The Top Ten Judicial Decisions Affecting Labor Relations in Public Education During the Decade of the 1990's: The Verdict of Quiescent Years

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Was there ever a society so infatuated with the drawing up of lists? Whole forests have been destroyed so that we can avidly consume the latest "top ten" in every conceivable category from the "worst dressed" to the "best colleges."

There can, of course, be objective bases for the construction of such lists as, for example, in the ratings of the greatest baseball batters of all time. But, when it comes to the identification of the most important judicial decisions in any field, subjectivity reigns supreme. While our designations may be informed by the number of times a particular case has been cited by other courts or analyzed in academic journals, such statistical elements do not do away with the need for judgment.

So it is with a great deal of humility and trepidation that I propose my own list of the "top ten judicial hits" of the decade of the nineties—those likely to have the greatest impact upon labor relations in the future. If, as I believe, the reader will find little of earth shaking significance in these decisions, I would reply that, indeed, very little of transcendental importance has occurred in the development of the judicially created law affecting labor relations in public education systems. In the main, the decisions have refined or expanded upon precedent, but blazed no new trails.

There were, of course, a number of significant labor law decisions of general applicability, but because the focus of this inquiry is public school labor relations I have limited my "short list" of candidates to those cases that arose at least in an educational context.

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With that constraint in mind, here are my nominees:


In the early 1990’s both states and municipalities were experiencing revenue short-falls. Baltimore was no exception. In 1991 Baltimore’s state aid was reduced by some $24 million dollars, and another $13 million dollar cut had been proposed for the following year. Considering the City’s precarious financial condition, the reductions could not have come at a worse time.

In consequence, the City was unable to erase a substantial deficit despite having effected non-salary costs savings, implemented layoffs, abolished positions and prompted early retirement of employees.

Baltimore thereupon declared a fiscal emergency, and, instead of ordering further layoffs, adopted a furlough plan whereby all full-time City employees, except for firefighters, lost the annual equivalent of 2.5 days of pay, or slightly less than 1% of their gross annual salaries.

The furlough plan was in conflict with the compensation terms of the collective bargaining agreement with the City’s public school teachers.

Article 1, Section 10, Clause 1 of the United States Constitution provides in relevant part that “No State’ shall... pass any... Law impairing the Obligation of Contracts...”

At least since United States Trust Company v. New Jersey,² it has been held that the “Contract Clause” prohibits a substantial impairment of a contractual relationship unless the impairment “is reasonable and necessary to serve an important public purpose.”

The Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO, filed suit alleging that the reductions constituted just such an impermissible impairment of their collective bargaining contract with the City.

The Court of Appeals had little difficulty in finding that the salary withholdings did constitute a substantial impairment of the Union’s contract with the City because the contractually specified level of compensation was the principal inducement for the Union to enter into the contract, and upon the continued existence of which its members had especially relied in ordering their financial affairs.

Although conceding that impairment of public contracts stands on a “somewhat different footing” than interference with private contracts because of the government’s self-interest, the Court nevertheless concluded that assuring

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financial integrity was an important public purpose, and accorded deference to the City’s legislative choice of the means to achieve this objective.

The Court considered four circumstances to be especially significant. The plan “effected simply a temporary alteration of the contractual relationships,” and was less drastic than layoffs would have been. The amount of the reduction was no greater than that necessary to meet the anticipated short fall, and did not alter pay-related benefits such as overtime pay rates.

The Union argued that alternatives were available to the City. The deficit could have been met by raising taxes or issuing bonds, or the financial burden could have been shifted to other programs—the funding for the Arts could have been cut, or schools could have been closed for a week.

The Court responded, “[w]here these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny for these courses are always open, no matter how unwise they may be.”

Although the Union’s petition for rehearing *en banc* was denied, one Judge dissented contending that breach of contract was chosen “[t]o avoid what politics would have rendered unpopular”—the raising of taxes or the reduction of funding for cultural activities.

The Fourth Circuit’s decision placing fiscal exigency above contractual observance by no means represents a majoritarian view.

In *Opinion of the Justices*, the Supreme Court of New Hampshire came to the opposite conclusion and declared that a proposed state furlough plan violated the Contract Clause because the state could address its financial needs through other policy alternatives not involving abrogation of existing contractual obligations.

While we are, at this writing, enjoying the benefits of a prolonged period of economic expansion and unprecedented growth in public revenues, history teaches us that years of plenty may be followed by years of famine.

Although the Court of Appeals asserted that the furlough plan was of general applicability, in effect it imposed a financial burden entirely upon public employees rather than the citizenry as a whole. Most of these employees, school teachers among them, were not paid according to private employment standards and consequently were hard-hit by this diminution in expected wages.

3. 6 F.3d at 1020.
4. 6 F.3d at 1026.
5. 6 F.3d at 1027.
6. The decision was criticized in *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1105n.6 (9th Cir. 1999) and in other authorities cited therein. *See also*, *Condell v. Bress*, 983 F.2d 415, 419-20 (2nd Cir.), *cert denied*, 507 U.S. 1032 (1993); *Carlstrom v. State*, 103 Wash. 2d 391, 396-47, 694 P.2d 1, 5-6 (1985).
There is a widely held belief that public employees trade-off compensation for job security. The Fourth Circuit’s decision illustrates, once again, that when times are tough and government coffers depleted, the assumed security of public school employment may be illusory, and lends credence to the cynical notion that public employees are second class citizens whose interests can be sacrificed for political considerations.  

2. Leslie Cowan v. Strafford R-VI School District, 140 F.3d 1153 (8th Cir. 1998).

Leslie Cowan was hired by the Strafford School District of Missouri as a second grade teacher on a probationary appointment subject to annual renewals.

When the School Board voted not to renew her contract for a fourth year, Ms. Cowan filed an action under Title VII of the Civil Rights Act of 1964, for religious discrimination, and for violation of her First Amendment Rights. She contended that her dismissal was the result of parents’ religiously based objections to her “magic rock” letter designed to encourage the pupils in her class. The letter read as follows:

“Dear Second Grader:

“You have completed second grade. Because you have worked so hard, you deserve something special and unique; just like you! That something special is your very own magic rock.

“The magic rock you have will always let you know that you can do anything that you set your mind to. To make your rock work, close your eyes, rub it and say to yourself three times, I am a special and terrific person, with talents of my own! Before you put your rock away, think of three good things about yourself. After you have put your rock away, you will know that the magic has worked.

“HAVE FUN IN THIRD GRADE!!!!"

During the ensuing summer vacation the school’s principal informed Ms. Cowan of the receipt of complaints from parents who had interpreted her letter as an endorsement of “magic practices,” and that at least two families, in protest, had decided to transfer their children to private Christian schools.

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8. The Baltimore decision obviously reaches far beyond the confines of public education and affects not only public employees generally, but all those who contract with municipalities and extend credit. See, Baltimore Teachers Union v. Mayor of Baltimore: Does the Contract Clause Have any Vitality in the Fourth Circuit? 72 N.C.L. REV. 1633 (1994).
The principal then held a staff meeting during which all teachers were informed of parents’ concerns over a perception that the school was teaching New Ageism. She recommended attendance at a seminar organized by a local pastor devoted to the subject of the “infiltration of ‘New Age’ thinking in the public schools.”

A jury found that the reason for the nonrenewal of Ms. Cowan’s Contract was the offended religious sensibilities of the community, and returned a verdict for Plaintiff on her Title VII religious discrimination claim in the amount of $18,000.00 and also found for her on her First Amendment claim without any additional damages.

However, the District Court denied Plaintiff’s motion for reinstatement to her former position, and, instead, elected to award Ms. Cowan two years “front pay.”

The Court of Appeals affirmed.

While there was evidence of dissatisfaction with Ms. Cowan’s teaching ability and the performance of her pupils on standardized tests, the Court of Appeals applying a “mixed-motives analysis,” concluded that Ms. Cowan had established that religion was the motivating factor in the employment decision, and that the School District had failed to carry its burden of persuasion that it would have made the same decision even in the absence of the illegal religious animus.

In the three quarters of a century that has passed since the Scopes trial over the teaching of revolutionary theory, the debate has continued unabated with the supporters of Creationism contending that Darwinism offends their belief based on a literal interpretation of the scriptures. The multiplication of denominations and religiously oriented sects has broadened the field of conflict between majoritarian views expressed in the classroom and contrary minority beliefs.

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11. Reinstatement was held to be an inappropriate remedy in view of the evidence that the teacher-principal relationship had been “so badly damaged” that it could not be reestablished, and that in the absence of an appropriate working relationship the school’s ability to function properly would be impaired.


13. 42 U.S.C. § 2000e-2(a)(1) makes it unlawful for an employer to discriminate against an employee “because of such individual’s . . . religion . . . .” In earlier decisions the 8th Circuit had interpreted the statute as requiring a plaintiff to prove the holding of a bona fide religious belief and an adverse employment action was taken because of this bona fide religious belief.

The concurring Judge noted that Ms. Cowan had not suggested that she had a religious belief relating to magic rocks, and that because of such a belief her employment was terminated.

However, at least one District Court has held that a claim for religious discrimination was properly pled based upon an allegation that co-workers opposed Plaintiff’s view of abortion, and that the employer’s adverse employment action against her was taken in response to her co-workers’ religious disapproval. Turick v. Holland Hospitality Inc., 842 F. Supp. 971 (W.D. Mich. 1994), aff’d in part and rev’d in part on other grounds, 85 F.3d 1211, (6th Cir. 1996).
Although, under the Constitution, public schools should not endorse or support religious doctrine, neither should they be obliged to tailor their educational mission to fit sectarian dogma. To do otherwise would require teachers in our public school system to conform to the most rigidly held of minority views. Remember, that the showing of Mickey Mouse cartoons was banned in China because under the teachings of Confucious, it was thought “unsuitable” to portray talking animals.

Undoubtedly, in a society where fairy tales are imbedded in the culture, and “Harry Potter” books about an imaginary boy wizard have become runaway best sellers, Ms. Cowan, who was new to the community, could not have known that her “magic rock” letter would offend religious sensibilities.

This case serves as a reminder that one of the most important safeguards against undue pressures from minority constituencies that teachers enjoy under a collectively bargained arbitration procedure is that the validity of adverse employment actions will be determined by an impartial neutral isolated from, and immune to, such community antagonisms.


In 1981 the Illinois legislature had authorized the State’s School Boards to enter into agency shop agreements if the fees charged non-union members were limited to “their proportionate share of the cost of ‘the collective bargaining process and contract administration.’” The limitation was mandated by earlier Supreme Court decisions in order to avoid collision with the First Amendment rights of Free Speech and Association that protect objecting employees from supporting ideological causes championed by the collective bargaining agent.

A group of non-union teachers sued the Chicago Teachers Union and the Chicago Board of Education alleging that the procedures utilized by the Union to collect its “fair share” or “agency” fee were constitutionally defective. In Chicago Teachers Union v. Hudson, the Supreme Court agreed with them.

Unions collecting agency shop fees from non-members in the bargaining units they represent were required, so the Supreme Court declared, to adopt certain procedural safeguards designed to protect objectors’ First Amendment rights. Unions were to inform the non-members of the method of calculating

14. 922 F.2d at 1307.
the fee, and offer them an opportunity to challenge the amount of the fee before
a neutral authorized to decide the issue.

Non-members might be charged only for activities (1) relevant to the union’s
collective bargaining duties, (2) supportive of the Government’s interest in pro-
moting labor peace and avoiding creation of a class of “free riders,” and (3) not
significantly burdensome upon the Free Speech rights of the objectors.

To avoid the risk that non-members’ funds would be used even temporarily for
Constitutionally impermissible purposes, the Court decreed that the disputed fees
were to be placed in an escrow account while a challenge was pending as to the
appropriate scope of union activities for which non-members could be assessed.

Because these procedures had not been implemented by the Teachers Union,
the Supreme Court remanded the cause to the District Court to oversee the
Union’s development of an appropriate assessment process.

The revised fair share allocation procedure subsequently adopted by the Union
survived a second round of appeals and was validated by the Seventh Circuit.

The general guidelines established by the Supreme Court in *Hudson* did not,
however, resolve the question of which particular activities’ costs were to be
wholly or partially charged *pro rata* to non-members and which were to be
excluded from the computation of the dissenters’ agency fee obligations alto-
gether.

These matters were to be determined on a case-by-case basis—a policy that
effectively involves the courts in the micro-management of union expenditures
and arguably requires an injudicious commitment of judicial time.

The Supreme Court’s decisional scheme and substantive restrictions also
burden labor organizations in a three-fold manner: First, unions are obliged to
undertake complex and not inexpensive accounting measures. Second, unions
are forced to expend significant sums in defending court challenges to their
assessments. Thus, under the Sixth Circuit’s analysis, the prior decision of an
arbiter or other neutral as to correctness of the fee calculation is not final and
binding and is subject to judicial review. In this regard, teachers’ unions have
been disproportionately involved in agency fee litigation.

Third, and perhaps most hobbling to teachers’ unions, is the Supreme
Court’s conclusion that the cost of political lobbying and campaigns for edu-

17. Indeed, in *Bromley v. Michigan Education Association—NEA*, 82 F.3d 686 (6th Cir. 1996), cert.

denied, 519 U.S. 1055 (1997), the Sixth Circuit held that the District Court was not justified in accepting an
arbiter’s endorsement of the union’s summary cost presentation and refused to allow the dissenters dis-
covery rights in the court of the materials on which the calculations were based.

18. See, e.g., *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2nd Cir., 1987); *Ping v.
National Education Association*, 870 F.2d 1369 (7th Cir. 1989); *Gwirtz v. Ohio Education Association*, 887
F.2d 678 (6th Cir., 1989), cert. denied, 494 U.S. 1080 (1990); *Grunwald v. San Bernardino Unified School
District*, 917 F.2d 1223 (9th Cir. 1990); *Bromley v. Michigan Education Association—NEA*, 82 F.3d 686 (6th
Cir., 1996); *Jibson v. Michigan Education Association—NEA*, 30 F.3d 723 (1994); *Knight v. Kenai Peninsula
Borough School District*, 131 F.3d 807 (9th Cir., 1997); *Illinois Federation of Teachers v. Illinois Education

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cational reforms as well as of public relations activities designed to enhance the reputation of the teaching profession generally, are outside the context of contract ratification and administration and therefore non-chargeable to dissenters."9


The Board of Education of the Piscataway Township, New Jersey, had developed an affirmative action policy responsive to a New Jersey State Board of Education regulation. The Township's policy committed it to "make a concentrated effort to attract... minority personnel for all positions so that their qualifications can be evaluated along with other candidates."

For this purpose the policy provided that:

In all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program [members of racial, national origin or gender groups identified as minorities for statistical reporting purposes by the New Jersey State Department of Education] will be recommended.

The same criteria was applied in layoff decisions.

At all relevant times black teachers at Piscataway Schools were neither under-represented nor under-utilized in comparison to their percentage in the relevant work force.

In 1989 one position in the Business Department at the Piscataway High School was to be eliminated. Under New Jersey law, layoffs were to be effected strictly in reverse order of seniority, and the School Board lacked discretion to choose between employees except in the instances of a tie in seniority. In the past, the Board had broken ties by casting lots. Two of the teachers in the Business Department, one white, one black, had begun their employment on the same day and had the fewest years of service. Because the black teacher, Ms. Debra Williams, was the only African-American in the Business Education Department, the Board made a discretionary decision to break the tie by applying its affirmative action policy for the educational objective of assuring a staff...


that was culturally diverse so that all students could come into contact with persons of different backgrounds. Accordingly, the Board voted to terminate the employment of the white teacher, Ms. Sharon Taxman.

Ms. Taxman filed a charge of discrimination with the Equal Employment Opportunity Commission. When attempts at conciliation failed, the United States filed suit under Title VII, against the Board and Ms. Taxman intervened. The District Court found in favor of the plaintiffs and the Board appealed.

In *Adarand Constructors, Inc., v. Pena,* the Supreme Court adopted a strict scrutiny analysis which requires that racial classifications "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Although in *Regents of the University of California v. Bakke* the Supreme Court seemingly endorsed "diversity" as a permissible criterion for student selection in Equal Protection cases, the Court had rejected a "role model for minority students" justification for preferential protection against layoffs accorded to minority teachers in *Wygant v. Jackson Board of Education.* However, Justice O'Connor in her concurring opinion distinguished the goal of providing role models from the goal of promoting racial diversity among faculty, and explicitly left open the possibility that the "diversity" objective might be sufficiently compelling to pass Constitutional muster.

Nonetheless, applying the strict scrutiny standard, race conscious policies of admission to higher education institutions have been struck down.

The United States Supreme Court in *United Steelworkers v. Weber* had held that Title VII's prohibition against racial discrimination was not violated by affirmative action plans that, as the Third Circuit put it, "have purposes that mirror those of the statute" and do not "unnecessarily trammel the interests of the [non-minority] employees."

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21. 515 U.S. 200 (1995); *Accord City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). (14th Amendment requires a state or local governmental unit to demonstrate a compelling interest in order to award government contracts based on race).
22. 515 U.S. at 235.
25. 476 U.S. at 288. A few courts had found "diversity" to be a valid "Equal Protection" objective. *See, e.g., Zaslawsky v. Board of Education of Los Angeles, 610 F.2d 661, 664 (9th Cir. 1979).*
26. *See, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir., 1994) (remediying the present effects of past discrimination may justify a race conscious program, but the effects caused by the state actor's past discrimination must have been of "sufficient magnitude" to justify the program).*
28. 91 F.3d at 1556.
29. 443 U.S. at 208.
Applying the Weber test to the pending case, a majority of the members of the Third Circuit held that the affirmative action policy had no "remedial purpose" because it was not adopted "with the intention of remedying the results of any prior discrimination or identified underrepresentation of minorities within the Piscataway Public School system."\(^\text{30}\)

The majority reasoned that "race cannot be a factor in employer decisions about hires, promotions, and layoffs," unless it was part of a plan to eliminate "the effects of past discrimination in the work place."\(^\text{31}\)

Finding that there had been no past employment discrimination in need of a remedy, and that there had been no underrepresentation of blacks within the School District's teaching staff as a whole, the Court of Appeals upheld the District Court's decision that the affirmative action plan applied by the Board to layoff plaintiff was invalid under Title VII.\(^\text{32}\)

The Third Circuit's opinion has proved influential,\(^\text{33}\) and its reasoning has also been followed in adjudicating challenges to race-conscious admissions' policies.\(^\text{34}\)

The Third Circuit dissenters viewed the issue presented to the Court as "whether Title VII required a School Board, faced with which of two equally qualified teachers should be laid-off, to make its decision through a lottery or whether it permitted the School Board to factor into its decision its bona fide belief, based on its experience with secondary schools, that students derive educational benefit by having a black faculty member in an otherwise all-white department."\(^\text{35}\)

Criticizing the majority opinion as looking backward, rather than forward towards "combating the attitudes that can lead to future patterns of discrimination," the dissenters argued that it is in the educational institutions where the youth can be exposed to a multitude of ideas and impressions that will strongly influence their future development and provide an opportunity to eradicate misconceptions and stereotypical categorizations which fuel future patterns of discrimination.\(^\text{36}\)

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30. 91 F.3d at 1562.
31. 91 F.3d at 1557-58.
33. See, Brewer v. West Irondequoit Cent. School District, 32 F. Supp.2d 619, 628 (W.D.N.Y. 1999); Eisenberg ex rel. Eisenberg v. Montgomery County Public Schools, 197 F.3d 123, 130 N.17 (4th Cir. Md., 1999); Lesage v. Texas, 158 F.3d 213, 221 (5th Cir. Tex., 1998); Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486 (3rd Cir. 1999) (Diversity not a legitimate Title VII goal).
34. See, Wessmann v. Gittens, 160 F.3d 790 (1st Cir., 1998); Ho v. San Francisco Unified School District, 147 F.3d 854 (9th Cir., 1998); Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999) (Diversity not a legitimate reason for racially based student transfer policy); Wooden v. Board of Regions of the University System of Georgia, 32 F. Supp.2d 1370 (S.D. Ga. 1999) (Diversity not a legitimate reason for racially based student admission policy).
35. 91 F.3d at 1571-72.
Thus, a School Board could reasonably conclude that “an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all white, faculty. . . . It is one thing for a white child to be taught by a white teacher that color, like beauty, is only ‘skin deep’; it is far more convincing to experience that truth on a day-to-day basis during the routine ongoing learning process.”

Finally, the dissenters wrote that Title VII’s limitations on an employer’s voluntary affirmative action program was at least as broad as that permitted by the Equal Protection Clause of the Constitution to which all public employers are subject.

The dissenters in Taxman, it should be noted, did not have to face the more complex issue of a conflict between the seniority terms of a collective bargaining contract and an affirmative action policy, because the agreement there expressly adopted the District’s procedure. In any event, even assuming that the “diversity” concept is encompassed within the scope of Title VII, an issue that must ultimately be decided by the Supreme Court, the unanswered question is whether it requires proportionate representation in every school department or only within the faculty considered as a whole.

Perhaps if, as seems likely, more and more minority members will enter the teaching ranks, the question will not need an answer.

In contrast to Taxman, Jacobson v. Cincinnati Board of Education, held that a teacher transfer policy adopted by the Cincinnati Board of Education to insure that the faculty of each school reflected a system-wide racial balance did not violate the Fourteenth Amendment Equal Protection rights of the plaintiff involuntary transferees.

The Board of Education’s policy provided that the percentage of black teachers in any school should not be 5% greater or less than the percentage of black teachers throughout the system. Implementation of the policy restricted the ability of some teachers to voluntarily transfer to other school buildings, and required the reassignment of others.

At the time, the Board was under a consent degree adopted as part of the settlement of a suit alleging that the school system had been unlawfully segregated. The decree required the Board to maintain and enforce the policy.

Both white and black teachers at an elementary school whose minority representation was below the minimum standard challenged the transfer policy as unconstitutionally racially based. The white plaintiffs were transferred to

36. 91 F.3d at 1572.
38. At the time of the lawsuits, the collective bargaining agreement provided that:

“teacher requests for transfer will be honored if positions are available and the teacher is qualified for a particular vacancy, provided that the transfer is consistent with the racial balance of the staff.”
another school and replaced by black teachers. The black plaintiffs were denied
their request to transfer out.

The Court of Appeals read Supreme Court decisions as allowing school
authorities to implement an educational policy prescribing a ratio of white to
minority students in order to prepare students for life in an pluralistic society.
It followed that it was equally legitimate to allow a school board to assign fac-
ulty to achieve a ratio reflecting the racial composition of the system's teaching staff.

Although the policy adopted by the Cincinnati Board was “race conscious”
in the sense that it allowed the Board to determine the schools at which a
teacher would teach solely on the basis of his or her race, the policy was racially
neutral in its application because it was applied impartially to both white and
black teachers without disparate racial impact.\(^3\)

The plaintiffs failed to demonstrate how their interest in selecting the schools
to which they were assigned outweighed the Board’s interest in fostering an
integrated, pluralistic school system.

5. Knox County Education Association v. Knox County
Board of Education, 158 F.3d 361 (6th Cir., 1998), cert. denied,
120 Sup. Ct. 46 (1999).

In 1989 the Knox County School Board adopted a workplace substance
abuse policy which provided not only for the testing of any employee upon
“reasonable suspicion of drug or alcohol impairment while at work,” but also
for suspicionless testing for all individuals who apply for, transfer to, or are
promoted to “safety sensitive positions.” The County’s 3,200 teachers were
included among those who were deemed to hold “safety sensitive positions.”

In the seven years that followed, two teachers had tested positive for drug or
alcohol use on the basis of “reasonable suspicion,” and one teacher applicant
was found to have tested positive in a pre-employment test.

The Education Association brought suit contending that the program was
violative of the Fourth Amendment’s prohibition against unreasonable search-
es and seizures.

The evidentiary record included testimony that security officers were not
available for every school and that teachers and principals at such schools were
“important to school security,” and that detecting drug use and possession of a
weapon were among teacher responsibilities. But, the record also included evi-
dence that no faculty drug or alcohol abuse problem existed, and that no secu-
ritv incident had been found to have been attributable to teacher negligence.

\(^3\) Because the policy did not offer “preferences based on race,” the Court concluded that it was not
subject to a “strict scrutiny” standard of review and withstood challenge under the less stringent criteria in
that it bore a “rational relationship to a legitimate Government objective,” or served an “important govern-
mental objective” and was substantially related to the achievement of that objective.
Ordinarily, a search is reasonable, and hence Constitutional, if it is conducted pursuant to a judicial warrant issued upon a finding of probable cause—that is, "individualized suspicion of wrong doing."

By definition suspicionless testing is inherently suspect, and requires a showing of special needs, beyond the normal need for law enforcement.

Thus, in *Skinner v. Railway Labor Executives' Association*, the Supreme Court had held that:

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of suspicions.

And, in *National Treasury Employees Union v. Von Raab*, the Supreme Court affirmed that the Constitutionality of a suspicionless drug testing program depends on a "balancing test":

... [if the intrusion serves special needs] it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

The Knox County District Court, in conducting the balancing test, found that the State's interest in assuring student safety was diminished by the lack of evidence of drug and alcohol abuse among students or faculty, and by the fact that no harm, or threat of any harm, to the children had occurred because teachers were in an impaired condition. On the other hand, the District Court concluded the testing procedures adopted were "intrusive" and infringed upon legitimate expectations of privacy held by the teachers.

In consequence, the District Court adjudged that the balance tilted in favor of protection of individual privacy interests, and held that the suspicionless testing program violated the Fourth Amendment.

On appeal, the Sixth Circuit came to the opposite conclusion, finding that the public's interest in testing outweighed the teachers' privacy interests, and so reversed.

Despite the absence of evidence that the teachers, being targeted for testing, had exhibited an apparent drug problem, the Court opined that the community had an especial interest:

in reasonably insuring that those who are entrusted with the care of our children will not be inclined to influence children—either directly or by example—in the direction of the illegal and dangerous activities which undermine values which parents attempt to instill in children in the home. For a great portion of a child's life, teachers occupy a position of immense direct influence on a child. Teachers are not simply role models for children through their own conduct and daily direct interaction with children they influence and mold the perceptions, and thoughts and values in children.

Noting that under Tennessee law teachers are in a loco parentis status with responsibility to "protect students from harm while in their custody," the Court insisted that this duty places teachers on the "frontline' of school security, including drug interdiction." By this the Court meant that teachers are in the best position to determine if a child is involved in drugs and are responsible for reporting observance of prohibited activity as part of their supervisory responsibilities.

The Sixth Circuit believed that the obligation to report assaults was particularly significant in light of the recent school yard shootings in Jonesboro, Arkansas and media reports of children being found in possession of dangerous weapons while at school.

These circumstances supported both the finding that there was a special governmental interest in the protection of school children and that teachers occupied safety-sensitive positions. On this latter issue the Court noted that a variety of occupations including gas meter repairmen, railroad engineers, nuclear power plant workers, seamen operating oil tankers, petro-refining process technicians, firefighters, pipeline operators, and police officers had all been held to occupy safety sensitive positions because the discharge of their duties was fraught with the risks of injury to others so that even a momentary lapse of attention could have disastrous consequences.

So too, the Court thought, teachers' "momentary lapse of attention" would have the same "disastrous consequences" because children could harm themselves or others while playing at recess or choking while eating lunch in the cafeteria.

In reaching this conclusion, the Court went counter to at least three previous trial court decisions that had held that teachers do not occupy safety-sensitive

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42. 158 F.3d at 375.
43. Id.
44. 158 F.3d at 377.
45. The Court did not consider whether the logic behind the choosing of this example would also place cafeteria helpers in "safety sensitive positions." Cf Aubrey v. School Board of Lafeyette Parish, 148 F.3d 559, 564 (5th Cir. 1998) (Elementary school custodian is "safety sensitive" employee).
As to whether teachers had a legitimate expectation of privacy, the Court acknowledged that "urination is an intensely private and personal act." However, the Court held that teachers were participating in a "heavily regulated industry" so that their privacy expectations were diminished. Furthermore, the Court found that the urine samples were taken without monitoring except in cases of suspected adulteration and the drug test results were kept confidential.49

The Court summed up its findings in these terms:

These public interests clearly outweigh the privacy interests of the teacher not to be tested because the drug-testing regime adopted by Knox County is circumscribed, narrowly-tailored, and not overly intrusive, either in its monitoring procedures or in its disclosure requirements. This is particularly so because it is a one-time test, with advance notice and with no random testing component, and because the school system in which the employees work is heavily regulated, particularly as to drug usage.50

The Court’s vindication of the suspicionless drug screening policy was surprising because the procedure tested for eighteen different drugs, eleven of which can be found in common medicines and are not drugs included within the Department of Transportation’s testing protocols. These include “Schedules IV and V” drugs that have an accepted medical use and a lower potential for abuse.51

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49. The Court found assurance of confidentiality even though the test results could be released and relied upon by the Board of Education, when relevant, in any administrative or court action by the employee or in any disciplinary proceeding resulting from violation of the anti-drug policy.
50. 158 F.3d at 384.
51. The “Comprehensive Drug Abuse Prevention and Control Act of 1970” and the state counterpart, the Uniform Controlled Substances Act of 1970 initially classified 145 substances into five schedules depending upon their relative potential for abuse and their acceptance for medical use. Additional substances including so called “designer drugs” were added, and the 1970 Uniform Act was superceded by the “Uniform Controlled Substances Act of 1990.” Schedule I drugs, including marijuana, have a “high potential for abuse” and no “accepted medical use.” Schedule II drugs, including opiates and cocaine, also have a high potential for abuse, but have an accepted medical use. Schedule III drugs have a potential for abuse less than the drugs or other substances in Schedules I and II and have an accepted medical use. Schedule IV drugs have a low potential for abuse relative to the drugs or other substances in Schedule V drugs have a low potential for abuse relative to substances in Schedule IV and have a currently accepted medical use.
Not only are there no “positive thresholds” established for these drugs, but the Department of Health and Human Service’s certification of laboratories does not extend to the testing of them. “Consequently,” as the Department of Transportation noted, “the uniform standards crucial to the accuracy and integrity of the testing process, which courts have relied upon in upholding Federally—required drug testing are not now in place for the additional drugs.”

The Sixth Circuit did express concern over the portion of the testing relating to these additional drugs, but found this shortcoming insufficient to render the test unconstitutional. In part, the Court relied upon the protection against “false positives” available through the Medical Review Officer’s assessment of the individual’s medical history to determine if a positive result could have been occasioned by legally prescribed medication.

The Sixth Circuit’s attenuated definition of “safety sensitive positions” to include teachers seems driven by the judicial perception that teachers, as a class, are no different from the “population at large.” This cynical view of the profession is unsupported by any reference to statistical data, and the suspicion of an existing problem among the Knox County Schools’ faculty that might justify a different conclusion is refuted by the uncontradicted evidence.

As frustration builds over the seeming inability to win what has been characterized as the “war on drugs,” legislative and administrative demands for random testing of teachers are likely to increase. Implicit in such calls is the belief that teachers are susceptible to the siren call of the drug culture, are in need of such monitoring and must be policed.

Not only is this view demeaning of the profession, but contributes to the erosion of public confidence in the public education system. Moreover, quite aside from the indignity of having to be subjected to the required testing procedure, teachers may well be concerned about yet another assault upon the Constitutional protection of personal privacy.


In two principal cases consolidated for decision, the Supreme Court of Illinois materially expanded the scope of collective bargaining by holding that reductions in force, and the development and implementation of teachers’ evaluation plans could qualify as mandatory subjects of bargaining under the Illinois Education Labor Relations Act.

52. 49 C.F.R. Part 40.
53. The Board had argued that “there is no indication that teachers are unaffected by the drug use affliction that affects our country as a whole.” 158 F.3d at 374.
The first case involved the Union's protest of the unilateral elimination of three full-time teaching positions in 1997 by a District Board of Education as a cost-saving measure because of declining enrollment and the District's fragile financial condition. The District and the Teachers' Association had not bargained about reductions in force, and no provision in their agreement touched on the matter.

In the second case, the collective bargaining agreement between a District and the Association representing its certified personnel provided that an employee evaluation plan was to be developed in cooperation with the teachers' bargaining representative as mandated by the Illinois School Code.

Various proposals were presented and discussed at several meetings between the committees selected by the parties. Finally, the District presented a draft plan which contained terms to which both the School District and Union committees had agreed. However, two months thereafter, the District formally adopted a revised plan which included terms which had never been discussed by the committees as well as others which had been considered but omitted from committees' recommended plan.

Unfair labor practice charges alleging failures to bargain in good faith were filed by the Unions in both cases with the Illinois Education Labor Relations Board.

The Board determined that the reduction in force was not a mandatory subject of bargaining, but that the development and implementation of a teachers' evaluation plan was.\textsuperscript{1}

Petitions for review resulted in the Illinois Appellate Tribunal reversing the Board's decisions in both cases, and concluding that a reduction in force for economic reasons was a mandatory subject of bargaining, but that the implementation and impact of the teachers' evaluation program was not.

The Illinois Supreme Court granted review and applied a three part "benefits/burden" balancing test to the competing interests.\textsuperscript{2}

Initially, the determination of whether a matter is one involving "wages, hours and terms and conditions of employment" is left to the Illinois Education Labor Relations Board. If the Board determines that it does implicate these subjects, then the Board must decide whether the matter is also one of "inherent

\textsuperscript{1}The Illinois Act excluded from the employer's duty to bargain "matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees." The employer, however, was "required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives." ILL. REV. STAT. 1987, ch. 48, par. 1704.

\textsuperscript{2}In this respect, the Court was persuaded to follow the interpretive lead of Courts in other States having similar statutes—Florida, Massachusetts, Michigan, Wisconsin and Pennsylvania.
managerial authority.” If so, then the Board is obligated to balance the benefits that the bargaining will bring to the decision-making process with the burdens that bargaining imposes upon the employer’s authority. These decisions, the Illinois Supreme Court predicted, are “very fact-specific questions, which the . . . [Board] is eminently qualified to resolve.”

Because in the instant case, the Board had not used the three-part test in analyzing whether teacher evaluation plans and reduction in force decisions were mandatory bargaining subjects, the cases were remanded for further proceedings.

Utilizing the Illinois Supreme Court’s formulation, the Labor Board then reaffirmed its decision that teacher evaluation plans were mandatory subjects of bargaining, but reversed its earlier position that reduction in force orders were not.

This not uncommon approach taken by the Illinois Supreme Court effectively passes the buck to the Labor Board to make scope of bargaining determinations without any real guidance, other than decisions by other jurisdictions on the issue.

Unlike private sector determinations, the scope of bargaining in public education labor relations requires consideration of two special competing interests. On the one hand, such bargaining implicates the expertise of the professional employees in the school system who have particular competence not only in defining the product to be delivered, but also in many other matters of educational policy such as the appropriate class size to maximize learning opportunity. On the other hand, it affects the right of the voting public to allocate government resources. These matters unfortunately appear to have been neglected in the Court’s analysis.

The issue is not easily resolved, and the conflict can be expected to be replayed in every state.


In the belief that the faculty of its state universities was devoting too much time to research at the expense of classroom teaching hours, Ohio enacted legislation providing that its Board of Regents, in cooperation with the universities,
was to develop standards for instructional work loads. The Boards of Trustees of the state universities were then to adopt faculty work load policies consistent with those standards. The legislation nullified statutory provisions which had made faculty work loads at public universities a proper subject for collective bargaining, and declared that the Trustee developed work load policies prevailed over any conflicting provisions of collective bargaining agreements.

When the Central State University administration adopted such a work load policy and notified the bargaining agent for its faculty that it would not bargain over the issue of work load, the Union filed a complaint in the Ohio trial court for injunctive relief alleging that the statute violated the Equal Protection Clauses of the Ohio and United States Constitutions by making only one class of public employees ineligible to bargain over their work load.

Despite the State’s insistence that uniformity in the assignment of teaching hours was essential to improve instruction, and that collective bargaining produced variations in work load in departments at different universities having the same academic mission, no evidence was introduced to prove that collective bargaining over work load lessened in any degree the faculty time spent in undergraduate teaching. Consequently, the Ohio Supreme Court concluded that the State had failed to establish a “rational basis” for singling-out university faculty members as the only public employees precluded from bargaining over their work load.

The United States Supreme Court granted certiorari and reversed. It began its analysis with the observation that a classification which neither involves “fundamental rights” nor proceeds along “suspect lines” is Constitutionally valid if there is a “rational relationship between the disparity of treatment and some legitimate governmental purpose.” Because the objective of the statute was to increase the time spent in the classroom by faculty, excluding work load determinations from collective bargaining was a rational step towards achieving the objective. The Court characterized the legislation as reflecting the Ohio General Assembly’s policy choice that the attainment of work load uniformity was a more important goal than determining workload through a system of collective bargaining.

The absence of evidence that collective bargaining on the subject had led to the decline in faculty classroom time did not deprive the legislative decision of rationality. Future collective bargaining over work load could result in reduced classroom hours. This possibility provided a sufficient, prophylactic reason to

sustain the exclusion of university professors from the otherwise generally applicable collective bargaining scheme for public employees.\textsuperscript{38}

However, although as a matter of Federal Constitutional practice, the legislation withstood scrutiny, the Supreme Court left the question of the statute's validity under Ohio's Constitutional Equal Protection counterpart for the State Court's determination. On remand, the Ohio Supreme Court dismissed, holding that the State Constitution was to be construed identically with the Federal.\textsuperscript{39}

The import of this decision for public school teachers is clear. It provides not only an authoritative interpretation of the Equal Protection clause, but also persuasive support for like construction of the Equal Protection provisions of state constitutions. It thereby encourages state legislatures to withdraw work load issues—for example, the number of class assignments, and the amount of released time—from the scope of collective bargaining between teachers and school districts, while similar issues remain proper subjects of bargaining for other public employees.


The New Jersey Constitution gives private sector employees the right to organize and bargain collectively. When the South Jersey Catholic School Teachers Organization petitioned the Catholic Diocese of Camden for recognition as the duly elected representative of the lay teachers employed by the elementary schools under the Diocese's jurisdiction, the Diocese responded that recognition would be granted only if the Union agreed to certain "minimum standards" that vested in the Diocese "complete and final authority to dictate

\textsuperscript{38} In dissent, Justice Stevens noted:

The question posed by this case is whether there is a rational basis for discriminating against faculty members by depriving them of bargaining assistance that is available to all other public employees in the State of Ohio. Even the Court's speculation about the possible adverse consequences of collective bargaining about faculty workload does not explain why collective bargaining about the workloads of all other public employees might not give rise to the same adverse consequences arising from lack of state-wide uniformity. Indeed, I would suppose that the interest in protecting the academic freedom of university faculty members might provide a rational basis for giving them more bargaining assistance than other public employees. In any event, no one has explained why there is a rational basis for concluding that they should receive less.

\textsuperscript{39} See, 87 Ohio St. 3d 55, 717 N.E.2d 286 (1999).
the outcome of any dispute and prohibited the union from assessing dues or collecting agency fees from non-union members.”

The Union refused to accept the conditions believing that it would be sacrificing a number of lay teacher rights prior to beginning the collective bargaining process.

The Union then instituted suit in the New Jersey courts to compel the Diocese to engage in collective bargaining.

The trial court sustained the jurisdictional objections of the Diocese holding that lay teachers in church-operated elementary schools could not be subject to the State’s bargaining law because its application to them would offend both the Free Exercise and Establishment of Religion clauses of the First Amendment.

The Appellate Division reversed and the New Jersey Supreme Court affirmed the applicability of the statute to church supported schools, but, in deference to the two Religion Clauses, limited the scope of negotiations to wages, certain benefit plans and any other secular terms and conditions of employment.

Relying upon the United States Supreme Court’s analysis in Agostini v. Felton, a decision that upheld New York City’s assignment of public school teachers to parochial schools to provide remedial education to disadvantaged students under Title I of the Elementary and Secondary Education Act of 1965, the New Jersey Supreme Court concluded that the application of state labor law did not violate the Establishment Clause because it promoted a secular legislative purpose, neither advanced nor inhibited religion and did not foster excessive government entanglement with religion.

Enhancing the economic welfare of private sector employees by affording them the right to organize and bargain collectively satisfied the secular legislative purpose requirement. As to the prohibition against advancing or inhibiting religion, the Court believed that bargaining over some secular terms and conditions of employment could proceed in a neutral fashion. Indeed, the Diocese since 1984 had negotiated a series of collective bargaining agreements with its lay high school teachers.

Finally, in the absence of any continued State surveillance of the collective bargaining process and any dictate from the State forcing the Diocese to negotiate terms that would affect religious matters, there was no excessive entanglement as would offend the Establishment Clause. Unlike the National Labor Relations Act’s regulatory scheme which requires the National Labor Relations Board to act as a “monitor and referee,” New Jersey’s enactment did not create

60. 150 N.J. at 582, 696 A.2d at 713.
an administrative agency to monitor the parties’ negotiations and exercise investigatory, prosecutorial and adjudicatory authority.

Turning to consider the claim of conflict with the Free Exercise Clause, the New Jersey Court thought the issue had been settled by Employment Division v. Smith, where the United States Supreme Court had held that a generally applicable and otherwise valid regulatory law that was not specifically intended to regulate religious conduct or belief and that only “incidentally burdened” the free exercise of religion, did not violate the Free Exercise Clause of the First Amendment.

Because the New Jersey State Constitution was a generally applicable civil law, neutral in its application and not intended to regulate religious conduct or belief, any burden on the Free Exercise of Religion was only “incidental.”

But, what if a state labor law did provide for administrative agency oversight? Would that fact require a different result? The question was answered in New York State Employment Relations Board v. Christ The King Regional High School.

Christ The King Regional High School is a Roman Catholic Secondary School which, until 1976, had been operated by the Diocese of Brooklyn, but thereafter “spun-off” as an independent entity.

The School’s lay faculty of teachers of secular subjects had been represented by the Lay Faculty Association. In 1981 the Association attempted to negotiate a collective bargaining agreement. When impasse was reached, the Union began a work stoppage, and the School thereupon ended negotiations and discharged the striking employees.

The State Employment Relations Board found the School had violated the State’s Labor Relations Act by refusing to bargain in good faith and improperly discharging the striking teachers.

When the Board petitioned to enforce its remedial order, the School claimed Constitutional immunity.

Because the State Labor Relations Act was a “facially neutral, universally applicable and secular regulatory regimen... intended to improve labor relations by encouraging good-faith collective bargaining,” the New York Court of Appeals concluded that its application to the School did not abridge the School’s rights under the Free Exercise Clause of the First Amendment. Citing decisions that had held that state labor relations acts do not implicate religious conduct or beliefs or purport to impose any express or implied restrictions on

63. 90 N.Y.2d 244, 682 N.E.2d 960 (1997).
64. 90 N.Y.2d 249, 682 N.E.2d 964.
religious beliefs or activities, the Court concluded that any "claim of burden . . . is plainly incidental, inchoate and speculative." 66

The Court gave short shrift to the School's argument that the New York Labor Relations Act would interfere with the fundamental rights of parents to direct the religious education of their children. The Court succinctly observed that the rights of parents in the education of their children are different from the rights of a religiously affiliated employer to control and exercise authority over lay employees.

Finally, considering the School's Establishment Clause contentions, the Court concluded that the Board's relationship with the religious schools over mandatory subjects of bargaining did not involve such extensive surveillance as to constitute excessive administrative entanglement. The Board supervision over the collective bargaining process was neither comprehensive nor continuing.

In so holding, the Court had to reject the Seventh Circuit's opinion in Catholic Bishop v. National Labor Relations Board. 67 There, the Court of Appeals had held that the National Labor Relations Board could not exercise jurisdiction over church-operated schools because of the "chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools." 68

Instead, the New York Court found the Second Circuit Court of Appeals decision in Catholic High School Association v. Culbert, 69 to be definitive. The Second Circuit Court had concluded that because a state labor board could not compel the parties to agree on specific terms, but only to return to the bargaining table and bargain in good faith on secular subjects, its oversight function could not be deemed to constitute an excessive entanglement.

The New York Court of Appeals warned, however, that "if, on individual application in the collective bargaining process or implementation, a line is crossed or the wall of separation is breached, that is the time and circumstance to assert and have adjudicated such arguably actual infringements." 70

On this score the School had argued that one of the dismissed striking teachers whom the Board had ordered reinstated had been discharged for "unchristian behavior." Because the Board had refused to accept the proffered religious reason for the firing, the School claimed that the Board had exhibited its inability

66. Id.
67. 559 F.2d 1112, (7th Cir. 1977) aff'd on other grounds, 440 U.S. 490 (1979). The United States Supreme Court affirmed on the statutory interpretation ground that Congress had not intended to bring teachers in church operated schools within the jurisdiction of the Board, and therefore found it unnecessary to reach the Constitutional issue.
68. 559 F.2d at 1124.
69. 753 F.2d 1161 (2nd Cir. 1985).
70. 90 N.Y.2d 252, 682 N.E.2d 966.
to separate the secular from the religious, and thereby had actually infringed upon Constitutionally protected religious relationships at the School.

While the New York Court of Appeals acknowledged that the First Amendment prohibits the State Board from inquiring into an asserted religious motive, the Board retained the authority to determine whether the religious motive was pretextual or insubstantial.

The New York Court of Appeals determined that the "conclusory characterization of the religious motive for the discharge enjoys no record support," and upheld the Board's reinstatement order.

The relationships of both church supported and non-sectarian private schools to the public educational system have become even more complex as a result of the development of voucher programs, the publicly funded, privately operated "alternative schools" movement and the legitimizing of public school teacher assignments to parochial institutions for remedial education purposes.

Subjecting religiously affiliated schools to state labor policy adds to that complexity. The jurisprudence developed in dealing with issues pertaining to the secular subjects of wages, hours and working conditions in the church school context will inevitably influence decisions on the same issues arising in the public school context, and as the public school education unions come to represent the lay faculty of religious schools, the linkages between labor relations in the public schools and in the private systems will grow even closer.


In a minority of jurisdictions (located primarily in the south and southwest) which do not provide for collective bargaining by public school teachers, when the legislative body fails to enact a satisfactory wage and benefit package, teacher unions have attempted to exert pressure to have their demands met through the strike weapon.

The common law had traditionally held that public employees did not have the right to strike, and were subject to injunctions and damage liability. Although some States have adopted legislation permitting non-uniformed employees to strike when alternative dispute resolution procedures fail, the majority continue to prohibit such concerted work stoppages.

Even in the absence of remedial legislation, the California Supreme Court determined that the common law prohibition was no longer to be followed except with respect to firefighters and law enforcement officers.

71. 90 N.Y.2d 253, 682 N.E.2d 966.
As to other classes of public employees the California Court opted for a case-by-case determination of whether the public interest in maintenance of their services would outweigh the employees right to withhold them. Factors militating in favor of allowing the right to strike included the possibility that the services might be performed by replacement employees or that hostile public opinion might induce the striking employees to return.

The West Virginia Supreme Court found these considerations insufficient. Thus, there could be no assurance that capable replacements for the strikers were available, while discharging the striking employees would waste their costly training, expertise, and experience. Of course, adverse public sentiment and the loss of pay might ultimately persuade the strikers to return to work, but during the interim the government would be without the capacity to carry on its functions.

Considering the complexity of the problem and the strike’s potential coercive effect upon the public treasury, the Court declined to alter the common law rules, and left the issues to be resolved in the legislative arena.

Accordingly, the Court concluded the teacher strike was illegal, and because it would result in irreparable harm to the public school system, the issuance of the preliminary injunction by the trial court was affirmed.

The decision was somewhat tempered by the Court’s position that the governmental employer cannot claim damages from “non tenured” public employees who had engaged in a peaceful work stoppage.

The Louisiana Supreme Court reached a contrary result in Davis v. Henry. There, some 750 teachers and 250 other employees of the Terrebonne Parish School Board began a work stoppage upon the failure of the School Board to engage in collective bargaining with the employees’ Union, the Terrebonne Association of Educators.

The Board sought a declaratory judgment that the strike was illegal, and moved to enjoin the employees from continuing to strike because of the allegedly irreparable injury to the District’s approximately 21,000 students.

The trial court denied relief, but the Court of Appeals reversed and ordered the trial court to grant the injunction.

Although Louisiana has a “little Norris-LaGuardia Act” that prohibits the issuance of injunctions in labor disputes except when there is imminent danger of threat to public health and safety, the Court of Appeals reasoned that the Act did not apply to public employees, and, alternatively, that if it did, irreparable harm had been shown justifying the injunctive relief.

75. See, City of Fairmont v. Retail Wholesale, and Department Store Union, AFL-CIO, 166 W.Va. 1, 283 S.E.2d 589 (1980).
76. 555 So.2d 457 (La. 1990).
On appeal the Louisiana Supreme Court reversed the Court of Appeals and affirmed the trial court’s denial of injunctive relief.

The Supreme Court found no legislative intent to exclude public employees from the scope of the Anti-Injunction Act. Moreover, unique among the states, Louisiana had not adopted the common law at the time it became a state, but rather remained a Civil Code Jurisdiction. Contrary to the common law, Louisiana’s jurisprudence had held that public employees possess the right to strike except when the work stoppage clearly endangers the public health and safety. As early as 1974, despite the absence of authorizing legislation, the Appellate Courts in Louisiana had approved collective bargaining between school boards and their employees.77

The Court found the forecast of “irreparable harm” to have been without merit, because teachers’ services, while “certainly more important than those of public golf course workers,” did not entail protection of the physical welfare of the citizenry.78

One of the most significant virtues of comprehensive public sector labor relations legislation is that it establishes the “rules of the game,” resolving the issue of the legitimacy of strike actions and offering alternative dispute resolution procedures. Despite early concerns about a potential unconstitutional delegation of legislative power, one such provision, statutorily authorized “final and binding” interest arbitration, has proven its worth as a mutually acceptable, fair and effective alternative to work stoppages.79

Looking to the future, it should be noted that school teachers’ compensation tends to lag behind private sector wage increases in periods of economic expansion, such as the present, and bargaining demands for “catch-up” often occur during periods of economic slowdown and declining public revenues which

77. Thereafter, the State’s Constitution was amended to authorize the State and its political sub-divisions to contract with employee organizations.
78. 555 So.2d at 468n.11.
KAN. STAT. ANN. Chapter 75.—State Departments; Public Officers And Employees Article 43.—Public Officers And Employees Public Employer-Employee Relations 75-4330. Memorandum agreements, limitations; grievance procedures; arbitration; judicial review.
inevitably follow. Conditions are then conducive to teacher-school board bargaining impasses, and we can look forward to a corresponding increase in work stoppages.80

A Concluding Note

I confess that based upon the performance of my investments in the stock market there is no reason for the reader to place much confidence in my ability to predict the future of labor relations in the public schools. Nonetheless, I hope I may be forgiven for prognosticating that a major issue in the first decade of the 21st century will involve the restructuring of compensation to include so-called "merit pay." This concept would link teacher salaries, tenure assignments and promotion to student learning as evidenced by their performance on standardized tests. The call for "accountability" of the teaching profession

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80. Comprehensive data on the number of work stoppages involving public school teachers is not available. However, statistics compiled by the respected publisher, BNA, Inc. from newspaper accounts, union magazines and federal agencies reveal that from 1990 through 1999 at least 471 work stoppages occurred in the "educational service industry" as defined by Standard Industrial Classification 82, of which 140 were confirmed as involving teachers or professors.
seems, at this writing, to enjoy widespread popular support. But, just how any such principle can be shaped to take into consideration such influential diversity factors affecting student performance as levels of parental income and education that may differ from one school population to another, remains to be seen. Resolution of the conflicts likely to arise over the attempted implementation of such merit pay programs may well represent the greatest challenge that will face teachers and administrators in the years immediately ahead.