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March 23, 2012

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Kenneth G. Dau-Schmidt
Winston Lin



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The Great Recession, the Resulting Budget Shortfalls, and the Attack on Public Sector Collective Bargaining in the United States

By Kenneth Glenn Dau-Schmidt*

And

Winston Lin**

I. Introduction

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

American public sector unions and collective bargaining have been subjected to a vicious attack under the auspices of balancing government budgets, promoting “equity” between private and public employees, and limiting the impact of “special interests” on government policy. The American and world financial crisis of 2007 resulted in the Great Recession of 2008 and substantial budget shortfalls for local and national governments world-wide. This financial crisis and the resulting disintegration of aggregate demand and employment are eerily similar to the financial crisis and collapse that led to the Great Depression of the 1930’s. However, unlike the calamity of the 1930’s, in the present emergency, American conservatives, funded by the moneyed class, are attempting to use the predicament as an opportunity to attack collective bargaining and other institutions of support and power for the American middle class. This grasp for power represents an assertion of power and control by the American upper class not experienced since the rise of scientific management, the deskilling of jobs, and the destruction of the trade union system of collective bargaining in the 1890’s.

In this paper, we outline the recent attack on public sector unions’ power in the American economy and the accompanying changes, as well as proposed changes, in American law. We will briefly describe the impact of the recent financial crisis on the American economy, the balance sheets of American state and national governments, and the opportunism of the American plutocracy in using this crisis to propose and enact legislation to undermine the institution of collective bargaining and political proponents for the middle and lower classes. In particular, we will discuss the recent efforts in Indiana, Wisconsin, Ohio, and Michigan to severely limit or prohibit public sector collective bargaining and the political influence of American public sector workers. This attack on collective bargaining constitutes the largest grab for economic and political power by the American upper class since the destruction of the labor guilds in the 1890’s and the rise of the “gilded age” from the 1890’s-1930’s.

* *Willard and Margaret Carr* Professor of Labor and Employment Law, Indiana University–Bloomington, Maurer School of Law. B.A. University of Wisconsin–Ann Arbor 1978; M.A. (Economics) University of Michigan–Ann Arbor 1981; J.D. University of Michigan–Ann Arbor 1981; Ph.D. (Economics) University of Michigan–Ann Arbor 1984.

** B.S. Stanford University 2006; J.D. Indiana University–Bloomington, Maurer School of Law 2011.

A. *The Great Recession*

The Great Recession of 2008 was the most severe economic downturn since the Great Depression of the 1930's.¹ The unemployment rate in the United States jumped from an annual rate of 4.6 percent in 2007 to 9.6 percent in 2010.² The unemployment rate for men in August of 2010 stood at 10.5 percent, almost two percentage points higher than the unemployment rate for women, 8.6 percent.³ The general monthly unemployment rate reached 10.2 percent in late 2009, and, although it has declined modestly, it has remained stubbornly above 8 percent since mid-2009.⁴ A broader measure of underemployment, including involuntary part-time employment and "discouraged workers" who want a job but have given up looking, stood at 17.0 percent in November 2010.⁵ Perhaps most worrisome, the percent of the workforce that has been unemployed for more than six months reached a U.S. postwar high of over 4 percent and has remained tenaciously high.⁶ Although the U.S. economy has begun expanding again, the recovery in the number of jobs has been much slower than other recent recoveries and seems to have stalled with recent layoffs of state employees. The Great Recession has also hammered wages. Growth in hourly nominal wages fell for men from 5.3 percent in 2007-2008 to -1.3 percent in 2009-2010 and for women from 5.2 percent to 3.7 percent.⁷

B. *The Resulting Budget Crises*

The Great Recession not only resulted in unemployment, but also enlarged federal and state government deficits as tax revenues dropped and claims for government assistance rose. The federal budget deficit grew from about \$342 billion in 2007 to \$1.5 trillion in 2009,⁸ and is currently estimated at slightly less than \$1.3 trillion for 2011.⁹ Some of this spike was due to spending under President Bush's Troubled Asset Relief Program (TARP) to stabilize the financial markets and President Obama's American Recovery and Reinvestment Act (ARRA) to stimulate the economy, but the recession itself increased the federal budget deficit by about \$400 billion a year.¹⁰ Over the same period of time, aggregate state budget shortfalls ballooned from relative insignifi-

¹ See Michael W. Elsby, Bart Hobjin & Aysegul Sahin, *The Labor Market in the Great Recession* (Nat'l Bureau of Econ. Research, Working Paper No. 15979, May 2010); Tindata Addabbo et al., *Income Distribution and the Effect of the Financial Crisis on the Italian and USA Labour*, IZA/OECD Workshop (Feb. 8, 2010).

² U.S. BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1940 TO DATE (2011).

³ *Id.*

⁴ U.S. BUREAU OF LABOR STATISTICS, MONTHLY REPORTS (Oct. 2009-2011).

⁵ Chris Tilly, *An Opportunity Not Taken . . . Yet: U.S. Labor and the Current Economic Crisis*, WORKINGUSA: J. LAB. & SOC'Y 73, 74 (2011).

⁶ Elsby, *supra* note 1, at 34.

⁷ Lawrence Mishel & Heidi Shierholz, *Recession Hits Workers' Paychecks: Wage Growth Has Collapsed* 8 (Econ. Policy Inst., Briefing Paper No. 277, 2010).

⁸ CONG. BUDGET OFFICE, BUDGET AND ECONOMIC OUTLOOK: HISTORICAL BUDGET DATA: REVENUES, OUTLAYS, DEFICITS, SURPLUSES, AND DEBT HELD BY THE PUBLIC, 1971 TO 2010, IN BILLIONS OF DOLLARS (Jan. 2011).

⁹ CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 1 (Aug. 2011).

¹⁰ KATHY RUFFING & JAMES R. HORNEY, CTR. ON BUDGET AND POLICY PRIORITIES, ECONOMIC DOWNTURN AND BUSH POLICIES CONTINUE TO DRIVE LARGE PROJECTED DEFICITS: ECONOMIC RECOVERY MEASURES, FINANCIAL RESCUES HAVE ONLY TEMPORARY IMPACT (May 2011).

cance to \$191 billion in 2010.¹¹ State budget shortfalls would have been about \$62 billion worse in 2010 were it not for federal transfers of funds under the ARRA.¹² Government deficit spending is a useful counter-cyclical stimulus that can help to stabilize the economy and promote renewed economic growth, and, indeed, the best estimates are that the spending stimulus of President Obama's ARRA helped initiate positive economic growth and reduce unemployment from 0.6 to 1.5 percent.¹³ However, the rapid increase in federal and state budget deficits created concern about the level of government debt and political pressure for government budget cutting—even though these budget cuts directly resulted in layoffs and a worsening of the unemployment rate. The states, most of whom are constitutionally required to carry balanced budgets, covered their projected shortfalls by using federal transfers under the ARRA, dipping into state “rainy day funds,” and cutting their spending.¹⁴

II. The Organization and Aspirations of the Political Right in the United States

In the United States, the political right has used the misfortunes caused by the Great Recession as an opportunity to go after not only public sector employee wages and benefits, but also collective bargaining rights. The state budget deficits caused by the Great Recession created the necessity to either raise taxes or reduce public spending by cutting public employment and compensation because many state governments are constitutionally required to produce a balanced budget. Tax increases are never popular, and the right used the opening to introduce envy between the battered private sector employees, who were suffering unemployment and stagnant or declining wages, and public sector employees. Although public sector employees are, on average, paid less than private sector counterparts,¹⁵ the right exaggerated the specter of pampered public sector employees with high wages and benefits and high job security. The right also claimed that these high wages and benefits were the result of a systematic problem of public sector bargaining and the representation of public employee interests in the political process. As a result, the right argued for the elimination of public employee collective bargaining rights and limitations on public union political resources.¹⁶ Thus, the purpose of the right's offensive against public sector collective bargaining was not only to reduce public employee employment and wages, but also to silence public employees, a traditional ally of the political left, in the political process.¹⁷

¹¹ ELIZABETH MCNICHOL, PHIL OLIFF & NICHOLAS JOHNSON, CTR. ON BUDGET AND POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT (June 2011).

¹² *Id.*

¹³ CTR. ON BUDGET AND POLICY PRIORITIES, CBO'S ESTIMATES OF ARRA'S IMPACT ON EMPLOYMENT AND ECONOMIC OUTPUT FOR THE SECOND QUARTER OF 2011 (Aug. 2011).

¹⁴ MCNICHOL, *supra* note 11.

¹⁵ Public employees earn less than their private sector counterparts, taking education levels into account. Wages in the public sector lag the private sector by 11.5 percent. Benefits in public employment are higher, but, even after factoring in benefits, total compensation lags the private sector by 3.7 percent. DAVID LEWIN ET AL., EMPLOYMENT POLICY RESEARCH NETWORK & LABOR & EMPLOYMENT RELATIONS ASS'N, GETTING IT RIGHT: EMPIRICAL EVIDENCE AND POLICY IMPLICATIONS FROM RESEARCH ON PUBLIC-SECTOR UNIONISM AND COLLECTIVE BARGAINING 4-5 (Mar. 2011).

¹⁶ Attacks against unions and their financial stability weaken the middle class and threaten to silence their political voice. *Id.* at 28.

¹⁷ This objective of silencing a political opponent was perhaps most evident in Wisconsin. State public union leaders agreed to wage and benefit concessions requested by Governor Walker, but he proceeded to gut collective bargaining for most public employees. See *Gov. Scott Walker Says He Asked Unions for Concessions and They Re-*

The stage for the current battles was set by the Republican successes in the 2010 congressional elections. Despite President Obama's victory in the 2008 Presidential election (winning 68 percent of the Electoral College and carrying with him a seventy-eight-seat Democratic majority in the House and an eighteen-seat Democratic majority in the Senate), by 2010, his accomplishment in passing healthcare reform had motivated the Republican base, and his relative lack of triumph in addressing the economy had depressed the Democratic base. As a result, there was a much smaller and more conservative turnout for the 2010 elections, which gave the Republicans impressive election victories, including a pick-up of six seats in the Senate and sixty-four seats in the House of Representatives—handing control of the House back to the Republicans and their new Speaker, John Boehner.¹⁸ Moreover, the Republican successes of 2010 included a net pick-up of eleven governorships and eighteen state legislative chambers,¹⁹ giving them complete control of state government in twenty states, including several states in the industrial heartland: Wisconsin, Indiana, Ohio, Michigan, and Pennsylvania.²⁰ Although state budget deficits and education reform were issues in many of the 2010 state races, rarely was there any hint of the future assault on public employee compensation and collective bargaining rights.²¹ Nonetheless, shortly after the Republican wins, however, staffers from conservative “think tanks” began producing policy statements and op-ed pieces attacking public employees in general and school teachers in particular.²² When legislatures came to session, bills drafted by the conservative American Legislative Exchange Council (ALEC) on all aspects of public employment and collective bargaining were introduced in state legislatures across the country. By one tally, of the more than 800 bills introduced in initial state legislative sessions, about 550 involved public sector unions and employees, and a majority of these bills sought to restrict the activities of public sector unions.²³ The Republicans achieved success in twenty-one states, and twelve of these states, Wisconsin, Ohio, Indiana, Arizona, Idaho, Michigan, New Hampshire, Oklahoma, South Carolina, Tennessee, Utah and Wyoming, passed significant restrictions on public sector collective bargaining.²⁴

fused, POLITIFACT WISCONSIN, Sept. 2011. Moreover, Governor Walker's plan applied to all state employees, except police and firefighters, who had supported his election. Daniel Bice, *Walker Denies Favor Police, Fire Unions*, JOURNAL SENTINEL, Feb. 13, 2011.

¹⁸ CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 2, 2010 (June 3, 2011).

¹⁹ Michael Cooper, *Decisive Gains at State Level Could Give Republicans a Boost for Years*, N.Y. TIMES, Nov. 3, 2010.

²⁰ NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 POST-ELECTION CONTROL OF STATE GOVERNMENT: LEGISLATURE AND GOVERNOR (2010).

²¹ See, e.g., *Wisconsin Gov. Scott Walker Says He Campaigned on His Budget Repair Plan, Including Curtailing Collective Bargaining*, POLITIFACT WISCONSIN, Feb. 2011.

²² William Cronon, *Who's Really Behind Recent Republican Legislation in Wisconsin and Elsewhere? (Hint: It Didn't Start Here)*, SCHOLAR AS CITIZEN, Mar. 15, 2011.

²³ David Schaper, *Collective Bargaining Curbs Spread Across the U.S.*, NAT'L PUB. RADIO, May 24, 2011.

²⁴ *Id.*

III. The Right's Legislative Agenda for Labor in the United States

A. Attempts to Limit Public Employee Collective Bargaining

In 2011, attacks on public employee collective bargaining rights made headlines across the country. State employees' rights came under fire even in states like Wisconsin that had historically supported the right of public employees to organize and engage in collective bargaining.²⁵ The general form of these laws imposing restrictions was to remove certain types of employees from coverage under collective bargaining laws and/or to restrict the subjects of bargaining to merely wages—and even then with additional restrictions.

In Indiana, even before the 2010 elections, Governor Mitch Daniels had unilaterally acted to take away the right of most state employees to collectively bargain. Although a few Indiana state employees, such as teachers, had a statutory right to organize and collectively bargain, most state employees only had modest collective bargaining rights as a result of an executive order issued by Governor Evan Bayh in 1989.²⁶ These collective bargaining rights were fairly modest, and the executive order specified that recognition and bargaining rights would be withdrawn from any public employee organization that engaged in any form of collective action against their employer.²⁷ No provision was made for mediation, fact-finding, or arbitration in the circumstance that a public employee union and the state could not agree on a term and condition of employment.²⁸ At best, Indiana's system of public employee collective bargaining could be described as "collective consultation," and, at worst, it could be described as "collective begging." Despite the very modest intrusion on management discretion this system of collective consultation might cause, shortly after his election in 2005, Governor Daniels rescinded the executive order and, in the stroke of a pen, single-handedly did away with collective bargaining rights for the vast majority of Indiana state employees.²⁹ Governor Daniels's rationale was that, even though there was no right to strike or arbitrate contract disputes, the collective agreements for a definite term that might result from collective bargaining limited the state's prerogative to change the terms and conditions of employment or sub-contract state work whenever it might seem advantageous to state managers.³⁰ The legislature later passed House Enrolled Act 1001, which codified this elimination of collective bargaining rights and ensured that no future governor could re-institute such rights by executive order.³¹

After the 2010 elections, when the Republicans obtained control of the entire legislative branch, Governor Daniels and the Republican leadership decided to go after teacher collective bargaining rights. Although House Democrats fled the state to prevent a quorum, the Republicans eventually passed, and Governor Daniels signed into law, Senate Bill 575, which signifi-

²⁵ Wisconsin had been the first state to pass a comprehensive law governing the right of public employees to collectively bargain in 1959. See Municipal Employment Relations Act (MERA) Wis. Stat. §§ 111.70 et seq.

²⁶ Melissa Maynard & Josh Goodman, *Behind Collective Bargaining Debate, Mixed Experiences in the States*, STATELINE, Feb. 24, 2011.

²⁷ See Ind. Exec. Order No. 90-6, 13 Ind. Reg. 10 (1990).

²⁸ *Id.*

²⁹ Maynard, *supra* note 26.

³⁰ See *Indiana Gov. Mitch Daniels Is Tough on Budget*, NAT'L PUB. RADIO, Feb. 28, 2011.

³¹ Dan Taglioli, *Indiana Union Challenges Public Employee Collective Bargaining Prohibition*, JURIST, Sept. 1, 2011.

cantly limits teacher collective bargaining rights in Indiana.³² Prior to this bill, Indiana teachers had a statutory right to organize and collectively bargain over wages and other terms and conditions of employment and, although there was no right to strike, there was a right to resort to interest arbitration over issues that could not be resolved through negotiations.³³ Senate Bill 575 followed the ALEC formula of removing employees from the collective bargaining statute or reducing the subjects of bargaining so that collective bargaining is much less useful. The bill prohibits negotiations on seniority provisions, school calendar, dismissal criteria, restructuring options, and the teacher evaluation process, while requiring localities to adopt a system of teacher evaluation developed by the state based on improvements in student test scores.³⁴ Subjects of bargaining are expressly limited to “salary, wages and fringe benefits.”³⁵ The existing system of interest arbitration was replaced with a system of last best offer “fact-finding.”³⁶ The stated rationale for the changes was to free local school administrators to control the terms and conditions of employment that might affect student education—for example, it was argued that prohibiting seniority provisions would permit administrators to retain excellent young teachers who might be laid-off because they had less seniority. Proponents of this view never dealt with the fact that the lack of seniority provisions would give local administrators incentive to lay off high-quality *senior* teachers merely because they were higher paid than entry level teachers who might also fill the class. They also never explained how imposing state standards on seniority and teacher evaluation was consistent with conservative principles of decentralized decision-making or would free local administrators to run school districts as they saw fit. A last minute rush by local school boards to get collective bargaining agreements approved before the new bill took effect suggests that not all local administrators saw the Republican plan as the best way to run a school district.³⁷

The 2010 election also brought a Republican sweep to the great state of Wisconsin for the first time since 1969,³⁸ as the newly elected Governor Scott Walker joined Republican majorities in both the House and Senate.³⁹ Governor Walker proposed severe limitations on public employee collective bargaining rights as part of an “emergency budget bill,” Wisconsin Act 10, aimed much more at ending public sector collective bargaining than at addressing any budget shortfall.⁴⁰ Indeed, Governor Walker proceeded with his effort to gut public sector collective bargaining even after Wisconsin public sector unions granted him every fiscal concession required by the bill.⁴¹ The “budget bill” sought to eliminate almost all collective bargaining rights for public employees by removing some state employees from collective bargaining completely and confining the lawful subjects of collective bargaining to merely wage increases that were less than the rate of inflation.⁴² Wage increases in excess of the rate of inflation would require

³² Daniels Signs Teacher Bargaining Bill, INSIDEINDIANABUSINESS, Apr. 21, 2011.

³³ See SEA 575, 2011 Ind. P.L. 48 (2011).

³⁴ See *id.*

³⁵ *Id.*; see BOSE MCKINNEY & EVANS LLP, TEACHER COLLECTIVE BARGAINING & DISCUSSION AFTER JULY 1, 2011 (Aug. 16, 2011).

³⁶ SEA 575, *supra* note 33.

³⁷ See Ben Skirvin, *Why Do Indiana Schools and Unions Want Longer Contracts?*, STATEIMPACT, July 21, 2011.

³⁸ State of Wisconsin Legislative Reference Bureau, *Q&A*, <http://legis.wisconsin.gov/lrb/research/qanda.htm>.

³⁹ *Wisconsin: GOP Wins Senate, House, Gov. Seats, Ousting Feingold*, USA TODAY, Nov. 3, 2010.

⁴⁰ See *Read Summary of Governor Walker’s Budget Repair Bill*, GREEN BAY PRESS-GAZETTE, Feb. 16, 2011.

⁴¹ Patrick Marley, *State Workers Willing to Bend on Concessions, Not Bargaining Rights*, JOURNAL SENTINEL, Feb. 14, 2011.

⁴² See *id.*

approval through a voter referendum. The “budget bill” also required that, in order to remain the bargaining representative, public sector unions stand for election each year, at their expense, and receive affirmative votes from at least 51% of the employees in the bargaining unit, effectively counting any employees who failed to vote as “no” votes.⁴³ The bill prompted spirited protests from public workers and other concerned citizens that grew in size until about 100,000 demonstrators protested peacefully at the state capitol.⁴⁴ At one point, Democratic senators left the state hoping to prevent a quorum and passage of the bill. In response, Republicans severed the collective bargaining provisions of the bill from the budget provisions so that it would not be subject to the quorum requirement and passed the bill. The act was signed into law on March 11, 2011, by Governor Walker.⁴⁵ The Dane County District Attorney filed suit to block enforcement of the Act citing several violations of Wisconsin’s open meeting laws in its passage.⁴⁶ The Dane County Circuit Court initially issued an injunction against the Act,⁴⁷ but the Wisconsin Supreme Court eventually upheld the Act in a strict party-line 4-3 vote.⁴⁸ The acrimony over the passage of the bill resulted in petitions for the recall of state senators on both sides: conservatives sought the recall of Democratic senators for leaving the state to prevent a quorum, and progressives sought the recall of Republican senators for exceeding their electoral mandate in gutting collective bargaining rights. Ultimately, four Democrats and six Republicans stood for special recall elections with none of the Democrats and only two of the Republicans losing those fights, one loss short of the number necessary for the Democrats to regain control of the Senate.⁴⁹ Opponents of the bill have also collected and filed over a million signatures for the recall of Governor Walker, and efforts are currently underway to conduct the recall election.⁵⁰

The 2010 elections also brought a new Republican governor with Republican control of both houses of the legislature to the state of Ohio.⁵¹ Shortly after his election, Governor John Kasich began promoting Senate Bill 5 to significantly constrain public sector collective bargaining rights. The law prohibited bargaining on various traditional subjects of bargaining, including retirement system contributions, health care benefits, privatization, and contracting out or the number of employees required to be employed.⁵² The law also removed the continuation, modification, or deletion of an existing collective bargaining agreement from being a subject of bargaining, such that when a collective bargaining agreement expired, it would be eviscerated and the employees and employer would have to start from scratch.⁵³ The law also prohibited strikes,

⁴³ See Andy Kroll, *What’s Happening in Wisconsin Explained*, MOTHER JONES, Mar. 17, 2011.

⁴⁴ Steve Contorno, Dan Benson & Ben Jones, *Police: Wisconsin Protest Saturday ‘One of Largest,’* USA TODAY, Feb. 27, 2011.

⁴⁵ *Wis. Governor Officially Cuts Collective Bargaining: Walker Says Bill Will Save \$30M in Budget Year; Union Leaders Plan to Launch Counterattack*, MSNBC, Mar. 11, 2011.

⁴⁶ See *State ex rel. Ozanne v. Fitzgerald*, Case No. 2011CV1244 (Dane County Cir. Ct. 2011).

⁴⁷ *Id.*

⁴⁸ See *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436 (Wis. 2011).

⁴⁹ See *GOP Retains Wisconsin Senate Control in Recall Battle*, CNN, Aug. 10, 2011.

⁵⁰ Brendan O’Brien, *Enough Signatures Collected to Recall Wisconsin Governor*, REUTERS, Jan. 17, 2012; John Nichols, *Overwhelmed by Opposition, Wisconsin’s Walker Won’t Challenge Recall Petitions*, THE NATION, Feb. 27, 2012.

⁵¹ See Reginald Fields & Mark Naymik, *Republican John Kasich Victorious in Ohio; Jobs Message Overcomes Wall Street Baggage*, CLEVELAND.COM, Nov. 3, 2010.

⁵² See Laura A. Bischoff, *Stakes High for Both Sides in SB 5 Battle: Win or Lose, the Controversial Bill’s Impact Will Be Huge*, DAYTON DAILY NEWS, Sept. 18, 2011.

⁵³ See *id.*

which had previously been allowed for non-essential public employees.⁵⁴ As in Wisconsin, the Ohio bill drew significant resistance and active demonstrations.⁵⁵ Despite this opposition, the Ohio state legislature passed Senate Bill 5, and Governor Kasich signed it into law on March 31, 2011.⁵⁶ However, opponents of the bill collected the necessary 230,000 signatures to place the bill on the November 2011 ballot as a public referendum.⁵⁷ Under the Ohio state constitution, enforcement of a bill is held in abeyance until it is confirmed in the referendum.⁵⁸ In a victory for labor, 61 percent of the Ohio electorate voted no on the referendum, and, as a result, the bill was discharged.⁵⁹

Michigan is another traditional labor bastion that saw a Republican sweep in the 2010 elections. At the request of Governor Rick Snyder, the legislature enacted the Emergency Financial Manager law, which was signed into law in March 2011.⁶⁰ The law extends the powers of emergency managers to remove locally elected officials, terminate collective bargaining, and force consolidation of schools, townships, cities, and counties—all without seeking authority or approval from any elected body or from the electorate. In April 2011, the first City Emergency Manager was appointed for Benton Harbor, Michigan, taking away all power of the elected city officials.⁶¹ The cities of Ecorse and Pontiac and the Detroit public school system now have emergency managers in place. Constitutional challenge is likely.⁶²

Other states also saw the enactment of significant limitations on public sector collective bargaining by emboldened Republican legislators. In Oklahoma, House Bill 1593 was signed into law on April 29, 2011.⁶³ The law repeals the Oklahoma Municipal Employee Collective Bargaining Act, which effectively eliminates all collective bargaining rights for municipal workers. In Iowa, Governor Branstad issued Executive Order 69, which rescinded a previous governor's executive order authorizing project labor agreements in public works projects and banned the allocation of public money to any projects entered into using such agreements.⁶⁴ Likewise, in Idaho, the legislature passed Senate Bill 1006, which prohibits local and state government entities from entering into project labor agreements.⁶⁵ In Nevada, as part of the budget bill, Assembly Bill 580, and Senate Bill 98, the legislature enacted provisions that allow local governments to reopen employee contracts during fiscal emergencies and that bar supervisors from collective bargaining.⁶⁶ In New Jersey, Senate Bill S2937 ended public employees' ability to collectively

⁵⁴ *Id.*

⁵⁵ *Ohio Governor Signs Senate Bill 5 into Law*, CBS NEWS, Mar. 31, 2011.

⁵⁶ *Id.*

⁵⁷ Robert Costa, *John Kasich Vs. Public Unions: A First-Time Governor Follows in the Footsteps of Scott Walker*, NATIONAL REVIEW, Oct. 18, 2011.

⁵⁸ *See id.*

⁵⁹ Michael Scott, *Issue 2 Defeated: Million Votes Are In and 63 Percent Says No, AP Says*, CLEVELAND.COM, Nov. 8, 2011.

⁶⁰ *Gov. Snyder Signs Controversial Emergency Financial Managers Measures*, MICHIGAN LIVE, Mar. 17, 2011.

⁶¹ *Updated: And So It Begins. Emergency Financial Mgr. Fires Entire Government of Benton Harbor, MI*, ELECTABLOG, Apr. 15, 2011.

⁶² *See* Kate Linebaugh, *Emergency Manager Law Faces Challenger*, WALL STREET JOURNAL, June 23, 2011.

⁶³ *Fallin Signs Municipal Collective Bargaining Repeal*, CAPITALBEATOK, Apr. 29, 2011.

⁶⁴ *Gov. Branstad Should Eschew Transition Period Opacity*, THE DAILY IOWAN, Mar. 31, 2011.

⁶⁵ Dustin Hurst, *House Clears Bills Limiting Union Money, Agreements*, IDAHO REPORTER.COM, Feb. 22, 2011.

⁶⁶ Sandra Chereb, *Lawmakers Reach Deal on Nevada State Budget*, DESERET NEWS, June 1, 2011.

bargain their medical benefits.⁶⁷ Now, health care plans for 500,000 public workers will be set by a new state panel comprised of union workers and state managers, rather than at the negotiating table.

Despite this onslaught, the attack on the collective bargaining rights of public employees was subdued or defeated in some states. For example, Iowa House File 525, which would have excluded from collective bargaining subjects such as retirement systems, staff cuts, outsourcing, and layoffs, passed the Iowa House but died in the Iowa Senate.⁶⁸ The bill would have also changed the state public employee interest arbitration provisions by eliminating the right of an arbitrator to consider past contracts and by requiring arbitrators to compare public employee wages, benefits, hours, or working conditions to the private sector and to consider whether the public employer had the ability to finance changes to the collective bargaining agreement without raising taxes. In Illinois, Senate Bill 1556, which would have stripped collective bargaining rights from state employees, is stuck in the Senate.⁶⁹ In Colorado, Senate Bill 11-038 would have ended collective bargaining for public employees but was killed in committee in February 2011.⁷⁰ The Connecticut Senate passed a budget bill, Senate Bill 1301, which included a section that would have limited collective bargaining in three areas: longevity payments, the accrual of sick days, and the definition of salary for the calculation of pensions.⁷¹ However, this section is considered to be for show and has not been taken up by the House. In Alaska, Representative Carl Gatto introduced House Bill 200, which would have stripped many public employees of the right to collectively bargain for hours, benefits, and working conditions, but he withdrew the bill on March 31, 2011.⁷²

B. “Paycheck Protection” Laws and Public Employee Political Rights

The ALEC legislative agenda calls for state legislatures not only to curtail or eliminate public employee collective bargaining rights, but also to limit the political power of their unions. In 2010 and 2011, several states considered or enacted so-called “paycheck protection” laws that prohibit or restrict the deduction of union dues or association fees from public employee paychecks. Many of the same states have also considered or passed laws limiting the political activity of public employees and their unions. Perhaps the most controversial of these laws was passed in Alabama. Alabama’s “Ethics Reform Package,” Alabama Act No. 2010-761, banned all payroll deductions for employee associations and any check-offs to any organization if the dues are used for a political purpose.⁷³ The law also prohibited, with criminal penalties, public

⁶⁷ See New Jersey State League of Municipalities, *About the Pension and Health Benefit Reform Law*, <http://www.njslom.org/letters/2011-0628-S-2937-pensions.html>.

⁶⁸ Lynda Waddington, *Collective Bargaining Bill DOA in Iowa Senate*, IOWA INDEPENDENT, Mar. 14, 2011.

⁶⁹ Illinois General Assembly, *Bill Status of SB1556*, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1556&GAID=11&DocTypeID=SB&SessionID=84&GA=97>.

⁷⁰ See Marianne Goodland, *Employee Partnerships Order Still on the Books*, COLORADO STATESMAN, Feb. 11, 2011.

⁷¹ KEVIN WITKOS, CONNECTICUT SENATE REPUBLICANS, ‘CAPITAL CONNECTION’ SPECIAL SESSION UPDATE (July 8, 2011).

⁷² Alaska State House of Representatives: The House Majority, *Personal Legislation: Representative Carl Gatto (R)*, <http://www.housemajority.org/gatto/index.php?p=bills>.

⁷³ Robert Kahn, *State’s Teachers Call New Law Unconstitutional Political Attack*, COURTHOUSE NEWS SERVICE, Feb. 28, 2011.

employees from engaging in “political activity” on state time or soliciting political contributions from subordinates or coercing subordinates to “work in any capacity in any political campaign or cause.”⁷⁴ The law defines “political activity” extremely broadly: making contributions to or contracting with any entity that engages in political communications; paying for or engaging in public opinion polling; paying for or engaging in any form of political communication; engaging in any type of political advertising; making phone calls for any political purpose; distributing political literature of any type; or providing any type of in-kind help or support to a political candidate.⁷⁵ This law stands in stark violation of the recent Supreme Court decision in *Citizens United*, which constitutionally protects corporate political expenditures from regulation.⁷⁶ The Alabama Education Association filed a lawsuit challenging its constitutionality and achieved a broad preliminary injunction on March 18, 2011.⁷⁷ So far, the Eleventh Circuit has upheld the preliminary injunction.⁷⁸

Similar “paycheck protection” legislation is still pending or expected in several other states. For example, Arizona had two different bills governing paycheck deductions and political activity with two different results. Both laws passed the legislature, but the Governor vetoed Senate Bill 1329, which would have prohibited public employees from engaging in political activity or lobbying a governmental entity during working hours, but signed into law Senate Bill 1365, which requires that employees annually reauthorize union dues deductions for any union dues that are utilized for a political purpose.⁷⁹ In Florida, House Bill 1021, which requires annual member reauthorization of the use of dues for political purposes and which allows union members to cancel their membership at any time and receive a refund of their dues, was withdrawn from consideration.⁸⁰ In California, conservatives have begun a campaign titled “Stop Special Interest Money Now” that seeks to put a referendum that would ban automatic dues deduction for any portion of union dues that are used for political purposes on the November 2012 ballot.⁸¹ In Kansas, House Bill 2130, which would ban public employee unions from endorsing candidates and prohibit unions from obtaining voluntary dues from its members for political activities, was approved by the House on February 24, 2011, and is now in a Senate committee.⁸² In Iowa, Senate File 217, which would prohibit deducting membership dues from wages or salaries of public employees receiving health care benefits, is stuck in committee.⁸³ In Missouri, House Bill 466, which would require unions to obtain written consent from members in order to deduct

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁷⁷ See *Ala. Educ. Ass’n v. Bentley*, Case No. 5:2011cv00761-CLS (N.D. Ala. 2011).

⁷⁸ See *Ala. Educ. Ass’n v. State Superintendent of Educ.*, 2011 U.S. App. LEXIS 25903 (11th Cir. 2011).

⁷⁹ Alia Beard Rau & Jim Walsh, *Brewer Vetoes 29 Bills, Signs 357 into Law*, AZ CENTRAL, Apr. 29, 2011; David Madrid, *Labor Unions Criticize New Arizona Laws Taking Effect*, ARIZONA REPUBLIC, July 22, 2011.

⁸⁰ See The Florida Senate, *CS/HB 1021: Labor and Employment*, <http://www.flsenate.gov/Session/Bill/2011/1021>.

⁸¹ Mark Landsbaum, *The “Stop Special Interest Money Now” Act in California*, ORANGE COUNTY REGISTER, Apr. 11, 2011.

⁸² Mike Hendricks, *Kansas House Shows It’s No Friend of Unions*, KANSAS CITY STAR, Feb. 24, 2011.

⁸³ The Iowa Legislature, *Bill History for SF 217*, <http://coolice.legis.state.ia.us/CoolICE/default.asp?Category=BillInfo&Service=DspHistory&var=sf&key=0241B&GA=84>.

money from their paychecks for political purposes, needs another vote in the House before it moves to the Senate, where similar legislation has already been approved.⁸⁴

C. Anti-Prevailing Wage Legislation

The theory behind prevailing wage laws is that the state is a powerful purchasing entity and should not enter the market to bid down employees' wages. Thus, prevailing wage laws require that state contractors and subcontractors pay their employees not less than the prevailing rate of pay, including fringe benefits, for work of similar character in the county in which the work is performed. State agencies or committees that are charged with enforcing the prevailing wage law generally rely on state department of labor surveys of wages and benefits, by geographic location and job classification, to determine the appropriate "prevailing wage." In 2011, Republican legislators in several states introduced bills that were aimed at limiting or curtailing prevailing wage laws and using the coercive power of the state to actively bid wages down. For example, Indiana House legislators passed House Enrolled Act 1216 to raise the threshold for application of the prevailing wage law from contracts for \$150,000 to contracts for \$350,000.⁸⁵ The law also modified the composition of the committee that determines the prevailing wage so that it includes a representative of the Associated Builders and Contractors, along with a representative of the AFL-CIO. Ohio legislators are currently considering a bill, House Bill 153, which would raise the prevailing wage threshold for public contracts from \$80,000 to \$250,000.⁸⁶

D. Public Employee Compensation and Retirement Systems

The recent assault on public sector employees has seen numerous laws aimed at reducing the wages and benefits of employees. The Wisconsin legislation previously discussed included an assumption of pension contributions by public employees that amounted to a 5.8 percent cut in total compensation.⁸⁷ This cut was in addition to wage freezes and cuts that Wisconsin employees had already made. The change in the pension formula also paves the way for a future transition away from the current defined benefit plan towards a defined contribution plan.⁸⁸ Similarly, in Florida, the Senate and House reached an agreement on Senate Bill 2100, requiring state employees to contribute 3 percent of their salaries to the state pension fund, eliminating a 3 percent cost of living adjustment for retirees, and requiring that new employees have eight years of employment in order to be vested in the state retirement system.⁸⁹ In Hawaii, many public employees received a 5 percent pay cut and can anticipate further pay cuts for at least two more years.⁹⁰ Nevada eliminated retirement health insurance for new employees as part of Assembly Bill 80 if they retire with less than fifteen years of service.⁹¹ In New Jersey, Senate Bill 2937 requires that

⁸⁴ Missouri House of Representatives, *HB 466*, <http://www.house.mo.gov/billsummary.aspx?bill=HB466&year=2011&code=R>.

⁸⁵ *2011 Focus: Employment-Related Bills*, THE BRIEFING ROOM, May 16, 2011.

⁸⁶ FROST BROWN TODD LLC, CHANGES IN OHIO'S PREVAILING WAGE LAW (Aug. 2, 2011).

⁸⁷ John Schmid, *Public Employees May Face Shift to 401(k) Plans*, JOURNAL SENTINEL, Mar. 6, 2011.

⁸⁸ *Id.*

⁸⁹ ASSOCIATED INDUSTRIES OF FLORIDA, HOUSE & SENATE REACH AGREEMENT ON PENSION REFORM (May 2, 2011).

⁹⁰ Wendy Osher, *Hawai'i Public Employee Pay Cuts Take Effect Friday*, MAUI NOW, June 30, 2011.

⁹¹ NEVADA STATE EMPLOYEE FOCUS, SOME BILLS PASSED AND SIGNED (June 18, 2011).

police officers, firefighters, teachers, and rank-and-file public workers all pay more for their pensions and health benefits.⁹² The bill also eliminates cost-of-living increases to pensions for retirees and raises the retirement age for new workers. Several states, including Utah, Kentucky, Oklahoma, and Kansas, have begun moves to change their public employee pensions from defined benefit plans to defined contribution plans.⁹³ These changes are intended to mirror the current state of private sector pensions that favor defined contribution plans, which shift risk to the employees and decrease pension benefits.⁹⁴ However, in Minnesota, House File 192, which would freeze public employee compensation, place restrictions on future public raises, require reductions in the state workforce, and promote private sub-contracting, has been referred to committee and seems to have little chance of passing.⁹⁵

E. Recent Legislative Attacks on Unions in the Private Sector

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

1. “Right to Work” Laws

Federal law creates a problem for unions in securing financial resources to support their efforts in negotiating and enforcing collective bargaining agreements. Although, under federal law, neither the union nor the employer can require an employee to join the union,⁹⁶ federal law also requires that the union must fairly represent all employees in the bargaining unit, whether the employee is a member of the union or not.⁹⁷ Such fair representation can be quite expensive, perhaps even requiring the retention of an attorney or other professionals, and the union can be sued by either the National Labor Relations Board (“NLRB”) or the aggrieved employee for failing to meet this duty.⁹⁸ This state of affairs creates what economists refer to as a “free-rider” problem in that employees can enjoy the benefits of union representation without having to pay for them and, thus, “free-ride” on the union’s efforts.⁹⁹ To solve this problem, federal law allows unions to negotiate agreements with employers for “union security” that require each employee in the

⁹² See *About the Pension*, *supra* note 67.

⁹³ Steven Greenhouse, *Pension Funds Strained, States Look at 401(k) Plans*, N.Y. TIMES, Feb. 28, 2011.

⁹⁴ BETH ALMEIDA & WILLIAM B. FORNIA, NAT’L INST. ON RETIREMENT SECURITY, A BETTER BANG FOR THE BUCK: THE ECONOMIC EFFICIENCIES OF DEFINED BENEFIT PENSION PLANS (Aug. 2008).

⁹⁵ Minnesota State Legislature, *HF192 Status in House for Legislative Session 87*, https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF192&ssn=0&y=2011.

⁹⁶ *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

⁹⁷ See *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977); see also *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944).

⁹⁸ This might create a whole host of other problems.

⁹⁹ Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Equity in Bargaining Power and Industrial Peace*, 91 MICH. L. REV. 419 (1992). Imagine the problems if federal law required businesses to provide services to prospective customers without having to pay.

bargaining unit to either join the union and pay full dues, or pay an “agency fee” to cover the costs of representing the employee in the bargaining unit.¹⁰⁰ However, in Section 14(b) of the Taft-Hartley amendments to the National Labor Relations Act (“NLRA”), Congress specified that states can pass laws that can make such union security agreements unenforceable.¹⁰¹ In the ultimate public relations move, the right has designated such laws “right to work” laws, ostensibly because under such laws an employee has a “right to work” without paying for the costs of union representation.¹⁰²

There are currently twenty-three states that have “right to work” legislation.¹⁰³ Twelve states passed right to work legislation either before or contemporaneously with the passage of the Taft-Hartley amendments in 1947.¹⁰⁴ Since that time, there has been a relatively slow trickle of states that have passed right to work legislation: five states passed it in the 1950’s, one passed it in the 1960’s, two passed it in the 1970’s and one passed it in each decade since the 1980’s.¹⁰⁵ One of the states that passed right to work legislation in the 1950’s, Indiana, later repealed that legislation in 1964.¹⁰⁶ In the current financial crisis, conservatives have promoted right to work laws as a way to improve state business climate and steal jobs from other states.¹⁰⁷ Since the 2010 elections, at least eighteen states have considered right to work legislation.¹⁰⁸ In Indiana, Governor Daniels made the passage of House Bill 1028, which makes it a crime to negotiate a union security agreement, the first priority of the 2012 legislative session, despite the fact that neither Governor Daniels nor any other Indiana politician had run for election on the basis of enacting right to work legislation and Governor Daniels had in fact told union members he would not support such legislation because it was not necessary for the success of the state’s economy and, further, would start a political “civil war.”¹⁰⁹ Despite spirited opposition and a boycott by Democrats, the House and Senate Republicans passed the legislation, and Governor Daniels signed it on February 1, 2012, making Indiana the twenty-third right to work state.¹¹⁰ However, even in the wake of Republican successes in the 2010 elections, in most states, right to work legislation has floundered in committee or otherwise been defeated. In New Hampshire, the governor vetoed a “right

¹⁰⁰ *Comm’n Workers of America v. Beck*, 487 U.S. 735 (1988).

¹⁰¹ 29 U.S.C. § 164(b).

¹⁰² See National Right to Work Legal Defense Foundation, Inc., *Right to Work States*, <http://www.nrtw.org/rtws.htm>.

¹⁰³ *Id.* (Most right-to-work states introduced the policy through state legislation, but five states (Arizona, Arkansas, Florida, Mississippi, and Oklahoma) have amended their state constitutions to enact the policy.).

¹⁰⁴ *Id.* (Those states are as follows: Nevada 1911; North Dakota 1935; Florida 1943; Arkansas 1944; Nebraska 1946; South Dakota 1946; Georgia 1947; North Carolina 1947; Tennessee 1947; and Virginia 1947.).

¹⁰⁵ *Id.* (Those states are as follows: Mississippi 1954; South Carolina 1954; Utah 1955; Indiana 1957; Kansas 1958; Wyoming 1963; Iowa 1974; Louisiana 1976; Idaho 1985; Texas 1993; Oklahoma 2001; and Indiana 2012).

¹⁰⁶ Travis Waldron, *FLASHBACK: Indiana’s Last ‘Right-To-Work’ Law Failed So Badly It Was Repealed Eight Years Later*, THINK PROGRESS, Feb. 1, 2012.

¹⁰⁷ Such tactics seem particularly cut-throat.

¹⁰⁸ The list of states includes the following: Alaska, Hawaii, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin. MICHAEL J. HICKS, CTR. FOR BUS. & ECON. RESEARCH, RIGHT-TO-WORK LEGISLATION AND THE MANUFACTURING SECTOR (Jan. 2012).

¹⁰⁹ Amanda Terkel, *Mitch Daniels’ Evolution on Right to Work in Indiana*, HUFFINGTON POST, Jan. 19, 2012.

¹¹⁰ Monica Davey, *Indiana House Passes a Bill on Union Fees*, N.Y. TIMES, Jan. 25, 2012.

to work” law, House Bill 474, and a vote to override the veto failed.¹¹¹ In Maine, Legislative Document 309, which would have ended a requirement that nonunion state employees pay a portion of union dues, was put off until 2012.¹¹² In Missouri, Senate Bill 1, brought in early 2011, is stalled.¹¹³ In New Mexico, House Bill 331 died in committee.¹¹⁴ In Alaska, House Bill 134 is stuck in committee.¹¹⁵ In Michigan, House Bill 4054 is also stuck in committee.¹¹⁶

2. “Save our Secret Ballot” Laws

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

Despite this preemption, four states, including Arizona, South Carolina, South Dakota, and Utah, passed laws in 2010 that require secret ballot elections for union representation. In January 2011, the NLRB wrote to the states, advising them that these laws were in conflict with and preempted by the NLRA. After some dialogue with the states, the NLRB filed suit against Arizona to enforce its opinion.¹¹⁷ The NLRB has indicated that it will also sue South Dakota. Nonetheless, other states are considering similar legislation. Since these laws are clearly unconstitutional, it seems their primary objective is to whip up political support for the current system of secret ballot elections that has proven very favorable to employer anti-union campaigns. This political support acts as a bulwark against possible reform of the NLRA to allow card check or registry methods of achieving employee organization.

IV. Conclusion

The Great Recession and the resulting state and federal budget deficits have provided a golden opportunity for the right to undertake a major offensive against public employees, their wages and benefits, their collective bargaining rights, and their activity in the political process. The right laid the ground-work for this offensive in the organization of conservative institutions to channel big money contributions into research, advocacy, bill-drafting, and the election of candi-

¹¹¹ *Year in Review: NH Speaker Bill O'Brien's Year-Long Failed Attempt to Pass Right to Work for Less (HB 474): Superconservative supermajority in the NH House Rejected Attack on Workers*, GRANITE STATE PROGRESS, Nov. 30, 2011.

¹¹² State of Maine Legislature, *Summary of LD 309*, <http://www.mainelegislature.org/LawMakerWeb/summary.asp?paper=HP0251&SessionID=9>.

¹¹³ Chad Garrison, *Missouri Right-to-Work Bill Appears Dead—For Now*, RIVERFRONT TIMES, Mar. 15, 2011.

¹¹⁴ AMERICAN FEDERATION OF TEACHERS NEW MEXICO, SUFFICIENT FUNDING BILLS FOR SCHOOLS STALL IN SENATE: CALL TODAY (Mar. 14, 2009).

¹¹⁵ Alaska State House of Representatives: The House Majority, *House Bill 134*, <http://housemajority.org/spon.php?id=27hb134>.

¹¹⁶ Michigan Legislature, *House Bill 4054 (2011)*, <http://www.legislature.mi.gov/%28S%285puqkn2gzscyri55iawozvit%29%29/mileg.aspx?page=getobject&objectname=2011-HB-4054>.

¹¹⁷ Sam Hananel, *NLRB Will Sue Ariz., SD Over Union Laws*, BLOOMBERG BUSINESSWEEK, Apr. 25, 2011.

dates in support of their conservative agenda. This is a national conservative movement that seeks to have a massive impact at both state and federal levels. The Republican electoral victories of 2010 allowed the conservatives to bring this agenda to fruition with the enactment of laws in many states that are designed to reduce public employee wages and benefits and to end or significantly limit their right to collectively bargain. Conservatives have achieved this success despite the fact that research shows that public employee compensation is in fact less than comparable to that of private sector employees and the fact that public opinion polls show that the majority of Americans favor the right of public employees to collectively bargain.¹¹⁸ This offensive against public employees is further clearly aimed at limiting public employees' right to participate in the political process, thereby silencing them. As evidenced by the recent passage of a "right to work" law in Indiana, the battle against collective bargaining is far from over.

¹¹⁸ Michael Cooper & Megan Thee-Brenan, *Majority in Poll Back Employees in Public Sector Unions*, N.Y. TIMES, Feb. 28, 2011.