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A LEGAL ROADMAP TO PRIVATIZING GOVERNMENT SERVICES IN WASHINGTON STATE

Nancy Buonanno Grennan

Abstract: Government employers contract out and privatize some of their functions as one way of meeting the public's need for more efficient and effective services. The Washington State Supreme Court, in *Washington Federation of State Employees v. Spokane Community College*, interpreted the state's civil service laws as imposing a nearly complete bar on contracting out at the state level. That decision was later extended to local public sector employers, who already face complex collective bargaining rules that require them to bargain with unions about contracting out work that has been done or that could be done by their unionized employees. This Comment analyzes both the judicial and statutory restrictions imposed upon local public sector employers in Washington. It argues that the judicial extension of the *Spokane* decision, a decision flawed in its own reasoning, to local public sector employers was improper. It further argues for a less-restrictive interpretation and application of current collective bargaining regulations.

In its decision in *Washington Federation of State Employees v. Spokane Community College*¹ the Washington Supreme Court held that the state's civil service laws restrict the state government's ability to contract for services in the private sector. In reaching its conclusion that procuring services ordinarily and regularly provided by classified civil servants violates the basic policy and purpose of the Washington civil service laws,² the court carved out one narrow exception to this bar. Specifically, a state agency may contract for services historically performed by civil service workers only when it can show that these workers are unable to provide the needed services.³

The bar to contracting out⁴ government services served as one of the driving forces behind recent civil service reform legislation introduced in

1. 90 Wash. 2d 698, 702-03, 585 P.2d 474, 477 (1978).

2. *Id.* at 702, 585 P.2d at 477. The State Legislature codified this decision but limited it by permitting contracting out of services if the services were regularly purchased by valid contract before April 23, 1979, the effective date of the Act, and did not have the effect of terminating existing civil service employees or positions. Act of April 23, 1979, ch. 46, §§ 1-2, 1979 Wash. Laws 1141 (codified at Wash. Rev. Code §§ 41.06.380-.382 (1996)).

3. *Spokane*, 90 Wash. 2d at 702-03, 585 P.2d at 477.

4. Contracting out, as traditionally viewed, is "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964). Privatization, often used as a synonym for contracting out, is the transfer of responsibility for the performance of desired functions to private institutions. Ronald A. Cass, *Privatization: Politics, Law & Theory*, 71 Marq. L. Rev. 449, 450 (1988). Because Washington statutes and judicial decisions treat these concepts synonymously, the terms also will be used interchangeably here. Outsourcing,

the 1993 session and reintroduced in the 1995 session.⁵ The bill contained a repeal of this restriction on state agencies;⁶ however, in these two passage attempts, the bill failed to win the support of both houses of the State Legislature.⁷ The attempts to eliminate the restriction caused great furor among state employee unions who both feared losing members' jobs and questioned contracting out's efficacy in general.⁸

Although the privatization battle at the state level has generated much press,⁹ little attention has been paid to this issue as it relates to local public sector agencies.¹⁰ A Washington appellate court extended the *Spokane* holding to local public sector entities with civil service systems similar to the state's.¹¹ This judicially-imposed restriction adds another layer of considerations for local agencies who already face complex local public sector collective bargaining rules.¹² These rules require local governmental employers to bargain with unions about contracting out work that has been done or that could be done by their unionized employees.¹³

This Comment analyzes both the judicial and statutory restrictions imposed upon Washington's local public sector employers. It argues that

another currently popular term often used synonymously with contracting out, generally refers to the transfer of technological functions to an outside provider. See Mark L. Gordon & Timothy P. Walsh, *When Government Institutions Outsource Technology*, Computer L., July 1996, at 15, 15.

5. Rebecca Boren, *Lowry Joins a Hot Trend 'A Revolution' as States Contract Out Services*, Seattle Post-Intelligencer, Mar. 18, 1993, at A1; see Personnel System Reform Act of 1995, S. 5841, 54th Leg., Sess. 1 (Wash. 1995) (Second Substitute Senate Bill).

6. S. 5841 §§ 208, 403.

7. David Ammons, *Lowry Wants Higher Minimum Wage*, A.P. Pol. Serv., Dec. 20, 1995; S. 5841, Legislative Digest & History of Bills of the Senate and House of Representatives, 54th Leg. Sess. 388-89 (Wash. 1996).

8. See, e.g., David Ammons, *Labor Boils at Lowry Civil Service Plan*, Morning News Trib. (Tacoma, Wash.), Feb. 23, 1993, at B1; Patti Epler, *The Roasting of Gov. 'Judas': State Workers see Civil Service Bill as Betrayal*, Morning News Trib. (Tacoma, Wash.), Mar. 20, 1993, at B1; Barbara A. Serrano, *Lowry Outrages Labor with Civil-Service Plan: Proposal to Streamline Services Would Cut Some Job Protections*, Seattle Times, Feb. 23, 1993, at C1.

9. See, e.g., Rebecca Boren, *Lowry Presses Civil Service Reform but Opponents to Hold Rally Against Privatization Plan*, Seattle Post-Intelligencer, Mar. 17, 1993, at A1; Peter Callaghan, *Legislature '95: Lowry's Civil Service Reform Tastes Sweet, Sour to Political Palates*, Morning News Trib. (Tacoma, Wash.), Feb. 3, 1995, at B1; Hal Spencer, *Legislature '93: Business Puzzled as Labor Decries Democrats' Support*, Morning News Trib. (Tacoma, Wash.), Mar. 26, 1993, at B5.

10. Local public sector agencies are cities, counties, and other political subdivisions of the state. Harry H. Wellington & Ralph K. Winter, Jr., *The Unions and the Cities, Studies of Unionism in Government* 54 (1971).

11. Joint Crafts Council v. King County, 76 Wash. App. 18, 20-21, 881 P.2d 1059, 1061 (1994).

12. Wash. Rev. Code ch. 41.56 (1996).

13. See *infra* part II.B.

the judicial extension of the flawed *Spokane* decision to local public sector employers was improper. Furthermore, it argues that these employers should be subject to a less-restrictive interpretation of current collective bargaining regulations.

Part I traces the modern civil service system's development and public sector collective bargaining's growth. It analyzes how both those systems impact public employers' privatization decisions. Part II focuses on how Washington's civil service system and collective bargaining regulations restrict a local public sector employers' ability to contract for services from the private sector. Part III describes how Washington public sector employers can navigate through this complex set of rules and restrictions to implement privatization decisions. Part IV criticizes Washington's current laws regarding contracting out and provides suggestions for change. Finally, part V recommends removing the current judicial restrictions on contracting out and narrowing the collective bargaining restrictions.

I. DEVELOPMENT OF THE LAWS REGULATING MODERN PUBLIC EMPLOYERS

The modern civil service system and collective bargaining regulations developed to address the needs of both the public and public employees. Because the needs of these two groups often conflict, the schemes present complex restrictions on government employers' privatization attempts.

A. *Development of the Civil Service System*

The Pendleton Act of 1883¹⁴ ushered in the era of the modern public civil service system.¹⁵ Spurred when a disappointed office-seeker assassinated President Garfield,¹⁶ Congress enacted the legislation to eliminate the political spoils system.¹⁷ By establishing a hiring system based on an applicant's merit, the Pendleton Act also sought to address

14. Pendleton Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. §§ 1101-1501 (1994); 40 U.S.C. § 42 (1994)).

15. Robert Vaughn, *Principles of Civil Service Law* § 1.2, at 1-3 (1976).

16. Ari Hoogenbloom, *The Pendleton Act and the Civil Service*, 64 Am. Hist. Rev. 301, 303 (1959).

17. 14 Cong. Rec. 206 (1882) (remarks of Senator Pendleton). But see Ronald N. Johnson & Gary D. Libecap, *Courts, A Protected Bureaucracy, & Reinventing Government*, 37 Ariz. L. Rev. 791, 817-18 (1995), for a more cynical analysis of the passage of the Pendleton Act.

the public's perception that the government was inefficient and its workers incompetent.¹⁸

Soon after the creation of the federal civil service system, state legislatures followed suit, creating their own state systems with similar intents to insulate state workers from the political process and to protect the public from incompetent performers.¹⁹ Modern civil service systems also do much more: they provide job tenure, standardized salary progression, and a whole host of other protections against arbitrary personnel actions.²⁰

Although civil service systems have served vital functions, they are increasingly the subject of criticism. One common criticism of civil service systems is that they do their job too well: by protecting employees from the political whims of newly-elected officials, these systems also make it impossible for agencies to weed out incompetent employees.²¹ Additionally, these same systems, though theoretically based on merit principles, make it nearly impossible to reward merit.²² Such a lack of reward, coupled with a culture that discourages innovation, erodes employee morale.²³ Another problem is an increasing myriad of rules and regulations that have developed with the systems.²⁴

18. Vaughn, *supra* note 15, § 1.2, at 1-16 to 1-17. The system that evolved established a control-based chain of command; the hierarchical system was viewed as the most efficient model for governance. See Donald F. Kettl et al., *Civil Service Reform: Building a Government that Works* 11-12 (1996). In addition, hiring practices were systematized and rules were promulgated concerning promotions, the classification of duties, and the assignment of salary to those classifications. Vaughn, *supra* note 15, § 1.3, at 1-27 to 1-28.

19. Vaughn, *supra* note 15, § 1.3, at 1-25. Although most states developed their own civil service systems, extensive political patronage schemes survived in many jurisdictions until the U.S. Supreme Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In *Rutan*, the Court held that use of party affiliation to determine promotions, transfers, and recalls from layoff impermissibly infringed upon the First Amendment rights of public employees. *Id.* at 75. It further held that hiring decisions based on an applicant's political belief or support, in the absence of a vital public interest, violated that applicant's First Amendment rights. *Id.* at 78-79. This decision reaffirmed an earlier holding that the First Amendment proscribed patronage dismissals. *Elrod v. Burns*, 427 U.S. 347 (1976).

20. See Kettl et al., *supra* note 18, at 16; Jonathan Walters, *The Shrink-Proof Bureaucracy*, *Governing*, Mar. 1992, at 32, 36.

21. David Osborne & Ted A. Gaebler, *Bringing Government Back to Life*, *Governing*, Feb. 1992, at 46, 49; Walters, *supra* note 20, at 36.

22. See David Osborne & Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* 158-59 (1993); see also Kettl et al., *supra* note 18, at 19 (noting that for civil service employees "[t]here are few rewards for success beyond the intrinsic satisfaction of a job well done").

23. Kettl et al., *supra* note 18, at 19-20.

24. See Walters, *supra* note 20, at 36.

Further, this complexity has caused the systems to become too centralized and too rigid for local agencies to find effective solutions to local problems, and too costly to maintain in an age of declining public revenues.²⁵

B. Civil Service Restrictions on Contracting Out

Some governments have responded to these and other public concerns by ceasing to provide directly some public services.²⁶ Contracting out of traditional governmental functions is not a new phenomenon,²⁷ and it is one that is ever increasing in popularity.²⁸

Contracting out certainly has its critics. Some critics argue that contracting out is merely an anti-labor policy cloaked in the verbiage of government efficiency.²⁹ These critics claim that the policy's true aim is to vitiate the substantial force of public sector unionized labor.³⁰ Other critics assert that the short-lived economic benefits derived from contracting out are vastly outweighed by the resulting long-term social and economic detriments, including the rebirth of the political spoils system in the award of government contracts.³¹

25. See Osborne & Gaebler, *supra* note 21, at 49–50. Because most civil service systems operate with a centralized personnel system, through which all hiring, firing, and pay decisions are made, agencies are left with little power to deal with their own, specific concerns. Jonathan Walters, *The Many Lives of Civil Service, How Not to Reform Civil Service*, *Governing*, Nov. 1992, at 30, 34.

26. See Kettl et al., *supra* note 18, at 48.

27. For example, when the federal government was eager for the mails to reach people living west of the Mississippi River, it contracted with 80 riders collectively titled the Pony Express. Osborne & Gaebler, *supra* note 22, at 335.

28. Kettl et al., *supra* note 18, at 48. The federal government alone spends \$200 billion a year contracting for goods and services. *Id.* at 49; see also Cass, *supra* note 4, at 450–52. For example, California and New York have contracted with private companies to run various aspects of the states' welfare systems. Juan Forero, *A Private Face on a Public Program, Caseworkers Fear Changes in Welfare Services*, *Star-Ledger* (Newark, N.J.), Sept. 19, 1996, at 001. In addition, prisons and county jails increasingly are being run by private companies. See Ken Neal, *Who Gets the Keys? Experienced Private Firms Need Consideration in Decision on Who Runs Tulsa County Jail*, *Tulsa World*, Aug. 25, 1996, at G1.

29. See, e.g., Craig Becker, *With Whose Hands: Privatization, Public Employment, and Democracy*, 6 *Yale L. & Pol'y Rev.* 88, 88–89 (1988).

30. *Id.* The percentage of unionized government workers is relatively high at 37.8%. Labor Statistics Bureau, U.S. Dep't of Labor, Pub. No. 41, *Union Members in 1996* (1996). In comparison, only 10.4% of nonagricultural private sector workers remain unionized.

31. See Boren, *supra* note 5, at A1; see also Cass, *supra* note 4, at 453–54. Because the government is one of the largest employers of minorities and women, contracting out may have a disparate impact on these groups. See Wellington & Winter, Jr., *supra* note 10, at 46; *Women's Employment in Federal, State, & Local Governments Increases, But Current Fiscal Crisis Threatens Recent Gains*, 29 *Gov't Employee Rel. Rep.* 851 (1991). The public also loses constitutional

Proponents of contracting out counter that privatization can produce both short- and long-term savings to taxpayers.³² Furthermore, proponents argue, agencies can ensure that a contract award is not a surreptitious reward for political support by creating a bidding system that is open, competitive, and publicly announced.³³

Several state courts, including Washington's, have entered the fray. Some courts have held that contracting out violates the state's civil service laws.³⁴ Some have based such a decision on the absence of explicit legislative or agency controls to protect current employees' rights and to prevent political patronage in the award of public contracts.³⁵ Washington courts have imposed an almost complete bar on contracting out.³⁶ Other state courts have recognized the public policy implications of contracting out, but refuse to hold that the mere existence of a civil service system mandates such pervasive restrictions on privatization.³⁷

protections when governments employ private contractors. See *Shelly v. Kraemer*, 334 U.S. 1, 13 (1948).

32. See, e.g., President's Comm'n on Privatization, *Privatization: Toward More Effective Government* 1-2 (1988); see also Kettl et al., *supra* note 18, at 67-68 (discussing increased savings and productivity that can result when government workers are required to compete with private contractors for projects).

33. See Timothy P. Dowling, Note, *State Civil Service Law—Civil Service Restrictions on Contracting Out by State Agencies*—Washington Federation of State Employees v. Spokane Community College, 55 Wash. L. Rev. 419, 424 (1980). The U.S. Supreme Court's recent decisions extending First Amendment rights to private contractors, protecting them against retaliation for the exercise of rights of political association or the expression of political allegiance, addresses some of the concerns that contracting out will facilitate a return to the spoils systems. *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2355 (1996); *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2346 (1996).

34. See, e.g., *Colorado Association of Public Employees v. Department of Highways*, 809 P.2d 988, 995 (Colo. 1991); *Washington Federation of State Employees v. Spokane Community College*, 90 Wash. 2d 698, 699, 585 P.2d 474, 476 (1978).

35. *Horrell v. Department of Admin.*, 861 P.2d 1194, 1200 (Colo. 1993).

36. *Spokane*, 90 Wash. 2d at 699, 585 P.2d at 476. See *infra* part II.A for further discussion of Washington's approach.

37. See, e.g., *Ball v. Board of Trustees of State Colleges*, 248 A.2d 650, 654 (Md. 1968) (holding that department heads may abolish merit system positions and lay off merit system employees, provided such action is done in good faith and is not subterfuge to evade merit system laws); *University of Nev. v. State Employees Association, Inc.*, 520 P.2d 602, 606-07 (Nev. 1974) (holding that appointing authority may only contract out when acting in good faith, effecting "a real and not fundamentally sham reorganization . . . for substantial rather than arbitrary and capricious reasons"); *Corwin v. Farrell*, 100 N.E.2d 135, 139 (N.Y. 1951) (holding that contracting out is permissible as long as private contractor is controlled by private entity and no evidence exists of subterfuge employer-employee relationship between contractor and public entity); *State ex rel. Sigall v. Aetna Cleaning Contractors, Inc.*, 345 N.E.2d 61, 65 (Ohio 1976) (*per curiam*) (holding that contracting out

Some state courts have refused to limit the government's ability to privatize.³⁸ These courts have noted that the government's pursuit of a long-term substantial economic savings through privatization does not violate the civil service act's intent or purposes.³⁹ These courts found nothing inherent in their civil service systems requiring that everyone who provides a service for the state must occupy a civil service position, even if civil service employees once provided that service.⁴⁰

Whatever one's position on contracting out, the subject is clearly controversial. As governments struggle to address public perceptions of a vast bureaucracy, Kafkaesque in its rules and regulations, privatizing services will continue to be one of the main avenues of reform.

C. *Public Sector Collective Bargaining*

Public sector employees' collective bargaining rights are layered on top of this complex web of personnel rules and regulations and their concomitant restrictions on contracting out government services.⁴¹ Statutes granting public employees collective bargaining rights developed much later than civil service legislation, generally because of the wide-spread perception that the collective bargaining process was inimical to public employment.⁴² This perception stemmed in part from a

is permissible in absence of proof of employer bad faith or intent to thwart purposes of civil service system).

38. See, e.g., *Moore v. Alaska*, 875 P.2d 765, 771 (Alaska 1994); *Connecticut State Employees Association v. Board of Trustees of Univ. of Conn.*, 345 A.2d 36, 40 (Conn. 1974); *Michigan State Employees Association v. Civil Serv. Comm'n*, 367 N.W.2d 850, 852 (Mich. Ct. App. 1985); *In re Local 195, International Federation of Professional and Technical Employees*, 443 A.2d 187, 193 (N.J. 1982); *Kiger v. Nixon*, No. 90-3354-1, 1996 WL 512031, at *7 (Tenn. App. Sept. 11, 1996).

39. See, e.g., *Michigan State Employees Association*, 367 N.W.2d at 852; *Stump v. Department of Labor & Indus.*, 624 A.2d 229 (Pa. Commw. Ct. 1993). Other courts have found that the need for specialized equipment or expertise may justify contracting out decisions. See, e.g., *Professional Engineers in California Government v. Department of Transp.*, 16 Cal. Rptr. 2d 599, 603-04 (Ct. App. 1993) (upholding scheme to enlist private finance, design, construction, and operation of transportation facilities to solve state transportation needs that could not be met with available public revenue; noting private contractors were to construct portions of highways in exchange for operation and collection of tolls); *Professional Engineers in California Government v. Department of Transp.*, 51 Cal. Rptr. 2d 465, 484 (Ct. App. 1996), (upholding statute authorizing contracting for seismic retrofitting of bridges), *review granted*, 917 P.2d 1165 (Cal. 1996).

40. *Michigan State Employees Ass'n*, 367 N.W.2d at 852. The Texas Supreme Court took a similar position in rejecting a public employee's challenge to contracting out custodial services. *Moncrief v. Tate*, 593 S.W.2d 312, 313-14 (Tex. 1980).

41. See Donald H. Wollett et al., *Collective Bargaining in Public Employment* 189-90 (4th ed. 1993), for examples of federal and state collective bargaining laws.

42. *Id.* at 4-6.

belief that public employee unions would have too great an influence on the legislative budgeting and policy agenda.⁴³ Not until President Kennedy granted bargaining rights to unions representing federal employees in 1962, did the concept of public sector bargaining become acceptable.⁴⁴ Following the lead of the federal government, many states also guaranteed their employees bargaining rights, and the ranks of organized public employees swelled.⁴⁵

Although it is recognized that most public employees have a constitutionally protected right to join a union,⁴⁶ there is no constitutional compulsion for public employers to recognize and bargain with these unions.⁴⁷ Dependent, therefore, on the legislature's or executive's grant of bargaining authority, state governments differ considerably as to the topics they have allowed to be placed on the bargaining table.⁴⁸ For example, some states, like Washington, do not permit state employees to bargain over wages, leaving that decision to the Legislature.⁴⁹ A few states have granted their employees bargaining rights modeled after those contained in the National Labor Relations Act (NLRA).⁵⁰ In these latter instances, negotiations cover the myriad of topics encompassed by the

43. Wellington & Winter, Jr., *supra* note 10, at 25; *see also* Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Rev. 265, 267-63 (1987).

44. Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962); *see also* Lawrence Green & Claire Hotto, Comment, *Public Employees' Bargaining Rights in Washington*, 14 Gonz. L. Rev. 197, 197 (1978). In contrast, Congress enacted the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)), almost 30 years prior to the public sector equivalent.

45. Wollett et al., *supra* note 41, at 9; *see also* John F. Burton, Jr. & Terry Thomason, *The Extent of Collective Bargaining in the Public Sector*, in *Public Sector Bargaining* 15-17 (2d ed. 1988) (discussing factors leading to accelerated growth of public sector unionization).

46. Although courts have generally recognized that union membership is protected by the right of association under the First and Fourteenth Amendments, a public employer may restrict a public employee's right of association if justified by an overwhelming public interest, specifically related to the association at issue. Vaughn, *supra* note 15, § 9.2, at 9-7; *see also* Wellington & Winter, Jr., *supra* note 10, at 74-75.

47. Green & Hotto, *supra* note 44, at 197. The scope of bargaining rights is a product of legislative action or executive order. *Id.*

48. Vaughn, *supra* note 15, § 9.3, at 9-24 to 9-26 (1976). Some states have allowed bargaining over only subjects not addressed by the civil service system, others have exempted only certain subjects. *Id.* at 9-31 to 9-32.

49. *See infra* part II.B for a discussion of Washington's approach. *See also* June Miller Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 Wis. L. Rev. 685, 699-700. Several courts have held that public employers do not have the authority to engage in collective bargaining. *Id.* at 695 n.29. These courts reason that because the budget-making functions of governmental bodies are nondelegable, the public employer must retain the ultimate authority to set wages and benefits. *Id.* at 695.

50. 29 U.S.C. §§ 151-169 (1994); *see* Wellington & Winter, Jr., *supra* note 10, at 146-47.

phrase “wages, hours and other terms and conditions of employment.”⁵¹ More typically, state legislatures have rejected the private sector scope language or have combined it with new language to form a hybrid of sorts.⁵² Even though many state legislatures initially distanced their bargaining laws from the private sector model, many courts and state administrative agencies, vested with the responsibility of enforcing the states’ labor laws, have, however, turned to the precedent developed under the NLRA for guidance in deciding scope-of-bargaining questions.⁵³

D. Collective Bargaining Restrictions on Contracting Out

Some states have looked to National Labor Relations Board (NLRB)⁵⁴ and federal court decisions to guide them in determining whether a governmental entity’s contracting out decision is a mandatory bargaining subject.⁵⁵ The seminal private sector contracting out case is *Fibreboard Paper Products Corp. v. NLRB*.⁵⁶ The U.S. Supreme Court held that, on the facts of that case, subcontracting was a mandatory subject of bargaining.⁵⁷ Fibreboard contracted out its maintenance work to cut labor costs but failed to bargain that decision with the union representing its regular maintenance staff.⁵⁸ Further, the company replaced its own laid off employees with those of the subcontractor, working in the same building, and performing the same duties as Fibreboard’s regular

51. Wellington & Winter, Jr., *supra* note 10, at 147. In *NLRB v. Wooster Div. of the Borg-Warner Corp.*, 356 U.S. 342 (1958), the U.S. Supreme Court adopted the NLRB’s approach of dividing proposals into three categories of bargaining subjects: mandatory, permissive, and illegal. *See id.* at 349.

52. Weisberger, *supra* note 49, at 700. Some states limited the discussions of topics to just that: discussions; in lieu of bargaining rights, unions have the right to request to meet and confer over issues but the employer retains the authority to set unilaterally wages and all other terms and conditions of employment. *See* Wellington & Winter, Jr., *supra* note 10, at 146.

53. Weisberger, *supra* note 49, at 706; *see also* *Saratoga Springs City Sch. Dist. v. New York State Pub. Employment Relations Bd.*, 68 A.D.2d 202, 207–08 (N.Y. App. Div. 1979) (determining that consideration of private sector decisions as useful guide was not precluded, though statute explicitly proscribed use of those decisions as binding precedent).

54. The NLRB is the administrative agency created to administer federal labor policies in the private sector. 29 U.S.C. §§ 151–169.

55. *See, e.g.*, *Local 316, Service Employees International Union v. State Educ. Labor Relations Bd.*, 505 N.E.2d 418, 423 (Ill. App. Ct. 1987); *Salem Police Employees Union v. City of Salem*, 781 P.2d 335, 340 (Or. 1989).

56. 379 U.S. 203 (1964).

57. *Id.* at 213–14.

58. *Id.* at 207.

employees. The only difference was that the employer no longer had to pay the wages, premiums, or other benefits it had previously bargained with the union.⁵⁹ Justice Stewart concurred separately to emphasize that the Court's holding did not mandate bargaining over every contracting out decision, but merely on the facts of the case before them such bargaining was required.⁶⁰

Following the U.S. Supreme Court's decision in *Fibreboard*, the NLRB and circuit courts of appeals generally have required an employer to bargain over decisions to contract out what had been bargaining unit work when done to reduce labor costs.⁶¹ Bargaining in those instances is particularly appropriate, reasoned the NLRB, because the "desire to reduce costs involves factors that are within the Union's control."⁶² Though the NLRB has adopted a per se rule requiring bargaining if essentially *Fibreboard*-type contracting out is involved,⁶³ it has acknowledged that there are cases in which the employer's contracting out decisions are outside the range of bargaining or are dictated by emergencies, rendering bargaining impracticable.⁶⁴

In applying this standard to the public sector, the state courts are split as to whether, on the facts of any given case, bargaining over contracting out is mandatory. Some state courts and administrative agencies have applied the more rigid private sector precedent to find that privatizing unionized work is a mandatory subject of bargaining, given that such a decision always implicates employment terms and conditions.⁶⁵ Other

59. *Id.* at 213.

60. *Id.* at 224 (Stewart, J., concurring).

61. *See, e.g., Olivetti Office U.S.A. Inc. v. NLRB*, 926 F.2d 181, 186 (2d Cir. 1991); *NLRB v. Plymouth Stamping Div., Eltec Corp.*, 870 F.2d 1112, 1116 (6th Cir. 1989); *W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 248 (7th Cir. 1988).

62. *Rock-Tenn Co.*, 319 N.L.R.B. 1139, 1139 (1995).

63. *Mid-State Ready Mix, Div. of Torrington Indus., Inc.*, 307 NLRB 809, 810 (1992).

64. *Id.*; *see also Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1248-49 (3d Cir. 1994). In finding that the NLRB's per se rule for *Fibreboard* situations contravened the U.S. Supreme Court's precedent in this area, the Third Circuit noted that the mere decision to contract out is not what triggers the bargaining obligation but rather, whether "requiring bargaining over this sort of decision will advance the neutral purposes of the Act." *Id.* at 1248 (quoting *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1991)). In its *First National Maintenance Corp.* decision, the U.S. Supreme Court concluded that in recognizing an employer's need for unencumbered decision-making, "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required *only* if the benefit for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 679 (emphasis added).

65. *See, e.g., Local 316, Service Employees International Union v. State Educ. Labor Relations Bd.*, 505 N.E.2d 418, 423 (Ill. App. Ct. 1987) (noting that employers and representatives of their

state courts have rejected that approach, holding that such decisions, when made for policy reasons, are public policy matters that are inappropriate for resolving through the collective bargaining process.⁶⁶

In short, the rather simplistic aims of the Pendleton Act of 1833 and the collective bargaining laws have evolved into a complex web of rules and regulations covering nearly every public sector entity in the nation. Navigating through this multilayered system is no sure and easy task for an agency that chooses to get out of the business of providing directly some portion of its services.

II. WASHINGTON STATE'S RESTRICTIONS ON CONTRACTING OUT GOVERNMENT SERVICES

Like most of its fellow state governments, Washington's civil service system has been criticized for its unwieldy constraints on government action. Unlike many of its counterparts, however, Washington's courts and Legislature have added to these constraints, by imposing restrictions on local governmental entities' privatization attempts.⁶⁷ These restraints emanate from judicial interpretations of the state's civil service system and from application of collective bargaining regulations.

A. *The Civil Service System as a Bar to Contracting Out*

A 1961 initiative created Washington State's civil service system.⁶⁸ The initiative established a personnel system "based on merit principles

employees are required to bargain collectively about contracting out work previously performed by members of existing bargaining unit); *Saratoga Springs City Sch. Dist. v. New York State Pub. Employment Bd.*, 68 A.D.2d 202, 207 (N.Y. App. Div. 1979) (finding state public employment board's decision mandating bargaining over subcontracting not arbitrary and capricious).

66. See, e.g., *In re Local 195, International Federation of Professional and Technical Employees*, 443 A.2d 187, 194-95 (N.J. 1982) (holding that substantive decision to subcontract is nonnegotiable matter of managerial prerogative but when decision to contract out is purely fiscally-driven, public employer may discuss decision with union, as employees would have suggestions for improving economy or efficiency); *Unified Sch. Dist. No. 1 v. Wisconsin Employment Relations Comm'n*, 259 N.W.2d 724, 731-32 (Wis. 1977) (holding that applicable standard is whether particular decision is primarily related to wages, hours, and conditions of employment of employees or whether it is primarily related to formulation or management of public policy. If latter issue predominates decision, matter is properly reserved to decision by elected officials); see also *Bay City Education Association v. Bay City Pub. Schs.*, 422 N.W.2d 504 (Mich. 1988).

67. See *infra* parts IIA-B for a discussion of these restrictions.

68. Initiative Measure No. 207, ch. 1, 1961 Wash. Laws 7 (codified at Wash. Rev. Code ch. 41.06 (1994)). In response to perceived abuses of the current administration, the League of Women Voters teamed up with the Washington Federation of State Employees, the union representing a large

and scientific methods."⁶⁹ A separate but nearly identical system was created for higher education institutions.⁷⁰ Administrative agencies, to which the responsibility of maintaining the system was delegated,⁷¹ have developed rules covering every conceivable facet of employment. These rules cover topics ranging from hiring⁷² and firing⁷³ to the type of leave an employee may take in times of inclement weather.⁷⁴ In all, there are over four hundred separate provisions,⁷⁵ excluding rules regulating the employment of higher education institution employees.⁷⁶ Many local public sector agencies in Washington followed suit and adopted similar kinds of civil service systems applicable to their own employees.⁷⁷

Washington's civil service system has been the target of waste and inefficiency allegations.⁷⁸ Washington public employers are limited, however, in how they can address such concerns. The first Washington case restricting a state agency from contracting out was *Washington Federation of State Employees v. Spokane Community College*.⁷⁹ In that case, Spokane Community College contracted with a private company in 1976 to provide janitorial services in a new office building rather than hire more custodians to do the work.⁸⁰ The college anticipated an annual savings of more than \$10,000 and intended to use the money saved to fund more student instruction.⁸¹ None of the employees were to lose their

percentage of state employees, to sponsor the state-wide initiative. Telephone Interview with Bill Daley, Senior Executive Policy Assistant to Governor Lowry (Mar. 18, 1996).

69. Wash. Rev. Code § 41.06.010 (1996).

70. Wash. Rev. Code ch. 28B.16 (1992).

71. Wash. Rev. Code § 41.06.150 (1996). Effective July 1, 1993, a Washington personnel resources board was created, replacing the state personnel board and the higher education personnel board. Ch. 281, § 1, 1993 Wash. Laws 1060.

72. Appointments—Separations, Wash. Admin. Code ch. 356–30 (1995 & Supp. 1996).

73. Disciplinary Actions—Appeals, Wash. Admin. Code ch. 356–34 (1995 & Supp. 1996).

74. Wash. Admin. Code § 356-18-115 (1995).

75. Department of Personnel, Wash. Admin. Code tit. 356 (1995 & Supp. 1996).

76. See Higher Education Personnel Board, Wash. Admin. Code tit. 251 (1995). The higher education system has over 350 rules governing employment. *Id.*

77. See, e.g., King County Charter art. 5, § 510 (1993); Seattle City Charter art. XVI, § 4 (1992). Home rule charter counties and first class cities have as broad a legislative authority as the state except when expressly restricted by constitutional provisions or enactments of the State Legislature. *King County Council v. Public Disclosure Comm'n*, 93 Wash. 2d 559, 611 P.2d 1227 (1980). As no explicit restriction was enacted by the State Legislature, charter counties and cities retained the authority to establish their own unique personnel system.

78. See Boren, *supra* note 9, at A1.

79. 90 Wash. 2d 698, 585 P.2d 474 (1978).

80. *Id.* at 699, 585 P.2d at 476.

81. *Id.* at 699–700, 585 P.2d at 476.

jobs, or experience any decrease in pay or work premiums due to contracting out.⁸²

The Washington Federation of State Employees, the union representing civil service employees who regularly provided janitorial services to that college, filed suit, alleging that the college lacked authority to contract for services traditionally performed by civil service employees.⁸³ The Washington Supreme Court agreed, and held that the state's civil service law barred contracting out new services that civil service employees have regularly and historically performed.⁸⁴ Because merit is the overriding principle in employee selection and retention, the court reasoned that procuring services ordinarily provided by these classified employees through independent contracts violates the civil service law's essential purpose.⁸⁵

The court went on to clarify that real or anticipated cost savings could not be a basis for eschewing the civil service system in favor of outside contractors.⁸⁶ It reasoned that the state's interests, as embodied in its legislation, are best served by a merit-based personnel system, regardless of "mere costs."⁸⁷ The court determined that contracting out is permissible only when the governmental entity can prove that a new need for services has arisen that is beyond the agency's capacity to fulfill.⁸⁸

A subsequent court of appeals decision narrowed *Spokane's* rule by holding that a state agency is not bound by the contracting out strictures when it is no longer feasible to continue to provide services, and the agency "abolish[es] completely one aspect of its operation."⁸⁹ In *Keeton v. Department of Social Services*,⁹⁰ the court held that the Department of Social Services did not violate the state's civil service laws by laying off its bakers and buying baked goods at the local market.⁹¹ The court

82. *Id.* at 701, 585 P.2d at 477.

83. *Id.* at 699, 585 P.2d at 476.

84. *Id.* at 702-03, 585 P.2d at 477. The law in question in the case was the state's Higher Education Personnel Law, Wash. Rev. Code ch. 28B.16.

85. *Spokane*, 90 Wash. 2d at 702, 585 P.2d at 477.

86. *Id.* at 703, 585 P.2d at 477-78.

87. *Id.*

88. *Id.* A later case held that even a state agency's contract with a local city for police services violated the state civil service laws. *Western Wash. Univ. v. Washington Federation of State Employees*, 58 Wash. App. 433, 442, 793 P.2d 989, 994 (1990).

89. *Keeton v. Department of Soc. Servs.*, 34 Wash. App. 353, 359, 661 P.2d 982, 986 (1983).

90. *Id.*

91. *Id.*

distinguished *Spokane* by noting that the department abolished completely its bakery operation, and purchased goods, not services, from the private sector.⁹²

In 1994, the *Spokane* analysis was extended to local public sector agencies. In *Joint Crafts Council v. King County*⁹³, the court found that the King County Department of Public Safety's decision to use private sector service stations to provide on-going maintenance to police cars did not violate the county's civil service rules.⁹⁴ The county had implemented a new police car assignment policy that allowed police officers to take home their individual cars.⁹⁵ Under this new "car-per-officer" program, police officers could service their cars at private maintenance shops near their homes rather than at the centralized facility, which was staffed by civil service employees.⁹⁶

In extending the *Spokane* rationale to local public sector entities, the court both heightened the restrictions on local-level contracting out and broadened the exceptions to the rule. It held that, although civil service principles require county civil service employees to provide those services that they have customarily provided, contracting out is permissible when the government agency can show "that it is not practicable for civil servants to provide the necessary services."⁹⁷ The court found the county's rationale for contracting out services analogous

92. *Id.*

93. 76 Wash. App. 18, 21, 881 P.2d 1059, 1061 (1994). Here the court applied the *Spokane* rule without comparing fully the county's own civil service system with that of the state. *Id.* at 20, 881 P.2d at 1061. The two systems varied greatly in that the county charter under consideration in *Joint Crafts* enabled county managers to lay off its employees for reasons of "efficiency." King County Code § 3.12.300 (1993). This efficiency rationale was not available to state managers at the time of the *Spokane* decision and is one of the implicit rationales behind the judicial limitation imposed on the state. See *infra* part IV.D for further discussion of this issue.

94. *Joint Crafts*, 76 Wash. App. at 21, 881 P.2d at 1061. The majority of King County employees are covered under a civil service system. See King County Charter art. 5, § 550 (1993). The King County Charter provides for "an effective personnel system for the county which will assure: recruitment, selection and retention of county employees on the basis of merit; the development of a county career service; promotion on the basis of demonstrated ability; and compensation and personnel practices which will keep the county system competitive." King County Charter art. 5, § 510 (1993).

95. *Joint Crafts*, 76 Wash. App. at 19, 881 P.2d at 1060.

96. *Id.*, 881 P.2d at 1060-61. The change in the car policy resulted in a decrease in officers' average response times to both a report of a crime and an emergency call, despite the dramatic increase in the county's population and crime rate. Appellant's Brief at 5-6, *Joint Crafts* (Nos. 32599-0-I, 32990-1-I).

97. *Joint Crafts*, 76 Wash. App. at 21, 881 P.2d at 1061.

to the situation in *Keeton*.⁹⁸ It therefore upheld contracting out vehicle maintenance services on the finding that it was no longer practicable for civil service employees to continue to provide these services.⁹⁹

B. Local Public Sector Collective Bargaining Restrictions

Before a local public sector employer in Washington may privatize existing or planned services, it not only must meet the judicially-imposed requirements outlined above, it also must comply with collective bargaining laws and regulations. The collective bargaining rights of public employees of cities, counties, and political subdivisions of the state are provided by the Public Employees Collective Bargaining Act (PECBA).¹⁰⁰ The Public Employment Relations Commission (PERC) is the state administrative agency empowered to administer and enforce the provisions of the PECBA.¹⁰¹ The PECBA requires local public employers to engage in collective bargaining over wages, hours, and working conditions with their employees' exclusive bargaining representatives.¹⁰² PERC has deemed these topics mandatory bargaining subjects.¹⁰³

PERC has found that employers must bargain the decision to assign work that bargaining unit employees historically have performed or

98. *Id.* at 22–23, 881 P.2d at 1062. Unlike the state agency's actions in *Keeton*, however, the County continued to maintain the centralized maintenance shop, and did not lay off any of its maintenance employees. *Id.* at 19–20, 881 P.2d at 1061. Thus, though the County was privatizing some services, it did not abolish completely one aspect of its operation. *See Keeton v. Department of Soc. Servs.*, 34 Wash. App. 353, 359, 661 P.2d 982, 986 (1983).

99. *Joint Crafts*, 76 Wash. App. at 22–23, 881 P.2d at 1062.

100. The Public Employees Collective Bargaining Act, ch. 108, 1967 Wash. Laws 1884, (codified at Wash. Rev. Code ch. 41.56 (1996)). The Act exempts employees of public utility districts, school districts, port authorities, and the state ferry system. Wash. Rev. Code § 41.56.020.

101. Wash. Rev. Code ch. 41.58 (1996).

102. Wash. Rev. Code §§ 41.56.030(4), .140(4). The Washington Legislature has required local public sector employers to engage in full scope collective bargaining, which it has largely refused for its own employees. Currently state employee bargaining is limited to grievance procedures and personnel matters over which the agency or institution may lawfully exercise discretion. Wash. Rev. Code § 41.06.150(13) (1996). Because the civil service rules are so pervasive and are subjects over which the agencies cannot exercise discretion, the scope of bargaining is sharply constricted. *See Senate Bill Report, S. 5841*, at 2 (Wash. 1996).

103. *Port of Seattle, PECB No. 4989*, at 14 (1995). An employer is prohibited from making unilateral changes to previously established wages, hours, and working conditions, "unless it has given notice of the proposed change to the exclusive bargaining representative of its employees, and has provided the union with an opportunity to bargain regarding the proposed change." *North Franklin Sch. Dist., PECB No. 3980*, at 9 (1992). A refusal to bargain over a mandatory subject constitutes an unfair labor practice. Wash. Rev. Code § 41.56.140(4).

could have performed¹⁰⁴ to persons outside of the bargaining unit.¹⁰⁵ Where a collective bargaining agreement contains an expansive management rights' clause or contractual waiver, PERC interprets these waivers very strictly, looking for adequate indicia that the union knowingly signed away its bargaining right on a particular subject.¹⁰⁶ In contrast to the precedent of many states,¹⁰⁷ PERC has acknowledged only a narrow set of circumstances when a contracting out decision falls outside the mandatory bargaining realm.¹⁰⁸ Further, PERC has rejected explicitly some justifications recognized under federal case law for excluding the decision from bargaining.¹⁰⁹

The Washington Supreme Court has held that to determine what is a mandatory subject of bargaining, PERC must do a case-by-case analysis of the proposal in question.¹¹⁰ According to the court, PERC must balance the proposed course of action's impact on wages, hours, and working conditions against the employer's need for entrepreneurial control.¹¹¹ The court stressed that each case will have unique circumstances in which the needs of either labor or management will vary; each case therefore demands independent evaluation.¹¹² Although

104. See *Community Transit*, PECB No. 3069, at 11 (1988) (requiring bargaining over work that could be performed by unit employees); *City of Kelso*, PECB No. 2120-A, at 6 (1985) (requiring bargaining over work historically performed by bargaining unit employees). It is unclear how far PERC will push the "could have been performed" prong. In *Community Transit*, PERC held that the employer was required to bargain the decision to expand its contract with a private bus company to provide commuter services when its own employees, bus drivers, had provided similar services in the past. *Community Transit*, PECB No. 3069, at 11.

105. PERC has held that this duty arises whether the employer transfers work to its own employees outside of the bargaining unit, an act known as "skimming," *City of Seattle*, PECB Nos. 4163, 4164, at 24 (1992), or to another entity altogether, either private or public. *City of Kelso*, PECB No. 2120-A, at 6-7 (work in question went to neighboring fire district).

106. *City of Kelso*, PECB No. 2633, at 25 (1988) (requiring that "waivers must normally be 'express' . . . and must be clear and unmistakable") (citations omitted). Waivers also may be found when the employer notified the union of its proposed decision but the union failed to request bargaining in a timely manner, thus waiving its right to bargain through inaction. *Id.* at 25-26.

107. See *supra* note 66 and accompanying text.

108. See, e.g., *City of Kelso*, PECB No. 2633-A, at 19 (1988) (finding that bargaining not required when employer "goes out of the business" of providing particular service or function).

109. See *City of Kelso*, PECB No. 2120-A, at 9 (rejecting need for speed, flexibility, or secrecy because "[m]ost public sector institutions do not exist to compete with private enterprise"). PERC imposes steep penalties on employers who fail to meet their statutory bargaining obligations. The general practice is to restore those "injured to the situation they would have enjoyed had no unfair labor practice been committed." *City of Kelso*, PECB No. 2633, at 30.

110. *Local 1052, International Association of Fire Fighters v. PERC*, 113 Wash. 2d 197, 203, 778 P.2d 32, 35 (1989).

111. *Id.*

112. *Id.* at 207, 778 P.2d at 37.

PERC has employed such an analysis in some cases,¹¹³ it has continued to characterize contracting out as an almost per se mandatory bargaining subject.¹¹⁴

III. THE STEPS TO PRIVATIZATION

Currently, local public sector employers desiring to privatize services face two distinct challenges. First, they must meet the requirements set forth in the *Spokane* decision.¹¹⁵ Second, if the privatization decision potentially affects the work of unionized employees, employers also must bargain that decision.¹¹⁶

Under *Spokane* and later decisions, privatizing services traditionally performed by civil service employees can be accomplished in several ways. First, the government employer can show it is no longer practical to continue the current service delivery mode¹¹⁷ or demonstrate that it is abolishing entirely one aspect of its operation.¹¹⁸ Alternatively, the employer's legislative body can change its own civil service system to clarify that the merit principle governing employee hiring and retention does not bar contracting out for efficiency or other public policy reasons.¹¹⁹ A more draconian approach would abolish the employer's merit system altogether, a politically unpalatable act.

Even if the public employer demonstrates that it is no longer practicable for its civil service employees to continue to provide the services in question, it must still face bargaining over that decision to the extent that it infringes on a union's recognized work jurisdiction. As long as the employer retains the legal rights and responsibilities of the provision of those services, the employer likely is required to bargain its privatization decision.¹²⁰ In the absence of mandated interest

113. See, e.g., *City of Anacortes*, PECB No. 5668, at 10 (1996); *City of Centralia*, PECB No. 5282-A, at 7 (1996).

114. See, e.g., *Kennewick Pub. Hosp. Dist. No. 1*, PECB No. 5594, at 26 (1996); *King County Fire Protection Dist. 36*, PECB No. 5352, at 8 (1995).

115. See *supra* part II.A for a discussion of these requirements.

116. See *supra* note 108 and accompanying text.

117. See *supra* notes 97-99 and accompanying text.

118. See *supra* notes 89-92 and accompanying text.

119. The court in *Spokane* suggested this alternative itself in its statement that "[i]n the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody." *Washington Federation of State Employees v. Spokane Community College*, 90 Wash. 2d 698, 704, 585 P.2d 474, 478 (1978).

120. See *City of Kelso*, PECB No. 2633-A, at 18 (1988).

arbitration,¹²¹ however, this requirement is not as restrictive as it initially appears.

The employer first must provide the union with notice of its contracting out proposal and give it an opportunity to bargain the decision. If the union does not waive its bargaining right, either explicitly or implicitly through inaction,¹²² the employer must negotiate with the union over the contracting out proposal. Nothing in the collective bargaining statutes, however, requires an employer or a union to reach agreement.¹²³ Rather, both parties are required to bargain in good faith and, if an agreement is reached, to set out the agreement in writing.¹²⁴ If no agreement is reached and the employer has exhausted all statutory dispute procedures,¹²⁵ then the employer may implement unilaterally its proposal.¹²⁶

IV. THE *SPOKANE* DECISION IS FLAWED AND SHOULD NOT BE APPLIED TO LOCAL PUBLIC SECTOR ENTITIES

Irrespective of whether a local public sector employer is able to comply with the strictures of both the *Spokane* decision and the collective bargaining process, these requirements, as they currently exist, are inappropriate. The policy concerns underlying *Spokane* and its progeny can be better served by other methods available to modern governments. Moreover, courts need to address public policy concerns through a case-by-case analysis rather than imposing an outright ban on privatization. In addition, courts err by blindly applying an interpretation

121. See, e.g., Wash. Rev. Code § 41.56.450 (1996) (requiring binding interest arbitration for uniformed personnel and their employers when impasse in negotiations is reached). Interest arbitration statutes empower a neutral third party arbitrator or arbitration panel to impose a legally enforceable award on unresolved items in negotiations. See *City of Bellevue v. Local 1604, International Association of Fire Fighters*, 119 Wash. 2d 373, 376, 831 P.2d 738, 739 (1992).

122. See *supra* note 106 and accompanying text.

123. Wash. Rev. Code § 41.56.030(4) (1996). The employer also is required to bargain the impact that decision has on bargaining unit members if the decision affects the members' wages, hours, or other employment terms and conditions. See *Local 1052, International Association of Fire Fighters v. PERC*, 113 Wash. 2d 197, 201, 778 P.2d 32, 34 (1989).

124. Wash. Rev. Code § 41.56.030(4).

125. Wash. Rev. Code § 41.56.100 (1996).

126. The employer is required to wait one year after reaching impasse before implementing unilaterally its proposal when there is an existing contract in place between the employer and the union. Wash. Rev. Code § 41.56.123 (1996). Unilateral implementation is not permissible with units covered under the State's interest arbitration statute. Rather, the impasse procedures end in interest arbitration, in which a neutral third party imposes a settlement on the parties. Wash. Rev. Code § 41.56.450 (1996).

of the state civil service system to local employers. Finally, collective bargaining contracting out restrictions should be narrowed to allow public sector employers to address timely and efficiently citizens' needs.

A. Spokane's Reasoning Is Anachronistic

The Washington Supreme Court issued the *Spokane* decision in 1978, relying on reasoning from other jurisdictions that has long since been abandoned.¹²⁷ Even if the decision seemed logical when first decided almost twenty years ago, the decision's logic and reasoning do not resonate today.

Spokane rested on the assumption that the civil service system was designed to accomplish two functions: to provide a mechanism for reducing government inefficiency and waste, and to eradicate the political patronage system from state governance.¹²⁸ Heeding these two considerations, the court wedded the government thereafter to one method of supplying government services: civil service employees.

Regardless of the goals of the civil service system, government's primary function at any level is to govern, not to employ. Effective governing requires efficiency, and efficiency extends beyond considerations of a qualified governmental workforce.¹²⁹ Governmental entities have a responsibility as well as a right to consider "mere costs" when determining the appropriate mode of service delivery. Government employers, like private employers, need to respond to contemporary fiscal concerns. Further, requiring a state or political subunit to be tied

127. *Washington Fed'n of State Employees v. Spokane Community College*, 90 Wash. 2d 698, 703-04, 585 P.2d 474, 477 (1978) (citing *Stockburger v. Riley*, 68 P.2d 741 (Cal. App. 1937), *overruled by California State Employees' Ass'n v. State*, 245 Cal. Rptr. 232 (Ct. App. 1988)); *Turel v. Delaney*, 32 N.E.2d 774 (N.Y. 1941). Subsequent cases indicate that the Washington court read the New York rule too broadly. *See, e.g., Corwin v. Farrell*, 100 N.E.2d 135, 139 (N.Y. 1951) (holding that state subdivisions are free to contract out as long as private contractor is controlled by private entity and there is no evidence of subterfuge employer-employee relationship between contractor and public entity); *Westchester County Civil Serv. Employees Ass'n v. Cimino*, 58 A.D.2d 869, 870 (N.Y. App. Div. 1977) (contracting out for services violates state constitution only when private contractor's employees are not independent of government), *aff'd*, 380 N.E.2d 327 (N.Y. 1978). In addition, California subsequently has moved to a rule in which work that is part of an existing state function and that involves the types of services traditionally performed by civil service employees may be contracted out as long as the government agency can prove that the contract will result in greater efficiency and economy without compromising the integrity of the civil service. *California State Employees' Ass'n*, 245 Cal. Rptr. at 234; *see also Professional Eng'rs in Cal. Gov't v. Department of Transp.*, 51 Cal. Rptr. 2d 465, 477 (Ct. App. 1996).

128. *Spokane*, 90 Wash. 2d at 703, 585 P.2d at 477.

129. *See Moore v. State*, 875 P.2d 765, 769 (Alaska 1994).

forever to a system of providing services simply because the voters rejected political patronage is unduly burdensome. Arguably, certain governmental functions, such as regulatory functions, should remain in the public sector. Other functions, however, may be appropriately contracted out to private companies that have the expertise and specialized equipment needed to perform the task at issue.¹³⁰ Such contracting out could accomplish the government's efficiency goals.

Most states have recognized that possessing a civil service system does not mandate the use of civil service employees to provide government functions merely because those employees have done so historically.¹³¹ Courts in other jurisdictions have recognized that changing technology as well as changing public needs and desires for services are legitimate reasons for contracting out traditional civil service functions.¹³² Further, many states have recognized that changing economic realities justify a decision to contract out.¹³³

Unlike other jurisdictions, Washington has not recognized these rationales underlying privatization decisions. This difference in approach derives not from fundamentally diverse statutory schemes, but rather from basic philosophical disagreements. The Washington Supreme Court is unwilling to defer to an agency a decision that has wide-ranging implications without clear legislative direction.¹³⁴ Under Washington's current approach, even a decision so mundane as who gets to deep clean the locker rooms in a local high school does not escape scrutiny, where this work is performed by civil service janitors.¹³⁵ Even if the monetary amount of the contract is *de minimus*, where it involves civil service employees' work, such a decision falls under the *Spokane* rubric.

Unquestionably, most privatization decisions present legitimate public policy concerns. Although the social costs of privatizing a government work force at any level might justify legislative scrutiny, and situations requiring judicial intervention on a case-by-case basis may arise, the risk

130. See *supra* note 39.

131. See *supra* notes 37-40 and accompanying text.

132. See *supra* note 39 and accompanying text.

133. See *supra* note 39 and accompanying text.

134. See *supra* note 119.

135. See *Clover Park Sch. Dist.*, PECB 2560-A (1986). Though this example stems from a PERC case determining whether the employer's decision to contract out custodial work performed by unionized employees is a mandatory subject of bargaining, certainly the employees could claim a violation of the *Spokane* rule as well, absent a showing that it was impracticable for the employees to provide such services.

that privatization poses to the merit system does not warrant the drastic measure of declaring it almost completely barred by statute.

B. A Civil Service System Is Just One Method of Eliminating Political Patronage

The primary purpose of most jurisdictions' civil service systems is to eliminate political spoils. The civil service system, however, is just one method of accomplishing that goal. Furthermore, as evidenced by the pervasive political patronage schemes that have survived in a number of jurisdictions, it is not a necessarily secure one at that.¹³⁶

Washington State government and its political subdivisions already have many tools at hand to combat political patronage and thus government inefficiency that could result from privatization. For example, most governmental agencies have regulations mandating open and competitive bidding for government contracts.¹³⁷ Publication of the request for proposed bids, notices of the opportunity to bid, and bidding procedures themselves are required.¹³⁸ Furthermore, removing the decision-making authority of elected officials from all but the final award of bids also aids in ensuring the fair distribution of contracts.¹³⁹ Not only are all these tools currently available to public entities, the U.S. Supreme Court's recent decisions extending First Amendment protections to government contractors¹⁴⁰ provide added incentive for these tools to be employed with greater frequency and vigilance.

Additional steps can be taken to ensure that privatizing services is free from the taint of the political spoils system. For example, Washington State courts already have a tool to review an individual agency's privatization decision to ensure that the motivating factor was not political considerations or a desire to set up a spoils system. Such a review is available under the State's Administrative Procedure Act.¹⁴¹ In addition, the legislative body could provide a mechanism for affected

136. See *supra* note 19 and accompanying text.

137. See, e.g., King County Code §§ 4.14-.16 (1993); Snohomish County Code § 3.04.160 (1992).

138. See, e.g., Wash. Rev. Code § 39.04.190 (1996); King County Code § 4.16.020 (1995).

139. The California Legislature also has included bidding requirements to ensure that the contract will not undermine the State's affirmative action program. *California State Employees' Association v. State*, 245 Cal. Rptr. 232, 235 (Ct. App. 1988) (citing Cal. Gov't Code § 19130(a)(4), (a)(8)).

140. See *supra* note 33.

141. Wash. Rev. Code ch. 34.05 (1996). The APA also provides for review of arbitrary and capricious agency action. Wash. Rev. Code § 34.05.570(4)(c)(iii).

employees to appeal an agency's decision to the existing civil service commission or reviewing board, or provide another form of internal review. This review could ensure that individual employees are not the target of politically-motivated decision-making.¹⁴² Most entities' civil service systems already provide employees rights to appeal layoffs and other personnel actions taken in violation of the existing rules.¹⁴³ Thus, extending appeal rights to civil service employees for impermissible contracting out is not unduly burdensome.

C. The Legislature Should Amend the Civil Service Laws To Permit Privatization

The Washington Legislature should amend the state's civil service laws to limit the reach of *Spokane* and subsequent decisions. Specifically, the Legislature should devise standards outlining when privatization is permissible. The reform legislation introduced in the 1993 and 1995 sessions contained a provision allowing state agencies to contract for services in the private sector.¹⁴⁴ This legislation contained no relief, however, for the judicially-imposed constraints extended in *Joint Crafts* to local public sector entities.¹⁴⁵ As discussed above, local public sector employers must seek legislative change of their own civil service systems to limit the reach of *Joint Crafts*.¹⁴⁶

The Washington rule as currently formulated has forced lower courts to find meaningless distinctions to allow employers to provide public services in a more efficient, effective manner. The *Keeton* court, for example, distinguished *Spokane* by noting that in *Spokane*, the employer contracted for services, janitorial services, but in *Keeton*, the employer bought a finished product, baked goods.¹⁴⁷ The court in *Joint Crafts* focused on the impracticability of civil service employees continuing to

142. Louisiana, for example, requires that the Director of Civil Service review and approve or disapprove any contract for services to ensure that the contracts do not provide for the performance of services that could and should be provided by civil service employees. *Parker v. State Dep't of Civil Serv.*, 454 So. 2d 162, 165 (La. Ct. App. 1984) (citing Civil Service Rule 3.1(o)).

143. See, e.g., King County Code §§ 3.12.280–290 (1994); Snohomish County Code § 3A.11 (1989).

144. Personnel System Reform Act of 1995, S. 5841, §§ 208, 403, 54th Legis. Sess. (Wash. 1995) (Second Substitute Senate Bill). Section 208 of the Bill exempted contracting out decisions from collective bargaining requirements.

145. See S. 5841.

146. See *supra* note 119 and accompanying text.

147. *Keeton v. Department of Soc. Servs.*, 34 Wash. App. 353, 360, 661 P.2d 982, 986 (1983).

provide services, specifically centralized vehicle maintenance, when the delivery method needed to change.¹⁴⁸

Rather than forcing agencies and courts to cloak decisions in the verbiage of *Spokane*, the Legislature should acknowledge that, for some agencies both at the state and local level, the civil service system may be too expensive to maintain in its current form. Either the Legislature should mandate a change in the system to cut costs or it should allow the agency to privatize services.

By allowing privatization without addressing the civil service system's inefficiencies or costs, the Legislature disservices its citizens. Citizens ultimately pay for antiquated and costly systems and are deprived of the opportunity to have a public hearing and to provide input on much needed changes. Thus, the Legislature should assure that when the costs of the system itself spur the privatization need, a review is triggered to evaluate whether or not the agency can reduce its cost of directly providing the services. Requiring the public entity to compete for contracts as opposed to eliminating public sector servicing altogether can also spur cost reductions. For example, an Arizona scheme that allows the public sector to compete with the private sector on contract bids has resulted in increased efficiency and productivity.¹⁴⁹

In some instances, however, an employer is attempting to make a fundamental operational change, not necessarily motivated by fiscal concerns resulting solely or primarily from labor costs. The civil service system ought not impede that change. Certainly the public may demand decentralized services to respond to the needs of growing municipalities and counties, as in the car-per-officer system allowed in *Joint Crafts*. Further, public employees may not possess the skills to provide necessary services, or the costs of acquiring the technological means or increasing employee expertise may be prohibitive.¹⁵⁰ In short, a public employer, as a governing entity, should be able to respond to its citizen's service needs, efficiently and effectively, whether or not that response

148. *Joint Crafts Council v. King County*, 76 Wash. App. 18, 21–22, 881 P.2d 1059, 1061–62 (1994).

149. See Kettl et al., *supra* note 18, at 67–68. Even making privatization a subject for serious discussion can spur reforms. For example, after Ohio's Governor Voinovich advocated more privatization of government services, the state employees' association formed a partnership with management to increase worker productivity. One program alone saved \$13 million by consolidating 73 training programs into 13. Neal R. Peirce, *Songs Don't Tell Labor's True Story Today*, *Hous. Chron.*, Sept. 2, 1996, at A40.

150. See *supra* note 39.

comes from within the civil service system. Legislation is needed to clarify that the civil service system is not an impediment to privatization.

D. Blind Application of the State Civil Service System to Local Public Sector Employers Is Inappropriate

In *Spokane*, the Washington Supreme Court reviewed the state's civil service laws and its implications for higher education employees' rights to continued employment.¹⁵¹ The state's civil service statutes under consideration not only provided for merit in the hiring and firing of employees in general, but the then current regulations implementing these statutes severely restricted the reasons why a higher education employee could be laid off.¹⁵²

According to those regulations, state higher education institutions could lay off employees only due to lack of funds or curtailment of work.¹⁵³ In contrast, the local public sector employer in the *Joint Crafts* case, King County, operates under its own charter and county ordinances.¹⁵⁴ These ordinances provide an expansive right to lay off workers for lack of work or funds, and most significantly, for considerations of efficiency.¹⁵⁵ This right demands that the state bar on contracting out not be extended to its political subunits that operate within different limitations.¹⁵⁶

The Washington Legislature has placed many restrictions on local public sector employers in the state; it is unwilling to place such restrictions on itself.¹⁵⁷ Often these restraints, such as the imposition of full-scope collective bargaining and interest arbitration, are created in the

151. *Washington Federation of State Employees v. Spokane Community College*, 90 Wash. 2d 698, 700-701, 585 P.2d 474, 476-477 (1978) (interpreting state's Higher Education Personnel Law (Wash. Rev. Code ch. 28B.16)).

152. Washington Administrative Code section 251-10-030(1) provided that employers may lay off employees only for lack of funds or curtailment of work. Wash. Admin. Code § 251-10-030 (1995). This regulation has since been amended to include the "good faith reorganization for efficiency purposes." Wash. St. Reg. 96-13-077.

153. Wash. Admin. Code § 251-10-030(1).

154. *See supra* note 97 and accompanying text.

155. King County Code § 3.12.300 (1993).

156. Other jurisdictions have recognized that state restrictions do not extend to the state's political subdivisions having different rules and regulations. *See, e.g., Allen v. City of Beverly Hills*, 911 F.2d 367, 370-71 (9th Cir. 1990).

157. *See supra* note 102.

name of the public good.¹⁵⁸ By judicially extending the *Spokane* constraint, the state courts have eroded further the ability of local public sector employers, in their role as governmental entities, to address citizens' needs effectively and efficiently.

E. Collective Bargaining Restrictions on Local Public Sector Employers Should Be Narrowed

The Public Employment Relations Commission applies a broad reading of private sector precedent to require bargaining over almost all privatization decisions. Although some concepts derived from private sector experience may transfer well to the public sector, wholesale adoption of such concepts is inappropriate.

Although contracting out decisions in the private sector are likely to be based on monetary considerations,¹⁵⁹ governmental agencies are entrusted not only with ensuring the public's tax dollars are spent efficiently, but also with fulfilling the public's service needs in the most effective way possible. Thus the core differences between public and private employers and the reasons underlying their contracting out decisions stem from fundamentally different concerns. Further, in the private sector, union demands may be influenced by private employers' ability to relocate their business if operating costs in one locale become too burdensome and if competitive pressures become too great.¹⁶⁰ Neither of these factors exists to influence bargaining in the public sector. This absence, coupled with labor's ability to influence the political agenda,¹⁶¹ demands that some decisions striking at public sector managerial control's core be left outside the collective bargaining arena.

Furthermore, PERC's requirements extend beyond even what the NLRB and the Washington Supreme Court have required. Unlike PERC, the NLRB, guided by the U.S. Supreme Court's decision in *Fibreboard*¹⁶² and its progeny, has recognized that for some management decisions requiring entrepreneurial discretion, bargaining should be required only if the benefit for labor-management relations and the

158. See, e.g., Wash. Rev. Code § 41.56.430 (1996) (guaranteeing uninterrupted and dedicated service of uniformed personnel because of vital nature to welfare and public safety of state); Wash. Rev. Code § 41.56.010 (1996) (promoting continued improvement of relationship between public employers and employees).

159. See Weisberger, *supra* note 49, at 697.

160. *Id.*

161. See *supra* note 43 and accompanying text.

162. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

collective bargaining process outweighs the burden placed on the conduct of the business.¹⁶³ The Washington Supreme Court has adopted this approach, rebuking PERC for making blanket scope-of-bargaining decisions.¹⁶⁴

Rather than impose a per se rule mandating bargaining over most privatization decisions, PERC instead should examine each public sector employer's unique needs. Where bargaining prevents the government entity from meeting citizens' needs, bargaining should not be mandatory. A case-specific analysis would allow public sector employers to privatize without the undue delays that can result from mandatory bargaining requirements. This analysis, additionally, would prevent employers from privatizing solely to rid themselves of unionized employees. Just as in the private sector, privatization decisions motivated solely by anti-union animus violates and will continue to violate employees' collective bargaining rights.

Although the present PERC rule mandating bargaining over privatization decisions may provide employees the greatest degree of protection, the cost to the public of such protection can be great. For example, implementing the car-per-officer program of *Joint Crafts* certainly would have been delayed or even canceled completely if bargaining over the use of private entities to provide vehicle maintenance had been required.¹⁶⁵ The delay in implementing a new, decentralized system, and the continued use of unresponsive, outmoded delivery methods contribute to public sentiment that government is inefficient.

V. CONCLUSION: A MODEL FOR CHANGE

Unquestionably, privatization poses problems for public concern. Any resulting societal harm, however, generally will be unique to each situation and can be addressed on a case-by-case basis. The almost-blanket, judicially-imposed bar against privatization should be removed. At the same time, government employers must ensure that adequate safeguards exist to protect both employees from arbitrary personnel actions and the public from the political spoils system's ills. Appropriate safeguards include systems mandating employee layoff by seniority, and competitive, open bidding processes for awards of contracts.

163. See *supra* note 64 and accompanying text.

164. See *supra* notes 110-114 and accompanying text.

165. *Joint Crafts Council v. King County*, 76 Wash. App. 18, 881 P.2d 1059 (1994).

The collective bargaining rules should be changed to require agencies to meet and confer over contracting out decisions and to ensure that unions have adequate opportunity to suggest alternatives to contracting out. Full-scale negotiations, however, should not be required. The change in the type of bargaining right granted would ensure timely implementation of public employers' decisions to manage the public trust most effectively. Finally, PERC should be able to review union appeals on a case-by-case basis to ensure that the employer's is not motivated solely by anti-union animus, and therefore has not violated the employees' collective bargaining rights.

