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“Running the Government Like a Business”: Wisconsin and the Assault on Workplace Democracy

INTRODUCTION: DEMOCRATIC SPRING

The news is filled with reports of democratic movements challenging authoritarian rule in the Middle East and elsewhere, prompting a nigh unanimous outpouring of support from across the American political spectrum. But a conflict much closer to home—the crisis in Wisconsin and a growing number of states over collective bargaining rights for public-sector workers—has produced a more mixed and complex reaction. To be sure, most polls suggest that a majority of Americans opposes efforts by Republican-dominated state governments to strip public-sector employees of their bargaining rights.¹ But a sizeable minority supports those efforts,²

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1. See, e.g., Doug Mataconis, *Have Republicans Lost the Public Relations War over Public Sector Unions?*, OUTSIDE THE BELTWAY (Mar. 3, 2011), <http://www.outsidethebeltway.com/have-republicans-lost-the-public-relations-war-over-public-sector-unions> (analyzing three public opinion surveys—a CBS/New York Times poll, a NBC News/Wall Street Journal poll, and a Rasmussen poll—and concluding that “Americans remain strongly supportive of unionism in general and the idea of the right to collective bargain with one’s employer, even when that employer happens to be the government”); *Ohio Women Lead in Disapproval of New Governor*, QUINNIPIAC UNIV. POLLING INST. (Mar. 23, 2011), <http://www.quinnipiac.edu/x1322.xml?ReleaseID=1570> (reporting that in the bellwether state of Ohio, “[v]oters oppose legislation . . . that would limit the ability of public workers to collectively bargain”).
 2. See, e.g., Lydia Saad, *More Americans Back Unions Than Governors in State Disputes*, GALLUP (Apr. 1, 2011), <http://www.gallup.com/poll/146921/Americans-Back-Unions-Governors-State-Disputes.aspx> (reporting that 39% of Americans “say [they] agree more” with the governors and 48% “say [they] agree more” with the unions in ongoing disputes over collective bargaining and state budgets).

and challenges to the role of teachers unions—the public sector’s most visible organized cohort—have been issuing from the right and left alike.³ And while a consensus may be emerging among the credible commentariat that Wisconsin Governor Scott Walker “overplayed his hand”—using a budget crisis as a pretext for punishing unions he views as political opponents⁴—the frequent portrayal of teachers and other civil servants as members of a privileged and overpaid class who enjoy jobs for life and the benefits of “lavish” health care and pension plans has clearly found some traction with the viewing public, despite the considerable gap between that image and the daily lives of most of those thus portrayed.⁵

But I want to argue here that the stakes in Wisconsin have less to do with the bona fides of budget crises and benefits packages than with something a great deal more fundamental: the struggle between democratic governance and authoritarian control in the American workplace. I don’t wish to overstate the parallel to events in the Middle East, where the courage of the men and women who have joined the unprecedented wave of antigovernment protests is nearly beyond measure. But unions give American workers something that markets and employers seldom afford them and that contemporary American law does not otherwise provide: a genuine voice in important decisions about their work lives and the power to make that voice heard. The attack on public-sector unions thus threatens to exacerbate what is already a breathtaking “democracy deficit” in U.S. labor relations and—should the effort gain traction and succeed—to cut American workers altogether out of a role in workplace governance. Indeed, now that private-sector union representation in the United States has reached a post-World War II low of under 8%,⁶ the mantra of Republican

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3. See, e.g., Andrew Rice, *Miss Grundy Was Fired Today*, N.Y. MAG., Mar. 20, 2011, <http://nymag.com/news/features/michelle-rhee-2011-3> (analyzing recent critiques of public school teachers “from union-busting Republicans on the right and wealthy liberals on the left”).
 4. See, e.g., David Brooks, Op-Ed., *Make Everybody Hurt*, N.Y. TIMES, Feb. 22, 2011, <http://www.nytimes.com/2011/02/22/opinion/22brooks.html>; Evan McMorris-Santoro, *The Next Union Battlefield in Ohio: The Ballot Box*, TALKING POINTS MEMO D.C. (Mar. 4, 2011, 8:36 AM), <http://tpmdc.talkingpointsmemo.com/2011/03/the-next-union-battlefield-in-ohio-the-ballot-box.php>.
 5. See, e.g., *The Daily Show with Jon Stewart: Crisis in Dairyland—Apocalypse Cow* (Comedy Central television broadcast Mar. 10, 2011), available at <http://www.thedailyshow.com/watch/thu-march-10-2011/crisis-in-dairyland--apocalypse-cow> (collecting clips from Fox News and other sources criticizing the “lavish, with a capital L, benefits” enjoyed by public school teachers who assertedly work “a part-time job, [where] they’re done at 2:30”).
 6. Compare News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *Union Members—2010*, at 7 tbl.3 (Jan. 21, 2011) [hereinafter BLS News Release], available at

state officials that government should be “run like a business”⁷ may well portend a clean and decidedly non-union sweep for the public-sector workforce as well.

Yet in my experience there aren’t many folks in the legal academy—or the legal profession more generally—who understand public-sector labor relations well enough to know just what to make out of the current crisis; indeed, there aren’t that many *labor law professors* who have much familiarity with the subject, though Lord knows of late we’ve been scurrying to get up to speed. So in order to lay out my argument that what’s at stake here is the survival of workplace democracy—and not, as even many progressives tend to assume, just another stage in the decline of a relic better suited to mines and factories than to the contemporary economy—I am going to need to provide a quick overview of some important points about public-sector union representation.

This Essay will therefore proceed as follows. In Part I, I explain why public-sector labor relations law is for most of us *terra incognita*, attributing the information gap to the absence of focus on public-sector issues in U.S. labor law teaching and scholarship. In Part II, I identify an important consequence of that gap: the failure of most contemporary accounts of the steep decline in private-sector union density to reckon with an equally dramatic *increase* in public-sector union density, contrasting fortunes that offer strong support for the view that labor law itself has played a robust role in whether and when American workers are able to secure an organized voice in the workplace. In Part III, I bring the differences between private- and public-sector labor law into focus and compare the union density figures with polling and survey data on the attitudes of American workers—union and non-union alike—to support my claim of a “democracy deficit” in workplace governance. In Part IV, I examine the details of the recent anti-union initiatives in Wisconsin and elsewhere and the likely

<http://www.bls.gov/news.release/pdf/union2.pdf> (reporting that 2010 private-sector union representation is 7.7%), with Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES, Jan. 21, 2011, <http://www.nytimes.com/2011/01/22/business/22union.html> (putting post-World War II unionization at 35%).

7. See, e.g., John O’Connor, *Senate Panel OKs Giving Governor More Power*, THE STATE (Columbia, S.C.), Mar. 25, 2011, <http://www.thestate.com/2011/03/25/1750365/senate-panel-oks-giving-governor.html> (quoting a spokesman for South Carolina Governor Nikki Haley as suggesting that she is seeking “to run[] state government like a business”); Press Release, Scott Walker for Wisconsin Governor, Walker Outlines Blueprint To Bring 250,000 Jobs to Wisconsin (Sept. 16, 2010), available at <http://www.scottwalker.org/press-release/2010/09/walker-outlines-blueprint-bring-250000-jobs-wisconsin> (describing constituents as “customers” and suggesting that parts of the state government ought “to operate more like a business”).

consequences for the democracy deficit if the initiatives in question stand and spread. Part V concludes with an examination of the argument—often (and wrongly) attributed to President Franklin D. Roosevelt—that public-sector unions promote workplace democracy at the expense of civic democracy and popular sovereignty; I argue that precisely the opposite is the case and that union representation for public-sector workers is a critical feature of contemporary participatory democracy.

I. THE WELL-KEPT SECRET OF PUBLIC-SECTOR LABOR LAW: ITS CAUSES AND CURE

Simply put, public-sector labor law is a well-kept secret because U.S. labor law scholars—not exactly a growth industry to begin with—devote relatively little scholarly energy to it and seldom have occasion to teach it to students. It gets very little attention in the most popular labor law casebooks, and few law schools offer it with any frequency as a freestanding course. To be sure, there are some important exceptions on both the scholarly and the teaching fronts—Joe Slater, Marty Malin, and Ann Hodges have been doing particularly thoughtful work in the field⁸—but for most of us it is a bit of a black hole.

On the one hand, this is somewhat surprising. One might think that the presence of an important sector of the U.S. economy that has been bucking the de-unionization trend—especially a sector that has historically been an important source of economic advancement for women and people of color marginalized in the private sector—would be of great interest to the left-liberals and progressives who predominate in our common field. On the other hand, our focus in recent years on the steep private-sector decline is perhaps understandable.⁹ Given that crisis, turning one's attention to the public sector might have seemed a bit like the fellow who loses his keys in the night but leaves the spot where he dropped them to search instead under a nearby streetlight, reasoning that it is so much brighter there.

8. See, e.g., MARTIN H. MALIN, JOSEPH E. SLATER & ANN C. HODGES, *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* (2d ed. 2011); JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-62* (2004); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735 (2009); Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369 (2009).

9. See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008).

A second reason for the gap is that public-sector labor law is not an easy “thing” to study. Since the private sector in the United States is for the most part governed by the National Labor Relations Act (NLRA)¹⁰ and administered by the National Labor Relations Board (NLRB) with appellate review by the federal courts,¹¹ labor scholars who wish to study the field know just where to look, at least when it comes to the law on the books. By contrast, public-sector employees—federal, state, and local—are expressly excluded from NLRA coverage.¹² Federal employees have their own labor relations statute (the Federal Labor Relations Act),¹³ and state and local employees—who make up the vast majority of U.S. public-sector workers¹⁴—are governed by labor relations laws that vary from state to state.

That variance can be substantial. At one end of the spectrum, a handful of states prohibit public-sector collective bargaining altogether;¹⁵ at the other, a somewhat larger group (but still a small minority) of states not only authorize public-sector collective bargaining but take the further, controversial step of permitting public employees to strike.¹⁶ Moreover, as the recent developments in Wisconsin and elsewhere remind us, labor law at the state level is very much a moving target, in stark contrast to the NLRA, which has proven virtually impossible to amend for the past half century.¹⁷ Given the multiplicity of sources and the diversity and malleability of content, it is far more difficult for scholars and teachers to paint the public sector with a broad brush. Indeed, there is no Model Public Employees Relations Act or Restatement of Public Sector Labor Law to work with—though one is tempted to add that the latter may be a good thing lest public-sector workers suddenly find themselves to be employed “at will.”¹⁸ At the same time, focusing like a laser beam on local law is not a

10. National Labor Relations Act (NLRA) of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (2006)).

11. See NLRA, 29 U.S.C. § 153 (describing the structure and the functions of the NLRB); *id.* § 160(e)-(f) (outlining appellate review).

12. See *id.* § 152(2)-(3).

13. 5 U.S.C. §§ 7101-7106, 7111-7123, 7131-7135 (2006).

14. BLS News Release, *supra* note 6, at 8 tbl.3 (reporting a combined total of 17.5 million state and local employees versus 3.6 million federal employees).

15. See, e.g., N.C. GEN. STAT. § 95-98 (2009).

16. See, e.g., 5 ILL. COMP. STAT. § 315/17 (2011); 115 *id.* § 5/13(b).

17. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

18. See Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93,

great strategy for securing tenure or enhancing the curriculum of a law school with national aspirations.

The longstanding habit of viewing private-sector labor relations in relative isolation has had less than salutary consequences for our understanding of one of the most important developments in our field. But whatever the reasons for this past neglect, “we are all badgers now”¹⁹ and labor law scholars are certainly paying more attention in the wake of what is happening in Wisconsin and other states.

II. A TALE OF TWO DEMOGRAPHICS

Consider the recently released figures from the Bureau of Labor Statistics revealing that in 2010 union representation in the private sector fell to 7.7%—a remarkable decline from a post-World War II peak in excess of a third of the working population²⁰—while representation among public-sector workers, virtually non-existent until the late 1950s, hit 40%.²¹ Indeed, the number of public-sector union workers in the United States now exceeds the number in the private sector, a striking development given that public-sector employees comprise less than 17% of the American workforce.²²

What are we to make of these figures? As suggested earlier, the attention of those in the labor field has been focused almost entirely on the private-sector decline, and a variety of plausible causes have been canvassed in the literature: the disappearance of mining and manufacturing jobs—once the bedrock of union membership in the United States—and the rise of a less union-friendly service economy;²³ a decline in “career”

99 (2009) (critiquing job security provisions of the proposed restatement of private-sector employment law for embracing a far more robust version of the employment-at-will rule than is justified by the case law).

19. Stanley Fish, *We're All Badgers Now*, N.Y. TIMES: OPINIONATOR (Mar. 21, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/03/21/were-all-badgers-now> (applauding the effort of the faculty at University of Illinois at Chicago to unionize in solidarity with Wisconsin educators and other workers).
20. See Greenhouse, *supra* note 6.
21. BLS News Release, *supra* note 6, at 7-8 tbl.3.
22. *Id.* (reporting 8.4 million public-sector union workers versus 7.9 million private-sector union workers and 21.1 million public-sector workers versus 103 million private-sector workers).
23. See, e.g., Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973-1998*, in THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES 28, 29 (James T. Bennett & Bruce E. Kaufman eds., 2002) (arguing that “most of the decline in the [private-sector] union membership rate is due to differential

employment and a marked increase in outsourcing, subcontracting, and project work;²⁴ the ill fit between traditional union-negotiated workplace rules and the asserted need for “flexibility” in an increasingly competitive global economy;²⁵ the perception that labor unions—once viewed as a critical countervailing force to heartless employers imposing starvation wages and onerous working conditions on a vulnerable working class—have little role to play in the contemporary workplace, where employees enjoy legal protection against such predations through minimum wage laws, the Occupational Safety and Health Act, and a host of other state and federal statutes;²⁶ and finally the flourishing of an “information” economy with so-called “knowledge” workers who neither need nor want unions since workplace hierarchies have flattened and the conflict between capital and labor—the motive force in traditional U.S. labor relations—has been greatly diminished.²⁷

There is no doubt some truth to each of these now-familiar talking points, but there are important though less familiar counterfactuals. The supposedly union-resistant service economy, for example, is proving to be surprisingly fertile ground for organizing, as contemporary unions enjoy impressive successes in a variety of service industries including hospitality,²⁸ security services,²⁹ custodial and landscaping work,³⁰ and home health care.³¹ Moreover, many of these successes have occurred in the

employment growth rates in the union and nonunion sectors,” specifically in service-producing rather than goods-producing sectors and professional and managerial occupations rather than blue-collar occupations).

24. See, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 51-66 (2004).
25. See, e.g., *id.*
26. See, e.g., James T. Bennett & Jason E. Taylor, *Labor Unions: Victims of Their Own Political Success?*, in THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES, *supra* note 23, at 245, 247 (making the case that this “substitution hypothesis” helps explain union membership decline).
27. See, e.g., ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET (2003).
28. See, e.g., HOTEL WORKERS RISING, <http://www.hotelworkersrising.org> (last visited June 21, 2011).
29. See, e.g., Steven Greenhouse, *Office Security Guards Reach Union Accord*, N.Y. TIMES: CITY ROOM BLOG (June 25, 2008, 5:15 PM), <http://cityroom.blogs.nytimes.com/2008/06/25/office-security-guards-reach-union-accord>.
30. See, e.g., Steven Greenhouse, *Janitors’ Drive in Texas Gives Hope to Unions*, N.Y. TIMES, Nov. 28, 2005, <http://www.nytimes.com/2005/11/28/national/28janitor.html>.
31. See, e.g., Stu Schneider, *Victories for Home Health Care Workers: Home Care Workers Get Organized*, DOLLARS & SENSE, Sept.-Oct. 2003, at 25-27, available at <http://www.directcareclearinghouse.org/download/homehealthcare.pdf>.

context of outsourced and subcontracted work—the Justice for Janitors campaign in Los Angeles and other cities is a prime example³²—and “project” work has posed no bar to longtime union representation for musicians, actors, and construction employees working out of union hiring halls.³³ As for the assumed ill fit between unions and “knowledge” workers, it’s worth noting that over 40% of teachers and others in the education, training, and library occupations currently enjoy union representation, constituting what is by some distance the most unionized occupational cohort in the entire U.S. economy.³⁴ Meanwhile, numerous studies reveal widespread and flagrant violations of minimum wage and workplace safety regulations among firms employing low-wage workers,³⁵ and the relentless incantation of the “flexibility” mantra—a.k.a. the effort to shift the risks of the business cycle to workers and their families by eliminating job security—is evidence of a deep and abiding conflict between the voracious demands of capital and the all-too-human needs of labor.

In sum, there are reasons to doubt the seemingly widespread assumption that the principal reason for the decline in union density is that American workers don’t want or need unions because they have little role to play in the contemporary economy. Indeed, there is another account, one that has its provenance in work done in the 1980s by Paul Weiler, who argued that the principal reason for the decline in private-sector union density is that U.S. employers are increasingly breaking the law to thwart union organizing efforts and that American labor law does little to deter or to remedy the unlawful efforts.³⁶ Other scholars have occasionally taken up this theme—Cindy Estlund expanded on it to particularly powerful effect a

32. *Justice for Janitors*, SERV. EMPS. INT’L UNION (SEIU), <http://www.seiu.org/division/property-services/justice-for-janitors> (last visited June 21, 2011).

33. See Bureau of Labor Statistics, *Arts, Entertainment, and Recreation*, CAREER GUIDE TO INDUSTRIES, 2010-11 EDITION, <http://www.bls.gov/oco/cg/cgs031.htm> (last modified Dec. 17, 2009) (noting that unions play an important role in the performing arts sector); Bureau of Labor Statistics, *Motion Picture and Video Industries*, CAREER GUIDE TO INDUSTRIES, 2010-11 EDITION, <http://www.bls.gov/oco/cg/cgs038.htm> (last modified Dec. 17, 2009) (“Virtually all film production companies and television networks sign contracts with union locals that require the employment of workers according to union contracts.”); BLS News Release, *supra* note 6, at 7 tbl.3 (showing that the union representation rate in the construction industry is 14%, a full six percentage points above the private-sector average).

34. See BLS News Release, *supra* note 6, at 7-8 tbl.3.

35. See, e.g., ESTLUND, *supra* note 9, at 64-67 (examining violations of health and safety laws); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010) (examining violations of minimum wage laws).

36. Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

few years back³⁷—and a rich body of empirical work has likewise developed to support the lawless employer/toothless law thesis.³⁸ But in most of this work the public sector has been ignored or given the shortest of shrift,³⁹ and the contention here is that if we view the American workforce as a *whole*—taking the private and public sectors together—the case for the Weiler thesis is considerably strengthened.

III. WHAT'S LAW GOT TO DO WITH IT?

There are two critical differences between the rules that govern labor relations in the private sector and those in the public setting, and they go a long way toward explaining the contrasting fortunes of private- and public-sector unions. Simply put, private-sector workers risk their jobs when they try to organize a union and—if they are successful in their organizing efforts—they must risk their jobs a second time to secure gains through collective bargaining. In the public sector, by contrast, employees almost invariably engage in both union organizing and collective bargaining without exposing themselves to such risks.

A. The Risk of Discharge for Union Organizers and Supporters

On the organizing front, private-sector workers are far more vulnerable to retaliatory discharge at the hands of an anti-union employer than their public-sector counterparts. While the law on the books protects both private-sector and public-sector employees against retaliation for union

37. See Estlund, *supra* note 17.

38. See Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 684-85 (2010) (collecting and analyzing studies).

39. The rare exception is the work of (naturally) a public-sector labor law specialist, on which I will frequently draw in Part III of the Essay. See Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53 (2007) [hereinafter Slater, *American Rule*]; Joseph E. Slater, *Lessons from the Public Sector: Suggestions and a Caution*, 95 MARQ. L. REV. (forthcoming 2011) [hereinafter Slater, *Lessons*]; see also Tom Juravich & Kate Bronfenbrenner, *Preparing for the Worst: Organizing and Staying Organized in the Public Sector*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 262 (Kate Bronfenbrenner et al. eds., 1998) (comparing employer anti-union conduct in private- versus public-sector union campaigns).

support,⁴⁰ the overwhelming majority of private-sector employees work under the employment-at-will rule, meaning in essence that their employer can fire them at any time for any reason not prohibited by law. As I have argued elsewhere, as a result, a discharged organizer faces an uphill battle in establishing that the employer's motive in firing her was to thwart the campaign.⁴¹ An employer so accused will ordinarily assert reasons for the dismissal that have nothing to do with the union—reasons such as insubordination or malingering, though under the “any” reason standard of employment-at-will the possibilities here are by definition virtually limitless.⁴² To be sure, in good years the NLRB is quite adept at seeing through pretexts, but the resulting process—from the filing of a charge of anti-union dismissal through complaint and hearing to judicial review—takes an average of two or three years.⁴³ Even if everything goes right, at the end of it all, a successful employee is entitled to no more than reinstatement (a frightening prospect in itself for most discharged workers) and back pay less interim earnings.⁴⁴ An employer therefore may decide that this is a small price to pay for thwarting a union organizing effort.

According to an impressive body of empirical studies, a shocking percentage of U.S. employers comes to precisely that calculation. One recent study estimated that as many as one in five U.S. workers who supports a union campaign as an “activist” is unlawfully fired for her efforts,⁴⁵ and another puts the odds at one unlawful discharge for every

40. In the private sector, see 29 U.S.C. § 158(a)(3) (2006) (prohibiting discharge and other discrimination on the basis of union support); in the public sector, see, for example, 5 U.S.C. § 7116(a)(2) (importing the same rule for federal employees).

41. See Richard Michael Fischl, “*A Domain into Which the King’s Writ Does Not Seek To Run*”: *Workplace Justice in the Shadow of Employment-at-Will*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 253 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002) (analyzing the challenge of establishing unlawful motive against the backdrop of employment-at-will).

42. See, e.g., Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 *TEX. L. REV.* 1655, 1670-78 (1996).

43. See Sachs, *supra* note 9, at 2695 & n.34.

44. On the “dismal” success rate of reinstatement in NLRB discharge cases and the limited monetary remedies available, see Fischl, *supra* note 41, at 255-57.

45. JOHN SCHMITT & BEN ZIPPERER, CTR. FOR ECON. & POLICY RESEARCH, *DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS* 11 (2007), available at http://www.cepr.net/documents/publications/unions_2007_01.pdf (“If we assume that ten percent of pro-union workers are union activists, and that employers target union activists, then we estimate [based on NLRB records of illegal firings during organizing campaigns] that in 2005 union activists faced about an 18 percent chance of being fired during a union-election campaign.”).

three union campaigns.⁴⁶ And while there is disagreement over the precise frequency,⁴⁷ there is no disputing that retaliatory discharges are an all-too-common feature of private-sector union campaigns—generating between six- and seven-thousand discriminatory dismissal charges filed with the NLRB in a typical year⁴⁸—and it is well recognized that such discharges are highly likely to halt a union campaign in its tracks.⁴⁹

The contrast to the public sector could scarcely be greater.⁵⁰ Most public-sector workers, at both the state and federal levels, enjoy the protections of civil service law and accordingly cannot be discharged without “just cause” or its equivalent.⁵¹ If a union organizer is fired in the midst of a campaign, the burden is on the employer to establish that this was not a retaliatory dismissal and that there was a *good* reason (not just “any” reason) apart from the organizing campaign to fire the employee.⁵² Moreover, because their employer is the government, public-sector

46. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 10 (Econ. Policy Inst., Briefing Paper No. 235, May 20, 2009), available at http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf.

47. For a perceptive discussion of the various studies and their significance, see Sachs, *supra* note 38, at 684-85.

48. See NAT'L LABOR RELATIONS BD., SEVENTY SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2007, at 122 tbl.2 (2007), available at <http://nlrb.gov/sites/default/files/documents/119/nlrb2007.pdf>; NAT'L LABOR RELATIONS BD., SEVENTY THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2008, at 80 tbl.2 (2008), available at <http://nlrb.gov/sites/default/files/documents/119/nlrb2008.pdf>; NAT'L LABOR RELATIONS BD., SEVENTY FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2009, at 94 tbl.2 (2009), available at <http://nlrb.gov/sites/default/files/documents/119/nlrb2009.pdf>.

49. See Bronfenbrenner, *supra* note 46, at 10.

50. For a comprehensive analysis of the legal protections against anti-union discharge available in the public-sector setting, see Slater, *American Rule*, *supra* note 39, at 88-90.

51. See, e.g., N.Y. CIV. SERV. LAW § 75 (McKinney 2011) (stating that a covered public employee “shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section”); 71 PA. CONS. STAT. ANN. § 741.807 (West 2011) (stating that “[n]o regular employee in the classified service shall be removed except for just cause”); WIS. STAT. § 230.34(1)(a) (2009) (“An employee with permanent status in class or an employee who has served with the state as an assistant district attorney for a continuous period of 12 months or more may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.”). See generally Slater, *American Rule*, *supra* note 39, at 88 (“While not all public officials are covered by just cause rules (policy-making officials typically are not, and there is often a probationary period for lower-level workers), the vast majority of public employees eligible to form unions are covered by such rules.”).

52. See *id.* at 89-90.

employees protected by civil service laws may enjoy due process rights in discharge cases that are not available against private-sector employers, and accordingly such employees will rarely face the sort of summary dismissal permissible in the private sector under employment-at-will.⁵³ As a result of these protections, retaliatory discharges for union organizing are comparatively rare in the public sector.⁵⁴ To be sure, this is in no small part the product of a culture in which public employers generally proceed with caution in dismissal cases, but the underlying legal protection has no doubt played a large role in the development of that culture.

B. Job Security Risks During Collective Bargaining

When employees in the private sector are successful in organizing a union, they face further risks to their jobs when the union and their employer commence collective bargaining over wages, hours, and working conditions. A private-sector union's principal source of bargaining power is the strike—the collective withholding of labor by the employees—or a credible threat that a strike will be mounted. This is a difficult undertaking in the best of circumstances, since striking employees and their families will have to make do without their paychecks or (in the vast majority of states) unemployment benefits for the duration of the strike, and the limited strike benefits available from most unions are nowhere near enough to make ends meet. But of far greater concern to most employees is the very real prospect that the strike will cost them their jobs.

This threat is a result of yet another gap between the law on the books and the law in action, for the NLRA explicitly protects the right to strike and proscribes employer interference with that right.⁵⁵ But the courts have interpreted the provisions in question to permit employers to hire “permanent replacements” for striking workers—replacements whom the employer is free to retain come the end of the strike.⁵⁶ The strikers, by contrast, have no right to re-employment unless and until there are post-strike vacancies in the employer's workforce.⁵⁷ Particularly during periods of economic stagnation or decline, the prospect of striking and thus risking

53. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

54. See Juravich & Bronfenbrenner, *supra* note 39, at 257 tbl.16.2 (estimating the frequency of discharge in a public-sector organizing campaign at 5% versus 30% for the private sector).

55. See NLRA, 29 U.S.C. §§ 157, 158(a)(1), 163 (2006).

56. The seminal case is *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

57. See, e.g., *NLRB v. Browning-Ferris Indus. Servs., Inc.*, 700 F.2d 385, 389 (7th Cir. 1983).

a job you have now for benefits that your union may or may not be able to achieve at the bargaining table—and which you may or may not be around to enjoy—is daunting, to say the least.

To be sure, employers have enjoyed the right to hire permanent replacements in the face of a strike since the earliest days of the NLRA,⁵⁸ but studies confirm a dramatic increase in the frequency of recourse to that right since the late 1970s,⁵⁹ coincident with the steep decline in private-sector density over the past three decades. The resultant effect on bargaining success rates has been devastating: a recent study reveals that nearly two-thirds of U.S. private-sector unions are unable to secure a contract within a year of recognition and that nearly half are unable to achieve one *at all*.⁶⁰

The contrast to the public sector is once again stark. In most states, public-sector unions do not (and indeed *cannot*) strike in support of bargaining demands; instead, a union's source of power at the bargaining table is a system of "interest arbitration."⁶¹ Although the details vary from state to state, the basic format works like this: if the employer and union fail to reach an agreement on a collective contract, a neutral arbitrator conducts proceedings in which the parties present evidence and arguments for their respective bargaining positions and then renders a decision, typically guided by such factors as comparable pay rates for similarly situated workers and the budgetary constraints on the government employer.⁶² In this setting, it is data and evidence, persuasive arguments, and reasonable proposals—rather than a self-immolating strike—that secures a union's goals in collective bargaining.

And even in the minority of states that do authorize public-sector strikes, for a variety of reasons—including civil service protections, state labor relations board rulings, and the previously described culture of job security in the public sector—public-sector workers seldom, if ever, face the prospect of permanent replacement in the course of a strike, eliminating for

58. See *Mackay Radio*, 304 U.S. 333.

59. See, e.g., Michael H. Leroy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935-1991*, 16 BERKELEY J. EMP. & LAB. L. 169, 189-91 (1995).

60. See JOHN-PAUL FERGUSON & THOMAS A. KOCHAN, SEQUENTIAL FAILURES IN WORKERS' RIGHT TO ORGANIZE 1 (2008), available at http://www.americanrightsatwork.org/dmdocuments/sequential_failures_in_workers_right_to_organize_3_25_2008.pdf.

61. Slater, *Lessons*, *supra* note 39.

62. See *id.*

them as well the threat to job security faced by their private-sector counterparts.⁶³

C. The Private/Public Difference and the Democracy Deficit

In sum, for the past several decades we have in effect been running a natural experiment to determine the difference between union density rates for employees who must risk their jobs to secure organizing rights and bargaining gains and those who can succeed on both fronts at relatively little risk to the prospect of continued employment. There should be no surprise that the figure for the former is less than one-fifth of the magnitude of the latter.

That this difference represents a “democracy deficit”—meaning that the private-sector figures do not reflect a decreased desire among employees for union representation but are instead the result of unlawful employer efforts to thwart that desire—is further buttressed by empirical work exploring the attitude of American workers toward unionization. In the well-known and frequently cited study *What Workers Want*—the product of a comprehensive multi-year survey conducted among private-sector workers in the United States—Richard Freeman and Joel Rogers reported that 32% of workers who were not represented by unions wished they were and that 90% of those who were wanted to stay that way.⁶⁴ Taking the figures together—at a time when union density was running just over 10%—the authors concluded that the statistics “implied a desired rate of private-sector unionization of 44%.”⁶⁵ Surely it is no coincidence that, in the one sector of the American economy where workers don’t face the threat of job loss for their union efforts, union density rates closely approximate that “desired” rate of unionization, and that employees who do face such a threat are organizing at a much lower rate.

It is of course possible that there are other differences between the private-sector and public-sector workforces that might account for the dramatically different degrees of unionization, but it is difficult to imagine just what those might be. The notion, for example, that public-sector workers are more “liberal” politically—and therefore more inclined to join unions—is undermined a bit by the fact that two of the most heavily

63. See Slater, *American Rule*, *supra* note 39, at 86 (finding no case of a legally authorized permanent replacement in the public sector).

64. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 17, 96-98 (2d ed. 2006).

65. *Id.* at 17; see also *id.* at 17-18 (analyzing Harris, Hart, and Zogby polling conducted between the initial 1999 study and 2006 and concluding that the desired rate of unionization had, if anything, increased in the interim).

unionized occupations in the public sector are police and firefighters,⁶⁶ not exactly strongholds for liberal sentiments. The notion that demographics play a major role is likewise difficult to sustain; for example, overall women are somewhat less likely than men to be represented by a union,⁶⁷ but they predominate in the field of education, the most unionized occupational cohort of all.⁶⁸ Indeed the sheer variety of blue collar, pink collar, and white collar occupations in the public sector—together with the fact that two of the largest occupational cohorts (education and health care) traverse the public/private boundary—suggest that there’s nothing inherent in the characteristics of the workforces in question which would predict strongly different views on unionization. There is, to be sure, one major difference with a lot of explanatory power: private-sector employers are nearly five times more likely than their public-sector counterparts to mount an aggressive effort against a union campaign and six times more likely to break the law while doing so.⁶⁹ But that’s precisely the difference that the Weiler thesis would predict.⁷⁰

There is thus ample reason to infer that the public-sector union density figure is a far superior measure of the appetite of American workers for union representation than the private-sector figure, but—given my argument here—it’s fair to ask whether a desire for union representation is the same as a desire for workplace democracy. As it happens, the argument for that correlation is even stronger in the case of public-sector workers than it is for their private-sector counterparts. Here’s why.

One of the principal benefits of union representation for private-sector workers is job security, for unionized workers almost invariably enjoy the benefits of collectively bargained “just cause” protection,⁷¹ in contrast to non-unionized private-sector workers who are overwhelmingly “at will.” Private-sector union workers also stand to gain substantially from the so-called “union wage premium,” which is estimated to push private-sector

66. See BLS News Release, *supra* note 6, at 7 tbl.3 (reporting union density of 37% among protective service occupations).

67. See *id.* at 5 tbl.1 (12% versus 14% in 2010).

68. Compare *id.* at 7-8 tbl.3 (showing a union density rate of 41% in education, training, and library occupations), with U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY 14 tbl.11 (2010), available at www.bls.gov/cps/cpsaat11.pdf (reporting that 74% of employees in those occupations are women).

69. See Juravich & Bronfenbrenner, *supra* note 39, at 266-67 tbl.16.2.

70. See Weiler, *supra* note 36.

71. See LAURA J. COOPER ET AL., ADR IN THE WORKPLACE: A COURSEBOOK 249, 258 (2000) (reporting that 92% of private-sector collective-bargaining agreements contain a “just cause” provision).

wage and benefits 15-20% higher than the wage and benefit package of non-union but otherwise similarly situated workers.⁷² Indeed, the increase in labor costs is a principal reason that many employers give for opposing unions.⁷³ The support for union representation in the private sector may accordingly have less to do with a generalized desire for workplace democracy than for what collective worker voice buys them—i.e., job security and a better pay package; indeed, the Freeman and Rogers survey confirms that union workers are far more likely to cite improved pay and working conditions as the principal benefit of union representation than having a say in workplace governance.⁷⁴

By contrast, as noted earlier most public-sector workers already enjoy “just cause” protection under civil service laws, and their ability to bargain over benefits is often narrowly circumscribed; in most states, for example, public-sector pensions are established via legislation rather than collective bargaining, and in the federal sector employees can’t bargain over wages or benefits at all.⁷⁵ So what’s the payoff in union representation for such workers?

A report in the *New York Times* about the recent union representation vote among the airport screeners working for the Transportation Security Administration (TSA) is revealing in this respect, contrasting the prospect of participation in workplace governance through union representation with the unilateral authority of the non-union employer.⁷⁶ Why, the article asks, would the screeners want to unionize, since their union (like most federal employee unions) won’t be able to bargain over wages, health benefits, or pensions and will also operate with additional restrictions (such as the preclusion of bargaining over job qualifications and discipline standards) in the name of “national security”? The answers offered by interviewed union supporters speak volumes. One employee, a nine-year veteran of the

72. See, e.g., David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, in *WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE* 79, 86, 88 tbl.4.3 (James T. Bennett & Bruce E. Kaufman eds., 2007).

73. See, e.g., Richard A. Epstein, *The Case Against the Employee Free Choice Act* 24-25 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 452, 2009), available at <http://ssrn.com/abstract=1337185>.

74. FREEMAN & ROGERS, *supra* note 64, at 107 (noting that 48% of union workers identified “[b]etter pay/working conditions” as “the most important thing a union does for its members” versus 11% who chose “[m]ore say in workplace issues”).

75. See Joseph E. Slater, *Public Sector Labor in the Age of Obama*, 86 *IND. L.J.* (forthcoming 2011).

76. Steven Greenhouse, *Unions Woo Airport Security Screeners*, *N.Y. TIMES*, Apr. 15, 2011, <http://www.nytimes.com/2011/04/16/business/16screeners.html>.

agency, explained that “screeners ‘don’t have any voice on the job.’” Another said, “We’re the black sheep of the federal government. There are no work floor regulations for us so when there’s an issue, management’s attitude is: ‘It’s our way or the highway.’” And a third—an army veteran who had opposed unionization when he was hired but had come to a different view on the job—reported that “management staff treats us like we’re children.”⁷⁷

In a memorable presentation at a labor law conference some years back, Kris Rondeau—one of the leading figures in the successful union campaign among Harvard’s clerical workers during the 1970s and 1980s—sounded those themes and made the case for union representation in the most succinct and eloquent form I have ever encountered:

[We told our colleagues] that self-respecting adults represent themselves in all things. And to the extent any American worker can look around wherever he or she is, they see successful people representing themselves. They see that there’s no such thing as someone who they consider successful in their lives not requiring that they will be in the room where decisions are made about their lives.⁷⁸

As suggested earlier, it may be the case that employees who already enjoy the benefits of union representation take “be[ing] in the room” for granted, but Freeman and Rogers confirm that unrepresented workers experience a deep and abiding “influence gap” between their desire for having a say in workplace governance and the willingness of employers to satisfy that desire.⁷⁹

In other countries, there are alternative legal mechanisms available to empower worker voice, from works councils to health and safety committees, but efforts to explore such initiatives during the Clinton

77. *Id.* Of the nearly 20,000 TSA employees who voted in the ensuing election, well over 80% supported union representation. Because the union support was divided nearly equally between two labor organizations—the American Federation of Government Employees and the National Treasury Employees Union—a runoff election will be conducted to determine the organization that will serve as the screeners’ bargaining representative. Steven Greenhouse, *Airport Screeners Need Runoff to Pick a Union*, N.Y. TIMES, Apr. 20, 2011, <http://www.nytimes.com/2011/04/21/business/21screener.html>.

78. Kris Rondeau, Remarks at the Critical Legal Studies Conference: Can the 30s and the 60s Equal the 90s? (Jan. 1989) (recording on file with author). On the Harvard campaign more generally, see JOHN HOERR, WE CAN’T EAT PRESTIGE: THE WOMEN WHO ORGANIZED HARVARD (1997).

79. FREEMAN & ROGERS, *supra* note 64, at 76-77.

Administration foundered in the face of steadfast opposition (and not a little red-baiting) from the U.S. Chamber of Commerce and other employer representatives.⁸⁰ As a result, under U.S. law a union is the only form of representation that is, as a practical matter, open to American workers, and the public sector is the one place where that form of representation has been flourishing—the one place where workers, who clearly desire a voice in workplace governance, enjoy a right to secure such a voice that is available in practice and not just on paper. The recent efforts in Wisconsin and other states to deprive workers of that right thus ought to be viewed as a serious threat to what is all too rapidly becoming the last bastion of democratic governance in the American workplace.

IV. MADISON-IAN DEMOCRACY 2.0

So what exactly is going on in Wisconsin and other states where public-sector unions appear to be in for a serious challenge? To keep an already too long Essay from getting much longer, I'll focus here exclusively on Wisconsin, though the provisions of the bill in question are similar in broad effect to the law enacted in Ohio at the end of March and to the executive orders issued a few years back by Indiana Governor Mitch Daniels reversing a decade and a half of collective bargaining practice in that state.⁸¹

A. Parsing the New Law

As of this writing, Wisconsin's legislation—signed by Governor Scott Walker in March after a now-infamous journey through the state legislature—has been given the green light by the state supreme court, but a coalition of unions has filed a lawsuit in federal court challenging many of its provisions; in the meantime, recall elections have been scheduled for July for six Republican senators who supported the Governor's bill and

80. For background on the Chamber of Commerce campaign, see generally John Logan, *The Clinton Administration and Labor Law: Was Comprehensive Reform Ever a Realistic Possibility?*, 28 J. LABOR RES. 609, 619-20, 622-23 (2007).

81. S.B. 5, 129th Gen. Assemb. § 4117.08 (Ohio 2011) (codified as amended in scattered sections of OHIO REV. CODE ANN. (West 2011)), available at http://www.legislature.state.oh.us/BillText129/129_SB_5_EN_N.pdf; Ind. Exec. Order 05-14 (Jan. 11, 2005) (repealing Ind. Exec. Orders 90-6 (May 22, 1990), 97-8 (Oct. 1, 1997), and 03-35 (Oct. 1, 2003), which were issued by Governors Evan Bayh, Frank O'Bannon, and Joseph Kernan respectively). For a perceptive account of the similarities as well as some important differences between the Wisconsin and Ohio approaches, see Steven Greenhouse, *Ohio's Anti-Union Law Is Tougher than Wisconsin's*, N.Y. TIMES, Apr. 1, 2011, <http://www.nytimes.com/2011/04/01/us/01ohio.html>.

three Democrats who opposed it, and the possibility of a differently constituted state senate may not bode well for the law's future, irrespective of what eventually happens in the courts.⁸² So the final chapter of this story is far from written.

Broadly speaking, the law seeks to accomplish four discrete ends: (1) eliminating collective bargaining altogether for some categories of workers; (2) eliminating or limiting collective bargaining for most of the rest of the public sector workforce with respect to particular bargaining subjects; (3) requiring an annual vote by employees to re-authorize bargaining by each state union; and (4) prohibiting the right of unions to secure the payment of representation fees via paycheck deduction. I will briefly address each in turn.

(1) The law eliminates collective bargaining altogether for home health care workers, family child care workers, employees of University of Wisconsin hospitals and clinics, and faculty and staff at the University of Wisconsin.⁸³

(2) For the remaining public-sector workers, collective bargaining is eliminated altogether for working conditions and non-wage benefits (such as health care coverage and pensions).⁸⁴ Although bargaining over wages is still permitted, wage increases will be approved (if at all) on an annual basis and capped at the rise in the Consumer Price Index.⁸⁵

(3) Employees in every union will be required to vote annually on whether to continue such representation,⁸⁶ a change from the former practice—and the practice followed in virtually every other private- and public-sector setting in the United States—of certifying continuing

82. See *Wisconsin v. Fitzgerald*, No. 2011AP613-LV & 2011AP765-W (Wis. June 14, 2011), available at <http://www.wicourts.gov/sc/opinion/DisplayDocument.html?content=html&seqNo=66078>. On the federal suit brought by the unions, see Don Walker & Patrick Marley, *Unions Seek To Overturn Court Order Reinstating Collective-bargaining Law*, MILWAUKEE J. SENTINEL, June 15, 2011, <http://www.jsonline.com/news/statepolitics/123921154.html>. On the recall efforts—which are also under legal challenge—see Tom Tolan, Patrick Marley & Jason Stein, *Recall Elections Set for 3 Democratic Senators*, MILWAUKEE J. SENTINEL, June 15, 2011, <http://www.jsonline.com/news/statepolitics/123516934.html>. Because of the legal challenge that eventuated in the state supreme court decision, the law has not yet been published; accordingly, citations here are to the bill as passed by the state legislature and signed by the governor. A.B. 11, 2011 Leg., Spec. Sess. (Wis. 2011) [hereinafter Wisc. Bill].

83. Wisc. Bill §§ 10, 12, 30, 45, 79, 80, 82, 84, 90-93, 164,-65, 186, 188, 196-97, 209, 229, 265, 269, 279, 302, 304, 307, 317, 323, 335, 370, 374.

84. *Id.* §§ 95, 210, 214, 245, 262, 314.

85. *Id.* § 169.

86. *Id.* § 289.

representation on the basis of a single initial vote and holding subsequent votes only if employees seeking ouster come forward with evidence that a substantial percentage desires decertification. Moreover, to secure recertification, each union will need to win the votes of a majority of the workers employed in the particular bargaining unit (e.g., the teachers in a particular school district or the civil servants in a particular office) rather than merely securing a majority from among the ballots actually cast,⁸⁷ the conventional method of measuring majority rule in union representation elections.

(4) Finally, the new law imposes steep obstacles on the ability of public-sector unions to secure the payment of fees designed to cover the costs of union representation in grievance proceedings, in collective bargaining, and in other endeavors. In the private sector, this is typically accomplished by the inclusion of two provisions in a collective-bargaining agreement: an “agency shop” provision (which requires employees to pay reasonable representation fees to the union as a condition of continued employment) and a “dues checkoff” provision (which requires that the fees in question be deducted from paychecks). In the public sector, these provisions are frequently referred to together as a “fair share” agreement, the idea being that each individual represented by the union must pay his or her “fair share” of the union’s representation costs. Under the Wisconsin law, “fair share” agreements are prohibited altogether; that is, individual employees may no longer be required to make “fair share” payments as a condition of employment, and government employers may no longer deduct such fees from their paychecks.⁸⁸

The likely effects of these provisions will be fairly self-evident to labor lawyers and scholars, but for other readers a word or two describing the devastating impacts may be in order. The provisions eliminating bargaining rights altogether for home health care and family child care workers target two of the most economically vulnerable occupational cohorts in the state, and the sudden and dramatic de-unionization of faculty and others at the University of Wisconsin will have a profound effect on governance and morale at that institution. I’ll have something more to say about the long-

87. *Id.* Oddly, the provision also requires that a union secure 51% of the votes rather than the conventional majority measure of 50% plus one. *See id.* This would mean, for example, that a union that won the votes of 101 employees in a 200-worker unit would *not* be certified as bargaining representative despite enjoying the support of a clear and unambiguous majority of eligible voters. It’s not clear from the sources I’ve been able to access whether this represents a deliberate effort to make recertification even more difficult for Wisconsin unions or simply a misunderstanding of the arithmetic ordinarily involved in calculating a “majority.”

88. *Id.* §§ 200, 213, 219, 223, 227, 276.

term benefits issue in a moment,⁸⁹ but I suppose that taking that off the table will free up unions to face the considerable institutional and logistical burdens that will necessarily attend a “permanent campaign”⁹⁰ in the face of those annual re-certification elections, an extraordinary waste of time and resources for all concerned—including, in an era of budget crises, the state agency that is required to conduct all those elections.⁹¹ Indeed, it’s worth noting that an application of the majority-of-eligible-voters test for determining the election winner—instead of the more conventional measure of a majority of those voting—would invalidate the results of most U.S. political elections conducted in recent decades, strongly suggesting that something other than a desire to promote democratic decisionmaking is at work here. And finally, the elimination of “fair share” agreements means that public-sector unions will predictably face the “free rider” problems already faced by private-sector unions in right-to-work states: an inability to collect representation fees from employees who enjoy the benefits of collective bargaining and whom the union is nevertheless bound by law to represent.

As many news stories and columns about these new laws have noted, the fact that it’s Wisconsin whose laws are at stake is particularly devastating as a symbolic matter. Wisconsin has a storied past when it comes to labor matters, having been the first state to enact workers compensation, unemployment benefits, and—ironically enough—collective bargaining for public-sector workers, which it did in 1959.⁹² Indeed, given the state’s strong and longstanding union tradition, those in the labor movement may quite reasonably be concerned that if it could happen there, it could happen with considerable ease in the many states with less union-friendly cultures.

B. Making Sense of These Initiatives

Those leading the charge for these restrictions are clearly taking a page from the playbook of Rahm Emanuel, for they are certainly not letting the

89. See *infra* notes 102-106 and accompanying text.

90. Cf. SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN: INSIDE THE WORLD OF ELITE POLITICAL OPERATIVES* (1980).

91. See, e.g., Kevin Lee, *Wisconsin Union Elections Pose Logistical Difficulties*, STATEHOUSE NEWS ONLINE.COM (Mar. 31, 2011), <http://statehousenewsonline.com/2011/03/31/wisconsin-union-elections-pose-logistical-difficulties> (reporting the concerns of the General Counsel of the Wisconsin Employment Relations Commission).

92. William Cronon, Op-Ed., *Wisconsin’s Radical Break*, N.Y. TIMES, Mar. 21, 2011, <http://www.nytimes.com/2011/03/22/opinion/22cronon.html>.

financial crises faced by many states go to waste.⁹³ In many cases, the crises do indeed require swift and decisive action, and public-sector payrolls are frequently a substantial part of a state budget and thus a highly plausible target, especially when health care and pension costs are included in the mix. And in laying the blame for budget woes at the feet of public-sector workers—while painting an image of them as overpaid and underworked—officials have found a receptive audience among many taxpayers who see themselves as “footing the bill” despite their own financial crises born of job losses, health care costs, mortgage troubles, and greatly diminished pensions and savings.

But for a host of reasons, the bona fides of the underlying argument are open to serious questions, and opinion polls in the wake of the Wisconsin crisis suggest that much of the public is asking those questions.⁹⁴ It is one thing to contend that public-sector workers must “share in the sacrifices” required by budget crises; it is another thing altogether to call for the repeal of a half century of collective bargaining rights.

Indeed, early in the dispute, the unions in Wisconsin signaled their willingness to meet all of the governor’s financial demands by agreeing to make sizeable contributions to their health care and pension plans—contributions which together amounted to a de facto pay cut in the neighborhood of 10%,⁹⁵ no small thing for working families living paycheck to paycheck. The refusal of the Republicans to settle for those concessions and declare victory suggests that the real target was unions rather than budget cuts. And a provision of the Wisconsin bill that I haven’t mentioned until now all but confirms that suspicion. The bill excludes police and firefighters unions from all of the anti-union provisions discussed earlier—the limitations on bargaining subjects, the annual re-election requirement, the prohibition of “fair share” agreements—and the members of those two unions just happened to have supported Governor Scott Walker’s campaign for office.⁹⁶

Given the circumstances, there can be little doubt that these initiatives are payback time, driven at least in part by a desire to defund the

93. See, e.g., Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, N.Y. TIMES, Nov. 9, 2008, <http://www.nytimes.com/2008/11/10/us/politics/10obama.html> (quoting Emanuel’s famous dictum, “Rule one: Never allow a crisis to go to waste”).

94. See, e.g., sources cited *supra* notes 1-2.

95. See Steven Greenhouse, *Union Leader Mince No Words when Labor Issues Are at Stake*, N.Y. TIMES, Feb. 22, 2011, <http://www.nytimes.com/2011/02/23/us/23beil.html>.

96. See Todd Richmond, *Wisconsin Contract Bill Political Payback?*, BLOOMBERG, Feb. 14, 2011, <http://www.bloomberg.com/news/2011-02-14/wisconsin-contract-bill-political-payback-.html>.

Democratic Party, traditionally the beneficiary of sizeable campaign contributions by organized labor. In an era when so much private-sector organizing is among low-wage workers whose union dues cannot do much more than cover the costs of bargaining and representation, targeting unions of higher-income public-sector workers is a potentially effective strategy for depleting labor's coffers—and, not coincidentally, for silencing the most powerful and effective voice working people have in American politics.

But the troubling dimensions of the anti-union effort do not stop there. The likely consequences of the Wisconsin effort for female workers in particular are striking and difficult to ascribe to mere oversight. Women make up the vast majority of home health care and family child-care workers,⁹⁷ the two occupations singled out for losing their collective-bargaining rights altogether. Moreover, if the pay and benefits cuts lead to a reduction in these services, the consequences will predictably fall more heavily on those who have traditionally provided the lion's share of care work in their own homes: (you guessed it) women.⁹⁸ Women also comprise a large majority of the public school teachers, librarians, and staff who form the largest single cohort of workers hurt by the other provisions of the Wisconsin bill,⁹⁹ and they are traditionally *under*-represented among police and firefighters, the two occupations exempted altogether from the proposed restrictions.¹⁰⁰ In view of these consequences, the refrain that public-sector workers are “the new welfare queens”¹⁰¹—conjuring up the Reagan-era image of folks living beyond their station at the expense of hardworking taxpayers—is revealing as much for its misogynistic undertones as it is for the ugly racial stereotypes it invokes.

97. See BUREAU OF LABOR STATISTICS, *supra* note 68, at 16-17 tbl.11 (reporting that nearly 95% of child-care workers and 90% of health care support workers are women).

98. See NATIONAL ALLIANCE FOR CAREGIVING WITH AARP, CAREGIVING IN THE U.S. 2009, at 14, available at http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf (reporting that two-thirds of all family caregivers are women).

99. See BUREAU OF LABOR STATISTICS, *supra* note 68, at 15 tbl.11 (reporting that nearly 74% of education, training, and library workers are women).

100. See *id.* at 16 tbl.11 (reporting that only 21% of the protective services occupation workforce nationwide were women in 2010, including 4% of fire officers and 13% of police officers).

101. Cf. Jonathan Cohn, *Why Public Employees Are the New Welfare Queens*, THE NEW REPUBLIC: CITIZEN COHN (Aug. 8, 2010, 11:56 PM), <http://www.tnr.com/blog/jonathan-cohn/76884/why-your-fireman-has-better-pension-you> (citing refrain but arguing that the larger problem is “that retirement benefits for everybody else have become too stingy”).

Moreover, in the larger debate that the Wisconsin crisis has provoked, some important facts about public-sector unions are getting lost in the crossfire. For one thing, a wealth of empirical studies demonstrates that—for comparably educated individuals—public-sector workers are paid less and sometimes significantly less than their counterparts in the private sector. And those figures include the supposedly “lavish” health care and pension benefits packages.¹⁰² Indeed, the principal effect of unionization on pay and benefits in the public sector is egalitarian: it tends to raise the compensation of less educated workers in lower-pay occupations at the expense of the more highly educated professionals in the public employ, and the relatively lower earnings of the latter thus account for the lion’s share of the public-private differential.¹⁰³ Research confirms that Wisconsin follows precisely this pattern. Thus, public-sector workers in that state enjoy a pay and benefits package that is on average 5% lower than that of private-sector workers with comparable education and skills. But college-educated and especially professional employees account for most of that differential, and workers without a high school education are compensated somewhat more generously than their private-sector counterparts.¹⁰⁴ It is these vulnerable workers who thus stand to lose the most if the Wisconsin bill becomes law.

I do not mean for a moment to minimize the serious difficulties presented by the high cost of public-sector pension benefits in a number of jurisdictions. To some extent, they are the result of a “perfect storm” of factors. On the one side, there are unions doing what American unions in the public and private sectors have always done: negotiating for a pay-and-benefit package that emphasizes long-term benefits over pay rates. On the other, there are public officials who sought to appease union demands with the promise of deferred benefits that some later administration would have to worry about, and that day has finally come.

But this perfect storm can only account for so much of the current difficulty, because in most states pensions are established by law—in many cases, laws that predate collective bargaining and that typically cover

^{102.} See David Lewin et al., *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* 4-6 (Emp’t Policy Research Network, White Paper, Mar. 16, 2011), available at <http://www.employmentpolicy.org/topic/402/research/getting-it-right> (collecting numerous studies).

^{103.} See *id.* at 6.

^{104.} See Jeff Keefe, *Wisconsin Public vs. Private Employee Costs: Why Compare Apples to Oranges?*, ECON. POLICY INST. (Policy Memorandum No. 173, Feb. 2011), available at www.epi.org/page/-/old/policy/EPI_PolicyMemorandum_173.pdf.

public officials, managers, and non-union employees as well as union members.¹⁰⁵ There are some obvious abuses (such as pension “spiking,” i.e., basing benefits on an annual income figure inflated by overtime and other pay strategically accrued during the final year or years of employment) that can and should be eradicated. And there are other practices—such as early retirement at full benefits and so-called “double-dipping” (permitting retirees with generous benefit packages to secure employment in another capacity for the state)—that might be justified in some circumstances (e.g., early retirement for firefighters, who have worked thirty years at a dangerous and physically demanding job) but should be restricted in others (e.g., law professors).¹⁰⁶

Eliminating public-sector collective bargaining won’t advance such salutary efforts; in the many states where pension rules are established by positive law—and where the principal beneficiaries of some of the dodgier practices are managers and other high-end employees who aren’t even union members—it won’t address the abuses at all. Indeed, as the unfolding drama in Wisconsin reminds us, remedial efforts are far more likely to achieve viable and broadly acceptable results if the workers’ representatives are made part of the process rather than banished to the sidelines.

V. CONCLUSION: AND NOW A WORD FROM OUR FOUNDER

Whatever else might be said about the current crisis, it has gratified my sense of irony to see proponents of the restrictive legislation citing as authority none other than Franklin D. Roosevelt, whose presidency ushered in the New Deal and with it the Wagner Act that laid the groundwork for the organizing rights enjoyed by private-sector workers. In passages that have gone viral on the Internet¹⁰⁷—lifted from a letter the President wrote to the leader of a labor organization representing federal employees—Roosevelt argued forcefully that “the process of collective bargaining, as usually understood, cannot be transplanted into the public service”; that “[t]he very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual

105. See Lewin et al., *supra* note 102, at 8.

106. See *id.* at 11-12.

107. See, e.g., Patrick McIlheran, *FDR’s Ghost Is Smiling on Wisconsin’s Governor*, REAL CLEAR POLS. (Feb. 19, 2011), http://www.realclearpolitics.com/articles/2011/02/19/the_ghost_of_fdr_is_smiling_on_wisconsins_governor_108962.html; James Sherk, *F.D.R. Warned Us*, N.Y. TIMES: ROOM FOR DEBATE (Feb. 19, 2011, 9:38 PM), <http://www.nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees/fdr-warned-us-about-public-sector-unions>.

discussions with Government employee organizations”; and in particular that strikes and other “militant tactics” by public-sector workers were “unthinkable and intolerable.”¹⁰⁸

But the full text of the letter suggests a more nuanced position than the one implied by the quoted passages, and I lay it out here so that readers can judge for themselves, though I have italicized two passages, which are typically omitted and which I will emphasize in a moment:

My dear Mr. Steward:

As I am unable to accept your kind invitation to be present on the occasion of the Twentieth Jubilee Convention of the National Federation of Federal Employees, I am taking this method of sending greetings and a message.

Reading your letter of July 14, 1937, I was especially interested in the timeliness of your remark that the manner in which the activities of your organization have been carried on during the past two decades “has been in complete consonance with the best traditions of public employee relationships.” Organizations of Government employees have a logical place in Government affairs.

The desire of Government employees for fair and adequate pay, reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities for fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical, but meticulous attention should be paid to the special relationships and obligations of public servants to the public itself and to the Government.

All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The

¹⁰⁸. Letter from President Franklin D. Roosevelt to Luther C. Steward, President, Nat'l Fed'n of Fed. Emps. (Aug. 16, 1937), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15445>.

employer is the whole people, who speak by means of laws enacted by their representatives in Congress. *Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.*

Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable. It is, therefore, with a feeling of gratification that I have noted in the constitution of the National Federation of Federal Employees the provision that “under no circumstances shall this Federation engage in or support strikes against the United States Government.”

I congratulate the National Federation of Federal Employees the twentieth anniversary of its founding and trust that the convention will, in every way, be successful.

Very sincerely yours, [signature omitted in original]¹⁰⁹

As I read the letter, Roosevelt is indeed quite clear about his opposition to strikes by public employees, but his position on collective bargaining seems to me to be more nuanced than the sound-bite version suggests. In the passages I have italicized, the President expresses support in principle for government consultation on a wide variety of matters—he specifically mentions wages, hours, working conditions, advancement, and grievances—with an organization representing its employees. And his point about the differences between the public and private setting, I take it, is not that collective bargaining and contractual commitments on such topics should be *prohibited* in the former but rather—turning now to the second italicized passage—that the authority of “administrative officials” to make such commitments was bounded by law, evincing a concern that the officials

109. *Id.* (emphasis added).

involved in “personnel management” are not acting of their own accord but answer instead (as the saying goes) to a higher authority. Thus, he contends, their authority is “governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.”

But he has chosen his words carefully here—he knows how to say “unthinkable and intolerable” but instead he says “governed,” “guided,” and “restricted,” even circumscribing the last with an adverbial phrase (“in many instances”), which suggests that “restriction” is not the rule but the exception. The punchline is that invoking President Roosevelt as an implacable opponent of public-sector bargaining on the basis of the letter in question is not an entirely convincing enterprise. It is also somewhat difficult to square with the legislation he had signed just a few years earlier creating the Tennessee Valley Authority (TVA), which authorized a fairly robust form of collective bargaining for federal employees.¹¹⁰

Two final thoughts. First, in point of fact, it would not trouble me to learn that a President who supported collective bargaining rights for private-sector workers had a different view when it came to the public sector. A few years back, I witnessed first-hand what happens when a charismatic University President—who had previously served with distinction as the Secretary of Health and Human Services under a Democratic President—faced the prospect of a union organizing campaign among janitors and landscapers who worked for poverty-level wages and enjoyed nothing in the way of either health or human services from the university and its labor contractor, and it wasn’t pretty.¹¹¹ It therefore would not surprise me to learn that a liberal icon who voiced strong support for the rights of workers generally had a rather different view of such rights when they were exercised closer to home. Like the University President, President Roosevelt was after all an *employer*. And in my own experience there is no leader more dreadful to work for than one who is dazzled by the righteousness of his or her mission, whatever its political skew. Indeed, the notion that public administration is filled to the brim with do-gooder liberals who don’t have the heart to stand up to their workers is surely wide of the mark; the workers who toil in their service may be the ones who need a union and a strong say in their work lives the most.

110. For an excellent account of the role of collective bargaining at the TVA, see SLATER, *supra* note 8, at 83, 221 n.57.

111. See Richard Michael Fischl, *The Other Side of the Picket Line: Contract, Democracy, and Power in a Law School Classroom*, 31 N.Y.U. REV. L. & SOC. CHANGE 517 (2007) (describing and criticizing the University President’s tenacious but ultimately unsuccessful efforts to thwart the organizing campaign).

The second and final point comes full circle to my basic argument—what’s at stake in Wisconsin is workplace democracy. There is a counter-argument, of course, that public-sector bargaining is *anti*-democratic, that it grants governing power to an institution that is neither elected by nor answerable to the sovereign citizens. That’s certainly one way to read President Roosevelt’s cautions, and it is a school of thought that has enjoyed acceptance over the years in some formidable scholarly and intellectual circles.¹¹²

But I confess that I’ve always had a difficult time understanding that point, since public officials bargain with unelected institutions all the time—defense contractors, office supply companies, landlords, and the host of other firms that provide goods or services to the government. Why is it problematic to bargain with workers but not with firms? If the vice is thought to lie in the fact that it’s *collective* bargaining, then we would do well to recall the central lesson in Justice Holmes’s brilliant dissent in *Vegeahn v. Guntner*¹¹³: capital is collective too.

A related and more familiar argument is that unionized public-sector workers get “two bites at the apple”—i.e., the deployment of union power in the selection of the very officials with whom their unions will bargain. To be sure, there is once again a parallel to other government contractors, and so long as we live in a world in which corporate contributors enjoy a considerable capacity to shape the scope and direction of our politics, it seems to me that the countervailing voice provided by public and private-sector unions on behalf of working people is a necessary and undeniable good. Indeed, the employees whose union rights are under attack in Wisconsin—in particular, the women providing home health care and family child care who have lost their bargaining rights altogether; the teachers in the elementary and secondary schools whose rights to bargain over pay, health care, and pension benefits have been greatly curtailed; and the workers without high school degrees who have gained the most materially from collective bargaining—are, by any fair measure, greatly under-represented groups in American politics. The notion that the amplified voice that union representation has afforded them undermines democracy—meaning the democracy we actually have rather than the New England town meeting we might imagine—strikes me as singularly unpersuasive.

112. See Malin, *supra* note 8, at 1370-74 (collecting a variety of authorities for this argument).

113. 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting).

Moreover, it seems to me that the arguments against public-sector bargaining ultimately rest on a cramped view of proper governance—of commands issuing from the sovereign—rather than a dialogic one far more compatible with the complexity of the administrative state and democracy on the ground. Indeed, it sounds a lot like running a government as if it were a business. But in the American workplace, the notion of governance as commands issuing from the sovereign is the *problem*; democracy is the solution.

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