

CHAPTER 15

CAN U.S. PUBLIC SECTOR COLLECTIVE BARGAINING SURVIVE THE TEA PARTY?

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Introduction

In recent years, a fundamental shift in public sector labor law in the United States has occurred at a pace not seen since collective bargaining rights were extended to government employees half a century ago. The change in the landscape has resulted from attacks on both the scope of collective bargaining rights and on the very power of public sector unions. While private-sector unions have been in steady decline in the United States for decades, public sector unions have enjoyed a long period of stability, with density above 30 percent since the 1970s. This success has been tied to an effective political strategy based primarily on financial support for Democratic candidates for public office. Cognizant of this, Republican opposition has targeted what it believes to be the heart of public sector union political influence, namely the ability to collect dues and fund pro-labor political activity. Coordinated attacks, led by central organizations on the political right and boosted by a change in political tides ushered in by the 2010 midterm elections, have resulted in the introduction and implementation of legislation at the state level that has either curtailed public sector unions' source of revenue or explicitly diminished collective bargaining rights.

In Part One, this paper offers background on the political and labor relations context in which recent attacks have succeeded. Part Two provides a summary of the newly enacted state legislation that alters the collective bargaining environment. The

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fundamental changes in public sector labor relations now underway are likely to have long-term impacts, including declining public sector union density, erosion of labor protections, limitations on union security, and the weakening of contract arbitration and fact-finding provisions.

Part One: Public Sector Labor Relations in the United States

In contrast to the private sector, where federal law governs labor relations for the vast majority of workers, the legal framework for public sector labor relations varies considerably across the states. As of 2010, 26 states had laws that provided bargaining rights for most state and local government employees; 16 states had laws that covered some subset of the public sector, while eight states had either no relevant legislation or prohibited collective bargaining outright. Only eight states granted a limited right to strike.³

Within this broad characterization of the legal framework, there is substantial variation regarding scope of bargaining, union security, and mechanisms to resolve impasse. As of 2010, 17 states allowed fair share or agency-fee agreements and 11 states permitted other union security arrangements. This is contrasted with the 22 states with right-to-work legislation that prohibited union security. With respect to dues' deduction, 14 states mandated dues' deduction, while 22 allowed for the deduction of dues with employee authorization, and 14 states were statutorily silent. Finally, impasse procedures could be found in the 37 states that provided mediation, with 30 of them also providing for fact-finding or arbitration of labor disputes.⁴

Minor modifications in relevant state laws from year to year are not atypical; the tone and direction of these changes depend largely on which political party is in power in a given state. More specifically, Republican administrations have been generally less friendly toward labor, while Democratic administrations have

³See HARRY CHARLES KATZ, THOMAS A. KOCHAN, & ALEXANDER JAMES COLVIN, AN INTRODUCTION TO COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS EX. 13-3, p. 350 (2008). See also *Public Sector Bargaining—State Laws*, BNA LABOR & EMPLOYMENT RESOURCE CENTER: COLLECTIVE BARGAINING (LAWS, REGS, DIRECTORIES, AND ECONOMIC DATA) (2012). Arbitration is available broadly in nine states, voluntary or limited to specific employee groups (police, fire, schools) in 13 others. Fact finding is provided broadly in 18 states, voluntary or limited to certain employee groups in six others. Sixteen states have both fact finding and arbitration for at least some groups of employees; 20 states have no provisions for either.

⁴*Public Sector Bargaining—State Laws*, BNA LABOR & EMPLOYMENT RESOURCE CENTER: COLLECTIVE BARGAINING: LAWS, REGS, DIRECTORIES, AND ECONOMIC DATA (2011).

been seen as more favorable to the collective bargaining rights of public sector employees. Although partisan politics has always been a factor, and opposition to public sector unionism from the political right has been long-standing, since the 2010 midterm elections, the attack on bargaining rights is unprecedented in both the breadth of issues covered and the number of employees potentially affected.

This section highlights the significance of the political environment nationally and in individual states. It also highlights the importance of the growing political power of the Republican right and its network of organizations in altering collective bargaining rights across the states.

The Importance of the Political Environment

A complete understanding of the current situation faced by public sector unions in the United States requires reflection on the political environment. As noted, public sector labor relations has long been a partisan issue at both the federal and state levels.⁵ The recent attacks on collective bargaining rights are due, in part, to the influence public sector unions have exerted in the political arena (both electoral activity and lobbying), where their expenditures have made them a target for Republican administrations.⁶

In the public sector, success in both representation and organizing is directly related to labor's political influence. For example, increased political activity allowed unions to extend collective bargaining rights to home healthcare workers under public sector laws in California and Pennsylvania in response to campaigns by the Service Employees International Union (SEIU) and the American Federation of State, County and Municipal Employees (AFSCME) in the 1990s.⁷ However, labor's adversaries assert that public employee unions have "exploited collective bargaining rights—and their political clout—to win overly generous compensation packages," and that unions' combined economic and political clout results in overly favorable deals for public workers when bargaining with government officials and managers.⁸ This conflict

⁵Kenneth Jost, *Public-Employee Unions: Are the current attacks justified?* 327, CQ PRESS (2011), available at <http://library.cqpress.com/cqresearcher/cqresrrc2011040800>.

⁶A.M. Lofaso, *In Defense of Public-Sector Unions*, 28 HOFSTRA LAB. & EMP. L.J. 301–34, 305 (2011).

⁷R.W. Hurd & S. Pinnock, *Public Sector Unions: Will They Thrive or Struggle to Survive?* 25 J. LAB. RESEARCH 213–14 (2004).

⁸Jost, at 316, 318.

between rights protection and clout eradication can be found in partisan debates and policy alternation at all levels of government in the United States.

Partisan Politics and Executive Labor Policy Alternation

In 1962, Democratic President John F. Kennedy signed an executive order explicitly guaranteeing the right of federal workers to engage in collective bargaining over certain terms and conditions of employment.⁹ To some extent, following Kennedy's lead, by the end of the 1960s, laws providing the right of state and local employees to unionize were in place in many states. Before that time, state public employees were prohibited¹⁰ from collective bargaining due to what was considered a special duty to the government.¹¹ In large part due to legislative gains, public sector union density exceeded 30 percent by the late 1970s.¹² At the close of the twentieth century, public sector unionism appeared stable with strengthening of statutory protections for federal workers, and the expansion of collective bargaining rights for state and local workers.¹³ Especially in the 1960s and 1970s, and even into the 1980s, public sector collective bargaining enjoyed some degree of bipartisan support with moderate Republicans in the Northeast, Midwest, and Pacific regions joining with Democrats. In more recent years, attitudes toward public sector unionism have divided more starkly along partisan lines. For example, Democratic President Bill Clinton issued a 1993 executive order establishing federal sector labor-management partnerships and requiring federal agencies to bargain with unions over the issues left open in the Civil Service Reform Act of 1978.¹⁴ However, Republican President George W. Bush rescinded the order less than a month after taking office, choosing instead to adopt "an aggressive, anti-union stance."¹⁵ Similar alternation in executive approaches to labor continues today as reflected by the opposing political maneuvers

⁹*Id.* at 325.

¹⁰Wisconsin is the only state that had enacted legislation prior to 1960 allowing collective bargaining by certain local government, but not state, employees.

¹¹Helisse Levine & Eric Scorsone, *The Great Recession's Institutional Change in the Public Employment Relationship: Implications for State and Local Governments*, 43 STATE & LOCAL GOV'T REV. 208-14, 209 (2011).

¹²*Id.*

¹³Jost, at 325-26.

¹⁴*Id.* at 327.

¹⁵*Id.*

of Presidents Bush and Obama during this period of fundamental labor relations change at the state and local levels.

Though partisan fluctuation in executive approaches to public sector unionism did not start with the Bush administration, Bush's elevated and open hostility towards public sector unionism is worth exploring in further detail. Within the first one hundred days of his presidency, Bush issued a series of executive orders that were unfriendly to unions. One of the more notable required all federal contractors to post a notice of the U.S. Supreme Court's ruling in *Communications Workers of America v. Beck*.¹⁶ In *Beck*, the Court held that, although union membership can be compelled under a union security clause, the obligations of membership must be limited to its "financial core," and thus bargaining unit employees are not required to support "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment."¹⁷ In short, the ruling prohibits unions from using funds collected from objecting dues-paying nonmembers for activity that falls outside a narrow definition of collective bargaining, most importantly political activity.

In addition to requiring *Beck* notice postings¹⁸ by federal contractors, Bush also introduced legislation aimed more explicitly at restricting union dues collection. Specifically, he introduced in Congress legislation dubbed by his administration as "paycheck protection." Bush's paycheck protection sought to require unions to obtain individual written consent from workers before use of member dues for political purposes such as campaign contributions.¹⁹ In effect, the policy implication is that, under paycheck protection, the *Beck* rule would become the status quo. Although Bush's federal paycheck protection policy was not ultimately enacted, its proposal within a few weeks of his inauguration was

¹⁶487 U.S. 735 (1988). The district court found that the executive order was preempted by the National Labor Relations Act, but the District of Columbia Circuit Court of Appeals reversed. *See United Auto Workers-Labor Emp. & Training Corp v. Chao*, 325 F.3d 360, 36–67 (2003).

¹⁷*Beck*, 487 U.S. at 745.

¹⁸It should be noted that, under Presidents Bush and later Obama, executive orders are of limited scope and only affect a small share of the workforce. Specifically, in the case of notice posting orders, federal employees and employees who are working on projects funded by federal money were the only employee groups affected by those executive orders.

¹⁹*Bush Vows to Push Tax Cut, GOP Agenda*, CNN.COM ALLPOLITICS, <http://edition.cnn.com/2000/ALLPOLITICS/stories/12/17/bush.agenda/> (last visited Mar. 6, 2013).

taken as retribution for labor's effective political activity widely credited for the Democratic Party's popular vote victory.²⁰

Of equal significance to his executive orders and legislative proposal was Bush's appointment of Elaine Chao as his Secretary of Labor. Chao's selection was particularly unsettling given her previous roots in the Heritage Foundation, the most prominent right wing think tank²¹ with a longstanding opposition to public sector unions.²² The Heritage Foundation is one of several powerful organizations in the Republican network responsible for construction of an anti-union platform underlying the legislation that has undermined collective bargaining rights in the states since the 2010 midterm elections. Thus, Chao's appointment was indicative of the growing political influence of the Heritage Foundation and its allies in defining the political environment for public sector labor relations at the highest executive levels.

The election of Barack Obama as president in 2008 brought with it tremendous optimism in the labor movement, as well as an expected policy shift more favorable to labor at the federal level. With a Democrat holding the federal executive office, public sector unions "breathed a sigh of relief" in regard to federal labor relations.²³ When Obama was sworn into office in 2009, there was an expectation that federal legislation favoring private sector unions, namely the Employee Free Choice Act, would be enacted in his first 100 days. It was also largely assumed that Obama would reverse the hostile executive orders of the previous administration. In fact, he did gradually reverse most of Bush's executive orders.²⁴ For instance, in contrast to Bush's requirement of *Beck* notice postings by federal contractors, Obama required them to post notice of workers' rights to union representation. Similarly evidencing a shift in the federal political environment for labor, Obama appointed Hilda Solis, largely seen as a strong advocate for the labor movement, as Secretary of Labor.²⁵ This was viewed

²⁰Richard W. Hurd, *In Defense of Public Service. Union Strategy in Transition*, 7 WORKINGUSA 6–25, 15–16 (2003).

²¹*About Heritage*, HERITAGE.ORG, <http://www.heritage.org/about> (last visited Mar. 6, 2013).

²²Hurd, at 15.

²³Kenneth Jost, *Public-Employee Unions: Are the current attacks justified?* 328, CQ PRESS (2011), available at <http://library.cqpress.com/cqresearcher/cqresrre2011040800>.

²⁴R. Hurd, *Obama and the US labour movement*, 15 TRANSFER: EUROPEAN REVIEW OF LABOUR & RESEARCH 579–86, 581 (2009).

²⁵Steven Greenhouse, *In Obama Labor Found the Support it Expected*, N.Y. TIMES (Mar. 2, 2009); M. Hall, *Obama's First 100 Days Mark Major Wins for Working Families*, AFL-CIO NOW (news blog), available at http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=367x19625 (Apr. 4, 2009).

by labor as a good sign and a dramatic contrast to Bush's labor secretary, Elaine Chao.

This friendly environment was short-lived, however, as the Republican Party, and a rise of Tea Party radicals, swept the 2010 midterm elections, forging a very different political and legislative atmosphere. Although Republicans controlled many of state legislatures prior to the election, their post-election majorities grew, giving them total control of 21 states.²⁶ This change in political tides facilitated recent challenges to public sector unions at the state level.

Coordinated Political Opposition

As noted, public sector unions have historically derived most of their success from political power. To give an example of the extent of this involvement, over the past 10 years, AFSCME's political action committee made over \$9.4 million in total contributions to federal candidates, with 97 percent of those donations earmarked for Democrats.²⁷ Furthermore, following the Supreme Court's decision in *Citizens United v. Federal Election Commission*,²⁸ unions overall spent over \$25 million on outside donations during the 2010 midterm elections, only \$25,000 of which went to conservatives. Public sector unions alone contributed over \$10 million exclusively to liberal candidates.²⁹ In addition, in terms of campaign expenditures unaffected by *Citizens United*, unions spent over \$96 million in the 2010 midterm elections, of which only 5 percent went to Republicans.³⁰

Although Republicans made important gains in the 2010 midterm election in states like Ohio, Michigan, Wisconsin, and Pennsylvania, they lost in close races in other important swing states, attributing those losses to union political activity and spending.³¹ As labor law scholar Anne Marie Lofaso has observed:

In this context, the incentive goes to the Republicans to shrink union treasuries available for political spending. Potentially, one very effective way of accomplishing that goal is to weaken unions. If public-sector unions are weakened by Republican initiatives, then there will be little to no opposition in raising campaign funds in most elections,

²⁶*State Legislative Elections, 2011*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/State_legislative_elections,_2011 (last visited Mar. 8, 2013).

²⁷Jost, at 321.

²⁸130 S. Ct. 876 (2010).

²⁹Lofaso, at 307.

³⁰*Id.*

³¹*Id.* at 308.

effectively allowing more conservative groups to have a much louder voice.³²

In line with Lofaso's logic, the Republican right, through the collaborative efforts of a network of supporting organizations and think tanks, has made weakening labor's influence and political participation a priority. The organizations most responsible for a coordinated policy are the National Right to Work Committee (NRTWC), the Heritage Foundation, the State Policy Network and, most importantly in the policy realm, the American Legislative Exchange Council (ALEC). The latter three of these groups have broad policy agendas reaching beyond labor issues. The NRTWC, the most narrowly focused of the lot, has set an agenda to fight what it calls "forced" or "compulsory" unionism and enacting "right-to-work" legislation with a purpose of making open shops the law of the land across both the public and private sectors.³³ Under a much larger public policy strategy, the Heritage Foundation deals not only with labor issues, but also with broader concerns, including domestic and economic policy, as well as issues of foreign policy and national defense.³⁴ The State Policy Network includes 58 separate free market think tanks, at least one based in each state,³⁵ most with formal ties to the Heritage Foundation.³⁶ Although these groups have been important in championing anti-union political platforms at multiple levels of government, it is the work of ALEC and its model legislation that has been crucial to legislative change related to public sector collective bargaining.

ALEC was founded in 1973, at the same time as the Heritage Foundation and supported by the same basic organizations and corporations, including, but not limited to, ExxonMobil, Bayer, United Parcel Service, Pfizer, Koch, Coca-Cola, Olin Corp.,³⁷ and foundations such as the Coors Foundation, the Charles G. Koch

³²*Id.*

³³*About NRTWC*, NRTWC.ORG, <http://nrtwc.org/about-2/> (last visited Mar. 6, 2013).

³⁴*Issues*, HERITAGE.ORG, <http://www.heritage.org/issues> (last visited Mar. 6, 2013).

³⁵Robert S. Eshelman, "Kochtopus" Hits New York and California. HUFFINGTON POST (Sept. 29, 2010). http://www.huffingtonpost.com/robert-s-eshelman/kochtopus-hits-new-york-a_b_743476.html.

³⁶Paul Abowd, *ALEC Anti-union Push Includes Key Players from Michigan, Arizona Think Tanks*. CENTER FOR PUBLIC INTEGRITY, (May 17, 2012), <http://www.publicintegrity.org/2012/05/17/8890/alec-anti-union-push-includes-key-players-michigan-arizona-think-tanks>.

³⁷Lisa Graves, *A CMD Special Report on ALEC's Funding and Spending*, PRWATCH/CENTER FOR MEDIA AND DEMOCRACY (July 13, 2011). <http://www.prwatch.org/news/2011/07/10887/cmd-special-report-alecs-funding-and-spending>.

Foundation, and the John M. Olin Foundation.³⁸ It is crucial to note that ALEC's goal is not to change policy overnight. It has been patiently engaged in 40 years of work to gradually modify the legal landscape in the creation of a more free market and individual choice-oriented environment, and it has contributed directly to the weakening of institutions that promote equality and power for working people. ALEC does not simply propose labor legislation, opting instead for a broader policy reach.³⁹

ALEC is composed of two separate categories of membership: legislative members and private sector members, who work together in "public-private" partnerships to "effectively promote the Jeffersonian principles of free markets, limited government, federalism, and individual liberty."⁴⁰ Legislative members are publicly elected state legislators, whereas private sector members are the corporations and funders underwriting the organization.⁴¹ At last count, there were approximated 2,000 legislative members (almost all Republicans) and 250 private sector members.⁴² The organization operates through three formal annual meetings, where it has task forces comprised of volunteers from both the legislative and private sector membership. Eight separate task forces draft model legislation on a variety of issues.⁴³ The standard over the past 30 years has been for ALEC to sponsor the introduction of approximately 1,000 pieces of state legislation per year, with approximately 170–180 enacted into law on average.⁴⁴

Immediately following the November 2010 election, ALEC held its annual early December meeting, in which state labor laws and right-to-work legislation were identified as a high priority for

³⁸ *American Legislative Exchange Council*, SOURCEWATCH.ORG, http://www.sourcwatch.org/index.php?title=American_Legislative_Exchange_Council (last visited Mar. 6, 2013).

³⁹ *About ALEC*, ALEC.ORG, <http://www.alec.org/about-alec/> (last visited Mar. 6, 2013): "The American Legislative Exchange Council works to advance the fundamental principles of free-market enterprise, limited government, and federalism at the state level through nonpartisan public-private partnership of America's state legislators, members of the private sector and the general public."

⁴⁰ *Membership*, ALEC.ORG, <http://www.alec.org/membership/> (last visited Mar. 6, 2013).

⁴¹ *Id.*

⁴² *Frequently Asked Questions*, ALEC.ORG, <http://www.alec.org/about-alec/frequently-asked-questions/> (last visited Mar. 6, 2013).

⁴³ *Task Forces*, ALEC.ORG, <http://www.alec.org/task-forces/> (last visited Mar. 6, 2013).

⁴⁴ Brendan Greeley, *ALEC's Secrets Revealed; Corporations Flee*, BLOOMBERG BUSINESSWEEK (May 3, 2012), <http://www.businessweek.com/articles/2012-05-03/alecs-secrets-revealed-corporations-flee>; Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=all&_r=1&.

2011.⁴⁵ The main objective of model legislation emanating from that meeting was to deprive unions of funding and the ability to provide financial support to progressive political candidates. Thus, ALEC set a policy agenda that attacked labor and unions on several fronts, including public sector collective bargaining rights, dues deduction, paycheck deduction for political action, and right-to-work legislation. Specifically, the “Employee Rights Reform Act,”⁴⁶ enacted in the state of Wisconsin as “Wisconsin Act 10,”⁴⁷ requires annual union recertification as the collective bargaining representative. The Political Funding Reform Act is basically the Bush-era paycheck protection plan, requiring workers to file a form annually affirmatively agreeing to the use of their dues to fund political activity by unions.⁴⁸ The Public Employer Payroll Deduction Act represents an attack on payroll deductions via prohibitions on automatic payroll deductions for union dues.⁴⁹ Two separate right-to-work bills—one for the private sector and the other for the public sector—are further examples of ALEC model legislation introduced at state level with the purpose of restricting dues’ deduction and creating obstacles to public sector unionism.⁵⁰

ALEC’s model legislation is important, given that many bills introduced and/or enacted in state and local governments contain the exact, or slightly altered, wording. For example, Michigan’s public sector right-to-work bill, HB 4003, is nearly identical to ALEC’s right-to-work model legislation with respect to its operative language.⁵¹ The New Jersey *Star-Ledger* analyzed hundreds of documents showing that the Republican administration under Governor Chris Christie was pushing through ALEC proposals

⁴⁵Brendan Fischer, *FreedomWorks Putting its War Chest to Work for ALEC’s Anti-union Agenda in the States*, PRWATCH/CENTER FOR MEDIA AND DEMOCRACY (Jan. 14, 2013), <http://www.prwatch.org/news/2013/01/11938/freedomworks-putting-its-war-chest-work-alec%E2%80%99s-anti-union-agenda-states>.

⁴⁶The Wisconsin version of the legislation is reportedly modeled after ALEC’s Public Employee Freedom Act, Prohibition of Negative Check-Off Act, Paycheck Protection Act and Right to Work Act. See, e.g., Common Cause, *The United States of ALEC*, available at http://theunitedstatesofalec.org/files/2012/09/USofALEC_CompleteToolkit.pdf.

⁴⁷State of Wisconsin, 2011 Wisconsin Act 10 (Mar. 11, 2011), available at <http://docs.legis.wisconsin.gov/2011/related/acts/10.pdf>.

⁴⁸*Id.*

⁴⁹Lisa Graves & Brendan Fischer, *Six Extreme Right-Wing Attacks by ALEC in State Governments*, TRUTHOUT (July 27, 2011), <http://www.truth-out.org/news/item/2361:six-extreme-rightwing-attacks-by-alec-in-state-governments>.

⁵⁰Brendan Fischer, *Michigan Passes ‘Right to Work’ Containing Verbatim Language from ALEC Model Bill*, PRWATCH/THE CENTER FOR MEDIA AND DEMOCRACY (Dec. 11, 2012), <http://www.prwatch.org/news/2012/12/11903/michigan-passes-right-work-containing-verbatim-language-alec-model-bill>.

⁵¹*Id.*

and policy initiatives. The *Star-Ledger* uncovered what it called a “pattern of similarities” between ALEC model legislation and New Jersey bills, where “[a]t least three bills, one executive order and one agency rule accomplish the same goals set out by ALEC using the same specific policies. In eight passages contained in those documents, New Jersey initiatives and ALEC proposals line up almost word for word.”⁵² The similarities of the proposed legislation to ALEC’s model policy demonstrates its influence on the changing legal landscape in state law, as well as the coordinated attack being launched by the Republican right at national and state levels.

*Coordinated Labor Response*⁵³

Labor may not have been prepared in advance for the challenges it would face in the second half of President Obama’s first term, but once the 2010 election results were known, unions quickly prepared a national response. The AFL-CIO held required forums in regions to raise awareness, to receive feedback regarding what happened in each state, and to generate ideas for how to react. Perhaps more important, the large public sector unions joined forces. The National Education Association (NEA) had long anticipated an ALEC offensive, had been closely monitoring its activity for years, and already had acknowledged the destructive potential of its model legislation. At the conclusion of the midterm elections, the president of the NEA joined together with counterparts at AFSCME and the SEIU to strategize a coordinated response. The three unions encouraged the AFL-CIO to convene a national meeting of union presidents, including all Change-to-Win and AFL-CIO unions, as well as the NEA. The outcome was a coordinated nationwide defensive campaign that targeted key states where ALEC legislators would be active. The AFL-CIO initiated a weekly e-mail newsletter called *State Battles Weekly Update* that informs unions about state legislative developments. The term “state battles” has since been embraced by all unions to describe the intense battles confronting them in the current political

⁵²Salvador Rizzo, *Some of Christie’s Biggest Bills Match Model Legislation from D.C. Group called ALEC*, STAR-LEDGER (Apr. 1, 2012), http://www.nj.com/news/index.ssf/2012/04/alec_model_bills_used_in_nj_la.html.

⁵³This section of the article draws from our more detailed analysis of labor’s strategic response to public sector attacks on collective bargaining. For further discussion, see R. Hurd & Tamara L. Lee, *Public Sector Unions Under Siege: Solidarity in the Fight Back*, Paper presented at the United Association for Labor Education Annual Conference, Toronto, Ontario, Canada (Apr. 18, 2013).

context in a number of states simultaneously. Labor's coordinated response has succeeded in fending off ALEC-inspired legislation in many states, but (in spite of this) momentum has clearly been on the side of the opponents of public sector unions.

Part Two: Altered Legislative Landscape

The Bush-era attacks on worker rights at the federal level discussed above foreshadowed similar pressure on public employee unions in the states.⁵⁴ After the 2010 elections, 11 state legislatures switched to Republican control.⁵⁵ With these additions, Republicans now controlled both the governor's office and the legislature in 21 states, while Democrats held complete control of 11 states, with control shared in 18 states. Republicans controlled the governor's office in 29 states, while the Democrats held the executive office in 20 states, with one independent.⁵⁶ Despite an Obama reelection in 2012, state elections brought Republican governorships up to 30, with complete Republican control in 23 states. By contrast, the Democrats hold 19 governorships and complete control over 14 states.⁵⁷ This means that Republican control increased by two states between 2011 and 2013, a remarkable advancement in a context where Obama won reelection. The spread of Republican control increases the likelihood of continued legislative attacks on public sector unions and collective bargaining.

It was this sharp increase in conservative influence that paved the way for ALEC's offensive. As of late March 2011, a database compiled by the National Conference of State Legislatures showed some 300 public sector labor bills introduced across 37 states.⁵⁸ "The surge in activity reflects conservatives' strategy to turn the anti-government feeling and economic angst shared by many Americans into tangible legislative victories against public employee unions."⁵⁹

⁵⁴Jost, at 327.

⁵⁵*State Vote 2010*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/2010-legislature-party-control-switch.aspx> (last visited Mar. 6, 2013).

⁵⁶*2011 State and Legislative Partisan Composition*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/documents/statevote/2011_Legis_and_State.pdf (last visited Mar. 6, 2013).

⁵⁷AFL-CIO Government Affairs, State Government Relations, Summary of 2012 Elections: Governor and State Legislative Races (Nov. 16, 2012) (unpublished document) (on file with the authors).

⁵⁸Jost, at 315.

⁵⁹*Id.*

Summary of Restrictions in Key States

Table 1 summarizes the various limitations and restrictions introduced and enacted across different states in 2011–2013, with respect to collective bargaining, dues deduction, paycheck deduction for political action, and right-to-work provisions.

Table 1. 2011–2013 Legislative Initiatives to Limit Public Sector Bargaining Rights⁶⁰

	Introduced	Enacted
Collective Bargaining	35	15
Dues Deduction	26	3
Paycheck Deduction for Political Action	21	4
Right-to-Work Laws	30	4

As can be seen in Table 1, legislation that would limit collective bargaining in the public sector at the state level has been introduced in 35 states and enacted in 15. The most extreme case was that of Wisconsin where Governor Scott Walker's offensive against state and local unions left collective-bargaining rights essentially gutted. Specifically, bargaining in that state is now limited to wages; however, wage increases may not be bargained at a rate higher than the rate of inflation as measured by the consumer price index. In other words, the best that a public sector union in Wisconsin can do is stay even in terms of real wages, while losing the right to influence any other terms of employment. Although not directly related to bargaining, the law also requires annual union recertification.⁶¹ Louisiana enacted one of the more narrow proscriptions, passing a "sunshine" bill that opens all collective bargaining sessions to the public and requires employers to make public sector collective bargaining agreements available on their websites for five business days prior to ratification, with

⁶⁰Data contained in Table 1 were compiled from the annual legislative summaries from the AFL-CIO. See AFL-CIO Government Affairs, State Government Relations, 2011 State Battles Legislative Summary (Jan. 23, 2012); 2012 State Legislative Summary (Dec. 31, 2012); and 2013 State Legislative Summary (Dec. 31, 2013).

⁶¹*Factbox: Details of Wisconsin's Anti-union Measure*, THOMSON REUTERS (Mar. 10, 2011), <http://www.reuters.com/article/2011/03/10us-wisconsin-law-idUSTRE7298BU20110310>.

written notice provided to employees explaining how to access the agreement.⁶² Thus, the limitations are largely symbolic and designed to raise public awareness and fuel opposition. In Maine, legislation repealed collective bargaining for home child care workers, a small subset of the public employee workforce in the state.⁶³ Similarly, Michigan enacted a law that eliminates collective bargaining rights for graduate research assistants.⁶⁴ Thus, there has been a wide range with respect to the scope of the restrictions in each state, but what is important is that both proposed and enacted laws either attacked collective bargaining or would limit it in some way in a majority of states.

Dues Deduction

On the extreme end of legislation targeting public sector unions, Wisconsin's law undermines unions by eliminating payroll deductions for union dues. Fair share agreements, which would require every worker employed in the contractual bargaining unit to either pay union dues or a fee that represents a fair share of the costs of the services provided by the union, are also prohibited. Further, the legislation forces unions to face annual recertification elections, which the union must win support from a majority of workers in the bargaining unit, as opposed to those who choose to vote.⁶⁵ Two other states also eliminated dues deduction for public sector unions in 2011–2013—North Carolina and Michigan (school employees only). Based on information provided by the NEA, there are now 22 states where affiliates collect dues directly from members.⁶⁶ The NEA estimates that a switch from payroll deduction to direct union dues collection results in a 30 percent loss in membership and revenue.⁶⁷

⁶²AFL-CIO Government Affairs, State Government Relations, State Battles Weekly Report: Week Ending 5/18/12.

⁶³AFL-CIO Government Affairs, State Government Relations, State Battles Weekly Report: Week Ending 4/20/12.

⁶⁴AFL-CIO Government Affairs, State Government Relations, State Battles Weekly Report: Week Ending 3/9/12.

⁶⁵*Factbox: Details of Wisconsin's Anti-union Measure*, THOMSON REUTERS (Mar. 10, 2011), <http://www.reuters.com/article/2011/03/10/us-wisconsin-law-idUSTRE7298BU20110310>.

⁶⁶NATIONAL EDUCATION ASSOCIATION MEMBERSHIP AND ORGANIZING DEPARTMENT, *THE PAYROLL DEDUCTION CAMPAIGN HANDBOOK* 9 (2012).

⁶⁷Telephone interview with Brian Dunn, NEA Membership and Organizing Department (Jan. 18, 2013).

Paycheck Deduction for Political Activity

Limits on payroll deduction for political activity are patterned along the lines of the federal legislation proposed by George W. Bush in 2001 as “paycheck protection.” All versions of this legislation seek to place strict limits on the ability of unions to receive funds for political activity via payroll deductions from employees. Most manifestations place certain requirements on unions regarding bookkeeping and collecting funds for use for political purposes. They would require unions to obtain workers’ approval to use money for political activity and to affirmatively renew that approval annually. In addition, some versions of the legislation would require the union to notify every member that a certain percentage of his or her dues is used for political activity; in cases where members have signed a political action committee agreement allowing dues to be used for political activity, paycheck protection legislation generally would require workers to renew those agreements with employers each year. In other versions of the policy, after union notification of the portion of dues marked for political activity, the burden is shifted to workers to affirmatively opt in to dues deduction for those purposes.

These laws usually target public sector unions, but may also apply to the private sector.⁶⁸ Versions were introduced in 21 states and were enacted in 4. Although it is too soon to know the impact of the recent legislation, in those states enacting parallel laws prior to 2011, unions experienced a 50 percent reduction in contributions to union political action funds on average.⁶⁹ As noted earlier, the implication of paycheck protection legislation is that *Beck* rules become the status quo.

Right-to-Work Laws

Right-to-work legislation was introduced in 30 states and enacted in 4. Two of those enacting states, Indiana and Michigan, saw broad new right-to-work legislation, while two others saw only minor expansions in what were already right-to-work states. In South Carolina, the amendments assure that union members have

⁶⁸For ALEC’s public sector version, see www.alec.org/model-legislation/public-employee-paycheck-protection-act/. For ALEC’s version applying also to the private sector, see www.alec.org/model-legislation/voluntary-contributions-paycheck-protection-act/.

⁶⁹Michael J. Reitz, *Safeguarding Employee First Amendment Rights through Paycheck Protection*, JAMES MADISON INSTITUTE POLICY BRIEF (2012).

a right to resign their membership at any time.⁷⁰ In Tennessee, the amendments simply tighten workers' rights to be employed, regardless of union status.⁷¹ There are now 24 right-to-work states, up from 22 previously. Prior to the 2012 enactment of right-to-work legislation in the historically strong union states of Indiana and Michigan, the most recent laws were passed in Oklahoma in 2001, in Idaho in 1985 and in Louisiana in 1976.⁷² In addition to the specific right-to-work legislation, the 2011 Wisconsin law that limited collective bargaining also imposed *de facto* right-to-work for the public sector by prohibiting requirements for employees to pay union dues.⁷³

Developments in 2013

As of May 29, during the 2013 state legislative session, bills restricting the collective bargaining rights of public sector workers had been introduced in 15 states and enacted in 2. Limitations on unions' ability to deduct dues were proposed in 14 states, but have yet to be enacted in any. Prohibitions on paycheck deduction for political action by unions was introduced in 10 states and enacted in two, while 17 states have introduced right to work legislation that would prohibit union security in states that do not currently have such legislation, though none have currently come to pass.

Other Challenges to Public Sector Collective Bargaining

Although the most intense initiatives to limit bargaining rights have come from governors and state legislators on the Republican right, unions have faced challenges from other quarters as well. In some states, Democrats have responded to budgetary deficits that linger in the aftermath of the recession of 2009–2010 by imposing restrictions on bargaining rights that parallel the more aggressive actions of their supposed philosophical opposites elsewhere.

⁷⁰ *Competitiveness Update: Right-to-Work Legislation Introduced*, SOUTH CAROLINA CHAMBER OF COMMERCE, http://www.scchamber.net/mediacenter.aspx?article_id=78 (last visited Mar. 8, 2013).

⁷¹ State of Tennessee, Public Chapter No. 826, Senate Bill No. 2821, *available at* <http://tn.gov/regboards/contractors/documents/pc0826.pdfEmployeeRight.pdf>).

⁷² *State Right to Work Timeline*, NATIONAL RIGHT TO WORK COMMITTEE, <http://nrtwc.org/facts-issues/state-right-to-work-timeline-2/> (last visited Mar. 6, 2013).

⁷³ *Factbox: Details of Wisconsin's Anti-union Measure*. THOMSON REUTERS (MAR. 10, 2011), <http://www.reuters.com/article/2011/03/10/us-wisconsin-law-idUSTRE7298BU20110310>.

In Illinois, Democratic Governor Pat Quinn withdrew bargaining rights for 3,500 state employees, temporarily terminated the collective bargaining agreement for the largest state employees' union, unilaterally reduced pensions, and eliminated thousands of jobs without negotiating the cuts with the relevant unions.⁷⁴

In Philadelphia, Democratic Mayor Michael Nutter went to court in an attempt to impose work rules and other contract terms on the city's unions.⁷⁵ In New York, Democratic Governor Andrew Cuomo proposed to end contract arbitration for police and firefighters in municipalities suffering from financial distress, although he later compromised and accepted a change in the rules governing arbitration awards to increase emphasis on ability to pay and reduce consideration of comparability.⁷⁶

These are but a few examples of Democratic-elected officials who have contributed to the trend of reduced bargaining rights. Additionally, in California, a conservative non-profit, the Center for Individual Rights, has filed suit in federal court to end agency fee requirements in California teacher union contracts. If successful, this suit would, in effect, create "right-to-work" standards in education without the need to pass legislation.⁷⁷

Impact of Restrictions in Key States

High levels of union density helped influence public sector unions to assume long-term stability. From 1980 through 2010, public sector density hovered around 36 percent. Although it was somewhat lower at the inception and peaked at around 38 percent, it has seen only slight fluctuations over the past 30 years.⁷⁸

⁷⁴Sam Stein, *AFSCME President Slams Pat Quinn, Michael Nutter as "Turncoats" Who Must "Pay,"* HUFFINGTON POST (Feb. 13, 2013), http://www.huffingtonpost.com/2013/02/11/afscme-pat-quinn-michael-nutter_n_2662879.html; *Gov. Quinn's State Facility Closures Could Cost More than 2,300 Jobs,* HUFFINGTON POST (Mar. 21, 2012), http://www.huffingtonpost.com/2012/03/21/gov-quinn-s-state-facility_n_1368074.html; *Pat Quinn Takes Collective Bargaining Rights Away from 3,580 State Employees,* DAILY KOS (Apr. 9, 2013), <http://www.dailykos.com/story/2013/04/09/1200501/-Pat-Quinn-takes-collective-bargaining-rights-away-from-3-580-state-employees>.

⁷⁵Stein, *ibid.*; Mike Dunn, Tim Jimenez, & Jericka Duncan, *Nutter Will Ask for Court OK to Impose Work Rules on City Workers' Union,* CBS PHILADELPHIA (Feb. 1, 2013).

⁷⁶Casey Seiler, *Capitol Confidential: Deal Reached to Extend, Tweak Binding Arbitration,* UNIONS (June 18, 2013), <http://blog.timesunion.com/capitol/archives/189388/deal-reached-on-binding-arbitration/>; Jimmy Vielkind, *Cuomo Plans to Help Municipalities Restructure,* ALBANY TIMES UNION (Apr. 25, 2013), <http://www.timesunion.com/local/article/Cuomo-plan-to-help-municipalities-restructure-4465131.php>.

⁷⁷Peter Scheer, *New First Amendment Suit Poses Existential Threat to Government Unions,* HUFFINGTON POST (May 2, 2013), http://www.huffingtonpost.com/peter-scheer/new-first-amendment-suit-po_b_3198718.html.

⁷⁸UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CPS, <http://unionstats.com/> (last visited Mar. 6, 2013).

Also supporting a sense of stability was the existence of some form of union security, agency fee, or fair share requirement built into many state laws, notwithstanding the variability in state public sector collective bargaining rights. While some state laws are essentially “right-to-work,” where each individual worker is allowed to decide whether he or she wants to become a member and pay dues, other states allow policies such as “maintenance of membership,” or more commonly provide for what is known as an “agency fee” or “fair share.” In states where maintenance of membership provisions are allowed, unions can sign contracts with employers stating that workers who voluntarily join the union must remain members during the contract’s term, except during opt-out periods surrounding contract expiration where they may withdraw their dues check-off forms.⁷⁹ An “agency fee” or “fair share” payment is allowed in those states where right-to-work legislation has not been enacted. This allows a union and the employer to enter into a union security agreement under which even those workers who object to full union membership can be required to pay their fair share of dues to cover the union’s expenses incurred as a result of representation services, such as collective bargaining and contract enforcement.⁸⁰ Some states go so far as to require dues payment without a prerequisite that it be negotiated.

Although it is difficult to estimate the long-term impact of the new legislative restrictions on public sector union density, evidence from Florida and Wisconsin indicates a difficult future. Florida is illustrative of the potential influence of the new right-to-work laws in Indiana and Michigan. Specifically, according to the Florida Department of Management Services, only 9.3 percent of represented state workers pay union dues.⁸¹ The rate is significantly higher (40 percent) in state police and fire-bargaining units, as well as among university faculty (45 percent). However, membership rates in the majority of state units are closer to 10

⁷⁹ *Common Labor Terms*, OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 23, <http://www.opeiulocal23.org/Local23Resources/LeadershipStewardHandbook/CommonLaborTerms.aspx> (last visited Mar. 6, 2013).

⁸⁰ *Employer/Union Rights and Obligations*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/rights-we-protect/employerunion-rights-obligations> (last visited Mar. 6, 2013).

⁸¹ FLORIDA DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF HUMAN RESOURCE MANAGEMENT, STATE PERSONNEL SYSTEM: ANNUAL WORKFORCE REPORT FISCAL YEAR 2011–2012 1, 27 (2012).

percent.⁸² An example of the potential impact of broad restrictions on public sector bargaining can be found in the oft-noted case of Wisconsin. Although the data is preliminary, a year after legislative restrictions were enacted in the typical AFSCME unit, only about 40 percent of represented workers pay union dues. The SEIU has fared about the same with support ranging from 25 percent to 50 percent. Nurses represented by the American Federation of Teachers (AFT) and teachers represented by NEA seem to be doing the best so far, with 70 percent retaining membership in large urban units and about 40 percent in smaller cities and rural areas.⁸³ The overall picture is grim with drastic reductions in membership and revenue.

Parallel Developments in Canada

Although there have been similar efforts to curtail the strength of unions in Canada—supported by the Progressive Conservative (PC) party—it is important to recognize that the reach of collective bargaining is significantly broader than in the United States, and related rights are more secure. Union density exceeds 74 percent in the public sector and 17 percent in the private sector;⁸⁴ both more than double the U.S. rates. Nonetheless, parallel initiatives have the potential to weaken unions and undermine institutions tied to collective bargaining.

The most well-known challenge to unions is federal legislation (C-377) that would impose financial reporting requirements on unions with terms identical to those established in the United States by Elaine Chao when she was Secretary of Labor (later rescinded by the Obama administration). Although these reporting requirements would not weaken unions directly, based on the U.S. experience, we know that they would provide information that could be utilized by right-wing organizations to attack unions. Although C-377 passed the PC-controlled House of Commons and is supported by Prime Minister Stephen Harper, unexpected opposition arose in the Senate (an appointed body also with a PC majority) where amendments greatly weakened the legislation.

⁸²*Id.*; Interview with Jack Fiorito, president, FSU Chapter, United Faculty of Florida (Jan. 10, 2013).

⁸³Telephone interview with Candice Owley, president of the Wisconsin Federation of Nurses & Health Professionals (Jan. 19, 2013).

⁸⁴Sharanjit Uppal, *Unionization 2011*, Statistics Canada (2012).

The bill is expected to re-emerge in its original form either later in 2013 or in the 2014 legislative session, likely with stronger support from the Prime Minister.⁸⁵

A more direct attempt to limit collective bargaining came in a move to allow the federal government to monitor bargaining and impose terms for the country's crown corporations (including VIA Rail, Canada Post, the Canadian Broadcasting Corporation, and about three dozen others).⁸⁶ An even more threatening proposal has been put forward by PC member of parliament Pierre Poilievre; this legislation, in effect, would impose right-to-work in the federal sector, which would be a major change in a country where union security is universal in a form of agency fee known as the Rand Formula.⁸⁷

There are parallel initiatives at the provincial level. Enacted in 2013 as Bill 85, the Saskatchewan Employment Act reduces collective bargaining coverage by expanding the definition of confidential and supervisory employees, places limits on the right to strike, imposes new financial reporting requirements on unions parallel to those in federal bill C-377, and leaves the door open for right to work in the future.⁸⁸ In Ontario, the Liberal party is now in power, but it seems likely based on public opinion polls that the PC will prevail in the next round of elections (not yet scheduled). In anticipation of potentially coming to power within the next two years, the PC has prepared a white paper, "Paths to Prosperity: Flexible Labour Markets," that reads very much like a Heritage Foundation document, and proposes to end union dues deduction, to increase financial reporting requirements for unions, to weaken labor relations board authority, to eliminate the card-check certification option, and to impose right to work restrictions.⁸⁹

⁸⁵Les Whittington, *Prime Minister Stephen Harper's Government Passes Bill Forcing Unions to Open Their Books*, TORONTO STAR (Dec. 12, 2012); Jordan Press, *Analysis: The Senate, the Union Bill and the Conservatives' Long Summer*, VANCOUVER SUN (June 27, 2013); *MP Predicts Smoother Ride for His Bill When it Returns to Parliament*, PEACH ARCH NEWS (July 2, 2013).

⁸⁶Leslie MacKinnon, *Sweeping Powers Introduced to Monitor Bargaining Sessions and Set Executive Wages*, CBC NEWS (May 1, 2013).

⁸⁷Tim Harper, *Pierre Poilievre Wants to Bring Right-to-work Legislation to Canada*, TORONTO STAR (Dec. 20, 2012).

⁸⁸*Bill 85, Saskatchewan Employment Act, Erodes Union Power, Sets New Tone for Labour Relations in Canada*, HUFFINGTON POST (Apr. 9, 2013), http://www.huffingtonpost.ca/2013/04/09/bill-85-saskatchewan-employment-act_n_3039850.html?just_reloaded=1.

⁸⁹ONTARIO PC CAUCUS, *PATHS TO PROSPERITY: FLEXIBLE LABOUR MARKETS* (June 2012).

In spite of the changes already enacted, public sector collective bargaining clearly is more secure in Canada in 2013 than it is in the United States. However, if the efforts to impose right to work for federal workers and in Saskatchewan and Ontario ultimately succeed, declining union density and collective bargaining coverage will surely follow.

Implications and Conclusions

For unions, restrictions and limitations on collective bargaining erode rights won gradually over the course of 60 years. Coordinated attacks led by organizations like ALEC, along with tea party Republican state legislators and governors, have been widespread since the change in political tides post-2010 midterm elections. The resulting legislation has negatively impacted unions' ability to effectively represent public employees. The potential long-term repercussions include declining density and diminished union security, as well as weakened provisions for closure such as fact-finding and contract arbitration.

The current political atmosphere is not conducive to any efforts to strengthen or expand the reach of public sector collective bargaining. As Phil Kugler of AFT describes the situation, "It is a tremendous challenge for us and all similarly situated unions."⁹⁰ This is echoed by Keith Willis of SEIU, "In the initial fight back people are riled up and in the streets, but it's difficult long term."⁹¹ The reality is that the political environment is extremely contentious for unions; they are on the defensive and largely on their own. Although mediators, arbitrators, and labor relations' academics have reason to favor stable institutions of collective bargaining, they are not in a position to advocate comfortably for what is clearly a partisan position.

The opponents of unions and public sector collective bargaining have no reservations regarding the role they will play as the state battles continue. As a high-level union staffer directly involved in the national unity table observed in 2012, "For the Koch brothers and their allies, this is their moment to destroy unions." Even if labor and the Democratic Party are successful in turning the political tide in the 2014 elections, that will not guarantee a reversal

⁹⁰Telephone interview with Phil Kugler, director of organizing, American Federation of Teachers (May 17, 2013).

⁹¹Telephone interview with Keith Willis, Service Employees International Union (Apr. 5, 2013).

in the confluence of factors that are undermining public sector labor relations. ALEC, the Heritage Foundation, and their financial backers are resilient. Michael Edwards of the NEA aptly summarized their approach: “They pursue their agenda by whatever means necessary—amendments, legal action, the Tea Party. . . . It’s 40 years and they’re still on message.”⁹² In short, the state battles won’t go away.

It appears that declining union density in the public sector is inevitable. The only questions are how far this trend will go, and how fast it will be. It seems likely that labor will be able to hold its own in states not subject to aggressive attacks, so the decline in density is likely to be uneven and slow on a national scale. However, the loss of bargaining leverage is likely to be faster. Labor’s revenue decline is already a reality. It is forcing unions to reduce staff, cut back on organizing and political action, and be more selective in pursuing both grievance and interest arbitration.⁹³

Ten years ago, the senior author of this article suggested a difficult future for public sector unions in an increasingly hostile environment, noting that calls for privatization and “paycheck protection” would be compounded by a dearth of member activism.⁹⁴ In retrospect, union stability persisted longer than expected. However, once the attack came, it was far more intense than could have been imagined. The struggle to survive is playing out now in the United States.

⁹²Interview with Michael Edwards, director of Labor Outreach, National Education Association (July 18, 2011).

⁹³Based on confidential interviews with high-level staff from three of the largest public sector unions, supported in part by informal conversations with experienced labor arbitrators.

⁹⁴R.W. Hurd & S. Pinnock, *Public Sector Unions: Will They Thrive or Struggle to Survive?* 25 J. LAB. RESEARCH 216–18 (2004).