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Indiana Law Journal

Volume 87 | Issue 1 Article 13

1-1-2012

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Recommended Citation
Slater, Joseph E. (2012) "Public-Sector Labor in the Age of Obama," *Indiana Law Journal*: Vol. 87: Iss. 1, Article 13.
Available at: http://www.repository.law.indiana.edu/ilj/vol87/iss1/13

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Public-Sector Labor in the Age of Obama[†]

JOSEPH E. SLATER[*]

INTRODUCTION

I am delighted to be part of this symposium on labor in the "age of Obama," and I am especially pleased to discuss the public sector. For too long, scholars have viewed public-sector labor relations as something of a boutique or specialty subject. The many recent books and articles that describe (and generally decry) the state of private-sector labor law and labor relations hardly mention the public sector.[1] Yet public-sector unions are one of the labor movement's biggest success stories. For some time, the union density rate in the public sector has been around 40%, while the private-sector rate is now less than 7%.[2] Indeed, as of 2010, in the United States more government employees were union members than private-sector employees.[3] In short, "the public sector" is over half of "labor" in the age of Obama, and public-sector unions have achieved many of labor's most significant accomplishments in the past few decades. Scholars should take heed.

On the other hand, public-sector unions are now facing extraordinary difficulties. In the initial draft of this Article, before the November 2010 elections, I played with the "best of times, worst of times" cliché. By early 2011 it became clear that public-sector unions are under attacks unprecedented in modern times. Since public-sector unions did not even begin to win the right to bargain

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I am grateful to the participants in this Symposium, especially Steve Befort, for their valuable comments. I also thank the University of Toledo College of Law and Eugene N. Balk Professorship for their financial support. Finally, Marissa Licatta and Margaret Reynolds provided very helpful research assistance.

Portions of Part I of this Article were previously published in JOSEPH E. SLATER, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, THE ASSAULT ON PUBLIC SECTOR COLLECTIVE BARGAINING: REAL HARMS AND IMAGINARY BENEFITS (2011), *available at* http://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf.

1. *See, e.g.*, CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010); CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005); Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMP. L.J. 311 (2010); Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133 (2007); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 380–89 (2007).

2. U.S. Bureau of Labor Statistics, *Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, BUREAU OF LAB. STAT. (Jan. 21, 2011), http://www.bls.gov/news.release/union2.t03.htm. In 2010, 36.2% of public employees were members of unions, and 40.0% were covered by union contracts. *Id.*

3. In 2010, 7.6 million public workers and 7.1 million private-sector workers were union members. U.S. Bureau of Labor Statistics, *Union Members Summary*, BUREAU OF LAB. STAT. (Jan. 21, 2011), http://www.bls.gov/news.release/union2.nr0.htm.

collectively until the 1960s, this may not be literally the worst of times for them,[4] but right now the balance seems closer to "worst" than "best." The economic crisis has caused significant cuts in public employment. By the fall of 2010, the number of workers employed by local governments had dropped to its lowest level since October 2006, and the drop in local government employment from August to September 2010 was the biggest one-month decline since 1982.[5] These trends are projected to continue or even worsen through 2011.[6] More broadly, the recession has provided an opportunity for some not only to argue that public workers are overcompensated, but also to blame various economic and budget woes on public sector unions and their right to bargain collectively.

Of course, describing "public-sector labor" in this or any other era is a challenge. Public employment includes a wide variety of jobs and types of employers: police officers in Virginia, grade school teachers in Missouri, security screeners for the Transportation Safety Administration, municipal janitors in California, and white-collar professionals in Ohio state agencies. Also, public-sector labor law is generally set by state and local laws, which vary significantly. Some states do not grant public workers the right to bargain collectively at all; some allow only a few types of public workers to bargain collectively; others allow collective bargaining generally but do not allow strikes; and some allow bargaining and strikes (for most public workers).[7] Thus, public school teachers in Virginia cannot bargain collectively or strike;[8] teachers in Michigan can bargain collectively but cannot legally strike;[9] and teachers in Pennsylvania can both bargain collectively and strike.[10] Statutes that allow bargaining but not strikes (the most common approach)[11] use varying processes for resolving bargaining impasses, including fact finding and mediation, and usually,

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4. For a discussion of the era before public workers began to win the right to bargain collectively, see generally JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962 (2004).

5. "Local governments employed 14.2 million, or 76,000 fewer people [in September] than in August, the biggest one-month decline since July 1982 . . . . Of the jobs cut, 50,000 were in education." Simone Baribeau & Ashley Lutz, *Local Government Employment in U.S. Falls to Lowest Since 2006*, BLOOMBERG (Oct. 8, 2010), http://www.bloomberg.com/news/2010-10-08/local-government-employment-in-u-s-falls-to-lowest-since-2006.html.

6. "'Unfortunately, the government sector is likely to see heavy job cuts again in 2011 . . . ,' [said John Challenger, the chief executive officer of an outplacement firm that has studied the issue]. 'In fact, the sector could see an increase in job cuts in 2011 . . . .'" *Reductions-in-Force: Despite Drop, More Government Job Cuts Ahead*, 49 Gov't Empl. Rel. Rep. (BNA) 39 (Jan. 11, 2011).

7. *See* RICHARD C. KEARNEY WITH DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR 60–61, 236–37 (3d ed. 2001).

8. *See id.*

9. *See id.*

10. *See id.*

11. *See generally* MARTIN H. MALIN, ANN C. HODGES & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS (2d ed. 2011) (sections discussing strikes and other aspects of collective bargaining); KEARNEY WITH CARNEVALE, *supra* note 7, at 236–37, 264–65.

but not always, end in some form of binding "interest arbitration."[12] Other legal rules vary significantly across jurisdictions, notably on scope of bargaining (often narrower than in the private sector) and coverage of employees (some public-sector laws cover supervisors).[13]

Partly because they are subject to local laws, and partly because their employers are elected officials, public-sector unions are often very vulnerable to shifting political winds. While the National Labor Relations Act (NLRA) seems almost immune to amendment,[14] public-sector unions frequently win and lose rights through legislative and executive actions.[15] The fundamental question of whether some, or even any, public employees should even have a right to bargain collectively remains contested, even though the vast majority of states have adopted collective bargaining rights for some or most public workers.[16] The economic crisis that began in 2008 has significantly intensified these debates. Events are unfolding at a rapid pace. From the fall of 2010, when I first presented this Article, to the spring of 2011, a number of states have made significant changes in their public-sector laws, some of which have been quite radical.[17]

This Article will focus on four issues involving public-sector labor in the age of Obama—issues that are significant on their own and also relate to questions of the proper nature and extent of collective bargaining in the public sector. The first two issues have had broad impact across the country; the second two focus on legal issues for discrete sets of workers that also raise broad issues about all public-sector labor relations.

Part I discusses the political attacks on public-sector unions, which have escalated during the economic crisis and resulted in the consideration and passage of new laws. It describes these laws and focuses on debates over public employee compensation, both pay and pensions. Part II covers certain bargaining and legal issues created by the economic crisis: the impact on interest arbitrations, the use of furloughs by public employers, and cases challenging unilateral employer actions under the Contracts Clause of the U.S. Constitution. Part III concerns acts (or potential acts) by the federal government that could have both great practical and symbolic significance: first, the continuing battle over whether employees of the Transportation Safety Administration (TSA) should have collective bargaining

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12. *See* KEARNEY WITH CARNEVAL, *supra* note 7, at 264–65.

13. MALIN ET AL., *supra* note 11, at 457–554 (scope of bargaining); *id.* at 359–412 (coverage of employees); KEARNEY WITH CARNEVAL, *supra* note 7.

14. In the first half of the Obama administration, a democratic president with a Congress featuring significant democratic majorities in the House and Senate was unable to pass the Employee Free Choice Act, which would have amended the NLRA. H.R. 1409, 111th Cong. (2009). The last major amendment to the NLRA, the Landrum-Griffin Act, was enacted over fifty years ago. *See* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. §§ 401–531 (2006)).

15. *See infra* Part I.D.

16. For example, in the past decade, Indiana, Arizona, and Kentucky had governors issue executive orders permitting certain public employees to bargain collectively, only to have the next governor repeal this order. MALIN ET AL., *supra* note 11, at 288–89; *see also infra* Part III (for a discussion regarding federal employees).

17. *See infra* Part I.D.

rights, and second, a proposed statute that would grant all police and firefighters collective bargaining rights. Finally, Part IV will describe a set of cases from Missouri interpreting its state constitutional requirement that employees have "the right to bargain collectively," which focus on the basic question of what exactly "collective bargaining" means.

I. THE ECONOMIC CRISIS, POLITICAL ATTACKS ON PUBLIC SECTOR UNIONS, AND NEW LAWS

A. Of Pensions and Politics

In the best of times, the fortunes of public workers and their unions are subject to political shifts. Sympathetic public officials can expand their legal rights; unsympathetic officials can contract them. Public sympathy can put pressure on elected officials (including the employers of union members) in a variety of contexts, including contract negotiations, where collective bargaining is allowed, and less formal arrangements, where it is not. Similarly, public skepticism of government employees and their unions can hurt labor in negotiations, increase pressure to cut taxes and privatize public services, and affect compensation and other issues not subject to collective negotiation (for example, state-run pension plans).

These are not the best of times. The severity of the economic downturn that began in the summer of 2008 needs no detailed recounting here. The current recession has prompted a political maelstrom around public employees and their unions. Critics have claimed that these workers are overcompensated and that their pension plans are economically unsustainable.[18] With unemployment high, the relatively greater job security of public workers—real and/or perceived—is likely also a source of friction.

Thus, for example, a *Wall Street Journal* editorial last spring made the remarkable claim that "America's most privileged class are public union workers."[19] *The New Republic* titled an article "Why Public Employees Are the New Welfare Queens."[20] A *Politico* article explained:

> Spurred by state budget crunches and an angry public mood, Republican and some Democratic leaders are focusing with increasing intensity on public workers and the unions that represent them, casting

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18. Amy Traub, Dir. of Research, Drum Major Inst. for Pub. Policy, Address at the AFL-CIO's Annual State Legislative Issues Conference: Countering Anti-Public Worker Sentiment (July 24, 2010), *available at* http://www.drummajorinstitute.org/library/article.php?ID=7523 (describing and criticizing the attacks).

19. Editorial, *The Government Pay Boom*, WALL ST. J., Mar. 26, 2010, at A18 (emphasis omitted). One might wonder if the authors of this editorial, associated as they are with Wall Street, might actually be aware of a class of Americans even more privileged than, say, the (unionized) janitorial staff at my (public) university.

20. Jonathan Cohn, *Why Public Employees Are the New Welfare Queens*, THE NEW REPUBLIC, Aug. 8, 2010, http://www.tnr.com/blog/jonathan-cohn/76884/why-your-fireman-has-better-pension-you.

> them as overpaid obstacles to good government and demanding cuts in their often-generous benefits. . . .
>
> "We have a new privileged class in America," said Indiana Gov. Mitch Daniels, who rescinded state workers' collective bargaining power on his first day in office in 2006. "We used to think of government workers as underpaid public servants. Now they are better paid than the people who pay their salaries."[21]

Tim Pawlenty, governor of Minnesota, made the politics of the issue explicit: "If you inform the public and workers in the private sector about the inflated benefits and compensation packages of public employees, and then you remind the taxpayers that they're footing the bill for that—they get on the reform train pretty quickly."[22] Mort Zuckerman, editor of *U.S. News & World Report*, was even more direct when he stated that we must escape from "public sector unions' stranglehold on state and local governments . . . or it will crush us."[23] Paul Gigot of the *Wall Street Journal* posited "a showdown looming across the country between taxpayers and public employee unions over pay and pensions."[24] Taking what in other times might have been considered a politically risky or at least an ironic stance, former Massachusetts governor Mitt Romney asked, "Why should taxpayers pay for health care for public employees that we don't have ourselves?"[25] The November 2010 election results, along with an economy that is still struggling, have intensified the mood. In the same week, my local paper reported that incoming Ohio governor John Kasich "wants to do away with binding arbitration for police and fire unions . . . and, as much as possible, dismantle the state's 1983 collective bargaining law" for public employees,[26] and the *New York Times* featured an article titled "Strained States Turning to Laws to Curb Unions."[27] On February 9, 2011, a bill was introduced in the Ohio Senate that would have, among other things: eliminated or severely limited collective bargaining for state workers; made all public-sector strikes illegal; greatly weakened binding interest arbitration rules for police and firefighters (who cannot currently strike); and removed, or mostly removed, health insurance from the scope of mandatory bargaining.[28] Along the same lines, the incoming governor of Wisconsin, Scott Walker, announced that he will seek to eliminate almost all collective bargaining rights of state and local

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21. Ben Smith & Maggie Haberman, *Pols Turn on Labor Unions*, POLITICO, June 6, 2010, http://www.politico.com/news/stories/0610/38183.html.

22. *Id.*

23. Amy Traub, *War on Public Workers*, THE NATION, July 5, 2010, at 5.

24. *Id.*

25. Jeff Crosby, *Public Sector, Public Good*, AFL-CIO NOW BLOG, Apr. 22, 2010, http://blog.aflcio.org/2010/04/22/public-sector-public-good/#more-28473.

26. Jennifer Feehan, *Kasich Stand Worries Union; Attack on Bargaining Law Called 'Teachable Moment,'* THE BLADE (Toledo, OH), Dec. 31, 2010, at B1.

27. Steven Greenhouse, *Strained States Turning to Laws to Curb Unions*, N.Y. TIMES, Jan. 4, 2011, at A1.

28. *See* Ignazio Messina, *Shift of Control Gives GOP Votes to Greatly Alter Ohio's Labor Law; Collective Bargaining for State Workers Among Issues*, THE BLADE (Toledo, OH), Feb. 11, 2011, at A1 (discussing Senate Bill 5).

public workers.[29] This is shocking not only because the bill is so radical, but also because Wisconsin adopted, around fifty years ago, the first public-sector collective bargaining law in the country.[30]

Much of the real and perceived financial problems in this area involve pension plans. Notably, public-sector pension benefits and rules in most states are *not* set through collective bargaining, but rather through statute and regulation.[31] Also, while some state plans have significant underfunding problems, in the aggregate, public-sector pension plans currently account for a total of 3.8% of state and local spending, which does not seem obviously out of balance.[32] Still, the problem is real, at least in a number of places. Causes range from stock market declines, to underfunding due to questionable actuarial assumptions and political pressure to divert funds to other projects, to some overgenerous benefit formulas.[33]

Certainly the stock market declines in recent years contributed to significant underfunding in a number of places. This, in turn, put additional strains on already-weakened public budgets. The *Politico* piece noted:

> A recent study from the Pew Center on the States found that states are short $1 trillion toward the $3.35 trillion in pension, health care and other retirement benefits states have promised their current and retired workers, the product of a combination of political decisions and the recent recession.
>
> But the immediate cause of the new spotlight on public sector unions is the collapse in tax revenues that came with the 2008 Wall

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29. Mary Spicuzza & Clay Barbour, *Walker: We Must Cut Power of Unions; Democrats and Public Workers Decry His Proposal to Eliminate Collective Bargaining*, WIS. ST. J., Feb. 11, 2011, at A1.

30. *See* SLATER, *supra* note 4, at 158–93.

31. *See* Gerald W. McEntee, Editorial, *Don't Blame Public Pensions; Opposing View*, USA TODAY, Jan. 18, 2011, at 9A (public-employee pension systems "predated public employee bargaining rights, and few plans are subject to the bargaining process today"). For example, in Ohio, pension benefits are set by statute and pension rules and benefits are not negotiable by unions. OHIO REV. CODE ANN. §145.01-95 (LexisNexis 2007) (statute setting pension rules and benefits for public employees); OHIO REV. CODE ANN. § 4117.10 (LexisNexis Supp. 2011) (provisions of laws pertaining to, inter alia, the retirement of public employees prevail over any provisions in a collective bargaining agreement).

32. ALICIA H. MUNNELL, JEAN-PIERRE AUBRY & LAURA QUINBY, CTR. FOR RET. RESEARCH, NO. 13, THE IMPACT OF PUBLIC PENSIONS ON STATE AND LOCAL BUDGETS 1 (2010).

33. *See* David Lewin, Thomas Kochan, Joel Cutcher-Gershenfeld, Teresa Ghilarducci, Harry Katz, Jeff Keefe, Daniel J.B. Mitchell, Craig Olson, Saul Rubinstein & Christian Weller, *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* 11–12 (Emp't Policy Research Network, Labor and Emp't Relations Ass'n Working Paper Series, 2011), *available at* http://ssrn.com/abstract=1792942; Florence Olsen, *Retirement: Assumptions About Investment Returns Set Public Pensions Apart, NASRA Says*, 48 Gov't Empl. Rel. Rep. (BNA) 401 (Apr. 6, 2010).

> Street crash, something that union leaders bitterly note is not their fault.[34]

California's public employee pensions are perhaps in the worst condition. A recent study from the Stanford Institute for Economic Policy Research, using economic assumptions the authors felt were more reliable than the officially approved standards the plan was using, found that *prior* to the 2008/2009 recession, the three major public-sector pension plans for the state had a combined funding shortfall of $425.2 billion.[35] Then, between June 2008 and June 2009, these three pension funds lost a combined $109.7 billion, putting their ability to meet future obligations at risk.[36] While this study contained recommendations to restore sound economic footing, the California pension problem has also inspired critiques less measured and more willing to blame unions—in books with titles like *Plunder!: How Public Employee Unions Are Raiding Treasuries, Controlling Our Lives and Bankrupting the Nation*, for example.[37]

In some cases, these problems have been exaggerated. A coalition of ten organizations representing state and local government employers issued a fact sheet on January 26, 2011, stating that state and local government pension funds on the whole "are not in crisis."[38] It concluded that "[m]ost state and local government employee retirement systems have substantial assets to weather the economic crisis; those that are underfunded are taking steps to strengthen funding."[39] Some have disputed claims, such as those made by the Stanford Institute for Economic Policy Research, that public pension fund managers make overly optimistic assumptions about investment returns.[40] Another independent study explains that

> the extent of public pension liabilities varies widely among the states and local governments. Some pension plans are fully funded, while others have seen their funding levels drop below 80 percent. In most cases, pension funding shortfalls are the result of the cyclical nature of the economy, which was particularly severe in the 2008–2009 period. In a minority of cases, unfunded liabilities can be directly traced to the

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34. Smith & Haberman, *supra* note 21.

35. *See* HOWARD BORNSTEIN, STAN MARKUZE, CAMERON PERCY, LISHA WANG & MORITZ ZANDER, STANFORD INST. FOR ECON. POLICY RESEARCH, GOING FOR BROKE: REFORMING CALIFORNIA'S PUBLIC EMPLOYEE PENSION SYSTEMS (2010), *available at* http://www.stanford.edu/group/siepr/cgibin/siepr/?q=/system/files/shared/GoingforBroke_pb.pdf.

36. *Id.*

37. STEVEN GREENHUT, PLUNDER!: HOW PUBLIC EMPLOYEE UNIONS ARE RAIDING TREASURIES, CONTROLLING OUR LIVES AND BANKRUPTING THE NATION (2009).

38. *Retirement: Public Pensions 'Not in Crisis,' Group Says, Pointing to 'Substantial Assets' for Long Run*, 49 Gov't Empl. Rel. Rep. (BNA) 162 (Feb. 8, 2011).

39. *Id.*

40. *See, e.g.*, Olsen, *supra* note 33 (quoting Keith Brainard, Research Director, National Association of State Retirement Administrators).

> failure of public officials to properly fund the pension system over a period of many years.[41]

Further, the benefit levels in many public-sector pensions systems are far from overly generous. "State pensions in Massachusetts average less than $26,000" a year.[42] Also, nearly a third of all state and local government employees (including this author) do not earn social security retirement benefits. This is because public employment in some states is not covered by social security.[43] One survey reported the following average pension benefits: California, $2,008 per month or $24,097 per year; Colorado, $2,278 per month or $27,339 per year (and no social security); Florida, $1,468 per month or $17,617 per year; and Ohio, $1,961 per month or $23,535 per year (and no social security).[44]

Also, states have cut back on their contributions to public employee pension plans; one study estimates this increased the funding shortfall by $80 billion.[45] Public employers made insufficient contributions to pension plans when the stock market was doing well. It was convenient politics—although poor economics—to assume this would continue indefinitely.[46] Actuarial assumption regulation is one area for potential reform. For example, rules on the actuarial assumptions that can be used in public-sector pension financing could be tightened such that plan administrators and politicians could not assume, for example, unrealistically high rates of return on investments or unrealistically low rates of retirement.[47] Notably,

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41. CTR. FOR STATE & LOCAL GOV'T EXCELLENCE, STATE AND LOCAL PENSIONS: AN OVERVIEW OF FUNDING ISSUES AND CHALLENGES 2 (2011), *available at* http://www.slge.org/vertical/Sites/%7BA260E1DF-5AEE-459D-84C4-876EFE1E4032%7D/uploads/%7BDE913A11-1C4F-475D-BF0E-1662B0C67612%7D.PDF.

42. Crosby, *supra* note 25.

43. *See* Dean Baker, *The Public Pension Outrage and Alan Greenspan's Pension*, TRUTHOUT (Aug. 16, 2010), http://archive.truthout.org/the-public-pension-outrage-and-alan-greenspans-pension62358; *see also Retirement Planner: State and Local Government Employment*, SOC. SECURITY ADMIN., http://www.ssa.gov/retire2/stateandlocal.htm (Social Security Administration website page noting that some public employment is not covered by social security). Around 30% of state and local government employees are not covered by social security, including teachers in California and Texas. Thomas Margenau, *Social Security Offsets: Policies Public Employees Love to Hate and Don't Understand*, THE CONTRIBUTOR, Summer 2007, at 2, 3, *available at* http://www.nagdca.org/content.cfm/id/contributor32007social_security_offsets_policies_public_employees_love_to_hate_and_dont_understand. Ohio public employees (including law professors at public universities) are also excluded from social security. *See, e.g.*, *Eickelberger v. Eickelberger*, 638 N.E.2d 130, 134 (Ohio Ct. App. 1994) ("Appellant, as a public employee, does not participate in the Social Security system. Instead, appellant participates in the Public Employee Retirement System ('PERS') governed by R.C. Chapter 145.").

44. NAT'L INST. ON RET. SEC., PENSIONOMICS: MEASURING THE ECONOMIC IMPACT OF STATE AND LOCAL PENSION PLANS (50 STATE FACT SHEETS) (2009), *available at* http://www.nirsonline.org/storage/nirs/documents/NIRS_NEI_state_factsheets.pdf.

45. DAVID MADLAND & NICK BUNKER, CTR. FOR AM. PROGRESS ACTION FUND, STATE BUDGET DEFICITS ARE NOT AN EMPLOYEE COMPENSATION PROBLEM: THE GREAT RECESSION IS TO BLAME 7 (2011).

46. *Id.*

47. *See* Olsen, *supra* note 33; MADLAND & BUNKER, *supra* note 45, at 7.

the law that governs private-sector pensions on this and other issues, the Employee Retirement Income Security Act (ERISA), does not apply to the public sector.[48]

Still, real problems exist. One study estimates that the total unfunded obligation for local government pension plans could be as high as $574 billion, and the unfunded obligation for *all* public pension plans is approximately $3 trillion.[49] The study also predicts that only five major systems have pension assets sufficient to pay already-promised benefits through 2025, and only twenty-nine systems have assets sufficient to pay such benefits through 2050.[50] On a more micro level, rules of defined benefit pension plans (still fairly common in the public sector) can sometimes be gamed. For example, defined benefit plan formulas are typically based on some multiple of the employee's average compensation in his or her last few years of work.[51] Employees can, in their last few years of employment, manipulate their average compensation through promotion, working unusually large amounts of overtime, or otherwise artificially raising their pay well above the norm for their careers.[52] Some systems are arguably too generous in allowing individuals to draw multiple public pensions. Some have required little or no employee contributions.

Such issues have prompted some significant changes. Since 2010, forty-one states have enacted significant changes to at least one of their statewide retirement plans. Eighteen have increased pension contribution requirements. Twelve have reduced the automatic cost of living adjustment on benefits.[53] These acts increased employee contributions to retirement plans, reduced benefits, or both. For example, Illinois passed a law in May 2010 altering benefits for all of the state's five pension systems, including "raising the retirement age, limiting pension raises, capping maximum benefits and ending public pensions for [retirees] who work another public job."[54] Georgia also made "changes . . . to its re-employment-after-retirement rules, providing that if a retiring employee has not reached normal retirement age on the date of retirement and returns to any paid service, his or her application for retirement is nullified."[55] (Interestingly, but not surprisingly, there have been no proposals to similarly amend what is by far the most generous public-

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48. Employee Retirement Income Security Act § 4(b), 29 U.S.C. § 1003(b) (2006).

49. *See* Robert Novy-Marx & Joshua Rauh, *The Crisis in Local Government Pensions in the United States*, *in* GROWING OLD: PAYING FOR RETIREMENT AND INSTITUTIONAL MONEY MANAGEMENT AFTER THE FINANCIAL CRISIS 47, 48–49 (Yasuyuki Fuchita, Richard J. Herring & Robert E. Litan eds., 2011).

50. *See id.* at 70–71 tbl.3-7.

51. *See* PETER A. DIAMOND, ALICIA H. MUNNELL, GREGORY LEISERSON & JEAN-PIERRE AUBRY, CTR. FOR RET. RESEARCH, NO. 12, PROBLEMS WITH STATE-LOCAL FINAL PAY PLANS AND OPTIONS FOR REFORM 2 (2010).

52. *See id.* at 3–5.

53. Monica Davey, *Many Workers in Public Sector Retiring Sooner*, N.Y. TIMES, Dec. 6, 2011, at A18.

54. *See* Smith & Haberman, *supra* note 21.

55. Tripp Baltz, *Retirement: Facing Long-Term Pension Problems, States Are Turning to Legislative Fixes*, 48 Gov't Empl. Rel. Rep. (BNA) 1156 (Oct. 5, 2010).

sector pension plan in the country: the plan that covers former members of the U.S. military.)[56]

In October 2010, California enacted changes to its pension plan for state employees.[57] The Act increased the amount current employees must contribute toward their retirements; decreased pension benefits to newly hired employees; and changed the pension calculation to use the average of the three highest salary years, not the single highest year.[58] The Act also contains "transparency" provisions that require the California Public Employees' Retirement System to submit specific information to the legislature, governor, and state treasurer regarding contribution rates, discount rates used to calculate liabilities, alternative discount rates, and various other assumptions.[59]

B. Are Public Employees "Overpaid"?

While studies on this point do not all agree, the more careful studies show that, comparing similar workers with similar credentials in similar jobs, public employees are more often paid less than comparable private-sector workers.[60] Nevertheless, the first wave of attacks on public-sector workers included claims that they were overpaid.

For example, Andrew Biggs, of the American Enterprise Institute, wrote that federal workers are significantly overpaid relative to private-sector workers.[61] "Even after including the full range of control variables in our own analysis, we found that federal workers continue to earn a pay premium of around 12 percent over private workers."[62]

In contrast, though, a study by the Office of Personnel Management concluded that two of the main studies purporting to show that federal employees were paid more than private-sector workers (from the Heritage Foundation and the Cato Institute) were inaccurate.[63] The figures on which Cato and Heritage relied, from the Bureau of Economic Analysis, "look only at gross averages, including retail and restaurant service workers and other entry-level positions that reduce private sector average pay in comparison to the Federal average, which does not include many of these categories in its workforce."[64] Also, the federal sector includes a

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56. *See* M.S., *America's Most Generous Public Pension*, *Democracy in America*, ECONOMIST (Aug. 10, 2010, 8:46 PM), http://www.economist.com/blogs/democracyinamerica/2010/08/pension_funding.

57. *See* Act of Oct. 20, 2010, ch. 3, 2010 Cal. Stat. 5152 (codified as amended in scattered sections of CAL. GOV'T CODE).

58. Laura Mahoney, *State Employees: Governor to Sign Pact with Rollbacks of Pensions 100 Days into Fiscal Year*, 195 Daily Lab. Rep. (BNA), A18 (Oct. 8, 2010).

59. *Id.*

60. Andrew G. Biggs & Jason Richwine, *Those Underpaid Government Workers*, AM. SPECTATOR, Sept. 2010, at 28, 28.

61. *Id.* at 28–29.

62. *Id.* at 29.

63. *See* Laura D. Francis, *Compensation: OPM, NTEU Dispute Reports That Feds Paid Twice as Much as Private Sector*, 48 Gov't Empl. Rel. Rep. (BNA) 994 (Aug. 24, 2010).

64. *Id.* (quoting John Berry, Director, Office of Personnel Management).

significantly higher percentage of highly specialized and professional employees, who are actually paid less than their private-sector counterparts.[65]

Generally, studies that find public workers are overpaid tend to look at gross average pay or median pay but do not take into account the different types of jobs in the public sector and, sometimes, the different kinds of workers.[66] Simply looking at aggregate data from the Bureau of Labor Statistics makes it seem as if public workers earn more on average than private workers, but the gap disappears completely when one compares similar workers (including age, experience, and education) in similar jobs.[67] There are many more professional jobs in the public sector, and fewer unskilled service jobs.[68]

Biggs has also argued that public employees generally may be receiving greater benefits.

> Public employees receive pensions that are about twice as large for each dollar of contributions as do private-sector employees. That is, assuming each worker (and his employer) contribute a given amount toward pensions each year, public-sector workers receive a guaranteed benefit at retirement that's about twice as high. . . . [T]his is a result of bogus pension accounting at the state level, which allows state pensions to assume they can earn high investment returns without risk. As a result, public pensions are underfunded by more than $3 trillion. Nevertheless, it's the taxpayer, not public-sector retirees, who bear the costs of this.
>
> Second, more than 80 percent of public-sector workers are eligible for retiree health benefits (often referred to as OPEBs, or Other Post-Employment Benefits), versus only around one-third in the private sector. OPEBs generally provide full coverage from the time a government worker retirees [sic] (often in their early to mid-50s) up until Medicare starts at age 65. . . . (Private-sector retiree health coverage, where it exists, is generally less generous, with higher deductibles and co-pays.) . . . [T]he Pew Center on the States reports that states currently owe around $500 for OPEBs . . . . That means that public-sector employees have effectively received an additional $500 billion in deferred compensation that is currently off the books.[69]

On the other hand, a recent study from the National Institute on Retirement Security concluded:

> Wages and salaries of state and local employees are lower than those for private sector workers with comparable earnings determinants (e.g., education). State employees typically earn 11 percent less; local workers earn 12 percent less.

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65. *See id.*

66. Biggs & Richwine, *supra* note 60.

67. *See* Joseph A. McCartin, *Convenient Scapegoats: Public Workers Under Assault*, DISSENT, Spring 2011, at 45, 45–46.

68. *Id.*

69. Andrew Biggs, *'Public Employees Get More Benefits,'* ENTERPRISE BLOG (July 28, 2010, 10:02 AM), http://blog.american.com/2010/07/public-employees-get-more-benefits/.

> Over the last 20 years, the earnings for state and local employees have generally declined relative to comparable private sector employees. . . .
>
> Benefits (e.g., pensions) comprise a greater share of employee compensation in the public sector.
>
> [Still] [s]tate and local employees have lower total compensation than their private sector counterparts. On average, total compensation is 6.8 percent lower for state employees and 7.4 percent lower for local workers, compared with comparable private sector employees.[70]

Several new, specific, and sophisticated studies also find that public workers are, if anything, underpaid relative to the private sector. Economists at the Center for Economic and Policy Research studied workers in New England, and found that while the average state or local government employee there earns higher wages than the average private-sector worker, that is because public workers are, on average, older and much better educated.[71] Specifically, over half of state and local government employees in New England have a four-year college degree or more, and roughly 30% have an advanced degree.[72] Only 38% of private-sector workers have a four-year college degree or more, and only 13% have an advanced degree.[73] Also, the typical state and local worker in New England is about four years older than the typical private-sector worker.[74] After adjusting for these factors, public-sector wages were generally lower than private-sector wages.[75] While the lowest paid public workers earned slightly more than their private-sector counterparts, for engineers, professors, and others in the higher-paid professional jobs, the wage penalty for being a public worker was almost 13%.[76]

Such studies have been done for states across the nation and for specific public employers. For example, a study from Georgia State University analyzing data from across the nation found that "[h]olding constant education, estimated work experience, occupation, location, race, and gender . . . [public] employees earned 4 to 6% less than comparable private sector workers in 1990, 2000, and 2005–06 . . . ."[77] Focusing more narrowly, a study by the chief economist in the office of

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70. KEITH A. BENDER & JOHN S. HEYWOOD, OUT OF BALANCE?: COMPARING PUBLIC AND PRIVATE SECTOR COMPENSATION OVER 20 YEARS 3 (2010), *available at* http://www.nirsonline.org/storage/nirs/documents/final_out_of_balance_report_april_2010.pdf.

71. Jeffrey Thompson & John Schmitt, *The Wage Penalty for State and Local Government Employees in New England* 3 (Ctr. for Econ. & Policy Research, Working Paper No. 232, 2010), *available at* http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_201-250/WP233.pdf.

72. *Id.* at 5.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Gregory B. Lewis & Chester S. Galloway, *A National Analysis of Public/Private Wage Differentials at the State and Local Levels by Race and Gender* 22 (Ga. State Univ. Andrew Young Sch. of Policy Studies, Working Paper No. 11-10, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1768190.

the New York City Comptroller found that employees in the New York City municipal workforce are paid 17% less on average than their private-sector counterparts.[78]

The Economic Policy Institute (EPI) has also compared public- and private-sector compensation in Michigan, Wisconsin, and Ohio, states with relatively strong union presence and relatively robust public-sector collective bargaining statutes.[79] For Michigan, the study concluded that, after controlling for education, experience, organizational size, gender, race, ethnicity, citizenship, and disabilities, full-time state and local government workers are undercompensated by approximately 5.3% compared to the private sector (2.9% when annual hours worked are factored in).[80] For Wisconsin, the study found that public employees are undercompensated by 8.2% (4.8% when annual hours worked are factored in).[81] For Ohio, the study found that public workers are undercompensated by 5.9% (3.5% when hours are factored in).[82]

An EPI study made similar findings on a national scale. Looking at public and private workers nationwide, it found a slight undercompensation of public employees on a cost per hour basis, after controlling for education, experience, hours, employer size, gender, race, ethnicity, and disability.[83] On average, full-time state and local employees are undercompensated by 3.7%, in comparison to similar private-sector workers.[84]

A very recent overview, surveying the research on this issue, concluded:

> The existing research, much of which is very current (completed within the past two years), shows that, if anything, public employees are underpaid relative to their private-sector counterparts. While public-sector benefits are higher than private sector counterparts, total compensation (including health care and retirement benefits) is lower than that of comparable private-sector employees. Erosion of public-sector pay and benefits will make it harder for public employers to

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78. John Herzfeld, *Public Employees: Municipal Pay Below Private Sector, New York City Comptroller Study Finds*, 46 Daily Lab. Rep. (BNA) A10 (Mar. 9, 2011).

79. *See infra* notes 80–84 and accompanying text.

80. JEFFREY H. KEEFE, ECON. POLICY INST., BRIEFING PAPER NO. 293, ARE MICHIGAN PUBLIC EMPLOYEES OVER-COMPENSATED? 1 (2011), *available at* http://www.epi.org/page/-/old/briefingpapers/BriefingPaper293%20%282%29.pdf?nocdn=1.

81. JEFFREY H. KEEFE, ECON. POLICY INST., BRIEFING PAPER NO. 290, ARE WISCONSIN PUBLIC EMPLOYEES OVER-COMPENSATED? 1 (2011), *available at* http://epi.3cdn.net/9e237c56096a8e4904_rkm6b9hn1.pdf.

82. JEFFREY H. KEEFE, ECON. POLICY INST., BRIEFING PAPER NO. 296, ARE OHIO PUBLIC EMPLOYEES OVER-COMPENSATED? 1 (2011), *available at* http://epi.3cdn.net/6ddeb152266bf6714f_6xm6b955l.pdf.

83. JEFFREY KEEFE, ECON. POLICY INST., BRIEFING PAPER NO. 276, DEBUNKING THE MYTH OF THE OVERCOMPENSATED PUBLIC EMPLOYEE: THE EVIDENCE 1 (2010), *available at* http://epi.3cdn.net/8808ae41b085032c0b_8um6bh5ty.pdf.

84. *Id.* The study also found a smaller compensation penalty for local government employees (1.8%) than for state government workers (7.6%). *Id.*

> attract, retain and motivate the workforce needed to provide public services.[85]

C. Collective Bargaining Rights Are Not Correlated with State Deficits

The claim that public employees are overpaid is often linked to the claim that collective bargaining rights for public workers increases their compensation to the point that it is a significant cause of state budget deficits. But no significant correlation between public-sector bargaining rights and state deficit levels has been shown. At a recent hearing on this issue, Rep. Mike Quigley observed that states that allow public-sector collective bargaining on average have a 14% deficit relative to their budgets, while states that bar collective bargaining have 16.5% deficits.[86] For example, Texas, which has essentially no public-sector collective bargaining and very low levels of unionization, has one of the worst budget deficits in the nation.[87] Nevada, which has no collective bargaining rights for state employees, also has one of the largest state budget deficits in the country.[88] In contrast, some states with strong public-sector bargaining laws, including those at the center of these debates, have smaller than average deficits. Wisconsin was projected to have a deficit of 12.8% of its budget in fiscal year 2012, Ohio 11%, and Iowa 3.5%.[89] In contrast, North Carolina, which bars all public-sector collective bargaining, is running a projected deficit of 20% in 2012.[90]

Nonetheless, opponents of public-sector unions insist on making dubious assumptions and links. For example, a recent piece in the conservative *National Affairs* argued:

> When all jobs are considered, state and local public-sector workers today earn, on average, $14 more per hour in total compensation (wages and benefits) than their private-sector counterparts. . . .
>
> When unions have not been able to secure increases in wages and salaries, they have turned their attention to benefits. . . . Of special interest to the unions has been health care: Across the nation, 86% of state- and local-government workers have access to employer-provided health insurance, while only 45% of private-sector workers do. . . .
>
> The unions' other cherished benefit is public-employee pensions. . . .
>
> How, one might ask, were policymakers ever convinced to agree to such generous terms? As it turns out, many lawmakers found that increasing pensions was very good politics. They placated unions with future pension commitments . . . .
>
> Public-sector unions thus distort the labor market, weaken public finances, and diminish the responsiveness of government and the quality of public services. Many of the concerns that initially led

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85. Lewin et al., *supra* note 33, at 2.

86. *State Employees: House Panel Debates State Budget Problems, Whether Bargaining Rights Need to Be Cut*, 25 Lab. Rel. Wk. (BNA) 700 (Apr. 21, 2011).

87. MADLAND & BUNKER, *supra* note 45, at 4.

88. *Id.* at 3–4; KEARNEY WITH CARNEVALE, *supra* note 7, at 61.

89. MADLAND & BUNKER, *supra* note 45, at 4.

90. McCartin, *supra* note 67, at 46.

> policymakers to oppose collective bargaining by government employees have, over the years, been vindicated.[91]

For reasons described above and for reasons I have argued elsewhere,[92] I think that these arguments are flawed and that the concluding sentence above is wrong. It is especially troubling to see public-sector unions and public-sector collective bargaining blamed for pension problems given that, again, in the vast majority of jurisdictions, public-sector unions are not even permitted to bargain about pensions.[93] The debate is often highly partisan (unions disproportionately support Democrats, Republicans disproportionately disapprove of unions), which can make the search for the truth more difficult.[94] But public-sector unions in the age of Obama will have to counter such narratives, and the first round has gone to labor's opponents.

D. The New Laws

In late 2010 through the first half of 2011, a number of states passed laws restricting—and in some cases, eliminating or practically eliminating—the collective bargaining rights of public-sector workers and their unions.

1. Wisconsin

Prior to recent amendment, Wisconsin had two fairly similar public-sector labor statutes: one covering local and county government employees,[95] and the other covering state employees.[96] Ironically, the former was the first state law permitting public-sector collective bargaining in the country, enacted in 1959.[97] The "Budget Repair Bill" recently signed by Gov. Scott Walker[98] makes sweeping revisions to

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91. Daniel DiSalvo, *The Trouble with Public Sector Unions*, NATIONAL AFFAIRS, Fall 2010, at 3, 14–15, 17. These claims, in turn, are echoed by conservative pundits. *See, e.g.*, David Brooks, Op-Ed., *The Paralysis of the State*, N.Y. TIMES, Oct. 12, 2010, at 31.

92. For my thoughts on the history and policy of the development of public-sector labor law, see generally SLATER, *supra* note 4; *see also* Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295 (2004).

93. *See supra* note 31 and accompanying text.

94. One might detect some defensiveness on this point from Ohio state senator Shannon Jones, who, in describing her support for the Ohio bill that would greatly restrict or eliminate public-sector collective bargaining, stressed, "I am not doing this to punish unions or serve as some sort of political payback or to dry up the source of money for campaigns, as some have suggested." Bebe Raupe, *State Employees: Ohio Workers Under Attack, Unions Say, from Bill to Cut Collective Bargaining Rights*, 29 Daily Lab. Rep. (BNA) A8 (Feb. 11, 2011).

95. WIS. STAT. ANN. § 111.70 (West Supp. 2010) (amended 2011).

96. WIS. STAT. ANN. § 111.81 (West Supp. 2010) (amended 2011).

97. SLATER, *supra* note 4, at 158.

98. Act of March 11, 2011, Act 10, https://docs.legis.wisconsin.gov/document/acts/2011/10.pdf; Clay Barbour & Mary Spicuzza, *Gov. Walker Signs Budget Bill Limiting Bargaining Rights, Rescinds Layoff Notices*, WIS. ST. J. (Mar. 11, 2011),

these laws (except for certain employees in "protective occupations," mainly police officers and firefighters).[99]

First, the Act eliminated collective bargaining rights entirely for some employees: University of Wisconsin (UW) system employees, employees of the UW Hospitals and Clinics Authority, and certain home care and childcare providers.[100] It generally limited collective bargaining to bargaining over a percentage of total base wages increase that is no greater than the percentage change in the consumer price index.[101] No other issues can be negotiated.[102]

Second, the Act imposes right-to-work rules for all Wisconsin employees except those in "protective occupations."[103] This means it is now illegal for unions and employers to agree to "fair share" union security clauses under which members of a union bargaining unit are obligated to pay that portion of their dues which goes to representing the bargaining unit in matters related to collective bargaining.[104] Further, the Act made it illegal for an employer to agree to automatic dues deduction for employees, even for those who wish to pay dues.[105]

Third, the Act created an unprecedented mandatory recertification system under which every union faces a recertification election every year.[106] A union will only be recertified if 51% of the employees in the collective bargaining unit—not merely those voting—voted for recertification.[107] So, for example, if a bargaining unit had 400 members and the recertification vote was 201 favoring union representation and 100 against, the union would be decertified because 201 is less than 51% of 400. This is a change from the prior system under which (consistent with the NLRA and other public-sector laws) a request from 30% of the bargaining unit was required to schedule a decertification election, decertification elections could not take place during the terms of valid union contracts (except for a required "window period" every three years allowing a decertification election), and the majority of those voting determined the outcome.[108]

The Act also limited the duration of collective bargaining agreements to one year, which is very unusual in labor law.[109] Further, the law now requires that

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http://host.madison.com/wsj/news/local/govt-and-politics/article_cef20214-4bff-11e0-b67d-001cc4c03286.html.

99. Paul Secunda, *Constitutional Contracts Clause Challenges in Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 265 & n.9 (2011).

100. *See* Act 10, §§ 323.

101. Act 10, § 245 (codified at WIS. STAT. ANN. § § 111.70(4)(mb) (West Supp. 2011)).

102. WIS. STAT. ANN. § 111.70(4)(mb)–(mc) (West Supp. 2011).

103. *See* Act 10, § 219 (codified as amended at WIS. STAT. ANN. § 111.70(2) (West Supp. 2011)).

104. *See* WIS. STAT. ANN. § 111.70(2) (West Supp. 2011).

105. Act 10, § 227 (codified at WIS. STAT. ANN. § 111.70(3g) (West Supp. 2011)).

106. *See* Act 10, § 242 (codified as amended at WIS. STAT. ANN. § 111.70(4)(d)(3) (West Supp. 2011)).

107. *See* WIS. STAT. ANN. § 111.70(4)(d)(3)(b) (West Supp. 2011).

108. WIS. STAT. ANN. § 111.70(4)(d)(2)(a) (West Supp. 2010) (amended 2011). The rules previously in place in Wisconsin were standard throughout public-sector labor statutes. *See* MALIN ET AL., *supra* note 11, at 391–93.

109. Act 10, § 238 (codified as amended at WIS. STAT. ANN. § 111.70(4)(cm)(8m) (West Supp. 2011). The NLRA contains no limit on the length of contracts, and this author's research has failed to reveal any other public-sector jurisdiction that limits the length of

employees pay one-half of all the required contributions to their retirement system.[110] Previously, the amount of employee contributions was negotiable—for example, the employer could agree to pay part or all of the employee contributions.[111]

On June 14, 2011, the Wisconsin Supreme Court overturned an injunction that Judge Maryann Sumi previously granted against this law (based on an alleged violation of the state Open Meetings Law requiring twenty-four hours' notice of certain legislative actions).[112] The law is now in effect.

The law has prompted considerable political activity, from massive protests in Madison to recall efforts aimed at both Republicans (six recall elections were certified) who voted for the bill and Democrats (three recall elections were certified) who fled the state in an attempt to block the bill by preventing a legislative quorum.[113] As of Summer 2011, nine recall elections have taken place; Democrats prevailed in five, thus adding two net Democrats to the Wisconsin Senate.[114] Also, this issue obviously affected the Wisconsin Supreme Court justice race between David Prosser and JoAnne Kloppenburg (Prosser ultimately prevailed, but by a much smaller margin than predicted before the bill was passed).[115]

2. Ohio

Ohio has a public-sector labor law applicable to most public employees.[116] Enacted in the early 1980s, it even allows most public workers to strike.[117] A new bill signed into law but later repealed, Senate Bill No. 5 ("SB 5"), was designed to profoundly alter this law.[118]After the bill was signed into law, enough signatures were gathered to put the law "on hold" until a voter referendum scheduled for November 2011 could determine whether the law would go into effect.[119] Though

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collective bargaining agreements to one year.

110. *See* WIS. STAT. ANN. § 59.875(2) (West Supp. 2011).

111. *See* WIS. STAT. ANN. § 169.59.875, 167.62.623 (West Supp. 2010) (amended 2011).

112. State *ex rel.* Ozanne v. Fitzgerald, 798 N.W.2d 436, 438 (Wis. 2011).

113. A. G. Sulzberger, *Union Bill Is Law, but Debate Is Far from Over*, N.Y.TIMES, Mar. 11, 2011, at A14.

114. *Democratic Sen. Dave Hansen Wins Recall Election*, 1330 WHBL SHEBOYGAN'S NEWS RADIO, (July 19, 2011, 8:11 PM), http://whbl.com/news/articles/2011/jul/19/demorcatic-sen-dave-hansen-wins-recall-election/.

115. Scott Bauer, *Opponent's Concession Seals Deal for Prosser; Kloppenburg Says the Recount Should Serve as a "Wake-Up Call."; Supreme Court*, WIS. ST. J., June 1, 2011, at A1.

116. OHIO REV. CODE ANN. § 4117.01–.27 (LexisNexis Supp. 2011).

117. *See* 1983 Ohio Laws 361; OHIO REV. CODE ANN.§ 4117.15 (LexisNexis Supp. 2011).

118. Amended Substitute S. B. 5, 129th Gen. Assemb., Reg. Sess. (Ohio 2011); Mark Naymik & Joe Guillen, *Gov. John Kasich Signs Senate Bill 5 as Supporters and Opponents Gear Up for Huge Referendum*, CLEVELAND.COM (Mar. 31, 2011, 8:30 P.M.), http://www.cleveland.com/open/index.ssf/2011/03/gov_john_kasich_signs_senate_b.html.

119. Bebe Raupe, *Collective Bargaining: Repeal of Ohio Measure Curbing Collective Bargaining for Public Workers to Be on November Ballot*, 49 Gov't Empl. Rel. Rep. (BNA) 950 (July 26, 2011).

the bill was eventually defeated in a voter referendum,[120] SB 5 would have done the following things, among others.

SB 5 would have eliminated collective bargaining rights entirely for certain employees, including at least most college and university faculty, lower level supervisors in police and fire departments, and employees of charter schools.[121] It would also have limited the bargaining rights of some other employees, including regional council of government employees and certain members of the unclassified civil service, who would have been able to bargain only if the public employer elected to bargain.[122]

For employees who can bargain, SB 5 would have eliminated both the right to strike for public employees who currently have that right (all public employees with the exception of police, fire, and a few other small categories)[123] and the right to binding interest arbitration at impasse for employees who cannot legally strike.[124] SB 5 would have provided stiff penalties (two days' pay for each day striking and removal) for striking or instigating a strike.[125] Encouraging or condoning a strike would also have been forbidden.[126]

Instead of the right to strike when bargaining reaches impasse[127] (or, for public safety employees, instead of the right to have a neutral interest arbitrator issue a binding order on contract terms),[128] SB 5 would have left the parties with only non-binding mediation and fact finding.[129] Under the bill, if these did not lead to an agreement, the governing legislative body (often the employer itself) would simply have been able to choose to adopt the employer's final offer.[130] In fact finding, a neutral party makes factual findings and issues recommendations as to contract terms. Under the bill, the employer or a majority of the union could have then rejected a fact finder's recommendations[131] (under the law currently in effect, a three-fifths vote is required to reject).[132] Under the bill, if either side rejected the recommendations, the parties' last best offers were submitted to the legislative body of the public employer to make a selection as to contract terms.[133] The bill

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120. Sabrina Tavernise, *Ohio Turns Back a Law Limiting Unions' Rights*, N.Y. TIMES, Nov. 9, 2011, at A1.

121. *See* Ohio Amended Substitute S. B. 5, § 1 (amending OHIO REV. CODE ANN. § 4117.01 (LexisNexis Supp. 2011)).

122. *Id.* (amending OHIO REV. CODE ANN. § 4117.01(C) (LexisNexis Supp. 2011)).

123. *Id.* (amending OHIO REV. CODE ANN. § 4117.14(D) (LexisNexis Supp. 2011)).

124. *Id.* (amending OHIO REV. CODE ANN. § 4117.14(D) (LexisNexis Supp. 2011)).

125. *Id.* (amending OHIO REV. CODE ANN. § 4117.23 (LexisNexis 2006)).

126. *Id.* (amending OHIO REV. CODE ANN. § 4117.15 (LexisNexis Supp. 2011)).

127. OHIO REV. CODE ANN. § 4117.14(D)(2) (LexisNexis Supp. 2011).

128. *Id.* § 4117.14(D)(1) (LexisNexis Supp. 2011).

129. *See* Ohio Amended Substitute S. B. 5, § 1 (amending OHIO REV. CODE ANN. § 4117.14(D) (LexisNexis Supp. 2011)).

130. *Id.* (amending OHIO REV. CODE ANN. § 4117.14 (LexisNexis Supp. 2011); effectively this bill would leave the parties with only OHIO REV. CODE ANN. § 4117.14(D)(1)–(2), which details what steps the public employer may take).

131. Ohio Amended Substitute S. B. 5 § 1 (amending OHIO REV. CODE ANN § 4117.14(C)(4)(a) (LexisNexis Supp. 2011)).

132. OHIO REV. CODE ANN. § 4117.14(C)(6)(a) (LexisNexis Supp. 2011).

133. Ohio Amended Substitute S. B. 5, § 1 (amending OHIO REV. CODE ANN.

would have required the public employer's last best offer to become the agreement if the legislative body were to fail to choose.[134] For certain employers, if the legislative body selected the last best offer that costs more, and the CFO of the legislative body could not or refused to determine whether sufficient funds existed to cover the agreement, the last best offers would have been submitted to the voters.[135] Unlike the law currently in effect, in which parties can mutually agree to a wide range of procedures to resolve bargaining impasses,[136] this is the only impasse procedure SB 5 would have allowed.

SB 5 would also have imposed "right-to-work" rules by barring "fair share" agreements.[137] As in Wisconsin, the effect (and, at least arguably, purpose) of this rule is to deny unions financial resources. SB 5 would also have barred public employers from agreeing to provide payroll deductions for any contributions to a political action committee without written authorization from the individual employee.[138]

Further, the bill would have restricted the scope of bargaining and expanded the list of subjects that were inappropriate for collective bargaining. It specified that the following would not be bargainable: (1) employer-paid employee contributions to retirement systems, (2) health care benefits (except the amount of the premium the employer and employees pay, although the provision of health care benefits for which the employer is required to pay more than 85% of the costs is not negotiable), (3) privatization or contracting out of a public employer's work, and (4) the number of employees required to be on duty or employed.[139] It would also have permitted public employers to not bargain on any subject reserved to the management of the governmental unit, even if the subject affected wages, hours, and terms and conditions of employment.[140] It would have barred collective bargaining agreements (CBAs) from providing for an hourly overtime payment rate that exceeded the overtime rate required by the Fair Labor Standards Act of 1938 (FLSA).[141] It would also have barred CBAs from containing provisions for certain types of leave to accrue above listed amounts or to pay out for sick leave at a rate higher than specified amounts.[142] It would have barred grievances and arbitrations based on past practice of the parties.[143]

SB 5 would have further restricted bargaining in education, including barring negotiating on the minimum number of personnel, on anything that restricted the employer's ability to assign personnel, and on the maximum number of students assigned to a class or teacher.[144] Also, employers would have been prevented from

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§ 4117.14(D)(1) (LexisNexis Supp. 2011)).

134. *Id.* (amending OHIO REV. CODE ANN. § 4117.14(D)(2) (LexisNexis Supp. 2011)).

135. *Id.* (amending OHIO REV. CODE ANN. § 4117.14(D)(2) (LexisNexis Supp. 2011)).

136. OHIO REV. CODE ANN. § 4117.14(C) (LexisNexis Supp. 2011).

137. *See* Ohio Amended Substitute S. B. 5, § 1 (amending OHIO REV. CODE ANN. § 4117.09(C) (LexisNexis 2006)).

138. *Id.* (amending OHIO REV. CODE ANN. § 4117.09(C) (LexisNexis 2006)).

139. *Id.* (amending OHIO REV. CODE ANN. § 4117.08(B) (LexisNexis Supp. 2011)).

140. *Id.* (amending OHIO REV. CODE ANN. § 4117.08(C) (LexisNexis Supp. 2011)).

141. *Id.* (creating OHIO REV. CODE ANN. § 4117.106(C)).

142. *Id.* (creating OHIO REV. CODE ANN. §§ 4117.108–.109).

143. *Id.* (amending OHIO REV. CODE ANN. § 4117.10(A)).

144. *Id.* (creating OHIO REV. CODE ANN. § 4117.081(B)(1)–(3)).

agreeing to any restriction on the public employer's authority to acquire any products, programs, or services from educational service centers.[145]

The bill would also have given greater rights to a public employer in a state of fiscal emergency or under "fiscal watch" to terminate, modify, or negotiate the agreement.[146] The bill seemingly would have repealed the "contract bar" rule (under which a decertification petition cannot be filed while a CBA is in effect, unless it is during the "window period" every three years).[147] Also, it would have repealed the provision requiring the public-sector labor law to be liberally construed.[148]

The bill was repealed via a voter referendum, which was held in November 2011. Had the bill been passed, it would have been a truly radical change.

3. Other States

While Wisconsin and Ohio have gotten the most press, other states where Republicans control most or all of state government have also passed bills limiting the collective bargaining rights of public workers.

Alabama passed a bill (Alabama Act No. 2010-761) making it a crime to arrange for public employee payments "by salary deduction or otherwise" to political action committees (PACs) or organizations including unions that use part of the money for "political activity."[149] That law has been enjoined by the U.S. District Court for the Northern District of Alabama, on the grounds that the statute is overbroad regarding activities protected by the First Amendment and that it is too vague to provide adequate notice.[150] The state is appealing.[151]

Idaho enacted a series of bills that curtail teachers' collective bargaining rights.[152] Senate Bill 1108 limits such bargaining to wages and benefits.[153] It also eliminates teacher seniority protections during layoffs and replaces tenure-track contracts for new teachers with renewable agreements of one or two years.[154] As in Ohio, this enacted bill is facing a campaign for repeal via a referendum.[155]

Indiana enacted a statute significantly limiting the scope of bargaining for teachers.[156] For example, the statute forbids the parties to agree on certain topics in

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145. *Id.* (creating OHIO REV. CODE ANN. § 4117.081(B)(7)).

146. *Id.* (creating OHIO REV. CODE ANN. § 4117.104(A)–(B)).

147. *Id.* (amending OHIO REV. CODE ANN. § 4117.05(C) (LexisNexis 2006)).

148. *Id.* § 2 (repealing OHIO REV. CODE ANN. § 4117.22 (LexisNexis 2006)).

149. Elliot T. Dube, *Union Dues: Alabama Appeals Injunction Enjoining Statute Barring Public Worker Deductions for Politics*, 49 Gov't Empl. Rel. Rep. (BNA) 433 (Apr. 5, 2011).

150. *Id.*

151. *Id.*

152. Amy Linn, *Collective Bargaining: Idaho Governor Signs Measure Weakening Teacher Bargaining; Foes Launch Referendum*, 49 Gov't Empl. Rel. Rep. (BNA) 506 (Apr. 19, 2011).

153. *Id.*

154. *Id.*

155. *Id.*

156. Nora Macaluso, *State Laws: Indiana Governor Signs Bill Limiting Teachers' Collective Bargaining Rights*, 82 Daily Lab. Rep. (BNA) A-5 (Apr. 28, 2011).

a contract that were formally "permissive" topics of negotiation (subjects on which unions and employers were legally allowed to agree but were not required to negotiate over unless both sides agree).[157] It also appears to bar arbitration over contract grievances and substitute fact finding for arbitration in impasse resolution.[158]

In Michigan, the Local Government and School District Fiscal Accountability Act allows the governor to appoint an "emergency manager" for local governments experiencing a "financial emergency."[159] The manager can reject, modify, or terminate any terms of CBAs with public-sector unions.[160] A pair of Detroit municipal pension funds have filed suits alleging that this violates the Contracts Clause of the U.S. Constitution.[161] Also in Michigan, a proposed bill would increase the penalties for striking teachers (all public-employee strikes in Michigan are illegal), including suspension or revocation of teaching licenses.[162] Further, Michigan enacted a bill (House Bill No. 4522) that requires interest arbitrators, in cases involving municipal police, fire, and emergency medical personnel, to give the highest priority in their decisions to the public employer's ability to pay.[163] This factor, generally seen as favoring employers, now trumps other factors arbitrators must or may consider.[164]

Nebraska enacted a bill (Legislative Bill 397) that makes changes to the rules governing the interest arbitrations run by the Nebraska Commission of Industrial Relations (CIR).[165] These changes, while somewhat technical, are designed to produce lower compensation awards. Under the new law, the CIR must follow a more specific set of criteria in finding and considering "comparable" groups of employees with regard to wage issues.[166] Also, the new law mandates CIR to include pension and health benefits in making compensation comparisons, and to order changes in wages only when total compensation falls outside a range of 98% to 102% of the comparison midpoint.[167] Among other things, the law creates a preference in wage comparisons for geographic proximity; requires out-of-state wage information to be adjusted to reflect the Nebraska cost-of-living; authorizes

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157. *Id.*

158. 2011 Ind. Acts 575 § 22.

159. Act of Mar. 16, 2011, Act 4, § 15(1)(4).

160. *Id.* § 19(1)(k).

161. *State Laws: CRS Suggests Michigan Bargaining Law Could Violate Constitution's Contract Clause*, 25 Lab. Rel. Wk. (BNA) 685 (Apr. 14, 2011); Nora Macaluso, *State Laws; Detroit Pension Systems Sue Michigan over New Emergency Manager Statute*, 76 Daily Lab. Rep. (BNA) A-8 (Apr. 20, 2011).

162. Catherine Jun, *Tougher Teacher No-Strike Law Pushed*, DETROIT NEWS, Mar. 30, 2011, at A1.

163. Nora Macaluso, *Collective Bargaining: Michigan Law Links Municipal Finances, Binding Arbitration in Employee Disputes*, 49 Gov't Empl. Rel. Rep. (BNA) 948 (July 26, 2011).

164. *Id.*

165. Christopher Brown, *Collective Bargaining: Nebraska Law Reins in Agency Overseeing Labor Disputes with Public Sector Unions*, 49 Gov't Empl. Rel. Rep. (BNA) 728 (June 7, 2011).

166. *Id.*

167. *Id.*

appeals from CIR orders directly to the Nebraska Supreme Court; and requires a public vote on any last, best offer of a union or an employer.[168] Union leaders expressed relief that they avoided an elimination of public-sector collective bargaining.[169]

Nevada enacted Senate Bill No. 98, which reduces the number of public-employee supervisors eligible to engage in collective bargaining.[170] It also mandates clauses that would reopen labor contracts during fiscal emergencies.[171] This affects only local government and their employees, since state employees in Nevada do not have collective bargaining rights.[172] Specifically, the new law states that employees who make budgetary decisions and who have authority on behalf of the employer to hire, fire, discipline, and negotiate labor contracts for management are not covered by the collective bargaining law.[173] It also makes ineligible doctors employed by a local government and civil lawyers who are assigned to a civil law division, department, or agency.[174]

New Hampshire enacted Senate Bill No. 1, which eliminates the requirement that the terms of a collective bargaining agreement automatically continue if an impasse is not resolved at the time of the expiration of such agreement.[175] About three months later, New Hampshire adopted House Bill 589, which repealed a 2007 law that provided for mandatory card check recognition (that is, the employer must recognize a union if a majority of employees in an appropriate bargaining unit sign cards indicating they want that union to represent them).[176]

The New Hampshire House, on March 30, 2011, approved legislation (House Bill No. 2) that would eliminate the negotiated terms of employment for public workers and make them "at-will" employees at the end of a CBA's term.[177] Also, on April 20, 2011, the New Hampshire Senate passed a "right-to-work" bill that would apply to both public- and private-sector unions.[178] The New Hampshire Senate passed the latter bill by a large enough margin to override a gubernatorial veto but, as of this writing, it has not yet been enacted.[179]

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168. *Id.*

169. *Id.*

170. William H. Carlile, *Collective Bargaining: Nevada Governor Signs Measure Curbing Public Sector Supervisors' Bargaining Rights*, 49 Gov't Empl. Rel. Rep. (BNA) 834 (June 28, 2011).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Rick Valliere, *Collective Bargaining: N.H. Repeals 'Evergreen' Requirement for Public Worker Bargaining Contracts*, 49 Gov't Empl. Rel. Rep. (BNA) 295 (Mar. 8, 2011).

176. Rick Valliere, *Organizing: New Hampshire Lawmakers Repeal Public Employee Card Check Law*, 49 Gov't Empl. Rel. Rep. (BNA) 764 (June 14, 2011).

177. Rick Valliere, *Collective Bargaining; New Hampshire House Passes Measure to End Union Terms at Contract Expiration*, 49 Gov't Empl. Rel. Rep. (BNA) 437 (Apr. 5, 2011).

178. Rick Valliere, *State Laws: New Hampshire Senate OKs Right-to-Work Bill Passed by House*, 76 Daily Lab. Rep. (BNA) A-12 (Apr. 20, 2011).

179. *Id.*

New Jersey enacted Senate Bill No. 2937, which mandates significant cutbacks in pension and health benefits for public employees.[180] It also enacted Assembly Bill No. 3393, which caps wage increases at 2% for New Jersey police and firefighter arbitration awards for contracts expiring between January 1, 2011, and April 1, 2014.[181] Further, Assembly Bill No. 3393 placed serious restrictions on interest arbitrators.[182] Arbitrators will now be randomly selected (as opposed to the previous process of mutual selection); arbitrator compensation is limited to $1,000 per day and $7,500 per case; and arbitrators will be penalized $1,000 per day for failure to issue an award within forty-five days of the filing of a request for interest arbitration.[183]

Oklahoma, in House Bill No. 1593, repealed a 2004 law requiring cities with populations of at least 35,000 to engage in collective bargaining with unions.[184] As in Wisconsin, this change does not affect police officers and firefighters, who, in Oklahoma, are covered by a separate statute.[185] However, a separate bill is pending that would affect the rights of police officers and firefighters to binding arbitration.[186]

Tennessee eliminated collective bargaining for public school teachers in House Bill No. 130 and in Senate Bill No. 113.[187] This law deletes the state's Education Professional Negotiations Act of 1978 (Tenn. Code Ann. § 49-5-601) and replaces it with language providing for "collaborative conferencing."[188] Teachers now will be represented by groups that receive at least 15% of votes in a confidential poll rather than a particular union or recognized professional employees' association.[189] Local school boards may meet with teachers' representatives to try to reach agreement on issues such as pay, benefits, working conditions, leave, and grievance procedures.[190] But the new law prohibits discussing certain issues during the conferences: differentiated pay plans or incentive compensation programs; expenditures of grants or awards designated for specific purposes; employee evaluations; staffing decisions and certain "innovative educational programs"

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180. Lorraine McCarthy, *Retirement/Health Benefits: New Jersey Lawmakers Approve Measure for Sweeping Public Sector Benefits Reforms*, 49 Gov't Empl. Rel. Rep. (BNA) 830 (June 28, 2011).

181. Lorraine McCarthy, *Alternative Dispute Resolution: New Jersey Governor Signs Public Safety Interest Arbitration Bill with Salary Caps*, 48 Gov't Empl. Rel. Rep. (BNA) 1494 (Dec. 28, 2010).

182. *Id.*

183. *Id.*

184. Nancy J. Moore, *Collective Bargaining: Repeal of Oklahoma Law Requiring City Collective Bargaining Signed by Governor*, 49 Gov't Empl. Rel. Rep. (BNA) 612 (May 10, 2011).

185. Nancy J. Moore, *State Laws: Oklahoma Legislature Oks Bill Repealing Law Requiring Cities to Recognize Unions*, 78 Daily Lab. Rep. (BNA) A-7 (Apr. 22, 2011).

186. *See id.*

187. Andrew M. Ballard, *Collective Bargaining: Tennessee Governor Signs Legislation Nixing Collective Bargaining for Teachers*, 49 Gov't Empl. Rel. R (BNA) 724 (June 7, 2011).

188. *Id.*

189. *Id.*

190. *Id.*

approved by lawmakers; personnel decisions regarding employee assignment; and payroll deductions for political activities.[191]

E. The Radical Nature of the Changes

As discussed above, significant evidence contradicts claims that these laws would help with budget problems. Public workers are not "overpaid," problems in pension underfunding are generally not related to collective bargaining rights, and there is no real correlation between collective bargaining rights and the levels of state deficits.

Further, many of the new rules obviously have no relation to state budgets or employee compensation; instead, they are meant to damage unions as institutions. Notably, "right-to-work rules" that bar "fair share" agreements only go to whether unions can require employees in a union bargaining unit to pay that portion of union dues which go to activities related to collective bargaining. Right-to-work rules have been criticized in that they permit "free riders" because unions continue to have a duty to fairly represent employees in a union bargaining unit even if such employees are not paying any dues.[192] But just as importantly here, whether employees pay dues to a union or not has no impact on public budgets.

The Wisconsin statute has additional rules which clearly do not relate to the state budget. First, the law bars dues checkoff for employees who want to pay dues to the union, even if the employer would agree to it.[193] Second, the law's onerous and unprecedented provisions for yearly recertification, applicable to the majority of the bargaining unit, have no purpose other than to make it very difficult for a union to stay certified. In Wisconsin previously and in labor law generally, once a union has been certified, its status can be challenged if 30% of the members of the bargaining unit request an election to do so, and the union can be decertified in the election if a majority of those voting choose that option. This long-established rule in both the public and private sectors correctly balances the need for stability in labor relations with the concept that a union should not represent employees if a majority of the employees does not wish it.

The real impetus behind this law is that some Republicans wish to damage unions institutionally because unions support Democrats more frequently than Republicans. For example, in a fundraising letter, Wisconsin State Senate majority leader Scott Fitzgerald explained that the goal of the Wisconsin legislation was "to break the power of unions . . . once and for all."[194] Further, in a Fox News interview, Fitzgerald said, "If we win this battle, and the money is not there under the auspices of the unions, certainly what you're going to find is President Obama

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191. *Id.*

192. *See, e.g.*, Michael M. Oswalt, Note, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 701 (2007).

193. *See* WIS. STAT. ANN. § 111.70(4)(d)(3)(b) (West Supp. 2011).

194. Michael Winship, *Labor Pains and the GOP*, SALON.COM (Apr. 1, 2011, 9:01 PM), http://www.salon.com/news/politics/war_room/2011/04/01/labor_fights_republicans_sharia_law_michael_winship/index.html.

is going to have a much more difficult time getting elected and winning the state of Wisconsin."[195]

These laws are often not even supported by actual public employers. For example, while the Wisconsin bill was pending, the executive director of the Wisconsin Association of School Boards wrote to the Wisconsin legislature:

> Many [Wisconsin Association of School Board] members are gravely concerned that the changes in the . . . bill limiting the scope of collective bargaining would wipe away the ability of local school boards to use the bargaining process in ways that enhance local control by telling local school boards they are prohibited from deciding whether to enter into a contract on any item other than wages; and would immeasurably harm the collaborative relationships that exist between school boards and teachers and may lead to job actions and other disruptions of educational services that will harm the educational quality in our public schools.[196]

Further, taking away collective bargaining rights is actively harmful. As a recent study by labor relations experts explained:

> Challenges to the freedom of association and the right to bargain collectively places the United States out of sync with established international human-rights principles. Collective bargaining has historically served to increase consumer purchasing power, assure voice in the workplace, and provide checks and balances in society. Models for collective bargaining in the public sector have incorporated alternative dispute-resolution mechanisms to protect the public interest.[197]

As to the first point, Article 23 of the United Nations' Universal Declaration of Human Rights stresses the importance of collective bargaining rights for all workers, including public employees.[198] So does the 1998 International Labor Organization Declaration on Fundamental Principles and Rights at Work (the United States is a signatory to this document).[199] In the latter document, "the United States pledged 'to promote and to realize . . . the principles concerning the fundamental rights' defined in the declaration, the first of which is 'freedom of association and the effective recognition of the right to collective bargaining.'"[200] Human Rights Watch and Amnesty International have publicly declared that at

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195. *Id.*

196. Letter from John H. Ashley, Exec. Dir., Wis. Ass'n of Sch. Bds., to Honorable Alberta Darling, Co-Chair, Joint Comm. on Fin., and Honorable Robin Vos, Co-Chair, Joint Comm. on Fin. (Feb. 15, 2011), http://wisconsinwave.org/sites/default/files/documents/WASB%20letter%20to%20Darling%20and%20Voss.pdf.

197. Lewin et al., *supra* note 33, at 3.

198. *Id.* at 26.

199. *Id.*

200. Michelle Amber, *Collective Bargaining: Human Rights Groups Say State Measures on Workers' Rights Violate International Law*, 49 Gov't Empl. Rel. Rep. (BNA) 438 (Apr. 5, 2011) (alteration in original).

least some of the legislation described above violates international human rights standards.[201] Human Rights Watch has noted that the "United States also is a party to and bound by its obligations under the International Covenant on Civil and Political Rights, which guarantees everyone the right to protect his or her interests through trade union activity, including collective bargaining . . . ."[202]

Further, contrary to stereotypes, unions do not cause inefficiencies; in fact, they can improve efficiency. Data showing that unions have a positive effect come from sources that range from international surveys to analyses of specific types of employers. In 2002, the World Bank released a report based on more than 1000 studies of the effects of unions and collective bargaining.[203] This report found that in the United States high unionization rates tend to have higher productivity, less pay inequality, and lower unemployment.[204] It found that workers who belong to unions are generally better trained than their non-union counterparts and that unions also help retain workers.[205] Also, having a large number of workers represented by unions tended to have a stabilizing and beneficial effect on a country's economy.[206] At the other end of the spectrum, there are studies of specific types of public-sector unions and employers in the United States. For example, evidence shows that unionization of teachers correlates positively with higher student scores on standardized tests.[207]

A survey of the literature on unions and efficiency concluded that there "is scant evidence that unions act to reduce productivity . . . while there is substantial evidence that unions act to improve productivity in many industries."[208] While this view is not unanimous, the combined teaching of most studies is that unions can increase productivity in many to most circumstances, and can decrease it in others.[209] In either case, the effect is usually not large.[210] Further, in recent years,

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201. *Id.*

202. *Id.*

203. TOKE AIDT & ZAFIRIS TZANNATOS, THE WORLD BANK, UNIONS AND COLLECTIVE BARGAINING: ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT 1 (2002), *available at* http://www.politiquessociales.net/IMG/pdf/worldunions.pdf.

204. *Id.* at 70, 97, 103 (noting that variation exists across industries).

205. *Id.* at 77.

206. *See id.* at 25 (discussing how the "influence of unions can result in outcomes closer to the competitive equilibrium").

207. *See* Lala Carr Steelman, Brian Powell & Robert M. Carini, *Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores*, 70 HARV. EDUC. REV. 437, 448, 456 (2000).

208. Dale Belman & Richard Block, *The Impact of Collective Bargaining on Competitiveness and Employment: A Review of the Literature*, *in* BARGAINING FOR COMPETITIVENESS: LAW, RESEARCH, AND CASE STUDIES 45, 51 (Richard Block ed., 2003). Also, an overview paper explains: "[a]nalyses of the union effect on firms and the economy have generally found unions to be a positive force, improving the performance of firms and contributing to economic growth . . . ." LAWRENCE MISHEL WITH MATTHEW WALTERS, ECON. POLICY INST., HOW UNIONS HELP ALL WORKERS 15 (2003), *available at* http://www.epinet.org/content.cfm/briefingpapers_bp143.

209. AIDT & TZANNATOS, *supra* note 203, at 26, 71–72.

210. Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, *in* UNIONS AND ECONOMIC COMPETITIVENESS 143, 155–56 (Larry Mishel & Paula Voos eds.,

new innovations in problem solving in labor management negotiations have brought new efficiencies to union workplaces, keeping the efficiencies brought by worker voice and a highly skilled workforce while eliminating certain types of work rules that may be less appropriate to modern workplaces.[211]

II. THE ECONOMIC CRISIS, BARGAINING, AND FURLOUGHS

A. Interest Arbitration Cases

A plurality of states permits public employees to bargain, to bar strikes, and to resolve bargaining impasses through interest arbitration. All told, approximately thirty states use some form of binding interest arbitration.[212] In this system, a neutral arbitrator (or sometimes a tripartite board) holds a hearing, evaluates evidence, follows statutory criteria, and makes a binding decision as to the terms of the collective bargaining agreement.[213]

Public-sector statutes use three basic models of interest arbitration.[214] The first is conventional arbitration. In conventional arbitration, the arbitrator can pick among the parties' proposals, create compromises, or even go beyond the parties' proposals.[215] The second is final offer whole package arbitration. In final offer whole package arbitration, the arbitrator may only choose the final set of proposals from the union or the final set of proposals from the employer, as a package.[216] The third is final offer issue-by-issue arbitration. In this system, the arbitrator must choose from final proposals from one side or the other, but the arbitrator may choose final proposals on some issues from one side and final proposals on other issues from the other side.[217]

Also, statutes providing for binding interest arbitration almost always include specific criteria which the arbitrator must consider and evaluate in making the arbitration award.[218] The employer's ability to pay is a standard factor the arbitrator must consider, as are the pay and conditions of similar employees (often called "comparables").[219]

Given the former factor, the economic crisis has played a big role in interest arbitrations in the age of Obama. Public employers consistently rely on the economic crisis to justify their positions. Even cases ruling in favor of a union have noted it. For example, an April 2010 interest arbitration award involving Helena, Montana concluded:

1992) ("The majority of studies find that union firms have higher productivity, but there are well-documented exceptions.").

211. Lewin et al., *supra* note 33, at 23–26.

212. KEARNEY WITH CARNEVALE, *supra* note 7, at 264–65.

213. *Id.* at 274.

214. Charles Rehmus, *Interest Arbitration*, *in* LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SECTOR: REDEFINING COLLECTIVE BARGAINING 196–214 (John Bonner ed., 1999).

215. *Id.*

216. *Id.*

217. *Id.*

218. Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 158 (1987).

219. *See id.* at 159–60.

> The City was shown to have the ability to pay for the increase. . . .
>
> [T]he City made what was essentially an equitable plea and asserted that fundamental fairness and one's "gut" sense should govern here as well. While there is some pull to that argument, especially given the economic circumstances around the nation and the state of Montana, . . . [and] there was some cogency to the claim that at this point in history even a small increase should be regarded as something of great benefit, the evidence and assertions demonstrated by a preponderance of the evidence that the Union's position was more justified than the City's on this record.[220]

Most arbitrators in these times have given more weight to the recession's effect on the employer's ability to pay than to other factors. An award from Washington state declared, "[T]his Arbitrator took the position that in the current tough economic times the State's ability to pay trumps all of the other statutory factors . . . ."[221] Similarly, another arbitrator in a Minnesota case explained:

> Minnesota's general economic conditions have deteriorated sharply since CY 2007. For this reason, the wage and insurance terms that the instant parties might have voluntarily negotiated under the prevailing economic and fiscal regime most likely would have been different from those that were negotiated by comparable external bargaining units during better times—2007. Accordingly, the Arbitrator is not inclined to rely on the "dated" negotiated settlements of comparable external bargaining units—a conclusion that is strongly attenuated by the Employer's increasingly strained ability-to-pay.[222]

In another Minnesota case, a different arbitrator noted that "the vast majority of cities in the Employer's comparison group are proposing 0% [wage increases] for 2010. . . . Some cities and counties are settling at 0% . . . ."[223]

In sum, the economic crisis is hurting public-sector workers in contract negotiations. While this may not be shocking, it is worth noting that the most common approach to resolving public-sector impasses may exacerbate this tendency. Most public workers are not allowed to strike, and the most common alternative is interest arbitration. Interest arbitrators are generally required, by statute, to consider the employer's ability to pay. And in hard economic times, that factor is often the trump card for employers in the arbitrations.

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220. City of Helena v. IAFF, Local 448, BOPA Case No. 5-2010, at *22 (407-2010) (Apr. 19, 2010) (Jacobs, Arb.), *available at* http://erd.dli.mt.gov/images/stories/pdf/labor_standards/decisions/firefighter/4-19-10_helena.pdf.

221. State of Washington v. SEIU Local 775 NW, Pub. Emp't Relations Comm'n No. 23406-1-10-0552, at *15 (Sept. 29, 2009) (Williams, Arb.), *available at* http://www.perc.wa.gov/Databases/IntArb/22677-I.htm.

222. Metro. Council & Law Enforcement Labor Servs., Inc., Local No. 203, BMS Case No. 08–PN-1141 (Feb. 27, 2009) (Bognanno, Arb.).

223. City of West St. Paul v. Law Enforcement Labor Servs., Inc., Local No. 72, BMS No. 09-PN-1062 (Jan. 19, 2010) (Miller, Arb.) (internal citation omitted).

B. Furlough Cases and the Contract Clause

Beyond interest arbitration awards, many public employers, including those with unionized employees, have imposed involuntary furloughs—mandatory days off without pay—as well as staffing cuts. Between 2007 and 2009, over half the states implemented mandatory furloughs.[224] In 2010, California and New York ordered furloughs for a combined total of approximately 250,000 state employees.[225]

For unionized public employees, furloughs often at least seem to violate the express terms of the collective bargaining agreement that covers them. Unions have challenged such actions, notably under the Contract Clause of the Constitution. The Contract Clause provides that "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[226] Such challenges to furloughs have, however, largely been unsuccessful.

For example, in *Fraternal Order of Police Lodge No. 89 v. Prince George's County, Maryland*,[227] the Fourth Circuit rejected a Contract Clause challenge to involuntary furloughs. In that case, in reaction to budget problems, the county employer instituted a furlough plan which required approximately 5900 employees to forego 80 scheduled work hours in fiscal year 2009.[228] This amounted to a 3.85% annual pay reduction.[229] The employer relied on a section of the county's personnel law, which authorized the county to furlough employees when the county executive determined that a revenue shortfall required the compensation level of a department, agency, or office to be reduced.[230] The district court upheld the union's Contract Clause challenge to this act.[231]

The Fourth Circuit reversed.[232] It first described the three-part test used in Contract Clause cases, which is intended to balance the Clause's protections against the states' reserved police powers: "(1) whether there has been an impairment of the contract; (2) whether that impairment was substantial; and (3) if so, whether the impairment was nonetheless a legitimate exercise of the police power."[233] Here, the first prong was not satisfied because the court found other sections of the county personnel law made all provisions of collective bargaining agreements subject to all provisions of the county's personnel law, including the provisions authorizing furloughs.[234]

The Fourth Circuit did note that a different result would have obtained had plaintiff unions been able to identify any part of their contracts that specifically prohibited furloughs; "If they had made such an identification, the Unions would

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224. Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 11 (2011).
225. *Id.*
226. U.S. CONST. art. I, § 10, cl. 1.
227. 608 F.3d 183 (4th Cir. 2010).
228. *Id.* at 186.
229. *Id.*
230. *Id*. at 190–91 (citing P.G. COUNTY CODE § 16-229(a)).
231. *Id.* at 187.
232. *Id.* at 193.
233. *Id.* at 188.
234. *Id.* at 190–91.

have been entitled to summary judgment," as part of the county personnel law authorizing a contract provision to override the general authority for furloughs.[235] The union, however, relied on somewhat more general language guaranteeing wages and hours.[236] These sections, the court held, were not enough.[237]

The California Supreme Court recently upheld furloughs of state employees under a different theory in a case involving somewhat different facts.[238] Governor Arnold Schwarzenegger had ordered furloughs for state workers on the first and third Fridays of each month from February 2009 to June 2010.[239] In a lengthy opinion, the court first held that the trial court erred in deciding that Governor Schwarzenegger's declaration of a fiscal emergency in an executive order gave him the authority to impose furloughs unilaterally on state workers.[240] Code sections that might have given the governor authority to issue furloughs were superseded by the state public-sector labor law governing state employees.[241] So, when the governor issued his furlough order on December 19, 2008, it was not valid at that time.[242] But subsequently, on February 19, 2009, the legislature enacted a revision to the 2008 budget, reducing the 2008–09 fiscal appropriation for state employee compensation to a level which reflected the reduced compensation to be paid under the governor's furlough plan.[243] This, the court held, was a permissible method to authorize and mandate such furloughs.[244]

This topic is not entirely new. Unions have brought Contract Clause cases challenging unilateral acts by governments that attempt to modify collective bargaining agreements since the 1970s. Some have succeeded (including some challenges to furloughs), and some have not.[245] For example, in 2008 the Eighth Circuit upheld a Contract Clause challenge to a city's unilateral reduction in health care premiums for retired employees.[246] A collective bargaining agreement obligated the city of Benton, Arkansas, to pay the full cost of the premiums, but during the term of the agreement, the city council attempted to reduce the city's contributions.[247] The court rejected the city's claim of "economic necessity," holding that it only applied to "'unprecedented emergencies,' such as mass foreclosures caused by the Great Depression."[248]

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235. *Id.* at 191.

236. *See id.*

237. *See id.*

238. Prof'l Eng'rs in Cal. Gov't v. Schwarzenegger, 239 P.3d 1186 (Cal. 2010).

239. *Id.* at 1190.

240. *See id*. at 1212–13, 1218–19 (discussing that CAL. GOV'T CODE § 3516.5 does not give the governor the authority to issue such an executive order).

241. *See id*. at 1207–12 (discussing how CAL. GOV'T CODE §§ 19849, 19851 do not give the governor authority). The court also took time to address whether authority could have been derived from any other source. *See id.* at 1213–18.

242. *See id.* at 1220.

243. *Id.* at 1220.

244. *Id.*

245. For an overview of decades of law in this area, see Befort, *supra* note 224, at 30–45.

246. American Federation of State, County and Municipal Employees, Local 2957 v. City of Benton, 513 F.3d 874 (8th Cir. 2008).

247. *Id.* at 877.

248. *Id.* at 882.

Time will tell whether other cases will use as strict a standard as the Eighth Circuit has—or perhaps courts will conclude that our current era is a time of unprecedented emergencies. Contract Clause cases can depend greatly on specific facts, specific local laws, and the attitudes of judges in analyzing the three factors used in Contract Clause cases. As one court remarked in a Contracts Clause case involving a teachers' union, "public servants might well be called upon to sacrifice first when the public interest demands sacrifice."[249]

An even more dramatic strategy involves a municipal employer declaring bankruptcy and thus voiding its obligations in collective bargaining agreements. In June 2010 a California court rejected a union's legal challenge to this process.[250] Notably, § 1113 of the Bankruptcy Code, enacted to avoid the harsh results of bankruptcies on union contracts in the private sector, does not apply to municipal bankruptcies.[251] If the economic situation worsens, more cities may try to use bankruptcy to avoid obligations under union contracts. Some leaders, including former Speaker of the House Newt Gingrich, have even suggested that *states* should consider bankruptcy as a mechanism to avoid pension obligations.[252] This would be unchartered waters, and the idea is quite controversial.[253]

III. THE FEDERAL GOVERNMENT AND THE RIGHT TO BARGAIN COLLECTIVELY

The federal government in the past two years has produced two intriguingly contrasting issues on the fundamental question of whether public employees should have the right to bargain collectively at all. In the first, employees of the TSA have struggled to overturn a ban on collective bargaining that the Bush administration imposed. Meanwhile, Congress has seriously considered a bill that would give basic collective bargaining rights to all public safety employees of local governments, essentially providing minimum rights to such employees who currently have none. This would be the first federal law in U.S. history granting such rights to broad swaths of state and local employees.

A. The Continuing Quest for Collective Bargaining Rights at the TSA

While this issue began during the Bush administration, there have been very important recent developments. After the terrorist attacks on 9/11, significant sectors of the federal government were reorganized into the Department of

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249. Baltimore Teachers Union, Local 340 v. Mayor & City Council of Baltimore, 6 F.3d 1012, 1021 (4th Cir. 1993). *See generally* Befort, *supra* note 224, at 39–51 (providing a discussion of this and related cases).

250. *In re* Vallejo, 432 B.R. 262 (E.D. Cal. 2010).

251. 11 U.S.C. § 1113 (2006); Befort, *supra* note 224, at 19–21 (section 1113 applies only to Chapter 11 proceedings, and municipal bankruptcy is handled through Chapter 9 of the Bankruptcy Code).

252. *See, e.g.*, Editorial, *It's a Bankrupt Idea*, L.A. TIMES, Jan. 25, 2011.

253. *Id.* This editorial criticizes the idea of state bankruptcy. Among other things, state bankruptcy would hurt investors in state bonds, hurt the state in trying to sell bonds, and hurt contractors and other creditors of the state. *Id.* The editorial argues cuts in benefits and tax increases would fix the problem. *Id.*

Homeland Security (DHS).[254] These moves included the creation of the TSA.[255] When the TSA was formed, the Bush administration determined that its workers would not have bargaining rights. On January 8, 2003, James Loy, then the head of the TSA, issued an order stating that TSA employees, "in light of their critical national security responsibilities, shall not . . . be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization."[256]

Further, when the DHS was created, the Bush administration insisted that the agency be allowed to create a personnel system that was not covered by existing federal-sector labor law and civil service rules.[257] The statute creating the DHS ultimately did grant the agency the right to create a more "flexible" system that could provide employees and their unions fewer rights than under these pre-existing laws.[258] But Democrats made sure that the statute preserved the basic right to bargain collectively.[259] This set the stage for litigation.[260] The DHS then set up a very restrictive system: among other things, the system allowed the DHS to void, unilaterally, any provision of any union contract it had agreed to.[261] The union representing DHS workers[262] sued, claiming this was not "collective bargaining" as the statute required. In *National Treasury Employees Union v. Chertoff*,[263] the D.C. Circuit agreed with the union. Collective bargaining is a "term of art," and it could not mean, *inter alia*, a system in which one side was not bound by collectively bargained and signed contracts.[264]

This, however, did not resolve the issue of whether employees in the TSA should have collective bargaining rights, and the issue remains contentious. The rhetoric, especially immediately after 9/11, was not always measured. "Do we really want some work rule negotiated prior to 9/11 to prevent us from finding somebody who is carrying a bomb on a plane with your momma?" Senator Phil Gramm asked in 2002.[265] In contrast, in debates over labor rules in the DHS generally, Senator Barbara Boxer insisted: "[T]he heroes of September 11 were union members."[266] "They . . . were afforded the protections of collective bargaining . . . . They never looked at their watch and said Oh, gee, I have been on

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254. *See* Slater, *supra* note 92, at 308.
255. *Id.* at 314.
256. *Id.* (alteration in original).
257. *Id.* at 297.
258. *See* 5 U.S.C. § 9701(a)–(b)(4) (2006); Slater, supra note 92, at 309–11.
259. *See* Slater, supra note 92, at 309–11.
260. *See id.* at 313.
261. 5 C.F.R. § 9701.506(a) (2008).
262. Prior to the reorganization, many of the workers in the DHS had been union members with bargaining rights under the statute that covers most federal employees in their predecessor agencies. *See* Slater, *supra* note 92, at 297.
263. 452 F.3d 839 (D.C. Cir. 2006).
264. *Id.* at 857–60.
265. 148 CONG. REC. 17,030 (2002).
266. 148 CONG. REC. 15,880 (2002).

the 74th floor of the World Trade Center, and now I have worked eight hours and I am coming down."[267]

Years after 9/11, the debate continues. In 2007 the Senate approved a broad bill that would have given collective bargaining rights to TSA workers,[268] but that language was stripped from the bill after President Bush threatened a veto.[269] In the fall of 2010, the House considered but did not pass a bill that would have granted bargaining rights to TSA employees.[270] President Obama's first nominee to head the TSA, Erroll Southers, withdrew his name from consideration at least in significant part due to Republican opposition to collective bargaining rights for TSA employees.[271] John Pistole, the man who finally filled the position of head of the TSA, initially refused to state whether or not he would permit TSA employees to bargain collectively.[272] He announced that DHS Secretary Janet Napolitano had asked him to review the collective bargaining issue and make a recommendation.[273]

While this issue was pending, the American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU) were jockeying to try to represent TSA employees. Both unions filed petitions with the Federal Labor Relations Authority (FLRA), the federal sector analogue to the National Labor Relations Board.[274] The FLRA's regional director rejected both petitions on the grounds that the FLRA did not have jurisdiction because TSA employees lack bargaining rights.[275]

However, in late 2010 the full FLRA reversed and held that a union election *could* go forward.[276] It explained that even though a union, if elected, could not bargain collectively, it could still represent employees in some contexts, for example, in grievances or as a *Weingarten* representative[277] (assisting employees during investigations with possible disciplinary consequences).[278] The FLRA also rejected arguments that unionization would threaten national security.[279] This is significant first because it is unusual for a public-sector labor agency to supervise an election and potentially to certify a union that has no right to bargain

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267. *Id.*

268. Chris Strohm, *Senate Approves Collective Bargaining for TSA Screeners*, GOV'T EXEC. (Mar. 7, 2007), http://www.govexec.com/dailyfed/0307/030707cdpm1.htm.

269. Daniel J. Doyle, *Labor Relations Under the Bush Administration*, STUDENT PULSE (May 4, 2010), http://www.studentpulse.com/articles/245/labor-relations-under-the-bush-administration.

270. Louis LaBrecque, *Union Says Screener Bargaining Rights Could Be Granted by TSA in Late Autumn*, 48 Gov't Empl. Rel. Rep. (BNA) 1051 (September 14, 2010).

271. Laura D. Francis, *Appointments: Pistole Says TSA Workforce Is Priority, But Dodges Collective Bargaining Issue*, 48 Gov't Empl. Rel. Rep. (BNA) 734 (June 22, 2010).

272. *Id.*

273. KIRSTEIN & YOUNG PLLC, WASHINGTON AVIATION SUMMARY 6 (2010), *available at* http://www.yklaw.com/WashingtonAviationSummaryJuly2010.pdf.

274. Emily Long, *AFGE Wins TSA Union Election*, GOV'T EXEC. (June 23, 2011), http://www.govexec.com/dailyfed/0611/062311l1.htm.

275. LaBrecque, *supra* note 270.

276. U.S. Dep't of Homeland Sec. Transp. Sec. Admin., 65 F.L.R.A. 242, 248 (2010).

277. *Id.* at 247.

278. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 253 (1975).

279. *U.S. Dep't of Homeland Sec. Transp. Sec. Admin.*, 65 F.L.R.A. at 245.

collectively. It is also important because of the sheer size of the unit: more than 40,000 employees.[280] In June 2011 the AFGE won a runoff election and is now the certified representative of TSA employees.[281]

Meanwhile, back in February 2011, Director Pistole issued his Decision Memorandum on the issue.[282] He has decided to create, in his words, "a comprehensive structure that is different and distinct, separate and independent, from [the statute that covers most federal employees], but that will provide for genuine, binding collective bargaining on specified subjects at the national level with the union, if any, that prevails in an election process . . . ."[283] The system would feature a scope of bargaining even more limited than the limited bargaining permitted of most federal workers. The union could negotiate about rules on priorities for vacation time and shift assignments, issues regarding workplace transfers, parking subsidies, uniform allowances, the selection process for special assignments, going from full time to part time and vice-versa, and how employees are recognized for commendable work.[284] Unions will not be allowed to negotiate over compensation (which is also not permitted under the general federal statute), job qualification rules, disciplinary standards, or security procedures—including when and where workers are deployed, and the means and methods of covert testing and results.[285] Disputes and impasses under this system will be resolved "by panels selected from a roster of neutrals, with backgrounds in both security and collective bargaining, who are mutually agreed upon" by the TSA and the union.[286]

This may not be the last word on the issue: unions may find this inadequate, and opponents of collective bargaining may feel it goes too far. Broadly, this issue raises the fundamental question of whether collective bargaining is proper in the public sector, or at least in large parts of the public sector. Arguments used to oppose collective bargaining at the TSA—that it creates inefficiencies and delays—could be used to oppose bargaining in practically any part of the public sector. Unions in the age of Obama will have to counter such arguments, as questions about the fundamental legitimacy of unions in government employment are not going away.

B. The First Federal Law Guaranteeing Bargaining Rights for (Some) Employees of State and Local Governments?

In contrast, the proposed Public Safety Employer-Employee Cooperation Act of 2009, House Bill 413, would provide collective bargaining rights for public safety

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280. Long, *supra* note 274.

281. *See Organizing: AFGE Certified as Airport Screener Union*, 49 Gov't Empl. Rel. Rep. (BNA) 860 (July 5, 2011).

282. JOHN S. PISTOLE, TRANSPORTATION SECURITY ADMINISTRATION, DECISION MEMORANDUM: TRANSPORTATION SECURITY OFFICERS AND COLLECTIVE BARGAINING (2011), *available at* http://www.tsa.gov/assets/pdf/determination_tso_and_collective_bargaining.pdf.

283. *Id.* at 5.

284. *Id.* at 9.

285. *Id.* at 9–10; 5 U.S.C. § 9701(d) (2006) (disallowing bargaining over compensation).

286. PISTOLE, *supra* note 282, at 20.

officers employed by state or local governments.[287] If enacted, it would provide such rights for the first time to a large number of employees—mostly police and firefighters—as a significant minority of states (approximately seventeen) do not permit both police and firefighters to bargain collectively.[288]

This Act would direct the FLRA to determine whether state laws provide specified collective bargaining rights for public safety officers.[289] If a state's law did not meet the standards in the Act, the FLRA would prescribe regulations covering the employees.

> Specifically, the Act would:
> (1) grant such employees the right to form and join a labor organization which excludes management and supervisory employees;
> (2) require public safety employers to recognize and agree to bargain with the employees' chosen labor organization;
> (3) require the FLRA to issue regulations establishing rights and responsibilities for public safety employers and employees in states that do not substantially provide for such public safety employee rights and responsibilities.
> (4) direct the Authority, in such cases, to:
> (a) determine the appropriateness of units for union representation;
> (b) supervise or conduct elections to determine whether a union has been selected as an exclusive representative by a voting majority of the employees in an appropriate unit;
> (c) resolve issues relating to the duty to bargain in good faith;
> (d) conduct hearings and resolve complaints of unfair labor practices; and
> (e) resolve exceptions to arbitrators' awards.
> (5) grant a public safety employer, employee, or labor organization the right to seek enforcement of Authority regulations and orders in state court;
> (6) prohibit public safety employers, employees, and labor organizations from engaging in lockouts or strikes; and
> (7) provide that existing collective bargaining units and agreements would not be invalidated by this Act.[290]

This bill did not pass while Democrats controlled both houses of Congress,[291] and with political power shifting in those chambers, it is much less likely now than when I first presented this Article that this bill will become law in the near future. Still, proponents of the bill have not given up, and conservatives and Republicans are sometimes more sympathetic to police and firefighter unions than to other public-sector unions.

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287. H.R. 413, 111th Cong. (2009).

288. For a list of which states provide bargaining rights to which employees, see KEARNEY WITH CARNEVAL, *supra* note 7, at 60–61.

289. H.R. 413 § 4(b).

290. MALIN ET AL., *supra* note 11, at 113–14; *see also* H.R. 413 § 4(b).

291. Bill Summary & Status, 111th Congress (2009–2010) H.R.413, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.413.

In some ways, this bill would be a substantial departure from traditional public-sector labor law. The federal government has never attempted to grant collective bargaining rights to large groups of state and local government employees. The only other time the federal government has granted bargaining rights to any state or local government employees involved the Urban Mass Transit Act of 1964.[292] This law provides funds for local governments to take over previously private mass transit systems and requires that collective bargaining rights of their employees be preserved.[293] The Public Safety Employee Act would affect many more employees.

In other ways, this law would not be a significant departure. Most federal employment laws cover public employees as well as private-sector employees. In some cases there are a few special rules, and in some cases the coverage is mostly identical. For example, the FLSA covers state and local government employees, although it contains some overtime rules that apply only to the public sector.[294] Title VII of the Civil Rights Act of 1964 generally applies to the public sector in the same ways, substantively and procedurally, as it does to the private sector.[295] Is it more intrusive for the federal government to apply anti-discrimination laws[296] and wage-and-hour rules to state and local governments than to mandate minimal collective bargaining rights?

Were this bill to become law, one would expect constitutional challenges. As late as 1976, the Supreme Court held that applying the FLSA to state and local government employers violated the Tenth Amendment.[297] That case was overruled in 1985.[298] But if this Act were passed, it could give the Court a chance to revisit this issue. Notably, the Court is arguably more conservative and sensitive to issues of state sovereignty in public employment now, as witnessed by its more recent Eleventh Amendment jurisprudence. For example, in *Alden v. Maine*, the Court, relying at least in part on the Eleventh Amendment, held that states were immune from monetary damages in private suits brought by state employees under the FLSA.[299]

Most broadly, passing this Act could be seen as a bold assertion of the importance of collective bargaining rights. In contrast to the TSA controversy, it

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292. *See* MALIN ET AL., *supra* note 11, at 228.

293. *Id.*

294. *See* 29 U.S.C. § 207(k), (o) (2006). These special overtime rules involve, respectively, the ability of public employers under certain circumstances to use compensatory time (paid time off) in lieu of money for overtime compensation, and the ability of public safety employers to use certain alternative schedules, other than the "forty hours in seven day" schedule, that trigger overtime liability.

295. *See, e.g.*, Civil Rights Act of 1964, tit. 7. The Act does have some special enforcement procedures for federal employees. *See, e.g.*, 42 U.S.C. § 2000e-16.

296. In addition to Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act apply to the public sector.

297. *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

298. Garcia v. San Antonio Metro. Transp. Auth., 469 U.S. 528, 531 (1985).

299. 527 U.S. 706, 712–13 (1999); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (providing the same immunity for suits under the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (providing the same immunity for suits under the Age Discrimination in Employment Act).

would be an assertion of the importance of such rights in the context of employees responsible for public safety. Still, one might wonder: why should a federal law provide bargaining rights *only* to public safety employees? It is hard to find a policy or practical principle that suggests that police and firefighters should have collective bargaining rights, while, for example, janitors, clerks, or teachers in government service should not.

IV. WHAT DOES "COLLECTIVE BARGAINING" MEAN? CURIOUS CASES INVOLVING THE MISSOURI CONSTITUTION

Recent cases in Missouri have raised interesting and important questions not only for public workers in that state, but also over the very meaning of the term "collective bargaining."

In 1945, Missouri added the following clause to its state Constitution: "employees shall have the right to organize and to bargain collectively through representatives of their own choosing."[300] In 1947, in *City of Springfield v. Clouse*, the Missouri Supreme Court held that this provision did not apply to *public* employees.[301] Sixty years later, in 2007, the Missouri Supreme Court overruled *Clouse* and held this constitutional provision *did* cover public employees.[302] This was significant because many government employees in Missouri, notably public school teachers and police, did not (and still do not) have a statutory right to bargain collectively[303] (other public employees in Missouri are covered by a limited state public-sector law passed in the 1960s).[304]

Missouri has not yet passed a statute implementing this constitutional guarantee or explaining how "collective bargaining" under the state constitution should work. Every other jurisdiction that provides public employees the right to bargain collectively has a detailed statute spelling out the rights and obligations of the parties in the collective bargaining process.[305]

Thus, after *Independence* in 2007, it is unclear what specific rights Missouri public employees have under their state constitution. Not surprisingly, views vary sharply. Public school employers in Missouri have promulgated labor relations rules quite different from what has traditionally been considered "collective bargaining." In 2009, lower state courts in Missouri decided two cases involving such systems.[306] (In the interest of full disclosure, I note that in these two cases I acted as a witness on behalf of the unions challenging these systems.)

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300. 1945 Mo. Laws 7 (codified at MO. CONST. art I., § 29).

301. City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. 1947).

302. Independence-Nat'l. Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 137 (Mo. 2007).

303. KEARNEY WITH CARNEVALE, supra note 7, at 61.

304. MO. REV. STAT. § 105.500 (2011).

305. The two other states with constitutions that provide for public sector bargaining rights are Florida, FLA. CONST. art. 1, § 6, and Hawaii, HAW. CONST. art. 13, § 2. For the statutory implementation of these constitutional rights, see FLA. STAT. ANN. § 447.301 (West Supp. 2012); HAW. REV. STAT. ANN. § 89-3 (West Supp. 2010).

306. Bayless Educ. Ass'n v. Bayless Sch. Dist., No. 09SL-CC01481 (Cir. Ct. St. Louis County Feb. 10, 2010); Springfield Nat'l Educ. Ass'n v. Sch. Dist. of Springfield, No. 0931-

In the first case, the Springfield, Missouri school district insisted that employees be given the option to choose multiple unions to represent the same employees at the same time.[307] This is contrary to the principle of exclusive representation, a staple of all U.S. labor laws. In the second case, the Bayless, Missouri school district insisted that a bargaining representative could be selected in only one way: each school within the district (elementary, middle, and high school) would elect two individual "representatives," and these representatives (along with a couple of other individuals) would form a body to bargain with the employer.[308] This is contrary to the principle in U.S. labor laws that employees are represented by an organization designed to speak with one coherent voice and one that has the power and responsibility to enforce a contract. It also violates the principle in U.S. labor law that the employer cannot dictate to employees the structure of their organization or how leaders of that organization are chosen.

In both cases, I testified on behalf of a teachers' union that in the United States, "collective bargaining" is and has been, historically, a term of art with some specific meanings and requirements, which include exclusive representation, the right to negotiate contracts that are binding on both parties, and the ability of workers to choose freely their collective representative without interference from employers. I discussed the use of this term and the practice under the early history of the Railway Labor Act, the National Industrial Recovery Act, the War Labor Boards (for both World Wars), and the early years of the National Labor Relations Act. The Springfield case was decided in the employer's favor, but the Bayless case found a violation of the Missouri Constitution.

More specifically, in *Springfield National Education Association v. Springfield School Board*, the school board promulgated a system for union recognition that included the following provision: employees in a bargaining unit of teachers could, in an initial ballot, choose to be represented by one union, multiple unions, or no union.[309] Under the multiple union option, more than one union would simultaneously represent the same group of teachers.[310] Nothing required that the labor organizations agree to this or have consistent goals.[311] Thus, the same employees could be represented, simultaneously, by two (or more) hostile and competing unions. This, as noted above, contradicts the principle in U.S. labor law of *exclusive* representation: only one union represents one group of employees.

The *Springfield* judge relied on modern dictionary definitions of "collective bargaining." Specifically, the judge quoted the *Independence* decision, which had referenced "collective bargaining" briefly in a footnote:

> "The dictionary definition says 'collective bargaining' is 'negotiation for the settlement of the terms of a collective agreement between an employer or group of employers on one side and a union or number of unions on the other.[']" The [Missouri] Supreme Court thereafter quoted BLACK'S LAW DICTIONARY (8th Ed. 2004), which says:

CV08322 (Cir. Ct. Greene County Sept. 10, 2009).

307. *Springfield Nat'l Educ. Ass'n*, No. 0931-CV08322 at *12.
308. *Bayless Educ. Ass'n*, No. 09SL-CC01481 at *5.
309. *See Springfield Nat'l Educ. Ass'n*, No. 0931-CV08322 at *12.
310. *See id.*
311. *See id.* at *2–9.

> "'collective bargaining' means 'negotiations between an employer and the representatives of organized employees to determine the conditions of employment . . . .['']"
>
> None of the definitions referenced by the [Missouri] Supreme Court suggest the phrase "collective bargaining" mandates exclusive representation.[312]

As a matter of constitutional interpretation, one wonders about using modern dictionaries to define terms put into a constitution more than sixty years ago. As a practical matter, the possibility of multiple union representation would seem unworkable, at least in situations (as in the *Springfield* case) where the two competing unions were hostile to each other but had the traditional duties standard in U.S. labor law (contract negotiation, grievance handling, duty of fair representation, etc.).

The effect of this decision for these parties was largely mooted by subsequent events on the ground. After the decision, the teachers voted to use the "one union representative" model—and voted in the union on whose behalf I testified.[313] But the model proposed in *Springfield* arose in another Missouri school district.[314]

A few months after *Springfield*, the union in *Bayless* successfully challenged a different system the Bayless school board had created.[315] In *Bayless*, the employer required employees in each school in the district to select two individual representatives and two alternates; these representatives, plus one representative designated by the union with the largest employee membership, would then be allowed, as a group, to bargain with the employer.[316]

Bayless held this did not satisfy the constitutional right to bargain collectively.[317] The judge in *Bayless* distinguished *Springfield*, explaining that in the *Springfield* process, employees were at least permitted to choose a traditional exclusive representative.[318] In contrast, the process in *Bayless* "mandates collaborative bargaining, not collective bargaining through a union representative."[319] It is not clear where the judge got the term "collaborative bargaining"; it does not appear in the Missouri Constitution, Missouri's public-sector labor statute, or relevant case law. It would have been better, in my view, for *Bayless* to have held that, among other things, this system would not have allowed the employees a "representative of their own choosing" (per the Constitutional language). In any case, after the

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312. *Id.* at *13–14 (quoting Independence-Nat'l. Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 138 n.6 (Mo. 2007)).

313. *SNEA Wins Exclusive Rep Election*, SOMETHING BETTER ONLINE (Spring 2010), http://www.mnea.org/Missouri/SomethingBetterOnline1/31.aspx.

314. *Grandview Nat'l Educ. Ass'n v. Grandview C-4 Sch. Dist.*, No. 1016-CV23514 (Cir. Ct. Jackson County). As of this writing, the case was just dismissed for mootness after the employees involved voted for a "one union representative" model. But apparently this issue is not going away.

315. Bayless Educ. Ass'n v. Bayless Sch. Dist., No. 09SL-CC01481 (Cir. Ct. St. Louis County Feb. 10, 2010).

316. *Id.* at *5.

317. *Id.* at *8.

318. *Id.* at *7–8.

319. *Id.* at *8.

Bayless decision, the union on whose behalf I testified won a representation election to represent these employees.

More broadly, this litigation, like the litigation described above involving the DHS, raises the question of whether "collective bargaining" is a term of art with some specific meaning, at least in the public sector. As noted above, the D.C. Circuit in *Chertoff* held that it is.[320] In that case, the court was dealing with the statute authorizing the DHS, not the Missouri Constitution, and of course the D.C. Circuit is not the Missouri Supreme Court. But in some important senses that case and the Missouri cases are similar. In both instances, employees were granted a right to bargain collectively; in neither instance did the authority granting that right define "bargain collectively"; and in both cases, courts had to try to give meaning to that term.

This is an especially interesting issue in the public sector, since "collective bargaining" has a universal meaning on some, but not all, issues. As noted above, state public-sector labor laws vary significantly on how bargaining impasses are resolved and what topics unions may legally bargain about.[321] On the other hand, public-sector labor laws have many fundamental rules in common with each other (notably, using an exclusive majority representative chosen by the employees). Indeed, the term "collective bargaining" in all U.S. labor laws throughout history always meant *some* specific things, including exclusive, majority representation.

It is not yet clear how these issues in Missouri will be resolved. As of this writing, the state legislature still has not clarified what precise rights public workers have under the state constitution. Even if the state enacted a bargaining statute, given that the right to collectively bargain is constitutionally protected, it is possible that a court could find a statute providing certain rules did not, in fact, provide "collective bargaining." Most fundamentally, in the age of Obama, seventy-five years after the passage of the NLRA and fifty years after the passage of the first state law authorizing collective bargaining in the public sector, we see a jurisdiction struggling with the meaning of the term "collective bargaining."

CONCLUSION

The current period presents stark contrasts for public-sector unions. Union density rates are high, yet the economic crisis has created a variety of threats: budget cuts, to be sure, but also political threats in which public employees are painted as an unfairly privileged class and long-standing rights to bargain collectively are at risk. "The best of times, the worst of times" will not do, given the growing tide of bad news for public-sector unions. But another old saying comes to mind: "may you live in interesting times." The phrase is often cited as an old Chinese curse. While it may not be Chinese in origin,[322] the sense in which it is

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320. *See supra* notes 263–64 and accompanying text.

321. *See supra* Part I.D. Complicating the issue in the Missouri cases, though, is that none of this diversity in public-sector law was present in 1945. *See* SLATER, *supra* note 4, at ch. 3. Back then, there were no public sector labor laws, only private sector labor laws. *Id.* Those laws had (and have) much less diversity in their rules. *Id.*

322. *See May You Live in Interesting Times*, PHRASE FINDER, http://www.phrases.org.uk/meanings/may-you-live-in-interesting-times.html.

a curse remains. For public sector labor, at least the first years of the age of Obama have been unusually interesting times.

In my view, public-sector labor law as it has existed for decades has worked well. State deficits are not caused by public-sector bargaining rights. As shown above, multiple studies have demonstrated that, after adjusting for type of worker and type of job, most public-sector workers are paid less than their private-sector equivalents. While some public-sector pension funds have real funding problems, these are not generally the fault of collective bargaining. This is true in large part because in the vast majority of states, public-sector unions are not legally permitted to negotiate over pension benefits. It is also true because other factors—notably the stock market crash of 2008 and questionable actuarial assumptions—are the main causes of the funding problems.

Thus, the radical and reactionary amendments to public-sector statutes some states have adopted are unlikely to help government budgets. They will, however, hurt working people and public services, and are also likely to dissuade talented people from entering public service. These effects will, in turn, harm the public. The attacks on collective bargaining are best understood as partisan politics—an attempt to de-fund and cripple unions because they are a core constituency of the Democratic Party. That is no justification for removing a longstanding, important right for working men and women.