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Ann C. McGinley

University of Nevada, Las Vegas – William S. Boyd School of Law

Kenneth Dau-Schmidt

Maurer School of Law, Indiana University - Bloomington

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INTRODUCTION: GUARANTEEING THE RIGHTS OF PUBLIC EMPLOYEES

BY

ANN C. MCGINLEY* AND KENNETH G. DAU-SCHMIDT**

On January 5, 2012, the Labor Relations and Employment Law Section of the Association of American Law Schools (AALS) presented a three-hour panel session on the rights of public employees at the AALS Annual Meeting in Washington, D. C. The time was ripe. Both Wisconsin and Ohio had passed legislation to ban collective bargaining, and ten other states had also passed legislation limiting the power of public sector labor unions.¹ There was intense media scrutiny of the events.

In Wisconsin, Governor Scott Walker prompted the Republican controlled Assembly and Senate to act on an “Emergency Budget Bill” that effectively stripped all public employees of the right to collectively bargain, except certain police and firefighters who had supported Walker’s election.² In response to the proposed legislation and in an attempt to prevent its passage, tens of thousands demonstrated, and Democratic legislators fled over the border to Illinois to prevent a quorum. However, after legislative maneuvers, the Republican controlled legislature passed the ban for Governor Walker’s signature despite the intense opposition and the absence of

* William S. Boyd Professor of Law, University of Nevada, Las Vegas Boyd School of Law

** Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University-Bloomington, School of Law.

1. Kenneth G. Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 412 n.31 (2012); Martin H. Malin, *Sifting Through the Wreckage of the Tsunami that Hit Public Sector Collective Bargaining*, 16 EMP. RTS. & EMP. POL’Y J. 533 (2012).

2. Wisconsin Act 10 completely bars some public employees from collectively bargaining, while allowing others to collectively bargain only over wage increases, and only up to the rate of inflation, if their collective representatives can achieve annual reelection by 51 percent of all employees in the unit (voting or not) in an election paid for by the representative. Municipal police and firefighters who supported Walker retained their right to collectively bargain, but University police and state firefighters who opposed him did not. 2011 Wis. Act 10 §§ 215-16, 242, 259.

the Democratic Senators.³ The enactment of this bill prompted recall efforts against Republican and Democratic Senators and Governor Walker. Buoyed by tens of millions of dollars of contributions, much from out-of state billionaires,⁴ Governor Walker outspent his Democratic opponent by seven to one to retain his governorship,⁵ although the Democrats retook the Wisconsin Senate as a check on Walker's excesses.⁶ Important provisions of the Act requiring annual recertification and barring automatic dues deduction have been struck down as violative of the equal protection clause,⁷ but this decision is under appeal.⁸

In Ohio, at the urging of Governor Kasich, the Republican legislature passed Senate Bill 5, a broad ban on public sector collective bargaining. The law prohibited bargaining on various traditional subjects of bargaining, including retirement system contributions, health care benefits, privatization, contracting out employment, and the number of employees required to be employed.⁹

3. Sam Stein & Amanda Terkel, *Wisconsin GOP Senators Pass Stand-Alone Anti-Union Bill Without Democrats Present*, HUFFINGTON POST (updated May 25, 2011, 7:35 PM ET), <http://www.huffingtonpost.com/2011/03/09/wisconsin-gop-plan-advance-anti-union_n_833796.html>; *Wisconsin Governor Officially Cuts Collective Bargaining: Walker Says Bill Will Save \$30M in Budget Year; Union Leaders Plan to Launch Counterattack*, MSNBC.COM (Mar. 11, 2011, 5:21 PM ET), <http://www.msnbc.msn.com/id/41996994/ns/politics-more_politics/t/wis-governor-officially-cuts-collective-bargaining/#.T7FVVp9YtU0>; see also Dau-Schmidt & Lin, *supra* note 1, at 418.

4. Clare O'Connor, *Gov. Scott Walker's Big Money Backers Include 13 Out-Of-State Billionaires*, FORBES (June 5, 2012, 1:42 PM), <<http://www.forbes.com/sites/clareoconnor/2012/06/05/gov-scott-walkers-big-money-backers-include-13-out-of-state-billionaires/>>.

5. Dan Eggen, *Influence Industry: In Wisconsin Recall Effort, the Side with Most Money Won Big*, WASH. POST (June 6, 2012), <http://www.washingtonpost.com/politics/the-influence-industry-in-wisconsin-recall-the-side-with-most-money-won-big/2012/06/06/gJQAKiG9IV_story.html>.

6. *GOP Retains Wisconsin Senate Control in Recall Battle*, CNN (Aug. 10, 2011, 12:18 PM), <<http://www.cnn.com/2011/POLITICS/08/10/wisconsin.recall.elections/index.html>>; see also Karen Tumulty, *Wisconsin Gov. Scott Walker Taking a Victory Lap Through Washington*, WASH. POST (June 14, 2012, 12:16 PM), <http://www.washingtonpost.com/blogs/election-2012/post/wisconsin-gov-scott-walker-taking-a-victory-lap-through-washington/2012/06/14/gJQALqscV_blog.html>.

7. See *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012). In Judge Conley's opinion, there was no rational basis for the Act's imposition of these limitations on unions representing general public employees (which Walker considered political opponents) but not unions representing public safety employees (which supported Walker). See *id.* at 860.

8. See Robyn Hagan Crain, *Seventh Circuit Hears Wisconsin Act 10 Appeal*, FINDLAW (Sept. 6, 2012, 9:02 AM), <http://blogs.findlaw.com/seventh_circuit/2012/09/seventh-circuit-hears-wisconsin-act-10-appeal.html>.

9. See Laura A. Bischoff, *Stakes High for Both Sides in SB 5 Battle: Win or Lose, the Controversial Bill's Impact Will Be Huge*, DAYTON DAILY NEWS (Sept. 18, 2011, 9:46 AM), <<http://www.daytondailynews.com/news/politics/stakes-high-for-both-sides-in-sb-5-battle-1255054.html>>.

The law also removed the continuation, modification, or deletion of an existing collective bargaining agreement from being a subject of bargaining, such that when a collective bargaining agreement expired, it would be eviscerated and the employees and employer would have to start from scratch.¹⁰ As in Wisconsin, the Ohio bill drew significant resistance and active demonstrations.¹¹ Despite the opposition, the Ohio state legislature passed Senate Bill 5, and Governor Kasich signed it into law on March 31, 2011.¹² However, opponents of the bill collected the necessary 230,000 signatures to place the bill on the November 2011 ballot as a public referendum.¹³ Under the Ohio Constitution, enforcement of a bill is held in abeyance until it is confirmed in the referendum.¹⁴ In a victory for labor, 63 percent of the Ohio electorate voted no on the referendum, and, as a result, the bill was discharged.¹⁵

Both Governors Walker and Kasich argued that the restrictions on public sector collective bargaining were necessary to gain control over the salaries and benefits of public employees in their financially strapped state.¹⁶ Walker, Kasich and other Republican leaders argued that the public employee unions were responsible for the empty state coffers, and blamed public workers as being overpaid vis-à-vis their counterparts in the private sector.¹⁷ Countervailing arguments that the recession was the cause of the state budget imbalances¹⁸ and that public sector employees are not paid more than private sector employees with similar education and skills¹⁹ were absent from their

10. See Doug Oplinger, *Summary of Senate Bill 5*, OHIO.COM (Apr. 2, 2011, 10:11 PM), <<http://politics.ohio.com/2011/04/summary-of-senate-bill-5/>>.

11. See *Ohio Governor Signs Senate Bill 5 into Law*, CBS NEWS (Mar. 31, 2011, 9:30 PM), <http://www.cbsnews.com/2100-201_162-20049481.html>.

12. See *id.*

13. Robert Costa, *John Kasich vs. Public Unions: A First-Term Ohio Governor Follows in the Footsteps of Scott Walker*, NAT'L REV. ONLINE (Oct. 18, 2011, 4:00 AM), <<http://www.nationalreview.com/articles/280382/john-kasich-vs-public-unions-robert-costa#>>.

14. OHIO CONST. art. II, § 1c.

15. Michael Scott, *Issue 2 Defeated: Million Votes Are In and 63 Percent Say No, AP Says*, CLEVELAND.COM (updated Nov. 9, 2011, 6:21 AM), <http://www.cleveland.com/politics/index.ssf/2011/11/issue_2_early_ohio_election_re.html>.

16. Costa, *supra* note 13; *Wis. Governor Officially Cuts Collective Bargaining: Walker Says Bill Will Save \$30M in Budget Year; Union Leaders Plan to Launch Counterattack*, MSNBC.COM (Mar. 11, 2011, 5:21 PM), <http://www.msnbc.msn.com/id/41996994/ns/politics-more_politics/t/wis-governor-officially-cuts-collective-bargaining/#.T7FVVp9YtU0>.

17. See, e.g., *Center for State Fiscal Reform*, AM. LEGISLATIVE EXCH. COUNCIL, <<http://www.alec.org/initiatives/critical-state-fiscal-reform/>> (last visited Dec. 4, 2012).

18. Dau-Schmidt & Lin, *supra* note 1, at 411-13.

19. KEITH A. BENDER & JOHN S. HEYWOOD, CTR. FOR STATE & LOCAL GOV'T EXCELLENCE & NAT'L INST. ON RETIREMENT SECURITY, OUT OF BALANCE? COMPARING

analysis.

The AALS panel, entitled, “Public Employees: Legal, Political, Economic and Social Issues,” sought to evaluate the issues surrounding the limitation of public employees’ bargaining rights and to consider whether the rhetoric supporting the state legislative changes was accurate. The panel was rich with experts in labor law, history, and economics. Joseph E. Slater, the Eugene N. Balk Professor of Law and Values at the University of Toledo College of Law, detailed the history of public sector unionization, followed by Martin H. Malin, Professor of Law and Director of the Institute for Law and the Workplace at Chicago-Kent College of Law, Illinois Institute of Technology, who spoke of the “tsunami” of anti-public-union legislation in the states, and Judy Neumann, the former Chair and a current Commissioner of the Wisconsin Employment Relations Commission, who discussed the issues that occurred on the ground in Wisconsin as Governor Walker and the Republican members of the state legislature pushed through the anti-union legislation. Michael Z. Green, Professor of Law and then Associate Dean of Faculty Research and Development at Texas Wesleyan University Law School, theorized that the current legislation’s exemption of public safety employees who are disproportionately white compared to other public employees, has a racially disproportionate disparate impact if not constituting intentional discrimination. Jeffrey Keefe explained the results of an empirical study that he and colleagues conducted that demonstrated that when compared to comparable private-sector workers, public sector employees receive a lower combination of salaries and benefits and are not overpaid.²⁰

Given the passage of the legislation banning collective bargaining, Ann C. Hodges, Professor of Law at the University of Richmond, explored means of union activity in the absence of collective bargaining. She spoke about states such as Virginia and

PUBLIC AND PRIVATE SECTOR COMPENSATION OVER 20 YEARS 5 (2010), *available at* <http://slge.org/wp-content/uploads/2011/12/Out-of-Balance_FINAL-REPORT_10-183.pdf>; JEFFREY KEEFE, ECON. POL’Y INST., BRIEFING PAPER NO. 276, DEBUNKING THE MYTH OF THE OVERCOMPENSATED PUBLIC EMPLOYEE (2010), *available at* <<http://www.epi.org/page/-/pdf/bp276.pdf>>; *see also* Kenneth G. Dau-Schmidt, *An Economic and Empirical Analysis of the Two Views of Public Sector Collective Bargaining in American Public Policy*, ILL. PUB. EMP. RELATIONS REPORT, Fall 2012, at 1.

20. *See* DAVID LEWIN, ET.AL, EMP’T POLICY RESEARCH NETWORK & LABOR & EMP’T RELATIONS ASS’N, GETTING IT RIGHT: EMPIRICAL EVIDENCE AND POLICY IMPLICATIONS FROM RESEARCH ON PUBLIC-SECTOR UNIONISM AND COLLECTIVE BARGAINING (2011), *available at* <<http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/EPRN%20PS%20draft%203%2016%2011%20PM%20FINALtk-ml4%20edits.pdf>>.

North Carolina that had previously banned public collective bargaining, and she offered comments about the options open to public unions when collective bargaining is precluded. Rafael Gely, Associate Dean for Academic Affairs and the James E. Campbell Missouri Endowed Professor of Law at the University of Missouri, School of Law, presented the results of empirical studies that he and Timothy D. Chandler, the Catherine M. Rucks Professor of Management and Co-Chair of the Management Department at Louisiana State University, had done on recent state legislation permitting card check authorization of union representation as a means of organizing public employees and as a possible end-run around the anti-collective bargaining legislation. Kenneth Dau-Schmidt, Willard and Margaret Carr Professor of Labor and Employment Law at Indiana University Maurer School of Law, moderated the panel.²¹

While not all of the papers and/or commentary made at the AALS program have been submitted for publication, the papers in this edition of the journal represent important contributions to the dialogue concerning the rights of public employees and how recent events have curtailed those rights.

In his paper, *Sifting Through the Wreckage of the Tsunami that Hit Public Sector Collective Bargaining*, Professor Martin H. Malin surveys the various recent state enactments limiting public sector collective bargaining and then analyzes the likely unexpected consequences of these restrictions. He documents the recent enactments in twelve states that have produced changes including: Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Tennessee, and Wisconsin.²² These restrictions on public sector collective bargaining fall in four main categories: provisions eliminating the right to collectively bargain for some or all public employees, limitations on the subjects of bargaining, provisions advantaging the employer in impasse resolution, and provisions allowing the abrogation of existing contract terms in times of financial distress.²³

Professor Malin argues that these restrictions on public sector collective bargaining will have unintended adverse consequences. He

21. Ann McGinley served as Chair of the section and planned the panel with the Executive Committee Vice Chair, Jeff Hirsch, Secretary Peggie Smith, and members Rachel Arnow-Richman, Aaron Lacy, Rebecca Lee, and Monique Lillard.

22. Malin, *supra* note 1, at 538-49.

23. *Id.*

notes that in the past when state legislatures have restricted the subjects of bargaining, this has caused public employee unions to focus on the subjects they can bargain over, resulting in unbalanced and inefficient contracts. He cites the example of Wisconsin's law in the 1990's that limited collective bargaining over wages and left the bargaining to focus on other benefits.²⁴ He predicts that similar displacement of bargaining resources will occur under the new restrictions. Malin also argues that by precluding public employee unions from bargaining over changes designed to increase employee productivity, the provisions will actually result in less effective reforms and ensure employee resentment of the changes that are made.²⁵ Malin cites the example of President Clinton's National Partnership Council in which collective bargaining was used to negotiate superior employee productivity.²⁶ Professor Malin reserves special attention for the changes in Indiana and Tennessee, which he suggests might be diamonds in the rough, but which he thinks will ultimately prove to be glass.²⁷

Professor Jeffrey Keefe, in his article *Five Dead in Ohio*, tests the assertions of Governor Kasich and Ohio Republicans that Ohio public employees are over-compensated relative to their private sector neighbors.²⁸ Professor Keefe notes that there are many differences between the typical Ohio public sector employee and the typical Ohio private sector employee: most importantly that Ohio public employees are almost twice as likely to have a college degree as their private sector counterparts and that public employees work for a relatively large employer that can efficiently spread risk and administer benefits.²⁹ As a result, one would expect that the average salary of Ohio public employees would be higher than the average salary of Ohio private sector employees to compensate them for the higher educational requirements of their jobs, and that the efficient wage and benefit mix in the Ohio public sector employees would include a relatively higher mix of benefits to wages than for their private sector counterparts. In examining full-time Ohio workers and

24. *Id.* at 535.

25. *Id.* at 549-50.

26. *Id.*

27. *Id.* at 550-53.

28. Jeffrey Keefe, *Five Dead in Ohio: Ohio Citizens Overwhelmingly Support Public Employee Collective Bargaining (61 Percent to 39 Percent) in a November 2011 State Referendum Blocking the Implementation of Senate Bill 5*, 16 EMP. RTS. & EMP. POL'Y J. 559 (2012).

29. *Id.* at 566.

controlling for the level of educational achievement and other variables, Keefe finds that Ohio public employees receive lower wages than their private sector counterparts, and although they receive a higher percentage of their compensation in benefits, this percentage is very close to the percent of compensation received in benefits by private employees of large employers and does not make up for the public employees' deficit in wages.³⁰ Professor Keefe argues that far from securing unreasonably high wages for public sector employees, public sector collective bargaining allows public employees to bargain with a more powerful employer to attain greater equity with private employees.³¹

In light of the efforts to restrict collective bargaining, in *Maintaining Union Resources in an Era of Public Sector Bargaining Retrenchment*, Professor Ann C Hodges discusses some of the methods that unions use to gain and attain power in states such as Virginia and North Carolina that have banned collective bargaining for years.³² She explains that union dues are necessary for unions to represent their members. Especially in the absence of a right to collective bargaining, payroll deduction of union fees is an important way for the unions to collect sufficient funds to permit them to engage in efforts to lobby the legislature, including lobbying for improved terms and conditions of public employees' employment.³³ Public unions operating in states that have banned payroll deductions have seen a sharp decrease in dues collection as a result of the ban.³⁴ She notes that although the southern states prohibit collective bargaining, a number of them do not prohibit payroll deductions of union dues, likely because they favor the lobbying efforts of the unions when the interests of the unions coincide with those of state legislators.³⁵ But, Hodges notes, a number of states have just recently prohibited payroll deductions.³⁶ An important example is the prohibition in the recently enacted Wisconsin law, which has been challenged in the federal courts.³⁷

Hodges argues that legislation banning payroll deductions may

30. *Id.* at 572.

31. *Id.* at 577.

32. 16 EMP. RTS. & EMP. POL'Y J. 599 (2012).

33. *Id.* at 601-02.

34. *Id.* at 605 & n.35.

35. *Id.* at 601-02.

36. *Id.* at 602-04.

37. *See id.* at 611-13.

be subject to constitutional attack, especially after *Citizens United v. Federal Election Commission*,³⁸ and her article engages in an extensive discussion of strategies that union lawyers can use and potential arguments that they can make in favor of holding the bans unconstitutional under the First Amendment and/or the Equal Protection Clause of the Fourteenth Amendment. The arguments may be fruitful if the union can prove viewpoint discrimination or retaliation based on the union's political views.³⁹ But, given United States Supreme Court decisions in *Ysursa v. Pocatello Education Ass'n*⁴⁰ and *City of Charlotte v. Local 660 International Ass'n of Firefighters*,⁴¹ upholding constitutional challenges to payroll deduction bans, Hodges concludes that she does not wish to be too optimistic about the results of further constitutional challenges even in light of *Citizens United*. Therefore, she urges unions to begin considering different methods of collecting dues that would not result in the drop of funding for the union, such as recurring bank drafts and credit card challenges.⁴²

In "*Before Wisconsin and Ohio*": *The Quiet Success of Card-Check Organizing in the Public Sector*, Professors Timothy D. Chandler and Rafael Gely examine the recent passage of legislation in state legislatures that permit unions to demand recognition from public employers based on cards signed by potential union members.⁴³ This method of organizing called "card check" was the norm right after passage of the National Labor Relations Act in 1935.⁴⁴ It wasn't until after the mid-1940's that the National Labor Relations Board began showing a preference for elections.⁴⁵ Contrary to what one would have expected in this anti-union environment, Chandler and Gely explain that eight states passed card check legislation between 2000 and 2009.⁴⁶ Chandler and Gely note that "these card-check laws promote union organizing by allowing unions to achieve recognition without a certification election, and do so in ways that provide limited

38. 130 S. Ct. 876, 876-77 (2010) (striking down portions of the campaign finance law as violative of the First Amendment).

39. Hodges, *supra* note 32, at 617-22.

40. 555 U.S. 353, 355 (2009).

41. 426 U.S. 283, 283 (1976).

42. Hodges, *supra* note 32, at 626-28.

43. 16 EMP. RTS. & EMP. POL'Y J. 629 (2012)

44. *Id.* at 631-32.

45. *Id.* at 632.

46. *Id.* at 633.

opportunities for employer interference.”⁴⁷ Thus, they hypothesized that such legislation should lead to higher union organization in the public sector of those states that permit recognition through card checks.

Chandler and Gely report the results of empirical studies to determine first, the conditions facilitating enactment of card check legislation and, second, the effects of card check laws on the level of organizing activity for the eight states enacting the legislation. Their studies found that states with higher populations, fewer minorities in employment, Democratic control over both the legislative and executive branches, and a higher percentage of public employee unionization had a significant positive correlation with the passage of card check legislation.⁴⁸ The presence, however, of a strong anti-labor environment, as evidenced by right to work laws, negated the effects of a high percentage of unionized public sector employees.⁴⁹

As to the effects of the card check legislation, Chandler and Gely found that the increase of membership in public unions and higher union density were significantly correlated with the passage of card check legislation.⁵⁰ This finding suggests, they posit, the importance of political action for unions.⁵¹ They note that elections matter and that the recent aggressive anti-labor efforts of Governors Walker and Kasich may lead to the passage of card check legislation as the preferred method of organizing.⁵² But, they caution, where there is anti-union hostility, it may be unlikely that states will be able to pass card check legislation.⁵³

The current debate over public sector collective bargaining will undoubtedly continue for some time. Despite the outcome of the 2012 elections, the Republicans may feel emboldened to impose further restrictions on the right of public employees to organize, collectively bargain and represent their views in the political arena. On the other hand, Democrats, with the election behind them, may attempt to roll back some of the restrictions recently imposed. This debate takes place within the context of a globalized economy in which employers and the upper class have gained new power in the

47. *Id.*

48. *Id.* at 640-42

49. *Id.* at 643-45

50. *Id.* at 645-48

51. *Id.* at 652.

52. *Id.*

53. *Id.*

economic and political arenas, but also in which the decline of the American middle class and rising inequality gives new urgency to means of preserving and increasing worker power. As of now, there is no way to know how this struggle will be resolved. We can only hope that the articles published in this edition will contribute to an informed debate.