

## BHI Policy Study

# *A Monopoly Against Our Children: Teachers Unions vs. American Ideals*

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# A MONOPOLY AGAINST OUR CHILDREN: TEACHERS UNIONS VS. AMERICAN IDEALS

by

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The Boston Tea Party is commonly thought of as a revolt by American colonists against British taxes, but the men who painted their faces and emptied the cargo of three ships into Boston Harbor on December 16, 1773 were protesting something else as well: the monopoly created when the East India Tea Company was given exclusive control over the sale of tea in the colonies, reversing the prior rule under which this staple was sold to traders at public auction for resale to merchants. If Parliament could take away a trader's livelihood, thought the colonists, they could do the same to anyone, thereby turning America into a nation of unskilled laborers-- "fur trappers and lumberjacks."<sup>1</sup>

Governments have historically tolerated monopolies in limited circumstances where necessary to achieve a desired public end; toll roads and bridges, for example, are frequently insulated from competition in order to ensure that revenues are available to repay bonds issued to finance their construction.<sup>2</sup> Where economic necessity was not present, however, the colonists were opposed to monopolies, an antipathy made plain by the chests of tea floating in the harbor on the morning after the Boston Tea Party. As Thomas Jefferson wrote to James Madison in

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<sup>1</sup> A.J. Langguth, *Patriots: The Men Who Started the American Revolution* (Simon & Schuster, 1988), p. 174.

<sup>2</sup> See, e.g., Section 20 of Chapter 465 of the Acts of 1956 creating the Massachusetts Port Authority, "Freedom from Competition," as it relates to the toll bridge over the Mystic River: "After the effective date of this act and so long as any bonds issued under the provisions thereof shall be outstanding, no bridge, tunnel or ferry, for vehicular traffic, shall be constructed by the commonwealth [of Massachusetts] or any political subdivision thereof or by any public instrumentality, over, under or across the Mystic river" between specified points.

1787, one of the things he did “not like” about the Constitution proposed by the Constitutional Convention was its lack of a “restriction against monopolies.”<sup>3</sup>

This article will examine the anti-monopolistic strain of American revolutionary thought as it relates to a commodity most would consider more precious than tea—our children. How we came to grant a monopoly over their education is a matter of more than passing interest for the reasons that are normally cited as grounds for laws that prohibit monopolies; they are against the public interest because they increase costs to the benefit of a small group and at the expense of the public at large, and insulate the seller from competition that would improve its product for the benefit of all.

Given the unique role that governments play in the purchase of K through 12 education in America, it is appropriate to consider whether public buyers are using every tool at their disposal to obtain the highest quality product at the best price for America’s students and their parents. After all, there are many beverages other than tea, but there is no practical substitute for a primary and secondary education if one is to become a self-supporting and productive citizen.

## I. GOVERNMENT BUYERS AS PRIVILEGED CUSTOMERS

Restraints of trade that limit the choices of private buyers are regulated by anti-trust laws, which may be enforced by both governmental entities and private citizens.<sup>4</sup> The economic value of restraints on private trade is also diminished by the threat of competition from sellers offering

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<sup>3</sup> Thomas Jefferson, letter to James Madison dated December 20, 1787, Thomas Jefferson: Writings, The Library of America (New York, 1984), p. 916.

<sup>4</sup> See 15 U.S.C. §15, permitting private individuals to sue for injuries to business or property as a result of violations of antitrust laws.

comparable products and services. The market for goods and services provided by state, local and federal governments to the public presents a somewhat different situation, however.

Governments are often the sole or dominant purchaser of a particular product (such as fighter planes and interstate highways) and when government buyers enter a market, they are subject to requirements (such as competitive bidding laws) from which private buyers are exempt, since governments are ultimately accountable to all citizens, not just their stockholders, and must subordinate the preferences of particular agents to the greater good of their constituents.

As the only purchasers who genuinely represent the common weal, however, government entities may also impose conditions on their participation in a market that are unavailable to private purchasers. Government agencies may, for example, act in concert and refuse to do business with sellers who do not adhere to legislated social norms,<sup>5</sup> and they are exempt from antitrust laws.<sup>6</sup>

Because governments are answerable to all of their citizens rather than a limited group of shareholders, their interests as buyers of labor and services are normally given greater weight than those of sellers under the law. For example, while private purchasers of labor must recognize collective bargaining units organized in compliance with applicable state and federal laws, government employees are normally given the right to bargain collectively by executive order, which may be withdrawn by a subsequent executive order rather than the adoption of legislation.<sup>7</sup> In some states, colonial antipathy towards government grants of exclusive rights to particular groups (such as that conferred on the East India Company that led to the Boston Tea

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<sup>5</sup> See, e.g., Massachusetts General Laws chapter 7, §22, prohibiting agencies of that state from procuring goods or services from any company having ten or more employees in a facility located in Northern Ireland.

<sup>6</sup> Under the so-called “state action” doctrine, also known as the “Parker Doctrine” after *Parker, Director of Agriculture, et al. v. Brown*, 317 U.S. 341 (1943), state governments and certain private actors may rely on a state regulatory scheme as a defense to an antitrust claim.

<sup>7</sup> Missouri Governor Matt Blunt and Indiana Governor Mitch Daniels have both rescinded collective bargaining rights for employees of those states. [The Wall Street Journal](#), August 11, 2005.

Party) are subject to constitutional restrictions.<sup>8</sup> The principle on which these limitations are based is that “[i]n a republic no person should be allowed to exploit the public’s authority for private gain.”<sup>9</sup>

Collective bargaining by employees was originally viewed as a restraint on trade in violation of the Sherman Anti-Trust Act of 1890,<sup>10</sup> which by its terms prohibited “every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations.” In a 1908 case<sup>11</sup> the Supreme Court pointed out that attempts to specifically exempt farmers and laborers from the Sherman Act had failed, and so the law applied to a hatters’ union and its members, whose concerted efforts ran afoul of it. The Clayton Act of 1914<sup>12</sup> and subsequent enactments amended federal labor law to exempt collective bargaining from the Sherman Act’s prohibition on agreements that restrain trade, but that law applies only to private employers, not public entities.

Over time, public employees acquired the right to bargain as a group against the governments (and citizens) who employed them. Wisconsin was the first state to confer this power on its employees in 1959, and California, the nation’s largest state, permitted it for the first time only in 1978; at present, only twelve states bar collective bargaining by all public employees, and twelve other states allow it only for some types of workers.<sup>13</sup> Federal government employees were granted collective bargaining rights in 1962 by an executive order

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<sup>8</sup> Massachusetts, New Hampshire and North Carolina all have so-called “anti-monopoly” clauses in their constitutions; G.S. Wood, *The Radicalism of the American Revolution*, p. 187-8 (Alfred A. Knopf, Inc., 1991).

<sup>9</sup> *Id.*, p. 187.

<sup>10</sup> 26 Stat. 209, codified at 15 U.S.C. §1 *et seq.* (hereinafter the “Sherman Act”).

<sup>11</sup> *Loewe v. Lawlor*, 208 U.S. 274 (1908), citing *United States v. Workingmen’s Amalgamated Council*, 56 Fed. Rep. 994, *aff’d* 57 Fed. Rep. 85.

<sup>12</sup> “The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.” 15 U.S.C. §17. *See also* National Labor Relations Act of 1935, 49 Stat. 449, codified at 29 U.S.C. §§151-169.

<sup>13</sup> “Badger Rebellion,” *The Wall Street Journal*, December 13, 2010.

of President Kennedy,<sup>14</sup> but the issues on which employees of the federal government may bargain collectively was severely restricted by the Civil Service Reform Act in 1978.<sup>15</sup>

In sum, collective bargaining in the public sector is a recent branch on the stalk of labor relations in America, and one that was grafted on, not an organic offshoot. Moreover, it was added as a precatory matter, and not out of legal or constitutional necessity: there is no right to government employment, and more importantly no right to exclude others from consideration for such employment, the guild-like effect that a closed shop produces.<sup>16</sup> Governments are thus free to withdraw or limit the legal monopoly that public sector collective bargaining confers on a particular group of individuals, although for reasons of self-interest public officials in office at any given time may be unwilling to do so for reasons identified by “public choice” theory. That theory holds that politicians and government officials, while ostensibly representing the public interest, nonetheless remain self-interested individuals who may subordinate the greater good to that of the narrower interests of smaller groups who can help them remain in office. In the case of public education, the government provider of this essential service has been captured by its employees, enriching them while starving alternative channels of delivery, most notably parochial schools.<sup>17</sup>

To understand how such a monopoly relationship could have developed, it is helpful to examine the history of the “common school” movement, which in nineteenth century America replaced a pattern of multiple local providers with a single uniform system administered by a central state authority.

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<sup>14</sup> Executive Order 10988.

<sup>15</sup> P.L. 95-454, 92 Stat. 111.

<sup>16</sup> In 1959 the Executive Council of the AFL-CIO advised “In terms of accepted collective bargaining procedures, government workers have no right beyond the authority to petition Congress—a right available to every citizen.”

<sup>17</sup> See, e.g., N. Devine, *Education and Public Choice: A Critical Account of the Invisible Hand in Education*, ABC-CLIO (2004).

## II. THE DUTY TO EDUCATE, FROM PARENTS TO COMMON SCHOOLS

American primary and secondary education developed out of a series of colonial laws by which the burden of public education shifted gradually from the family to local government. The first such law, the Massachusetts Act of 1642, required only that the “Select men of every town . . . shall have a vigilant eye over their brethren & neighbors, to see” that all families “indeavour to teach” the English language and the “Capital Lawes” of the state to their children and apprentices “by themselves or others.” In other words, while the law created a legal duty to educate the child, it imposed the duty on the parents, and allowed them to satisfy it either by themselves or through others. Five years later, the General School Law of 1647—also known as the “Old Deluder Satan Law”—required all towns of fifty or more families to hire a schoolmaster to teach children to read and write<sup>18</sup>; towns with one hundred families or more were required to “set up a grammar school, the master thereof being able to instruct youth so far as they may be fitted for the university.”<sup>19</sup>

The evil sought to be remedied by the 1647 law was the “chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures . . . by keeping [the Bible] in an unknown tongue”; in other words, the Catholic model of religion in which a priestly class trained in Latin served as intermediaries between God and man, as opposed to the Protestant notion of

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<sup>18</sup> The wages of teachers were to be paid “either by the Parents or Masters of such children, or by way of supply”—that is, by goods rather than cash compensation. Thus parents were expected to supply firewood for the schoolhouse, and if they failed to do so their children were placed furthest from the source of heat, creating negative reinforcement to insure that students reminded their parents of their default in this regard. C. Andrews, *The Colonial Period of American History*.

<sup>19</sup> Prior to these laws, some cities and towns had already taken steps to educate their children. In Boston, for example, a schoolmaster was first employed in 1635, and a year later school buildings were constructed there, Roxbury and Dorchester. “Education in Massachusetts Bay,” J. Williams, appearing at The Order of the Founders and Patriots of America website, [http://www.founderspatriots.org/articles/mass\\_education.htm](http://www.founderspatriots.org/articles/mass_education.htm).

the priesthood of all believers, which recognized an individual's right and duty to read the Bible in the vernacular and to take part in the governance of the church.<sup>20</sup>

The die for American education was thus cast in a monolithic mold – one world view to the exclusion of another competing vision, both of them colored by religion. Massachusetts law provided for an established religion as early as 1638, when the General Court (the state legislature) ordered individuals who were not members of the Congregational Church “to contribute to all charges, both in church & commonwealth, whereof hee doth or may receive benefit.” Every inhabitant of the Commonwealth who did not “voluntarily contribute . . . for upholding the ordinances in the churches,” could be compelled to do so by the “cunstable or other officer of the towne.”<sup>21</sup> When the Massachusetts Constitution of 1780 was adopted, by contrast, it allowed citizens to divert funds payable in support of public education to teachers of their “own religious sect or denomination”<sup>22</sup> rather than those of the state-funded schools.

The recognition of parents' freedom of conscience in the choice of education for their children was rescinded in 1833 as the number of Catholic immigrants to Massachusetts increased dramatically, raising the specter that the Catholic model of religious schooling would prevail by the weight of numbers in a democratic society.<sup>23</sup>

At about the same time, reformers such as Horace Mann began to conceive of state-wide rather than local funding of schools as a means of improving the quality of primary and secondary education. In 1834 the Massachusetts legislature passed a law that created, for the

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<sup>20</sup> Johann Jakob Herzog, Philip Schaff, Albert. *The New Schaff-Herzog Encyclopedia of Religious Knowledge*. 1911, page 419.

<sup>21</sup> Nathaniel B. Shurtleff, ed., *The Records of the Governor and Company of the Massachusetts Bay in New England* (Boston, 1853), I: 240-241. In 1642, the General Court gave the teaching elders of six principal congregations “full power & authority to make & establish all such ordinances, statutes, & constitutions as they shall see necessary,” Shurtleff, II, 30, cited in *The Making of an American Thinking Class*, D. Staloff (Oxford University Press, 1998), p. 93.

<sup>22</sup> MASSACHUSETTS CONSTITUTION, Part 1, Article III, text in effect until amended in 1833.

<sup>23</sup> Oscar Handlin, *Boston's Immigrants, 1790-1880: A Study in Acculturation* (Cambridge: the Belknap Press of Harvard University Press, 1991), 37-43, 51-56.



first time, an interest-bearing common school fund,<sup>24</sup> which reformers hoped would be used to support and improve free public schooling; the “common” schools provided for the lower and middle classes had, in their view, been starved for funding by the property-owning classes, who sent their children to private academies. These schools, of which there were more than three hundred in the state at one time, were built on land given to them by the state. Once constructed, such schools required little in the way of tax revenue as they were supported by parents’ tuition payments. They were, in design and practice, private Protestant schools for the wealthy paid for by both the poor who could not afford them and Catholics who were excluded from them.<sup>25</sup>

Mann subscribed to the common prejudices of the Protestant establishment of his day, referring to the Pope as “the vice-regent of hell” in an essay written while an undergraduate,<sup>26</sup> but he at least saw the injustice of a system of education that benefited one class of society at the expense of others. He was, however, horrified by a proposal by New York Governor William Seward to give public monies to Catholic schools serving the Irish in New York City; he believed well-funded common schools teaching an ecumenical Protestantism reduced to its least common denominator would bring the nation’s stratified economic classes and warring ethnic groups together, and that a diversity of religious schools would by contrast lead to sectarian strife.<sup>27</sup>

The primary and secondary schools that Mann began to survey when he became the first Secretary of the Massachusetts State Board of Education in 1837 were deficient in many respects—more than ninety schools had been “broken up” by rowdy students before the end of

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<sup>24</sup> Jonathan Messerli, *Horace Mann* (New York, Alfred A. Knopf, 1972) (hereinafter “Messerli”), p 223.

<sup>25</sup> Messerli, 286, 304.

<sup>26</sup> Messerli, p. 35.

<sup>27</sup> Messerli, p. 307, 343. Mann, like the Congregational Church elders of the 17<sup>th</sup> century, was not just anti-Catholic but more precisely anti-heterodox. He could not comprehend why the Shakers, a Protestant sect in Hancock, Mass. resisted all attempts to subject their children to state-supervised education while at the same time demonstrating their intelligence, skill and commercial integrity by the production of high-quality goods, Messerli, 372.

the immediately preceding school term, for example—but in his solipsism and monomania, he replicated in the system of common schools of the 19<sup>th</sup> century the adversarial model that the Congregational Church had brought with them from Europe and imprinted on colonial American soil; namely, that public education is best delivered by buildings under the exclusive control of public authorities, funded by monies taken even from those who would prefer to send their children elsewhere.

Mann resigned his position with the Board of Education in 1848 to take the seat in the House of Representatives vacated by John Quincy Adams' death. He left behind a "Common School cause in Massachusetts . . . so consolidated . . . that [he] felt nothing could overturn it."<sup>28</sup> He can accordingly not be charged with responsibility for the enshrinement of this monolithic model of education in the Massachusetts Constitution several years later by the American Party (commonly referred to as the "Know-Nothing Party" because its members were sworn to secrecy), although it bears the outlines of his thinking. The so-called "Anti-Aid Amendment" passed at the height of a tide of nineteenth-century nativist sentiment provided that state appropriations and local tax revenues for education could be

expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.<sup>29</sup>

As one member of the Constitutional Convention of 1853 bluntly put it, the Know-Nothing's feared that Catholics would "outvote the Protestants, and claim the school fund."<sup>30</sup>

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<sup>28</sup> Letter to William B. Fowle, April 17, 1848, Mass. Historical Society, cited in Messerli, p. 455.

<sup>29</sup> MASS. CONSTITUTION amendment article XVIII, subsequently amended by amendment articles XLVI and CIII.

<sup>30</sup> Official Report of the Debates and Proceedings in the State Convention Assembled May 4, 1853 to Revise and Amend the Constitution of the Commonwealth of Massachusetts (Boston: White & Potter, 1853), 615 (statement of B.F. Hallett of Wilbraham).

The universe of American primary and secondary education we live in today thus extends back from the Know-Nothings to Mann to the Congregational Church elders who served as the heads of an American theocracy before religious liberty was protected from encroachment by state governments in the twentieth century.<sup>31</sup> It may accurately be described as Manichean; that is, divided in two, with public funds flowing only to an approved hemisphere where goods and services—buildings, books, teachers, etc --- are paid for by tax dollars, while on the opposite side are located all other educational assets, the cost of which is paid for by parents out of after-tax dollars remaining after the approved state educational system has been paid for. Because governments have the power to raise funds by compulsion through taxation of their citizens, the revenue stream derived from this source requires a different type of protection from monopoly power; parents’ ability to choose among competing vendors with their discretionary spending is protected by anti-trust laws, but state action is exempt from antitrust laws.<sup>32</sup>

### III. EDUCATION VS. OTHER PUBLIC GOODS

Should government assert its typical privileged status as purchaser of K through 12 education, or should it subject itself and the public to a monopoly, in the manner of a municipality that builds a toll bridge and agrees to prohibit competition for the benefit of a limited group and to the detriment of other citizens who may wish to provide alternative services?

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<sup>31</sup> *Gitlow v. New York*, 268 U.S. 652 (1925), is generally recognized as the first case to hold that state governments could not favor one religion over another, following the passage of the Fourteenth Amendment to the U.S. Constitution in 1868.

<sup>32</sup> *Parker v. Brown*, *supra*, note 6.

The essential characteristic of those situations in which government imposes the disability of a monopoly on itself is necessity, usually financial. Absent a monopoly for a turnpike or a toll road, for example, a government might have to pay higher interest costs to bondholders in order to finance construction expenses, which would consume resources better used for other social purposes. Even where monopolies have been granted by governments, however, they have traditionally been limited in duration because of their deleterious effects and because the public retains a reversionary interest in the assets subjected to the monopolists' control. The holder of a government-approved monopoly is customarily granted only a temporary interest of an agreed-upon length of time, sufficient to allow it to recoup its investment and pay financing costs.<sup>33</sup> As a result, courts have historically viewed with disfavor attempts by private holders of public monopolies to extend the term of their grants, since to do so would be contrary to the public interest.<sup>34</sup>

The question may thus be stated as follows: is primary and secondary education one of those limited circumstances under which a monopoly-monopsony relationship should be tolerated by governments, or is it more like those government services where the needs of society and the direct customers—in this case, parents and children—outweigh the interests of the sellers?

An example drawn from outside the necessarily emotional context of childhood education may serve to throw the distinction into greater contrast. In Pennsylvania, proposed budget cuts may result in the sale of state-owned liquor stores, a move that is opposed by the

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<sup>33</sup> See, e.g., *State ex rel. Boardman v. Lake*, 8 Nev. 276 (1873); *Kendall v. Hillsbore S.P.P. Turnpike Road*, 23 Ky. L. Rep. 2372, 67 S.W. 376 (1902); *Heath v. Barmore*, 50 N.Y. 302 (1872), *aff'g* 49 Barb. 496 (1867); *Tift v. Buffalo*, 82 N.Y. 204 (1880); *People ex rel. El Dorado County v. Davidson*, 79 Cal. 166, 21 Pac. 539 (1889); *McMullin v. Leitch*, 83 Cal. 239, 23 Pac. 294 (1890); *State v. Hannibal & R.C. Gravel Road Co.*, 138 Mo. 332, 39 S.W. 910 (1897); *State v. Maine*, 27 Conn. 641, 71 Am. Dec. 89 (1858).

<sup>34</sup> See, e.g., *State ex rel. Hines v. Cape Girardeau & J. Gravel Road Co.*, 207 Mo. 85, 39 S.W. 910 (1907).

unions representing the public employees at such stores.<sup>35</sup> Since the product—privately-manufactured liquor packaged for retail sale—is identical regardless of whether the state or multiple private entities offer it to the public, straightforward monopoly analysis is somewhat beside the point; the state may desire to suppress the volume and variety of liquor products or the hours at which liquor by the bottle may be purchased by residents in order to reduce drunk driving and the cost to the public fisc of treatment for alcohol-related health problems. In this case, there are social goals that may outweigh the ills that a government monopoly produces.

In the case of K through 12 education, however, there is no countervailing public interest that militates in favor of the grant of exclusive rights to educate children at public expense to a single group. No benefit is gained by reducing the quantity of educational services to such consumers, and there is no known social harm that results from excess consumption of such services.

To date, most discussion of the harm that monopolies cause in the realm of K through 12 education have focused on one of three alternatives: charter schools, educational vouchers, and tax credits or deductions for expenses incurred at private or parochial schools. Each has been the subject of extensive study, but none would change the existing monopoly default system by which the majority of students are educated at local public schools, since all three--charter, private and parochial schools--are by definition outside the prevailing regime under which students are assigned to particular elementary or secondary schools by a municipal authority. This article will accordingly limit its proposals to more novel or less familiar remedies that would instead be applied to the nation's existing elementary and secondary public education infrastructure.

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<sup>35</sup> [The Wall Street Journal](#), March 9, 2011.

## Ending or limiting monopoly provider status

Several states have recently attempted to curtail the monopoly powers previously conferred upon providers of K through 12 education. In 2011 and 2012 Idaho, Indiana, Michigan, Ohio, Tennessee and Wisconsin all enacted measures that limit the scope of collective bargaining by public employees, although the Ohio law was repealed by a voter referendum.<sup>36</sup>

These laws reduce monopoly power over K-12 education by several means:

*Collective bargaining limited to compensation.* The laws adopted in Idaho,<sup>37</sup> Indiana,<sup>38</sup> Michigan,<sup>39</sup> Tennessee<sup>40</sup> and Wisconsin<sup>41</sup> all limit the scope of collective bargaining to matters having to do with compensation, and exclude educational considerations. The Idaho, Indiana and Michigan and Tennessee laws expressly exclude specific subjects such as teacher placement and performance evaluation from collective bargaining, while the Wisconsin law includes a general prohibition on bargaining over “[a]ny factor or condition of employment except wages.” By so limiting the scope of bargaining, states can prevent monopoly power of a collective bargaining unit from extending into classroom.<sup>42</sup>

*Term limitations.* Indiana’s law provides that a contract between a school employer and an exclusive representative may not extend past the end of a state budget cycle.<sup>43</sup> Idaho’s law goes further, declaring “evergreen or continuation clauses” in negotiated teacher contracts to be contrary to public policy in that they “purport to bind in perpetuity the actions of future” school

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<sup>36</sup> The Ohio Collective Bargaining Limit Repeal, appeared on the November 8, 2011 general election ballot in Ohio as Issue 2, and received 2,145,042 “no” votes to repeal Senate Bill 5, and 1,352,366 “yes” votes, thereby repealing Senate Bill 5. Supporters of repeal outspent supporters of Senate Bill 5, \$29,848,414 to \$11,429,000, report filed July 29, 2011 with the Secretary of State of Ohio.

<sup>37</sup> Idaho Code Ann. § 33-1271-75 (2012).

<sup>38</sup> Ind. Code Ann. § 20-29-6-4.5 (LexisNexis 2012).

<sup>39</sup> Mich. Comp. Laws § 423.215 (2012).

<sup>40</sup> Tenn. Code Ann. § 49-5-601-09 (2012).

<sup>41</sup> Wis. Stat. §111.70(1)(a) (2011).

<sup>42</sup> Idaho Code Ann. § 33-1271; Ind. Code Ann. § 20-29-6-4(b); Mich. Comp. Laws § 423.215; Wis. Stat. §111.70(4).

<sup>43</sup> Ind. Code Ann. §20-29-6-4.7.

boards, and thus “subvert the ability of the people to direct their own affairs.”<sup>44</sup> The effect of such provisions is to limit the exercise of monopoly power to a particular period of time and allow for subsequent democratic action to reduce or eliminate such power if a prior grant proves to be unwise, in much the same manner that governments have imposed temporal limits on bridge and toll road monopolies.

*Right to refrain from collective bargaining.* The statutes of Tennessee and Wisconsin provide that teachers have the right to refrain from joining unions,<sup>45</sup> thereby reducing monopoly power to the extent that non-members may bargain directly for themselves and withhold monopoly rents, in the form of compulsory union dues, that would otherwise be collected by collective bargaining units.

*Government buyer as privileged buyer.* Government monopsony buyers of education are representative of all citizens, while teachers unions are monopoly sellers of education that represent a necessarily smaller class of citizens. As noted above, it is for this reason that governments assert rights unavailable to private citizens when they enter the marketplace for goods and services. Idaho’s law provides that a school board that has reached an impasse with teachers may establish compensation at a level that reflects “the last best good faith offer.”<sup>46</sup>

*Collaborative model:* The Tennessee statute seeks to revamp the model of teacher collective bargaining entirely, instead creating a structure for “collaborative conferencing” in which teachers may select from a number of professional employee organizations to represent them in discussions with a local educational authority, or forego affiliation with any

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<sup>44</sup> Idaho Code Ann. § 33-1271A.

<sup>45</sup> Tenn. Code Ann. § 49-5-603; Wis. Stat. § 111.70(2).

<sup>46</sup> Idaho Code §§ 33-1274(2), 33-1274A

representative organization. This model creates the possibility of participation by multiple individuals representing several competing organizations and unaffiliated employees.<sup>47</sup>

*Merit pay:* The Ohio law that was repealed would have created a merit-based pay system for teachers and prohibited districts from giving preference based on seniority in making layoffs, a type of measure approved recently in Florida and Idaho and under consideration in Massachusetts.<sup>48</sup> By allowing individuals to compete for higher pay free from collective restrictions that would otherwise govern promotion, placement and pay, entrepreneurial teachers are able to counteract the deleterious effect that monopoly control has on their professional advancement and the education of their students by eliminating the ability of senior personnel without subject matter expertise to displace more junior but better qualified teachers.

It is not clear whether these initiatives will succeed elsewhere, or endure where they have been adopted, as they engender fierce opposition from teachers unions without inspiring a similar fervor among parents; after all, they do not directly address classroom instruction or educational quality, while they have an immediate, tangible and negative effect on monopoly power. The law that was repealed in Ohio failed to make any distinction between teachers and public safety workers such as fire and police, a strategic decision that lumped together government functions with widely divergent characteristics; voters are unlikely to have the same desire for personal involvement in fighting fires or apprehending criminals as they feel in the case of their children's education.<sup>49</sup>

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<sup>47</sup> Tenn. Code Ann. § 49-5-605.

<sup>48</sup> "Ohio Voters Reject Law Limiting Teachers' Collective Bargaining," *Education Week* November 8, 2011, S. Cavanagh. The Massachusetts measure is Initiative Petition Number 11-20, An Act Promoting Excellence in Public Schools.

<sup>49</sup> Prior to the development of public police forces in Massachusetts in the first half of the nineteenth century, private citizens acting as constables or night watchmen were responsible for law enforcement, L.M. Friedman, *Crime and Punishment in American History* (Basic Books, 1993), p. 28. Urban fire protection was originally a private industry,



## “Parent trigger” laws

In California, a recently-enacted state law<sup>50</sup> gives parents the right to oust the administration of a failing public school by majority vote, as evidenced by signatures on a petition. Once 51% of parents of students at the school sign such a “parent trigger” petition, the state may intervene in the school’s operation using one of four models: the “turnaround” model, the “restart” model, the “transformation” model, or school closure. The turnaround model calls for replacement of the school’s principal, and the grant to a successor principal of additional operational flexibility. The restart model converts a school to a charter school or one managed by an education management organization selected through a rigorous review process. The transformation model involves replacement of the school’s existing principal, and implementation of a rigorous evaluation system for the school’s teachers.

A comparable concept was included in the No Child Left Behind Act of 2001,<sup>51</sup> which granted to parents of children attending failing public schools the right to transfer their children to another public school within their school district, or free supplemental educational services. These remedies have failed for a number of reasons. The school transfer option has failed because there are often no better public schools within the child’s district and transfers to private and parochial schools are not permitted, and the federal Department of Education has in many cases granted school districts waivers that allow them to offer only supplemental educational services and not the option of physical transfer. Four years after the passage of No Child Left

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funded by insurance companies, and private fire protection is common in Denmark and the western and southern United States, “Fire Protection Privatization: A Cost-Effective Approach to Public Safety,” J.R. Guardiano, D. Haarmeyer, R. Poole, Jr., *Reason*, <http://www.reason.org/ps152.html>.

<sup>50</sup> SBX5 4, Chapter 3, 5<sup>th</sup> Extraordinary Session, 2010, codified as California Education Code §§53, 53202, 533000.

<sup>51</sup> Pub.L. 107-110, 115 Stat. 1425, enacted January 8, 2002.

Behind, only one percent of eligible students had participated in the public school choice option.<sup>52</sup>

The remedy of supplemental educational services has failed because local education agencies, that is, the public entities that failed eligible children during normal school hours, have entered the field to provide such services “even though [they] were identified for improvement.”<sup>53</sup> In many cases, school districts have used their existing monopoly power to crowd out potential competitive providers of such services, and to deny such providers access through a “fair, open and objective process, on the same basis and terms” as other groups that seek access to school facilities. In the case of the Boston Public Schools, the monopoly government provider charged unreasonable access and usage fees for access to its facilities.<sup>54</sup>

Whether “parent trigger” laws can succeed where No Child Left Behind has proven inadequate remains to be seen. Similar laws are being considered in other states and the city of Chicago,<sup>55</sup> but the California law is being resisted by teachers unions and their allies.<sup>56</sup>

### Competitive bidding laws

A third possible way to enhance competition in elementary and secondary schooling would be to expressly include K through 12 education among those services which must be procured through competitive bidding, or where a state procurement statute does not expressly exclude such services, open up K through 12 instruction to bidders other than the existing

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<sup>52</sup> Letter of U.S. Secretary of Education Margaret Spellings to Chief State School Officers dated May 15, 2006, <http://www.ed.gov/policy/elsec/guid/secletter/060515.html>.

<sup>53</sup> *See, e.g.*, waivers for Boston Public Schools dated March 12, 2007 and April 8, 2008 granted by the federal Department of Education.

<sup>54</sup> Letter of U.S. Secretary of Education Margaret Spellings to Boston Public School Superintendent dated August 4, 2008.

<sup>55</sup> Georgia, Indiana, Michigan, New Jersey, West Virginia and Maryland, [change.org](http://news.change.org/stories/parent-trigger-law-could-trigger-change-around-the-nation), <http://news.change.org/stories/parent-trigger-law-could-trigger-change-around-the-nation>.

<sup>56</sup> “Crushing Hopes in Compton,” [The Wall Street Journal](http://www.wsj.com), March 2, 2011.

collective bargaining unit.<sup>57</sup> State competitive bidding laws typically require that government contracts for goods and services for a purchase price in excess of a minimal threshold amount be advertised and awarded to the most advantageous offeror where the selection among bidders requires consideration of factors other than price.<sup>58</sup> By allowing competing providers an opportunity to present proposals for the operation of local schools, the current elevation of the rights of the producers of K through 12 education over those of the consumers of those services—namely, children and their parents—would be aligned with democratic values.

## CONCLUSION

We forbid the exercise of monopoly power and restraints of trade in the private sector except in the case of bargaining by employees, who may otherwise be at a disadvantage in dealing with a private employer. In the case of public services, however, the marketplace is different; customers are compelled to pay in advance for services which, if a monopoly of public employees colludes to withhold or provides in an adequate fashion, they may be unable to afford or even to obtain elsewhere. The customer who refuses to cross a picket line at a private business takes his money elsewhere and buys substitute goods or services; the parent of a school-age child can't get a refund for taxes previously paid if teachers strike or a school fails to educate his or her child, and must pay twice to purchase the education that the state requires children to obtain under compulsory attendance laws.

There may be government activities where the service in question does not require a high level of skill, such as trash collection, or where the activity has only a tangential (or even

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<sup>57</sup> Massachusetts General Laws chapter 30B, §2, for example, does not expressly exclude K through 12 instruction from its definition of services that must be procured through competitive bidding, and so a school district whose contract with a teachers union local had expired by its terms or by breach could legally open its purchase of such services to bidders other than the incumbent designated bargaining unit.

<sup>58</sup> *See, e.g.*, Massachusetts General Laws chapter 30B, §6.

negative) impact on the common weal, such as state liquor stores. In these cases a government's willingness to subject itself to a monopoly may be harmless or if not, outweighed by some other greater social goal.

The education of the children of a nation, which educators since Horace Mann and before have argued is essential to a democracy, is not one of those cases.