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THE GREAT RECESSION, THE RESULTING BUDGET SHORTFALLS, THE 2010 ELECTIONS AND THE ATTACK ON PUBLIC SECTOR COLLECTIVE BARGAINING IN THE UNITED STATES

By Kenneth Glenn Dau-Schmidt & Winston Lin***

I. INTRODUCTION

The institution of collective bargaining is under serious attack in the United States.

American public sector unions and collective bargaining have been subjected to a vicious attack under the auspices of balancing government budgets, promoting “equity” between private and public employees, and limiting the impact of “special interests” on government policy.¹ The American and world financial crisis of 2007 resulted in the Great Recession of 2008 and substantial budget shortfalls for local and national governments worldwide.² This financial crisis and the resulting disintegration of aggregate demand and employment are eerily similar to the financial crisis and collapse that led to the Great Depression of the

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1. See discussion *infra* Part III.A.

2. See Elizabeth McNichol et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET AND POLICY PRIORITIES, 1 (Mar. 21, 2012), <http://www.cbpp.org/files/2-8-08sfp.pdf>; see also *The Long Term Effects of Recession*, OXFORD UNIV. PRESS: ONLINE RES. CTRS., <http://www.oup.com/uk/orc/bin/9780199565184/01student/further/13effects/> (last visited Apr. 20, 2012).

1930s. However, unlike the calamity of the 1930s, in the present emergency, American conservatives, funded by the moneyed class, are attempting to use the predicament as an opportunity to attack collective bargaining and other institutions of support and power for the American middle class. This grasp for power represents an assertion of power and control by the American upper class not experienced since the rise of scientific management, the deskilling of jobs, and the destruction of the trade union system of collective bargaining in the 1890s.³

In this paper, we outline the recent attack on public sector unions' power in the American economy and the accompanying changes, as well as proposed changes, in American law. We will briefly describe the impact of the recent financial crisis on the American economy, the balance sheets of American state and national governments, and the opportunism of the American plutocracy in using this crisis to propose and enact legislation to undermine the institution of collective bargaining and political proponents for the middle and lower classes. In particular, we will discuss the recent efforts in Indiana, Wisconsin, Ohio, and Michigan to severely limit or prohibit public sector collective bargaining and the political influence of American public sector workers. This attack on collective bargaining constitutes the largest grab for economic and political power by the American upper class since the destruction of the labor guilds in the 1890s and the rise of the "Gilded Age" in the late nineteenth and early twentieth century.⁴

A. The Great Recession

The Great Recession of 2008 was the most severe economic downturn since the Great Depression of the 1930s.⁵ The unemployment rate in the United States jumped from an annual rate of 4.6% in 2007 to

3. See CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 11-13 (1985) (attributing the decline of union influence during the 1890s in part to increased vulnerability to employer pressure in industries affected by the consolidation of corporate management).

4. See, e.g., William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1113 (1989).

5. See Tindata Addabbo et al., Univ. of Modena and Reggio Emilia, *Income Distribution and the Effect of the Financial Crisis on the Italian and USA Labour Markets 3*, IZA/OECD Workshop (Feb. 8-9, 2010), available at http://www.iza.org/conference_files/EcCrRiUnEm2010/addabbo_t5800.pdf; see also Michael W. Elsby et al., *The Labor Market in the Great Recession 2* (Nat'l Bureau of Econ. Research, Working Paper No. 15979, 2010) (describing the labor market conditions of 2007 as the worst since the 1940s).

9.6% in 2010.⁶ The unemployment rate for men in August of 2010 stood at 10.5%, almost two percentage points higher than the unemployment rate for women, 8.6%.⁷ The general monthly unemployment rate reached 10.2% in late 2009, and, although it has declined modestly, it has remained stubbornly above 8%.⁸ “[A] broader measure of underemployment, including involuntary part-time employment and discouraged workers who want a job but have given up looking, stood at 17.0 percent in November” 2010.⁹ Perhaps most worrisome, the percentage of the workforce that has been unemployed for more than six months reached a U.S. postwar high of over 4% and has remained tenaciously high.¹⁰ Although the U.S. economy has begun expanding again, the recovery in the number of jobs has been much slower than other recent recoveries and seems to have stalled with recent layoffs of state employees.¹¹ The Great Recession has also hammered wages.¹² Growth in nominal wages fell for men from 5.3% in 2007-2008 to -1.3% in 2009-2010 and for women from 5.2% to 3.7%.¹³

B. The Resulting Budget Crises

The Great Recession not only resulted in unemployment, but also enlarged federal and state government deficits as tax revenues dropped

6. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1941 TO DATE (2011), *available at* <http://www.bls.gov/cps/cpsaat01.pdf>.

7. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNEMPLOYED PERSONS BY OCCUPATION AND SEX (2011), *available at* <http://www.bls.gov/cps/cpsaat25.pdf>.

8. *See* BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT SITUATION NEWS RELEASE—OCTOBER 2009 (2009), *available at* http://www.bls.gov/news.release/archives/empst_11062009.pdf; BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 16 YEARS AND OVER, 1977 TO DATE (2011), *available at* <http://www.bls.gov/web/empst/cpseea01.pdf>.

9. Chris Tilly, *An Opportunity Not Taken . . . Yet: U.S. Labor and the Current Economic Crisis*, 14 WORKINGUSA: J. LAB. & SOC’Y 73, 74 (2011) (internal quotation marks omitted).

10. Elsby et al., *supra* note 5, at 24.

11. *See* JEFFREY THOMPSON, POLITICAL ECON. RESEARCH INST., UNIV. OF MASS., AMHERST, RAISING REVENUE FROM HIGH-INCOME HOUSEHOLDS: SHOULD STATES CONTINUE TO PLACE THE LOWEST TAX RATES ON THOSE WITH THE HIGHEST INCOMES? 4 (2012), *available at* http://www.peri.umass.edu/fileadmin/pdf/published_study/Revenue_PERI_March5.pdf.

12. *See* LAWRENCE MISHEL & HEIDI SHIERHOLZ, ECON. POLICY INST., RECESSION HITS WORKERS’ PAYCHECKS: WAGE GROWTH HAS COLLAPSED 1 (2010).

13. *Id.* at 9.

and claims for government assistance rose.¹⁴ The federal budget deficit grew from about \$342 billion in 2007 to \$1.5 trillion in 2009,¹⁵ and is currently estimated at slightly less than \$1.3 trillion for 2011.¹⁶ Some of this spike was due to spending under President Bush's Troubled Asset Relief Program (TARP) to stabilize the financial markets and President Obama's American Recovery and Reinvestment Act (ARRA) to stimulate the economy,¹⁷ but the recession itself increased the federal budget deficit by about \$400 billion a year.¹⁸ Over the same period of time, aggregate state budget shortfalls ballooned from relative insignificance to \$191 billion in 2010.¹⁹ State budget shortfalls would have been about \$62 billion worse in 2010 were it not for federal transfers of funds under the ARRA.²⁰ Government deficit spending is a useful counter-cyclical stimulus that can help to stabilize the economy and promote renewed economic growth, and, indeed, the best estimates are that the spending stimulus of President Obama's ARRA helped initiate positive economic growth and reduce unemployment by between 0.5% and 1.6%.²¹ However, the rapid increase in federal and state budget deficits created concern about the level of government debt and political pressure for government budget cutting—even though these budget cuts directly resulted in layoffs and a worsening of the unemployment rate.²² The states, most of which are constitutionally required to carry balanced budgets,²³ covered their projected shortfalls

14. THOMPSON, *supra* note 11, at 3.

15. CONG. BUDGET OFFICE, BUDGET AND ECONOMIC OUTLOOK: REVENUES, OUTLAYS, DEFICITS, SURPLUSES, AND DEBT HELD BY THE PUBLIC, 1971 TO 2010, at 1 (2011), available at [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12039/historicaltables\[1\].pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12039/historicaltables[1].pdf).

16. CONG. BUDGET OFFICE, CURRENT BUDGET PROJECTIONS: PROJECTED DEFICITS IN CBO'S BASELINE 1 (2011), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/BudgetTables.pdf>.

17. Kathy A. Ruffing & James R. Horney, *Economic Downturn and Bush Policies Continue to Drive Large Projected Deficits: Economic Recovery Measures, Financial Rescues Have Only Temporary Impact*, CTR. ON BUDGET & POLICY PRIORITIES, 3 (May 10, 2011), <http://www.cbpp.org/files/5-10-11bud.pdf>.

18. *Id.* at 2.

19. Elizabeth McNichol et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POLICY PRIORITIES, 3 fig.2 (Mar. 21, 2012), <http://www.cbpp.org/files/2-8-08sfp.pdf>.

20. *See id.* at 8 fig.4.

21. CONG. BUDGET OFFICE, ESTIMATED IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT ON EMPLOYMENT AND ECONOMIC OUTPUT FROM APRIL 2011 THROUGH JUNE 2011, at 2 (2011).

22. *See* McNichol et al., *supra* note 19, at 7.

23. *See State Balanced Budget Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/budget/state-balanced-budget-requirements.aspx> (last updated Apr. 12, 1999).

by using federal transfers under the ARRA, dipping into state “rainy day” funds, and cutting their spending.²⁴

II. THE ORGANIZATION AND ASPIRATIONS OF THE POLITICAL RIGHT IN THE UNITED STATES

In the United States, the political right has used the misfortunes caused by the Great Recession as an opportunity to go after not only public sector employee wages and benefits, but also collective bargaining rights.²⁵ The state budget deficits caused by the Great Recession created the necessity to either raise taxes or reduce public spending by cutting public employment and compensation because many state governments are constitutionally required to produce a balanced budget.²⁶ Tax increases are never popular, and the right used the opening to introduce envy between the battered private sector employees, who were suffering unemployment and stagnant or declining wages, and public sector employees. Although public sector employees are, on average, paid less than their private sector counterparts,²⁷ the right exaggerated the specter of pampered public sector employees with high wages and benefits and high job security. The right also claimed that these high wages and benefits were the result of a systematic problem of public sector bargaining and the representation of public employee interests in the political process.²⁸ As a result, the right argued

24. See McNichol et al., *supra* note 19, at 1-2.

25. See Todd C. Dvorak, Note, *Heeding “The Best of Prophets”: Historical Perspective and Potential Reform of Public Sector Collective Bargaining in Indiana*, 85 IND. L.J. 701, 701 (2010) (discussing the Indiana governor’s attack on collective bargaining rights that began when he entered office in 2005). “Opponents of workers’ rights fear that public-sector collective bargaining ‘might skew the democratic process by giving public sector unions an inordinate degree of power in comparison with other interest groups.’” *Id.* at 704 (quoting Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1235 (1985)). “This fear is exaggerated. Public-employee unions ‘are no more threatening than other organized interest groups having multiple means of influencing political decision-making and perhaps are even relatively powerless in comparison to [many] such groups.’ . . . Furthermore, union influence is often limited by structural checks like legislation or ratification requirements.” *Id.* (internal citations omitted) (quoting Mary Volk Gregory, *Proposed Public Sector Bargaining Legislation for Colorado*, 51 U. COLO. L. REV. 107, 113 (1979)).

26. See *State Balanced Budget Requirements*, *supra* note 23.

27. See DAVID LEWIN ET AL., EMP’T POLICY RESEARCH NETWORK & LABOR & EMP’T RELATIONS ASS’N, *GETTING IT RIGHT: EMPIRICAL EVIDENCE AND POLICY IMPLICATIONS FROM RESEARCH ON PUBLIC-SECTOR UNIONISM AND COLLECTIVE BARGAINING* 2, 4-5 (2011) (taking education levels into account). Wages in the public sector lag the private sector by 11.5%. *Id.* at 4. Benefits in public employment are higher, but, even after factoring in benefits, total compensation lags the private sector by 3.7%. *Id.* at 5.

28. See Dvorak, *supra* note 25, at 704. “Opponents of workers’ rights fear . . . the political

for the elimination of public employee collective bargaining rights and limitations on public union political resources.²⁹ Thus, the purpose of the right's offensive against public sector collective bargaining was not only to reduce public employee employment and wages, but also to silence public employees,³⁰ a traditional ally of the political left, in the political process.³¹

The stage for the current battles was set by the Republican successes in the 2010 congressional elections. Despite President Obama's victory in the 2008 Presidential election (winning 68% of the Electoral College and carrying with him Democratic majorities in both the House and Senate),³² by 2010, his accomplishment of passing healthcare reform had motivated the Republican base, and his relative lack of triumph in addressing the economy had depressed the Democratic base. As a result, there was a much smaller and more conservative turnout for the 2010 elections, which gave the Republicans impressive election victories, including a pick-up of six seats in the Senate and sixty-four seats in the House of Representatives—handing control of the House back to the Republicans and their new Speaker, John Boehner.³³ Moreover, the Republican successes of 2010 included a

process will be 'significantly change[d] . . . [by] removing subjects of bargaining from effective public discussion.'" *Id.* (quoting Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441, 447 (2003)).

29. Attacks against unions and their financial stability weaken the middle class and threaten to silence their political voice. *See* LEWIN ET AL., *supra* note 28, at 28 (listing the "core roles" collective bargaining plays in civil society, including providing "worker voice" on public matters).

30. *See* Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 609 (2004) ("The concept of 'voice' in the employment context refers to the ability of workers to communicate viewpoints, complaints, and desires to their employers in a meaningful way. This voice is beneficial in terms of enhancing individual dignity, employee satisfaction, workplace productivity, and civic responsibility.").

31. This objective of silencing a political opponent was perhaps most evident in Wisconsin. State public union leaders agreed to wage and benefit concessions requested by Governor Walker, but he proceeded to gut collective bargaining for most public employees. *See* Dave Umhoefer, *Gov. Scott Walker Says He Asked Unions for Concessions and They Refused*, POLITIFACT WISCONSIN (Sept. 16, 2011, 9:00 AM), <http://www.politifact.com/wisconsin/statements/2011/sep/16/scott-walker/gov-scott-walker-says-he-asked-unions-concessions/>. Moreover, Governor Walker's plan applied to all state employees, except police and firefighters, who had supported his election. Daniel Bice, *Walker Denies Favoring Police, Fire Unions*, J. SENTINEL (Milwaukee), Feb. 13, 2011, <http://www.jsonline.com/watchdog/noquarter/116139104.html>.

32. *See Election Results 2008*, N.Y. TIMES, Dec. 9, 2008, <http://elections.nytimes.com/2008/results/president/votes.html>.

33. *See* Douglas Stanglin, *Election Day 2010: GOP Wins House, Democrats Retain Senate*, USA TODAY (Nov. 3, 2010, 11:13 AM), http://www.usatoday.com/news/politics/2010-11-03-RW_mainelection02_ST_N.htm.

net pick-up of eleven governorships and eighteen state legislative chambers,³⁴ giving them complete control of state government in twenty states, including several states in the industrial heartland: Wisconsin, Indiana, Ohio, Michigan, and Pennsylvania.³⁵ Although state budget deficits and education reform were issues in many of the 2010 state races, rarely was there any hint of the future assault on public employee compensation and collective bargaining rights.³⁶ Nonetheless, shortly after the Republican wins, staffers from conservative “think tanks” began producing policy statements and op-ed pieces attacking public employees in general and school teachers in particular.³⁷ When legislatures came to session, bills drafted by the conservative American Legislative Exchange Council (ALEC) on all aspects of public employment and collective bargaining were introduced in state legislatures across the country.³⁸ By one tally, of the more than 800 bills introduced in initial state legislative sessions, about 550 involved public sector unions and employees, and a majority of these bills sought to restrict the activities of public sector unions.³⁹ The Republicans achieved success in twenty-one states, and twelve of these states, Wisconsin, Ohio, Indiana, Arizona, Idaho, Michigan, New Hampshire, Oklahoma, South Carolina, Tennessee, Utah and Wyoming, passed significant restrictions on public sector collective bargaining.⁴⁰

34. Michael Cooper, *Decisive Gains at State Level Could Give Republicans a Boost for Years*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04states.html>.

35. See *2010 Post-Election Control of State Government: Legislature and Governor*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/2010-postelection-state-government-control.aspx> (last visited May 23, 2012).

36. See, e.g., Dave Umhoefer, *Wisconsin Gov. Scott Walker Says He Campaigned on His Budget Repair Plan, Including Curtailing Collective Bargaining*, POLITIFACT WISCONSIN (Feb. 22, 2011, 7:14 PM), <http://www.politifact.com/wisconsin/statements/2011/feb/22/scott-walker/wisconsin-gov-scott-walker-says-he-campaigned-his-/>.

37. See, e.g., William Cronon, *Who's Really Behind Recent Republican Legislation in Wisconsin and Elsewhere? (Hint: It Didn't Start Here)*, SCHOLAR AS CITIZEN (Mar. 15, 2011), <http://scholarcitizen.williamcronon.net/2011/03/15/alec/> (describing the history behind the current wave of radical conservative legislation, including the attack on public employees).

38. See Mary Bottari, *ALEC Bills in Wisconsin*, PR WATCH (July 14, 2011, 8:07 AM), <http://www.prwatch.org/news/2011/07/10880/alec-bills-wisconsin>.

39. David Schaper, *Collective Bargaining Curbs Spread Across the U.S.*, NAT'L PUB. RADIO (May 24, 2011), <http://www.npr.org/2011/05/24/136610879/collective-bargaining-curbs-spread-across-the-u-s>.

40. *Id.*

III. THE RIGHT'S LEGISLATIVE AGENDA FOR LABOR IN THE UNITED STATES

A. Attempts to Limit Public Employee Collective Bargaining

In 2011, attacks on public employee collective bargaining rights made headlines across the country.⁴¹ State employees' rights came under fire even in states like Wisconsin that had historically supported the right of public employees to organize and engage in collective bargaining.⁴² The general form of these laws imposing restrictions was to remove certain types of employees from coverage under collective bargaining laws and/or to restrict the subjects of bargaining to merely wages—and even then with additional restrictions.⁴³

In Indiana, even before the 2010 elections, Governor Mitch Daniels had unilaterally acted to take away the right of most state employees to collectively bargain.⁴⁴ Although a few Indiana state employees, including teachers, had a statutory right to organize and collectively bargain, most state employees were given collective bargaining rights as a result of an executive order issued by Governor Evan Bayh in 1989.⁴⁵

41. See, e.g., Michael Cooper & Katharine Q. Seelye, *Wisconsin Leads Way as Workers Fight State Cuts*, N.Y. TIMES, Feb. 18, 2011, <http://www.nytimes.com/2011/02/19/us/politics/19states.html?pagewanted=all#>.

42. See *id.* Wisconsin had been the first state to pass a comprehensive law governing the right of public employees to collectively bargain in 1959. See Municipal Employment Relations Act (MERA), WIS. STAT. § 111.70(2) (2011), *declared unconstitutional by Wis. Educ. Ass'n v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012) (finding some restrictions recently placed on public employees to be violative of equal protection).

43. See, e.g., Bottari, *supra* note 38.

44. See, e.g., Dvorak, *supra* note 25, at 715-16.

On his second day in office, Governor Daniels signed Executive Order 05-14, which impacted state workers in three primary ways. First, it rescinded Executive Orders 90-6, 97-8, and 03-35, which effectively revoked the collective bargaining rights of almost 25,000 state workers. Second, it canceled existing contracts between the state and state employees' unions, which were supposed to run through 2007. Third, the order established a new employee complaint procedure, to be administered under the State Employees Appeals Commission (SEAC). Although Daniels claimed 'unions can still have a role in the process,' the order left state employee unions virtually ineffective.

Id. (internal citations omitted) (internal quotation marks omitted).

45. See Melissa Maynard, *Behind Collective Bargaining Debate, Mixed Experiences in the States*, STATELINE (Feb. 24, 2011), <http://www.pewstates.org/projects/stateline/headlines/behind-collective-bargaining-debate-mixed-experiences-in-the-states-85899375338>; see also Dvorak, *supra* note 25, at 714 ("Bayh directed a course for public-sector labor relations that respected workers' rights without sacrificing fiscal responsibility or the interests of taxpayers. Contrary to the fears of

These collective bargaining rights were fairly modest, and the executive order specified that recognition and bargaining rights would be withdrawn from any public employee organization that engaged in any form of collective action against their employer.⁴⁶ No provision was made for mediation, fact-finding, or arbitration in the event that a public employee union and the state could not agree on a term and condition of employment.⁴⁷ At best, Indiana's system of public employee collective bargaining could be described as "collective consultation," and, at worst, it could be described as "collective begging." Despite the very modest intrusion on management discretion this system of collective consultation might cause, shortly after his election in 2005, Governor Daniels rescinded the executive order and, in the stroke of a pen, single-handedly did away with collective bargaining rights for the vast majority of Indiana state employees.⁴⁸ Governor Daniels's rationale was that, even though there was no right to strike or arbitrate contract disputes, the collective agreements for a definite term that might result from collective bargaining limited the state's prerogative to change the terms and conditions of employment or sub-contract state work whenever it might seem advantageous to state managers.⁴⁹ The legislature later passed House Enrolled Act 1001, which codified this elimination of collective bargaining rights and ensured that no future governor could re-institute such rights by executive order.⁵⁰

After the 2010 elections, when the Republicans obtained control of the entire legislative branch, Governor Daniels and the Republican leadership decided to go after teacher collective bargaining rights.⁵¹

critics, this new labor environment dramatically reduced tensions. This successful beginning laid the groundwork for fifteen years of harmonious and cooperative relations between state employees and their employer. [Unfortunately, s]uccess by executive order had one primary limitation: the continued existence of collective bargaining rights hung in the balance with each gubernatorial election." (internal citations omitted)).

46. See Ind. Exec. Order No. 90-6, 13 Ind. Reg. 10 (1990).

47. See *id.*

48. See Maynard, *supra* note 45.

49. See Dvorak, *supra* note 25, at 716-17 ("Behind the rhetoric lay the purpose of Executive Order 05-14: to silence the voice of state employees, thereby freeing the Governor to act unilaterally in state personnel decisions. Daniels' governing style required action and did not allow for the hassle of consulting with other interested parties."); see also *Indiana Gov. Mitch Daniels Is Tough on Budget*, NAT'L PUB. RADIO (Feb. 28, 2011), <http://www.npr.org/2011/02/28/134111630/indiana-gov-mitch-daniels-tough-on-budgets>.

50. Dan Taglioli, *Indiana Union Challenges Public Employee Collective Bargaining Prohibition*, JURIST (Sept. 1, 2011, 12:41 PM), <http://jurist.org/paperchase/2011/09/indiana-union-challenges-public-employee-collective-bargaining-prohibition.php>.

51. *Daniels Signs Teacher Bargaining Bill*, INSIDE INDIANA BUSINESS (Apr. 20, 2011), <http://www.insideindianabusiness.com/newsitem.asp?ID=47280>.

Although House Democrats fled the state to prevent a quorum, the Republicans eventually passed, and Governor Daniels signed into law Senate Bill 575, which significantly limits teacher collective bargaining rights in Indiana.⁵² Prior to this bill, Indiana teachers had a statutory right to organize and collectively bargain over wages and other terms and conditions of employment and, although there was no right to strike, there was a right to resort to arbitration over issues that could not be resolved through negotiations.⁵³ Senate Bill 575 followed the ALEC formula of removing employees from the collective bargaining statute or reducing the subjects of bargaining so that collective bargaining is much less useful.⁵⁴ The bill prohibits negotiations on seniority provisions, school calendar, dismissal criteria, restructuring options, and the teacher evaluation process, while requiring localities to adopt a system of teacher evaluation developed by the state, based on improvements in student test scores.⁵⁵ Subjects of bargaining are expressly limited to “salary, wages and fringe benefits.”⁵⁶ The existing system of interest arbitration was replaced with a system of last best offer “fact-finding.”⁵⁷ The stated rationale for the changes was to free local school administrators to control the terms and conditions of employment that might affect student education—for example, it was argued that prohibiting seniority provisions would permit administrators to retain excellent young teachers who might be laid-off because they had less seniority.⁵⁸ Proponents of this view never dealt with the fact that the lack of seniority provisions would give local administrators incentive to lay off high-quality *senior* teachers merely because they were higher paid than entry level teachers who might also fill the class. They also never explained how imposing state standards on seniority and teacher evaluation was consistent with conservative principles of decentralized decision-making, or that such standards would free local administrators

52. *Id.*

53. See IND. CODE ANN. § 20-28-7.5-7 (West, Westlaw through May 31, 2012).

54. See Harold Schaitberger, *ALEC Gives Lawmakers Legislative Ammo*, IAFF FRONTLINE BLOG (Feb. 13, 2012, 10:14 AM), <http://blog.iaff.org/post/2012/02/13/ALEC-Gives-Lawmakers-Legislative-Ammo.aspx>.

55. See § 20-29-6-4.5 (Westlaw); § 20-29-6-4.7 (Westlaw).

56. § 20-29-6-4 (Westlaw)); see also BOSE MCKINNEY & EVANS LLP, TEACHER COLLECTIVE BARGAINING & DISCUSSION IN INDIANA AFTER JULY 1, 2011, at 3 (2011), available at http://www.boselaw.com/assets/uploads/-Updated-Bargaining-and-Discussion-in-Indiana-After-July-1-2011-1953020_1-.pdf.

57. § 20-29-6-15 (Westlaw).

58. See J.K. Wall, *New Laws Hang Teacher Pay on Performance*, INDIANAPOLIS BUS. J., May 7, 2011, <http://www.ibj.com/new-laws-hang-teacher-pay-on-performance/PARAMS/article/27029>.

to run school districts as they saw fit. A last minute rush by local school boards to get collective bargaining agreements approved before the new bill took effect suggests that not all local administrators saw the Republican plan as the best way to run a school district.⁵⁹

The 2010 election also brought a Republican sweep to the great state of Wisconsin for the first time since 1969,⁶⁰ as the newly elected Governor Scott Walker joined Republican majorities in both the House and Senate.⁶¹ Governor Walker proposed severe limitations on public employee collective bargaining rights as part of an “emergency budget bill,” (commonly referred to as Wisconsin Act 10) which was aimed much more at ending public sector collective bargaining than at addressing any budget shortfall.⁶² Indeed, Governor Walker proceeded with his effort to gut public sector collective bargaining even after Wisconsin public sector unions granted him every fiscal concession required by the bill.⁶³ The “budget bill” sought to eliminate almost all collective bargaining rights for public employees by removing some state employees from collective bargaining completely and confining the lawful subjects of collective bargaining to merely wage increases that were less than the rate of inflation.⁶⁴ Wage increases in excess of the rate of inflation would require approval through a voter referendum.⁶⁵ The “budget bill” also required that, in order to remain the bargaining representative, public sector unions stand for election each year, at their expense, and receive affirmative votes from at least 51% of the employees in the bargaining unit, effectively counting any employees who failed to vote as “no” votes.⁶⁶ The bill prompted spirited protests

59. See Ben Skirvin, *Why Do Indiana Schools and Unions Want Longer Contracts?*, STATEIMPACT INDIANA (July 21, 2011, 4:49 PM), <http://stateimpact.npr.org/indiana/2011/07/21/why-do-indiana-schools-and-unions-want-longer-contracts/>.

60. Q&A, STATE OF WIS. LEGIS. REFERENCE BUREAU, <http://legis.wisconsin.gov/lrb/research/qanda.htm> (last visited May 24, 2012).

61. *Wisconsin: GOP Wins Senate, House, Gov. Seats, Ousting Feingold*, USA TODAY (Nov. 3, 2010, 3:03 AM), http://www.usatoday.com/news/politics/2010-11-02-wi-full-election-results_N.htm.

62. See Grace Wyler, *Wisconsin Gov. Says Budget Bill Is About Money, Not Unions*, BUSINESS INSIDER (Feb. 23 2011), http://articles.businessinsider.com/2011-02-23/politics/30047428_1_union-rights-senate-democrats-collective-bargaining-rights.

63. See Patrick Marley, *State Workers Willing to Bend on Concessions, Not Bargaining Rights*, J. SENTINEL (Milwaukee), Feb. 14, 2011, <http://www.jsonline.com/news/statepolitics/116162704.html>.

64. See *id.*

65. See *id.*

66. See Erin Richards & Tom Tolan, *Most Teachers Unions Plan to Recertify Under New Rules*, J. SENTINEL (Milwaukee), Sept. 29, 2011, <http://www.jsonline.com/news/education/most->

from public workers and other concerned citizens that grew in size until about 100,000 demonstrators protested peacefully at the state capitol.⁶⁷ At one point, Democratic senators left the state hoping to prevent a quorum and passage of the bill.⁶⁸ In response, Republicans severed the collective bargaining provisions of the bill from the budget provisions so that it would not be subject to the quorum requirement and passed the bill.⁶⁹ Governor Walker signed the Act into law on March 11, 2011.⁷⁰ The Dane County District Attorney filed suit to block enforcement of the Act citing several violations of Wisconsin's open meeting laws in its passage.⁷¹ The Dane County Circuit Court initially issued an injunction against the Act,⁷² but the Wisconsin Supreme Court eventually upheld the Act in a strict party-line 4-3 vote.⁷³ Judge Conley of the Western District of Wisconsin has since struck down the provisions requiring annual recertification and barring automatic dues deduction as violative of the Equal Protection Clause, but this decision is under appeal.⁷⁴ The acrimony over the passage of the bill resulted in petitions for the recall of Governor Walker and state senators on both sides: progressives

teachers-unions-plan-to-recertify-under-new-rules-130823698.html.

67. Steve Contorno et al., *Police: Wisconsin Protest Saturday 'One of Largest,'* USA TODAY (Feb. 27, 2011, 2:12 PM), http://www.usatoday.com/news/nation/2011-02-26-wisconsin-saturday-rally_N.htm.

68. Amanda Terkel, *Wisconsin Democratic Senators: We're Staying in Illinois Until Gov. Walker Agrees to Negotiate*, HUFFINGTON POST (Feb. 20, 2011 9:33 PM), http://www.huffingtonpost.com/2011/02/20/wisconsin-democratic-senators-illinois_n_825748.html.

69. Sam Stein & Amanda Terkel, *Wisconsin GOP Senators Pass Stand-Alone Anti-Union Bill Without Democrats Present*, HUFFINGTON POST (Mar. 9, 2011, 9:46 PM), http://www.huffingtonpost.com/2011/03/09/wisconsin-gop-plan-advance-anti-union_n_833796.html.

70. *Wis. Governor Officially Cuts Collective Bargaining: Walker Says Bill Will Save \$30M in Budget Year; Union Leaders Plan to Launch Counterattack*, MSNBC.COM (Mar. 11, 2011, 5:21 PM), http://www.msnbc.msn.com/id/41996994/ns/politics-more_politics/t/wis-governor-officially-cuts-collective-bargaining/#.T7FVVp9YtU0.

71. Andy Kroll, *Madison Judge Temporarily Blocks Wisconsin "Repair" Bill*, MOTHER JONES (Mar. 18, 2011, 8:56 AM), <http://www.motherjones.com/mojo/2011/03/madison-judge-temporarily-blocks-wisconsin-repair-bill>.

72. *Wisconsin ex rel. Ozanne v. Fitzgerald*, No. 11 CV 1244, 2011 WL 1197661 (Dane Cnty. Cir. Ct. Mar. 31, 2011).

73. See *Wisconsin ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436 (Wis. 2011); Mike Hall, *Wisconsin Coalition Takes Fight Against Walker's Attack to Federal Court*, AFL-CIO NOW (June 15, 2011), <http://www.aflcio.org/Blog/In-The-States/Wisconsin-Coalition-Takes-Fight-Against-Walker-s-Attack-to-Federal-Court>.

74. See *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012). In Judge Conley's opinion, there was no rational basis for the Act's imposition of these limitations on unions representing general public employees (which Walker considers political opponents) but not unions representing public safety employees (which supported Walker). See *id.* at 860.

sought the recall of Walker and Republican senators for exceeding their electoral mandate in gutting collective bargaining rights, and conservatives sought the recall of Democratic senators for leaving the state to prevent a quorum.⁷⁵ Ultimately, Walker retained his position as governor, but the Democrats regained control of the Wisconsin Senate, providing a check on Walker's excesses.⁷⁶

The 2010 elections also brought a new Republican governor with Republican control of both houses of the legislature to the state of Ohio.⁷⁷ Shortly after his election, Governor John Kasich began promoting Senate Bill 5 to significantly constrain public sector collective bargaining rights.⁷⁸ The law prohibited bargaining on various traditional subjects of bargaining, including retirement system contributions, health care benefits, privatization, contracting out employment, and the number of employees required to be employed.⁷⁹ The law also removed the continuation, modification, or deletion of an existing collective bargaining agreement from being a subject of bargaining, such that when a collective bargaining agreement expired, it would be eviscerated and the employees and employer would have to start from scratch.⁸⁰ Furthermore, the law prohibited strikes, which had

75. See Shushannah Walshe, *\$30 Million Pouring in to Influence Wisconsin Recall Elections*, ABC NEWS (Aug. 4, 2011), <http://abcnews.go.com/Politics/30-million-pouring-influence-wisconsin-recall-elections/story?id=14235471>; Brendan O'Brien, *Enough Signatures Collected to Recall Wisconsin Governor*, REUTERS, Jan. 17, 2012, available at <http://www.reuters.com/assets/print?aid=USTRE80G1TB20120117>; see also John Nichols, *Overwhelmed by Opposition, Wisconsin's Walker Won't Challenge Recall Petitions*, NATION (Feb. 27, 2012, 2:00 PM), <http://www.thenation.com/blog/166474/overwhelmed-opposition-wisconsins-walker-wont-challenge-recall-petitions>.

76. *GOP Retains Wisconsin Senate Control in Recall Battle*, CNN (Aug. 10, 2011, 12:18 PM), <http://www.cnn.com/2011/POLITICS/08/10/wisconsin.recall.elections/index.html>; see also Karen Tumulty, *Wisconsin Gov. Scott Walker Taking a Victory Lap Through Washington*, WASH. POST (June 14, 2012, 12:16 PM), http://www.washingtonpost.com/blogs/election-2012/post/wisconsin-gov-scott-walker-taking-a-victory-lap-through-washington/2012/06/14/gJQALqscV_blog.html.

77. Reginald Fields & Mark Naymik, *Republican John Kasich Victorious in Ohio; Jobs Message Overcomes Wall Street Baggage*, CLEVELAND.COM (Nov. 3, 2010, 9:00 AM), http://www.cleveland.com/politics/index.ssf/2010/11/republican_john_kasich_headed.html.

78. See Robert Wang, *Kasich in Canton – Protesters Voice Opposition to Senate Bill 5*, CANTONREP.COM (Feb. 22, 2011, 10:47 AM), <http://www.cantonrep.com/news/x1694034525/Protesters-voice-opposition-to-Senate-Bill-5>.

79. See Laura A. Bischoff, *Stakes High for Both Sides in SB 5 Battle: Win or Lose, the Controversial Bill's Impact Will Be Huge*, DAYTON DAILY NEWS (Sept. 18, 2011, 9:46 AM), <http://www.daytondailynews.com/news/politics/stakes-high-for-both-sides-in-sb-5-battle-1255054.html>.

80. See Doug Oplinger, *Summary of Senate Bill 5*, OHIO.COM (Apr. 2, 2011, 10:11 PM), <http://politics.ohio.com/2011/>

previously been allowed for non-essential public employees.⁸¹ As in Wisconsin, the Ohio bill drew significant resistance and active demonstrations.⁸² Despite the opposition, the Ohio state legislature passed Senate Bill 5, and Governor Kasich signed it into law on March 31, 2011.⁸³ However, opponents of the bill collected the necessary 230,000 signatures to place the bill on the November 2011 ballot as a public referendum.⁸⁴ Under the Ohio Constitution, enforcement of a bill is held in abeyance until it is confirmed in the referendum.⁸⁵ In a victory for labor, 63% of the Ohio electorate voted “No” on the referendum, and, as a result, the bill was discharged.⁸⁶

Michigan is another traditional labor bastion that saw a Republican sweep in the 2010 elections.⁸⁷ At the request of Governor Rick Snyder, the legislature enacted an emergency financial manager law, which was signed into law in March 2011.⁸⁸ The law extends the powers of emergency managers to remove locally elected officials, terminate collective bargaining, and force consolidation of schools, townships, cities, and counties—all without seeking authority or approval from any elected body or from the electorate.⁸⁹ In April 2011, the first Emergency Manager appointed for Benton Harbor, Michigan, took away all power of elected city officials.⁹⁰ The cities of Ecorse and Pontiac and the

04/summary-of-senate-bill-5/.

81. See Bischoff, *supra* note 79.

82. See *Ohio Governor Signs Senate Bill 5 into Law*, CBS NEWS (Mar. 31, 2011, 9:30 PM), http://www.cbsnews.com/2100-201_162-20049481.html.

83. See *id.*

84. Robert Costa, *John Kasich vs. Public Unions: A First-Term Ohio Governor Follows in the Footsteps of Scott Walker*, NAT’L REV. ONLINE (Oct. 18, 2011, 4:00 AM), <http://www.nationalreview.com/articles/280382/john-kasich-vs-public-unions-robert-costa#>.

85. OHIO CONST. art. II, § 01c.

86. Michael Scott, *Issue 2 Defeated: Million Votes Are In and 63 Percent Say No*, AP SAYS, CLEVELAND.COM (Nov. 9, 2011, 10:08 PM), http://www.cleveland.com/politics/index.ssf/2011/11/issue_2_early_ohio_election_re.html.

87. See Peter Roff, *Measuring the Size of Election 2010’s Republican Sweep*, U.S. NEWS (Nov. 5, 2010), <http://www.usnews.com/opinion/blogs/peter-roff/2010/11/05/measuring-the-size-of-election-2010s-republican-sweep>.

88. See John T. Gregg & Patrick E. Mears, *Michigan’s Emergency Financial Manager Law and Its Impact on Creditors of Municipalities and School Districts*, NAT’L L. REV. (Mar. 11, 2012), <http://www.natlawreview.com/article/michigan-s-emergency-financial-manager-law-and-its-impact-creditors-municipalities-a>.

89. See *UPDATED: And So It Begins. Emergency Financial Mgr. Fires Entire Government of Benton Harbor, MI*, ECLECTABLOG (Apr. 15, 2011), <http://eclectablog.com/2011/04/and-so-it-begins-emergency-financial.html>.

90. *Id.*

Detroit public school system now have emergency managers in place.⁹¹ A constitutional challenge is likely.⁹²

Other states also saw the enactment of significant limitations on public sector collective bargaining by emboldened Republican legislators. In Oklahoma, House Bill 1593 was signed into law on April 29, 2011.⁹³ The law repealed the Oklahoma Municipal Employee Collective Bargaining Act, effectively eliminating all collective bargaining rights for non-uniformed municipal workers.⁹⁴ In Iowa, Governor Branstad issued Executive Order 69, which rescinded a previous governor's executive order authorizing the allocation of public funds to project labor agreements in public works projects.⁹⁵ Likewise, in Idaho, the legislature passed Senate Bill 1006, which prohibited local and state government entities from entering into project labor agreements.⁹⁶ In Nevada, as part of the budget bill, the legislature enacted provisions that allow local governments to reopen employee contracts during fiscal emergencies and that bar supervisors from collective bargaining.⁹⁷ In New Jersey, Senate Bill S2937 ended public employees' ability to collectively bargain their medical benefits.⁹⁸ As a result, health care plans for 500,000 public workers will be set by a new state panel comprised of union workers and state managers rather than at the negotiating table.⁹⁹

91. See Kate Linebaugh, *Emergency Manager Law Faces Challenge*, WALL ST. J., June 23, 2011, <http://online.wsj.com/article/SB10001424052702304657804576401841344789736.html>.

92. *Id.*

93. *Fallin Signs Municipal Collective Bargaining Repeal*, CAPITALBEATOK (Apr. 29, 2011), <http://capitolbeatok.com/reports/fallin-signs-municipal-collective-bargaining-repeal>.

94. *Id.*

95. See *Gov. Branstad Should Eschew Transition Period Opacity*, DAILY IOWAN (Mar. 31, 2011, 7:20 AM), <http://www.dailyiowan.com/2011/03/31/Opinions/22458.html> (defining project-labor agreements as "contracts in which the buyer and the contractor agree to certain terms for . . . construction projects, including hiring and scheduling issues.").

96. Dustin Hurst, *House Clears Bills Limiting Union Money, Agreements*, IDAHOREPORTER.COM (Feb. 22, 2011), <http://www.idahoreporter.com/2011/house-clears-bills-limiting-union-money-agreements/>.

97. Sandra Chereb, *Lawmakers Reach Deal on Nevada State Budget*, DESERET NEWS (June 1, 2011, 5:55 PM), <http://www.deseretnews.com/article/700140758/Lawmakers-reach-deal-on-Nevada-state-budget.html>.

98. See *About the Pension and Health Benefit Reform Law*, N.J. ST. LEAGUE OF MUNICIPALITIES, <http://www.njslom.org/letters/2011-0628-S-2937-pensions.html> (last visited May 26, 2012); see also *N.J. Assembly Passes Landmark Employee Benefits Overhaul*, NJ.COM (June 24, 2011, 11:20 AM), http://www.nj.com/politics/index.ssf/2011/06/assembly_passes_landmark_emplo.html.

99. See *Pension and Health Benefits Reform 2011 Under Chapter 78, P.L. 2011*, N.J. DEP'T OF THE TREASURY, <http://www.state.nj.us/treasury/pensions/reform-hb-qa.shtml> (last updated Oct. 11, 2011); see also Salvador Rizzo, *N.J. Pension Reform Vote Reveals Unusual Political Alliances*,

Despite this onslaught, the attack on the collective bargaining rights of public employees was subdued or defeated in some states. For example, Iowa House File 525, which would have excluded from collective bargaining subjects such as retirement systems, staff cuts, outsourcing, and layoffs, passed the Iowa House but died in the Iowa Senate.¹⁰⁰ The bill would have also changed the state public employee interest arbitration provisions by eliminating the right of an arbitrator to consider past contracts and by requiring arbitrators to compare public employee wages, benefits, hours, or working conditions to the private sector and to consider whether the public employer had the ability to finance changes to the collective bargaining agreement without raising taxes.¹⁰¹ In Illinois, Senate Bill 1556, which would have stripped collective bargaining rights from state employees, is stuck in the Senate.¹⁰² In Colorado, Senate Bill 11-038 would have ended collective bargaining for public employees but was killed in committee in February 2011.¹⁰³ The Connecticut Senate passed a budget bill, Senate Bill 1301, which included a section that would have limited collective bargaining in three areas: longevity payments, the accrual of sick days, and the definition of salary for the calculation of pensions.¹⁰⁴ However, this section is considered to be for show and has not been taken up by the House.¹⁰⁵ In Alaska, Representative Carl Gatto introduced House Bill 200, which would have stripped many public employees of the right to collectively bargain for hours, benefits, and working conditions, but he withdrew the bill on March 31, 2011.¹⁰⁶

NJ.COM (June 20, 2011, 11:40 AM), http://www.nj.com/news/index.ssf/2011/06/nj_pension_reform_vote_reveals.html.

100. See Lynda Waddington, *Collective Bargaining Bill DOA in Iowa Senate*, IOWA INDEP. (Mar. 14, 2011, 4:42 PM), <http://iowaindependent.com/53767/collective-bargaining-bill-doa-in-iowa-senate>.

101. See *id.*

102. See *Bill Status of SB1556*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1556&GAID=11&DocTypeID=SB&SessionID=84&GA=97> (last visited May 26, 2012).

103. See Marianne Goodland, *Employee Partnerships Order Still on the Books*, COLO. STATESMAN (Feb. 11, 2011), <http://www.coloradostatesman.com/content/992580-employee-partnerships-order-still-books>.

104. See Sen. Kevin Witkos, 'Capital Connection' Special Session Update, CONN. SENATE REPUBLICANS (July 8, 2011), <http://ctsenaterepublicans.com/2011/07/%E2%80%99special-session-update/>.

105. See Christine Stuart & Hugh McQuaid, *Senate Passes Collective Bargaining Reforms; House Declines, but Labor Gets Message*, CT NEWS JUNKIE (June 30, 2011, 10:08 PM), http://www.ctnewsjunkie.com/ctnj.php/archives/entry/senate_passes_collective_bargaining_reforms_house_declines/.

106. *Alaska GOP Lawmaker Seeks to Curb Collective Bargaining Rights*, CNN (Mar. 22,

B. "Paycheck Protection" Laws and Public Employee Political Rights

The ALEC legislative agenda calls for state legislatures not only to curtail or eliminate public employee collective bargaining rights, but also to limit the political power of their unions.¹⁰⁷ In 2010 and 2011, several states considered or enacted so-called "paycheck protection" laws that prohibit or restrict the deduction of union dues or association fees from public employee paychecks.¹⁰⁸ Many of the same states have also considered or passed laws limiting the political activity of public employees and their unions.¹⁰⁹ Perhaps the most controversial of these laws was passed in Alabama.¹¹⁰ Alabama's "Ethics Reform Package," Alabama Act 2010-761, "banned all payroll deductions for employee associations and . . . any checkoffs to any organization if the dues are used for a political purpose."¹¹¹ The law also prohibited, with criminal penalties, public employees from engaging in "political activity" on state time as well as the solicitation of political contributions from subordinates or coercing subordinates to "work in any capacity in any political campaign or cause."¹¹² The law defines "political activity" extremely broadly: making contributions to or contracting with any entity that engages in political communications; paying for or engaging in public opinion polling; paying for or engaging in any form of political communication; engaging in any type of political advertising; making phone calls for any political purpose; distributing political literature of any type; or providing any type of in-kind help or support to a political candidate.¹¹³ This law stands in stark violation of the recent Supreme Court decision in *Citizens United*, which constitutionally protects

2011), http://articles.cnn.com/2011-03-22/politics/alaska.collective.bargaining_1_state-employees-bill-bargaining?_s=PM:POLITICS; *Personal Legislation: Representative Carl Gatto (R)*, THE HOUSE MAJORITY, <http://www.housemajority.org/gatto/index.php?p=bills> (last visited May 26, 2012).

107. See Miles Mogulescu, *ALEC: The Behind the Scenes Player in the States' Fight Against the Middle Class*, HUFFINGTON POST (Mar. 7, 2011, 6:01 PM), http://www.huffingtonpost.com/miles-mogulescu/alec-states-unions_b_832428.html.

108. Susan Martin, *State Initiatives Affecting Public Employees' Collective Bargaining Rights*, 2011 A.B.A. SEC. OF LAB. & EMP. L., available at http://www.americanbar.org/newsletter/groups/labor_law/II_flash/1106_aball_flash/1106_aball_flash_state_initiatives.html.

109. *Id.*

110. *Id.*

111. *Id.*; see also Robert Kahn, *State's Teachers Call New Law Unconstitutional Political Attack*, COURTHOUSE NEWS SERV. (Feb. 28, 2011, 10:00 AM), <http://www.courthousenews.com/2011/02/28/34492.htm>.

112. Martin, *supra* note 108.

113. *Id.*; see also Kahn, *supra* note 111.

corporate political expenditures from regulation.¹¹⁴ The Alabama Education Association filed a lawsuit challenging its constitutionality and achieved a broad preliminary injunction on March 18, 2011.¹¹⁵ The Eleventh Circuit has upheld the preliminary injunction.¹¹⁶

Similar “paycheck protection” legislation is still pending or expected in several other states.¹¹⁷ For example, Arizona had two different bills governing paycheck deductions and political activity with two different results.¹¹⁸ Both laws passed the legislature, but the Governor vetoed Senate Bill 1329, which would have prohibited public employees from engaging in political activity or lobbying a governmental entity during working hours, but signed into law Senate Bill 1365, which requires that employees annually reauthorize deductions for union dues for any union dues that are utilized for a political purpose.¹¹⁹ In Florida, House Bill 1021, which requires annual member reauthorization of the use of dues for political purposes and which allows union members to cancel their membership at any time and receive a refund of their dues, was withdrawn from consideration.¹²⁰ In California, conservatives have begun a campaign, titled “Stop Special Interest Money Now,” that seeks to put a referendum on the November 2012 ballot that would ban automatic dues deductions for any portion of union dues that are used for political purposes.¹²¹ In Kansas, House Bill 2130, which would ban public employee unions from endorsing

114. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010) (finding “corporate independent expenditures” to amount to a “ban on speech.”).

115. See *Ala. Educ. Ass’n v. Bentley*, 778 F. Supp. 2d 1283, 1287 (N.D. Ala. 2011).

116. *Ala. Educ. Ass’n v. State Superintendent of Educ.*, 665 F.3d 1234, 1239 (11th Cir. 2011) (delaying final judgment as to the preliminary injunction until the Alabama Supreme Court provides its interpretation of the Act).

117. See *Paycheck Protection*, ALLIANCE FOR WORKER FREEDOM, <http://workerfreedom.org/paycheck-protection-a2789> (last visited May 27, 2012.)

118. Alia Beard Rau & Jim Walsh, *Brewer Vetoes 29 Bills, Signs 357 Into Law*, AZCENTRAL.COM (Apr. 29, 2011, 8:50 PM), <http://www.azcentral.com/news/election/azelections/articles/2011/04/29/20110429arizona-bills-brewer-24-vetoes.html> (prohibition on political activity); David Madrid, *Labor Unions Criticize New Arizona Laws Taking Effect*, AZCENTRAL.COM (July 22, 2011, 12:00 AM), <http://www.azcentral.com/news/election/azelections/articles/2011/07/22/20110722labor-unions-criticize-new-arizona-laws.html> (paycheck deduction law).

119. Rau & Walsh, *supra* note 118; Madrid, *supra* note 118.

120. See *CS/HB 1021: Labor and Employment*, FLA. SENATE, <http://www.flsenate.gov/Session/Bill/2011/1021> (last visited May 27, 2012).

121. See Mark Landsbaum, *The “Stop Special Interest Money Now” Act in California*, ORANGE CNTY. REGISTER (Apr. 11, 2011, 2:30 PM), <http://orangepunch.ocregister.com/2011/04/11/the-stop-special-interest-money-now-act-in-california/43641/>.

candidates and prohibit unions from obtaining voluntary dues from its members for political activities, was approved by the House on February 24, 2011, and is now in a Senate committee.¹²² In Iowa, Senate File 217, which would prohibit deducting membership dues from wages or salaries of public employees receiving health care benefits, is stalled in committee.¹²³ In Missouri, House Bill 466, which would require unions to obtain written consent from members in order to deduct money from their paychecks for political purposes, needs another vote in the House before it moves to the Senate, where similar legislation has already been approved.¹²⁴

C. Anti-Prevailing Wage Legislation

The theory behind prevailing wage laws is that the state is a powerful purchasing entity and should not enter the market to bid down employees' wages.¹²⁵ Thus, prevailing wage laws require that state contractors and subcontractors pay their employees not less than the prevailing rate of pay, including fringe benefits, for work of similar character in the county in which the work is performed.¹²⁶ State agencies or committees that are charged with enforcing the prevailing wage law generally rely on state department of labor surveys of wages and benefits, by geographic location and job classification, to determine the appropriate "prevailing wage."¹²⁷ In 2011, Republican legislators in several states introduced bills that were aimed at limiting or curtailing prevailing wage laws and using the coercive power of the state to actively bid wages down.¹²⁸ For example, Indiana House legislators

122. Mike Hendricks, *Kansas House Shows It's No Friend of Unions*, KAN. CITY STAR, Feb. 25, 2011, available at http://www.ongo.com/preview_article.php?a=469398.

123. *Bill History for SF 217*, IOWA LEGISLATURE, [http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=](http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=sf&key=0241B&GA=84) BillInfo&Service=DspHistory&var=sf&key=0241B&GA=84 (last updated May 27, 2012).

124. *Mo. House Backs Consent Requirement on Union Dues*, NEWSTRIBUNE.COM (Apr. 20, 2011), <http://www.newstribune.com/news/2011/apr/20/mo-house-backs-consent-requirement-union-dues/>.

125. See generally Peter W. Hahn, *Prevailing Wage Laws: What Are They and How Are They Changing?*, NAT'L L. REV. (May 25, 2011), <http://www.natlawreview.com/article/prevailing-wage-laws-what-are-they-and-how-are-they-changing> (discussing the benefits of prevailing wage laws for owners and contractors).

126. *E.g.*, U.S. ex rel. Wall v. Circle Constr., LLC, 700 F. Supp. 2d 926, 936 (M.D. Tenn. 2010) (discussing the Davis-Bacon Act's requirement that government contractors pay prevailing wages in part to protect local wage standards).

127. See Christine Tracey, *An Argument for the Repeal of the Davis-Bacon Act*, 5 J. SMALL & EMERGING BUS. L. 285, 291-92 (2001).

128. See, e.g., The Electrical Worker, *ID GOP Proposes Repeal of Long-Dead Prevailing*

passed House Enrolled Act 1216 to raise the threshold for application of the prevailing wage law from contracts for \$150,000 to contracts for \$350,000.¹²⁹ The law also modified the composition of the committee that determines the prevailing wage so that it includes a member named by the Associated Builders and Contractors, along with a representative named by the president of the state federation of labor.¹³⁰ Ohio legislators are currently considering a bill, House Bill 153, which would raise the prevailing wage threshold for public contracts to \$250,000.¹³¹

D. Public Employee Compensation and Retirement Systems

The recent assault on public sector employees has seen numerous laws aimed at reducing the wages and benefits of employees. The Wisconsin legislation previously discussed included an assumption of pension contributions by public employees that amounted to a 5.8% cut in total compensation.¹³² This cut was in addition to wage freezes and cuts that Wisconsin employees had already made.¹³³ The change in the pension formula also paves the way for a future transition away from the current defined benefit plan towards a defined contribution plan.¹³⁴ Similarly, in Florida, the Senate and House reached an agreement on Senate Bill 2100, requiring state employees to contribute 3% of their salaries to the state pension fund, eliminating a 3% cost of living adjustment for retirees, and requiring that new employees have eight years of employment in order to be vested in the state retirement system.¹³⁵ In Hawaii, many public employees received a 5% pay cut and

Wage Law, DAILY KOS (Feb. 16, 2011, 8:54 AM), <http://www.dailykos.com/story/2011/02/16/945520/-ID-GOP-Proposes-Repeal-of-Long-Dead-Prevailing-Wage-Law>.

129. *2011 Focus: Employment-Related Bills*, THE BRIEFING ROOM (May 16, 2011), <http://insendems.wordpress.com/2011/05/16/2011-focus-employment-related-bills/>.

130. See H. Enrolled Act 1216, 117th Gen. Assemb. (Ind. 2011), available at <http://www.in.gov/legislative/bills/2011/HE/HE1216.1.html>.

131. *Changes in Ohio's Prevailing Wage Law*, FROST BROWN TODD LLC (Aug. 2, 2011), <http://www.frostbrowntodd.com/resources-1348.html>.

132. John Schmid, *Public Employees May Face Shift to 401(k) Plans: Walker's Budget Opens Door for Defined Contribution Plan*, J. SENTINEL (Milwaukee), Mar. 6, 2011, <http://www.jsonline.com/business/117472998.html>.

133. Dave Umhoefer, *Group Says State Workers "Haven't Had to Sacrifice,"* POLITIFACT WISCONSIN (Feb. 18, 2011, 3:13 PM), <http://www.politifact.com/wisconsin/statements/2011/feb/18/club-growth/group-says-wisconsin-state-workers-havent-had-sacr/>.

134. Schmid, *supra* note 132.

135. *House & Senate Reach Agreement on Pension Reform*, ASSOCIATED INDUS. OF FLA. (May 2, 2011), http://aif.com/legislative_public/2011/aif_art/sn_5.shtm; Eric Giunta, *Should Judge*

can anticipate further pay cuts for at least two more years.¹³⁶ As part of Assembly Bill 80, Nevada eliminated retirement health insurance for new employees if they retire with less than fifteen years of service.¹³⁷ In New Jersey, Senate Bill 2937 requires that police officers, firefighters, teachers, and rank-and-file public workers all pay more for their pensions and health benefits.¹³⁸ The bill also eliminates cost-of-living increases to pensions for retirees and raises the retirement age for new workers.¹³⁹ Several states, including Utah, Kentucky, Oklahoma, and Kansas, have begun moves to change their public employee pensions from defined benefit plans to defined contribution plans.¹⁴⁰ These changes are intended to mirror the current state of private sector pensions that favor defined contribution plans, which shift risk to the employees and decrease pension benefits.¹⁴¹ However, in Minnesota, House File 192, which would freeze public employee compensation, place restrictions on future public raises, require reductions in the state workforce, and promote private sub-contracting, has been referred to committee and seems to have little chance of passing.¹⁴²

Fulford Be Upheld? State Pension Reform Legal Analysis, SUNSHINE ST. NEWS (Mar. 12, 2012, 3:55 AM), <http://www.sunshinestatenews.com/story/should-judge-jackie-fulford-upheld-state-employees-pension-reform-legal-analysis>.

136. Wendy Osher, *Hawai'i Public Employee Pay Cuts Take Effect Friday*, MAUI NOW (June 30, 2011), <http://mauinow.com/2011/06/30/hawaii-public-employee-pay-cuts-take-effect-friday/>.

137. *Some Bills Passed and Signed*, NEV. ST. EMP. FOCUS (June 18, 2011), <http://nvemployees.wordpress.com/2011/06/18/some-bills-passed-and-signed/>.

138. Davy James, *State Senate Passes Pension Reform Legislation: Bill Enjoyed Bipartisan Support in Trenton*, WARREN PATCH (June 20, 2011), <http://warren.patch.com/articles/state-senate-passes-pension-reform-legislation>.

139. John Patten, *Teachers Join with Other State Workers to Protest Against Reform Bill*, WARREN PATCH (June 16, 2011), <http://warren.patch.com/articles/teachers-join-protest-against-reform-bill#photo-6608108>.

140. See Steven Greenhouse, *Pension Funds Strained, States Look at 401(k) Plans*, N.Y. TIMES, Feb. 28, 2011, <http://www.nytimes.com/2011/03/01/business/01pension.html?pagewanted=all>.

141. See generally BETH ALMEIDA & WILLIAM B. FORNIA, NAT'L INST. ON RET. SEC., *A BETTER BANG FOR THE BUCK: THE ECONOMIC EFFICIENCIES OF DEFINED BENEFIT PENSION PLANS* (2008), available at http://ucrfuture.universityofcalifornia.edu/files/2010/08/peb_ax_k-4_overview-discussion-db-dc-plans.pdf (comparing the benefits of defined benefit pensions with those of defined contribution retirement savings plans).

142. *HF192 Status in House for Legislative Session 87*, MINN. ST. LEGISLATURE, https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF192&ssn=0&y=2011 (last updated Jan. 5, 2012); Martin, *supra* note 108.

E. Recent Legislative Attacks on Unions in the Private Sector

The recent financial upheavals in the United States have also provided the right with an opportunity to attack and undermine private sector unions, as well as public sector unions, through state legislation. These attacks have taken two forms: “right to work” laws that make union security clauses unenforceable, thereby undermining unions’ financial resources,¹⁴³ and “save our secret ballot” laws, which seem to be aimed at working up constituencies merely to oppose possible future federal legislation that might allow employee organization merely on a card check system without a formal election.¹⁴⁴

1. “Right to Work” Laws

Federal law creates a problem for unions in securing financial resources to support their efforts in negotiating and enforcing collective bargaining agreements. Although under federal law neither the union nor the employer can require an employee to join the union,¹⁴⁵ federal law also requires that the union must fairly represent all employees in the bargaining unit, whether the employee is a member of the union or not.¹⁴⁶ Such fair representation can be quite expensive, perhaps even requiring the retention of an attorney or other professionals, and the union can be sued by either the National Labor Relations Board (“NLRB”) or the aggrieved employee for failing to meet this duty.¹⁴⁷ This state of affairs creates what economists refer to as a “free-rider” problem in that employees can enjoy the benefits of union representation without having to pay for them and, thus, “free-ride” on the union’s efforts.¹⁴⁸ To solve this problem, federal law allows unions to negotiate

143. See Bradford L. Livingston, *Beware the Ides of March: Indiana’s Right to Work Law Takes Effect*, SEYFARTH SHAW EMP’R LAB. REL. BLOG (Mar. 15, 2012), <http://www.employerlaborrelations.com/2012/03/15/beware-the-ides-of-march-indianas-right-to-work-law-takes-effect/>.

144. See Clint Bolick, *Save Our Secret Ballot*, DEFINING IDEAS (July 15, 2011), <http://www.hoover.org/publications/defining-ideas/article/85781>.

145. NLRB v. Gen. Motors Corp., 373 U.S. 734, 738 (1963).

146. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977); see also *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944).

147. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967) (explaining that while the NLRB has the authority to sue a union on the grounds of an unfair labor practice for breach of duty of fair representation, the NLRB does not have exclusive jurisdiction, and an employee is also authorized to bring suit against the union for breach of duty of fair representation).

148. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 457 (1992). Imagine the

agreements with employers for “union security” that requires each employee in the bargaining unit to either join the union and pay full dues, or pay an “agency fee” to cover the costs of representing the employee in the bargaining unit.¹⁴⁹ However, in section 14(b) of the Taft-Hartley amendments to the National Labor Relations Act (“NLRA”), Congress specified that states may pass laws that make such union security agreements unenforceable.¹⁵⁰ In the ultimate public relations move, the right has designated such laws “right to work” laws, ostensibly because under such laws an employee has a “right to work” without paying for the costs of union representation.¹⁵¹

There are currently twenty-three states that have “right to work” laws either by state or via constitutional provision.¹⁵² Eleven states passed right to work laws either before or contemporaneously with the passage of the Taft-Hartley amendments in 1947.¹⁵³ Seven states passed right to work laws in the 1950s.¹⁵⁴ Since that time, there has been a relatively slow trickle of states that have passed right to work legislation as only one state has passed such a law in each decade since the 1960s.¹⁵⁵ One of the states that passed right to work legislation in the 1950s, Indiana, later repealed that legislation in 1965 but, of course, reenacted such legislation in 2012.¹⁵⁶ In the current financial crisis, conservatives have promoted right to work laws as a way to improve state business climates and steal jobs from other states.¹⁵⁷ Since the

problems if federal law required businesses to provide services to prospective customers without having to pay.

149. *CWA v. Beck*, 487 U.S. 735, 736, 739 (1988).

150. See 29 U.S.C. § 164(b) (2006).

151. See *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/rtws.htm> (last visited June 1, 2012).

152. *State Right-to-Work Laws and Constitutional Amendments in Effect as of January 1, 2009 with Year of Passage*, U.S. DEP’T OF LAB., <http://www.dol.gov/whd/state/righttowork.htm> (last visited June 1, 2012).

153. *Id.* Those states are Florida (1943), Arkansas (1944), Arizona (1946), Nebraska (1946), South Dakota (1946), Georgia (1947), Iowa (1947), North Carolina (1947), North Dakota (1947), Tennessee (1947), and Virginia (1947). See *id.*

154. *Id.* Those states are Nevada (1951), Alabama (1953), Mississippi (1954), South Carolina (1954), Utah (1955), Indiana (1956), and Kansas (1958). *Id.*

155. *Id.* Those states were Wyoming (1963), Louisiana (1976), Idaho (1985), Texas (1993), Oklahoma (2001), and Indiana (2012). *Id.*

156. Travis Waldron, *FLASHBACK: Indiana’s Last ‘Right-to-Work’ Law Failed So Badly It Was Repealed Eight Years Later*, THINKPROGRESS (Feb. 1, 2012, 3:30 PM), <http://thinkprogress.org/economy/2012/02/01/416444/flashback-indiana-right-to-work-fail/?mobile=nc>.

157. See, e.g., RICHARD VEDDER ET AL., CTR. OF THE AM. EXPERIMENT, MINNESOTA RIGHT-TO-WORK: HOW THE FREEDOM OF WORKERS IN THE WORKPLACE ENHANCES PROSPERITY 9-10 (2012), [available at](#) [at](#)

2010 elections, at least eighteen states have considered right to work legislation.¹⁵⁸ In Indiana, Governor Daniels made the passage of House Bill 1028, which makes it a crime to negotiate a union security agreement, the first priority of the 2012 legislative session, despite the fact that neither Governor Daniels nor any other Indiana politician had run for election on the basis of enacting right to work legislation and Governor Daniels had in fact told union members he would not support such legislation because it was not necessary for the success of the state's economy and, further, would start a political "civil war."¹⁵⁹ Despite spirited opposition and a boycott by Democrats, the House and Senate Republicans passed the legislation, and Governor Daniels signed it on February 1, 2012, making Indiana the twenty-third right to work state.¹⁶⁰ However, even in the wake of Republican successes in the 2010 elections, in most states, right to work legislation has floundered in committee or otherwise been defeated. In New Hampshire, the governor vetoed a "right to work" law, House Bill 474, and a vote to override the veto failed.¹⁶¹ In Maine, Legislative Document 309, which would have ended a requirement that nonunion state employees pay a portion of union dues, was put off until 2012.¹⁶² In Missouri, a right to work bill brought in early 2011 is also stalled.¹⁶³ In New Mexico, House Bill 331 died in committee.¹⁶⁴ In Alaska, House Bill 134 is stuck in

http://www.amexp.org/sites/default/files/article_pdf/Minnesota%20Right%20to%20Work%20Center%20of%20the%20American%20Experiment%20Jan%202012.pdf.

158. See MICHAEL J. HICKS, CTR. FOR BUS. & ECON. RES., RIGHT-TO-WORK LEGISLATION AND THE MANUFACTURING SECTOR 2 (2012), available at <http://cms.bsu.edu/academics/centersandinstitutes/bbr/~media/DepartmentalContent/MillerCollegeofBusiness/BBR/Publications/RightToWork/RightToWork.ashx>.

159. Amanda Terkel, *Mitch Daniels' Evolution on Right to Work in Indiana*, HUFFINGTON POST (Jan. 19, 2012, 6:27 PM), http://www.huffingtonpost.com/2012/01/19/mitch-daniels-indiana-right-to-work_n_1216949.html.

160. See Monica Davey, *Indiana House Passes a Bill on Union Fees*, N.Y. TIMES, Jan. 25, 2012, <http://www.nytimes.com/2012/01/26/us/indiana-house-passes-right-to-work-bill.html>.

161. *Year in Review: NH Speaker Bill O'Brien's Year-Long Failed Attempt to Pass Right to Work for Less*, GRANITE STATE PROGRESS (Nov. 30, 2011), <http://www.granitestateprogress.org/news/year-in-review-nh-speaker-bill-obriens-year-long-failed-attempt-to-pass-right-to-work-for-less-hb-47.html>.

162. See *Summary of LD 309*, ST. OF ME. LEGISLATURE, <http://www.mainelegislature.org/LawMakerWeb/summary.asp?paper=HP0251&SessionID=9> (last visited May 14, 2012).

163. See Chad Garrison, *Missouri Right-to-Work Bill Appears Dead—For Now*, RIVERFRONT TIMES BLOG (Mar. 15, 2011, 8:29 AM), http://blogs.riverfronttimes.com/dailyrft/2011/03/missouri_right_to_work_bill_stalls.php.

164. *Big Wins for Pooches and Pinots in Legislature*, NAT'L FED'N OF INDEP. BUS., <http://www.nfib.com/nfib-in-my-state/nfib-in-my-state-content?cmsid=57086> (last visited June 1,

committee.¹⁶⁵ In Michigan, House Bill 4054 is also stuck in
committee.¹⁶⁶

2. "Save our Secret Ballot" Laws

Although the American election procedure features prominently in the system for deciding questions of union representation under the NLRA, there are actually two other paths to obtaining union representation: voluntary recognition of a union by an employer where there is reliable evidence of majority union support, and a NLRB bargaining order to remedy employer unfair labor practices that have undermined the integrity of an election where there is reliable evidence of past union support.¹⁶⁷ These alternative paths to recognition are well established in federal law, which clearly preempts inconsistent state law.¹⁶⁸

Despite this preemption, four states, including Arizona, South Carolina, South Dakota, and Utah, passed laws in 2010 that require secret ballot elections for union representation.¹⁶⁹ In January 2011, the NLRB wrote to the states, advising them that these laws were in conflict with and preempted by the NLRA.¹⁷⁰ After some dialogue with the states, the NLRB filed suit against Arizona to enforce its opinion.¹⁷¹ The NLRB has indicated that it will also sue South Dakota.¹⁷² Nevertheless, other states are considering similar legislation.¹⁷³ Since these laws are clearly unconstitutional, it seems their primary objective is to whip up

2012).

165. *House Bill 134: Right to Work*, THE HOUSE MAJORITY, <http://housemajority.org/spon.php?id=27hb134> (last visited June 1, 2012).

166. *House Bill 4054 (2011)*, MICH. LEGISLATURE, [http://www.legislature.mi.gov/\(S\(ww2dpwiaho2yed45vipzvt3g\)\)/mileg.aspx?page=getobject&objctname=2011-HB-4054](http://www.legislature.mi.gov/(S(ww2dpwiaho2yed45vipzvt3g))/mileg.aspx?page=getobject&objctname=2011-HB-4054) (last visited June 1, 2012).

167. See Benton J. Mathis, Note, *Gissell Bargaining Orders: Circuit Court Struggle to Limit NLRB Abuse*, 40 WASH. & LEE L. REV. 1661, 1662 (1983).

168. See *id.*

169. Steven Greenhouse, *U.S. Plans to Sue 4 States Over Laws Requiring Secret Ballots for Unionizing*, N.Y. TIMES, Jan. 15, 2011, <http://www.nytimes.com/2011/01/15/business/economy/15labor.html>.

170. See *id.*

171. *Id.*

172. *Id.*

173. See Ray Stern, "Save Our Secret Ballots" Group Includes Arizona in Anti-Labor-Union Plans to Change State Constitutions, PHOENIX NEWTIMES BLOG (Dec. 29, 2008, 8:40 PM), http://blogs.phoenixnewtimes.com/valleyfever/2008/12/save_our_secret_ballots_group.php (stating Arizona, Arkansas, , Missouri, Nevada and Utah have taken steps towards state constitutional amendment).

political support for the current system of secret ballot elections that has proven very favorable to employer anti-union campaigns. This political support acts as a bulwark against possible reform of the NLRA to allow card check or registry methods of achieving employee organization.

IV. CONCLUSION

The Great Recession and the resulting state and federal budget deficits have provided a golden opportunity for the right to undertake a major offensive against public employees, their wages and benefits, their collective bargaining rights, and their activity in the political process. The right laid the groundwork for this offensive in the organization of conservative institutions to channel big money contributions into research, advocacy, bill-drafting, and the election of candidates in support of their conservative agenda. This is a national conservative movement that seeks to have a massive impact at both state and federal levels. The Republican electoral victories of 2010 allowed the conservatives to bring this agenda to fruition with the enactment of laws in many states that are designed to reduce public employee wages and benefits and to end or significantly limit their right to collectively bargain.¹⁷⁴ Conservatives have achieved this success despite the fact that research shows that public employee compensation is in fact less than comparable to that of private sector employees and the fact that public opinion polls show the majority of Americans favor the right of public employees to collectively bargain.¹⁷⁵ This offensive against public employees is clearly aimed at limiting public employees' right to participate in the political process, thereby silencing them. As is evidenced by the recent passage of a "right to work" law in Indiana, the battle against collective bargaining is far from over.

174. See Abby Goodnough, *Massachusetts House Seeks to Limit Collective Bargaining*, N.Y. TIMES (Apr. 29, 2011), <http://www.nytimes.com/2011/04/30/business/economy/30massachusetts.html>.

175. Michael Cooper & Megan Thee-Brenan, *Majority in Poll Back Employees in Public Sector Unions*, N.Y. TIMES, Mar. 1, 2011, <http://www.nytimes.com/2011/03/01/us/01poll.html>.