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BEYOND WISCONSIN: PUBLIC EMPLOYEE UNION RIGHTS AMIDST STATE ATTACKS ON PUBLIC SECTOR COLLECTIVE BARGAINING

MICHAEL L. ARTZ*

INTRODUCTION

Public sector union members and their supporters will surely remember this moment in time for the rise of the Tea Party and the ruthless, relentless attacks on their collective bargaining rights and their unions. The class warfare initiated by conservative politicians and their supporters in Wisconsin, Ohio, Michigan, Indiana, Florida, Arizona and many other states could reasonably be considered as an unfair fight against an imagined enemy. In spite of claims by conservatives of undue union influence in electoral politics and strain on resources by union member pensions and wages, union members remain a paltry percentage of the country's workforce and a minority of the public sector workforce.¹ Yet,

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1. *See Union Members Summary*, BUR. OF LAB. STAT. (Jan. 21, 2011), <http://www.bls.gov/news.release/union2.nr0.htm> (showing that in 2010, the union membership rate overall was 11.9 percent, down from 12.3 percent in 2009, and public sector union membership was at 36.2% while private sector membership was at 6.9%).

conservative legislators and governors, inspired by their new majorities in state governments either previously held by Democrats or split between the parties,² sensed an opportunity to wield a final death blow to one of the few remaining organized efforts in the interests of the working and middle classes: unions.³

They failed. While anti-union laws were introduced and passed in Wisconsin, Ohio, Michigan and elsewhere, the residents of those states voiced their opposition, organized, fought back, and in several measurable ways, won. In Wisconsin,⁴ Governor Scott Walker's anti-union budget repair bill resulted in an occupation of the state house by union supporters,⁵ the fleeing of the state by Democratic lawmakers temporarily preventing passage of the law,⁶ the eventual running of recall elections against state senators that

2. See *2010 Election: Legislature Party Control Switch*, NAT'L CONF. OF STATE LEGIS, <http://www.ncsl.org/?tabid=21318> (last visited Oct. 29, 2012) (showing that eleven states changed from Democratic to Republican control in November of 2010).

3. See *Factbox: Several States Beyond Wisconsin Mull Union Limits*, REUTERS Mar. 10, 2011, <http://www.reuters.com/article/2011/03/11/us-unions-states-idUSTRE72A05T20110311> (providing an overview of legislatures and Governors in 2010 and 2011 who introduced and, in many cases, enacted new laws attacking collective bargaining rights, public employee pensions, and/or public employee health care including Alaska, Arizona, California, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, Nevada, New Hampshire; New Jersey, Ohio, Oklahoma, Pennsylvania Tennessee, Washington, and Wisconsin); see also Julia Edwards, *Union Protests Spread Across America*, NAT'L J., Apr. 8, 2011, <http://nationaljournal.com/union-protests-spread-across-the-u-s--20110408> (identifying proposed legislation throughout the United States aimed at impacting unions and collective bargaining rights through an interactive map).

4. S.B. 233, 2011 Reg. Sess. (Wis. 2011), 2011 Wisc. Legis. Serv. Act 10, § 245 (West 2011); Assemb. B. 338, 2011 Reg. Sess. (Wis. 2011). *But see*, *Madison Teachers, Inc. v. Scott Walker*, No. 11CV3774, 2012 Wis.Cir. WL 4041495, (Wis. Cir. September 14, 2012) (holding several sections of 2011 Wisconsin Act 10 relating to collective bargaining to be unconstitutional). See generally Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABAJ. Lab. & Emp. L. 293 (2012) (examining the bill's history and passage that included the massive protests, the Democrats' fleeing to Illinois to avoid the quorum, the eventual passing of the bill by simple majorities, the political and legal battles played out in the Dane County District Court, and the unsuccessful efforts to re-call Governor Scott Walker).

5. See Steve Contorno, Dan Benson & Ben Jones, *Police: Wisconsin Protest Saturday 'One of Largest'*, USA TODAY (Feb. 27, 2011, 2:12 PM), <http://www.usatoday.com/news/nation/2011-02-26-wisconsin-saturday-rallyN.htm> (reporting that up to 100,000 people protested at the state capitol grounds in Madison, Wisconsin).

6. See Lyndsey Layton, *'Wisconsin 14' Group of Democratic Senators Returns, Greeted by Thousands at Capitol*, WASH. POST, Mar. 13, 2011, at A04. available at http://www.washingtonpost.com/politics/wisconsin-14-group-of-democratic-senators-returns-greeted-by-thousands-at-capitol/2011/03/12/ABB28IS_story.html (reporting that fourteen Wisconsin state senators left the state for Illinois to prevent the quorum needed to pass Governor Walker's budget repair bill and a provision contained in the bill which would reduce public employee bargaining powers).

supported the law,⁷ and ultimately, a recall election against Walker himself.⁸

In Ohio, over one million voters signed a petition putting Governor John Kasich's anti-collective bargaining law, Senate Bill number five (SB 5), on the ballot in November for an up-or-down vote by the people.⁹ The people of Ohio then overwhelmingly voted to rescind the law.¹⁰

In Michigan, signatures were submitted in an attempt to do the same to Governor Rick Snyder's emergency financial manager law, otherwise known as the "dictator law."¹¹

Time will tell if these efforts by organized labor, their members, and supporters represent a sign that collective action is on the rise in the workplace, or if instead, these efforts are merely the death rattle of a dying movement. From the perspective of workers, labor leaders, and union supporters, unions are back in the news for fighting back, rather than taking it on the chin.¹²

The new laws attacked public sector union members with two general techniques. Some states governors and legislatures, such as in Arizona, attempted to regulate the unions as institutions by restricting their ability to participate in the political arena and effectively lobby on behalf of their

7. See *2011 Wisconsin Senate Recalls*, WisPolitics.com (Aug. 12, 2011), <http://www.wispolitics.com/index.iml?Article=238683> (documenting recall elections which resulted in two Republican incumbents losing their seats and reducing the Republican majority in the Wisconsin Senate from a five-person to a one-person margin).

8. See Jessica Vanegeren, *Capitol Report: Walker Recall Election Appears One Step Closer to Reality*, THE CAP TIMES, Feb. 27, 2012 (reporting that deadline had passed for Walker to challenge the more than one million signatures submitted to trigger a recall election). http://host.madison.com/ct/news/local/govt-and-politics/capitol-report/capitol-report-walker-recall-election-appears-one-step-closer-to/article_77e01348-5f4b-11e1-bae3-0019bb2963f4.html

9. See Joe Vardon, *SB 5 Opponents Make a Statement in a Big Way*, COLUMBUS DISPATCH, Jun. 30, 2011 (reporting that a parade of thousands of union supporters delivered 1.3 million signatures to the Ohio Secretary of State to place a collective bargaining law on the state's November ballot for "an amount equal to nearly [one] out of [six] of Ohio's [eight] million registered voters).

10. See Dennis Willard & Melissa Fazekas, *Turning the Tide in Ohio; How Social Media Helped Amplify our Message, Boost Earned Media Efforts, and Overturn an Ohio Law*, CAMPAIGNS AND ELECTIONS, Feb. 7, 2012, <http://www.campaignsandelections.com/case-studies/294222/turning-the-tide-in-ohio.html> (reporting the rejection of SB 5 by sixty-one percent of the vote)..

11. See, e.g., Kristin Longley, *Flint City Council Supports Referendum on Emergency Financial Manager Law*, FLINT J., Sept. 15, 2011 (reporting that Flint, Michigan's City Council passed a resolution voted to place a referendum on Michigan's 2012 ballot to repeal Michigan's emergency financial manager law).

12. See, e.g., *Fight for the Middle Class in Your State Capital!*, UNITED AUTO WORKERS, <http://www.uaw.org/page/fight-middle-class-your-state-capital> (last visited Feb. 21, 2011) (responding to events in "battleground" states affecting union workers).

members' interests.¹³ In other states, like Ohio and Michigan, lawmakers directly attacked the right to collectively bargain.¹⁴ Meanwhile, in Wisconsin, the birthplace of public sector collective bargaining in the United States,¹⁵ lawmakers combined both strategies in an attempt to completely wipe out union rights for public employees altogether.¹⁶ Not to neglect the quirky and nonsensical, in Maine, the Governor took the dramatic step of removing murals of workers from the state house and renaming conference rooms to avoid what he claimed was an anti-business bias.¹⁷

ATTACKS ON UNIONS AS INSTITUTIONS

Some state politicians, making no effort to hide their anti-union sentiments, proposed laws directly attacking unions' ability to survive and participate in the political process.¹⁸ These laws included provisions that would eliminate payroll deductions of union dues or eliminate fair-share fees from employees who opt out of paying dues for political purposes, as well as provisions that would limit the right for union members to make political contributions at all.¹⁹

In Arizona, recently-enacted, but currently enjoined, Senate Bill 1365 requires Arizona unions wishing to continue to receive dues by payroll deduction to collect signatures annually from members who previously signed

13. See ARIZ. REV. STAT. § 23-361.02 (2011) (amending Arizona's labor code to require new disclosures and employee consent procedures for union dues used for "political purposes"). *But see* UFCW Local 99 v. Brewer, 827 F.Supp.2d 1118 (2011) (ordering the Attorney General preliminarily enjoined from enforcing SB 1365)..

14. See S.B. 5, 129th Sess. (Ohio 2011), 2011 OHIO LEGIS SERV. 10 (West 2011); Local Government and School District Fiscal Accountability Act, MICH. COMP. LAWS § 14.1501 (2011).

15. Spurred by the organizing efforts of the American Federation of State, County and Municipal Employees ("AFSCME"), Wisconsin passed the first public sector collective bargaining law in the United States. See generally Joseph E. Slater, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW AND THE STATE, 1900-1962, 167 (Cornell University Press, 2004) (chronicling the history of public sector bargaining in the United States).

16. See S.B. 233, 2011 Reg. Sess. (Wis. 2011), 2011 WIS. LEGIS. SERV. § 111 (West 2011).

17. See Eric Russell, *Fight Over LePage Removing Labor Mural Not Over Yet*, BANGOR DAILY NEWS, Jul. 16, 2011 (documenting LePage's antagonism to mural and pointing out that reports of public complaints against mural were of questionable validity).

18. See, e.g., Tom Feran, *Gov. John Kasich Says Leadership of Public Unions Unwilling to Pay Share of Pension Costs*, POLITIFACT (Aug. 25, 2011), available at <http://www.politifact.com/ohio/statements/2011/sep/27/john-kasich/gov-john-kasich-says-leadership-public-unions-unwi/> (last accessed Sept. 21, 2012) (revealing factual inaccuracies in state governor anti-union animus).

19. See S.B. 2, Special Session 2010 (Ala. 2010) (enacted), 2010 Ala. Laws 761 (codified at Ala. Code § 17-17-5 (b) 2012); H.B. 474, 2011 Leg., 162nd Sess. (N.H. 2011). *But see* St. Superintendent of Educ. v. Ala. Educ. Ass'n, Docket No. 1110413 (Ala. 2012) (appeal docketed); Press Release, Office of the Governor of New Hampshire, *Governor Lynch's Veto Message Regarding HB 474* (May 11, 2011), available at: <http://www.governor.nh.gov/media/news/2011/051111-veto-hb474.htm>..

voluntary authorization forms prescribed by federal law.²⁰ The law subjects employers to excessive fines unless the union supplies information to the employer about the union's expenditure of its treasury money for any "political purpose."²¹ Political purpose is vaguely defined under the law and includes just about every action public sector unions take on behalf of their members and bargaining units.²² Yet with no policy justification and likely due to political considerations, the law exempts all public safety unions.²³ A coalition of unions filed a lawsuit challenging the law as invalid under the First Amendment, Impairment of Contracts Clause, Due Process and Supremacy Clause due to National Labor Relations Act preemption; the lawsuit also charged that the law is in violation of the Equal Protection and Privileges and Immunities Clauses of the federal and state constitutions.²⁴ On September 23, 2011, the United States District Court for the District of Arizona agreed with the union plaintiffs and preliminarily enjoined the law as unconstitutional viewpoint discrimination in violation of the First Amendment.²⁵ Republicans in the Arizona legislature have also introduced a series of new proposals intended to restrict political spending and dues collection by unions.²⁶

The second part of Arizona's one-two punch is SB 1363, which creates a number of new crimes and civil offenses arising out of labor disputes applying to unions and their members, but not to employers.²⁷ The law prohibits or chills the speech and associational rights of unions and their members to engage in leafleting, picketing, boycotts, organizing or attending rallies, petitioning the government, commenting on an employer's goods, wares or services, or publicizing labor disputes or poor working conditions and labor records of certain Arizona employers.²⁸

In Alabama, the Alabama Education Association was successful in its effort to stop a similar law: SB 2.²⁹ SB 2 stated that no public authority may "arrange by salary deduction or otherwise for any payments to a political action committee" or for "dues" from any employee to "a membership organization

20. See ARIZ. REV. STAT. § 23-361.02 (2011) (amending Arizona's labor code to require new disclosures and employee consent procedures for union dues used for "political purposes"). But see *UFCW Local 99 v. Brewer*, 827 F.Supp.2d 1118 (2011) (ordering the Attorney General preliminarily enjoined from enforcing SB 1365)..

21. See *id.* at § 23-361.02(A).

22. See *id.* at § 23-361.02(I).

23. See *id.* at § 23-361.02(H).

24. See *Complaint to Intervene, United Food & Commercial Workers Local 99 v. Brewer*, No. 2:11-cv-00921-gms (D. Ariz. filed June 23, 2011).

25. See *Order, United Food & Commercial Workers Local 99 v. Brewer*, No. 2:11-cv-00921-gms (D. Ariz. filed September 23, 2011).

26. See Leigh Owens, *Arizona Anti-Union Bills Fueled By Americans For Prosperity, Koch Brothers Support*, HUFFINGTON POST (Mar. 1, 2012), http://www.huffingtonpost.com/2012/03/01/arizona-union-rights-koch-brothers_n_1311243.html

27. ARIZ. REV. STAT. § 12-1809 (2011).

28. See *id.* at § 12-1809.

29. See *Ala. Educ. Ass'n v. Bentley*, 788 F.Supp.2d 1283 (N.D. Ala.2011).

which uses any portion of the dues for political activity.”³⁰ Any organization that arranges for its membership dues to be deducted and remitted by a public employer must “certify” in advance its non-political use of the dues, and it must then annually provide a “detailed breakdown of [its] expenditures” of the dues.³¹ A group that fails to comply with any of these requirements or “files false information” shall be “permanently barred” from entering into such arrangements.³²

ATTACKS ON COLLECTIVE BARGAINING RIGHTS

Other states, like Ohio and Michigan, decided not to explicitly attack unions as institutions, but instead severely limited what could be collectively bargained down to the point of rendering collective bargaining completely ineffective and generally worthless.³³

In Ohio, Senate Bill 5 (“SB 5”), championed by Republican Governor John Kasich, would have permitted unions to continue to collect dues and spend those dues on political activities.³⁴ The law, however, would have prohibited the right to strike, would have greatly limited what could be bargained over, and it would have placed final authority on the results of bargaining in the hands of the employer, no matter the employees’ voice on the matters that effect them.³⁵ The law would also have permitted the State Auditor to declare a public employer in a state of fiscal watch and permitted the Governor to declare a public employer in a state of fiscal emergency, thereby allowing the public employer to repudiate all or part of the existing collective bargaining agreements.³⁶ Employees would not have been able to bargain over health care except for whether or not employees would pay more than a fifteen percent minimum of premium costs.³⁷ Public employers would have been free to impose whatever

30. S.B. 2, Special Session 2010 (Ala. 2010) (enacted), 2010 Ala. Laws 761 (codified at Ala. Code § 17-17-5 (b) 2012). *But see* St. Sup’t of Educ. v. Ala. Educ. Ass’n, Docket No. 1110413 (Ala. 2012) (*appeal docketed*).

31. *See id.*

32. *See id.*

33. *See* S.B. 5, 129th Sess. (Ohio 2011), 2011 OHIO LEGIS. SERV. 10 (West 2011); Local Government and School District Fiscal Accountability Act, MICH. COMP. LAWS § 14.1501 (2011). *See also* Susan Berfield, *Financial Martial Law in Michigan*, BLOOMBERG BUS. WEEK (Apr. 28, 2011), http://www.businessweek.com/magazine/content/11_19/b422700462247.htm (examining Michigan’s controversial emergency financial management law).

34. OHIO REV. CODE § 4117.09(C) (2011) (prohibiting collection of agency fees of non-members).

35. *See* Am. Sub. S.B. No. 5, §§ 4117.11(B)(8), 4117.12(B)(4), 4117.15; 4117.08, 4117.09(F), 4117.105, 4117.106, 4117.107, 4117.108, 4117.109; 4117.11(B)(10), 4117.14, 4117.141, 4117.20.

36. *See id.* at 4117.104(A).

37. *See id.* at § 4117.08(B)(2), (E).

health plan they desired on their employees, regardless of quality of coverage. Public employers could also have chosen to provide no coverage at all if they so desired, without any collective bargaining over those choices.³⁸ SB 5 would also have imposed caps and limitations on vacation, sick leave, holidays, personal days, retirement cash out of sick leave, longevity pay supplements.³⁹

Moreover, the new law would have allowed the government to outsource its work to private contractors, with no voice from employees arising out of collective bargaining,⁴⁰ and would have excluded any new contracts that “contain[ed] any provision that in any way prohibits a public employer from entering into a contract with another public or private sector entity to privatize the public employer’s services or the contracting out of the public employer’s work.”⁴¹ Additionally, upon the privatization of its work force, no contract would have been able to provide protections to displaced workers by retaining those workers in other employment or paying severance pay as a result of the workers’ termination.⁴²

More troubling, staffing levels were off limits for collective bargaining under the proposed law. As it prohibited negotiations over the number of employees required to be on duty or employed in any department, division, or facility of a public employer.⁴³ Seniority, the keystone of the union workplace, could be factored into layoff decisions, but could not be the only factor.⁴⁴

Perhaps the biggest blow to meaningful collective bargaining rights was SB 5’s granting of the final say in any negotiating impasse to the employer.⁴⁵ Under the proposal, both the employer and the union submit their last offers to the legislative body, which then holds a public hearing within fifteen days after the collective bargaining agreement expires.⁴⁶ The parties explain their respective positions with respect to the fact-finder’s report,⁴⁷ then the chief financial officer certifies the higher priced offer.⁴⁸ Finally, the legislative body decides which offer to accept.⁴⁹ And if the legislative body fails to act within the law’s time limits, the employer’s offer is deemed the final agreement, effectively granting the legislature a pocket veto of the union’s position.⁵⁰

38. *See id.*

39. *See id.* at § 4117.108-09.

40. *See id.* § 4117.14(G)(7)(b).

41. Am. Sub. S. B. No. 5, § 4117.105.

42. *See id.*

43. *See id.* at §§ 4117.08(B)(5) and 4117.106(A).

44. *See id.* at § 4117.09(F).

45. *See id.* at § 4117.14(C)(2).

46. *See* Am. Sub. S. B. No. 5, § 4117.14.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

The law also could have taken working conditions out of the hands of the workers, their union, and their employer and instead set them to a public vote.⁵¹ Under certain circumstances in the proposed law, either party or any constituent could have submitted the union's or the employer's last offer to the voters upon obtaining signatures of five percent of the electorate.⁵² During this process, the employer's last best offer would apply.⁵³ SB 5 generated intense outrage and backlash in Ohio.⁵⁴ The citizens' reaction was so strong that they voted down the law in a public referendum by a sixty-one percent margin.⁵⁵

In Michigan, the state legislature has passed and the Governor has signed into law the Local Government and School District Fiscal Accountability Act (Act) better known as the Emergency Financial Manager Bill or Dictator Law.⁵⁶

The Act allows the state treasurer or superintendent of public instruction to conduct a financial review of a local government or school district if in his or her sole discretion he or she finds facts or circumstances indicative of financial stress.⁵⁷ Upon a finding of financial stress, the Governor must then appoint a review team to undertake a financial management review.⁵⁸ If after the review, the Governor determines and confirms that a financial emergency exists, the Governor shall place the local government in receivership and appoint an emergency manager with broad powers to act in place of the locality's governing body and officers.⁵⁹ The emergency manager may then unincorporate, merge, or dissolve municipal governments and take over the authority and responsibility of passing and enforcing local laws.⁶⁰

The emergency manager may also consolidate or eliminate departments of local government, remove administrators and heads of departments, and

51. See Am. Sub. S. B. No. 5, § 4117.14.(C)(4)(a).

52. See *id.*

53. See *id.*

54. See Anita Waters, *Ten Thousand Ohioans Kick Off Fight to Repeal Senate Bill 5*, PEOPLE'S WORLD (Apr. 29, 2011), available at <http://peoplesworld.org/ten-thousand-ohioans-kick-off-fight-to-repeal-sen> (discussing Ohio residents' outrage and protest of SB 5).

55. See Reginald Fields, *Unions No-Shows at Gov. John Kasich's Compromise Meeting on Collective Bargaining Law*, THE PLAIN DEALER (Aug. 19, 2011), available at http://www.cleveland.com/open/index.ssf/2011/08/unions_stand_together_no-shows.html (describing unsuccessful negotiations between Ohio Governor Kasich and public employee union representatives regarding the pending vote on Senate Bill 5, now known as "Issue 2" on the ballot). The official results of the referendum vote were 61.59% of voters against the anti-union law and 38.41% of voters in favor. Official Results as reported by Ohio Secretary of State, November 8, 2011, available at <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue2.aspx>.

56. Local Government and School District Fiscal Accountability Act, MICH. COMP. LAWS § 14.1501 (2011).

57. See *id.* at § 141.1512(r).

58. See *id.* at § 141.1512(3)(4).

59. See *id.* at § 141.1515(4).

60. See *id.* at § 141.1519(1)(cc)(dd).

privatize local government functions.⁶¹ Moreover, the manager can also, among other powers, change or terminate local budgets, limit local spending, change or terminate local contracts including collective bargaining agreements, and establish and implement staffing levels for local government.⁶² The financial manager's power is so broad that he may "take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed."⁶³

The Dictator Act has already been applied in a few predominantly African-American cities including the City of Benton Harbor and is expected to quickly affect many other majority-minority localities in Michigan suffering financially from the economic downturn.⁶⁴ In Benton Harbor, the emergency manager issued a directive prohibiting city officials from taking any action without his approval.⁶⁵ Additionally, a financial manager has been appointed over the Detroit Public Schools system and has terminated all financial provisions of the system's contracts and implemented an across-the-board wage cut of ten percent and a twenty percent increase in employee health care contributions.⁶⁶

A coalition of labor unions and other organizations have developed a litigation strategy and have filed a lawsuit in state court to challenge the law on its face. The lawsuit alleges, among other causes of action, that the new law violates the Michigan Constitution's non-delegation doctrine and state law prohibitions on unfunded mandates.⁶⁷

The retirement systems of Detroit have also filed a lawsuit in federal district court for declaratory and injunctive relief. The lawsuit alleges violations of the contracts clause, due process clause, equal protection clause, and takings clause of the United States Constitution and the contracts clause, equal

61. See Local Government and School District Fiscal Accountability Act, MICH. COMP. LAWS § 141.1519(1)(n)(r) (2011).

62. See *id.* at § 141.1519(1).

63. See *id.* at § 141.1519(1)(ee).

64. See, e.g., Paul Egan, *Highland Park Schools Official Says Emergency Manager Not Necessary*, DETROIT NEWS, Aug. 30, 2011, available at <http://detnews.com/article/20110830/METRO/108300393/Highland-Park-schools-official-says-emergency-manager-not-%E2%80%98necessary%E2%80%99>.

65. See generally Emergency Manager of Benton Harbor Order No. 11-05 (Apr. 14, 2011), available at <http://www.revolutionaryviews.com/chris/Eclectablog/JoeHarrisOrders.pdf> (prohibiting all city boards, commissions and authorities to act on behalf of the city and placing all such power into the hands of an emergency manager).

66. See Jennifer Chambers, *Unions sue to block 'unprecedented' DPS pay cut, challenge new EM law*, DETROIT NEWS (Aug. 5, 2011), <http://detnews.com/article/20110805/SCHOOLS/108050371/Unions-sue-to-block-%E2%80%98unprecedented%E2%80%99-DPS-pay-cut--challenge-new-EM-law#ixzz1UAI86X50> (illustrating a decision that implies a direct violation of a union bargain agreement).

67. See Monica Davey, *Michigan Residents Sue Over Law on Emergency Management of Struggling Cities*, N.Y. TIMES, June 22, 2011, <http://www.nytimes.com/2011/06/23/us/23michigan.html> (depicting labor unions' discontent toward the new law).

protection clause, takings clause, due process clause, accrued financial benefits provisions, and home rule provisions of the Michigan Constitution.⁶⁸

Additionally, a coalition of organizations is seeking to overturn the law through a public referendum.⁶⁹ Referendum petitions require signatures of at least five percent of the total votes cast for governor during the last election.⁷⁰ On February 29, 2012, the coalition submitted 226,000 petition signatures to a state elections panel for certification. If at least 161,305 are verified, the issue will be on the ballot at the next general election.⁷¹

WISCONSIN DID BOTH

Governor Walker and his supporters in the state legislature decided that either attacking unions as institutions or severely limiting collective bargaining rights was insufficient, thus Wisconsin's budget repair bill did both.

The law almost completely destroys any collective bargaining over wages and completely eliminates the voices of workers to collectively bargain over anything else. State employees, general municipal, county, and school employees (except certain police and fire employees), and school boards and local governmental units may only bargain over "total base wages."⁷² Health insurance, pension, vacation, holidays, hours of work, and any other conditions of employment (including promotions, evaluations, safety, grievance/arbitration procedures, and just cause standards for discipline) are prohibited subjects of bargaining.⁷³ "Total base wages" excludes overtime, premium pay, merit pay, performance pay, supplemental pay, pay schedules, and pay progressions.⁷⁴ Changes in the total base wages are limited to the amount of any increase or decrease in the consumer price index unless approved by referendum.⁷⁵

Childcare workers, home health care workers, and university hospital and clinic workers are not allowed to bargain over any working conditions or wages at all.⁷⁶

Moreover, any collective bargaining agreements remaining after such draconian restrictions may only last one year, unless the union and employer

68. *See Gen. l. Ret. Sys. of the City of Detroit v. Snyder*, No. 2:11-cv-11686-SFC-LJM, 2011 WL 4506357 (E.D. Mich.) (explaining the long-term interests and actions taken by the of Retirement System members and retirees).

69. *See Longley, supra* note 8 (showing union members' efforts to repeal the newly promulgated law).

70. *See* MICH. CONST. art. II, § 9 (West Nov. 2010).

71. 226,000 petition signatures for repeal of emergency manager law land in Lansing, Detroit Free Press, March 1, 2012, Dawson Bell.

72. S.B. 233, 2011 Reg. Sess. (Wis. 2011), 2011 Wisc. Legis. Serv. Act 10, § 245 (West 2011).

73. *See id.*

74. *See id.*

75. *See id.* at §§ 168, 314, 327.

76. *See id.* at § 207 (repealed 2011).

agree otherwise.⁷⁷ A decertification election must be conducted on an annual basis to determine whether a majority of employees support the union as their union's hired bargaining representative.⁷⁸

Walker and the conservatives in the state house focused their public statements about the new law on the changes in contributions for employee health care and pensions.⁷⁹ The new law increases employee contributions to their pension and requires employees to contribute "an amount equal to one-half of all actuarially required contributions" out of their paychecks.⁸⁰ For health care, the bill replaces this minimum employer contribution with a cap on employer premiums at eighty-eight percent of that amount for full-time employees.⁸¹

These cuts seem unnecessary after examining the actual costs of public employee pensions on state governments. Most public employee pension plans only cost the employer approximately four percent of their budget.⁸² Moreover, the argument that public employees earn significantly more money than private sector employees fails after accounting for the differences between the two workforces. When considering comparable education and experience, public employees generally earn the same as private sector employees at the same level.⁸³ Studies comparing similar workers show that public sector employees with similar experience and education levels sometimes receive less total compensation than their private sector counterparts.⁸⁴ Labor's detractors have attempted to take advantage of the general public's anger arising out of the economic downturn, Wall Street malfeasance, and the housing crisis. The legislative battles in the states, however, have caused many to examine the

77. See S.B. 233, 2011 Reg. Sess. (Wis. 2011), 2011 WISC. LEGIS. SERV. Act 10, § 320.111.92(3)(b) (West).

78. See *id.* at § 289.111.83(3)(b).

79. See generally Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 28 HOFSTRA LAB. & EMP. L.J. 301, 302 (2011) (arguing that public sector unions are not the source of state budget woes, but are convenient scapegoat for state budgetary issues).

80. S.B. 233, 2011 Reg. Sess. (Wis. 2011), 2011 WISC. LEGIS. SERV. Act 10, § 70.40.05(1)(a)1 (West).

81. See *id.* at §§ 77.40.05(4)(ag), 88.40.51(7).

82. See Alicia H. Munnell, Jean-Pierre Aubry and Laura Quinby, *The Impact of Public Pensions on State and Local Budgets*, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE, No. 13-2010, http://crr.bc.edu/images/stories/Briefs/slp_13.pdf. See also Kevin G. Hall, *Why Employee Pensions Aren't Bankrupting States*, MCCLATCHY NEWSPAPERS (Mar. 6, 2011), available at <http://www.mcclatchydc.com/2011/03/06/109649/why-employee-pensions-arent-bankrupting.html> (illustrating that state and local employers impose minimal burden on state spending).

83. See BLS ECONOMIC NEWS RELEASE (Sept. 8, 2011), <http://www.bls.gov/news.release/ecec.tn.htm>.

84. See Keith A. Bender and John S. Heywood, *Out of Balance? Comparing Public and Private Sector Compensation Over 20 Years*, CENTER FOR STATE AND LOCAL GOVERNMENT EXCELLENCE; National Institute on Retirement Security (Apr. 2010), http://www.slge.org/index.asp?Type=B_BASIC&SEC=%7B22748FDE-C3B8-4E10-83D0-959386E5C1A4%7D&DE=%7BBD1EB9E6-79DA-42C7-A47E-5D4FA1280C0B%7D (comparing private and public worker earnings since the 1970's including benefit levels and concluding that the average compensation of public employees at the state and local level is not excessive).

statistics and understand that public sector union members are being unfairly used as scapegoats.

LEGAL CHALLENGES-BASIC LAW ON COLLECTIVE BARGAINING RIGHTS

Numerous legal challenges have been filed against the anti-labor legislation with varying success and many cases still pending. Many of these cases rely on rights protected by the United States Constitution.⁸⁵ While the National Labor Relations Act creates collective bargaining rights for most private sector employees,⁸⁶ the Supreme Court has ruled that no duty exists on the part of public employers to bargain with workers, or for states to recognize unions as exclusive bargaining representatives of a group of public employees.⁸⁷ The First Amendment, however, protects the right of government employees to form a union, to participate in that union, and most importantly, to have a voice in their union.⁸⁸ The lawsuits filed against the anti-union laws will test the boundaries of the public employee's right to association and expression through their union.

CONCLUSION: POLITICAL/CULTURAL SHIFT?

The reaction of students, workers, and residents in Wisconsin was not surprising given the state's long, proud, progressive history from the early 1900's through the Vietnam War protests of the 1960's to today.⁸⁹ The state's motto after all is "Forward!"⁹⁰ The backlash and strong activism from union supporters in Ohio, Michigan, and elsewhere is perhaps more surprising and more encouraging for the labor movement as a whole.

This new activism is not limited to a renaissance of awareness from union members or unions themselves, but has expanded into an awakening of the general public, both union and non-union alike. Given the level of union density in the United States workforce, the millions of people who inspired

85. See Mike Hall, *Wisconsin Coalition Takes Fight Against Walker's Attack to Federal Court* (June 2011), <http://blog.aflcio.org/2011/06/15/wisconsin-coalition-takes-fight-against-walkers-attack-to-federal-court/> (describing a federal lawsuit filed by Wisconsin State AFL-CIO in opposition to a Wisconsin law reducing public employee collective bargaining rights).

86. See 29 U.S.C. § 157 (2011).

87. See *Smith v. Ark. State Hwy. Emps. Local 1315*, 441 U.S. 463 (1979) (holding that the public employers refusal to consider or act upon grievances when filed by the union rather than by the employee directly does not violate the First Amendment).

88. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that requiring an association to produce a membership list of all members and agents entails a substantial restraint upon one's right to exercise freedom of association, and thus constitutes a denial of due process).

89. See generally David Maraniss, *They Marched Into Sunlight: War and Peace Vietnam and America October 1967* (Simon & Shuster, 2003) (analyzing the epic events that occurred during October 1967).

90. See STATE OF WISCONSIN, http://www.wisconsin.gov/state/core/wisconsin_state_symbols.html (last visited Oct. 27, 2011) (explaining that the state motto, "Forward," reflects Wisconsin's "continuous drive to be a national leader").

to act cannot possibly all come from union households.⁹¹ The general public, agitated by the economy and the overreaching of the new Republican majorities in the states, has become more intrigued with the role unions play in the economy and how unions protect the middle class and working class by establishing and raising standards in the workplace. Even those often opposed to organized labor have decided that workers should have at least some voice in their workplace.

The strategy to pit private sector workers against public sector workers by depicting public employees as living high on the hog has failed. Non-union workers look to their neighbors and understand that their children's teachers, the social workers, the people fixing the water and sewer lines, the security guards, the librarians, and many other public employees are not living extravagant lifestyles. These citizens are questioning the premise that public employees have it too good and the numbers support their instincts. The average public employee pension is only about \$23,000 per year, and significantly lower after accounting for managers and other more highly paid positions.⁹²

Favorable judicial opinions on the pending litigation efforts against the anti-union laws would greatly increase labor's ability to emerge from this "Tea Party moment" stronger and ready to grow. The real benefit to labor from the struggles of the past year, though, will come from a greater understanding of the public of the value of collective bargaining and unions to the culture and the overall economy.

91. See BUR. OF LAB. STAT. PRESS RELEASE, *supra* note 1 (noting the differences between public and private industries).

92. See Alicia H. Munnell, Jean-Pierre Aubry, Josh Hurwitz and Laura Quinby, *Unions and Public Pension Benefits*, CTR FOR RETIRE. RES. AT BOSTON COLLEGE (July 2011), <http://www.thefiscaltimes.com/~//~/media/Fiscal-Times/Research-Center/Personal-Savings/2011/07/19/Unions-And-Public-Pension-Benefits.ashx?pid={A273FFC8-2890-4DA9-821D-234F45964BEE}> (concluding that analysis of public employee pension statistics contradict the perception that "unions are responsible for pushing up state and local pension benefits").