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THE STRANGELY UNSETTLED STATE OF PUBLIC-SECTOR LABOR IN THE PAST THIRTY YEARS

*Joseph Slater**

I. INTRODUCTION

Labor law in the public sector is, and has been for at least the past thirty years, central to labor relations in the U.S. and, increasingly, it has acquired a high profile in the political world. It is common knowledge that union density *as a whole* has dropped precipitously in the past three decades. In 1983, overall union density in the U.S. was 20.1 percent, with 17.7 million members; by 2012, it was 11.3 percent, with 14.4 million members.¹ These numbers, however, mask the stark contrast between the public and private sectors. In 2012, union density (measured by actual union membership) in the public sector was 35.9 percent, while the private sector figure was 6.6 percent.² Measuring union density in the public sector by counting all the employees unions represent, the figure is 39.6 percent overall (and, for local government employment, 45.2 percent).³ The high union density in the public sector, combined with declining unionization rates in the private sector, meant that by 2009, public-sector workers had become a majority of all union members in the U.S. Yet despite this success in organizing, public-sector labor law and labor relations have been in a state of tumult in the past thirty years. This includes, but is definitely not limited to, laws passed in 2011 and 2012 in about a dozen states gutting the rights of public-sector unions and their members.⁴ Scholars have commented on the increased “oscillations” of private-sector labor law in the last thirty

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1. Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members Summary (Jan 23, 2013), <http://www.bls.gov/news.release/union2.nr0.htm>.

2. *Id.*

3. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, TABLE 3: UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY OCCUPATION AND INDUSTRY (Jan. 23, 2013), <http://www.bls.gov/news.release/union2.t03.htm>.

4. *See infra* Part V.

years, with the National Labor Relations Board changing positions on various issues depending on which party was in power.⁵ However, public-sector labor law in the past thirty years has experienced much wilder swings back and forth: not only through agency interpretation, but also through significant rewriting of statutes, and the creation and elimination of statutes.⁶

In a way, this is odd. Although it took public-unions longer to win collective bargaining rights than private-sector unions (as discussed below, the first state public sector statute came in 1959), by the 1980s it seemed as if public-sector collective bargaining was widely, if not universally, accepted, and it was functioning in a fairly stable manner. Union density in the public sector in 1980 was already close to forty percent.⁷ Yet the next three decades would feature surprising instability, with a number of dramatic wins and losses.⁸ This is partly because, unlike private-sector labor law, public-sector law primarily is state and local labor law.⁹ Thus, these laws both vary considerably and are more subject to political shifts at a local level. A minority of states does not permit any public employees to bargain, and another minority only permits a few types of public employees to bargain.¹⁰ Specifically, by 2007, seven states had no provision for collective bargaining, and two states had only more limited “meet and confer” statutes.¹¹ Thirteen states allowed only one to four types of public workers to bargain (most commonly teachers and firefighters).¹² Also, where collective

5. ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* (15th ed. 2011), 76-77 (tracing the beginning of a more partisan NLRB to the Reagan administration and noting the continuation and arguable exacerbation of the trend to the present); Steven Porzio, *NLRB Chairman Addresses Labor Law Reform at American Bar Association Meeting*, UNIONS AND LAB. L. REFORM BLOG (Nov. 11, 2009, 1:52 PM), <http://www.efcablog.com/2009/11/articles/craig-becker-nlr/nlr-chairman-addresses-labor-law-reform-at-american-bar-association-meeting/> (former NLRB Chair Wilma Liebman “argued that Congressional inaction has fostered ‘deep divisions’ and ‘controversy’ in labor law and has ‘facilitated’ the NLRB’s ‘flip-flopping’ and ‘policy oscillation.’”).

6. See *infra* Parts II-III.

7. See Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 1 fig.1 (Princeton Univ. Indus. Relations Section, Working Paper No. 503, 2005), available at <http://harris.princeton.edu/pubs/pdfs/503.pdf>.

8. See *infra* Part III.A.

9. Section 2 of The National Labor Relations Act excludes the public sector. 29 U.S.C. § 152(2) (2006).

10. See Richard B. Freeman & Eunice S. Han, *Public Sector Unionism Without Collective Bargaining*, AMERICAN ECON. ASS’N 3 (Jan. 6, 2012), <http://www.aeaweb.org/aea/2013conference/program/retrieve.php?pdfid=326>.

11. See RICHARD C. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 62-64 (4th ed., 2009).

12. *Id.* About 89 percent of public employees are covered by a public employee labor law. Jeffrey H. Keefe, *A Reconsideration and Empirical Evaluation of Wellington’s and Winter’s*, The

bargaining is authorized, the scope of bargaining is generally narrower – sometimes quite a bit narrower – than in the private sector.¹³ Further, the majority of states do not allow any public employees to strike.¹⁴ While most states that provide collective bargaining rights to public employees allow some form of binding “interest arbitration” to settle contract disputes, some states only allow voluntary arbitration, non-binding arbitration, or only mediation and/or fact-finding.¹⁵

Because there is so much variation in the public sector, there is no single story of the past thirty years to tell. Life for public-sector unions in states like Virginia and North Carolina, where no such union is permitted to bargain,¹⁶ is different from life in states such as New York and California where such bargaining is well-established and under no immediate threat.¹⁷ Both of these stories, in turn, differ from states such as Wisconsin where a robust collective-bargaining statute in place for half a century was recently almost completely gutted, which in turns differs from Ohio, where such a move was enacted as law but then beaten back by a voter referendum.¹⁸

Thus, this paper will discuss illustrative events over the past thirty years: significant events which helped shape the broader history of labor relations, even influencing the private sector. In sum, even though a majority of states had granted collective bargaining rights to public employees by the 1980s, contests over the basic question of whether public employees should have such rights have continued over this entire stretch of time. These events feature defeats and victories, and show continuing debates over the foundations and principles of labor law and relations in the public sector: in short, how public sector labor relations remains a strangely unsettled issue.

This article starts with early history of public sector labor law (because it is necessary to understand some of the events of the past

Union and the Cities, 34 COMP. LAB. LAW & POL'Y J. 251, 262 (2013).

13. See MARTIN H. MALIN, ANN C. HODGES, & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 457-554 (2d ed. 2010).

14. See KEARNEY, *supra* note 11, at 233-34.

15. MALIN, HODGES & SLATER, *supra* note 13, at 555-674; KEARNEY, *supra* note 11, at 233-34 (listing the thirteen states that, in 2008, permitted some public employees to strike), 259-60 (listing alternative procedures each state uses to settle public-sector bargaining impasses).

16. See Ann C. Hodges & William Warwick, *The Sheathed Sword: Public Sector Union Efficacy in Non-Bargaining States*, 27 A.B.A. J. OF LAB. & EMP. L. 275, 275-76 (2012).

17. See N.Y. CONST. art. 1, § 17; JOSEPH A. MCCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA 243 (2011) (“[T]he Meyers-Milias Brown Act in 1968 . . . cleared the way for local governments in California to bargain collectively with their employees.”).

18. See *infra* Part V.

thirty years), and then moves to the last three decades. For the 1980s, it discusses two key (and contrasting) events of the early part of the decade: the crushing defeat of the PATCO strike, and the enactment of the Ohio public-sector labor statute. It then discusses some significant twists and turns in the 1990s. Moving to the twenty-first century, it discusses some (mostly positive) trends for public-sector unions in the first decade of the century, but then turns to the wave of anti-union legislation in 2011 and beyond (although even here, there are some developments in the other direction). The final sections discuss the practical and theoretical policy issues at stake, and attempt to make some guesses at the future of this unsettled area.

II. EARLIER HISTORY

While public-sector unions have, for decades, been central to the U.S. labor movement, labor historians have focused much more on the private sector.¹⁹ Thus, it is worth highlighting some of the major events of public sector labor history, in the first half of the twentieth century. This history is important for several reasons. The events and debates of this era still influence discussions of policy today. For example, we cannot understand what happened in Wisconsin in 2011 without knowing what happened there in 1959. The early history is also important because in some states, the law is in many ways the same as it was a century ago: *e.g.*, in Virginia, North Carolina, South Carolina, and other states where public-sector unions still have no right to bargain collectively.²⁰ Also, the history helps explain why it is that in the U.S., public-sector labor law is so different from private-sector law. After all, in most other industrialized democracies, the laws governing public

19. See generally Joseph A. McCartin, *Bringing the State's Workers In: Time to Rectify an Imbalanced U.S. Labor Historiography*, 47 LAB. HIST. 73 (2006); Robert Shaffer, *Where are the Organized Public Employees? The Absence of Public Employee Unionism from U.S. History Textbooks, and Why it Matters*, 43 LAB. HIST. 315, 323 (2002) ("Of the 12 college textbooks reviewed, only two . . . offer any substantive discussion of public employee unionism."). The two principal overviews of the history of public sector unions are JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE 1900-62* (2004) [hereinafter *PUBLIC WORKERS*], and the much older but still useful STERLING D. SPERO, *GOVERNMENT AS EMPLOYER* (1948). Some works focus on specific unions or a specific type of employee. See, *e.g.*, JOSHUA B. FREEMAN, *IN TRANSIT: THE TRANSPORT WORKERS UNION IN NEW YORK CITY, 1933-1966* (1989); JOHN LYONS, *TEACHERS AND REFORM: CHICAGO PUBLIC EDUCATION, 1929-70* (2008); MCCARTIN, *supra* note 17; Marick F. Masters, *AFSCME as a Political Union*, 19 J. OF LAB. RES. 313 (1998); Gregory M. Saltzman, *Bargaining Laws as a Cause and a Consequence of the Growth of Teacher Unionism*, 38 INDUS. & LAB. REL. REV. 335 (1985).

20. See Freeman & Han, *supra* note 10, at 17 tbl. 1.

sector labor unions and those governing private sector labor unions are and have long been very similar if not identical.²¹ Although the first state law authorizing public-sector collective bargaining was not passed until 1959,²² public workers organized throughout the first half of the twentieth century.²³ Indeed, in the first two decades of the century, public-sector unions were on the rise. A number of major public-sector unions were formed in the early 20th century.²⁴ In 1910, union density in the public sector was 3.5 percent; from 1915 to 1921, this density increased from 4.8 to 7.2 percent.²⁵ Given the simultaneous expansion of government, this meant that from 1915 through 1921, the total number of public workers in unions nearly doubled.²⁶

But the Boston police strike of 1919 cut short this growth. Boston Police Commissioner Edwin Curtis caused this strike by banning Boston police officers from joining a union affiliated with the AFL and suspending officers who refused to leave the affiliated union.²⁷ The police officers had sought out the AFL because of complaints – common to workers then and now – about low wages, long hours, and unhealthy working conditions.²⁸ Opponents of police union unions (in Boston and elsewhere) argued that unionized police would not be neutral in strikes by private-sector unions.²⁹

The strike began on September 9, 1919 and was a disaster.³⁰ For the three days, crime was rampant in the city.³¹ State guards finally intervened, killing nine and wounding twenty-three others.³² Many more were injured during the strike, and there was extensive property

21. For example, public workers in Britain and France won bargaining rights in the first part of the twentieth century largely similar to those of private sector workers in those countries. See PUBLIC WORKERS, *supra* note 19, at 92-93.

22. See generally *id.* at ch. 6.

23. *Id.*

24. In 1906, the American Federation of Labor (AFL) created its first national union of government workers, the National Federation of Post Office Clerks. *Id.* at 18. In 1916, the AFL formed the American Federation of Teachers. *Id.* In 1917, the AFL created the National Federation of Federal Employees, and both the National Association of Letter Carriers and the Railway Mail Carriers affiliated with the AFL. *Id.* The AFL chartered its first firefighters local in 1903 and created the International Association of Fire Fighters (IAFF) in 1918. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 26.

28. See *id.* at 25.

29. See *id.* at 22.

30. See *id.* at 26.

31. See *id.* at 13.

32. *Id.* at 13-14.

damage.³³ After the strike was crushed, all 1,147 strikers were fired and never reinstated.³⁴

The aftermath of the Boston strike significantly damaged public-sector unionism. Many local governments banned not just police unions, but also all forms of public sector unions.³⁵ Even though such unions stressed their no-strike policies fierce opposition to such unions led to an end to the early period of growth. The rate of unionization in the public sector stagnated below the 1921 rate of 7.2 percent through the rest of the 1920s.³⁶ For decades after the strike, policymakers and judges associated all forms of public-sector unionism with the horror of the Boston strike. Even though all AFL (and, later, CIO) unions renounced strikes, and even though from 1920 until the late 1960s, public-sector unions almost never struck,³⁷ the image of police striking was associated with all public-sector unions. Courts through the early 1960s consistently upheld “yellow dog” rules barring union membership in government employment, insisting that public-sector union organizing would inevitably lead to public workers striking.³⁸ In the 1980s, President Ronald Reagan was influenced by the Boston strike when he fired illegally striking members of the Professional Air Traffic Controllers Union in 1981.³⁹ The specter of the Boston strike continues to influence even academic discussion of the public-sector labor.⁴⁰

A. *The First Public-Sector Labor Law in Wisconsin, and Developing Alternative Forms of Dispute Resolution in the Public Sector*

The first public-sector labor law was passed (perhaps ironically, given recent events) in Wisconsin in 1959, and then amended in 1962.⁴¹ This event too, is important in understanding events of the past thirty

33. *Id.* at 13-14, 27.

34. *See id.* at 14, 34.

35. *See id.* at 35-36.

36. *Id.* at 36.

37. *Id.* at 82.

38. For examples and details, *see id.* at ch. 3; Joseph Slater, *The Court Does Not Know “What a Labor Union is: How State Structures and Judicial (Mis)Constructions Deformed Public Sector Labor Law,”* 79 OR. L. REV. 981, 991 (2000) [hereinafter *Deformed Public Sector Labor Law*].

39. MCCARTIN, *supra* note 17, at 321; *see discussion infra* Part III.A.1.

40. *See, e.g.,* NORMA RICCUCCI ET AL. PERSONNEL MANAGEMENT IN GOVERNMENT: POLITICS AND PROCESS 477 (6th ed., 2007) (although “many years have elapsed” between the Boston police strike and the present, “the basic problems involved are essentially the same and remain without substantial resolution.”).

41. PUBLIC WORKERS, *supra* note 19, at 158-59.

years.

Proponents of public-sector collective bargaining in Wisconsin began attempting to pass such a law in 1951.⁴² Central to the debates over the bills and the enacted legislation was an issue that remains central today in public-sector labor law. Assuming public-sector unions are not allowed to strike, how can bargaining impasses be resolved? The Wisconsin law for the first time was a realistic attempt to create alternative forms of dispute resolution for unions of government employees.⁴³

After almost a decade of watching earlier bills fail – in part because of concerns over police strikes and in part because Republicans controlled state government – advocates, led by the public-sector union AFSCME, introduced a bill in 1959.⁴⁴ It contained the right to organize, and it specified that if bargaining reached impasse, a state agency could mediate and conduct voluntary arbitrations.⁴⁵ A modified version of this bill became law, but the section authorizing the WERB to aid in bargaining impasses was dropped.⁴⁶

The law led to many contracts between unions and local governments in Wisconsin.⁴⁷ But it was still unclear what, exactly, should happen when bargaining came to an impasse.⁴⁸ In 1961, AFSCME introduced a bill that amended the 1959 law such that at impasse, the parties could ask the WERB for a mediator or fact-finder.⁴⁹ Also, under the 1961 Wisconsin bill, WERB officials could act as mediators or arbitrators.⁵⁰ Also, impasses could be resolved through a voluntary, non-binding arbitration process.⁵¹

While there have been many developments in this area, this law was a significant precedent for modern public-sector labor laws. Mediation and fact-finding are now common in such statutes.⁵² Typically, fact-finders find facts relevant to the bargaining impasse and offer recommendations.⁵³ Today, arbitration at impasse to set contract

42. *Id.* at 159-60.

43. *See id.* at ch. 6.

44. *See id.* at 158-59.

45. *Id.* at 180.

46. *Id.* at 181-83.

47. *See id.* at 185.

48. *Id.* at 184-85.

49. *Id.* at 186.

50. *Id.*

51. *Id.* at 186-87.

52. *See* MALIN, HODGES & SLATER, *supra* note 13, at 611-15; KEARNEY, *supra* note 11, at 251-83.

53. *See* MALIN, HODGES & SLATER, *supra* note 13, at 612-15; KEARNEY, *supra* note 11, at

terms – so-called “interest arbitration” – is also common in the public sector.⁵⁴ Although it is now more often mandatory and binding – and indeed, the Wisconsin law was later amended to provide for binding, mandatory interest arbitration⁵⁵ – both “voluntary” and “advisory” models still exist.⁵⁶

The Wisconsin law sparked a national trend. Federal employees won a limited right to bargain collectively soon after in 1962, when President Kennedy issued Executive Order 10988.⁵⁷ By 1966, sixteen states had enacted laws granting organizing and bargaining rights to at least some public workers.⁵⁸ By the end of the 1970s, a majority of states had adopted such laws.⁵⁹ Public-sector unionization increased rapidly as well. AFSCME grew from approximately 125,000 members in 1955 to more than a million members by 1978.⁶⁰ In 1955, all the public-sector unions put together had a combined membership of around 400,000; by the 1970s, the total was more than 4,000,000.⁶¹ Also, in the late 1960s, courts held for the first time that the First Amendment of the Constitution prevents a public employer from firing or otherwise discriminating against a public employee because of union activities.⁶² This was a major departure from the precedent of the first half of the 20th century, and it put an end to “yellow-dog” and other official bans on union organizing in the public sector that were common through the early 1960s.⁶³

With more legal rights and a greater acceptance from the public, union organizing in the public sector continued to increase. By 1975, the union density rate in the public sector equaled that of the private sector (around 25 percent).⁶⁴ The public-sector rate then increased to

251-70.

54. See MALIN, HODGES & SLATER, *supra* note 13, at 615.

55. See William C. Houlihan, *Interest Arbitration and Municipal Employee Bargaining: The Wisconsin Experience*, in COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 69, 82-84 (Joyce Najita & James Stern, eds. 2001).

56. See MALIN, HODGES & SLATER, *supra* note 13, at 615-74; KEARNEY *supra* note 11, at 271-86.

57. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963).

58. PUBLIC WORKERS, *supra* note 19, at 191.

59. Chris Edwards, *Public-Sector Unions*, CATO INST. TAX & BUDGET BULLETIN (Mar. 2010), http://www.cato.org/sites/cato.org/files/pubs/pdf/tbb_61.pdf.

60. *Fighting for Working Families: A Short History of AFSCME*, AFSCME, <http://www.afscme.org/union/history/afscme-75-years-of-history> (last visited Apr. 24, 2013).

61. PUBLIC WORKERS, *supra* note 19, at 193.

62. *Deformed Public Sector Labor Law*, *supra* note 38, at 1006-07.

63. See MALIN, HODGES, & SLATER, *supra* note 13, at 274-80; *Deformed Public Sector Labor Law*, *supra* note 38, at 1006.

64. See Farber, *supra* note 7, at 1 fig. 1.

about 38 percent in 1979, and has stayed around that level ever since, *i.e.*, for the last thirty years.⁶⁵

III. HIGHLIGHTS OF THE PAST 30 YEARS (OR SO)

A. *The 1980s: A Defeat and a Victory*

Thus, by the 1980s, unions in the public sector had accomplished quite a lot, both in terms of legal doctrine and actual organizing. Still, even the modern history of public-sector labor relations has proven to be rocky and highly contested. This section describes an important defeat and an important victory for public-sector unions in this decade: first, the defeat of the PATCO strike; second, the victory of the Ohio public-sector statute.

1. The PATCO Strike of 1981

On August 3, 1981, more than 12,000 air traffic controllers represented by the Professional Air Traffic Controllers Organization walked off their job in an illegal strike (federal employees cannot strike per statute).⁶⁶ President Reagan announced that if the strikers did not return to work within forty-eight hours, they would be fired and permanently replaced.⁶⁷ They did not, and they were.⁶⁸ The crushing defeat of this strike is one of the most important events in all of labor relations – not just the public sector – of the past half century. As historian Joseph McCartin shows, it had a lasting impact on public-sector labor relations, private-sector labor relations, and U.S. politics in general.⁶⁹

PATCO was founded in 1968, organized pursuant to the Kennedy Executive Order described above.⁷⁰ The union had engaged in some job actions before: a slow-down in 1968 that brought some improvements the union sought, and “blue flu” type actions in 1969 and 1970 that were

65. *See id.*

66. MCCARTIN, *supra* note 17, at 6.

67. *Id.* at 7.

68. Joseph A. McCartin, *The Strike that Busted Unions*, N.Y. TIMES Aug. 2, 2011, at A25, available at http://www.nytimes.com/2011/08/03/opinion/reagan-vs-patco-the-strike-that-busted-unions.html?_r=0.

69. *See* the excellent recent history of this and surrounding events, MCCARTIN, *supra* note 17. Most of the information in this section is taken from this work.

70. *Id.* at 9, 35-69.

not successful.⁷¹ Still, by 1977, PATCO had become one of the most aggressive of all the unions in the federal government.⁷² Controllers were now operating under President Nixon's Executive Order 11491, which expanded the rights available under the Kennedy Executive Order.⁷³ Under their first contract, PATCO took advantage of the new right to binding grievance arbitration, winning the majority of its cases. By 1976, PATCO had 13,681 members: 85 percent of controllers eligible to join.⁷⁴

Warning signs appeared, however, as future contracts proved more difficult to negotiate. There was a continuing tension between the fact that controller wages were not keeping up with inflation,⁷⁵ and the legal rule that controllers (like most federal employees) were not permitted to negotiate over wages.⁷⁶ This led to job actions that foreshadowed the 1981 strike. In 1974, controllers had engaged in a "rolling delays" job action that forced the FAA to agree to certain union terms.⁷⁷ However, later on, an attempt to win a pay increase by "reclassifying" controllers into a higher grade was rejected by President Ford (who, under advice from Dick Cheney, was trying to avoid being outflanked on the right by Ronald Reagan).⁷⁸ This led to another staggered slowdown job action by controllers.⁷⁹ Attempts at compromise failed, leaving both sides angry.⁸⁰ Even after Jimmy Carter was elected, controllers threatened a job action that would disrupt his inauguration.⁸¹ This threat was not carried out, in large part because PATCO won an agreement to reclassify "up" a large number of controller jobs.⁸²

In addition to wage complaints, in the later 1970s, the job of controller was changing, and not for the better. Deregulation of the airline industry created the modern "hub and spoke" system, making "hub" airports even busier.⁸³ New automation, which did not always

71. *Id.* at 79-119.

72. *Id.* at 145.

73. For example, it created a mediation and arbitration system to resolve bargaining impasses (the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel, respectively), which both still exist and perform similar functions today. *Id.* at 135.

74. *Id.* at 150-51, 153, 156.

75. *Id.* at 162-63.

76. *Id.*

77. *Id.* at 159-61.

78. *Id.* at 163-65.

79. *Id.* at 166.

80. *Id.* at 167-70.

81. *Id.* at 171-73.

82. *Id.* at 173.

83. *Id.* at 198.

work well, posed challenges as well.⁸⁴ Similar trends sparked militancy in other countries, as controllers in Canada, Germany, France, Australia, and Britain staged job actions.⁸⁵ In 1978, understaffing and new but unreliable technologies in the U.S. arguably caused a rise in the number of “near misses” and a fatal accident in San Diego.⁸⁶ Militants began to gain a larger voice within PATCO. They were unhappy with contract negotiations in 1978, and they pushed for a job action, but the resulting slowdown did not have solid support within the union, and it was a failure.⁸⁷

Clouds continued to gather. Hopes that Carter would expand the narrow scope of bargaining in the federal sector were soon dashed.⁸⁸ While the Civil Service Reform Act of 1978 codified collective bargaining rights for federal employees and made some improvements in the process, it did not widen the scope of bargaining.⁸⁹ Wages were still not negotiable.⁹⁰ These disappointments, plus cutbacks in retirement and other programs, led some factions within PATCO to push the idea of a strike.⁹¹ At the same time, the new anti-tax political movement helped create less sympathy for public-sector unions. The *Wall Street Journal* – in a piece that could have been republished in 2011 – crowed hopefully about a coming “schism between private and public employee unionism.”⁹² PATCO President John Leyden was on the defensive, insisting that, “We are not the overpaid, underworked . . . federal employee that the normal person in this country, who looks at federal employees, thinks.”⁹³ In early 1980, the more militant Bob Poli successfully challenged Leyden for leadership of the union.⁹⁴ FAA leaders began strike preparations.⁹⁵

Meanwhile, in the 1980 presidential election, Ronald Reagan attempted to woo disaffected union members. While Governor of California, Reagan had actually signed into law the California state statute granting collective bargaining rights to employees of local and

84. *Id.* at 197-200.

85. *Id.* at 200.

86. *Id.* at 202-04.

87. *Id.* at 206-12.

88. *Id.* at 212-14.

89. *Id.* at 217.

90. *Id.*

91. *Id.* at 218-26.

92. *Id.* at 215-16.

93. *Id.* at 216.

94. *Id.* at 227-30.

95. *Id.* at 233-36.

municipal governments.⁹⁶ Reagan wrote to PATCO, agreeing that controllers “worked unreasonable hours,” and promised improved equipment and better scheduling.⁹⁷ This was more than Carter would say, and PATCO endorsed Reagan.⁹⁸

In the 1981 negotiations, PATCO pushed for higher pay.⁹⁹ For the better-compensated federal employees, the gap between pay increases and inflation was even larger than for other federal workers.¹⁰⁰ While federal law still did not permit the union to negotiate over pay,¹⁰¹ PATCO leaders seemed confident that a strike would yield their desired results.¹⁰² In negotiations, attempts at compromise failed.¹⁰³ On July 2, 1981, PATCO rejected the contract offer, essentially ensuring there would be a strike.¹⁰⁴ Meanwhile, the FAA made a series of contingency plans, crucially enlisting the cooperation of the airlines.¹⁰⁵ Also, the Reagan administration decided to respond to any strike in a severe and unprecedented manner.¹⁰⁶

The strike began on August 3, 1981.¹⁰⁷ Ninety percent of the controllers were absent in New York and Boston; only six controllers showed up for work at O’Hare Airport in Chicago.¹⁰⁸ Reagan announced that if the strikers did not return within forty-eight hours, they would all be fired.¹⁰⁹ In another bad sign for the union, neither the Pilots Union nor the Machinists Union was willing to strike in solidarity.¹¹⁰ Still, few strikers defected within the forty-eight hour period.¹¹¹ The strike did create significant delays, and it cost the airline industry an estimated \$1 billion per month at the outset.¹¹² But between supervisors, military controllers who had not worked in the FAA before, furloughed pilots, new trainees, and strike defectors, the FAA held on.¹¹³

96. *Id.* at 243-45.

97. *Id.* at 246-47.

98. *Id.* at 247-49.

99. *Id.* at 237.

100. *Id.* at 237-38.

101. *See id.* at 237-41.

102. *See id.* at 257-62.

103. *Id.* at 265-74.

104. *Id.* at 274-76.

105. *Id.* at 281-83.

106. *Id.* at 277-85.

107. *Id.* at 287-88.

108. *Id.* at 289.

109. *Id.* at 289-90.

110. *Id.* at 291-92.

111. *Id.* at 295-97.

112. *Id.* at 304.

113. *Id.* at 301-04.

Although there were twice as many “hazard reports” in the first month of the strike than normal, there was no highly-publicized disaster.¹¹⁴

The Reagan administration then took the most punitive position toward strikers possible. Striking controllers were not just fired, but arrested and criminally charged (the federal sector statute makes striking a crime) – a number were actually convicted.¹¹⁵ PATCO was ordered to pay \$28.8 million in damages.¹¹⁶ Leaders of the AFL-CIO tried to work out a compromise such that most of the strikers would be rehired, and some administration officials supported such a move, but this came to naught.¹¹⁷ After the strike had been defeated, a number of voices, ranging from the *Washington Post* to conservatives William Safire and Jack Kemp called for reinstatement.¹¹⁸ But all Reagan would offer is to limit the penalty of a ban on all federal employment to a ban on employment with the FAA.¹¹⁹ The FAA also made a standard part of its contract with private companies a clause that barred those companies from employment any former controller who had struck; this and the FAA bar remained until President Clinton repealed these policies in 1993.¹²⁰ The administration fought every reinstatement case brought to the Merit Systems Protection Board, and would not consider clemency for a single PATCO striker.¹²¹

This strike had an enduring impact, redolent of themes throughout public sector history. Reagan’s firing of all the controllers reminded some (and perhaps Reagan himself) of Calvin Coolidge firing the Boston police strikers.¹²² In 2011, Wisconsin Governor Scott Walker invoked Reagan and PATCO while pushing through a law stripping collective bargaining rights from most public employees in Wisconsin (discussed further *infra*).¹²³ Further, McCartin argues that the rejection of Republicans who pushed for reinstatement of some strikers helped marginalize Republicans who were more moderate on union issues and strengthened the hard-core anti-union factions that would gain control

114. *Id.* at 307. There was one collision that caused one death on August 19, 1981. *Id.* at 309. After the strike had been lost, on January 13, 1982, a plane crash in Washington, DC – caused in part by the errors of a controller who had been a supervisor – killed seventy-eight people. But it was too late to matter. *Id.* at 325-26.

115. *Id.* at 305.

116. *Id.*

117. *Id.* at 313-15.

118. *Id.* at 320.

119. *Id.* at 320-24.

120. MALIN, HODGES, & SLATER, *supra* note 13, at 589.

121. *Id.* at 335-36.

122. MCCARTIN, *supra* note 17, at 342.

123. *Id.* at 229, 365-66.

later.¹²⁴ Even more broadly, McCartin writes “no strike since the advent of the New Deal damaged the U.S. labor movement more.”¹²⁵ Through the 1980s, strikes decreased in the public sector, and in the private sector, strikebreaking – through the use of permanent replacement workers – increased dramatically.¹²⁶ Further, “Reagan’s breaking of the PATCO strike, more than any other act of his presidency, also announced the dawn of a conservative era.”¹²⁷ As to the controllers, a 1986 study found that one-third of them had incomes so low that they qualified for food stamps.¹²⁸

2. The Ohio Public-Sector Statute

A much more positive event for public-sector unions in the 1980s came in 1983 – thirty years ago – when Ohio passed a statute granting collective bargaining and related rights to public employees.¹²⁹ While this statute came after most states had enacted such laws, Ohio’s law was, and remains quite robust – despite an attempt to eviscerate it in 2011 discussed *infra*. It has broad coverage, a relatively wide scope of bargaining, and it even permits most covered employees to strike.¹³⁰ As in Wisconsin, it took quite some time to pass the law.¹³¹ The struggle leading up to the law’s enactment is instructive, as are the effects the law had on strikes.¹³² As in other states, in Ohio, union activity in the public sector came significantly before formal statutory rights. As far back as 1947, in reaction to such activity, the Ohio Supreme Court held, in *Hagerman v. Dayton*,¹³³ that local governments could not grant unions dues check-off (voluntary deductions of dues from paychecks). It also held (consistent with a view that dominated in the first half of the

124. *Id.* at 336-38.

125. *Id.* at 300.

126. *Id.* at 340-41, 350.

127. *Id.* at 330. For example, McCartin quotes George Will: “In a sense, the ‘60s ended in August 1981.” *Id.*

128. *Id.* at 332.

129. James T. O’Reilly & Neil Garth, *Structures and Conflicts: Ohio’s Collective Bargaining Law of Public Employees*, 44 OHIO ST. L. J. 891, 895 (1983).

130. The modern statute is codified at OHIO REV. CODE Ann. § 4117 (West 2007); Joseph Slater, *The Rise and Fall of SB-5: The Rejection of an Anti-Union Law in Historical and Political Context*, 43 U. TOL. L. REV. 473, 479 (2012) [hereinafter *Rise and Fall*]

131. See *Rise and Fall*, *supra* note 130, at 477, 479.

132. See *id.* at 479-480 (discussing these topics in more detail); *History of Public Employee Collective Bargaining in Ohio*, SPRINGFIELD NEWS-SUN (Sept. 18, 2011), <http://www.springfieldnewsun.com/news/news/national-govt-politics/history-of-public-employee-collective-bargaining-1/nMt5S/> (explaining a short overview of this history).

133. 71 N.E.2d 246 (Ohio 1947).

twentieth century but has now largely been rejected) that collectively bargained contracts between governments and unions of their employers were unconstitutional as an improper delegation of government authority.¹³⁴ Also in 1947, Ohio enacted the Ferguson Act, which banned public employee strikes and provided for dismissing strikers.¹³⁵

However, as the discussion of the Wisconsin above shows, sentiments on public sector unions were shifting. Indeed, in 1959 – the same year the Wisconsin law was enacted – Ohio authorized union dues checkoff for public employees, overturning part of the *Hagerman* ruling.¹³⁶

In 1975, the Ohio Supreme Court held that school boards had the authority to bargain with employees and form enforceable contracts, including contracts requiring that contract grievances be sent to binding arbitration.¹³⁷ On the other hand, also in 1975, Republican Governor James Rhodes vetoed a bill that would have given bargaining rights to public employees in Ohio.¹³⁸ In 1977, Governor Rhodes vetoed a second such bill.¹³⁹

As in Wisconsin, such a law would only be passed when Democrats took control of the state House, Senate and governor's office. This happened in Ohio in 1983, and Democratic Governor Richard Celeste signed a public-sector labor law authorizing collective bargaining (and again, in many cases, strikes) by public employees.¹⁴⁰ This law, with only minor amendments, has been Ohio's public sector labor law since its effective date (although as shown *infra*, it looked as if the law had been entirely revised in 2011, but then a voter referendum repealed the changes).

One of the most notable effects of this law in the past thirty years – and one that policymakers in the future should heed – is that it greatly reduced the number of public-sector strikes in Ohio. This may seem odd. Prior to the law, all public sector strikes were illegal; after the law was passed, most public sector strikes were legal. Normally, one would expect that legalizing an activity would mean that activity would happen more often, not less. But after the law took effect, in the eight years

134. *Id.* at 246-54. For more on the role of the “non-delegation” doctrine in labor cases in the first half of the 20th century, see SLATER, PUBLIC WORKERS, *supra* note 20, at ch. 3.

135. *Rise and Fall*, *supra* note 130, at 479.

136. *Id.* at 480.

137. *Dayton Classroom Teachers' Ass'n v. Dayton Bd. of Educ.*, 323 N.E.2d 714, 717-719 (Ohio 1975).

138. *Rise and Fall*, *supra* note 130, at 480.

139. *Id.* at 480.

140. OHIO REV. CODE ANN. §4117 (West 2007); see *Rise and Fall*, *supra* note 130, at 480.

from 1984 through 1992, there were 110 public sector strikes in Ohio, seven of which were illegal.¹⁴¹ In contrast, in the years before the law was passed, from 1974-1979 (obviously, a shorter time period), there were 286 strikes, all illegal.¹⁴² This law has continued to inhibit strikes to the present time. From 1993-99, there were only fifty public sector strikes in Ohio.¹⁴³ From 2000-2010, there were only forty-three.¹⁴⁴

How could this be? It is because Ohio's law provides various procedures that unions and employers must go through before a union can legally strike, procedures designed to bring the parties to an agreement before the strike. Specifically, in Ohio, for those employees who can strike (notably, police, fire, and corrections workers may not), before they may strike, they must go through a series of procedures. The Ohio statute sets out a "default" procedure the parties must use at impasse, although it also permits the parties to jointly agree to alternate procedures.¹⁴⁵ The procedures are designed to bring the parties together, and thus to avoid strikes.¹⁴⁶

Specifically, under the default procedure, before striking the parties must first go through mediation.¹⁴⁷ If that fails, they must go through a fact-finding process.¹⁴⁸ No later than seven days after the fact-finder's findings and recommendations are sent to the parties, the parties must each decide whether to accept or reject the recommendations, and rejection requires a super-majority vote: a three-fifths vote of the legislative body and the union.¹⁴⁹ If neither side rejects the recommendations, the recommendations are deemed agreed upon.¹⁵⁰ If one or both sides reject the recommendations, SERB "shall publicize the findings of fact and recommendations of the fact-finding panel"¹⁵¹ – a rule clearly designed to allow public pressure to work on one or both sides, again with the aim of bringing the parties together and avoiding a

141. *Rise and Fall*, *supra* note 130, at 480.

142. See Martin Malin, *Public Employees' Right to Strike: Law and Experience*, 26 MICH. J. OF L. REF. 313, 364 tbl.3 (1993).

143. *Rise and Fall*, *supra* note 130, at 481.

144. *Id.* (citing PHILIP STEVENS, BENEFITS OF BARGAINING: HOW PUBLIC SECTOR NEGOTIATIONS IMPROVE OHIO COMMUNITIES 8 (2011), available at <http://www.policymattersohio.org/BenefitsofBargaining.htm>).

145. § 4117.14(C), (E).

146. Bureau of Mediation, OHIO STATE EMP'T RELATIONS BD., www.serb.state.oh.us/sections/mediation.

147. § 4117.14(C)(2).

148. § 4117.14(C)(3).

149. § 4117.14(C)(6)(a).

150. *Id.*

151. *Id.*

strike. Finally, if the parties cannot reach agreement within seven days after such publication, then public employees who are allowed to strike may legally strike, but even then only after giving ten days' notice.¹⁵²

These sorts of processes have reduced strikes not just in Ohio but in other states as well. Studies have found that strikes were most likely to occur in states without a bargaining law and least likely to occur in states with a bargaining law that provided for binding interest arbitration.¹⁵³ In sum, one lesson of the past thirty years is that laws that provide reasonable and fair ways to settle bargaining impasses – *e.g.*, binding interest arbitration, but also strikes – often produce more labor peace than states without such laws.

IV. EBBS AND FLOWS IN THE 1990S AND AUGHTS

Even before 2011, public-sector labor law at the state level was subject to shifting political tides.¹⁵⁴ Some states limited public-sector bargaining rights in the 1990s, especially for teachers' unions. For example, in 1994, Michigan enacted some significant limits on bargaining for teachers.¹⁵⁵ The law as amended restricted the scope of bargaining, barring negotiations on, among other things, the starting day of the school term, the amount of required pupil contact time, decisions to operate charter schools, and contracting out noninstructional services.¹⁵⁶ The law also imposed much stiffer penalties for illegal strikes.¹⁵⁷ Also in the 1990s, Oregon added restrictions on the scope of bargaining for teachers, excluding, among other things, the topics of class size, the school calendar, teacher evaluation criteria, school curriculum, dress and personal conduct codes for school personnel, and student discipline.¹⁵⁸

Further, in 1993, Wisconsin enacted the "Qualified Economic Offer" (QEO) rule.¹⁵⁹ Under this rule, if a school district's wage offer met a prescribed formula, it effectively could not be negotiated to a

152. § 4117.14(D).

153. See Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May be the Worst Legislation*, 37 J. L. & ECON. 519, 538 (1994).

154. See Martin Malin, *The Upheaval in the Public Sector: A Search for Common Elements*, 27 ABA J. LAB. & EMP. LAW 149 (2012) [hereinafter *Upheaval in the Public-Sector*].

155. *Id.* at 151.

156. *See id.*

157. *See id.*

158. *See id.*

159. *Id.*

higher level.¹⁶⁰ Ohio prohibited bargaining on state university faculty workloads.¹⁶¹ In 1995, the Chicago School Reform Act also limited the scope of bargaining, barring the Chicago Public Schools and the City Colleges of Chicago from bargaining over not just the decisions but also the impact of decisions regarding, among other things, charter school proposals, subcontracting, layoffs and reductions in force, class size, class staffing, class schedules, the academic calendar, pupil assignment policies, and the use of technology.¹⁶²

In 1998, Pennsylvania enacted Act 46 which provided that if the Philadelphia school system was found to be in financial distress, the scope of bargaining would be greatly restricted.¹⁶³ For example, subcontracting, RIFs, staffing patterns, assignments, class schedules, the school calendar, pupil assessment, teacher preparation time, charter schools, and the use of technology could not be bargained.¹⁶⁴

Finally, the entire New Mexico Public Employee Labor Relations Act was allowed to “sunset” in 1999.¹⁶⁵

Still, in the early twenty first century, some states reversed course and began expanding public sector bargaining rights. Illinois amended the Chicago School Reform Act such that what were formerly illegal subjects of bargaining now became permissive subjects (meaning that while the employer and union were not required to bargaining about the topics, they were legally allowed to do so).¹⁶⁶ Also, the amendments reduced the minimum number of workers required for statutory coverage, and instituted interest arbitration for first contracts of bargaining units of thirty-five or fewer employees.¹⁶⁷

Wisconsin repealed the QEO rule.¹⁶⁸ The state also gave collective bargaining rights to state university faculty and research assistants, and expanded topics of bargaining.¹⁶⁹ For example, teacher preparation time and changes to teacher evaluation rules became mandatory topics.¹⁷⁰

160. *Id.*

161. *See* Cent. State Univ. v. Am. Ass’n of Univ. Professors, 526 U.S. 124, 125 (1999) (rejecting an equal protection challenge to the statute).

162. *Upheaval in the Public- Sector*, *supra* note 154, at 151; Ill. Pub. Act 89-15 § 10 (codified at 115 ILL. COMP. STAT. ANN. 5/4.5 (West 2011)).

163. *Upheaval in the Public- Sector*, *supra* note 154, at 151.

164. *Id.*

165. *Id.*

166. *Id.*; Ill. Pub. Act 93-3 §10

167. *Upheaval in the Public- Sector*, *supra* note 154, at 152; Ill. Pub. Act 93-3 (codified at 115 ILL. COMP. STAT. ANN. 5/4.5 (West 2011)) (effective Apr. 16, 2003).

168. *Upheaval in the Public- Sector*, *supra* note 154, at 152.

169. *Id.*

170. *Id.*

In 2003, New Mexico enacted a collective bargaining statute for public workers, replacing the law that had “sunset” a few years earlier with an even stronger law.¹⁷¹ In 2004, Oklahoma extended collective bargaining rights to employees of municipalities with populations of 35,000 or more.¹⁷²

Perhaps most interestingly, a number of states adopted mandatory “card check” recognition rules.¹⁷³ Under such rules, if a union supplies an employer with cards requesting a specific union represent employees, and is signed by a majority of the members of an appropriate bargaining unit (and such cards are not the product of coercion or fraud), the employer must recognize the union.¹⁷⁴ This is a more “union-friendly” rule than that which exists in the private sector and in the majority of public-sector jurisdictions, where an employer may voluntarily recognize a union based on a “majority card” showing, but is not required to do so.¹⁷⁵ Nonetheless, Illinois, New Jersey, Oregon, New Hampshire, California and Massachusetts all adopted mandated card check recognition in their public-sector statutes in the “aughts.”¹⁷⁶

Also, a number of states granted collective bargaining rights to home health care aides and in-home daycare providers (in part, by specifying that the state was the employer).¹⁷⁷

On the other hand, there was some movement in the other direction in the aughts. In 2004, governors of Indiana and Missouri withdrew executive orders permitting state employees to bargain collectively.¹⁷⁸ Also, President Bush took a number of aggressive actions against federal sector unions, including stripping collective bargaining rights from employees in various agencies. For example, Executive Order 13252 took away such rights from employees of five sections of the

171. *Id.*

172. *Id.*

173. Timothy Chandler & Rafael Gely, *Card-Credit Laws and Public-Sector Union Membership in the States*, 36 LAB. STUD. J. 446, 446 (Dec. 2011).

174. *Id.*

175. *See id.* at 446-47.

176. *Id.* at 446; *Upheaval in the Public-Sector*, *supra* note 154, at 152.

177. *Upheaval in the Public-Sector*, *supra* note 154, at 152; Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1403-04 (2008).

178. Martin Malin, *The Paradox of Public-Sector Labor Law*, 84 IND. L. J. 1369, 1369 (2009) [hereinafter *Paradox of Public-Sector*]. In Indiana, Governor Evan Bayh had issued Executive Order 90-6 (1990), which gave collective bargaining rights to state employees. In 2005, on his first day in office, Governor Mitch Daniels, revoked this Executive Order. Martin Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 35 COMP. LAB. L. & POL’Y. J. 277, 290-91, n. 72 (2008) [hereinafter *Public Employee Collective Bargaining*].

Department of Justice.¹⁷⁹ More famously, the Bush administration barred collective bargaining for employees of the Transportation Security Administration, and attempted to nearly eliminate such rights for employees at the new Department of Homeland Security (DHS) and the Department of Defense (DoD).¹⁸⁰ The regulations governing the DHS were struck down, but the regulations covering the DoD were upheld.¹⁸¹

Another significant event in this decade occurred in Missouri in 2007, when the Missouri Supreme Court reversed prior precedent and held that public employees have a right under the Missouri State Constitution to bargain collectively.¹⁸² Specifically, the court held that a clause added to the state Constitution in 1945 stating “employees shall have the right to organize and to bargain collectively through representatives of their own choosing” applies to public employees, reversing a 1947 decision by the same court that had held the opposite.¹⁸³

This has led to some confusion over what specific rights employees have. Missouri does have a limited public-sector labor statute, but it excludes significant categories of public employees (notably, police and teachers).¹⁸⁴ Thus, the *Independence* case meant that a large number of public workers in Missouri now have the right to bargain collectively, but only under the state Constitution. And the contours of this right remain unclear. The Constitution does not provide any language beyond what is quoted above; the state legislature has not passed a statute attempting to enact the right; and Missouri courts have only begun to try to define the rights and obligations of the parties.

Some interesting developments have already taken place. For example, in *Springfield Nat’l Educ. Ass’n v. Sch. Dist. Of Springfield*,¹⁸⁵ the local school board created a system for union recognition that

179. 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, 316 (2004) [hereinafter *Homeland Security vs. Workers Rights?*].

180. See *id.* at 297.

181. Nat’l Treasury Emp. Union v. Chertoff, 452 F.3d 839, 844 (D.C. Cir. 2006) (invalidating DHS regulations); AFGE v. Gates, 486 F.3d 1316, 1319 (D.C. Cir. 2007) (upholding DoD regulations).

182. Joseph Slater, *Public-Sector Labor Law in Age of Obama*, 87 IND. L. J. 189, 225 (2012) [hereinafter *Age of Obama*].

183. *Independence-Nat’l Educ. Ass’n v. Independence Sch. Dist.*, 223 S.W.3d 131, 142 (Mo. 2007) (Price, J., concurring in part and dissenting in part), *rev’d*, 206 S.W.2d 539 (Mo. 1947).

184. *Id.* at 143.

185. *Springfield Nat’l Educ. Ass’n v. Sch. Dist. of Springfield*, No. 0931-CV08322, (Cir. Ct. Greene County Sept. 10, 2009).

potentially allowed multiple unions to represent the same group of teachers at the same time. The school board provided no explanation of how this would work if the different unions had inconsistent goals or strategies.¹⁸⁶ The *Springfield* court held that this was permitted, relying largely on a dictionary definition of “collective bargaining” that defined that term as “negotiation . . . between an employer or group of employers on one side and a union or number of unions on the other.”¹⁸⁷ I have criticized this reasoning elsewhere, and noted that it was not appealed because, after this decision, the affected teachers chose a “one union representative” model instead.¹⁸⁸ Still, the potential for a public employer in Missouri to use such a system remains.

In November 2012, the Missouri Supreme Court decided two more cases on this Constitutional provision. In *Eastern Missouri Coalition of Police, Fraternal Order of Police Lodge 15, City of Chesterfield v. City of Chesterfield*,¹⁸⁹ the court held that the provision imposes a duty on each city to bargain with unions, but cities were not required to set up any specific type of framework for collective bargaining.¹⁹⁰ Cities must create their own procedures, the court explained, consistent with the state constitution.¹⁹¹

In the companion case, *American Federation of Teachers v. Ledbetter*,¹⁹² the court held that the provision requires public employers to meet and confer with the union in good faith, with a present intention to reach an agreement.¹⁹³ This is a somewhat tricky issue in Missouri, as the Missouri public-sector statute does not require full-blown “bargaining in good faith” but rather only a duty to “meet and confer” (a somewhat lesser standard).¹⁹⁴ The court described its holding regarding the standard under the state constitution as follows:

The course of a negotiation between parties acting in good faith should reflect that both parties sincerely undertook to reach an agreement. While there is an inherent tension between the duty to bargain with a serious attempt to resolve differences and the employer’s freedom to

186. *Id.* at *12-13.

187. *Id.* at *14.

188. *See Age of Obama*, *supra* note 182, at 226-27.

189. *E. Missouri Coal. of Police v. City of Chesterfield*, 386 S.W.3d 755 (Mo. 2012).

190. *Id.* at 764.

191. *Id.* at 760.

192. *Am. Fed’n of Teachers v. Ledbetter*, 387 S.W.3d 360 (Mo. 2012).

193. *Id.* at 367.

194. *Id.* at 363. For a discussion of this lesser standard, *see* MALIN, HODGES & SLATER, *supra* note 13, at 457-554.

reject any proposal, this tension serves to strike the balance intended by the voters of Missouri in their adoption of article I, section 29.¹⁹⁵

What, precisely, that means, and how other aspects of collective bargaining should work under the Missouri Constitution may be a good topic for discussion in a similar edition of this journal in the future, because it may take decades to resolve. In any event, while the extent of this right remains to be developed, this can be filed under the “positives” column for public-sector unions in the aughts.

In sum, public sector labor law has long been subject to changes. Nothing, however, prepared those in the field for what was going to happen in 2011.

V. 2011 AND AFTER

In 2011, an unprecedented number of states enacted laws limiting or eliminating public sector bargaining rights. Such moves took place in Wisconsin, Ohio, Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, and Tennessee. Others and I have listed the details of these changes elsewhere.¹⁹⁶ Thus, I will just cover the highlights below.

Wisconsin's Act 10 practically eliminated collective bargaining for all public employees except for “public safety” employees, who were exempted from the Act.¹⁹⁷ Among other things, it eliminated collective bargaining rights entirely for some employees, including those of the University of Wisconsin (UW) system.¹⁹⁸ For other, non-safety employees, it limited the scope of bargaining to the single issue of bargaining over total base wages, and even for that issue, no increase could be greater than the percentage increase in the consumer price index.¹⁹⁹ It made the state a “right-to-work” jurisdiction.²⁰⁰ Further, the law makes it illegal for an employer to agree to automatic dues deduction, even for employees who voluntarily wish to pay dues. It also limits the duration of collective bargaining agreements to one year.²⁰¹

195. 387 S.W.3d at 367.

196. See, e.g., *Age of Obama*, *supra* note 182, at 203-12; *Upheaval in the Public-Sector*, *supra* note 154, at 149-50.

197. See *Age of Obama*, *supra* note 182, at 203-05.

198. *Id.* at 204.

199. *Id.*

200. *Id.*

201. See *id.*; see also Paul Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. L. 293, 293-94 (2012) (discussing the background of Act 10).

Act 10 also requires an unprecedented mandatory recertification system under which every union must face a recertification election every year, and the union is recertified only if “51 percent of the employees in the collective bargaining unit – not merely those voting – voted for recertification.”²⁰² So, “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 percent of 400).”²⁰³

Under the previous law, like almost all labor laws in the U.S., a request “from 30 percent 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 that there had to be a ‘window period’ every three years allowing a decertification election), and the majority of those voting determined the outcome.”²⁰⁴

In the spring of 2012, a federal district court upheld most of Act 10, but enjoined the recertification provision and the bar on dues check-off on both equal protection and First Amendment grounds.²⁰⁵ The court found no rational basis for distinguishing between “protective occupations” and other public employees for these purposes, at least none that did not offend the First Amendment (the court noted that those exempted from Act 10 disproportionately supported Scott Walker in the 2010 election).²⁰⁶

However, the Seventh Circuit reversed this decision and upheld Act 10 in full.²⁰⁷ The court noted that while all five public-sector unions that had endorsed Governor Walker’s candidacy in 2010 were excluded from Act 10 as “public safety unions,” some of the other excluded unions had not endorsed Governor Walker.²⁰⁸ The court added:

Admittedly, the Unions do offer some evidence of viewpoint discrimination in the words of then-Senate Majority Leader Scott Fitzgerald suggesting Act 10, by limiting unions’ fundraising capacity, would make it more difficult for President Obama to carry Wisconsin in the 2012 presidential election. While Senator Fitzgerald’s statement may not reflect the highest of intentions, his sentiments do not invalidate an otherwise constitutional, viewpoint neutral law.

202. *Age of Obama*, *supra* note 182, at 204.

203. *Id.*

204. *Id.*

205. *Wisconsin Educ. Ass’n Council v. Walker*, 824 F.Supp.2d 856, 859 (W.D.Wis. 2012).

206. *Id.* at 860, 867.

207. *Wisconsin Educ. Ass’n Council v. Walker*, 705 F.3d 640, 642 (7th Cir. 2013).

208. *See id.* at 643.

Consequently, Act 10's prohibition on payroll dues deduction does not violate the First Amendment.²⁰⁹

The Seventh Circuit further held that the distinctions Act 10 makes between "public safety" and other public-sector unions survive rational basis scrutiny.²¹⁰ The court deemed the State's argument sufficient which stated that if public safety officers were denied the rights Act 10 denies most public-sector unions, public safety officers might strike.²¹¹ Litigation continues, however, in Wisconsin state courts, where a lower court has enjoined certain provisions of Act 10 and an appellate court has refused to stay the injunction.²¹²

Those familiar with the history can wonder at the irony. In the decade leading up to the enactment of the Wisconsin law in 1959, one of the biggest obstacles to passing such a law was the argument by opponents of union rights that police should not have collective bargaining rights.²¹³ In 2011, when the Wisconsin law was gutted, opponents of union rights argued that *only* police and closely-related types of employees should have such rights.²¹⁴

In Ohio, a fairly similar statute, SB-5, was enacted but then voided by a voter referendum.²¹⁵ Among other things, SB-5 would have eliminated collective bargaining rights for some employees, including at least most college and university faculty and lower level supervisors in police and fire departments.²¹⁶ For other employees, SB-5 would have eliminated both the right to strike for those who have that right and would have eliminated the right to binding interest arbitration for employees who cannot strike.²¹⁷ Instead, the parties would have had only mediation and fact-finding, and if those did not lead to an agreement, the public employer could have simply chosen its own final offer.²¹⁸ SB-5 also would have imposed "right to work" rules, and it

209. *Id.* at 645.

210. *Id.* at 653.

211. *See id.* at 656.

212. Order denying motion for relief pending appeal, *Madison Teachers Inc. v. Walker*, No. 2012AP2067 (Wis. Ct. App. Mar. 12, 2013); *See Court Declines to Stay Ruling Voiding Wisconsin's Collective Bargaining Law*, 11 WLR (BNA) 375 (Mar. 15, 2013).

213. *See* PUBLIC WORKERS, *supra* note 19, ch. 6.

214. *See* Carl Horowitz, *State Judge Guts Wisconsin Public Employees Union Curbs; AG Files Appeal*, NAT'L LEGAL & POL'Y CENTER (Sept. 19, 2012), <http://nlpc.org/stories/2012/09/19/state-judge-guts-wisconsin-public-employees-union-curbs>.

215. *See Rise and Fall*, *supra* note 130, at 473.

216. *Id.* at 487.

217. *See id.* at 487-88.

218. *See id.*

would have greatly restricted the scope of bargaining.²¹⁹

Ohio was one of the few “victories” for public sector unions in the past few years (if one counts returning to the *status quo ante* as a victory, which, in context, one probably should). Again, nine additional states passed laws restricting the elimination of collective bargaining.²²⁰

One other state, Idaho, passed and then repealed such legislation. In 2011, Idaho enacted SB 1108, which limited such collective bargaining for teachers to “compensation” (defined, essentially, as wages and benefits), limited the duration of collective bargaining agreements to one year, and eliminated the requirement of fact-finding (only mediation remained).²²¹ However, in the November, 2012 elections, in three ballot proposals, Idaho voters rejected the changes made by SB 1108.²²² Highlights from other state laws include the following. Illinois limited subjects of bargaining for teachers and made it more difficult for teachers, especially Chicago teachers, to strike (requiring authorization from 75 percent of the bargaining unit).²²³ Indiana and Michigan also limited the scope of bargaining for teachers in their state laws.²²⁴ Michigan, in addition, enacted the Local Government and School District Fiscal Accountability Act, which allows the governor to appoint an “emergency manager” for local governments; the manager can reject or modify any terms of contracts with public-sector unions.²²⁵ New Hampshire repealed its 2007 law that provided for mandatory card check recognition.²²⁶ Oklahoma repealed its 2004 law that required cities with populations of at least 35,000 to bargain collectively with unions.²²⁷ Tennessee repealed its 1974 law that

219. See *id.* at 486.

220. See *supra* Part I.

221. See *Age of Obama*, *supra* note 182, at 208; See also *Upheaval in Public-Sector*, *supra* note 154, at 158, 160 (detailing these and other laws of 2011).

222. See Amy Linn, *Idaho Voters Say No to GOP-Backed School Overhaul, Anti-Union Measure*, 50 Gov’t Empl. Rel. Rep. (BNA Online) 1402 (Nov. 20, 2012).

223. See Elizabeth G. Olson, *Chicago Teachers’ Strike: Everybody Wins, Really?*, FORTUNE (Sept. 20, 2012, 4:36 PM), <http://management.fortune.cnn.com/2012/09/20/chicago-teachers-strike-everybody-wins-really/>.

224. See *New Laws Relating to Collective Bargaining And Benefits in the Public Sector*, AMERICAN BAR ASS’N (Aug. 15, 2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/149_authcheckdam.pdf [hereinafter *New Laws in Public Sector*].

225. See CITIZENS RESEARCH COUNCIL OF MICH., THE LOCAL GOVERNMENT AND SCHOOL DISTRICT FISCAL ACCOUNTABILITY ACT (Apr. 2011), available at <http://www.gomasa.org/news/crc-analyzes-local-government-and-school-district-fiscal-accountability-act>.

226. See *New Laws in the Public Sector*, *supra* note 224.

227. See *id.*

authorized collective bargaining for teachers and replaced it with a unique “collaborative conferencing” system in which teachers will be represented by any group that receives at least 15 percent or more of votes in a confidential poll (as opposed to being represented by an exclusive, majority representative).²²⁸ This may or may not matter much, given that the scope of bargaining under the new Tennessee is extremely narrow, and there is no impasse dispute mechanism.²²⁹

Battles over legal rules affecting public sector unions continue. In 2012 and early 2013, a number of states have passed or proposed legislation limiting or eliminating the use of dues check-off for public-sector unions.²³⁰ Some of these laws involve complete bans on dues check-off, some on payroll deductions for political purposes only.²³¹ Some of these laws apply to all unions, some only to certain unions.²³² Legal challenges to these rules have met with mixed success in lower courts.²³³ Such laws are more vulnerable to challenges when they appear to distinguish among unions for politically-motivated purposes, but the law in this area remains unsettled.²³⁴

On the other hand, in a rare piece of good news for public employees in the past year or so, the Obama administration granted TSA employees some limited collective bargaining rights, and they have successfully negotiated a contract.²³⁵

Thus, public-sector labor law is still changing rather dramatically (evolving or regressing, depending on one’s perspective). The present and future, as well as the past, are unsettled.

VI. POLICY AND PRACTICAL CONCERNS

What has caused this volatility? The most cynical and perhaps obvious answer probably has the most explanatory power: partisan politics. It is no coincidence that Wisconsin unions won the state collective bargaining law only after Republicans lost control of state

228. *See id.*

229. *See Age of Obama*, *supra* note 182, at 211-12.

230. *See Ann Hodges, Maintaining Union Resources in an Era of Public Sector Bargaining Retrenchment*, 16 EMP. RTS. & EMP. POL’Y J. 599, 603-604 (2012).

231. *Id.*

232. *Id.*

233. *Id.* at 609-11.

234. *Id.* at 616.

235. *See Age of Obama*, *supra* note 182, at 221-22; Louis LaBrecque, *Airport Screeners Ratify First-Ever Contract With TSA; Includes New Performance System* 50 Gov’t Emp. Rel. Rep. (BNA) 1373 (Nov. 13, 2012).

government to the Democrats, and laws such as Wisconsin's Act 10 and Ohio's SB-5 could only be passed when the states' legislatures and executives were controlled by Republicans. Also, as the discussion of PATCO notes, the partisan split on labor unions in general became increasingly exacerbated in beginning in the 1980s.

But other issues have come to the forefront in recent years. The most prominent arguments against collective bargaining in the public sector are the notions that public sector workers are "overpaid" relative to private sector workers, and a revamping of older claims that public-sector unions improperly interfere with democracy by giving unions "two bites of the apple" on public-policy issues: lobbying and bargaining.

A. Pocket-Book Issues: The Question of Public Employee Pay

Especially at the height of the recent recession, it was common to stir up resentment against public sector unions with claims that these employees were overpaid. I have also discussed this issue in detail elsewhere.²³⁶

In sum, while there are some dissenting voices, a majority of studies on this issue have found that public workers on the whole are paid somewhat less than comparable private sector.²³⁷ Almost all studies agree that at the bottom of the pay scale, public workers are somewhat better compensated, while at the upper end, private sector workers are paid more.²³⁸ Most studies agree that public workers generally receive less in take home pay than analogous private workers, but that public workers generally receive greater compensation in benefits.²³⁹ Most of the disagreements, therefore, are about employees in the middle of the pay scale.²⁴⁰

Important issues and methodological differences include how to calculate the value (and current cost) of future benefits; what employees are comparable (e.g., the extent to which age, education and other factors matter, given that public employees are generally older and better educated); how to compare certain types of jobs across sectors

236. For a discussion of various pay studies, see Joseph Slater & Elijah Welenc, *Are Public-Sector Employees "Overpaid" Relative to Private-Sector Employees? An Overview of the Studies*, 53 WASHBURN L. REV. (forthcoming 2013).

237. *Id.* (manuscript at 2).

238. *Id.*

239. *Id.*

240. *Id.*

(especially given that some public sector jobs, like police and firefighting, have no private-sector equivalents); and whether to assign value to “job security” for government employees (and if so, how much).²⁴¹ Still, again, the majority of these studies to not support the “public workers are overpaid!” arguments made in support of anti-union legislation.

Further, when considering how policy should be made, one should also understand that, in the overwhelming majority of jurisdictions (including Ohio and Wisconsin), public-sector pension benefit formulas are *not* legal subjects of collective bargaining. Rather, they are almost always set by a separate statute governing pensions, and, in almost all public-sector jurisdictions, pension formulas cannot be changed through collective bargaining.²⁴² This is one important way in which the public sector typically differs from the private sector. Similarly, even if one were to value “job security” as the compensation of public employees, most such employees have “just cause” discharge protection not just from union contracts, but also from civil service and teacher tenure laws.²⁴³ “In short, even the minority position that public sector workers are “overpaid” does not necessarily lead to the conclusion that collective bargaining rights should be [eviscerated]”.²⁴⁴ Indeed, it would be more logical to amend public sector pension formulas, as the vast majority of states have in the recent past.²⁴⁵

B. Theory: Back to Wellington & Winter?

The more theoretical objection to public sector union rights is based on arguments dating from the 1972 book by Harry Wellington and Ralph Winter, *The Union and the Cities*.²⁴⁶ Two main parts of their thesis are: (1) politicians will, for self-interested political reasons, be unable to resist the demands of striking public-sector workers; and (2) collective bargaining gives public workers too much power through “two bites of the apple” (bargaining and lobbying).²⁴⁷ This thesis has recently been revived by opponents of public sector unions,²⁴⁸ and rebutted by those

241. *Id.*

242. *Age of Obama*, *supra* note 182, at 194.

243. MALIN, HODGES & SLATER, *supra* note 13, at 134-82.

244. Slater & Welenc, *supra* note 236 (manuscript 2-3).

245. *See Age of Obama*, *supra* note 182, at 197-98.

246. HARRY WELLINGTON & RALPH WINTER, JR., *THE UNIONS AND THE CITIES* (1971).

247. *Id.*; *see* Michael Gottesman, *Wellington's Labors*, 45 N.Y.L. SCH. L. REV. 77, 79-83 (2001).

248. *See e.g.* John McGinnis & Maz Schanzenbach, *The Case Against Public Sector Unions*,

favoring public-sector collective bargaining rights.²⁴⁹

In short, the basic responses are, first, that history has shown that public-sector strikes are often unpopular and that politicians can and do effectively resist (and not infrequently, crush) them. In addition to the PATCO strike above, also consider the very unpopular (and unsuccessful) strike by New York transit workers in 2007. Many other examples exist.²⁵⁰ Thus, incentives for political leaders have often not been what Wellington and Winter predicted. Recall also the experiences in Ohio and elsewhere (discussed *supra*) where collective bargaining laws actually reduced the number of public employee strikes.

Second, limiting union influence on matters of public policy has long been accomplished by using appropriate scope of bargaining rules. Clyde Summers made this response to Wellington and Winter most famously in a 1987 article,²⁵¹ and essentially all public-sector labor laws adopt this approach as a matter of practice. Issues that are truly matters of public policy are not mandatory subjects in public-sector labor statutes.²⁵² To pick two examples, first, even before Act 10 in Wisconsin, the decision of whether to have a “year round” school schedule instead of the traditional summer break was held not to be a mandatory subject of negotiation.²⁵³ Second, a California case held that a police policy governing when police officers had authorization to discharge a firearm was not negotiable.²⁵⁴ Also, external statutes (*e.g.*, civil service rules and teacher tenure rules) often also make various topics that would be mandatory in the private sector non-negotiable in

POL’Y REV., no. 162 (Aug. 1, 2010), available at <http://www.hoover.org/publications/policy-review/article/43266>. *Rise and Fall*, *supra* note 130, at 499-500 (arguing that the theory used by Wellington and McGinnis does not accurately describe reality because public-sector employees are undercompensated compared to private-sector employees).

249. See *e.g.* Keefe, *supra* note 12, at 274; See also Martin Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL. J. (forthcoming 2013) (manuscript at 305) (on file with authors).

250. See Craig Olson, *Dispute Resolution in the Public Sector*, in PUBLIC SECTOR BARGAINING: INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES 160, 162 (Aaron, Najita & Stern eds., 2d ed. 1988).

251. See generally Clyde Summers, *Bargaining in the Government’s Business: Principles and Politics*, 18 U. TOL. L. REV. 265 (1987) (arguing that public employee bargaining process should be shaped to fit its special function).

252. MALIN, HODGES & SLATER, *supra* note 13, at 457-524 (discussing scope of bargaining rules in various states).

253. See *Racine Educ. Ass’n v. Racine Unified Sch. Dist.*, Dec. No. 27972-C (Wis. Emp’t Relations Comm’n Mar. 18, 1996), <http://www.wisbar.org/res/wercd/1996/27972-c.htm>; See also MALIN, HODGES & SLATER, *supra* note 13, at 486-490.

254. See *San Jose Peace Officers Ass’n v. City of San Jose*, 78 Cal.App.3d 935, 948 (1978).

the public sector.²⁵⁵ In short, if a subject is truly a matter of public policy, unions do not get “two bites of the apple” (lobbying and bargaining), because they are not permitted to bargain about it.

VII. CONCLUSION

Given that thirty years ago, public-sector unions had won the right to bargain collectively in the federal sector and in the clear majority of states, and given that union density rates in the public sector then through now have consistently stayed in the 35-40% range, law and policy in this area has remained contested and strangely unsettled. It would be unwise to bet against this continuing in coming decades. Statutes and executive orders granting or restricting and even eliminating collective bargaining rights will, in all likelihood, come and go in a number of states.

Of course, many states will maintain their public-sector bargaining laws, and a few will not seriously consider enacting one. But even in these states, battles will continue. Unions will continue to organize and be active even where they are not allowed to bargain collectively. As noted above and as shown in detail elsewhere, historically, public sector unions organized and acted to represent their members long before any law gave them the right to bargain collectively.²⁵⁶ Today, unions in states that lack collective bargaining rights are active and represent their members in a variety of ways. For example, Virginia prohibits public sector collective bargaining, and yet public sector union density in that state is more than 9 percent. Unions there and in North Carolina, which also bar all public-sector collective bargaining, represent their members in various legal fora, work on political campaigns, and do on-the-job training and other tasks.²⁵⁷ This will continue in the next thirty years.

Similarly, opponents of unions will seek restrictions on union rights and powers, even in states where the basic right to bargain collectively remains in place. Perhaps the most dramatic (and surprising) example of this came when Michigan became a “right-to-work” state in 2012.²⁵⁸

255. MALIN, HODGES & SLATER, *supra* note 13, at 529-50.

256. See PUBLIC WORKERS, *supra* note 19, 71-97 (introducing the history of public sector labor law before legalized collective bargaining)-

257. See Ann Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORN. J. L. & PUB. POL. 735, 748-49; see also Hodges & Warwick, *supra* note 16, at 275-76.

258. See Nora Macaluso, *Bills Speed Through Legislature to Make Michigan “Right-to-Work” State*, 50 Gov’t Empl. Rel. Rep. (BNA) 1485 (Dec. 11, 2012).

Some similar surprise will likely occur in the future. On the other hand, where unions have lost rights, they are likely to fight to regain them. As shown above, it took Wisconsin unions almost a decade to get the first public-sector labor law passed; they may spend another decade trying to put it back in place.

Ideally, one would hope for a robust, interesting, and productive debate on public-sector labor issues. This subject offers a wonderful opportunity for such a discussion for several reasons. Because many state public-sector labor laws differ in key (and arguably more minor) areas, one can compare, contrast, and learn from best practices and results. It is the classic laboratory of democracy. Further, it is interesting to consider not only which rules from the private sector should be imported to the public sector, but also – especially considering the greater success of unions in the public sector – to consider which rules from the public sector might improve private-sector law.

The challenge, however, will be to avoid using the rights of public employees and their representatives as a partisan football. Too often, in the past few years, the attacks on public-sector collective bargaining rights – and on public employees themselves – have seemed to have been motivated in large part by the desire of one political party to cripple a major supporter of the other political party. Of course it would be naive to think that this has not always been true to some extent (consider Wisconsin in 1959 as well as in 2011). But, perhaps beginning with PATCO, positions have hardened in the past thirty years.

It would be a shame if this continued into the next thirty. The rights of working people and their representatives, and the desire for effective, efficient government, should be bipartisan concerns. The extent to which those two goals are seen as conflicting will, in large part, determine the extent to which public-sector labor law remains unsettled in the future. For the record, I do not believe that these goals conflict.

