughly entrenched. A full treatment of this turn in American law is brilliantly and exhaustively documented in Frankfurter & Greene, supra note 6.

23. Injunctions historically were restricted to the preservation of tangible "property." However, American courts held that an intangible business interest also was property. The second prerequisite to the obtaining of injunctive relief was a showing of irreparable harm. Frankfurter & Greene, supra note 6, at 47-48; see generally id. at 47-81.

24. The employer would prepare a vague affidavit alleging that his employees were striking, picketing, or engaging in other concerted activity, or were about to do so, and that irreparable harm would result to the employer's business for which he had no adequate legal remedy. A petition supported by the affidavit would be presented to a judge, seeking an immediate ex parte temporary restraining order. The orders customarily were issued upon request during day or night, from the courthouse or the judge's home. Bonds were not required of the employer. The orders were prepared by the employer's counsel and were usually extremely vague. Since no one could be sure what or who was being enjoined, the effect was to deter all union activity, as well as sympathetic activity. Service of papers and giving of notice tended to be grossly haphazard. Within hours of the issuance of the order, either all union activity had ceased or contempt proceedings had been initiated and concluded and the union leaders were in jail. Id. at 66-81.

For the most part, whatever judicially transpired thereafter was of little relevance to the cause of the workers or the legality of their conduct; the workers' objective had been defeated with the issuance of the temporary restraining order. In those cases where trials were later held, the judge who had issued the order customarily would make findings that wrongdoing by the workers had been imminent even if none had in fact occurred. Evidence in support of such a finding was not considered indispensable. The finding was considered sufficient to support conversion of the temporary order into a final injunction. Some judges frankly stated that their findings and orders were based upon their contempt for the working class. Since the cases were heard in chancery courts, there was no right to a jury trial. Appeals from the trial courts were essentially futile because the issue between the parties had long since been determined by the time an appeal could be heard and decided. See generally id. at 55-76; C. Gregory, Labor and the Law 52-62 (rev. ed. 1949).

25. The Democratic Party in its 1896 platform declared:
American unions responded to the hostile judiciary by mounting a major campaign to withdraw from both federal and state courts the authority to issue injunctions in labor disputes. The seemingly successful results at the federal level were sections 6 and 20 of the Clayton Act of 1914. Section 6 ostensibly barred legal proceedings against unions under the Sherman Act. Section 20 ostensibly forbade issuance of injunctions in

[We especially object to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners; and we approve the bill passed by the last session of the United States Senate, and now pending in the House of Representatives, relative to contempt in Federal courts and providing for trials by jury in certain cases of contempt.]

President Theodore Roosevelt asked for corrective action in five successive messages to Congress: 15 Messages & Papers of the Presidents 6983 (Dec. 5, 1905); 7026-27 (Dec. 3, 1906); 7086 (Dec. 3, 1907); 7190 (Apr. 27, 1908); 7313 (Dec. 8, 1908). See also 42 Cong. Rec. 1347-48 (1908). He stated on December 3, 1906 that "there have undoubtedly been flagrant wrongs committed by judges in connection with labor disputes even within the last four years." 15 Messages & Papers of the Presidents 7027. He added in his April 27, 1908, message: "They are blind who fail to realize the extreme bitterness caused among large bodies of worthy citizens by the use that has been repeatedly made of the power of injunction in labor disputes." Id. at 7190. President Taft subsequently renewed the call. Inaugural address, March 4, 1909; 16 Messages & Papers of the Presidents 7378. Above history reprinted and discussed in Frankfurter & Greene, supra note 6, at 76-77 and 76 n.116.

Within Congress, from 1894 through 1914, continuous and strenuous attention was being devoted to the problem of the labor injunction. See discussion of Congressional action leading to the Clayton Act in the dissent of Mr. Justice Brandeis in Truax v. Corrigan, 257 U.S. 312, 369-70, nn.39 & 40 (1921).

26. An evocative incident in this battle is related in Frankfurter & Greene, supra note 6, at 52-53, n.19. At a Senate hearing on January 6, 1913, Gompers first quoted from the judge who had tried the highly publicized McNamara brothers case, involving a bombing of the Los Angeles Times building: "The evidence in this case will convince any impartial person that government by injunction is infinitely to be preferred to government by dynamite." Gompers then offered the response: "If ever the time shall come (and let us hope and work that it never shall come) when government by dynamite shall be attempted it will have as its main cause the theory and policy upon which is based government by injunction—personal government foisted upon our people instead of a government by law."


28. 15 U.S.C. § 17 (1970). This antitrust federal enactment had been intended to apply to combinations of capital; however, the courts saw it as another mechanism with which to strike at combinations of labor. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Loewe v. Lawler, 208 U.S. 274 (1908); see Frankfurter & Greene, supra note 6, at 139 & n.17.

Section 6 of the Clayton Act provided in pertinent part that the antitrust laws were not to be construed to forbid the existence and operation of labor organizations or to restrain their members from "lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." Ch. 323, § 6, 38 Stat. 781 (1914) (current version at 15 U.S.C. § 17 (1970)).
labor disputes. Labor leader Samuel Gompers promptly characterized his apparent victory as "Labor's Magna Carta." He did not take into account the resourcefulness of labor's antagonists on the United States Supreme Court.

The new law was interpreted by the United States Supreme Court in *Duplex Printing Co. v. Deering* in a majority opinion by Mr. Justice Pitney. The Court essentially found that Congress, rather than curbing judicial activity in labor disputes, actually had codified the very judicial evils it was attempting to eliminate. Section 6 was handled by the almost casual observation that "there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade."

Only slightly more difficult was the convolution of section 20. Finding that "Congress had in mind particular industrial controversies, not a general class war....", the opinion confined the applicability of the statutory prohibitions to disputes between an employer and his employees, excluding from protection third parties attempting to organize the employer. Mr. Justice Pitney proclaimed that section 20 "is but declaratory of the law as it stood before." In effect, Pitney revitalized the distinction drawn by the Massachusetts majority under the old illegal purpose doctrine when civil tort had been the judicial weapon. Convinced that expansion of union power through organization was economically and socially undesirable, the Court was not about to be dissuaded by a Congressional act from its conclusion that employees of a given employer but not union federations could strike and picket in support of their bargaining demands.

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29. Ch. 323, § 20, 38 Stat. 738 (1914) (current version at 29 U.S.C. § 52 (1970)). In pertinent part, the section provides:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

30. 21 American Federationist 971 (1914).
31. 254 U.S. 443 (1921).
32. Id. at 469.
33. Id. at 472.
34. Id. at 470.
35. See generally notes 9-11 and accompanying text supra.
36. Mr. Justice Brandeis, dissenting, offered an analysis which for the first time challenged the economic underpinning of the Massachusetts doctrine. He asserted that for workers in an industry to organize was necessary as a matter of self-defense, or else the advanced wages and working standards of organized labor could not survive. 254 U.S. at 479-80.
The Yellow Dog Contract

Contemporaneously with its use of the labor injunction as a weapon against the exercise of union power, American industry employed the "yellow dog contract" to restrict union membership. Under the yellow dog contract, employers extracted from their employees, as a condition of hiring and continued employment, a promise that the employee would not be a member of a union. The labor movement, however, successfully mobilized its political resources to obtain federal and state legislation rendering yellow dog contracts not only illegal, but criminal. Once again, industry turned to the judiciary for assistance. The United States Supreme Court responded favorably, holding under the fifth and fourteenth amendments of the United States Constitution that both the federal and state laws were unconstitutional infringements of the right to contract. To the unions' protest that the legislation merely sought to overcome the unfair bargaining advantage industry had over the individual employee, the Court responded that in our economic system the person holding more property would inevitably be stronger than his adversary.

In attacking the yellow dog contract, labor had successfully used its political power to combat its adversaries' superior economic power at the conventions of both major political parties as well as with the executive and legislative branches of government. Now the Court was nullifying labor's political victory on the explicit ground that industry inherently was entitled to the advantage and that it was beyond the realm of political authorities to

Brandeis then recapitulated the 20-year history leading to the adoption of the Clayton Act. With respect to the illegal purpose doctrine he stated:

It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful; and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

Id. at 485. According to Brandeis, the method agreed upon by the advocates of reform legislation was for Congress to legalize certain acts "which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States." Id. at 486.

Brandeis then focused upon the proper role of the judiciary:

The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature... Id. at 488.

40. Id. at 17-18.
alter the scales.\textsuperscript{41} From that time on, unions concluded that it was essential to achieve sufficient political power, not only to affect executive and legislative decisions, but to place the "right" people on the bench.\textsuperscript{42}

The conflict was further escalated in \textit{Hitchman Coal & Coke Co. v. Mitchell}.\textsuperscript{43} There, the United States Supreme Court upheld a labor injunction barring the organizing efforts of the United Mine Workers in unorganized coal mines where the miners had been forced to sign yellow dog contracts as a condition of employment. Mr. Justice Brandeis cried out in dissent against a runaway judiciary flying in the face of Congressional and state legislative action that had declared the use of yellow dog contracts a crime.\textsuperscript{44}

The utter disdain in which organized labor held the United States Supreme Court reached its apex in reaction to \textit{Hitchman}. When President Hoover appointed Judge Parker of the Court of Appeals for the Fourth Circuit to fill a Supreme Court vacancy, labor successfully opposed his nomination on the ground that he had followed the \textit{Hitchman} precedent in a subsequent case. The effect was to nullify the Supreme Court decision; any judge who followed it would be exposed to the wrath of organized labor.\textsuperscript{45}

\textbf{The Norris-LaGuardia Act}

In the late 1920's, labor marshaled its political power in another attempt at a legislative cure for its problems with the judiciary. The result was the Norris-LaGuardia Act.\textsuperscript{46}

Norris-LaGuardia removed the federal courts from the arena of labor-management conflict. It made yellow dog contracts unenforceable as a matter of public policy.\textsuperscript{47} By setting forth clear definitions susceptible of but a single construction,\textsuperscript{48} and by immunizing from federal court injunction certain equally well-defined acts involving or growing out of a labor dis-

\textsuperscript{41} Although he had applied virtually the identical philosophical rationale, even Recorder Levy in the Philadelphia Cordwainers Case had not gone so far as to nullify clear expressions of the legislature and executive. \textit{See note 4 supra.}

\textsuperscript{42} Eventually, this strategy produced dividends for labor, in the form of President Roosevelt's 1936 court-packing plan and the upholding of the constitutionality of the National Labor Relations Act (29 U.S.C. \textbf{\$} 151-168 (1970)) the following year. \textit{NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See note 59 infra.}

\textsuperscript{43} 245 U.S. 229 (1917) (Brandeis, Holmes, & Clarke, J.J., dissenting).

\textsuperscript{44} \textit{See id. at} 263-74.

\textsuperscript{45} The political sensitivity of organized labor to Supreme Court appointments never ceased after this successful experience. Forty years later, labor was largely instrumental in achieving the rejection of President Nixon's successive attempts to achieve federal decrees to allow federal appeals judges Haynsworth and Carswell.


\textsuperscript{47} \textit{Id. \$} 103.

\textsuperscript{48} \textit{Id. \$} 113.
Congress sought to resist the anticipated judicial attempt to relegate the Norris-LaGuardia Act to the fate of the Clayton Act.\(^5\)

In the lower courts, Old Guard federal judges responded to the Norris-LaGuardia Act as anticipated. As with the Clayton Act, the same two-pronged approach was taken. First, section 13, the definition section, was interpreted in the same manner as section 20 of the Clayton Act was interpreted in the *Deering* case. The courts ignored the fact that section 13 had been drafted with that decision in mind and in unmistakably clear language to avoid that result.\(^5\) Second, Norris-LaGuardia was held unconstitutional on the theory that Congress lacked the power to prohibit an injunction against third parties to a labor dispute who were seeking to organize the industry.\(^5\) The issue was settled on appeal when the majority on the New Deal Supreme Court interpreted the Norris-LaGuardia Act as it was written and upheld its constitutionality.\(^5\)

After one and a quarter centuries, the American courts were finally out of the business of "legislating" policy to govern labor disputes in the private sector. Union organization would be permissible on an industry-wide basis and the means to be employed by the parties, including economic self-help measures, would be determined by them and not by the courts.

**The New Deal Legislation**

The New Deal Congress, however, was not satisfied to remain neutral. A series of pro-labor measures were adopted, which substituted Congressional for judicial determination of what policies would best serve the public interest in labor-management disputes. An essential feature of this legislation was the virtual recognition of the right of workers to strike, conditioned only upon their prior observance of mediation and other procedures designed to resolve the dispute. Provision also was made for dealing with national emergency strikes.

49. *Id.* § 104.

50. Use of the unlawful purpose doctrine was prohibited (*id.* § 105); strict agency principles were to be adhered to in the attribution of responsibility or liability (*id.* § 106); injunctive orders were required to be supported by findings and a bonding requirement was specified (*id.* § 107); a party seeking injunctive relief was obligated to have utilized all available methods of resolving the dispute (*id.* § 108); the scope of the injunction was limited to those specific acts complained of and enumerated in the findings of fact (*id.* § 109); provision was made for expeditious review by the federal court of appeals (*id.* § 110); the right of jury trial was established in contempt cases other than direct contempt (*id.* § 111); and procedures were provided to assure an impartial judge in a contempt case (*id.* § 112).


52. *E.g.*, Lauf v. E.G. Shinner & Co., 82 F.2d 68 (7th Cir. 1933), *aff'd*, 90 F.2d 250 (7th Cir. 1937), *rev'd*, 303 U.S. 323 (1938).

The Railway Labor Act provided for separate and disparate treatment of "major disputes" and "minor disputes." In a major dispute, a party is permitted to employ self-help measures only after exhaustion of the prescribed statutory mediation procedures. In a minor dispute, the parties are not permitted to employ self-help measures. Instead, the statute provides machinery for grievances and binding arbitration.

The Wagner Act of 1935 and the Taft-Hartley amendments of 1947 set forth the Congressional labor policy affecting the largest number of employees in the private sector. Like the Railway Labor Act, the measures provide a mechanism to settle labor disputes without strikes or lockouts.

In a major dispute where there is an existing collective bargaining agreement between the parties which is about to expire, Taft-Hartley provides certain procedural prerequisites which must be observed prior to strike or lockout. It further provides for the handling of national emergencies created by actual or threatened strikes or lockouts in an entire industry or a substantial part of the industry. Unlike the Railway Labor Act, Taft-Hartley does not absolutely prohibit self-help as a method of resolving minor disputes. However, binding arbitration is favored. The United States Supreme Court, implementing this Congressional policy, has held binding arbitration clauses in collective bargaining agreements judicially enforceable.

55. The term "major dispute" referred to an interest dispute, e.g., a dispute over what would be the terms of the contract. The term "minor dispute" referred to a contract or rights dispute, e.g., a dispute over the construction or interpretation of the terms of the contract. Id. § 152, construed in Elgin, Joliet & E.R. Co. v. Burley, 325 U.S. 711, 722-25 (1944).
59. The genesis of the Wagner Act was section 7(a) of the National Industrial Recovery Act (the "Blue Eagle") of 1933 (Pub. L. No. 90-67, 48 Stat. 195 (1933)) [hereinafter referred to in the text as NRA], which (1) gave employees the right to organize and bargain collectively with representatives of their own choosing, free from employer interference; and (2) provided that no employee, as a condition of employment, could be forced to join or not join a union. President Franklin Roosevelt, by Executive Order, created the National Labor Board to enforce the NRA. Significantly, the legislation did not empower the Board to compel compliance with its orders. Nevertheless, the Supreme Court held the NRA unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Wagner Act was passed the same year in response to pressure immediately brought to bear by organized labor. The court-packing plan followed and the constitutionality of the Wagner Act was upheld by a bare majority. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
61. Id. § 176.
62. Id. § 173.
63. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). In furtherance of the
The federal labor policy governing minor disputes under Taft-Hartley was further delineated in a trilogy of steelworkers cases. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.* the Supreme Court ruled that, should the question be raised, the presumption is in favor of arbitrability. The Supreme Court further held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* that the courts were not to substitute their judgment for that of the arbitrator as to the appropriate remedy for a contract violation. Finally, in *United Steelworkers of America v. American Manufacturing Co.*, again emphasizing the limited role reserved to the courts, the Court reversed a court of appeals' refusal to order arbitration on the ground that in its opinion the grievance was absolutely frivolous.

*Status of the Law in the Private Sector*

After a century and a half of bitter struggle, the federal government had reached certain conclusions and decisions regarding labor relations in the private sector: the courts were largely removed as participants in the resolution of labor disputes; public policy was to be established by Congress, not by the courts; the right to engage in self-help in pursuit of a party's selfish interests during a major dispute was left to the discretion and judgment of that party, although procedures were established to deal with national emergencies, and prior exhaustion of mediation or other procedural requirements was made a prerequisite to self-help action; and finally, the right to engage in self-help in the resolution of minor disputes was either prohibited or discouraged in favor of grievance and arbitration machinery, which was insulated against judicial interference except under the most exceptional circumstances. It was against this historical background that the Illinois judiciary undertook to determine its proper role with respect to labor disputes in the public sector.

**THE ILLINOIS COURTS AND THE PUBLIC SECTOR**

Prior to the New Deal turnaround, certain proclivities predominated judicial thinking and conduct in the private sector labor cases: a socio-economic philosophy which rendered the right of employees to act collec-

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64. 363 U.S. 574, 582-83 (1960).
tively in pursuit of their self-interest subservient to the goal of employer efficiency; the adoption of open-ended legal theories under which judicial decisions could be based upon the views of individual judges rather than recognized judicial principles; reliance upon vague statutory provisions to rationalize desired conclusions; disregard of public policy as expressed by the legislative and political branches; refusal to abide by explicit legislative provisions; and use of the injunction as the chief weapon to nip in the bud union self-help activity without prior adjudication of the issues involved in a labor dispute. The discussion which ensues will demonstrate that the Illinois judiciary has followed a very similar pattern in curbing the right of public employees to strike and to enforce their collective bargaining agreements.

**Legislative Background**

Until 1965, the Illinois courts of appeal had no occasion to consider the role to be played by state courts in public employee labor disputes. Although legislative coverage existed in certain limited categories, the Illinois General Assembly had failed to adopt a comprehensive public employee labor act. Two general statutes dealing with labor disputes, however, were not on their face inapplicable to the public sector.

The Anti-Injunction Act, adopted in 1925, prohibited injunctions in any case growing out of or involving a labor dispute and the Uniform Arbitration Act provided that written agreements to arbitrate contract disputes were valid and enforceable in court. The fact that the latter legislation had been adopted in 1961, the year following the *Steelworkers Trilogy*, suggested that Illinois was fashioning a labor policy with respect to arbitration of contract disputes similar to the federal policy.

An additional expression of apparent legislative intent was furnished by

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67. For a history of the attempts to achieve this goal in the General Assembly, including a 1945 bill that was vetoed by the governor, see Goldstein, *Current Trends in Public Employee Labor Law in Illinois: Alice-in-Wonderland Revisited*, 23 DePaul L. Rev. 382, 382-85 [hereinafter cited as *Current Trends*]. See note 2 supra.

68. Ill. Rev. Stat. ch. 48, § 2a (1975). The Anti-Injunction Act had been challenged before the Illinois Supreme Court, where it survived an attempt to emasculate it by reassertion of the illegal purpose doctrine. Fenkse Bros. v. Upholsterers Int'l Union, 358 Ill. 239, 193 N.E. 112, cert. denied, 295 U.S. 734 (1934); see text accompanying notes 102-117 infra.


70. Section 112(e) of the Uniform Arbitration Act provided that, in the case of a collective bargaining agreement, the grounds for vacating an arbitration award would be those that existed prior to the date of the enactment. Under pre-existing Illinois case law, absent fraud or similar contentions, mistakes of an arbitrator as to either law or fact were not subject to court review so long as the arbitrator acted within his authority. Stone v. Baldwin, 226 Ill. 338, 345, 80 N.E. 890, 893 (1907).

71. Also leading to this conclusion were Illinois court holdings that arbitration was favored as an alternative to protracted and expensive litigation. William B. Lucke, Inc. v. Spiegel, 131 Ill. App. 2d 532, 535, 266 N.E.2d 504, 507 (1970); School Dist. No. 46 v. Del Bianco, 68 Ill. App. 2d 145, 157, 215 N.E.2d 25, 31 (1966).
the General Assembly when it conferred upon the Chicago Transit Authority the right to continue the collective bargaining procedures that had been used by the predecessor private transit company, including voluntary binding arbitration of minor disputes. With this legislative background available for guidance, the Illinois courts began formulating policies to govern public employee strikes and the enforcement of public employee collective bargaining agreements.

The Right of Public Employees to Strike

The first consideration by the Illinois Supreme Court of the right of public employees to strike was in 1965 in Board of Education v. Redding. A school board sued for an injunction when its custodians engaged in a recognitional strike and picketing. On appeal by the school board to the Illinois Supreme Court from an order dismissing its complaint, neither the parties nor the court mentioned the Anti-Injunction Act. The union conceded that school teachers could not strike, but argued that the prohibition should not be extended to custodial employees.

The supreme court reversed and directed that the injunction issue. The court asserted the following reasons for its decision: a "universal view" that a strike of public employees for any purpose was illegal; the indispensability of, and absence of a profit motive in, governmental functions as compared with the private sector; and a state constitutional requirement that the General Assembly "provide a thorough and efficient system of free schools," with school employees viewed as agents of the public employer, having a duty not to interfere with achievement of this objective. Each of the court's rationale merit analysis.

Universal View That Public Employee Strikes Are Illegal

The "universal view" argument was thinly supported by a threadbare sampling of cases cited by the Illinois Supreme Court. If anything was suggested, it was the lack of a sufficient number of public employee strikes to warrant any generalization. Moreover, within a few years following Redding, an impressive list of governmental bodies rejected this "universal view."

The legislatures of Alaska, Hawaii, Minnesota, Oregon, Pennsylvania, and Vermont authorized teacher and other public employee strikes under

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73. 32 Ill. 2d 567, 207 N.E.2d 427 (1965).
74. Id. at 571-73, 207 N.E.2d at 430.
varying conditions, generally reserving the right to have the strike enjoined should it threaten the public health, safety or welfare.\textsuperscript{75} The Supreme Court of New Jersey saw no reason why its legislature could not find strikes by public employees tolerable.\textsuperscript{76} The Supreme Court of Michigan refused to uphold an injunction against a teacher strike absent a showing that the public health, safety and welfare were adversely affected and that the public employer had bargained in good faith.\textsuperscript{77} The Supreme Courts of Rhode Island\textsuperscript{78} and New Hampshire\textsuperscript{79} adopted substantially the same position.

This method of dealing with the problem was substantially recommended in the 1971 Illinois Governor's Commission Report which stated: "[W]e have concluded that a limited right to strike be allowed public employees whose continued service at the time is not held vital to public health, safety, or welfare, provided that impasse procedures have run their course."\textsuperscript{80} In addition, Executive Order No. 6, issued in 1973 by Governor Daniel Walker, created collective bargaining rights and procedures for employees of the state of Illinois similar to those conferred upon private sector employees under the Labor Management Relations Act,\textsuperscript{81} and contained no restriction whatsoever upon the right to strike.\textsuperscript{82} This silence was construed as de facto recognition by Governor Walker of the right-to-strike.\textsuperscript{83}

\textsuperscript{75} See The Illinois Anti-Injunction Act, supra note 2, at 191 n.6. This legislative approach is similar to that contained in the federal statutes governing the private sector to the extent that the right to strike is conditioned upon special qualifications in emergency situations.


\textsuperscript{78} School Comm. of Westerly v. Westerly Teachers Ass'n, Ill R.I. 96, 98, 299 A.2d 441, 445 (1973).

\textsuperscript{79} The Supreme Court of New Hampshire stated:

We are persuaded . . . that it would be detrimental to the smooth operation of the collective bargaining process to declare that an injunction should automatically issue where public teachers have gone on strike . . . . The essence of the collective bargaining process is that the employer and the employees should work together in resolving problems relating to the employment. The courts should intervene in this process only where it is evident the parties are incapable of settling their disputes by negotiation or by alternative methods such as arbitration and mediation . . . . Judicial interference at any earlier stage could make the courts 'an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining processes'. . . . Accordingly, it is our view that in deciding to withhold an injunction the trial court may properly consider among other factors whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue.


\textsuperscript{80} COMMISSION ON LABOR LAWS, REPORT AND RECOMMENDATIONS 19-20 (April 1971), discussed in Current Trends, supra note 67, at 394.

\textsuperscript{81} See note 58 supra.

\textsuperscript{82} See Current Trends, supra note 67, at 394-95.

\textsuperscript{83} See Current Trends, supra note 67, at 400.
It seems fair to conclude that the "universal view" is not universal at all but represents the particular views of the members of the Illinois Supreme Court. There is a reason for this. Previously, Recorder Levy and the anti-labor jurists that followed him were aligned with industry and adversaries of labor for reasons of social and economic class and because the franchise was limited to property owners. Today in Illinois, judges are dependent for their positions on officeholders who in turn are held accountable by a broader electorate who must pay taxes to finance increased public employee benefits. This dependence may provide a clue as to why the "universal view" seen by the Illinois Supreme Court is perceived differently in other states where judges enjoy more independent tenure. This seems especially logical since the view finds no support in Illinois statutory law and has been consistently rejected by recent Illinois governors and gubernatorial aspirants. Moreover, it is inconsistent with judicial and executive determinations in several other states.

Indispensability of Government Functions and Lack of Profit Motive

The Redding court's notion that governmental functions may not be impeded or obstructed by a public employee strike must be based upon some concept of sovereignty. Under our system, however, sovereign power is not unlimited.

The court's rationale assumes that all government activities are inherently so essential to society that they cannot be permitted to be impeded. This argument, sometimes referred to as the "essentiality of functions" doctrine, presupposes that all governmental functions are essential while all private employer functions are nonessential, a contention that cannot with-

84. In the 1976 Illinois gubernatorial campaign, Democratic candidate Michael Howlett promised to support a law giving public employees the right to strike and the victorious Republican candidate, James Thompson, made a similar promise. Thompson's proposal would retain in the judiciary the power to bar a strike which threatened the public health and safety. Chicago Daily News, Oct. 15, 1976, at 58.

Academics have raised additional doubts about the "universal view." Robben Fleming warned:

In my judgment the danger that any strike against the government will undermine our democracy is counterbalanced by the equally dangerous contempt for the law which results from the prohibition of all strikes and leads to its frequent violation. If this prohibition continues, either it will lead to this contempt for the law, or there will be great public pressure for it to be applied against the strike in the private sector as well.


85. Molitor v. Kaneland Community Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). Abolishing the partial sovereign immunity from tort liability of public school districts, the court proclaimed that the concept "the King can do no wrong" had no place in American jurisprudence. For a discussion of the related argument that a public employee strike is tantamount to an insurrection against the government, see The Illinois Anti-Injunction Act, supra note 2, at 195-97.
stand the most cursory analysis. It is self-evident that a private utility provides more essential functions than a public golf course. Further, the same functions often are performed interchangeably by government and private enterprise in such fields as transit, nursing homes, hospitals, light, water, other utilities, garbage collection, medical and social counseling and services, golf courses, liquor sales and education.

The companion justification, that government differs from free enterprise because of the absence of the profit motive, is surely one of the most ironic statements to be found in American judicial opinions. For more than a hundred years, workers in the private sector were inhibited in the exercise of their rights because of the profit motive in free enterprise. Starting with Recorder Levy, they were told that their exercise of such rights was incompatible with their employers' ability to remain competitive in a "free enterprise" market. Now, workers in the public sector are being told that their rights are being restricted because of the lack of the profit motive.

In a sense, the court has resurrected the repudiated Massachusetts doctrine, in which the working person was thought to have no recognizable interest in the inferior wages and working conditions that prevailed in the industry outside his own plant. The attempt now, though, is to isolate employees in the public sector from their counterparts in the private sector. Thus, in Redding, the Massachusetts doctrine is turned upside down. The public employee is not seeking to exert economic pressure to raise the wages and working conditions of strangers at other establishments; rather, he is

86. The irrationality of distinguishing between public and private sector strikes on the basis of essentiality of functions was dramatically and convincingly illustrated by Judge Keating, dissenting in a New York case. At issue was whether public employees could be denied the right to a jury trial when charged with criminal contempt. Judge Keating stated:

When it is remembered that employees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence, that employees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel, that private sanitation workers, who carry away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants and that thousands of other workers, carrying out activities vital to the life and safety of the city, may demand a trial by jury if they are charged with a violation of a court order restraining a strike, the fallacy in the reasoning which would deny a jury trial to these defendants is readily exposed. References to the dangers to the children from the teachers' strike, real as those dangers may be, are not a substitute for a penetrating analysis of the labels 'public' and 'private' employees.


87. The premise is untenable in modern society. The court assumes a clear delineation between nonprofit governmental bodies and private units engaged in free enterprise. The actual fuzziness of the line is clear even from the cases heard and decided by the court. Compare a governmentally-owned nursing home which is self-supporting and in competition with private nursing homes (County of Peoria v. Benedict, 47 Ill. 2d 166, 265 N.E.2d 141 (1970), cert. denied, 402 U.S. 929 (1971) (discussed in text following note 101 infra)) with a private not-for-profit hospital. Peters v. South Chicago Community Hosp., 44 Ill. 2d 22, 253 N.E.2d 375 (1968) (discussed in text following note 99 infra).
trying to exert pressure upon his own employer to meet the higher-paid private competition. The public employer, with the aid of the courts, is therefore enabled to maintain a competitive advantage over private enterprise.

Apparently the "sacred cow" has changed, but the Illinois judicial view of the role of workers has remained constant. The judges who decided the early American private sector cases believed that the societal goal was to permit industry to produce at maximum efficiency and lowest cost, and workers could not be permitted to obstruct that objective. Redding simply substituted government for industry.

Like the Massachusetts majority, the Redding court failed to recognize the fundamental and universal nature of the employer-employee relationship. As Holmes stated: "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return." One need only substitute the word "government" for the word "capital," and the statement is transferable from the private employer to the public employer. If capital serves as the middleman, society pays for products in the form of prices, which presumably will be raised if the worker receives more for his services. If government serves as the middleman, society pays in the form of taxes, which presumably will be raised if the worker receives more for his services. In both cases, members of the judiciary have the same interest as any private citizen in not paying more.

Operations of Schools Constitutionally Mandated

The court's unsupported assertion in Redding that organized strikes against school boards are incompatible with the vague goal in the 1870 Illinois Constitution of providing a thorough and efficient system of free schools is strongly reminiscent of judicial usurpation of power under the criminal conspiracy and unlawful purpose doctrines. Without a citation of authority or a word of testimony as to fact or expert opinion, the Illinois Supreme Court found itself able to make this value judgment.

88. The contention has been advanced that to treat public employees disparately from private employees is a wrong that can be elevated to the status of a constitutional violation. See, e.g., The Illinois Anti-Injunction Act, supra, note 2, at 193-94.
89. To Recorder Levy, such a situation would be intolerable; he would argue that such judicial favoritism to the public sector would assure the destruction of the free enterprise system. See text following note 4 supra.
91. Such judicial "legislation" based upon vague statutory provisions was later subjected to severe criticism by Mr. Justice Jones in City of Pana v. Crowe, 13 Ill. App. 3d 90, 299 N.E. 2d
To buttress its constitutional argument, the court relied on an agency theory, concluding that school employees were required to serve the public without interruption. This rationale, however, does not apply well to other situations. For example, since the Illinois Constitution establishes a state treasurer, all employees of his office would be required to subordinate their self-interest to that of the state. Such a doctrine might be viable when an elected official performs substantially all the work of his office. However, it has no logical application to industrialized and urbanized Illinois, where hundreds or thousands of hired employees perform the work of an office that a century ago was handled by a single elected public official. The court's position further ignores the significant shift of employment from the private to the public sector, bringing an ever-increasing segment of the work force under the umbrella of the court's agency theory. If the government were to become the sole employer of all citizens, this doctrine would require the denial to all citizens of the right to economic self-help.

Contrary to the court's assumption, some writers have argued that the educational system is not necessarily damaged and may even be improved as a result of traditional collective bargaining, including the right to strike. The Supreme Court of New Jersey refused to latch onto a vague constitutional provision, similar to the one in Illinois. It reasoned that "even where the Constitution requires a public service to be rendered, as in the case of free public schools, . . . there may be room for legislative judgment as to what interruptions are compatible with the fulfillment of that mandate." Aftermath of Redding

Redding did not achieve stability in the public schools; it achieved quite the contrary. Public employers, particularly school boards, reacted to

770 (1973). However, the Illinois Supreme Court reversed, rejecting his admonition and asserting the right of the judiciary to establish policy independent of the General Assembly. 57 Ill. 2d 547, 316 N.E.2d 513 (1974). See discussion of the two opinions in the text accompanying notes 104-16 infra.

92. The tremendous growth in public employment at both state and local levels is demonstrated in Public Employment in 1976, GOV'T EML. REL. REP. (Ref. File) (BNA) 71:2111. The three fastest-growing unions in the United States are the American Federation of State, County and Municipal Employees, the American Federation of Government Employees and the American Federation of Teachers. See Cushman, Arbitration of Deadlocks in Public Employee Bargaining, 1969 L.R.Y. (BNA) 329.

93. One writer compares the short-range effects of a brief teachers' strike, which may have only minimal effect on school operations, and the long-range effects, which may increase school efficiency if the teacher bargaining demands are beneficial to the students' education. Note, Teacher Negotiations in Illinois: Current Status and Proposed Reforms, 1973 U. ILL. L.F. 307, 334. Another text ridicules the anomaly of considering pupils irreparably damaged as a result of a one-day teacher strike while assuming no harm is done to children when school is closed for summer, holidays, teachers' conventions, inclement weather, presidential visits and a host of other reasons. M. LIEBERMAN & M. MOSKOW, COLLECTIVE NEGOTIATIONS FOR TEACHERS 299 (1966).

the declaration that their employees could not strike by stiffening their bargaining positions. Strikes by public employees, virtually unknown in Illinois prior to *Redding*, became commonplace, and union leaders were sent to jail for violation of injunctive orders. Communities and school districts were torn apart by animosity. A new militancy arose within teacher unions accompanied by a distinct hostility toward the judiciary.

The groundwork laid in *Redding* precipitated a series of cases dealing with the right to strike. The Illinois courts wrestled with the problem and encountered great difficulty in their attempt to formulate a rational and consistent policy.

The "essentiality of functions" test asserted in *Redding* was next considered in *Peters v. South Chicago Community Hospital*. *Peters* involved a recognitional strike of employees of a private, not-for-profit hospital. The appellate court held that the strike was against public policy because it impeded the operation of the hospital and thus had an illegal purpose. Relying upon *Redding*, the court held the Anti-Injunction Act inapplicable. Applying the essentiality of functions test, the court reasoned that if public policy rendered a strike of school employees illegal, certainly a hospital strike could not be tolerated.

The Illinois Supreme Court reversed, asserting, "[I]t was not this *court* that declared the public policy [in *Redding*], as did the appellate court in this case [*Peters*], it was the *constitution* that declared the public policy . . . ." The supreme court found the Anti-Injunction Act controlling in

95. See Board of Educ. v. Kankakee Fed'n of Teachers, Local 886, 46 Ill. 2d 439, 264 N.E.2d 15 (1970); County of Peoria v. Benedict, 47 Ill. 2d 166, 265 N.E.2d 141 (1970), cert. denied, 402 U.S. 929 (1971); Board of Junior Colleges v. Cook County College Teachers Union, 126 Ill. App. 2d 418, 262 N.E.2d 125 (1970), cert. denied, 402 U.S. 998 (1971). But see Board of Educ. v. Morton Council Teachers Local 571, 50 Ill. 2d 258, 278 N.E.2d 769 (1972), where there was a retrenchment when the court was faced with the prospect of jailing 64 of the 378 teachers in a high school district. The disinclination of the executive passively to accept the judiciary's handling of public employee strikes through contempt proceedings was evidenced by Governor Walker's issuance of pardons to the union leaders who had been jailed. For a comparison of the response of the executive and legislative branches to use of the labor injunction in the private sector cases, see note 25 supra.

96. Following *Redding*, the use of the labor injunction in the public sector in many respects repeated the private sector experience. Although Illinois statutory law carefully prescribed due process procedures to be followed in injunction proceedings, the appellate courts held that the failure of a chancellor to comply with those procedures was not a jurisdictional defect and, therefore, afforded a union no effective remedy on appeal if it had disobeyed the injunction. Hence, as in the case of private employee unions prior to adoption of the Norris-LaGuardia Act, the labor injunction could be used with impunity to curb public employee unions and they had no meaningful legal recourse to challenge its abuse. See Board of Trustees of Community College Dist. No. 508 v. Cook County College Teachers Local 1600, 42 Ill. App. 3d 1056, 356 N.E.2d 1089 (1976).

98. 107 Ill. App. 2d at 467-69, 246 N.E.2d at 843-44.
99. 44 Ill. 2d at 27, 253 N.E.2d at 378 (emphasis added).
Peters in the absence of any contrary constitutional requirement or legislative enactment, stating: "The language of the statute is clear and it makes no exceptions for hospitals." \(^{100}\)

Thus, whereas the appellate court in Peters had used the illegal purpose doctrine to reach the result desired by the judges, the Illinois Supreme Court seemed to accept the concept that policy-making was a legislative and not a judicial function.

The following year, 1970, the Illinois Supreme Court held that the Anti-Injunction Act prohibited the issuance of an injunction against an economic strike by employees of a county nursing home. In County of Peoria v. Benedict, \(^{101}\) the court decided the issue with the curt statement that in Peters "we held the Illinois anti-injunction law applicable to employees of a non-profit hospital. For the same reasons stated therein, we find the anti-injunction act . . . applicable to the instant case." \(^{102}\)

The court had now applied the Anti-Injunction Act to public employees. It thus appeared that the only exception to the application of the Anti-Injunction Act which survived from Redding was an overriding constitutional or legislative expression of public policy. The single situation where such an exception had been found was stated in Redding, i.e., the constitutional mandate of providing public schools; with the adoption of the 1970 Illinois Constitution, that constitutional provision was made applicable only to primary and secondary public schools. \(^{103}\) Although the Anti-Injunction Act was applied to public employees in Benedict, the operation of the county nursing home there was, in competition with private nursing homes, a voluntary and proprietary function. Thus, the court had yet to rule on a public employee "essential function" case comparable to Peters.

Such a case arose in the City of Pana, Illinois. An economic strike by municipal employees was enjoined on the grounds that the strike directly interfered with the operation of the city's water, sewer, street and police departments, which were indisputably essential to the health, safety and welfare of the city's inhabitants.

In a two-to-one decision, the appellate court in City of Pana v. Crowe\(^ {104}\) found Benedict rather than Redding controlling. Writing for the

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\(^{100}\) Id.


\(^{102}\) Id. at 169-70, 265 N.E.2d at 143.

\(^{103}\) The Anti-Injunction Act was declared to be overridden by the constitutional duty to provide public schools in Allen v. Maurer, 6 Ill. App. 3d 633, 644, 286 N.E.2d 135, 143 (1972). Illinois courts, however, have chosen to ignore the fact that the 1970 Illinois Constitution mandates free public education only through the secondary level. Ill. Const. art. X, § 1. Hence, the public college teacher unions urged inclusio unius est exclusio alterius—the corollary principle to Redding would logically be that teachers in the public colleges could strike.

majority, Mr. Justice Jones took a cue from Justices Holmes and Brandeis and refused to override the express prohibition of the Anti-Injunction Act on the basis of "general, scattered and indirect and . . . vague" constitutional and statutory provisions relating to performance of the impaired municipal services. He stated that any labor-management policy should emanate from the General Assembly, not the courts.  

The Illinois Supreme Court reversed that decision, flatly declaring public employee strikes illegal. Mr. Justice Schaefer, writing for the court, conceded that the plain language of the Anti-Injunction Act supported the appellate court holding that its scope encompassed public employee strikes. Nevertheless, he held the statute inapplicable to such strikes. He premised his holding primarily upon two assertions. He found, first, that the history of the statute clearly established that its purpose was to prohibit the enjoining only of "lawful conduct." Cited as authority for this proposition was an earlier Illinois Supreme Court decision, Fenske Brothers v. Upholsterers International Union. Second, he asserted that at the time the Illinois Act was adopted in 1925, strikes by governmental employees were universally considered unlawful and "that view prevails generally today in the absence of legislative sanction.

Mr. Justice Schaefer was plainly wrong about the purpose of the Anti-Injunction Act. The history of the Anti-Injunction Act shows that its purpose was to prohibit courts from enjoining peaceful strikes and picketing through application of the unlawful purpose doctrine. Moreover, Fenske Brothers clearly demonstrates that the history and purpose of the Anti-Injunction Act are diametrically opposed to Mr. Justice Schaefer's conclusion. There,

105. Id. at 94, 299 N.E.2d at 773.
106. 57 Ill. 2d 547, 316 N.E.2d 513 (1974).
108. 57 Ill. 2d at 549, 316 N.E.2d at 514.
109. Upon the adoption of the Clayton Act by Congress, many state legislatures reacted by enacting "little Clayton Acts," modeled after section 20 of the federal law. Among these enactments was the Illinois Anti-Injunction Act of 1925. ILL. REV. STAT. ch. 48, § 2(a) (1975). The statute avoided the ambiguity which had been relied upon by Mr. Justice Pitney in Deering four years earlier (see text following note 31 supra) to emasculate section 20 of the federal statute and revitalize the unlawful purpose doctrine. The Illinois law simply prohibited any Illinois court or judge from issuing a restraining order or an injunction in any case involving or growing out of a dispute concerning terms or conditions of employment. Unlike section 20 of the Clayton Act, which applied "in any case between an employer and employees," the Anti-Injunction Act contained no reference to an "employer" or "employee" which might invite a restrictive application of the Anti-Injunction Act. The conclusion is inescapable that the Illinois General Assembly intended the Anti-Injunction Act to apply to all labor disputes regardless of the parties involved.
110. Additionally, Mr. Justice Schaefer furnished no authority for his statement that public employee strikes were universally considered unlawful in 1925, nor was it shown what public employee strikes had occurred as of that time. Furthermore, his statement that the view continues today in the absence of legislative sanction failed to take into account the decisions of the supreme courts of New Hampshire, Rhode Island and Michigan. See notes 77-79 supra.
the Illinois Supreme Court rejected an attempt to narrow the scope of the Anti-Injunction Act and held that its scope was all-inclusive.\textsuperscript{111}

Although it was not the purpose of the Anti-Injunction Act to exclude any classification of employees from its coverage, Mr. Justice Schaefer was correct in concluding that the Anti-Injunction Act was not intended to bar an injunction against unlawful actions. The Anti-Injunction Act did not insulate "illegal conduct" such as violence to person or property, intimidation or threats of violence. In other words, strikes were protected against injunction regardless of purpose so long as the strikers behaved themselves in accordance with normal proscriptions established under criminal and civil law. However, by expanding that limited area of enjoinable conduct, the court in \textit{Pana} revitalized the "unlawful purpose" doctrine which \textit{Fenske Brothers} found had been outlawed by the Anti-Injunction Act. Mr. Justice Schaefer's legal exercise is logically indistinguishable from that employed by Mr. Justice Pitney in the \textit{Deering} case except that Mr. Justice Pitney emasculated section 20 of the Clayton Act through statutory interpretation, while Mr. Justice Schaefer concedes that the Anti-Injunction Act is contrary on its face to his interpretation. Mr. Justice Pitney found an illegal purpose in union organizational strikes; Mr. Justice Schaefer found an illegal purpose in union strikes against a public employer.

An additional parallel exists between the Pitney and Schaefer opinions. Pitney's interpretation of the Clayton Act perpetuated the Massachusetts doctrine that employees of the target employer were permitted to engage in primary strikes, but participation by strangers was outlawed as an "illegal purpose." This "classification of persons" concept was not eliminated in the private sector until the adoption of the Norris-LaGuardia Act. Like Pitney, Schaefer interprets the Anti-Injunction Act so as to create a "classification of persons," e.g., public employees, who are denied the protection of the Anti-Injunction Act, once again on the basis of an "illegal purpose."

\textsuperscript{111} In \textit{Fenske Bros.}, a group of corporations was seeking to sustain the action of a trial court, which had enjoined a private sector union from striking and picketing in support of its demand for a closed shop. The corporations argued the illegal purpose doctrine, citing many of the exhaustive list of cases that had followed the Massachusetts view. Illinois was among the states that had followed this view. O'Brien v. People, 216 Ill. 354, 75 N.E. 108 (1905). The Illinois Supreme Court disposed of this argument, noting: "Each of the cases . . . cited . . . was decided before there was any legislation in this State upon the question here involved." 358 Ill. at 246, 193 N.E. at 116. The court found that, regardless of how the judiciary had determined the legal status of labor activities prior to the enactment of the Anti-Injunction Act, the purpose of the Anti-Injunction Act was to legalize the activities to which the Anti-Injunction Act applied. As a result of \textit{Fenske Bros.}, the illegal purpose doctrine and the labor injunction were thought to have been outlawed in Illinois until the \textit{Pana} decision held otherwise.
Mr. Justice Schaefer asserted another ground upon which to support the *Pana* decision: "It may also be noted that the Federal counterpart of the statute involved in this case, the Norris-LaGuardia Act . . . was held to be inapplicable to employees of the Federal Government." Ignored was the fact that this argument was heard but not adopted by the Illinois Supreme Court in the *Benedict* case. In *Benedict*, several arguments were made before the court. First, the Anti-Injunction Act predated the Norris-LaGuardia Act, was a counterpart of section 20 of the Clayton Act, and was carefully drafted to avoid the problems that had resulted in nullification of section 20. Second, the United States Supreme Court decision interpreting the Norris-LaGuardia Act to ban strikes by federal employees issued in 1947, the same year that Congress explicitly illegalized such conduct in the Taft-Hartley Act. Third, numerous bills had been submitted to the Illinois General Assembly without passage which sought to ban public employee strikes, measures that would seem superfluous if strikes were already enjoinable. Thus, *Benedict* contradicts Mr. Justice Schaefer's analogy to the federal law.

According to Mr. Justice Schaefer, the General Assembly had acquiesced in the view he espoused in *Pana* because, since 1925, it had enacted collective bargaining statutes for certain public employees but "it has refused to interfere with the conclusion that a strike of public employees is unlawful." Not explained is how the General Assembly could possibly be cognizant of any such conclusion in view of Illinois case law prior to the supreme court's *Pana* decision. The opposite conclusion logically would be derived from a reading of Illinois Supreme Court decisions; specifically, that the illegal purpose doctrine did not survive the Anti-Injunction Act (*Fenske Brothers*), the Anti-Injunction Act was applicable in the absence of constitutional or statutory expressions of public policy to the contrary (*Peters*), and the Anti-Injunction Act was applicable to public employees (*Benedict*).

112. 57 Ill. 2d at 550, 316 N.E.2d at 514.
113. Every reference in the federal statute that could be construed to make the Anti-Injunction Act applicable only to private employers had been deleted in the drafting of the Anti-Injunction Act. For example, where the Clayton Act applied "in any case between an employer and employees . . . involving or growing out of a dispute . . .," 29 U.S.C. § 52 (1970), the Anti-Injunction Act applied "in any case involving or growing out of a dispute . . ." Ill. Rev. Stat. ch. 48, § 2(a) (1975). Similarly, whereas the Norris-LaGuardia Act had been construed by the United States Supreme Court to define an employer in such a way as to exclude the United States, (United States v. United Mine Workers of America, 330 U.S. 258 (1947)), the Anti-Injunction Act was in all respects drawn so as to apply to all employers including governmental employers (see generally County of Peoria v. Benedict, 47 Ill. 2d 166, 265 N.E.2d 141 (1970), cert. denied, 402 U.S. 929 (1971)).
114. In *Benedict*, the union relied on Board of Educ. v. Public School Employees' Union, 233 Minn. 144, 45 N.W.2d 797 (1951), in which the Minnesota Anti-Injunction Act was applied to the public sector, largely on the basis of these three points.
115. 57 Ill. 2d at 552, 316 N.E.2d at 515.
Obliquely recognizing the inconsistency of *Pana* with the latter two decisions, the court stated:

It is therefore appropriate to repeat what has often been said before, that the public policy of the State is not found solely in the provisions of the Constitution . . . In our opinion neither the *Peters* case nor the *Benedict* case requires that we depart in this case from the longstanding rule that public employees have no right to strike and that a strike by them is unlawful and, therefore, not within the scope of the anti-injunction act.\(^{116}\)

In short, the court discarded its pronouncement in *Peters* that public policy emanates from the Constitution and the legislature, not from the courts, and resurrected the illegal purpose doctrine under which an individual judge declares the law to be as the judge determines.

Concluding his opinion in *Pana*, Mr. Justice Schaefer offered the essentiality of functions doctrine as an additional supporting rationale. A distinction between public and private employees based on that theory has no factual or logical underpinning.\(^ {117}\) Moreover, that doctrine was rejected in *Peters* as a proper basis for judicial intervention. Since *Peters* still stands as controlling law in private sector cases, there is no rational basis for applying the doctrine to the public sector.

In sum, the decisions following *Redding* show that the Illinois Supreme Court has repeated the early private sector history by applying its own socio-economic views rather than established principles of law in order to support its conclusion that public employees cannot strike. The judges once again have determined that the employees' right to act in their own self-interest must defer to the employers' right to operate without interference resulting from employee discontent.

*The Right of Public Employees to Enforce Their Collective Bargaining Agreements*

The same tendency for the Illinois judiciary to apply its own socio-economic views in place of established legal principles has emerged with regard to the second major area of public employee case law, enforceability of contracts. In so doing, however, the Illinois courts have not followed any antiquated private sector judicial pattern because, by the time the issue arose in the private sector, the federal courts and Congress favored enforcement of labor contracts. Nevertheless, the Illinois courts did adapt the pre-existing non-delegability of governmental powers theory, stretching it to stifle most attempts to enforce collective bargaining agreements when school boards desired to extricate themselves from the bargains they had made.\(^ {118}\)

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116. *Id.* (emphasis added).
117. *See* text accompanying notes 85-90 *supra*.
118. This use of the non-delegability theory is not universal. As the Ohio Supreme Court
Initially, the Illinois judiciary seemed to be moving in the federal direction, which favored collective bargaining and arbitration of contract disputes. The first case, *Chicago Division of Illinois Education Association v. Board of Education of Chicago*, 119 dealt with the issue of whether, in the absence of explicit statutory authorization, a school board can recognize and contract with an exclusive collective bargaining representative selected by its teachers. Two legal theories predominated in the arguments before the appellate court: (1) whether the board had an implied power to take such action; and (2) whether such an act constituted an ultra vires delegation of the board’s duties and responsibilities. 120 Case law had very narrowly construed the scope of powers that were implied, rather than specifically granted, to school boards under the Illinois School Code. 121 Further, three existing Illinois decisions had forbidden school boards to delegate to other parties the decision-making responsibility which the School Code lodged in the boards. 122

Nevertheless, after a careful review of the arguments, the appellate court seemed to conclude that collective bargaining contracts were no more a delegation of the board’s powers than any other contract for goods or services would be. The court stated:

> The fact that the municipality engages in collective bargaining does not necessarily mean that it has surrendered its decision making authority with respect to public employment. The final decision as to what terms and conditions of employment the municipality will agree to, or whether it will agree at all, still rests solely with its legislative body. 123

The court then held that the Board did not require legislative authority to enter into a collective bargaining agreement with a sole collective bargaining agency selected by its teachers, and that such an agreement was not against public policy. 124

has recognized, it amounts to little more than a public body reneging on its agreements. Dayton Classroom Teachers Ass’n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).


120. For some inexplicable reason, the court treated these theories separately, seemingly unaware that they coalesce into a single proposition. If a school board has an implied power to do something, then the commission of the act cannot be ultra vires. Conversely, if the commission of the act is ultra vires, then the board cannot have the implied power.


122. Elder v. Board of Educ., 60 Ill. App. 2d 56, 208 N.E.2d 423 (1965); Stroh v. Casner, 201 Ill. App. 281 (1916), and Linblad v. Board of Educ., 211 Ill. 261, 77 N.E. 450 (1906). Under this illegal delegation doctrine, in *Linblad* a board was prohibited from delegating to a state agency its responsibility to select and place student practice teachers; in *Casner* two boards were prohibited from building a common schoolhouse for joint education of children in the two districts; and in *Elder* a board was prohibited from assigning to its superintendent its statutory responsibilities concerning teachers.

123. 76 Ill. App. 2d at 472, 222 N.E.2d at 251.

124. *Id.* The Illinois Supreme Court declined to review this decision. 35 Ill. 2d 630 (1967).
During the next six years, public sector collective bargaining in Illinois proliferated. The contracts by and large incorporated mechanisms developed in the private sector, including compulsory and binding arbitration to resolve grievances. Arbitrators who had developed expertise and reputations in private sector labor disputes were chosen to hear public sector cases, and a substantial body of public sector arbitral common law began to emerge.

This apparent stability was suddenly shattered for Illinois school districts when the Illinois Appellate Court for the Second District decided Board of Education v. Rockford Education Association\textsuperscript{125} and thereby cast great doubt on the meaning of Chicago Division. A collective bargaining agreement between the Rockford school district and its teachers' association contained a clause requiring that promotions be filled in accordance with certain specified procedures and "on the basis of qualifications for the vacant post."\textsuperscript{126} A teacher grieved, alleging that the Board failed to follow the contract procedures governing promotions and claiming that he was entitled to be promoted to a vacant administrative position. When the association demanded selection of an arbitrator from the American Arbitration Association list, the board sued, and the chancellor enjoined arbitration. The appellate court affirmed, stating:

> It has been held that a board of education does not require legislative authority to enter into a collective bargaining agreement and that such an agreement is not against public policy. However, a board may not, through a collective bargaining agreement or otherwise, delegate to another party those matters of discretion that are vested in the board by statute. The School Code provides that the board has the duty 'To appoint all teachers and fix the amount of their salaries . . . .' The cases have held that these are among the powers and duties of a board that cannot be delegated or limited by contract . . . . The ultimate determination of 'qualification' was not, nor could it be, delegated by the Board to any outside agency including the American Arbitration Association.\textsuperscript{127}

Rockford is unclear as to whether the court was holding that the subject matter involved in the dispute was beyond the purview of collective bargaining or was merely inarbitrable. If the former, Rockford would seem to be irreconcilable with Chicago Division, despite the court's disinclination to directly repudiate that decision. If the court was asserting that none of the

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\textsuperscript{125} 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972).
\textsuperscript{126} Id. at 1093, 280 N.E.2d at 287.
\textsuperscript{127} Id. at 1093-94, 280 N.E.2d at 287-88 (citations omitted). It is assumed that the court was alluding to the arbitration of the grievance. The court's opaque reference to a delegation to any outside agency, including the American Arbitration Association [hereinafter referred to in the text as AAA], evidences an apparent misunderstanding of the function of the AAA, which assists parties in selecting an arbitrator to hear the case. The AAA itself does not adjudicate grievances.
powers of a school board derived from the School Code can be made the subject matter of a collective bargaining agreement, collective bargaining would in effect be permissible as to form, but not as to any possible content, since the only powers a school board has are those specified in, and incidental to, the School Code. Furthermore, Rockford ignored the fact that Chicago Division had rejected the applicability of the illegal delegation doctrine to collective bargaining, and in doing so, had found inapplicable the same three cases that Rockford relied upon in support of its holding.128 Each of the pivotal cases involved a situation where a school board had delegated to another party a decision-making responsibility conferred upon it by the School Code. They certainly are distinguishable from the case of a collective bargaining contract in which a school board agrees to conditions of employment as consideration for the teachers’ agreement to render services. Were the giving of consideration declared illegal, no school board could operate because it could not enter into any contract necessary to implement its specific powers.

On the other hand, it might be assumed that the Rockford court was taking the narrower position that only the agreement to submit the grievance to binding arbitration constituted an illegal delegation of the Board’s powers. It then becomes difficult to comprehend how the court could uphold a board’s power to enter into a contract but not the power to agree to arbitrate a dispute arising under it.129

The Rockford court also had no reason to conclude that the Board would have been deprived of its ultimate right to judge qualifications and select candidates for promotion if the arbitration proceedings had been held.130 The grievance in Rockford, if arbitrated, undoubtedly would have decided the issue of whether the Board had adhered to the procedural requirements it had agreed to, but not the issue of determination of qualifications.

Whatever Rockford held, it clearly reflected a departure from the basic socio-economic orientation of Chicago Division, which favored and

128. See note 122 supra.

129. See Note, Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment, 54 CORNELL L. REV. 129, 133 (1968) [hereinafter cited as Agreements to Arbitrate]. See also School Dist. No. 46 v. Del Bianco, 68 Ill. App. 2d 145, 215 N.E.2d 25 (1966), where the same court that decided Rockford enforced an arbitration clause in a contract between a school board and an architect for professional services in connection with the construction of a school building.

130. In private sector collective bargaining agreements, this subjective adjudicative function is consistently left to management. Also, an arbitrator will not attribute a contrary intent to the parties absent clear contract language so stating. Should an employer be challenged, the normal arbitral test is whether the exercise of its discretion was unreasonable, capricious, arbitrary or discriminatory. See E. ELKOURI & F. ELKOURI, HOW ARBITRATION WORKS 387-88 (BNA, rev. ed. 1960) [hereinafter cited as HOW ARBITRATION WORKS], and cases cited therein.
facilitated collective bargaining in the public sector. As a result, there was uncertainty as to the finality and legality of arbitration in the public schools. School boards began either to seek injunctions preventing arbitration or to vacate unfavorable awards. Thus, arbitration became virtually meaningless as the final method of resolving contractual disputes.

The ambiguity in *Rockford* as to whether the nondelegability doctrine was a limitation on the scope of permissible contract subject matter or only on grievance arbitration\(^1\) seemingly was resolved in three subsequent appellate court decisions: *Board of Education v. Johnson,*\(^1\)\(^2\) *Classroom Teachers Association v. Board of Education,*\(^1\)\(^3\) and *Illinois Education Association Local Community High School District 218 & Henry Davis v. Board of Education of District 218.*\(^1\)\(^4\)

*Johnson* involved a grievance over an involuntary transfer of a senior teacher from one school within the district to another. Under the collective bargaining contract, two of the criteria required to be used in selecting teachers for involuntary transfer were seniority and qualifications. Four guidelines for determining qualifications were specified. When the union sought arbitration of the grievance, alleging noncompliance with these procedures, the board obtained an injunction preventing the arbitration. The Illinois Appellate Court for the First District affirmed.

The court opined that *Rockford* was entirely consistent with *Chicago Division,* concluding that "*Rockford* simply stated that certain decisional matters, although contained in the terms of a collective bargaining agreement, could not be delegated."\(^1\)\(^5\) The court further stated that, both in *Rockford* and in the instant case,\(^1\)\(^6\) grievance arbitration and not interest arbitration was involved and that "in this opinion we are addressing ourselves only to grievance arbitration."\(^1\)\(^7\)

\(^1\)\(^3\) The state courts sometimes have confused grievance arbitration with contract bargaining, as was noted by Judge Hoffman, dissenting in *Gary Teachers Local No. 4 v. School City of Gary,* 152 Ind. App. 591, 284 N.E.2d 108, 115 (1972). Negotiation of a collective bargaining contract resolves an interest or major dispute. Interest arbitration involves an arbitrator deciding what terms will be included in the agreement. Grievance arbitration resolves a dispute over the interpretation, construction or application of a contract. Such a dispute is called a rights or minor dispute. How Arbitration Works, *supra* note 130, at 30, 31; Agreements to Arbitrate, *supra* note 129, at n.6.

\(^1\)\(^2\) 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

\(^1\)\(^3\) 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973).


\(^1\)\(^5\) 21 Ill. App. 3d at 488, 315 N.E.2d at 639.

\(^1\)\(^6\) A second grievance was also involved in this appeal. The union had successfully arbitrated a contractual provision insulating teachers from any obligation to perform functions "clerical in nature." A violation occurred when the administration required the teachers to write in the names of their students on attendance cards, a task until then performed by the school clerk. Reversing the chancellor, who had set aside the arbitrator's award, the appellate court held that nothing in the School Code barred arbitration of this dispute. *Id.* at 494-95, 315 N.E.2d at 644.

\(^1\)\(^7\) *Id.* at 488 n.11, 315 N.E.2d at 639 n.11.
The court noted that in the absence of public employment legislation creating a basis for arbitration, the sole legal basis of arbitration was the holding in Chicago Division. Therefore, the court continued, "we cannot say that all disputes arising from the collective bargaining agreement are proper subjects for binding arbitration." 138

Hence, the court seemingly concluded that the permissible scope of the arbitration clause is narrower than the permissible scope of the subject matter of the collective bargaining agreement. Not explained was how collective bargaining over subject matter within the authority of the board can be any less a delegation of that board's powers than the submission to an arbitrator of a dispute over the interpretation, construction or application of the agreement which was the product of the collective bargaining. 139 This gap in judicial reasoning is further widened by the failure of the appellate court even to consider the general legislative policy in Illinois favoring arbitration of contract disputes as primarily evidenced by the adoption of the Uniform Arbitration Act. 140

Seeking standards to determine which grievance disputes were arbitrable, the court reverted to the Rockford doctrine that the powers granted to school boards under the School Code were nondelegable and, therefore, not arbitrable. Finding that the board ultimately had the responsibility of determining qualifications for involuntary transfer, it barred arbitration of the issue of whether the board had complied with the procedures and utilized the guidelines contractually required in the making of this determination. The court concluded,

[T]o allow an arbitrator to review the decision of the administration would permit the substitution of the arbitrator's judgment as to the relative importance of each guideline in the ultimate decision. This, in effect, would result in the arbitrator determining the teacher's qualifications and, . . . that decision is to be made by the school administration. 141

This conclusion seems unwarranted because the purpose of arbitration would merely be to ascertain whether the board had adhered to the guidelines specified in the contract. The contract did not authorize the arbitrator to second-guess the board in its application of those guidelines.

138. Id. at 491, 315 N.E.2d at 641.
139. See note 131 supra; Agreements to Arbitrate, supra note 129.
140. See text accompanying notes 67-94 supra. Only one Illinois appellate court decision even remotely deals with this consideration. Referring to non-delegability cases, where the law prohibits arbitration over the subject matter, the First District held that "the Uniform Arbitration Act does not provide the exclusive remedy for restraining arbitration . . . ." Board of Trustees of Junior College Dist. No. 508 v. Cook County College Teachers Local 1600, 22 Ill. App. 3d 1053, 1056, 318 N.E.2d 197, 200 (1974), aff'd without consideration of this issue, 62 Ill. 2d 470, 343 N.E.2d 473 (1976).
141. 21 Ill. App. 3d at 493, 315 N.E.2d at 643.
Rockford and Johnson both had denied an arbitrator the opportunity to review an alleged procedural violation because the board was empowered to make the ultimate substantive decision based upon its assessment of qualifications. But the Third District in Classroom Teachers and the First District in Illinois Education Association held that a court could review and cure alleged procedural violations under similar circumstances.

In Classroom Teachers, a school board involuntarily transferred a teacher from the position of counselor to instructor, failing to comply with specified procedural prerequisites contained in the collective bargaining agreement. Overruling the chancellor, who had found Rockford controlling, the Illinois Appellate Court for the Third District stated:

The Board has voluntarily agreed to follow reasonable and fair evaluation procedures preliminary to any involuntary transfer of the teacher. If the Board had kept its bargain it would have had the basis of making an informed judgment prior to the transfer of the plaintiff teacher who, in turn, would have had clear warning of her deficiencies with ample opportunity to correct them or to suffer the consequences. We believe that such a bargain is consonant with public policy and should be enforced.\(^{142}\)

Since both Johnson and Classroom Teachers involved procedures governing involuntary transfer of tenured teachers, there is an apparent conflict between the First and Third Districts. The only distinction between the cases seems to be that Johnson involved arbitrability and Classroom Teachers involved court enforcement.

In Illinois Education Association, a nontenured teacher was terminated for cause. The chancellor held the discharge improper because of failure to follow the classroom evaluation procedures required under the collective bargaining contract, and reinstated the teacher.

The Appellate Court for the First District affirmed, finding no material distinction between the case before it and Classroom Teachers.\(^{143}\) In both cases, the board had agreed with the union to a procedural condition precedent to an involuntary change in employment status, and then had attempted to alter that status without complying with the agreed procedures.

The comparison drawn in Illinois Education Association to Classroom Teachers could just as easily have been made to Rockford or Johnson. The only apparent material distinction between the four cases was that two were arbitrability cases while the other two involved court enforcement of collective bargaining contracts. Thus it appeared that the Illinois appellate courts were saying the nondelegability doctrine limited an arbitrator's authority,

\(^{142}\) 15 Ill. App. 3d at 229, 304 N.E.2d at 520.

but not that of a court, to impinge upon a board’s discretionary powers when awarding relief for violation of a collective bargaining contract. The implication was that the ambiguity in Rockford had been resolved and that, while the authority of the arbitrator was curtailed, the permissible subject matter of collective bargaining was not being limited. However, this seeming reconciliation of the appellate court decisions was short-lived because two cases followed in which courts refused to enforce collective bargaining agreements.

In Wesclin Education Association v. Board of Education, the Appellate Court for the Fifth District addressed the issue of whether a school board can impose upon itself conditions precedent to dismissal of a nontenured teacher, in excess of the conditions imposed by the Illinois School Code. A professional negotiations agreement required that the discharge of a teacher be preceded by an evaluation procedure. The court held that such an agreement was at variance with the School Code and, therefore, ultra vires and unenforceable in court. The court observed that the School Code vested in boards of education the authority to dismiss teachers; that this authority was limited by certain specified rights of tenured teachers; but that nontenured teachers were entitled only to receive sixty days’ written notice of termination. The court then held: "We believe that just as a school board cannot abrogate the procedural safeguards accorded tenured teachers, neither can it, by means of a collective bargaining agreement, destroy the flexibility accorded it with respect to the dismissal of nontenured teachers."

The court recognized that its decision conflicted with the position taken by the First District in Illinois Education Association. However, it opined that its treatment of the nonrenewal of a nontenured teacher’s contract was reconcilable with the Third District’s decision in Classroom Teachers which dealt with the involuntary transfer of a tenured teacher: "We find this distinction significant since the School Code establishes, and maintains, numerous distinctions between the rights accorded to tenured teachers and those accorded to nontenured teachers."

Support subsequently was given to Wesclin when, in 1975, the Illinois Supreme Court reversed the First District’s decision in Illinois Education Association. The court held that the board’s powers under the School Code with regard to the nonrenewal of contracts of nontenured teachers were nondelegable. Therefore, the court chose to construe the

144. 30 Ill. App. 3d 67, 331 N.E.2d 335 (1975).
145. Id. at 77, 331 N.E.2d at 342.
146. Id. at 76, 331 N.E.2d at 341.
147. Id. at 75, 331 N.E.2d at 340.
149. Id. at 130, 340 N.E.2d at 9.
collective bargaining agreement as not expanding the rights conferred upon a nontenured teacher under the School Code, in effect abrogating the additional procedures contained in the contract. Accordingly, since the plaintiff teacher had been terminated in compliance with his rights under the School Code, the court found that the action of the board was valid under both state law and the collective bargaining agreement.

Additional confusion was engendered when the Third District interpreted its earlier Classroom Teachers decision in Lockport Area Special Education Co-operative v. Lockport Area Special Education Cooperative Association.¹⁵⁰ Before the court was the issue of arbitrability of the non-renewal of a probationary teacher under a clause which required the school board to establish "'just cause' in support of a refusal to retain the teacher. The court first agreed with Wesclin that the provision could not be enforced because it conflicted with the exclusive School Code procedures with regard to nontenured teachers.¹⁵¹ Two of the three justices went further, however, explicating the basis of Classroom Teachers. That case, they explained, involved a procedural prerequisite to the exercise of board discretion, which was enforceable, as contrasted to the delegation by a board of the actual substantive decision to another party, which was unenforceable.¹⁵² Since Classroom Teachers involved court enforcement while Lockport involved arbitrability, the court implied it was not material which was involved. This explanation left no means of reconciling Classroom Teachers with Rockford and Johnson, where the procedural prerequisites had been held inarbitrable. Except in the case of nontenured teachers, where Illinois Education Association seems to govern, that conflict between the appellate courts has not been squarely resolved.

The rationale introduced by the Fifth District in Wesclin, followed in Lockport and reiterated by the Illinois Supreme Court in Illinois Education Association, was one grounded upon the exclusivity of the School Code procedures for nontenured teachers. That rationale became muddled when the Illinois Supreme Court reached the same result in a nontenured teacher termination case, in the absence of such "exclusive" statutory procedures. That case was one of three arbitration cases involving the Cook County College Teachers Union.¹⁵³ The grievances were based upon the alleged failure of the college board to follow evaluation procedures contained in a collective bargaining agreement, the same issue as was involved in Wesclin and Illinois Education Association.

¹⁵¹. Id. at 792-93, 338 N.E.2d at 465-66.
¹⁵². Id. at 793-94, 338 N.E.2d at 466-67.
¹⁵³. Board of Trustees of Junior College Dist. No. 508 v. Cook County College Teachers Local 1600, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) [hereinafter referred to in the text as the College Teachers Trilogy].
Before the supreme court, the union contended that, unlike the School Code, the Public Community College Act did not contain a procedure governing renewal of nontenured faculty members; it merely authorized the board to devise a tenure policy. In pursuance of that statutory power, the board had negotiated with the union the evaluation procedures which were at issue and those procedures had been incorporated into the board's rules. Therefore, the union contended the converse of Illinois Education Association, i.e., in the absence of statutory exclusivity, the tenure policies including the evaluation procedures were valid and legally enforceable.

Not responding to this argument, the Illinois Supreme Court invalidated the contractual evaluation procedures as involving an illegal delegation of the board's powers to appoint teachers. The only authority or rationale offered in support of this conclusion was the citation without comment of Illinois Education Association. Hence, within two months, the Illinois Supreme Court had ruled that evaluation procedures governing renewal of contracts for nontenured teachers were illegal both when enabling legislation imposed an "exclusive" procedure for that purpose, as in Weschlin and Illinois Education Association, and when the enabling legislation imposed no procedure but empowered the board to devise such a procedure, as in the first case in the College Teachers Trilogy.

The second case in the College Teachers Trilogy dealt with the arbitrábility of grievances protesting denial of promotions in rank. The Illinois Supreme Court ruled that such grievances were inarbitrable on the basis of the nondelegability doctrine it had asserted in Illinois Education Association. The board's nondelegable authority to grant or deny promotions, according to the court, was fairly implied from the provisions of the Public Community College Act which empowered the board to employ personnel, to establish policies governing their employment and dismissal, and to fix

155. 62 Ill. 2d at 476, 343 N.E.2d at 476.
156. Other jurisdictions, although agreeing with the Illinois judiciary that tenure decisions are nondelegable, have found evaluation procedures to be severable from the ultimate decision on tenure and have accordingly permitted arbitration of alleged violations of such procedures and have upheld arbitral awards which granted remedies including reinstatement but not including the granting of tenure. School Comm. of Danvers v. Tyman, — Mass. —, 360 N.E.2d 877 (1977); Dennis Yarmouth Regular School Comm. v. Dennis Teachers Ass'n, — Mass. —, 360 N.E.2d 883 (1977); School Comm. of W. Bridgewater v. West Bridgewater Teachers Ass'n, — Mass. —, 360 N.E.2d 886 (1977). Similar recent decisions from Michigan and New York are cited and discussed in the Tyman opinion, 360 N.E.2d at 879-80. The supportive reasoning in these decisions comports with the rationale of the Illinois Appellate Court for the Third District, in Lockport Area Special Educ. Co-op. v. Lockport Area Special Educ. Co-op. Ass'n, 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975) discussed in text following note 150 supra. However, the Third District stands alone in Illinois when distinguishing between the ultimate substantive decision and preliminary procedural requirements.
the amount of their compensation.\textsuperscript{157}

The sole case in the \textit{College Teachers Trilogy} in which the court found in favor of the union dealt with grievances protesting that certain faculty members had not been awarded extra work assignments consisting of the teaching of summer school classes. The collective bargaining agreement required that this extra work be offered to "qualified" teachers on a rotational basis so that every faculty member would receive an equal opportunity to perform the extra work. The arbitrator found that the board had violated the agreement by passing over the grievants in favor of other faculty members below them on the rotational scale, and awarded the grievants back pay. The board sued to modify the remedy and that issue eventually reached the supreme court.\textsuperscript{158}

In dictum, the court noted that the board had not raised, and in the court's opinion there did not exist, any nondelegability problem because all of the applicants for summer work admittedly were "qualified." Therefore, unlike the result in the first two cases in the \textit{College Teachers Trilogy}, these grievances were declared arbitrable. The rationale justifying this distinction was that "the board retains the authority to select extra courses and to offer rotational employment only to teachers \textit{it has determined to be qualified} to teach the offered courses."\textsuperscript{159}

Thus, in the entire confused and unsteady progression from \textit{Rockford} to the \textit{College Teachers Trilogy}, only one clear pattern seems to have emerged. The Supreme Court of Illinois has declared that its chief concern is preventing the delegation by a school board of its responsibility for determining teacher qualifications, as that determination affects such questions as renewal of nontenured teacher contracts, awarding of tenure, and promotions. This concern predominated in the \textit{Rockford} and \textit{Johnson} decisions of the Illinois appellate courts. However, the Illinois Supreme Court has devised a strange method indeed to achieve the desired end. It has refused to enforce procedural conditions precedent to board determination of qualifications, conditions intended to guarantee due process to teachers and to assist school boards in making substantive decisions. On the other hand, in the

\textsuperscript{157} 62 Ill. 2d at 479, 343 N.E.2d at 477.

\textsuperscript{158} The chancellor granted summary judgment to the board, ordering that the grievants be afforded the opportunity to make up the extra work in the future in lieu of receiving back pay, as awarded by the arbitrator. The Appellate Court for the First District affirmed, 22 Ill. App. 3d 1066, 318 N.E.2d 202 (1974). The Illinois Supreme Court reversed. Citing both the \textit{Steelworkers Trilogy} (see text accompanying notes 64-66 supra) and earlier Illinois decisions, the court ruled that an arbitrator was normally authorized to remedy a deprivation of work to a public employee by a backpay award. The court further held that a make-up-of-work award would financially prejudice the grievants because they, "in order to accept the proffered work, would be forced to forego other work, which might be available to them." \textit{Id.} at 482, 343 N.E.2d at 479.

\textsuperscript{159} \textit{Id.} at 480, 343 N.E.2d at 478. (emphasis added).
summer school case in the *College Teacher Trilogy*, the court has judicially sanctioned a system whereby the board initially determined the qualified teachers but relinquished its right to make the substantive decision on assignments, which were instead determined by an automatic procedure. This anomalous situation hardly squares with the court's expressed concern for preserving the authority of school boards.

By rendering evaluation systems for nontenured teachers unenforceable, the court is substituting its judgment, in the absence of any clear legislative mandate, for that of the academic community. It is not fortuitous that so many of the decided cases involve evaluation procedure clauses because they reflect a general consensus in academia as to how accredited educational institutions should assure elemental fairness and due process to faculty. To the extent that school boards, administrations and professional educational organizations in Illinois are judicially required to deviate from accepted standards of academic professionalism, it is most debatable whether the status of Illinois public educational institutions will be enhanced.\footnote{An Illinois appellate court decision illustrates both the inequity to the teacher and the possible harm to the school district generated by the judicial nullification of teacher evaluation procedures. In Board of Educ., Argo Community High School Dist. No. 217 v. Christensen, 30 Ill. App. 3d 696, 332 N.E.2d 482 (1975), a grievant had received uniformly favorable evaluations up to and including his final probationary year prior to tenure. Yet his teaching contract was not renewed at the conclusion of that year. He grieved, alleging a violation of the evaluation procedure article which provided: "'No teacher shall be refused tenure status unless the . . . evaluation procedure has been substantially followed and every reasonable effort has been made by the administration to assist the teacher to improve . . . .'" *Id.* at 697, 332 N.E.2d at 483. At the grievance hearing before the Board the grievant contended that at no time had the administration given him any verbal or written criticism of any kind. During his final probationary year, the North Central Accreditation Association had issued a report highly critical of the high school and, in particular, of the department in which the grievant taught. Subsequently, at a department faculty meeting following receipt by the grievant of the favorable evaluation prepared by the director of his department, the grievant made proposals to the faculty members in his department to improve the department to meet the criticisms of the accreditation association. After the meeting, the director accused the grievant of "showing him up" and told the grievant that his contract would not be renewed for his tenure year. No evidence or reasons of any kind in support of the nonrenewal were submitted before the board at the grievance hearing. The board denied the grievance and refused to arbitrate. A suit to compel arbitration was dismissed. On appeal, the First District affirmed, stating: "'Under the contract, the evaluations are only advisory and are not binding on the Board.'" *Id.* at 698, 332 N.E.2d at 483.}

Worsening the academic debacle created by judicial intrusion into the arena of academic due process is the fact that the courts invariably are dealing with a fiction when they suggest that a school board actually makes the determination whether a teacher should be hired, promoted, renewed, transferred or given tenure. Although this assumption may be warranted in a small school district, it is pure fancy in a large school system, where in practice the administration makes the recommendation, which is automatically rubber-stamped by the board. The irony of this fiction is manifested by
the fact that the nondelegation doctrine in Illinois was born in a case where a school board was not allowed to delegate its responsibility to the district's superintendent.\textsuperscript{161}

Thus, in the field of contract enforcement, as in the private and public sector right-to-strike cases, the Illinois courts seem to be imposing their philosophy about the proper power relationship of participants in the labor-management struggle. Lacking sound judicial principles to support their decisions, the courts are once again ignoring the Holmes-Brandeis admonition against the judiciary's performing a legislative function.

The lack of clear legal principles in this field has emasculated binding arbitration as a means of resolving contract disputes in the public schools because school boards are understandably unwilling to accept adverse arbitration awards which in all likelihood can be successfully appealed to the courts. Further, the Illinois courts are out of step with the judiciary of the United States Supreme Court and of the federal district court, which have proclaimed arbitration to be the "panacea" for the epidemic of court congestion.\textsuperscript{162}

It is a strange and irresponsible doctrine indeed that encourages school boards to make promises in consideration for the services to be performed by teachers with the underlying premise that, should the boards desire to renege, the courts will bail them out from their agreements under a non-delegation theory.\textsuperscript{163} The anti-labor approach of the Illinois judiciary has resulted in a situation in which the courts have declared public employee strikes illegal, yet also have undermined the only practical alternative of binding arbitration.\textsuperscript{164}


\textsuperscript{163} That is not to say all provisions in collective bargaining agreements should survive judicial attack based on the non-delegation doctrine. In Weary v. Board of Educ. School Dist. No. 189, 46 Ill. App. 3d 182, 360 N.E.2d 1112 (1977), the Fifth District applied the doctrine, in a two to one decision, when the agreement provided that a substantial portion of any increase in state aid received by the board would be expended for the benefit of union members in a manner to be designated by the union. Distinguishing the situation where the parties simply provided for a retroactive wage increase in the event of receipt of additional funds, the court found that under this agreement the board had delegated to the union in substantial measure its legal responsibility. The conclusion would appear to be warranted under these facts.

\textsuperscript{164} Yet in the Johnson case, the First District gave lip service to the benefits of arbitration:

\textquote{Binding arbitration of grievances, however, has much to commend it. First, the collective bargaining agreement is more meaningful because the confidence of the workers in the equity of the agreement is strengthened when they know that any dispute over the meaning of the contract may be submitted to an impartial third party for decision. Second, it encourages more careful decision making by the government employer. If he knows that his actions may be subjected to the scrutiny of an arbitrator whose decision will be binding, he will be less likely to make hasty
CONCLUSION

The conduct of the Illinois judiciary in thwarting the efforts of public employees to better themselves clearly parallels the earlier private sector experience. Judicial action has not been based upon established legal principles, but rather upon the social, political and economic views of the judges, masked in fictions such as criminal conspiracy, illegal purpose, universal views and illegal delegation of powers. Legislation, either directly applicable on its face or expressing legislative intent, has been overridden or ignored by the courts.

It is also arguable that the failure of the Illinois General Assembly to enact comprehensive public employee labor legislation is attributable in large part to the willingness of the courts to step into the legislative vacuum, thereby diminishing the pressure on the legislature to act. However, any assumption that additional legislation will prove a simple panacea to resolve public employee union problems misconceives the political process of this country. Legislation is not a theoretically-derived solution to social issues; it is but one result of the evolving political process and the ever-changing social forces that contribute to that process. An illusion exists that the judiciary operates apart from that process. This article has sought to demonstrate that this has never been the case in the field of employer-employee relations.

If history follows its usual tendency of repetition, the growing public employee unions will increase in militancy, as did their counterparts in the private sector, and if the courts do not change direction, public employee unions will exert pressure on political officials to obtain judges more sensitive and responsive to these workers' needs. As the federal courts changed under the New Deal, the Illinois judiciary may be transformed in response to the emerging strength of public employee unions.

decisions and more likely to calculate the effect of his order. Third, it would create pressure to settle grievances at lower levels. The natural reluctance of management officials to have their decisions reviewed by outside parties reduces the tendency of upper-level management to uphold unjust decisions made by lower-level management. Fourth, if the parties must bear the cost of arbitration by outside parties, they are likely to attempt to resolve their differences before such expense is incurred.

21 Ill. App. 3d at 493, 315 N.E.2d at 643-44 (quoting Agreements to Arbitrate, supra note 129, at 135-36).

165. Recent evidence suggests that the process may already have begun. In 1976, with public employee union support, independent candidates William Clark, former Attorney General of the state, and James Dooley, an internationally renowned trial lawyer, won unanticipated upset victories in the Democratic primary to fill two vacancies on the Illinois Supreme Court. Both were then elected in the general election.