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The New York State Taylor Law: Does One Size Fit All?

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NOTE

THE NEW YORK STATE TAYLOR LAW: DOES ONE SIZE FIT ALL?

I. INTRODUCTION

Let's go back in time. Imagine you are a New York State public school teacher in the early 1950s, only a few decades ago.¹ You are underpaid and often moved around to other schools in a factory-style system where you have no right to bargain for better treatment.² You are not able to join together with other public school teachers in a union to fight for more acceptable conditions as a single unit.³ Although there is a federal law that protects employees in the private sector,⁴ there is not a comparable state or federal law to protect your rights as a public sector employee.⁵ You are at a standstill, and it is because collective bargaining and striking are prohibited in the public sector.⁶

Although private sector employees began to receive labor law protections in the 1930s,⁷ public sector employees did not receive many of these rights until almost thirty years later.⁸ There continued to be

1. See Sol Stern, *How Teachers' Unions Handcuff Schools*, CITY J. (1997), <https://www.city-journal.org/html/how-teachers'-unions-handcuff-schools-12102.html>.

2. *Id.*

3. Agustina S. Paglayan, *Here's the Real Reason Teachers Are Revolting in Red States*, WASH. POST (Apr. 2, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/02/heres-the-real-reason-teachers-are-revolting-in-red-states>.

4. *Which Employees Are Protected Under the NLRA?*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/resources/faq/nlr/which-employees-are-protected-under-nlra> (last visited May 18, 2020).

5. See Charles J. Russo, *Teachers Unions, the Right to Work, and Fair-Share Agreements*, 82 ASS'N OF SCH. BUS. OFFICIALS INT'L 37, 37 (Jan. 2016), http://www.naylornetwork.com/asbnwl/pdf/SBA_January_2016_Teachers_Unions_the_Right_to_Work_and_Fair-Share_Agreements.pdf.

6. See Paglayan, *supra* note 3.

7. See Laura J. Cooper, *A Research Guide to the Law of Private Sector Labor-Management Relations*, 79 U. MINN. L. LIBR. J. 387, 389-90 (1987).

8. M.E. Warner, *New York State Taylor Law: History*, CORNELL UNIV., <http://www.mildredwarner.org/gov-restructuring/special-projects/taylor-law> (last visited May 18, 2020).

restrictions on public school teachers' ability to strike,⁹ even as public sector employees began to receive the right to join a union and collectively bargain.¹⁰ Lawmakers in cities across the country slowly began passing laws designed with the goal of specifically protecting the rights of public sector employees, and many states followed suit.¹¹ Beginning with the state of Wisconsin in 1959,¹² various state legislatures passed labor laws to address the increasing need and desire for public sector collective bargaining, including the state of New York in 1967.¹³

In New York State, the Public Employees' Fair Employment Act, which is more commonly known as the Taylor Law, governs public sector employers and employees.¹⁴ Aside from banning strikes, and imposing a severe penalty on employees who do choose to strike, the Taylor Law also outlines a process for when a collective bargaining dispute between a public sector employer and employee occurs, resulting in negotiations at a standstill.¹⁵ The Taylor Law applies when a public sector employer and employee cannot reach an agreement during the collective bargaining process, thus creating an impasse.¹⁶

Currently, the Taylor Law has two distinct ways of handling an impasse that depends on whether the dispute is between a public employer and employee in the emergency service sector, or whether the conflict is between an employer and employee in the public education sector.¹⁷ While emergency workers, including police officers and

9. See generally Education Week Staff, *Teacher Strikes: 4 Common Questions*, EDUC. WK. (Mar. 13, 2018), <https://www.edweek.org/ew/issues/teacher-strike/index.html>.

10. Lawrence Mishel, *Evidence Shows Collective Bargaining—Especially with the Ability to Strike—Raises Teacher Pay*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 30, 2018, 1:41 PM), <https://www.epi.org/blog/evidence-shows-collective-bargaining-especially-with-the-ability-to-strike-raises-teacher-pay>.

11. Joseph A. McCartin, *What's Really Going on in Wisconsin?*, NEW REPUBLIC (Feb. 19, 2011), <https://newrepublic.com/article/83829/wisconsin-public-employees-walker-negotiate> (noting that New York City and Philadelphia were two of the first cities that enacted legislation recognizing public sector collective bargaining).

12. *Id.*

13. Tim Anderson, *Fight Over Future of Collective Bargaining Laws Has Just Begun*, COUNCIL ST. GOVERNMENTS (Apr. 7, 2011, 12:00 AM), <https://knowledgecenter.csg.org/kc/content/fight-over-future-collective-bargaining-laws-has-just-begun>; Warner, *supra* note 8.

14. Deidre McFadyen, *The History of the Taylor Law*, UNITED FED'N OF TCHRS. (June 9, 2005), web.archive.org/web/20110115100909/http://www.uft.org/labor-spotlight/history-taylor-law.

15. Arvid Anderson et al., *Impasse Resolution in Public Sector Collective Bargaining—An Examination of Compulsory Interest Arbitration in New York*, 51 ST. JOHN'S L. REV. 453, 454-55 (1977).

16. N.Y. CIV. SERV. LAW § 209(1) (McKinney 2020) (finding that an impasse “exist[s] if the parties fail to achieve agreement at least one hundred twenty days prior to the end of the fiscal year of the public employer”).

17. Jason A. Zwara, *Left in the Dark: How New York's Taylor Law Impairs Collective*

firefighters, are subject to final and binding arbitration when an impasse occurs, members of the public education sector are only given the voluntary option to attend arbitration, which is not final or binding on either party.¹⁸ The Taylor Law does not impose a sanction or penalty on employers or teachers' unions in the public education sector for not attending arbitration, or for failing to implement an arbitrator's decision if the parties do attend the currently non-binding and non-mandatory arbitration.¹⁹ Thus, if an impasse occurs and either party does not want to attend arbitration, or the parties do attend arbitration but do not implement the arbitrator's recommendation, the parties could potentially never reach a new agreement.²⁰

This Note argues that the Taylor Law, in enforcing binding arbitration on the emergency service sector and detailing a vague and complicated voluntary arbitration process for the public education sector, creates a grave inequality between two groups that in all other aspects must operate in the same way, under the same law.²¹ In its current form, the Taylor Law has a multitude of fundamental flaws that previously has, and still can, place segments of the public education sector into a so-called 'limbo' during collective bargaining negotiation disputes.²² Presently, the Taylor Law not only enforces an unfair procedure that the public education sector must follow, but it also effectively creates a sharp division among the public sector, in which public educators are deemed to provide non-essential services to the general public, even though over two and a half million New York public school students rely on these educators each day.²³

This Note begins with a brief discussion of the history of the National Labor Relations Act and the Taft-Hartley Act, two federal labor laws that are geared to the private sector.²⁴ Part II also examines the historical background of New York's Taylor Law and the Triborough

Bargaining, 31 HOFSTRA LAB. & EMP. L.J. 193, 235 (2013).

18. CIV. SERV. § 209(3); Robert F. Worth, *The Transit Showdown: The Taylor Law: A Powerful Tool to Use Against Striking Employees*, N.Y. TIMES (Dec. 13, 2002), <https://www.nytimes.com/2002/12/13/nyregion/transit-showdown-taylor-law-powerful-tool-use-against-striking-employees.html>.

19. Risa L. Lieberwitz et al., Panel: Public Sector Labor Relations in Higher Education: Distinctive Issues in Higher Education under the Taylor Law at "The Taylor Law at 50" New York State Bar Association Conference (May 10, 2018), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82425>.

20. *Id.*

21. Zwara, *supra* note 17, at 229; *see infra* Part III.

22. Anderson et al., *supra* note 15, at 459, 508.

23. *NY State Public School Enrollment*, N.Y. ST. EDUC. DEP'T, <https://data.nysed.gov/enrollment.php?year=2017&state=yes> (last visited May 18, 2020).

24. *See infra* Part II.A.

Amendment, which was passed in an attempt to resolve some of the Taylor Law's inherent flaws.²⁵ Part III discusses a relevant and significant collective bargaining dispute that occurred in Buffalo, New York, which directly represents the problem with the Taylor Law in its current form.²⁶ Additionally, Part III considers the implications of a very recent United States Supreme Court decision that has already minimized the power of public sector unions.²⁷ Part III of this Note also explains the underlying issues of the current impasse resolution procedure and provisions of the Taylor Law and the impact of the present non-binding and non-mandatory arbitration process on the public education sector.²⁸ Part IV discusses the public policy arguments in favor of and against amending the Taylor Law, and addresses how the proposed solution will solve a problem that has created inequality and unfairness for a large portion of the New York State public sector for over fifty years.²⁹ Part IV also examines how two other states have adopted legislation regarding the public sector's right to strike and collectively bargain, and describes how these states' labor laws can be used as models for and as a comparison with an amended Taylor Law in New York State.³⁰ Finally, Part IV proposes solving this issue by first removing section 209(3)(f) of the Taylor Law in full, and then amending section 209(4) of the Taylor Law to eliminate its current categorization between emergency workers and the public education sector by imposing a single collective bargaining dispute procedure, and creating a mandatory and binding arbitration process for the *entire* public sector.³¹

II. U.S. FEDERAL AND STATE LABOR LAWS: A BRIEF HISTORY

There has been immense development in the creation and expansion of labor laws over the past century.³² From the passage of the first national labor law, which was geared toward the private sector, to the passage of a multitude of state labor laws, which were geared toward the public sector in the following years, labor law has come a long way.³³ However, some state labor laws, including New York's Taylor

25. See *infra* Part II.B.

26. See *infra* Part III.A.

27. See *infra* Part III.B.

28. See *infra* Part III.C.

29. See *infra* Part IV.A.

30. See *infra* Part IV.B.1–2.

31. See *infra* Part IV.C.

32. See Graham Boone, *Labor Law Highlights, 1915-2015, Monthly Labor Review*, U.S. BUREAU OF LAB. STAT. (Oct. 2015), <https://doi.org/10.21916/mlr.2015.38>.

33. *Id.*

Law, can still be improved and should be amended to address and remedy the current inequality in the public sector collective bargaining arena.³⁴ First, this Part discusses the reasons the National Labor Relations Act was passed to benefit both private sector employers and employees.³⁵ This Part also discusses how this Act, along with the federal Taft-Hartley Act that was passed only a few years later, contributed to the rise of states' initiatives to pass their own labor laws that apply to the public sector.³⁶ Lastly, this Part describes the history of the Taylor Law, including how the Taylor Law defines the rights and limitations of public sector employees in New York, and examines why the Triborough Amendment was enacted by the New York legislature in an attempt to combat some of the Taylor Law's reoccurring faults.³⁷

A. Federal Labor Laws Lead the Way

Congress enacted the Wagner Act, also known as the National Labor Relations Act ("NLRA"), in 1935.³⁸ The NLRA was Congress' second attempt at creating a national labor law because the United States Supreme Court struck down Congress' first labor law, the National Industrial Recovery Act, only two years after it was enacted.³⁹ The NLRA, which similarly only covers the private sector, does not apply to public sector employers or employees.⁴⁰

The NLRA was designed to protect the rights of private sector employees.⁴¹ For example, under the NLRA, it is unlawful for an employer to discriminate against an employee for belonging to a union or engaging in union activities.⁴² The NLRA also grants private sector employees the right to strike and bargain collectively, which has led to

34. See generally Ken Girardin, *Senate Set to OK Union Trap Law*, EMPIRE CTR. (Jan. 12, 2018), <https://www.empirecenter.org/publications/senate-set-to-ok-union-trap-law> (discussing how even half a century after the Taylor Law was implemented to grant public unionization in New York, there is currently proposed legislation in New York State to amend the Taylor Law).

35. See *infra* Part II.A.

36. See *infra* Part II.A.

37. See *infra* Part II.B.

38. *Wagner Act*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Wagner-Act> (last updated Feb. 26, 2020).

39. Robert P. Hunter, *The National Labor Relations Act and the Growth of Organized Labor*, MACKINAC CTR. FOR PUB. POL'Y (Aug. 24, 1999), <https://www.mackinac.org/2306>. Although the National Industrial Recovery Act gave private sector employees the right to organize unions and collectively bargain, it did not provide for a mechanism to implement these rights. *Id.*

40. *Id.*

41. *National Labor Relations Act*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/resources/national-labor-relations-act-nlra> (last visited May 18, 2020).

42. *National Labor Relations Act (NLRA)*, EMP. L. HANDBOOK, <https://www.employmentlawhandbook.com/federal-employment-and-labor-laws/nlra> (last visited May 18, 2020).

many of these employees actively seeking and obtaining union membership.⁴³ Additionally, the NLRA set up the National Labor Relations Board, an independent agency with the authority to enforce private sector employees' rights and resolve collective bargaining disputes through hearings and recommended orders.⁴⁴ In a close 5-to-4 decision in 1937,⁴⁵ the Supreme Court upheld the constitutionality of the NLRA, which spelled out a victory for private sector unions and laid the foundation for greater rights and protections for private sector employees.⁴⁶

Only a decade after the NLRA was declared constitutional,⁴⁷ Congress drafted the Labor Management Relations Act, more commonly known as the Taft-Hartley Act.⁴⁸ There was much speculation surrounding the idea that some members of Congress viewed unions as greedy under the NLRA, so they wanted to balance the powers of labor unions and employers by enacting a new law to curtail some of the unions' perceived power.⁴⁹ President Harry S. Truman, who was opposed to the passage of the Taft-Hartley Act, explained his veto of the bill as follows: "The bill taken as a whole would reverse the basic direction of our national labor policy. . . . It would contribute neither to industrial peace nor to economic stability and progress. . . . [T]he bill violates principles essential to our public welfare."⁵⁰ Congress nevertheless passed the Taft-Hartley Act in 1947, and as President

43. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 157, 163 (1947); Daniel Nelson, *What Happened to Organized Labor?*, AM. HERITAGE (Aug. 1999), <https://www.americanheritage.com/content/what-happened-organized-labor>. The NLRA forces employers to bargain in "good faith," and failure to do so constitutes an "unfair labor practice." *Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5))*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-section> (last visited May 18, 2020).

44. *The 1935 Passage of the Wagner Act*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> (last visited May 18, 2020).

45. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-34 (1937) (holding that the National Labor Relations Board ("NLRB") is constitutional under the Commerce Clause, and that the National Labor Relations Act is constitutional because it protects a fundamental right by safeguarding unions' ability to organize and bargain collectively). The Supreme Court also found that labor-management disputes are directly related to the flow of interstate commerce. *Id.*

46. See David Morris, *When Unions Are Strong, Americans Enjoy the Fruits of Their Labor*, INST. FOR LOC. SELF-RELIANCE (Mar. 31, 2011), <https://ilsr.org/when-unions-are-strong-americans-enjoy-the-fruits-of-their-labor>. Morris discusses that the Supreme Court's decision to uphold the NLRA was the "first time the Court supported a major New Deal law." *Id.*

47. *Id.*

48. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 141 (1952).

49. Nelson, *supra* note 43.

50. John Woolley & Gerhard Peters, *Harry S. Truman: Veto of the Taft-Hartley Labor Bill*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/veto-the-taft-hartley-labor-bill> (last visited May 18, 2020).

Truman feared, it weakened much of the progress made by the NLRA by restricting the activities and power of private labor unions.⁵¹ The Taft-Hartley Act permits states to prohibit or limit the agency shop and allows employees to refrain from participating in collective bargaining activities.⁵² In addition, the Taft-Hartley Act, like the NLRA, is a federal law that applies to only the private sector;⁵³ therefore, the Act does not provide protection for public sector employees.⁵⁴

B. The Taylor Law: The Background of New York State's Public Sector Labor Law

The culmination of many years of labor unrest in the public sector came to a head on New Year's Day in 1966, when a disastrous walkout by New York City transit workers grinded the City to a halt for almost two weeks.⁵⁵ The resulting economic losses totaled an estimated \$100 million for each day the transit workers were on strike.⁵⁶ For the twenty years prior to this massive and highly disruptive strike, the Condon-Wadlin Act governed the New York State public sector.⁵⁷ The Condon-Wadlin Act prohibited strikes, imposed harsh penalties on strikers, and did not provide alternative methods to resolve collective bargaining labor disputes.⁵⁸ Although the language of the Act made it clear that strikes were prohibited, the Act was viewed as rather weak, and ultimately, it was ineffective and did not have the power of deterring

51. *Id.*; Hunter, *supra* note 39.

52. Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 *FORDHAM L. REV.* 181, 182 n.12 (1987); see also Jay W. Waks, Comment, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 *CORNELL L. REV.* 547, 547 n.2 (1970) (defining the agency shop as an agreement between an employer and union where "no employee shall be forced to join or remain a member of a union as a condition of employment" and mandates that an employee who opts out of membership must pay the union a fee "for acting as his agent in collective bargaining and in the administration of the collective bargaining agreement").

53. See Colin Gordon, *The Legacy of Taft-Hartley*, *JACOBIN* (Dec. 19, 2017), <https://jacobinmag.com/2017/12/taft-hartley-unions-right-to-work>.

54. F. Vincent Vernuccio, *The State of Current Public Sector Labor Laws*, *MACKINAC CTR. FOR PUB. POL'Y* (June 2, 2015), <https://www.mackinac.org/21334>.

55. Angela M. Blassman et al., Panel: *The Triorborough Doctrine and Statute: A Catalyst or Hindrance to Harmonious Labor Relations?* at New York State Bar Association Conference: *The Taylor Law at 50* (May 10, 2018), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82098>.

56. *Id.*; Zwara, *supra* note 17, at 196.

57. Kristin Guild, *New York State Taylor Law: Negotiating to Avoid Strikes in the Public Sector*, *CORNELL UNIV.* (May 1998), <http://www.mildredwarner.org/gov-restructuring/special-projects/nys-civil-service>. The Condon-Wadlin Act, in effect from 1947 to 1967, was highly ineffective; public sector employees continued to strike—even though striking was prohibited—and the Act's harsh penalties were rarely applied. *Id.*

58. *Id.*

strikes.⁵⁹ Further, the Act did not provide any provisions or a method for workers to seek better working conditions.⁶⁰ As a result, labor unrest continued to grow and fester among the public sector.⁶¹ Once it became clear that a new state labor law to govern the public sector was necessary to combat the likelihood of a recurring crisis, work on a new public sector law began.⁶²

The Taylor Law was passed into New York law in 1967.⁶³ Unlike the state labor laws in some other states, the Taylor Law applies to all public sector employers and employees in New York State.⁶⁴ The drafters of the Taylor Law incorporated some provisions of the Condon-Wadlin Act, such as the prohibition of strikes, in which the Taylor Law authorizes the deduction of two day's pay for each day a public employee strikes.⁶⁵ However, unlike the Condon-Wadlin Act, the Taylor Law set up a procedure for addressing disputes that may arise during collective bargaining negotiations.⁶⁶

The Taylor Law also deviated from the Condon-Wadlin Act by creating the Public Employment Relations Board ("PERB"), which, among many other tasks, oversees the enforcement of the Taylor Law and issues determinations.⁶⁷ PERB is also charged with determining

59. Labor-Management Relations, N.Y. ST., https://www.dos.ny.gov/lg/handbook/html/labor_management_relations.html (last visited May 18, 2020).

60. *Id.*

61. *Id.* Although many bills were introduced in the New York State Legislature between 1960 and 1963, during the height of the push toward public sector workers' rights, none of the proposed bills were ultimately passed. *Id.*

62. E.J. McMahon, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws*, EMPIRE CTR. (Oct. 17, 2007), <https://www.empirecenter.org/publications/taylor-made-the-cost-and-consequences-of-new-yorks-public-sector-labor-laws>. The Taylor Committee originally acknowledged that some public service groups would be viewed as "more essential" than others but would not identify which group was being referred to by this statement. *Id.* The Committee did, however, admit that a strike by any state or local government worker would be damaging to the proper and "orderly functioning of the democratic form of representative government." *Id.* Prior to the passage of the Taylor Law, the Taylor Committee rejected compulsory arbitration as a tool to resolve an impasse. *Id.* Interestingly, in 1974, the New York State Legislature amended the Taylor Law to impose compulsory interest arbitration on certain public sector groups. Sean P. Beiter et al., *News & Updates: New York Renews Binding Arbitration for Three More Years*, GOLDBERG SEGALLA (July 19, 2013), <https://www.goldbergsegalla.com/resources/news-and-updates/new-york-renews-binding-arbitration-three-more-years>. Compulsory interest arbitration is now the mandatory, binding, and final arbitration procedure imposed on the public sector that is made up of emergency workers who perform essential services for the public. *See id.*

63. McMahon, *supra* note 62.

64. NAT'L PUB. EMP. LAB. REL. ASS'N, ACADEMY I: THE FOUNDATION OF LABOR RELATIONS 5, https://www.statenpelra.org/files/public/Academy/Resource%20Books/Academy%20Book%20I_final_2011.pdf (last visited May 18, 2020).

65. N.Y. CIV. SERV. LAW § 210 (McKinney 2020).

66. *Id.* § 209.

67. *Who We Are*, PUB. EMP. REL. BOARD (Oct. 2, 2018), <http://www.perb.ny.gov>. The Public

when an impasse exists and is tasked with initiating the Taylor Law's impasse mechanisms if an impasse arises.⁶⁸ One of PERB's earliest and most important decisions involved the collective bargaining and impasse procedures of the Taylor Law.⁶⁹

As more and more conflicts and collective bargaining disputes came before PERB, the New York State Legislature realized that an amendment to the Taylor Law was not only a request by public sector unions, but also essential to the successful operation of the Taylor Law.⁷⁰ In 1982, the Triborough Amendment was enacted with the understanding that as long as a public sector union does not violate the Taylor Law's no-strike provision, it is improper for an employer to deliberately "refuse to continue all the terms of an expired agreement until a new agreement is negotiated."⁷¹ The drafters of the Triborough Amendment believed that this new amendment was a solution to many of the Taylor Law's faults and would strengthen the Taylor Law overall by appeasing public sector unions and closing the loopholes associated with many employers' stalling of negotiations.⁷² However, even after the

Employment Relations Board ("PERB") is considered an agency, in addition to a board, that is required to provide impasse resolution services, as detailed further in the Taylor Law. *Id.*

68. Robert H. Platt, *Comparison of Impasse Procedures: The New York City Collective Bargaining Law and the New York State Taylor Law*, 9 FORDHAM URB. L.J. 1039, 1044 (1981).

69. *Triborough Bridge & Tunnel Auth. v. Dist. Council 37 & Local 1396, Am. Fed'n of State, Cty., & Mun. Emps.*, 5 P.E.R.B. ¶¶ 3037, 3064-65 (1972) (holding "an employee organization which does not strike is entitled to the maintenance of the *status quo* during negotiations"). In this case, an issue arose from a collective bargaining dispute between the Triborough Bridge Authority and the transit workers' union. See Zwara, *supra* note 17, at 202. The Triborough Bridge Authority refused to continue the terms of the prior agreement and PERB ruled that this amounted to bad faith on the part of the employer because the most current agreement, even though it is expired, must remain in effect until a new agreement is reached. *Id.* at 202-03.

70. Richard E. Casagrande & Deborah A. Milham, *Why We Defend Triborough*, N.Y. ST. UNITED TCHRS. (Feb. 18, 2011), <https://www.nysut.org/news/nysut-united/issues/2011/march-2011/why-we-defend-triborough>. There were various amendments added to the Taylor Law between the enactment of the Law and 1982; however, the addition of the Triborough Amendment to the Taylor Law signaled one of the first significant changes to the Taylor Law that impacted the public education sector. *Id.* Since the passage of the Triborough Amendment to the Taylor Law, there has generally been little urgency from teachers to reach a deal on a new contract because the terms of the expired contract remain in effect until a new contract is ratified by both parties. See Glens Falls Post-Star, *Teacher Contracts Often Allowed to Expire*, EMPIRE CTR. (July 10, 2014), <https://www.empirecenter.org/publications/teacher-contracts-often-allowed-to-expire>.

71. CIV. SERV. § 209-a(1)(e). Under this provision, unless a public sector union engages in a strike, all of the provisions of the prior, expired, agreement stay in effect and remain applicable while a successor agreement is negotiated and until a new agreement is ultimately reached. Casagrande & Milham, *supra* note 70.

72. See Rosanne Mamo, *A Quick Lesson on the Taylor Law and Triborough Amendment*, SEWANHAKA FED'N OF TCHRS. (Nov. 2014), http://www.sft-nea.org/images/Update_11-14.pdf. The Triborough Amendment was enacted with the idea that it would increase labor harmony in the public sector and maintain the status quo so both parties were incentivized to negotiate in good faith. *Id.*

enactment and implementation of the Triborough Amendment, there are still fundamental flaws and deep-rooted issues with other provisions of the Taylor Law.⁷³

The fundamental problems of the Taylor Law go beyond its lack of final and binding arbitration for the public education sector; PERB has weakened over time and has not done enough to resolve collective bargaining disputes that arise in the public education sector.⁷⁴ This independent and neutral agency, made up of three members appointed by the Governor with the advice and consent of the Senate, is the first step toward reaching a resolution when there is an impasse.⁷⁵ As discussed in greater detail below,⁷⁶ if mediation and fact-finding are unsuccessful, the Taylor Law takes two different routes, through either mandatory and final arbitration, or a non-binding legislative hearing.⁷⁷ The route taken is completely contingent on the type of public sector employees and employers that are involved in the impasse.⁷⁸ Since New York is one of the United States' most heavily unionized states, amending the provisions and procedures of the Taylor Law would be a catalyst for change in other states and would be the start of increased fairness and equality for the public sector.⁷⁹

In its current form, the Taylor Law outlines two different procedures for resolving disputes that may arise in the course of

73. Zwara, *supra* note 17, at 212-13.

74. See Robert D. Helsby & Thomas E. Joyner, *Impact of the Taylor Law on Local Governments*, ACAD. OF POL. SCI., Dec. 1970, at 29, 29-30. Helsby and Joyner note that PERB, which was originally created to resolve collective bargaining disputes, has since been pushed to the sidelines in favor of the use of mediation procedures, and if needed, fact-finding boards that determine which issues are in dispute and propose potential solutions to these issues. *Id.*

75. CIV. SERV. § 205.

76. See *supra* text accompanying notes 63-70.

77. See *New York State Public Employees' Fair Employment Act—The Taylor Law*, N.Y. ST. GOVERNOR'S OFF. EMP. REL., <https://goer.ny.gov/new-york-state-public-employees-fair-employment-act-taylor-law> (last visited May 18, 2020).

78. See *id.*

79. Empire Ctr., *Hard Bargain: Panel*, YOUTUBE (July 17, 2018), https://www.youtube.com/watch?v=M0K6E9_r5o0. The moderator of the panel notes that members of the New York Police and Fire Retirement System are among the highest paid employees in New York's public sector when compared with public state and local government employees, as well as public education employees such as teachers. *Id.* In comparison, teachers in the New York State Teacher Retirement System, which currently has about 428,000 active and retired members, earn pensions of, in some cases, approximately half that of similarly situated retired police officers and firefighters. Joseph Spector, *School Pensions: Check out What New York Retirees Are Earning in Your District*, USA TODAY (Mar. 1, 2018, 9:42 AM), <https://www.democratandchronicle.com/story/news/politics/albany/2018/03/01/school-pensions-check-out-what-new-york-retirees-earning-your-district/379104002>; see Justin Moore, *Nearly 5,000 New York State Retirees Receiving \$100k or More in Pensions*, WKBW (Aug. 10, 2018, 5:41 PM), <https://www.wkbw.com/news/nearly-5000-new-york-state-retirees-receiving-100k-or-more-in-pensions>.

collective bargaining negotiations, depending on whether the employee is a worker who provides emergency services to the public, or the employee is a worker in the public education sector.⁸⁰ If an impasse occurs between a public employer and employees that provide essential services to the public, a mediator is appointed to try to resolve the dispute.⁸¹ If mediation is unsuccessful after fifteen days, a fact-finding board is next appointed with the power to make recommendations to resolve the issues.⁸² The arbitration panel is authorized to conduct a public hearing with the parties and take all necessary action to resolve the dispute in the best interests of the employees, the employer, and the general public.⁸³ The ultimate determination of the public arbitration panel is final and binding on both of the parties for a period determined by the panel.⁸⁴ The Taylor Law does specify, however, that the prescribed period is not to exceed two years from the termination date of any past collective bargaining agreement.⁸⁵

An impasse that occurs between a public school board and a public school employees' union takes a different approach under the Taylor Law's collective bargaining dispute procedure.⁸⁶ In this circumstance, the parties *may* attend mediation and have the opportunity to meet with a fact-finding board to explain their positions to potentially reach a solution on the disputed issues or terms of the proposed contract.⁸⁷ However, the parties are not subject to the same final and binding arbitration if the impasse continues over a period of time.⁸⁸ Rather, the public education sector is not mandated to participate in this type of arbitration.⁸⁹ Since the prescribed arbitration is both voluntary and not binding on either of the parties, the Taylor Law does not provide the public education sector with any guarantee of finality.⁹⁰ Additionally,

80. CIV. SERV. § 209. Emergency workers, such as police officers and firefighters, provide essential services to the public. See Kate Montgomery Swearingen, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining*, 44 COLUM. J.L. & SOC. PROBS. 513, 540-42 (2011). Essential services are defined as "those the interruption of which would endanger the life, personal safety or health of the whole or part of the population." *Manual on Collective Bargaining and Dispute Resolution in Public Service*, INT'L LABOUR OFF., 1, 139 (2011), https://www.ilo.org/wcms/p5/groups/public/---ed_dialogue/---sector/documents/instructionalmaterial/wcms_180600.pdf.

81. CIV. SERV. § 209(3).

82. *Id.* § 209(4)(b).

83. *Id.* § 209(4)(c)(v).

84. *Id.* § 209(4)(d)(vi).

85. *Id.*

86. See Mitchell H. Rubinstein, *Advisory Labor Arbitration Under New York Law: Does It Have a Place in Employment Law?*, 79 ST. JOHN'S L. REV. 419, 422-23 (2005).

87. CIV. SERV. § 209(3)(f).

88. *Id.*

89. *Id.* § 209.

90. Zwara, *supra* note 17, at 234-36.

because the Triborough Amendment provides for the status quo and does not impose any type of penalty or consequence on the parties for failing to reach an agreement on a new contract within a reasonable amount of time, there is often no sense of urgency to come to an agreement on a new contract and either party can avoid settling a contract with new terms for any variety of reasons, as long as the postponement of reaching a new agreement is done in “good faith.”⁹¹

III. THE UNFAIR CATEGORIZATION AND UNEQUAL PROCESS OF RESOLVING COLLECTIVE BARGAINING DISPUTES IN NEW YORK STATE

The lack of binding arbitration on the public education sector in New York is a problem—not only does this provision of the Taylor Law create a grave categorization and distinction between public sector employees, but it also puts the public education sector on an unequal playing field with other public sector workers.⁹² This Part explains the problem with the Taylor Law in its current form and examines how a law that all public sector employees have to adhere to, with the exception of one specific provision, creates unfair and unequal treatment for a select group of public sector workers.⁹³ This Part first discusses the circumstances surrounding a Buffalo, New York, school district dispute that clearly outlines the implicit legal issue with the lack of final and binding arbitration on the public education sector.⁹⁴ In addition, this Part examines a recent Supreme Court case that has limited the power of public sector unions, and explains how this decision not only negatively affects the public education sector in conjunction with the Taylor Law in its current form, but also presents the reason there must be a change—now.⁹⁵ Finally, this Part addresses how the lack of final and binding arbitration on the public education sector puts public school employers and employees at a potential standstill if the parties do not agree to attend arbitration or fail to follow the recommendation of the arbitrator if the parties do attend the presently voluntary arbitration.⁹⁶

91. See generally *The School Mandate Primer: A Guide to New York State Mandates Impacting Our School District*, CHAPPAQUA CENT. SCH. DISTRICT (Mar. 22, 2011), https://www.ccsd.ws/uploaded/CCSD/Board_of_Education/Meetings/Presentations/Presentation_2011-04-12_Draft_School_Mandate_Primer_with_Recommendations.pdf (arguing that the Triborough Amendment removes incentives to give concessions or bargain in good faith, creating an uneven playing field).

92. See Zwara, *supra* note 17, at 231-32.

93. See *infra* Part III.

94. See *infra* Part III.A.

95. See *infra* Part III.B.

96. See *infra* Part III.C.

A. *Buffalo, New York, Sets the Stage for a Series of Unfortunate Events*

The public school district and public teachers' union in Buffalo, New York, is just one model that can be used to represent the many ongoing problems associated with New York's Taylor Law.⁹⁷ As the second-most populous city in New York State, after New York City, the City of Buffalo, which encompasses Buffalo Public Schools,⁹⁸ is subject to enormous financial pressure when collectively bargaining and negotiating its public school teachers' contracts.⁹⁹ Due to the substantial problems with the Taylor Law in its current form, most specifically the lack of mandatory and binding arbitration, lengthy collective bargaining disputes between Buffalo Public Schools and the Buffalo public teachers' union, known as the Buffalo Teachers Federation, have occurred multiple times throughout the last three decades.¹⁰⁰

In 1989, for example, the Buffalo public school district's contract came up for negotiations, and the contract's contested provisions were not resolved until 2000—a full decade after negotiations first began.¹⁰¹ In the late 1980s, New York State public school funding was tight and the City of Buffalo was not in the financial position to increase teachers' salaries, which led to a collective bargaining dispute between the teachers' union and the Buffalo Public Schools.¹⁰² Following the Taylor Law's current provisions that outline the process of handling a collective bargaining dispute, PERB stepped in to suggest a solution.¹⁰³ Unfortunately, the Board's solution was essentially ineffective and useless, as neither party was willing to agree to the terms of the non-binding recommendation and no compromise could be reached at that time.¹⁰⁴ Eventually, after nearly a decade of collective bargaining

97. See Zwara, *supra* note 17, at 216-22.

98. See School Directory, BUFFALO PUB. SCHS., <https://www.buffaloschools.org/domain/35> (last visited May 18, 2020) (outlining the sixty-five public schools that encompass the Buffalo Public Schools).

99. Zwara, *supra* note 17, at 215-16; *Buffalo, New York Population 2020*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/buffalo-population> (last visited May 18, 2020) (estimating the population of the city of Buffalo to be slightly over a quarter of a million people in 2020). There are approximately 34,000 students currently attending a public school in the Buffalo School District. *About Us*, BUFF. PUB. SCHS., <https://www.buffaloschools.org/Page/33> (last visited May 18, 2020).

100. Zwara, *supra* note 17, at 216-22; see also Lise Bang-Jensen, *Teaching Without Contracts*, EMPIRE CTR. (Sept. 3, 2009), <https://www.empirecenter.org/publications/teaching-without-contracts> (noting that in 2009, the Buffalo School District, at an almost six-year collective bargaining impasse, was the New York public school district to go the longest without a contract in the state at that time).

101. Zwara, *supra* note 17, at 218.

102. *Id.* at 217-18.

103. *Id.*

104. *Id.* The Board suggested that the Buffalo Public Schools agree to a hefty salary increase

disputes, contested issues, and back-and-forth negotiations, a five-year contract took effect from 1999 to 2004, which provided teachers with back pay and a salary increase.¹⁰⁵

Like clockwork, the Buffalo Public Schools' contract expired in 2004, and negotiations, once again, reached a standstill.¹⁰⁶ Over the next twelve years, which would turn out to be one of the longest labor impasses between a public school district and a public teachers' union in New York State's history, little progress would be made to hammer out a new agreement to replace the Buffalo Public Schools' expired contract.¹⁰⁷ The Buffalo Public Schools and the Buffalo Teachers Federation spent over a year working to negotiate a new agreement before declaring an impasse in August 2005.¹⁰⁸ The parties attended mediation sessions for years, pursuant to the applicable provisions of the Taylor Law, but the mediation failed to produce a final settlement or resolution to the disputes between the parties.¹⁰⁹ A fact-finder was appointed in 2013, under a last-ditch effort to reach an agreement, as provided for in the Taylor Law.¹¹⁰ The fact-finder developed a list of proposals and recommendations for the Buffalo City School District and the Buffalo Teachers Federation to agree on in order to reach a settlement, but because the Taylor Law provides for nothing beyond a

for its public school teachers, but since this was a non-binding recommendation under the Taylor Law, the Buffalo Public Schools' Superintendent rejected the Board's recommendation, and the impasse continued. *Id.* at 218-19.

105. Darryl Campagna & Peter Simon, *Opening-Day Relief: Teachers Relent on Threat of Job Action*, BUFF. NEWS (Sept. 6, 2000), <https://buffalonews.com/2000/09/06/opening-day-relief-teachers-relent-on-threat-of-job-action>; *Master Contract July 1, 1999 Between the Buffalo Teachers*, CORNELL U., <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1381&context=perbcontracts> (last visited May 18, 2020).

106. See Ronald E. Kowalski, *Fact-Finding Report and Recommendations*, BUFF. TCHRS. FED'N 2, http://www.btfny.org/news/fact_finder_report.pdf (last visited May 18, 2020); Matt Smith, *Buffalo Teachers Protest Ruling, Contract Impasse*, N.Y. ST. UNITED TCHRS. (Dec. 20, 2015), <https://www.nysut.org/news/nysut-united/issues/2016/january-2016/buffalo-teachers-protest-ruling-contract-impasse>; Denisa R. Superville, *After Lengthy Impasse, Buffalo Teachers Seeking New Labor Pact*, EDUC. WK. (Oct. 11, 2016), <https://www.edweek.org/ew/articles/2016/10/12/after-lengthy-impasse-buffalo-teachers-seeking-new.html> (commenting that some of the controversial and disputed contractual issues between the Buffalo Public Schools' officials and Board of Education, and the nearly 3600 members of the Buffalo Teachers Federation, include wage increases, health-care contributions, and school day hours).

107. See Superville, *supra* note 106.

108. Kowalski, *supra* note 106, at 2.

109. *Id.*

110. *Id.* The fact-finder overseeing the Buffalo Public Schools' impasse commented on the purpose of a fact-finder during this final stage and described the fact-finder's responsibilities as, "to inquire into the causes and circumstances of the dispute and make recommendations to the parties for its settlement." *Id.* Many of the disputed issues brought before the fact-finder replicated the contested issues from the prior collective bargaining dispute: wages, health insurance, work hours, and back pay. *Id.* at 3.

fact-finder's non-binding recommendations at this stage,¹¹¹ the recommendations can be, and ultimately were, ignored.¹¹²

Finally, in October 2016, twelve long years after collective bargaining negotiations began in the City of Buffalo, the Buffalo Public Schools' collective bargaining dispute and impasse ended, and a new agreement between the Buffalo Public Schools and the Buffalo Teachers Federation was approved by a 7-2 school board vote.¹¹³ The reason that it took over a decade—not just once, but twice in less than thirty years—for the Buffalo Public Schools and the Buffalo Teachers Federation to compromise and reach a final agreement on salary issues and general contractual provisions is due to the inherent flaws of the Taylor Law.¹¹⁴ These impasses were not an anomaly; in fact, there are countless other New York public school districts facing the same challenges caused by the Taylor Law.¹¹⁵ Rather than impose a final and binding procedure that would limit the duration of an impasse and create a bright-line standard for resolving collective bargaining disputes, the Taylor Law currently allows a public education impasse to continue indefinitely, which results in grave consequences for millions of students, teachers, and communities.¹¹⁶

111. Tiffany Lankes, *Impasse with Buffalo Teachers Could Result in Taylor Law Challenge*, BUFF. NEWS (Oct. 20, 2015), <https://buffalonews.com/2015/10/20/impasse-with-buffalo-teachers-could-result-in-taylor-law-challenge> (“While the law lays out some options to force resolution when municipalities and other unions remain in a stalemate—such as a binding ruling by an outside arbitrator or a municipality’s elected body—no such rule exists for teachers.”). Lankes points out that if this final step of the Taylor Law’s impasse resolution procedure fails, “there is no other remedy to jump-start negotiations.” *Id.*

112. See Kowalski, *supra* note 106, at 20. The language of the Taylor Law allows “such action as is necessary and appropriate to reach an agreement.” N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2020).

113. See *Collective Bargaining Agreement Between the Buffalo Public Schools and Buffalo Teachers Federation*, BUFF. PUB. SCHS. 1, 1-4 (Oct. 16, 2016), <https://www.buffaloschools.org/cms/lib/NY01913551/Centricity/domain/59/current%20contracts/collective%20bargaining%20agreement-1.pdf>; Mark Keierleber, *The Last Cut: Buffalo Teachers Agree to Contract After 12-Year Stalemate*, THE 74 (Oct. 20, 2016), <https://www.the74million.org/article/the-last-cut-buffalo-teachers-agree-to-contract-after-12-year-stalemate>.

114. Zwara, *supra* note 17, at 222.

115. See Joe Olenick, *Newfane District Declares Impasse with Teachers*, LOCKPORT UNION-SUN J. (June 19, 2013), https://www.lockportjournal.com/news/local_news/newfane-district-declares-impasse-with-teachers/article_437c888e-23d8-5248-95d9-48e0071ca375.html. The Newfane Central School District, located in Niagara County, New York, is yet another example of an impasse that could have been resolved quickly and efficiently if the Taylor Law were amended to create a final and binding arbitration procedure. *Id.* In 2011, the Newfane Central School District declared an impasse after thirty-eight failed negotiation sessions with the Newfane Teachers Association, its teachers’ union, for a new contract. *Id.* Even though the Newfane Teachers Association wanted to continue negotiating, “district officials felt the sides were too far apart” and declared an impasse. *Id.*

116. See McMahon, *supra* note 62.

*B. Don't Want to Join Your Public Sector Union
or Pay Union Fees? Now, No Problem!*

The United States Supreme Court, in recently overturning a 1977 precedent,¹¹⁷ has already begun to weaken the power of public sector unions and chip away at many state labor laws.¹¹⁸ In *Abood v. Detroit Board of Education*, the Supreme Court considered whether a state law could lawfully compel public school teachers to join their union or pay the union an agency fee, which is also known as a fair-share fee.¹¹⁹ In a unanimous decision, the Court held that public sector unions could compel workers into paying union fees for being represented during collective bargaining negotiations.¹²⁰ This meant that employees who did not join a union nevertheless had to pay fees to it if they benefited from the union's collective bargaining agreement, which essentially applied to all employees.¹²¹

In a close 5-4 vote, the Supreme Court's June 2018 decision in *Janus v. A.F.S.C.M.E.* effectively overruled *Abood* by concluding that public sector unions cannot require the collection of agency fees, which had been mandatory in twenty-two states prior to this decision, because the collection of these fees was deemed to be a constitutional violation.¹²² Previously, agency fees were deducted from public employees' pay, regardless of whether or not the employee belonged to the union.¹²³ For example, New York City teachers automatically

117. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229, 241-42 (1977).

118. *Janus v. A.F.S.C.M.E.*, 138 S. Ct. 2448, 2456-57 (2018) (holding agency fees to be a violation of workers' First Amendment free speech rights by forcing them to give money to an organization they may not support or find objectionable, since teachers' unions bargain on behalf of all employees, even those who choose not to join the union).

119. 431 U.S. at 209-10.

120. See Dylan Matthews, *6 Excerpts that Explain the Supreme Court's Big Anti-Union Ruling*, VOX (June 27, 2018, 11:48 AM), <https://www.vox.com/2018/6/27/17509460/supreme-court-janus-afscme-public-sector-union-alito-kagan-dissent>.

121. *Janus*, 138 S. Ct. at 2456-59. Writing for the dissent, Justice Kagan reflected, "[This] decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. . . . Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways." *Id.* at 2487 (Kagan, J., dissenting).

122. See Dana Goldstein & Erica L. Green, *What the Supreme Court's Janus Decision Means for Teacher Unions*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/teacher-unions-fallout-supreme-court-janus.html> (noting that "agency fees cover the costs of representing nonmember teachers in contract negotiations and disputes with management"); Megan McArdle, *Why You Should Care About the Supreme Court's Janus Decision*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/opinions/the-supreme-court-may-have-killed-collective-bargaining/2018/06/27/9b19bbc6-7a3c-11e8-aeee-4d04c8ac6158_story.html?utm_term=.495d853740bf.

Prior to this decision, states that allowed public sector unions to collect agency fees tended to have teachers with higher salaries and districts with greater school funding than teachers and districts in states that did not allow agency fee collection. Goldstein & Green, *supra*.

123. *Janus*, 138 S. Ct. at 2461.

became union members, but if a teacher chose to opt-out of the union, they paid agency fees instead.¹²⁴ However, now that nonmembers do not have to pay agency dues, as there is no mechanism that can mandate the collection of these dues, and dues cannot be automatically deducted without consent from the public employee, there is much less of an incentive to join or stay in a public sector union.¹²⁵ As a result of *Janus*, nonmembers can voluntarily pay agency fees, which allow them to receive all union services except those associated with political activities, nonmembers can voluntarily pay a fee to receive certain union services, such as individualized representation in disciplinary actions, or nonmembers can pay nothing, while remaining represented in collective bargaining negotiations and reaping the benefits.¹²⁶

This puts public sector unions, and especially public teachers' unions, in a tough spot.¹²⁷ Not only does the average teacher in the United States earn less than a comparable worker with the same education level,¹²⁸ but also, many states have already started to make cuts to the public education sector.¹²⁹ Furthermore, after the ruling in *Janus*, public teachers' unions must still represent both members and nonmembers alike during collective bargaining negotiations, but now without receiving funds from nonmembers who do not give consent to the removal of these dues from their pay.¹³⁰

124. Christina Veiga, *New York City Teachers Union Braces for Supreme Court Ruling that Could Drain Money and Members*, CHALKBEAT (Feb. 22, 2018), <https://www.chalkbeat.org/posts/ny/2018/02/22/new-york-city-teachers-union-braces-for-supreme-court-ruling-that-could-drain-money-and-members>. The Supreme Court has held that nonmembers cannot be forced to pay union dues, but they can be required to pay an agency fee for the sole purpose of collective bargaining activities, which include collective bargaining, contract administration, and grievance adjustment. *Comm'n Workers v. Beck*, 487 U.S. 735, 744-45 (1988).

125. Goldstein & Green, *supra* note 122. Recent commentary reflects the sentiment that the *Janus* decision could result in a loss of more than 200,000 union members and millions of dollars. *Id.*

126. John H. Gross & Rose A. Nankervis, *What the Janus Decision Means to Your School District*, NYSSBA (July 23, 2018), <https://www.nyssba.org/news/2018/07/20/on-board-online-july-23-2018/what-the-janus-decision-means-to-your-school-district>. Additionally, a public teachers' union is now only required to provide nonmembers with "negotiation and enforcement" of the terms of the collective bargaining agreement. *Id.*

127. Celine McNicholas, *The Supreme Court's Decision on Union Dues Will Have Profound Consequences*, EDUC. WEEK (June 27, 2018), <https://www.edweek.org/ew/articles/2018/06/27/the-supreme-courts-decision-on-union-dues.html> (commenting that there are over 8.8 million state and local educational workers—only half of whom are union members).

128. See Kaitlin Mulhere, *This Chart Shows How Much Money College Grads Are Giving up by Working as Teachers*, MONEY (Sept. 5, 2018), <https://money.com/this-chart-shows-how-much-money-college-grads-are-giving-up-by-working-as-teachers> ("Public school teachers earned average weekly wages of \$1,137 in 2017, while all other college graduates working full time earned \$1,476 per week.").

129. See McNicholas, *supra* note 127.

130. *Janus v. A.F.S.C.M.E.*, 138 S. Ct. 2448, 2486 (2018). One of the major issues with the

While the Supreme Court's *Janus* decision means relatively little for certain states, most specifically Right to Work states,¹³¹ other states, including New York, are certain to feel the impact of the Supreme Court's decision.¹³² It has been estimated that the long-term effects of this precedent-shattering decision will reach approximately twenty-three states and apply to at least five million workers.¹³³ The *Janus* decision, which may cripple the power and strength of public teachers' unions over time, compiled with the current inequality and ineffectiveness of New York's Taylor Law, directly showcases the reason there is a need for change at this time.¹³⁴

In its current form, the Taylor Law not only creates a distinction between the emergency public service sector and the public education sector, but coupled with *Janus*, there is a further division among the public education sector into nonunion members and union members.¹³⁵ In light of *Janus*, the New York State Legislature made some minor adjustments to the Taylor Law to comply with the Supreme Court's decision by incorporating amendments into the 2019 New York State budget.¹³⁶ While some may argue that these updates were made to protect New York's public sector unions, the new provisions do more to

now non-mandatory and non-enforceable collection of union agency fees is that a free-rider problem is likely to result—both members and nonmembers equally benefit from collective bargaining negotiations because nonmembers are subject to the same terms as members who contributed dues to their union and actively bargained for their contract. Kate Walsh & Kency Nittler, *Analysis: How Will a Janus Ruling Impact Teachers and Unions in Each State? Data & Interactive Maps Tell the Story*, THE 74 (Mar. 19, 2018), <https://www.the74million.org/article/analysis-how-will-a-janus-ruling-impact-teachers-and-unions-in-each-state-data-interactive-maps-tell-the-story>.

131. *Right to Work*, NAT'L RIGHT TO WORK COMMITTEE, <https://nrtwc.org/facts/right-work-mean> (last visited May 18, 2020). Right to Work states make it illegal to require an employee to join a labor union or pay dues to a union. *Id.* A state can become a Right to Work state by adopting a state constitutional amendment, enacting a state statute, or both. Jackson Brainerd, *Right-to-Work Resources*, NAT'L CONF. ST. LEGS., <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last visited May 18, 2020). Florida became the first Right to Work state in 1943, and many states, such as Arizona and Nebraska, followed suit within the next three years by passing Right to Work legislation. Michael Pearson, *What's the 'Right to Work' Battle All About?*, CNN (Dec. 12, 2012, 10:21 AM), <https://www.cnn.com/2012/12/11/us/right-to-work-q-and-a/index.html>.

132. Francie Diep, *The Supreme Court Just Weakened Public-Sector Unions. What Will Happen Next?*, PAC. STANDARD (June 28, 2018), <https://psmag.com/social-justice/the-supreme-court-just-weakened-public-sector-unions-what-will-happen-next>.

133. *Id.*

134. Colleen Wilson, *New York's Unions Brace for Fallout from Supreme Court's Janus Decision: Will Members Pay?*, LOHUD (July 18, 2018, 7:46 AM), <https://www.lohud.com/story/new-s/education/2018/07/18/new-york-public-employee-unions-janus/780709002> (citing that New York State United Teachers, a teacher federation of over 600,000 union members in New York, collected approximately \$140 million in membership dues in 2017).

135. *See id.*

136. *Id.*

clarify the effect of *Janus* on the collection of fees by public sector unions than to create a better and more effective system overall.¹³⁷ Specifically, the amendments to the Taylor Law included changes involving membership information and payroll deduction of dues, as well as the modification of unions' obligations to nonunion members under the duty of fair representation.¹³⁸ Even with the passage of these amendments in response to the *Janus* decision, the effect of the Taylor Law on the public sector has remained unchanged.¹³⁹

C. Limbo: More than a Childhood Game—It Is an Unwavering Reality for the Public Education Sector

Without amending the current collective bargaining impasse provisions of the Taylor Law, the public education sector can remain in limbo forever if and when a collective bargaining negotiations dispute arises.¹⁴⁰ If either party refuses to settle or the parties do not want to attend arbitration, which is presently non-binding in any case, an impasse could potentially never be resolved and may continue indefinitely.¹⁴¹ Furthermore, the Taylor Law's provision that makes it illegal for public employees to strike—and imposes huge penalties on those who violate the law and strike anyway—disproportionately harms the public education sector and has the power of temporarily crippling public education sector unions.¹⁴²

As discussed in Part II,¹⁴³ the Triborough Amendment was passed to supplement the Taylor Law in an attempt to satisfy the public education sector's demands for greater protection under the Taylor Law.¹⁴⁴ While proponents of the Triborough Amendment say that it has given teachers' unions and school districts a peaceful and stable process for negotiations in creating an acceptable procedure for collective bargaining disputes, the Triborough Amendment has not done enough,

137. *Id.* The new provisions focus on situations in which a public sector union is not required to represent a nonmember and streamline the new rights of unions in allowing union representatives to meet with new employees to discuss union membership. *Id.*

138. Christopher J. Honeywell, *The United States Supreme Court Decision in Janus v. AFSCME and the Amendments to New York State's Taylor Law*, HONEYWELL L. FIRM (July 2, 2018), <https://www.honeywelllawfirm.com/news/2018/07/02/the-united-states-supreme-court-decision-in-janus-v-afscme-and-the-amendments-to-new-york-states-taylor-law>.

139. *Id.*

140. See Zwara, *supra* note 17, at 224-26.

141. Anderson et al., *supra* note 15, at 458.

142. N.Y. CIV. SERV. LAW § 210 (McKinney 2020). The United Federation of Teachers lost close to \$2 million in revenue, in addition to losing its dues deduction privileges for three months, after a five-day strike in 1975. Worth, *supra* note 18.

143. See *supra* Part II.B.

144. See Mamo, *supra* note 72.

and likely cannot do enough, even if it is amended, to fix the inherent problems of the distinction in impasse procedures created by the Taylor Law.¹⁴⁵ The Taylor Law makes it illegal for unions to strike, and those that do strike face severe consequences.¹⁴⁶ Part of the problem with the New York public education sector's inability to strike without enduring the harsh penalty of losing two days of pay for each day on strike is that the Taylor Law, compiled with the Triborough Amendment, mandates "status quo" protections for employees who do not strike when there is a collective bargaining dispute.¹⁴⁷ Further, the Taylor Law's categorization between employees who provide essential services to the public, such as police officers and transit workers, and public education employees, like teachers, puts teachers at an even greater disadvantage during contract negotiations that occur during an impasse.¹⁴⁸

Pursuant to the current language of the Taylor Law, there are two different procedures for addressing a public sector collective bargaining impasse.¹⁴⁹ As described in Part II,¹⁵⁰ the final step of the impasse procedure for New York's public sector takes two different paths, which

145. *But see* Casagrande & Milham, *supra* note 70. Further putting New York's public education sector at a disadvantage as compared to other public sector employees, "[t]he Triborough Amendment gave significant added negotiating leverage to police officers and firefighters, who (unlike other government employees in New York) have the right to binding 'interest arbitration' of their contract impasses." *Triborough Trouble*, EMPIRE CTR. 6, <https://www.statempelra.org/files/public/StatePELRAPdfs/NY%20Triborough%20Amendment%20Report.pdf> (last visited May 18, 2020).

146. CIV. SERV. § 210.

147. *Id.*; Mishel, *supra* note 10. The laws in only twelve states allow public sector employees to go on strike and engage in work stoppages. Sean Collins, *New York's "Taylor Law" Exists to Stop Strikes. Will the Strike Wave Change It?*, STRIKE WAVE (Nov. 6, 2019), <https://www.thestrikeyave.com/original-content/taylor-law>. In the first half of 2018, teachers went on strike in five states: Arizona, Colorado, Kentucky, Oklahoma, and West Virginia. Steven Greenhouse, *Making Teachers' Strikes Illegal Won't Stop Them*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/opinion/teacher-strikes-illegal-arizona-carolina.html>. Out of these five states, four of them—Arizona, Kentucky, Oklahoma, and West Virginia—are Right to Work states. Brainerd, *supra* note 131. Since then, teachers in more than ten other states have gone on strike or called out of work to engage in rallies, including public school educators in Florida in January 2020. Linda Jacobson, *Tracker: Florida Teachers Rally in Tallahassee*, EDUC. DIVE (Jan. 13, 2020, 8:19 AM), <https://www.educationdive.com/news/tracker-teachers-on-strike/547339>. Although the Florida State Constitution does not allow public employees to strike, over a thousand Florida public school teachers risked losing their employment to attend a rally sponsored by the Florida Education Association, where teachers pushed for increased educational funding, smaller class sizes, and more updated classrooms. *Id.*; *see also* Roy De Jesus, *Getting Answers: Rally vs. Strike, Why It Matters for Florida Teachers*, SPECTRUM NEWS (Jan. 13, 2020, 4:24 PM), <https://www.baynews9.com/fl/tampa/news/2020/01/13/rally-vs--strike--why-it-matters-for-florida-teachers>.

148. *See* Martin H. Malin, *The Motive Power in Public Sector Collective Bargaining*, N.Y. ST. BAR ASS'N (May 10, 2018), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82425>.

149. *See* Swearengen, *supra* note 80, at 540-42.

150. *See supra* Part II.

depends on the group of public sector employees a person is classified as belonging to under the Taylor Law.¹⁵¹ The first path, compulsory interest arbitration, clearly applies to police officers, firefighters, and some transit employees.¹⁵² Since the determination of this form of arbitration is binding on the parties, there is very little uncertainty as to how long it will take for an impasse to be resolved or what the next steps are for the parties.¹⁵³

The second path of resolving a collective bargaining dispute applies to the public education sector, and the final steps of the impasse procedure are far more ambiguous and uncertain.¹⁵⁴ The Taylor Law allows the public education sector to attend voluntary arbitration, but the recommendations of the arbitration panel are not binding on the parties.¹⁵⁵ Instead, the panel's recommendations are simply a list of suggestions that the parties can choose to implement or ignore.¹⁵⁶ In addition, the Taylor Law provides that the parties may receive "such assistance as may be appropriate."¹⁵⁷ Due to the lack of finality and clarity of this non-binding arbitration and impasse resolution procedure, coupled with the Triborough Amendment that enforces the "status quo," there is no sense of urgency to negotiate or to reach an agreement, making the entire process essentially unproductive.¹⁵⁸ Therefore, if either the public school union or the public school district, or both parties, do not want to compromise on certain issues and prefer to "wait it out,"¹⁵⁹ there is absolutely nothing stopping them from doing so and going years on end without reaching an agreement—hence Buffalo Public Schools going over a decade without a renewed contract.¹⁶⁰

151. CIV. SERV. § 209(3)(f) (establishing the term "public employer" as applying to a school district, a community college, a state or city university of New York, and a board of cooperative educational services).

152. *Interest Arbitration*, PUB. EMP. REL. BOARD, <http://www.perb.ny.gov/interest-arbitration> (last modified Apr. 24, 2018).

153. *Id.* Compulsory interest arbitration is "final and binding on the parties for a period of time up to two years from the expiration date of any previous collective bargaining agreement." *Id.*

154. Zwara, *supra* note 17, at 224-26.

155. *Id.*

156. *Id.*

157. N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2020).

158. Zwara, *supra* note 17, at 224-26.

159. See Dale Mezzacappa, *Wait for a Teachers' Contract Drags on*, NOTEBOOK (Feb. 14, 2017, 8:06 AM), <https://thenotebook.org/articles/2017/02/14/wait-for-a-teachers-contract-drags-on>. Mezzacappa notes that teachers in Philadelphia, Pennsylvania, worked without a contract for years due to a "historically long deadlock." *Id.* Some of the disputed issues included conflicts over raises and benefits, as well as teacher preparation time and school assignments. *Id.* The Philadelphia School District alleged that it could not offer the teachers a more lucrative contract due to education cuts made in 2011 that were never made up, and both parties postponed further negotiations for years. *Id.*

160. CIV. SERV. § 209-a(1); Malin, *supra* note 148. While the Taylor Law does mandate that

IV. AMENDED PROVISIONS AND STREAMLINED PROCEDURES WILL CREATE EQUALITY, CERTAINTY, AND CONSISTENCY

Due to serious policy concerns, as well as the constantly changing circumstances in the United States, the Taylor Law should be revised to put the public education sector on an equal playing field with other public sector employers and employees.¹⁶¹ This Part first discusses the public policy arguments for extending the mandatory process for resolving collective bargaining impasses to the public education sector and analyzes some of the concerns associated with this proposed revision.¹⁶² Next, this Part explains how other states have adopted legislation regarding public sector strikes, collective bargaining, and impasse arbitration, as well as specifically examines the public sector labor laws in two different states that can be used as a comparison with New York's Taylor Law.¹⁶³ This Part then proposes amending section 209 of the Taylor Law to create a mandatory process of resolving collective bargaining disputes and imposing a final and binding arbitration procedure for all public sector employees, regardless of whether the employee performs a so-called essential or emergency function to the public.¹⁶⁴ Further, this Part suggests that the Taylor Law be revised to clarify some of the terms used throughout the Taylor Law, and proposes possible changes for these concepts, such as the allusive "good faith" negotiation process.¹⁶⁵

A. *A Positive Step Toward an Inclusive Solution*

The Taylor Law should be amended to create an impasse system in which the public education sector is entitled to the same impasse resolution process as public sector employees who are defined as workers who perform emergency functions.¹⁶⁶ This inclusive solution is beneficial to not only the public education sector, but also to individuals and families throughout all of New York State.¹⁶⁷ As previously

the parties negotiate in "good faith," there are many "good faith" reasons that either party would stall or fail to reach an agreement during a collective bargaining impasse. See Anderson et al., *supra* note 15, at 494-95.

161. See Rubinstein, *supra* note 86, at 422-23.

162. See *infra* Part IV.A.

163. See *infra* Part IV.B.

164. See *infra* Part IV.C.

165. See *infra* Part IV.C.

166. See Anthony Zumbolo, *The Acceleration and Decline of Discord: Collective Bargaining Impasses in New York State*, 36 HOFSTRA LAB. & EMP. L.J. 163, 167 (2018) (noting that school districts and other educational organizations employ the greatest number of public civil servants in New York State).

167. *Id.* Section 209 of the Taylor Law includes the impasse resolution procedures that go into

discussed, there are over two and a half million New York State public school students.¹⁶⁸ These students, and their families, rely on public school educators and administrators to be actively ready to perform their jobs.¹⁶⁹ If the Taylor Law is not amended, there is the potential for grave consequences for the public education sector, millions of students, and other groups of New York residents and workers who count on the public education sector on a daily basis.¹⁷⁰

There is a strong argument in favor of amending the Taylor Law to expand the current impasse resolution procedure from covering only emergency workers who provide essential services to the public to covering the entire public sector, including the public education sector.¹⁷¹ The Taylor Law was implemented to balance two objectives: allowing public sector workers to participate in the process of determining the conditions of their employment, and to prevent workers from striking by outlining fines and consequences for workers who strike.¹⁷² The Triborough Amendment was then passed as an amendment to the Taylor Law in 1982 with the goal of increasing the effectiveness of the collective bargaining process by requiring that all of the terms of an expired contract remain in place and in effect until a new agreement is negotiated and settled.¹⁷³

effect when a collective bargaining dispute occurs. *Id.* While these procedures have been amended multiple times since the passage and implementation of the Taylor Law in 1967, the mediation requirement that is the initial intervention for the public education sector has remained unaltered and untouched. *Id.*

168. See *supra* Part I.

169. Martin H. Malin, *The Taylor Law in Context: National and International Comparisons at New York State Bar Association Conference: The Taylor Law at 50* (May 10, 2018), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82425>. Illinois public school students in the Homer School District, for example, lost almost a year of schooling in 1986 when teachers went on strike due to the inability to overcome a collective bargaining dispute. Tim Mitchell & Rebecca Mabry, *Two Decades Later, Homer Teachers Strike Still Sore Subject*, NEWS-GAZETTE (Dec. 12, 2006), <http://www.news-gazette.com/news/education/2006-11-12/two-decades-later-homer-teachers-strike-still-sore-subject.html>. The eight-month strike, which accounted for 156 missed school days, eventually led to the school district's decision to merge with another school district, more than half of the teachers involved in the strike leaving the school district, and the loss of a considerable amount of state aid. *Id.*

170. Malin, *supra* note 148. During an Illinois teachers' strike in 2012, in which over 160 nurses and special education classroom aides walked a picket line, a circuit judge issued a temporary restraining order and injunctive relief requiring that these "essential" employees return to work. Bob Sunsjara, *Judge Orders District 15 Nurses, Aides back to Work*, DAILY HERALD (Oct. 17, 2017, 7:20 PM), <http://www.dailyherald.com/news/20171017/judge-orders-district-15-nurses-aides-back-to-work>. The court found that the absence of these public education sector workers posed a "clear and present danger" to students' health and safety. *Id.*

171. Zumbolo, *supra* note 166.

172. Theodore W. Kheel, *The Taylor Law: A Critical Examination of Its Virtues and Defects*, 20 SYRACUSE L. REV. 181, 181-82 (1968).

173. See N.Y. State Sch. Bds. Assoc., *Triborough Amendment Issue Brief*, 2012 ST. ISSUES

Individuals against changing or amending the Taylor Law to include the public education sector in the compulsory arbitration impasse resolution procedure often cite the Triborough Amendment and claim that the Amendment does enough to protect the public education sector.¹⁷⁴ While the Triborough Amendment does tend to benefit workers in the public education sector, the Amendment does not go far enough to create the type of equality in resolving a collective bargaining dispute or an impasse that is needed; in fact, it works with the Taylor Law to perpetuate the lack of urgency in reaching a new contract that has been seen for decades.¹⁷⁵

While the public education sector is arguably not comprised of workers who perform life-or-death functions, such as police officers, the Taylor Law should be amended to extend the final and binding arbitration process for an impasse that is currently only mandatory for emergency workers.¹⁷⁶ The Triborough Amendment mandates the maintenance of the status quo during the period of time between an expired contract and a new contract that is agreed to by both of the parties.¹⁷⁷ By allowing public education workers to remain under the protections of their expired contract, the Triborough Amendment provides more opportunity for school districts to discourage mobilization and removes the urgency of reaching a new agreement after the previous contract expires.¹⁷⁸ For example, a school board may try to postpone reaching an agreement on a new contract if it believes that the union wants a salary increase and feels that the union is willing to hold off on settling an agreement.¹⁷⁹ On the other hand, a school board may attempt

CONF., http://www.nyssba.org/clientuploads/nyssba_pdf/GR-SIC-Triborough-Amendment-Issue-Brief.pdf (last visited May 18, 2020).

174. *Id.* The Triborough Amendment currently freezes the most recently expired public school contract in effect if the union and the school board have not agreed on a new contract. *Id.* This means that until a new agreement is settled on and agreed to, the terms of the expired contract remain in place and cannot be changed unilaterally. *Id.* Opponents of the Triborough Amendment argue that this should be enough to appease the public education sector in regard to the faults of and discrepancies in the Taylor Law, especially since school districts must continue to pay any automatic pay increments and workers keep their salary and benefits. *Id.*

175. Blassman et al., *supra* note 55.

176. *Id.*

177. *Id.* The purpose of the Triborough Amendment in regard to maintaining the status quo is to eliminate, or limit, the public education sector's willingness to go on strike if a collective bargaining dispute arises and a new agreement cannot quickly be reached. *Id.* In August 2018, New York Democratic gubernatorial candidate Cynthia Nixon argued that the Taylor Law is "tilted against workers." Carl Campanile, *Cynthia Nixon Says Public Workers Should be Able to Strike*, N.Y. POST (Aug. 7, 2018, 6:26 PM), <https://nypost.com/2018/08/07/cynthia-nixon-says-public-workers-should-be-able-to-strike>.

178. Tatiana Cozzarelli & Francesca Gomes, *What Is the Taylor Law?*, LEFT VOICE (Dec. 7, 2017), <http://www.leftvoice.org/What-is-the-Taylor-Law>.

179. *Id.*

to coerce a union into agreeing to a contract that is disfavored by union members by subtly, or not so subtly, implying that continued negotiations without ratification of the contract may result in a lower likelihood of obtaining salary increases going forward.¹⁸⁰ In a bad economy, a school board may attempt to stall the settlement of a new contract if the terms of the expired agreement cost the district less money than the terms of the proposed contract.¹⁸¹ Similarly, in a bad economy, a teachers' union may seek to push off or postpone settlement of a new contract if the union members feel that the terms of a new contract, especially in regard to a potentially reduced salary and fewer benefits, would be worse for its members than prolonging negotiations so that the terms of the expired contract remain in effect for a longer period of time.¹⁸²

Since the status quo applies, and the Taylor Law does not provide for a mandatory, final, or binding arbitration process for an impasse affecting the public education sector, there is effectively no incentive to reach an agreement and there are no consequences imposed on either a school board or a union that takes months, or even years, to agree to a new contract.¹⁸³ Therefore, implementing an impasse resolution

180. *Id.* In 2014, after five years without a contract, the United Federation of Teachers convinced employees to accept a contract that included two years of zero percent raise in back pay and a large deduction in health benefits after being told that failure to ratify the contract meant several more years without any raises. *Id.* To make the new contract's terms more appealing, a \$1000 signing bonus was added if the memorandum of agreement, or contract, was ratified soon after the latest proposal. James Eterno, *New UFT Contract: Retro Delayed = Retro Denied While Absent Teacher Reserves Have Tenure Weakened*, MORE (May 2, 2014), <https://morecaucusnyc.org/2014/05/02/new-contract-retro-delayed-retro-denied>. The meeting in which this new contract was discussed is described as "a propaganda love fest." *Id.*

181. *Id.* The economy plays an important role in a public school board's or union's willingness to quickly negotiate a new contract, or whether to draw out negotiations over a period of time following the expiration of the old contract. *Be Careful with the Taylor Law*, CORNER (Mar. 20, 2018), <http://thecorner.eu/world-economy/be-careful-with-the-taylor-law/71709>.

182. See Thomas A. Kochan et al., *The Long-Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, CORNELL U. 1, 22-24 (Oct. 1, 2009), <http://www.nyspffa.org/main/wp-content/uploads/2013/02/NYSPFFA-ALARM-Cornell-MIT-Study-on-the-Effects-of-Binding-Arbitration-2009.pdf> (arguing that the length of time between the expiration of an old contract and the issuance of a new contract after an arbitration award has greatly increased over the past three decades, in part because the arbitration awards include retroactive salary increases when the past contract has already expired, meaning that the longer the delay in reaching an agreement, the greater the lump-sum retroactive payment).

183. See CSEA Legal Department, *Taylor Law Manual: A Guide for CSEA Labor Relations Staff*, CSEA 1, 18-22 (Jan. 2014), <http://csea860.com/wp-content/uploads/2014/07/Taylor-Law-Manual.pdf>. Pursuant to the Taylor Law, a public employer and a union must both negotiate in good faith. N.Y. CIV. SERV. LAW § 209-a(1)(d) (McKinney 2020). However, the term "good faith" is fairly vague and it is unclear as to what encompasses a good faith effort, aside from "the duty not to act unilaterally with respect to a mandatory subject of negotiation." CSEA Legal Department, *supra*, at 8-9. The term "good faith" is not defined or described more fully anywhere in the Taylor

procedure in which public education school boards and unions alike cannot procrastinate in reaching a final contract to replace an expired agreement would be fair and beneficial to all involved: educators, administrators, school boards, students, parents, and families, among many other groups.¹⁸⁴

*B. State by State: Using Two States' Labor Laws
as a Comparison with New York*

As federal labor laws tended to backtrack and weaken private sector unions in the late 1940s and throughout the 1950s, the need for new labor laws covering both the private and public sectors arose, and states began to pass their own laws to safeguard the rights of public sector workers' unions.¹⁸⁵ In 1959, Wisconsin became the first state to pass labor legislation to protect collective bargaining and public sector unions, and a plethora of states immediately followed.¹⁸⁶ Many states enacted laws that granted public sector unions the right to collectively bargain in contract negotiations, while some states passed laws authorizing unions to strike, and other states passed Right to Work laws.¹⁸⁷ These various public sector labor laws can be broken down into the following four categories: states with a single comprehensive law covering multiple occupations, such as New York; states with a separate law for each occupation, like Illinois; states with a law for only some occupations, like Oklahoma; and states with no public sector labor

Law. CIV. SERV. § 201.

184. *But see State of New York Legislative Document 1972 Report—Number 25*, JOINT LEGIS. COMMITTEE ON THE TAYLOR L. 1, 32-33 (1972), <http://www.perb.ny.gov/wp-content/uploads/2018/04/1971JLC.pdf> (noting that “the test of impasse procedures is in part the acceptability of agreements reached and not solely the reaching of agreements”).

185. *See Vernuccio, supra* note 54 (noting that collective bargaining in the public sector is primarily governed by state laws, which did not come into existence until the late 1950s).

186. Steven Greenhouse, *Wisconsin's Legacy for Unions*, N.Y. TIMES (Feb. 22, 2014), <https://www.nytimes.com/2014/02/23/business/wisconsins-legacy-for-unions.html>. Prior to Wisconsin Governor Gaylord Nelson signing the nation's first public sector labor law in 1959, thus allowing public sector unions in Wisconsin the right to negotiate their contracts and bargain collectively, only private sector unions had a government-protected right to bargain collectively. *Id.* However, Wisconsin's public sector union labor law is somewhat limited, especially as compared with other public sector labor laws passed soon after Wisconsin's law was enacted. *Id.* In fact, Wisconsin's labor leaders and union members are limited to negotiating for base pay, and little else, under Wisconsin Act 10. Emily Zantow, *Wisconsin Unions Fight Collective-Bargaining Limits*, COURTHOUSE NEWS (Feb. 26, 2018), <https://www.courthousenews.com/wisconsin-unions-fight-collective-bargaining-limits>.

187. Steven Greenhouse, *A Watershed Moment for Public-Sector Unions*, N.Y. TIMES (Feb. 19, 2011), <https://www.nytimes.com/2011/02/19/us/19union.html>. As of February 2017, twenty-eight states are Right to Work states. Brainerd, *supra* note 131.

law.¹⁸⁸ There are various components of the provisions of the public sector labor laws in Illinois and Oklahoma that can be used as a comparison with the Taylor Law in New York State.¹⁸⁹

1. Illinois's Separation and Division of Labor Laws

In 1983, the Illinois General Assembly enacted the Illinois Public Labor Relations Act ("IPLRA") to grant public sector employees the right to organize and collectively bargain.¹⁹⁰ That same year, a second law, the Illinois Educational Labor Relations Act ("IELRA"), was passed in Illinois to extend various protections to public sector educational employees.¹⁹¹ Together, the IPLRA and the IELRA cover all public sector employees in Illinois.¹⁹²

The IELRA specifically applies to the Illinois public education sector.¹⁹³ This law provides employees in the public education sector with the right to form and join an employee organization, such as a union.¹⁹⁴ The IELRA prohibits educational employees employed in school districts in cities of over 500,000 inhabitants from going on strike, and a penalty, which may include discipline by the employer and

188. Robert Hebdon, *Public Sector Labor Policy: A Human Rights Approach*, 14 NEV. L.J. 509, 512 (2014). Aside from New York, states with a single comprehensive law that covers multiple occupations include Florida, Hawaii, Iowa, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, Ohio, Oregon, New Mexico, and the District of Columbia. *Id.* Besides Illinois, states with a separate law for each occupation include Alaska, California, Connecticut, Delaware, Kansas, Maine, Michigan, Nebraska, Pennsylvania, South Dakota, Vermont, Washington, and Wisconsin. *Id.* In addition to Oklahoma, states with a law for only some occupations include Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Maryland, Missouri, Nevada, Rhode Island, Tennessee, Texas, Utah, and Wyoming. *Id.* States that do not have an applicable public sector labor law include Arkansas, Colorado, Louisiana, Mississippi, North Carolina, North Dakota, South Carolina, Virginia, and West Virginia. *Id.* With the exception of Colorado, all of the states that do not have a public sector labor law are Right to Work states. Brainerd, *supra* note 131.

189. See *infra* Part IV.B.1–2.

190. 5 ILL. COMP. STAT. ANN. 315/7 (West 2014) (providing that the parties may choose, "by mutual agreement," to attend arbitration if an impasse occurs and the parties cannot agree on conditions of employment to be included in a collective bargaining agreement); Martin H. Malin, *Implementing the Illinois Educational Labor Relations Act*, 61 CHI.-KENT L. REV. 101, 101 (1985).

191. Malin, *supra* note 190.

192. *Labor and Employment in the State of Illinois*, FISHER & PHILLIPS LLP 3, https://www.fisherphillips.com/media/publication/5339_59988_Illinois%20State%20Law%20Booklet%20Revised%202015_.pdf (last visited May 18, 2020).

193. 115 ILL. COMP. STAT. ANN. 5/2 (West 2020); Sally J. Whiteside et al., *Illinois Public Labor Relations Law: A Commentary and Analysis*, 60 CHI.-KENT L. REV. 883, 887 (1985). Under the IELRA, an educational employee is defined as an individual, excluding students, supervisors, short term employees, confidential and managerial employees, part-time community college employees employed by an educational employer, and elected officials. *Id.* at 5/2(b). An educational employer is "the governing body of a public school district, including [a] . . . public school district . . . public community college district or State college or university . . ." *Id.* at 5/2(a).

194. *Id.* at 5/3.

loss of compensation, is imposed on those who do go on strike.¹⁹⁵ The law also creates a duty for an educational employer and a public school union to collectively bargain on issues including wages and terms and conditions of employment.¹⁹⁶ The law was amended after it was originally passed to create the Illinois Educational Labor Relations Board.¹⁹⁷

The IELRA sets forth an impasse procedure that applies when a collective bargaining dispute arises between an educational employer that is not in a city of more than 500,000 inhabitants and an educational employees' union.¹⁹⁸ Essentially, the parties must notify the Board if they do not reach an agreement during negotiations by ninety days before the start of the upcoming school year.¹⁹⁹ If, after spending a reasonable amount of time negotiating, and within ninety days of the start of the upcoming school year, the parties have reached an impasse, either party may request the Board to initiate mediation, or the Board may invoke mediation on its own accord if the parties fail to reach an agreement within forty-five days of the start of the upcoming school year and the parties have not requested mediation.²⁰⁰ Each party must submit to the mediator, the Board, and the other party, a summary of the new offer, which is posted and remains on the Board's website until an agreement is reached.²⁰¹

The IELRA also includes a procedure for collective bargaining disputes that arise between an educational employer that is in a city of over 500,000 inhabitants and an educational employees' union.²⁰² Here, if the parties do not reach an agreement after a reasonable period of mediation, the dispute is submitted to fact-finding.²⁰³ The fact-finder is empowered to conduct hearings, attempt mediation, and require both parties to submit their final offers for disputed issues.²⁰⁴ If the dispute is not settled in seventy-five days, the fact-finder must issue a report to the parties with advisory findings of fact and recommended terms of settlement, which are deemed agreed on as a final resolution to the disputed issues unless either party submits a notice of rejection, with rationale as to why it is rejected, within fifteen days of receiving the

195. *Id.* at 5/13; 105 ILL. COMP. STAT. ANN. 5/34-1.01 (West 2020).

196. 115 ILL. COMP. STAT. ANN. 5/10(a) (West 2020).

197. *Id.* at 5/5.

198. *Id.* at 5/12.

199. *Id.*

200. *Id.*

201. *Id.* at 5/12(a-5)(2).

202. *Id.* at 5/12(a-10).

203. *Id.* at 5/12(a-10)(1).

204. *Id.* at 5/12(a-10)(3).

report.²⁰⁵ After this stage, the IELRA is fairly unclear on what happens next, and how the parties should proceed, which does lead to some ambiguity.²⁰⁶

2. Oklahoma's Individualized Labor Laws

Oklahoma has enacted three statutes to cover certain public sector workers: police officers and firefighters, school employees, and municipal employees.²⁰⁷ The statute covering school employees deals in great part with negotiations between school employees' unions and school districts.²⁰⁸ First, the statute makes it illegal for a union to strike or threaten to strike as a way to resolve a collective bargaining dispute.²⁰⁹ Any member of a union who strikes is denied the full amount of their wages for the period of the violation.²¹⁰ It is important to note that as a Right to Work state, union membership in Oklahoma is completely optional and voluntary.²¹¹

There is also a procedure for resolving an impasse that occurs during collective bargaining negotiations.²¹² If there is an impasse, the items that cannot be resolved are referred to a fact-finding committee, and the chosen chairperson of that committee is obligated to present written recommendations to the union and the school board within twenty days of being selected.²¹³ Then, if either party rejects any of the committee's recommendations, that party must request a meeting of the representatives who negotiated for the school board and the union within seven days.²¹⁴ At the meeting, the representatives are to exchange written statements with each other and with the committee.²¹⁵ The parties are expected to attempt to resolve any remaining differences in good faith,

205. *Id.* at 5/12(a-10)(5).

206. *Id.*

207. AFSCME, *Public Sector Collective Bargaining Laws*, AM. FED'N OF ST., COUNTY & MUN. EMPs., <https://web.archive.org/web/20190114144617/https://www.afscme.org/news/publications/for-leaders/public-sector-collective-bargaining-laws> (last visited May 18, 2020).

208. OKLA. STAT. ANN. tit. 70, § 509.1 (West 2020).

209. *Id.* § 509.8.

210. *Id.*

211. Emily Sullivan, *Union Leader Calls for an End to Oklahoma Teachers' 9-Day Strike*, NPR (Apr. 21, 2018, 1:40 PM), <https://www.npr.org/sections/thetwo-way/2018/04/14/602462055/union-leader-calls-for-an-end-to-oklahoma-teachers-9-day-strike>.

212. § 509.7.

213. *Id.* In the state of Oklahoma, a collective bargaining impasse exists where "negotiations are not successfully concluded by the first day of school" or where either party declares an impasse prior to the first day of school. *Id.*

214. § 509.7(D).

215. *Id.*

and for the following fourteen days, the representative must try to resolve these issues before discontinuing his or her efforts.²¹⁶

Next, a copy of the fact-finding report is to be filed with the Oklahoma State Superintendent of Public Instruction.²¹⁷ If, at this point, the collective bargaining differences and issues between the parties are resolved, the parties are to draft a written agreement that addresses the agreed upon issues, and present that agreement for ratification.²¹⁸ However, if the parties' differences remain unresolved and they cannot reach a compromise or a solution to end the collective bargaining impasse, the school board must send the Oklahoma State Superintendent of Public Instruction "its final disposition of the negotiations impasse process within thirty days of the effective date of implementation."²¹⁹ There are no specific guidelines set forth by statute as to what information should be included in the school board's final disposition to the Oklahoma State Superintendent of Public Instruction.²²⁰

C. Imposing Mandatory and Binding Arbitration While Creating Clarity

The present distinction in the Taylor Law, which creates a division in the collective bargaining dispute and impasse resolution procedure between emergency workers, who provide essential services to the general public, and the public education sector, should be removed and replaced with a mandatory and binding arbitration process for all public sector employees.²²¹ This mandatory arbitration process should be final for both public sector employees and employers so neither party can delay the process of reaching a resolution during a collective bargaining impasse.²²² Further, the "good faith" negotiations standard that is currently imposed under the Taylor Law should be clarified and concretely defined to be more understandable for the parties to interpret.²²³

Additionally, the Taylor Law's current procedures for the public education sector's impasse arbitration leaves important collective bargaining dispute procedures up to interpretation and perpetuates the

216. *Id.*

217. *Id.* § 509.7(E).

218. *Id.*

219. *Id.*

220. *Id.*

221. N.Y. CIV. SERV. LAW § 209 (McKinney 2020).

222. Guild, *supra* note 57.

223. *Id.*

open-ended process of resolving an impasse that may arise during negotiations involving the public education sector.²²⁴ Including the public education sector in the mandatory, binding, and final arbitration process that is currently only imposed on emergency workers,²²⁵ and ensuring that this streamlined and uniform procedure is followed and overseen by PERB,²²⁶ is significant, not only for the longevity and success of the Taylor Law, but also for the entire public sector that utilizes these procedures when there is an impasse during contract negotiations.²²⁷ Further, following the Supreme Court's recent ruling in *Janus* that puts increased pressure on public sector unions and could potentially cripple much of their power through the modification of dues deduction requirements,²²⁸ public sector unions, and especially public education unions, need protection under the Taylor Law more than ever before.²²⁹ This proposed modification to the Taylor Law would help rebalance the inequality in bargaining power and push toward increased fairness for the entire New York State public sector.²³⁰

This Note offers a solution to the Taylor Law's current discrepancy in how a collective bargaining dispute and an impasse are resolved.²³¹ This solution provides for the removal of the distinction between emergency workers who perform essential functions, who currently must attend final and binding interest arbitration when an impasse occurs, and the public education sector, which is presently subject to voluntary arbitration if mediation and fact-finding cannot resolve the collective bargaining dispute.²³² Essentially, the provisions of the Taylor Law, most specifically section 209(3)(f), that separate the public education

224. See Zwara, *supra* note 17, at 205-06.

225. CIV. SERV. § 209(3).

226. See *id.*

227. But see Erin Audra Russ, Note, *Strike Three—You're Out! Revamping the New York State Taylor Law in Response to Three Transport Workers' Strikes*, 9 CARDOZO J. CONFLICT RESOL. 163, 200-01 (2007) (arguing that arbitration should be voluntary, and not compulsory, because forced arbitration is frequently disfavored by commentators as a less peaceful method of resolving a dispute as compared to advisory arbitration, which is not binding on the parties).

228. *Janus v. A.F.S.C.M.E.*, 138 S. Ct. 2448, 2487 (2018); Wilson, *supra* note 134.

229. See Wilson, *supra* note 134.

230. See Scott Horton, *New York Protects Public Sector Unions*, HORTON MGMT. L. (Apr. 19, 2018), <https://hortonpllc.com/new-york-protects-public-sector-unions>. On April 12, 2018, New York Governor Andrew M. Cuomo signed a bill containing new legal protections for public unions that represent government employees to begin protecting public sector unions from the fallout of *Janus*. *Id.* Since the signing of this State Budget bill, it appears that little else has been done to protect unions from the implications of the decision in *Janus*, which effectively ruled against public sector unions. See generally Scott Horton, *Supreme Court Rules Against Public Unions*, HORTON MGMT. L. (June 28, 2018), <https://hortonpllc.com/supreme-court-rules-against-public-unions>.

231. See *supra* Part IV.A.

232. N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney 2020).

sector into its own group, should be removed in full.²³³ Additionally, to address the strong policy arguments discussed above,²³⁴ as well as to create equality and fairness throughout New York State's entire public sector, the New York State Legislature should amend section 209(4) of the Taylor Law to cover the public education sector and apply to a collective bargaining dispute or an impasse in which "the public employer is a school district, a board of cooperative educational services, a community college, the state university of New York, or the city university of New York."²³⁵ This language aptly describes the portion of the public education sector to which the Taylor Law applies, and does not require any immediate change.²³⁶ Removing section 209(3)(f) of the Taylor Law completely and adding the public education sector to the groups of the public sector that are entitled to mandatory, binding, and final arbitration during an impasse is the first step toward creating real change, equality, and fairness in New York State's public sector labor laws.²³⁷

Finally, it would be incredibly useful to create a definition for, or at the minimum a description of, the allusive "good faith" negotiations that public sector employers and unions are expected to maintain during a collective bargaining dispute when seeking to reach a new contract agreement under the Taylor Law.²³⁸ Currently, the Taylor Law provides for a public employer and employee organization, such as a union, to meet and confer at reasonable times and in good faith during contract

233. *Id.*

234. *See supra* Part IV.A.

235. *See* CIV. SERV. § 209(3)(f). This language is taken directly from the current provisions of the Taylor Law in regard to which segments of the public education sector are included under the Law. *Id.* This description of the public education sector should remain consistent in an amended Taylor Law, but should be moved to Section 209(4) when Section 209(3)(f) is eliminated, so that Section 209(4) encompasses both the emergency public sector and the public education sector. *Id.* This simple change alone would make a large difference in the impact of the Taylor Law on the public education sector and would increase equality and fairness under the Law. *See generally The Taylor Law*, UNITED TCHRS. NORTHPORT, <https://unitedteachersofnorthport.com/the-taylor-law> (last visited May 18, 2020).

236. *See generally* James E. Freeman & Peter Kolozi, *Between a Rock and a Hard Place: Public Sector Unions and New York's Triborough Amendment*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/68493.htm> (last visited May 18, 2020) (finding that the difficulty of reaching a new agreement under the current Taylor Law extends throughout the entire public education sector, and noting that the City University of New York ("CUNY"), which is a public higher education entity that fits precisely within the Taylor Law's present definition of a public employer, failed to come to an agreement with the CUNY union, resulting in about 25,000 faculty and staff members working without a contract for six years).

237. *See* Lieberwitz et al., *supra* note 19.

238. CIV. SERV. § 204(3). While the Taylor Law does begin with a section that includes many definitions used throughout the Taylor Law, the term "good faith" is noticeably missing from this section and is not described in any other provision or section of the Law. *Id.* § 201.

negotiations, but the Taylor Law's good faith requirement "does not compel either party to agree to a proposal or require the making of a concession."²³⁹ Interestingly, other state labor laws that apply to the public sector also use the term "good faith," and some of these laws, most notably Oklahoma's laws, do define what constitutes a good faith effort.²⁴⁰

Oklahoma's public sector labor law, as discussed in greater detail above,²⁴¹ requires a good faith effort in resolving differences between an employer and employee when there is an impasse.²⁴² Oklahoma's law also includes a specific section detailing what it means to negotiate in good faith, and this language should be slightly tweaked and then added to the Taylor Law's definition section to provide the following: "To negotiate in good faith means both parties must consider proposals in an effort to find a mutually satisfactory basis for agreement and must discuss their respective contract proposals. If a party objects to the other party's contract proposal, then the objecting party must support its objections with rationale."²⁴³ Additionally, imposing a penalty on a party for failing to negotiate in good faith would further incentivize the parties to reach an agreement in a timely fashion and discourage either party from stalling or prolonging negotiations.²⁴⁴

Including language in the definition section of the Taylor Law that specifically defines the term "good faith" serves at least two important purposes.²⁴⁵ First, this language would remove much of the ambiguity as to what "good faith" means because there would be a clear definition, which would in turn ultimately avoid some of the litigation that currently arises due to collective bargaining disputes.²⁴⁶ Second, this definition would help to eliminate some of the delays in contract negotiations that currently occur when a party offers a proposed agreement with disfavored terms.²⁴⁷ The inclusion of this definition would mandate that the party objecting to some or all of the terms must provide the other party with an explanation or rationale as to why the terms are disfavored.²⁴⁸ The possibility of shortening the negotiation process when

239. *Id.* § 204(3).

240. OKLA. STAT. ANN. tit. 70, § 509.6 (West 2020).

241. See *supra* text accompanying notes 207-20.

242. Tit. 70, § 509.7(D).

243. CIV. SERV. § 201; Tit. 70, § 509.6.

244. See Swearengen, *supra* note 80, at 543-46 (offering a payment of restitution or a payment toward a public fund as two possible consequences for a party's failure to bargain in good faith).

245. CIV. SERV. § 201; Swearengen, *supra* note 80, at 545-46.

246. See Lieberwitz et al., *supra* note 19.

247. Swearengen, *supra* note 80, at 545-46.

248. *Id.*

there is a collective bargaining dispute and resolving an impasse quickly and rationally, perhaps without the need to turn to mediation, fact-finding, or even arbitration altogether, would benefit the public sector in terms of money, resources, and ultimately the court system, should litigation arise between the parties.²⁴⁹ Adding this language to the Taylor Law, in conjunction with removing the distinction between the public education sector and the emergency public sector in regard to arbitration, is a positive and necessary step toward strengthening the Taylor Law and promoting equality, fairness, and swiftness in resolving a collective bargaining dispute or an impasse for the entire New York State public sector.²⁵⁰

V. CONCLUSION

Public sector employees have made great strides in achieving more favorable labor laws that protect the right to join a union and collectively bargain.²⁵¹ While many different groups of workers make up the public sector, public education workers are undoubtedly a large component of this population.²⁵² New York State's public sector labor law, coined the Taylor Law, currently creates a process for a collective bargaining dispute and an impasse resolution procedure in which some groups of the public sector are entitled to mandatory, final, and binding compulsory arbitration, while members of the public education sector do not enjoy that same sense of finality and resolve.²⁵³

As seen countless times over the past few decades, many public sector educational employees are left to work without an updated contract, and collective bargaining disputes have continued indefinitely,

249. Zumbolo, *supra* note 166.

250. Lieberwitz et al., *supra* note 19. See also John H. Gross, Panel: The Potential Demise of the Agency Fee and Its Impact on Management and Unions at New York State Bar Association Conference: The Taylor Law at 50 (May 10, 2018), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82425> (noting that teachers' unions have been a part of American society since the late 1800s and since they have played such an important and significant role in shaping the public education sector throughout the history of the United States, they deserve equality under the Taylor Law and the same rights as other public sector employees). At the present time, a legislative change is needed to strengthen the Taylor Law to create fairness throughout the public sector and to achieve greater protection for teachers' unions in the public education sector. See Zwara, *supra* note 17, at 208-09.

251. See Warner, *supra* note 8.

252. *New York State Education at a Glance*, N.Y. ST. EDUC. DEP'T, <https://data.nysed.gov> (last visited May 18, 2020) (calculating that there are over 212,000 public school teachers in New York State). There are 732 school districts and more than 4430 public schools in New York State. *Id.* Additionally, during the 2018-2019 school year, there were over 2,600,000 public school students in kindergarten through twelfth grade in New York State. *Id.*

253. Zwara, *supra* note 17, at 224-26.

leaving at times thousands of workers in a state of limbo and creating havoc for teachers, students, and communities.²⁵⁴ Additionally, the recent Supreme Court decision in *Janus* has only created a greater challenge for public sector unions, and the consequences of this decision have not yet been fully exposed.²⁵⁵ Eliminating the distinction between the public education sector and emergency workers who perform essential services for the public, and creating a single, uniform impasse resolution procedure in which the entire public sector is entitled to mandatory, final, and binding arbitration, is a positive step.²⁵⁶ This solution works toward achieving equality and uniformity for *all* members of New York State's public sector under the Taylor Law.²⁵⁷

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254. See *supra* Part III.C. Recently, almost 30,000 California teachers in the Los Angeles Unified School District, which is the second largest school system in the country with a 33,000-member union and more than 600,000 students, went on strike after two years of contract negotiations produced no results regarding higher pay and smaller class sizes. Valerie Strauss, *The Los Angeles Teachers Strike, as Told in a Dozen Tweets*, WASH. POST (Jan. 14, 2019), https://www.washingtonpost.com/education/2019/01/15/los-angeles-teachers-strike-told-dozen-tweets/?noredirect=on&utm_term=.b098ba137c18. While schools in Los Angeles were kept open for the duration of the strike, the learning process was greatly disrupted as over 400 substitutes were hired and 2000 personnel members were temporarily assigned to Los Angeles schools to work as teachers, counselors, and librarians. *Id.*

255. See *supra* Part III.B.

256. See *supra* Part IV.C.

257. See *supra* Part IV.

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