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# A Cautionary Tale of Collective Bargaining in Public Education: A Teacher's Right or Tail Wagging the Dog?

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Charles J. Russo <sup>n1</sup>

## I. Introduction

Considerable controversy has emerged in Wisconsin <sup>n2</sup> and Ohio <sup>n3</sup> over legislative attempts to limit the power of unions and the scope of public sector collective bargaining <sup>n4</sup> in education. Union-led bargaining increases in educator salaries <sup>n5</sup> and retirement benefits <sup>n6</sup> won at the negotiating table not only impose significant additional costs on school boards. <sup>n7</sup> Even so, these advances in salary and benefits outpace those in the private sector <sup>n8</sup> and are becoming increasingly untenable for the public till, <sup>n9</sup> these disputes reflect the degree to which teachers and their unions have come to treat collective bargaining as an immutable, entrenched right, <sup>n10</sup> regardless of its impact on school board budgets and the ability of taxpayers to provide adequate funding. Not surprisingly, as a subject of continuing study, <sup>n11</sup> stakeholders, <sup>n12</sup> including some teachers, <sup>n13</sup> have raised questions about the necessity of unions <sup>n14</sup> and the value of collective bargaining.

Organized labor and collective bargaining in education have grown to the point that three out of four public school teachers in the United States are represented by either a union or a professional association; <sup>n15</sup> this stands in stark contrast to the status of employees in the private sector. <sup>n16</sup> In fact, not including the dwindling numbers of teachers who are organized in religiously affiliated non-public schools, <sup>n17</sup> the less than 7% of private sector workers who are union members represent a mere one-fifth of what private sector membership was at its height in the mid-1950s. <sup>n18</sup>

The conflict between public sector labor unions and their employers in Wisconsin and Ohio over legislative reforms with which they disagree, especially those representing teachers, has attracted significant attention in the popular media. However, this evolving dynamic has yet to be subject to scrutiny in academic fora. <sup>n19</sup> Thus, this Article examines the history, process, and status of the relationship between and among teacher unions, collective bargaining, and public school employers, concentrating on Wisconsin and Ohio, before reflecting on their broader meaning. In so doing, this Article considers whether unions and bargaining are the tail that wags the dog in the day-to-day world of public education and beyond, particularly as unions in Wisconsin seek to remove the governor for spearheading reform efforts. <sup>n20</sup> This Article focuses on developments in the two bellwether states of Wisconsin and Ohio because they have generated the most controversy <sup>n21</sup> over whether unions have too much say about work rules that shape the terms and conditions of teacher employment.

The remainder of this Article, then, is divided into four substantive sections. The first part presents a brief history of teacher unions as a lead into the second section, which examines key elements in the practice of collective bargaining that have helped to set the stage for the current debate about its future in public education. The third portion reviews developments aimed at reforming

teacher bargaining in Wisconsin before turning to Ohio where the initial attempt to reform collective bargaining was defeated at the ballot box.<sup>n22</sup> Based on the tales of these two states, which have thus far had different outcomes with regard to reforms of bargaining, the fourth section reflects on what has transpired in Wisconsin and Ohio while reflecting about where teacher unions and collective bargaining may be heading,<sup>n23</sup> particularly as costs for public education continue to escalate despite the current economic downturn.<sup>n24</sup> Of course, as suggested in a brief conclusion, since the status of bargaining is likely to remain in a state of flux, this Article serves as an exploratory analysis of a saga whose last chapter will be written sometime in the future.

## II. Teacher Unions and Collective Bargaining

### A. Prolegomena

Before turning to a history of teacher unions, and in light of events that have transpired in Wisconsin and Ohio, this Article adopts the perspective that public sector collective bargaining remains a zero-sum game. In bargaining situations, the purpose of labor unions is, above all else, to protect and save the jobs of their members while seeking to increase their compensation packages, typically at the expense of taxpayers. Not surprisingly, from the union's perspective, all else, including lofty rhetoric about caring for students and providing members input into their professional lives and activities, is secondary at best. Put another way, when dealing with collective negotiations in public education or the private sector-attempted new, alternative models, such as win-win bargaining that is designed to limit or eliminate conflict notwithstanding<sup>n25</sup> -the zero-sum impact of bargaining is that one side wins and the other loses.

Against this backdrop, this article maintains that the power teacher unions have gained through mandatory membership or the payment of "fair share" fees in many states is based on what may well be the faulty notion that advancing union goals are in the best interest of public education and the children that the unions are designed to serve, a topic discussed in more detail below.<sup>n26</sup> To this end, the Article explains that since teacher collective bargaining exists primarily to advance the power of unions in the educational process, in part through mandatory membership and compulsory dues or "fair share" fees, the conflicts that have arisen in Wisconsin and Ohio, in attempts to reform this process, were inevitable since organized labor apparently sees no need to change the status quo.

### B. History of Teacher Unions

In jurisdictions permitting the practice, collective bargaining is the vehicle by which public school boards and the exclusive representatives or unions of their employees meet to negotiate salary and other terms and conditions of employment, a term of art grounded in the National Labor Relations Act.<sup>n27</sup> Collective bargaining in education is modeled largely on the process as it exists in private sector industrial labor relations, an approach which is premised on standardized work products and outputs.<sup>n28</sup>

Since the industrial labor relations model originates in workplaces that vary significantly from the more white-collar professional culture of schools, an argument can be made that this approach may not be the best vehicle for addressing labor relations in education.<sup>n29</sup> Moreover, even though "schools are utterly dependent on teachers not acting like industrial workers . . . [t]he disjuncture between how teachers are organized has become increasingly apparent over the past fifteen years during which the overall institutional quality and capacity of public education has become a policy issue."<sup>n30</sup> This disconnect in treating teachers as industrial workers is reflected in the prevailing use

of across-the-board pay increases, which "ignore any relationship between salary and effectiveness." <sup>n31</sup> Even so, as revealed in developments in Wisconsin and Ohio, teachers and their unions have rejected attempts to move beyond traditional bargaining models. <sup>n32</sup>

Putting aside debate about whether the current model of bargaining is most appropriate for education at this time, and what constitutes a union, as opposed to a professional association, since both focus on winning benefits for their members, their lofty rhetoric about children notwithstanding, <sup>n33</sup> the reality is that two major national labor organizations, using the term as it is defined in the National Labor Relations Act, <sup>n34</sup> represent the interests of American public school teachers. These two groups, the National Education Association (NEA), the largest teacher organization in the United States, <sup>n35</sup> and the American Federation of Teachers (AFT), also wield political clout by means of financial contributions to the Democratic Party <sup>n36</sup> and its members. <sup>n37</sup> As much power as these two bodies wielded separately, and despite talks aimed at fostering closer relations between the two organizations, <sup>n38</sup> the NEA and AFT have chosen not to merge formally at the national level, <sup>n39</sup> even though consolidations have occurred in at least three states. <sup>n40</sup>

The NEA, which historically prefers thinking of itself as a professional association rather than a union, traces its origins to the summer of 1857. <sup>n41</sup> However, until the NEA implemented unified state-national membership in the 1970s, membership in its state associations was significantly larger than the national body. <sup>n42</sup> Its current focus on teachers notwithstanding, the NEA did not elect a classroom teacher as its president until 1928, and the next classroom teacher was not chosen for another eleven years. <sup>n43</sup> In fact, until 1945, only three teachers served as president of the NEA insofar as their leaders were primarily school administrators or college presidents. <sup>n44</sup>

The other national teachers group, the AFT, founded in 1916 as an association formally affiliated with organized labor, views itself as a labor union. As significant as the AFT is, it was not the first teacher union in the United States. The first union, the Chicago Teachers' Federation, created in 1897, voted to affiliate with the Chicago Federation of Labor in 1902. Subsequently, in April 1916, the leaders of three teacher unions in Chicago and one local teacher union from Gary, Indiana, met in Chicago to form a national organization. <sup>n45</sup> By May of 1916, eight local unions were affiliated with the national organization: two from Chicago (Chicago Federation of Men Teachers and Chicago Federation of Women High School Teachers), along with one each in Gary, Indiana; New York City; Oklahoma; Scranton, Pennsylvania; and Washington, D.C. Also during 1916, Samuel Gompers welcomed these local unions into the American Federation of Labor <sup>n46</sup> as the American Federation of Teachers. <sup>n47</sup>

The AFT's affiliation with organized labor came none too soon for teacher unions because, in 1917, the Supreme Court of Illinois ruled that the Chicago Board of Education had the authority to prohibit its teachers from joining a union. <sup>n48</sup> An en banc panel of the Supreme Court of Washington <sup>n49</sup> later affirmed that a local school board had the power to adopt a resolution dictating that it would not hire or retain employees if they were members of a teacher association; the court added that educational officials could require teachers to sign a declaration acknowledging the board's position. <sup>n50</sup>

As teachers in public schools struggled to secure the right to engage in negotiations with their boards, changes in the private sector were advancing the course of collective bargaining. After more than fifty years of labor strife in the private sector aimed at granting workers a greater say in setting the terms and conditions of their employment, <sup>n51</sup> the passage of the Wagner Act in 1935, also known as the National Labor Relations Act, <sup>n52</sup> granted union-organizing rights to employees in the private sector. The Wagner Act also created the National Labor Relations Board to mediate private sector

labor disputes.<sup>n53</sup> These developments in federal law established a precedent for the developments of similar protections for public school teachers through the adoption of state, rather than federal, statutes.

The first negotiated teacher contract in public education was signed in 1944, in Cicero, Illinois, where the AFT local union entered into a collective bargaining agreement with the local school board.<sup>n54</sup> This development notwithstanding, in 1947, the Supreme Court of Ohio ruled that officials representing the City of Dayton were not obligated to deduct dues from the salaries of union members and pass the funds on to their unions, a practice now known as "dues check-offs."<sup>n55</sup> This judgment was abrogated in 1959 by the adoption of a law that permitted employees to authorize such deductions from their pay.<sup>n56</sup> In 1951, Connecticut's highest court, although conceding that educators had the right to bargain collectively, affirmed that strikes by teachers were illegal,<sup>n57</sup> a situation that remains in effect in most states.<sup>n58</sup>

Change began to emerge with regard to the status of public sector bargaining in the 1950s. Officials in Cincinnati began bargaining with municipal employees in 1951,<sup>n59</sup> even though Ohio did not adopt a statewide statute for teachers until more than a generation later.<sup>n60</sup> Public sector bargaining received an even bigger boost in 1958 when then Mayor Robert Wagner of New York City promulgated an executive order permitting municipal employees to bargain collectively for the first time.<sup>n61</sup> In 1959, Wisconsin became the first state to mandate collective bargaining by public employees.<sup>n62</sup>

President John F. Kennedy's Executive Order 10988 of January 17, 1962, establishing a federal policy of granting recognition to unions of governmental employees, served as a harbinger of the thrust for public school teacher unions.<sup>n63</sup> Less than three months later, the movement toward teacher unions took a dramatic turn in favor of teachers when, on April 11, 1962, members of the United Federation of Teachers in New York City, recent victors in a representation election over the AFT,<sup>n64</sup> voted to strike.<sup>n65</sup> Although more than one-half of the City's teachers went on strike, they returned to work a day later in the face of an injunction ordering them to do so.<sup>n66</sup> This brief strike led to a wave of national public school<sup>n67</sup> teacher activism, culminating in having forty-one states with some type of legislation requiring some form of bargaining as of 1975,<sup>n68</sup> the heart of the first generation of teacher unions. At present, more than thirty jurisdictions have enacted statutes granting teachers the right to organize and bargain collectively with their school boards over terms and conditions of employment.<sup>n69</sup>

### III. The Process and Subject Matter of Collective Bargaining

Before reviewing attempted reforms of collective negotiations for public school teachers, this section provides a brief overview of the bargaining process.<sup>n70</sup> In so doing, this part of the Article highlights key aspects of the bargaining process, most notably the topics that may be subject to negotiations, a major issue addressed by current reform efforts.

The extent to which local school boards may engage in bargaining varies from one jurisdiction to the next, such that states can be placed in one of three categories: those granting public employees the right to form unions; those with right-to-work laws; and those forbidding public sector unions. As noted, a majority of jurisdictions explicitly permit sector collective bargaining for teachers,<sup>n71</sup> while twenty-two jurisdictions<sup>n72</sup> have right-to-work laws in place.<sup>n73</sup> The most dramatic limits on bargaining exist in North Carolina,<sup>n74</sup> Texas,<sup>n75</sup> and Virginia;<sup>n76</sup> jurisdictions explicitly forbidding

teachers, as public employees, from engaging in negotiations. The resolution of the tensions between supporters of unfettered bargaining and those who oppose negotiations is likely to shape the future of collective bargaining in public education.

To the extent that state law permits them to do so, school boards and employee unions are free to enter into contracts created via legally approved bargaining processes on topics that are properly subject to negotiations. Of course, teachers cannot serve as board members in the districts where they are employed, since this would present a conflict of interest.<sup>n77</sup>

The First Amendment does not require boards to recognize or bargain with unions. Still, the First Amendment does protect teachers who join labor organizations<sup>n78</sup> and safeguards them from being disciplined for doing so or for engaging in protected union activities.<sup>n79</sup> However, since the preliminary issue of who is protected by negotiated agreements<sup>n80</sup> involves who may join bargaining units, the next subsection briefly examines this topic.

#### A. Bargaining Units

Before public school boards and their teachers can enter into negotiated agreements, employee unions must organize bargaining units. Once state-level public employment relations boards certify that unions are organized as a result of votes of eligible employees,<sup>n81</sup> they serve as the exclusive bargaining agents of their members.<sup>n82</sup> From this point on, boards can only negotiate with the exclusive bargaining representatives of their employees.<sup>n83</sup> In other words, where teachers are organized for collective bargaining, school boards cannot bypass the unions or engage in direct dealings with individuals to discuss terms and conditions of employment.<sup>n84</sup>

On their part, unions have the duty to represent all employees in good faith<sup>n85</sup> during and after collective bargaining. This union duty includes having to represent individuals who are not members but must pay so-called agency or representation fees, which require non-members or dissenters to pay a "fair share" of expenses associated with union representation in educational contexts,<sup>n86</sup> premised on the notion that non-members benefit from the actions of unions as they represent employees who belong to their ranks.<sup>n87</sup>

In order to avoid conflicts of interest, different bargaining units form around varying communities of interest so that teachers, typically referred to as professional staff, are in one unit while other employees, usually referred to as classified staff, such as office workers and maintenance employees, are in another.<sup>n88</sup> While managerial or administrative and confidential employees who work in personnel offices and/or others involved in bargaining are usually not permitted to form unions,<sup>n89</sup> laws typically do not treat department heads as supervisors who are excluded from the bargaining process.<sup>n90</sup>

#### B. Scope of Bargaining

It almost goes without saying that collective bargaining is subject to legislative control, a dynamic which went to the heart of the controversies in Wisconsin and Ohio, and judicial interpretation. Statutes vary in scope and specificity as some refer only expansively to terms and conditions of employment while others leave gray areas requiring judicial interpretation.

Topics for bargaining can be classified into three broad, sometimes overlapping, categories.<sup>n91</sup> Consistent with practices in private sector labor law, mandatory topics include such matters as salary, as well as other terms and conditions of employment. Boards and unions are prohibited from engaging in managerial prerogatives such as setting staffing needs and curriculum. A third category

of topics, those that are permissive, is most readily subject to judicial interpretation. An applied example of a controversial topic of bargaining is class size, since some jurisdictions treat it as excluded from bargaining<sup>n92</sup> while others treat it as either a mandatory<sup>n93</sup> or permissive<sup>n94</sup> topic of negotiations.

### C. Mandatory Topics of Bargaining

In considering whether proposals are subject to mandatory bargaining, the Supreme Court of Iowa offered a two-part test.<sup>n95</sup> According to the first part of this test, proposals had to fall within the meaning of mandatory subjects as listed in the state's collective bargaining statute. Second, the court explained that proposals could not be outside of the scope of bargaining. Based on its analysis, the court asserted that issues concerning staff who taught more than 300 minutes per day and pooling sick leave were mandatory topics, while topics dealing with evaluations and the time and place of wage payments were not subject to mandatory bargaining.<sup>n96</sup>

Beyond terms and conditions of employment, topics such as salaries<sup>n97</sup> and fringe benefits,<sup>n98</sup> issues that, again, were central in Wisconsin and Ohio, courts agree that an array of topics are subject to mandatory negotiations. For example, due to their impact on financial aspects of employment, courts have held that the following topics are subject to mandatory bargaining: a new policy requiring teachers to submit their lesson plans via the Internet;<sup>n99</sup> reimbursing teachers for graduate studies;<sup>n100</sup> the impact of a smoke-free work environment;<sup>n101</sup> holiday pay;<sup>n102</sup> subcontracting of services;<sup>n103</sup> early retirement incentives;<sup>n104</sup> a reduction-in-force plan;<sup>n105</sup> stipends for mileage and released time while serving on professional development committees;<sup>n106</sup> a proposed dress code policy;<sup>n107</sup> a merit system for hiring, as spelled out in a bargaining contract;<sup>n108</sup> moving expenses for a new teacher;<sup>n109</sup> teacher transfers and reassignments;<sup>n110</sup> and whether a contract was to remain in effect until the parties negotiated a new agreement.<sup>n111</sup> Of course, under the law in Wisconsin and the rejected statute in Ohio, all of these topics would have moved to the next category: prohibited topics of bargaining.

### D. Prohibited Topics of Bargaining

Topics that courts have interpreted as beyond the power of school boards to bargain include assignments and transfer policies;<sup>n112</sup> granting tenure;<sup>n113</sup> creating school calendars;<sup>n114</sup> appointing principals<sup>n115</sup> and department heads;<sup>n116</sup> and withholding salary increments.<sup>n117</sup>

### E. Permissive Topics of Bargaining

If topics are not explicitly excluded from collective bargaining, questions arise as to whether they must be subject to negotiations. Although many disputes begin in administrative proceedings, they are typically resolved by the courts. In considering whether topics are subject to mandatory or permissive bargaining, some courts have proposed guidelines supplementing such factors as conditions of employment, and managerial prerogatives. The courts caution that these judgments must be made on a case-by-case basis. Examples of permissive topics of bargaining are broad zipper clauses, which allow parties to renegotiate items mid- contract;<sup>n118</sup> drug testing;<sup>n119</sup> the timing and effective dates of lay-offs;<sup>n120</sup> and adoption of year-around schooling.<sup>n121</sup>

Against this backdrop, the next part of this Article reviews developments in two states, Wisconsin and Ohio, where officials have tried to rein in the power that unions wield through the process of collective bargaining.

## IV. Tales of Collective Bargaining Reform

This section focuses on the conflicts between public sector labor unions in Wisconsin and Ohio. More specifically, this part of the Article examines how the proposed changes in these two states have impacted education, as elected officials who have sought to reform collective bargaining by placing limits on its scope have, to date, reached different outcomes. Perhaps the greatest difference between the laws in these two states is that Wisconsin's statute granted exemptions to firefighters along with State Patrol Troopers and State Patrol Inspectors<sup>n122</sup> while the Ohio statute was aimed at the broader public sector and would have eliminated bargaining for police and firefighters.<sup>n123</sup> At the same time, Wisconsin's statute survived a judicial challenge,<sup>n124</sup> even though its governor is all but likely to face a recall election spearheaded by union forces<sup>n125</sup> while the law in Ohio was repealed as part of a referendum initiated by supporters of organized labor.<sup>n126</sup> In light of divergent results in these two states, the remainder of this section reviews developments in the bellwether states of Wisconsin and Ohio.

#### A. Wisconsin

The status of unions and collective bargaining appears to have come full circle in Wisconsin. Put another way, Wisconsin led the way as the first state to mandate negotiations for public sector employees,<sup>n127</sup> including teachers, while also being the initial jurisdiction to enact reforms aimed at limiting the scope of unions and collective bargaining.

Controversy ensued after Republican Governor Scott Walker, who ran on a platform of promises to balance the state budget, signed the 2011 Wisconsin Act 10 ("Act 10")<sup>n128</sup> into law on March 11, 2011.<sup>n129</sup> The Act took effect on June 29, 2011.<sup>n130</sup>

Opposition to the proposed Act 10 emerged even before it became law. An estimated 70,000 noisy protestors rallied outside of the state capitol in Madison,<sup>n131</sup> while others defaced the interior of the building.<sup>n132</sup> Moreover, some sympathetic doctors attended the rallies and wrote "sick notes," purportedly excusing protestors from work,<sup>n133</sup> and handed them to striking teachers.<sup>n134</sup> The bill passed solely with the support of Republican legislators after Democratic members adopted the unorthodox strategy of leaving the state rather than voting on the proposed Act.<sup>n135</sup>

Act 10 was designed to address projected state deficits<sup>n136</sup> by setting restrictions on the rights of public employees to bargain collectively with their employers. As another cost-saving measure, the bill allows local school boards to use the competitive bidding process for healthcare, rather than relying on union-backed plans, resulting in considerable savings to school systems and the state.<sup>n137</sup> The new law limits the ability of public school teachers and their unions to bargain collectively on topics other than base wages in about two-thirds of the state's school systems, due to the existence of contracts that were adopted before it came into effect.<sup>n138</sup> Moreover, Act 10 requires the state's 63,000 teachers, most of whom pay nothing towards their pensions,<sup>n139</sup> to contribute 5.8% of their salaries to fund their retirements and at least 12.6% of the cost of their health insurance premiums.<sup>n140</sup>

Unhappy with the new law, supporters of teacher unions filed an all but immediate judicial challenge led by Dane County District Attorney Ismael Ozanne, a Democrat.<sup>n141</sup> The suit claimed that state officials violated Wisconsin's Open Meetings Law by failing to provide the required twenty-four-hour public notice in enacting a budget repair bill, which included provisions mandating additional public employee contributions for health care and pensions, curtailing collective bargaining rights for most state and local public employees, and making appropriations.<sup>n142</sup> In an unpublished opinion, a trial court issued a temporary restraining order against the newly passed bill on March



18, 2011,<sup>n143</sup> primarily on the ground that the legislature violated the Open Meetings Law. An intermediate appellate court, in an unpublished order, certified the question for an appeal to the Supreme Court of Wisconsin.<sup>n144</sup>

As the dispute over Act 10 was wending its way through the courts, a related controversy took center stage: the election of Wisconsin Supreme Court justices. In the end, a key member of the Supreme Court of Wisconsin,<sup>n145</sup> David T. Prosser, largely considered to be a member of the conservative end of the bench,<sup>n146</sup> in what was supposed to be officially a nonpartisan race,<sup>n147</sup> defeated a critic of the Governor, JoAnne Kloppenburg, a state assistant attorney general,<sup>n148</sup> to retain his seat.<sup>n149</sup> This election set the stage for later developments.

On further review, the Supreme Court of Wisconsin vacated the temporary restraining order in *State ex rel. Ozanne v. Fitzgerald*.<sup>n150</sup> In a four- to-three judgment split along philosophical, if not party, lines, the court reasoned that the trial judge lacked the authority to enjoin a law of great public importance.<sup>n151</sup> The court added that the legislature did not violate the Open Meetings Law even though it limited the number of members of the public who were present during the debates prior to the Act's enactment and did not violate state constitutional provisions calling for keeping the doors of each house to be kept open except when public welfare requires secrecy. In addition, the court ruled that the legislature satisfied the Open Meetings Law both because the Senate and Assembly were kept open to the press and public during debates while television stations were present to broadcast the proceedings live as they occurred.<sup>n152</sup> The district attorney who initiated the litigation has since asked the state's highest court to re-open the case based on his allegation that one of its members should have recused himself in the dispute.<sup>n153</sup>

The political gamesmanship in Wisconsin did not end with Ozanne as opponents of Act 10 sought to recall legislators who voted in favor of the law. In a round of acrimonious recall elections in July 2011, which cost taxpayers a record \$ 43.9 million,<sup>n154</sup> Republicans managed to retain four of the six contested seats, allowing them to preserve their majority in the upper chamber; albeit by a margin of seventeen-to-sixteen rather than the nineteen-to-fourteen advantage that they had prior to the recall elections.<sup>n155</sup>

Even amid reports that Act 10 has helped to cut deficits in many school districts in Wisconsin,<sup>n156</sup> union-backed opponents unsuccessfully sought Walker's recall<sup>n157</sup> in an election with an estimated cost of \$ 9 million.<sup>n158</sup> At the same time, a survey revealed that only 5% of respondents viewed collective bargaining as the most important issue facing Wisconsin and 43% thought that Republicans were moving the state in the right direction; only 37% maintained that the Republicans were leading Wisconsin in the wrong direction.<sup>n159</sup>

The recall campaign, which turned acrimonious with regard to pro-Walker supporters,<sup>n160</sup> sought to gather 540,208 valid signatures by January 17, 2012,<sup>n161</sup> but later claimed to have gathered one million signatures.<sup>n162</sup> In light of earlier irregularities,<sup>n163</sup> it remained to be seen whether supporters reached their goal,<sup>n164</sup> even as state officials stepped up efforts to validate signatures.<sup>n165</sup>

As the recall campaign progressed, Governor Walker "expect[d] a recall election 'sometime in early June [2012],'"<sup>n166</sup> assuming that officials did not need more time to evaluate the legitimacy of petitions.<sup>n167</sup> The fact that the attempted recall of Walker failed aside, such a strategy raises a question about the power of unions who represent a minority of residents in Wisconsin to impact state and local economies as well as the political process as a whole.

Along with potential electoral activity, judicial challenges to Act 10 are far from finished. Opponents of the new law filed suit in the federal trial court for the Western District of Wisconsin challenging the constitutionality of the Act under the First and Fourteenth Amendments.<sup>n168</sup> This suit alleged that the Act impermissibly created two categories of workers, those who can engage in bargaining and those who lack the right to do so.<sup>n169</sup>

In the actual litigation, a federal trial court in Wisconsin rejected the major challenges to Act 10, ruling that the statutory limits on the bargaining rights of general public employees, but not public safety workers, did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>n170</sup> However, the court decided that requiring the annual recertification of unions representing general public employees and forbidding the deduction of dues from their paychecks, but not applying their conditions to the labor organizations representing public safety employees did violate equal protection.<sup>n171</sup>

In state-based litigation, union-backed opponents of Act 10 claimed that the new law violated the state constitution.<sup>n172</sup> This suit alleged that by enacting a budget repair bill ignoring the requirements governing special legislative sessions, the law placed limits on the topics that unions could discuss with public employers, imposed severe pay raise limitations on union workers that are inapplicable in the private sector, and limited the associational rights of union workers in their pursuit of increased pay.<sup>n173</sup>

Interestingly, in the wake of the changes brought about by Act 10, unions continue to operate, if not flourish, in Wisconsin. In fact, a news report revealed that about 90% of the unions in Wisconsin chose to recertify even though the new law placed limits on their ability to bargain collectively on behalf of their members.<sup>n174</sup>

## B. Ohio

Developments in Ohio, which were less factually complex and not subject to the same level of political intrigue, were no less contentious than in Wisconsin. As such, the situation in Ohio does not warrant as much detailed review as in Wisconsin.

As in Wisconsin, Ohio's new bargaining law, commonly referred to as Senate Bill 5, was approved along party lines as none of the Democrats in the General Assembly voted in favor of the 304 page law.<sup>n175</sup> The bill passed by a one vote margin of seventeen-to-sixteen in the State Senate along party lines but comfortably made it through the House on a fifty-three-to-forty-four vote before being signed into law by Republican Governor John Kasich on March 31, 2011.<sup>n176</sup> Unlike its counterpart, Act 10 from Wisconsin, an argument can be made that the Ohio Senate Bill 5 overreached by including all public employees, including nurses, police, and firefighters in addition to educators.<sup>n177</sup>

Ohio's new collective bargaining law, which was greeted by protests since its inception,<sup>n178</sup> was designed to help the state overcome budget deficits by limiting unions to engage in negotiations with school boards over salary but not health care, sick time, or pension benefits.<sup>n179</sup> The law was also envisioned as a tool to eliminate automatic longevity and degree-pay increases for educators and replace them with merit performance-based pay while banning strikes and requiring all public employees to pay at least 15% of their health care costs.<sup>n180</sup> The Kasich administration had estimated that these changes would have saved local governments, including school boards, more than \$ 1 billion per year,<sup>n181</sup> helping to reduce an \$ 8 billion state-wide deficit.<sup>n182</sup>

Opponents of Senate Bill 5 mounted an aggressive campaign, collecting a record number of signatures to have a referendum placed on the ballot on Election Day in November 2011.<sup>n183</sup> In response to what was known as Issue 2, the law was repealed in a decisive twenty-two point defeat at the polls.<sup>n184</sup> Interestingly, though, even as voters rejected a bill that was designed to reduce costs in public education, they continue to defeat levies designed to fund local public school systems in Ohio,<sup>n185</sup> a move that is inexplicable insofar as the largest expenditures that boards have cover employee salaries and benefits.<sup>n186</sup>

Both sides seem to recognize that this controversy is far from over in Ohio. Even so, the Governor has not revealed what steps he may take in trying to reduce deficits after the public rejected his attempted revisions of the collective bargaining law.<sup>n187</sup>

## V. Reflections

The final two sections of this Article reflect on the controversies about the scope and parameters of collective bargaining between public school teachers and their boards in Wisconsin and Ohio, using developments in these two states as a springboard to an examination of the larger picture concerning education labor relations. This part of the Article, then, serves as a cautionary tale for educational leaders, lawmakers, policymakers, and attorneys in other jurisdictions, regardless of whether they have bargaining in place. As one of the first articles on the controversies in Wisconsin and Ohio, the author hopes that this piece generates on-going discussion about whether the economy or voters are willing to sustain a "business as usual" approach with regard to the growth of the influence of public sector teacher unions via bargaining and resulting increases in expenditures, most of which are for salaries absent concomitant improvement in student achievement.

### A. Preliminary Matters

As a precursor to discussing the future of collective bargaining in public education, it is worth noting the following initial points highlighting emerging tensions between and among interests of unions, their public employers, and taxpayers who are ultimately responsible for paying the bills.

First, although the First Amendment to the United States Constitution affords public employees the opportunity to organize and bargain collectively, it does not guarantee such a right.<sup>n188</sup> Accordingly, as indicated earlier, jurisdictions are free to place limits on bargaining by means of state constitutions or statutes.<sup>n189</sup> To this end, school boards and employee unions must work together to develop equitable systems for all, most notably for students and taxpayers who ultimately pay the salaries of teachers and other public employees. As part of this limit, a question can be raised as to whether "fair share" fee arrangements for the collective bargaining process, a topic discussed earlier,<sup>n190</sup> should be permitted to continue. A difficulty with fair share fees is that they arguably involve a form of compelled speech insofar as non-members and dissenters are required to pay fees essentially to help support organizations and/or points of view with which they disagree,<sup>n191</sup> in potential violation of the First Amendment, even if they do benefit from union activities in terms of salaries and other benefits.

Second, as reflected in the motivations behind the attempted reforms of collective bargaining in Wisconsin and Ohio, public officials are seeking to operate effective, cost-efficient school systems by limiting the scope of bargaining, particularly during the economic downturn that the United States is currently facing. At the risk of engaging in a form of utilitarian cost-benefit analysis insofar as student achievement is a multi-factored issue well beyond the scope of this Article, questions arise about the need to place limits on increasing expenses due largely to cost increases based on

salaries and benefits for educators who often raise the battle cry that funding increases are needed to help children.<sup>n192</sup> This claim persists even as student test data remain essentially flat,<sup>n193</sup> suggesting that there is a less than robust return on the investment of state dollars in public education. Further, the gap between what public school educators earn continues to widen when compared with worker salaries in the private sector,<sup>n194</sup> making public education an increasingly expensive, yet not always effective, enterprise in some places. It thus remains to be seen how much the public can continue to afford to pay for unacceptable results before critics call for more drastic steps such as lay-offs; reducing the length of the school year;<sup>n195</sup> and the draconian option of terminating public funding for student transportation.<sup>n196</sup>

Third, despite their political clout, it must be kept in mind that teacher and other public sector unions represent a relatively small percentage of workforce populations in their states.<sup>n197</sup> Yet, the unions in Wisconsin applied raw political power in attempting to recall legislators who had the temerity to refuse to do their bidding. Moreover, as events that transpired in this Article illustrated, although the union there redoubled its effort aimed at removing the Governor of Wisconsin, he survived. Of course, unions also played a large role in the dispute in Ohio.

In an amazing fete of self-interest, that stands to cost the cash-strapped state \$ 50 million,<sup>n198</sup> the union-led recall effort in Wisconsin proceeded even though Walker's plan seemed to have been succeeding for the greater public good. In fact, even writers at a newspaper that is critical of Walker's reform efforts editorialized that "[he] did balance the budget . . . reduce the structural deficit significantly; he did put a lid on property tax increases; he did give schools and municipalities more control over their budgets than they've had in years."<sup>n199</sup> Put another way, even though respondents to a poll in Wisconsin did not perceive public sector collective bargaining as a major issue in the state,<sup>n200</sup> the unions placed their personal interests ahead of those of the majority as they pursue undoing the attempted reforms, much as their counterparts have done in Ohio. Clearly, the failed recall election was something of a battle royale between the union and its supporters, both in and out of Wisconsin, that was watched closely throughout the nation.<sup>n201</sup>

Fourth, as a segue into the discussion of where unions and bargaining may be headed, lawmakers and policymakers in other states should be careful not to over-interpret the result of the election in Ohio that invalidated the new bargaining law. It is important to adopt an air of caution in reviewing the outcome in Ohio because it appears that the statute may have over-reached in applying to a wide array of public employees. It is possible that a more carefully crafted law, enacted with greater support from constituent groups, may be able to garner support leading to needed change so that public sector collective bargaining can become more mindful of costs as well as its impact on state and local budgets.

#### B. A New Era in Collective Bargaining and School Labor Relations?

History is clear that teacher unions, like other labor organizations, developed at a time when workers needed protection from management in order to have a fair say in shaping the terms and conditions of their employment.<sup>n202</sup> However, insofar as teacher unions have taken on a role as a major political force that can seek to unseat governors and legislators with whom they disagree, as in Wisconsin, or can stymie the enforcement of a reform law, as in Ohio, then it may be time to re-conceptualize their role in education.

It may be propitious for a re-examination of the status of unions because their reliance on benefits gained through collective bargaining appears to have made them the tail wagging the dog of education by arguably exercising more authority than observers would have expected in terms of their ability to shape both state and local politics. Unions have gained an advantageous position through the attainment of significant political clout such that they are now something of a sword that can be used to attack opponents rather than a shield aimed primarily at protecting employees who lacked unequal bargaining power. Consequently, the remainder of this section raises questions for consideration when thinking about the future of teacher collective bargaining in light of the needs to balance the rights of organized labor and the taxpayers who pay the bill, not to mention the needs of students who are supposed to be the ultimate beneficiaries of the "system," yet suffer most when schools fail to operate well.

First, while not wishing to be perceived as displaying an anti-union animus, in light of earlier discussions about how the efforts of Governor Scott Walker in Wisconsin have actually achieved their goal of saving the public money,<sup>n203</sup> questions should be raised about the propriety of allowing unions of public school teachers and other governmental employees to "hire" their bosses<sup>n204</sup> by contributing large sums of money almost exclusively to one party and its candidates since they will do their bidding.<sup>n205</sup> The reach of organized labor was shamelessly demonstrated in Wisconsin when legislators set a poor precedent by deciding to flee the state rather than vote on a bill that would have angered or disappointed their union-backed supporters.<sup>n206</sup> Given the essential need for transparency in establishing public trust, meaning that elected (and appointed) officials should be open in all of their dealings, and not beholden to one side or the other, especially when dealing with taxpayer funds,<sup>n207</sup> it is important to safeguard the rights of the public by placing limits on the power of unions to influence elections for their own gain and that of their members.

In a second, related point, as discussed earlier,<sup>n208</sup> the Supreme Court has rejected claims that placing limits on the extent to which non-union members or dissenters must provide financial support for unions via fair share fee arrangements violate the First Amendment rights of labor organizations. Accordingly, it may be desirable, if not necessary, to place restrictions on how much teacher unions can donate to political candidates just as there are caps on the amount of contributions that individuals can make to specific political candidates.<sup>n209</sup> Seeking to place a limit on union donations may be timely because there appears to be a clear conflict of interest in allowing public sector labor organizations such as teacher unions to provide funding for legislators who ultimately serve as their employers.<sup>n210</sup>

Third, perhaps it is time to move to a new model, one suggested more than twenty years ago, which calls for shared decision and policy making<sup>n211</sup> while treating teachers as professionals<sup>n212</sup> with greater levels of autonomy in their daily activities. Insofar as professionals, particularly in medicine,<sup>n213</sup> have traditionally not organized as union members who bargain collectively with their employers, it may be propitious to adopt a new approach in place of the often acrimonious process that emerges in the industrial labor model of bargaining. Such a model should focus less on salary and benefits for members while demonstrating greater concern for the key constituents, children and taxpayers, by holding teachers accountable for student performance.

A new approach to collective bargaining should seek to move beyond even the win-win mentality wherein both sides hope to come away from the bargaining table with something they sought. Instead, a new model would focus on developing shared plans aimed at achieving actual outcomes such as improvements in student achievement. Moreover, in suggesting that teachers can take on

some managerial prerogatives in decision making such as having responsibility for peer-evaluations, a law authorizing such a process can be devised in such a way as to not have educators run the risk of losing tenure as managerial employees. <sup>n214</sup>

If states and local school boards are to be able to implement lasting reform concerning the status of unions and bargaining, then one lesson to be learned from developments in Wisconsin and Ohio is the need to engage in shared decision making while setting realistic goals of changing "the system." Of course, as occurred in Wisconsin, when legislators flee a state in doing the bidding of their political masters abdicating their legal responsibilities in the process, it is difficult to engage in a true consultative legislative process. On the other hand, as revealed in Ohio, leaders may have to work in manageable stages, reforming education incrementally rather than attempting to do so in one grand and dramatic fashion since this effort essentially set back reform efforts by leading to conflict that may make future compromise all the more difficult.

As part of a new model, teachers and their unions may be forced to consider a controversial element that was soundly rejected in the Ohio controversy, namely merit pay. That is, while merit pay has long been the subject of considerable debate and is <sup>n215</sup> often opposed by teacher unions and other critics, <sup>n216</sup> in the one-size-fits-all world of unions, good, effective teachers are treated the same as their less than adequate colleagues to the detriment of faculty morale, district budgets, and most significantly, students, who are forced to endure substandard teaching. <sup>n217</sup> Even in conceding that merit pay may not be the panacea to heal all that ails public education, perhaps if teachers who are not performing as they should were to no longer receive across-the-board pay raises, then they would have the motivation either to improve or leave their jobs to others who would actually work to enhance student achievement.

Fourth, when teacher unions resort to the mantra of how higher salaries and benefits are ultimately intended to "help the children," <sup>n218</sup> it all but forces observers to take a hard look at exactly what this means, especially in light of events in Wisconsin and Ohio, even if they were not universal. How, for example, were teachers in Milwaukee, a school system with abysmal high school graduation rates, <sup>n219</sup> concerned with the needs of children when they went out on strike protesting Wisconsin's new law? Similarly, how did teachers in Madison focus on the needs of their students when the doctors who were present at protests signed bogus "sick notes" excusing them from school so that they could engage in similar actions? <sup>n220</sup> Further, even if teachers used their own personal days to demonstrate, why could they have not done so on weekends so that they were in schools to better serve their students? Moreover, what message do teachers send to their students about integrity when many relied on bogus "sick notes" to miss work in pursuit of their own gains?

Of course, individuals, including public school teachers, have the right to disagree with and protest governmental actions with which they are not in agreement. <sup>n221</sup> Still, one can only hope that protestors would make their displeasure known via the ballot box rather than through such noisy and destructive displays of public action as occurred in Wisconsin, particularly the state capitol, which resulted in additional public expenditures to clean up and repair the mess left behind by those involved. <sup>n222</sup>

At the risk of taking on an idealistic tone, might it be too much to ask unions to focus on children not only by encouraging their members to remain in schools while working to set higher standards for teachers via more stringent evaluation standards <sup>n223</sup> and students, rather than focus primarily on protesting proposed changes in medical coverage or less than sought after wage increases as the

law restricted the scope of public sector bargaining? While the need to support one's family is understandable, if educators and their unions wish to be taken seriously, then those who engaged in such raucous activities as occurred in Madison, Wisconsin, have ultimately committed a grave disservice to those who seek to live up to their professional responsibilities.

## VI. Conclusion

If American leaders, whether educators or politicians, truly desire public education to achieve the system's goal of developing an educated citizenry, then the time is ripe for transforming the dynamics of the relationship between teacher unions and their public employers. It is time for change because, as costs continue to rise for salaries and benefits for educators in public schools even as student performance remains flat at best, <sup>n224</sup> such a situation is increasingly untenable in a rapidly changing, competitive world market. Even conceding that improving student performance is a multi-faceted concern, it is unfortunate that insofar as public education in many places has failed to make a good return for the investments of taxpayer funds, <sup>n225</sup> something must be done to improve the situation. Allowing the status quo to continue unabated in public education is simply unacceptable.

As reflected by developments in Wisconsin and Ohio, change is rarely easy to accomplish. Yet, all parties involved in attempts to reform union activities and collective bargaining in education should keep in mind that their actions are truly designed to provide a better future for America's children. If all sides in public education can focus on the true purpose of schools as educating children, rather than simply trying to keep adults employed or playing petty partisan politics, then perhaps they can learn from what has happened in Wisconsin and Ohio as they develop strategies to make progress less daunting while this ongoing drama plays itself out in coming years.

## POSTSCRIPT

As Governor Walker anticipated, <sup>n226</sup> he faced an acrimonious, <sup>n227</sup> and expensive, <sup>n228</sup> recall election campaign. In addition to Walker's having spent \$ 47 million and his challenger, Milwaukee Mayor Tom Barrett's, having expended \$ 19 million, the exact amount spent by unions remains open to debate. <sup>n229</sup> In sum, the "campaigns and special interest groups may have spent \$ 125 million or more [and], Wisconsin taxpayers have contributed over \$ 20 million to the county and municipal costs of holding the 15 recall elections" <sup>n230</sup> in June 2012 and August 2011. At the end of the day, on June 5, 2012, <sup>n231</sup> "almost a third of union members who cast a vote did so for Walker, as did 48% of voters who live with a union member but aren't members themselves" <sup>n232</sup> in his victory by 6.9 percent of the votes. <sup>n233</sup>

Scott Walker's victory does not appear to portend well for public labor organizations. In fact, within days of Walker's victory, Republican Governor Mitch Daniels of Indiana went on record suggesting that public sector unions should be abolished. <sup>n234</sup> Thus, the future bears close watching for all interested in the status of teacher collective bargaining in public education.

## FOOTNOTES:

n1 B.A., 1972, St. John's University; M. Div., 1978, Seminary of the Immaculate Conception; J.D., 1983, St. John's University; Ed.D., 1989, St. John's University; Panzer Chair in Education and Adjunct Professor of Law, University of Dayton (UD). I would like to extend my appreciation to Dr. Ralph Sharp at East Central University in Ada, Oklahoma; Governor of Ohio (1999-2007) Bob Taft, Distinguished Research Associate at UD; Dr. David A. Dolph, Chair of the Department of Educational Leadership and Dr. Kevin R. Kelly, Dean of the School of Education and Allied Professions (SOEAP) at UD for their useful comments on drafts of the manuscript; and William E. Thro, University Counsel, University of Kentucky, Lexington, Kentucky. I would also like to thank Mrs. Ann Raney of the Curriculum Materials Center in the SOEAP at UD for her help in locating materials cited in this article and my Assistant, Ms. Beth Pearn for proof-reading the

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n2 Wisconsin imposed significant limitations on collective bargaining for public school teachers in 2011 Wisconsin Act 10. This act survived a constitutional challenge in *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436 (Wis. 2011). See note 150 *infra* and accompanying text for a discussion of this case.

n3 Ohio sought to impose significant limitations on public sector bargaining that not only included teachers but also applied to an array of employees such as fire fighters, nurses, and police officers. S.B. 5, 129th Gen. Assemb., 2011- 2012 Sess. (Ohio 2011) (repealed 2011). Since voters repudiated this law in a ballot initiative, presumably the matter will head back to the Ohio General Assembly. For news coverage, see, for example, Laura A. Bischoff & Lynn Hulsey, *Unions Celebrate Decisive Victory*, Dayton Daily News, Nov. 9, 2011, at A1.

n4 For a representative definition of bargaining, see, for example, Ohio Rev. Code Ann. § 4116.01 (West 2012): (G) "To bargain collectively" means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms, and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. "To bargain collectively" includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession.

n5 Jason Richwine & Andrew G. Biggs, *Assessing the Compensation of Public-School Teachers*, The Heritage Found., Nov. 1, 2011, at 2 (specifying that public school teachers earn 52% more in total compensation than the fair market level for similarly skilled private-sector workers); Kristine Lamm West & Elton Mykerezi, *Teachers' Unions and Compensation: The Impact of Collective Bargaining on Salary Schedules and Performance Pay Schemes*, 30 *Econ. of Educ. Rev.* 99, 104 (2011) (discussing the "significant" impact that collective bargaining has on teacher salaries). For additional information, see Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 *Cato J.* 1, 155-70 (Winter 2010), for a discussion of salary increases for teachers and disparities in financial contributions from unions to Democrats rather than Republicans.

n6 See James Sherk, *Inflated Federal Pay: How Americans are Overtaxed to Overpay the Civil Service*, The Heritage Found., July 7, 2010, at 1 (reporting that the "hourly cash earnings [of a federal employee is] 22 percent above the average private worker's"). See also Mark Hemingway, *Lies, Damned Lies, and Fact Checking: The Liberal Media's Latest Attempt to Control the Discourse*, *Wkly. Standard*, Dec. 19, 2011, at 26-27 ("According to the latest data from the Bureau of Economic Analysis . . . federal workers earned average pay and benefits of \$ 123,049 in 2009 while private workers made on average \$ 61,051 in total compensation. What's more, the pay gap between the federal and private sectors has been growing substantially. A decade ago, average pay and benefits for federal workers was \$ 76,187 - federal civil servants have seen a 62 percent increase in their compensation since then, more than double the 30.5 percent increase in the private sector."); *Public-sector Pensions: Tackling the Intractable*, *Economist*, Mar. 12, 2011 at 27 (discussing the growing disparity between public and private sector pensions); Steve France, *Letter to the Editor, Power of Public Unions*, *Akron Beacon J.*, Oct. 1, 2010, at A10 (pointing out that in Ohio, "[s]tate and local workers in the public sector earn about \$ 14 more per hour in wages and benefits than their private sector counterparts, or a gap of more than \$ 20,000 per year").

n7 For a study documenting how unions increase costs to local school boards, see John V. Winters, *Teacher Salaries and Teacher Unions: A Spatial Econometric Approach*, 64 *Indus. & Lab. Rel. Rev.* 747, 747 (2011) (noting that "union activity (measured by the legal status of collective bargaining and teacher union membership density) increases salaries for experienced teachers by as much as 18 to 28%; it increases salaries for beginning teachers, however, by considerably less").

n8 Dennis Cauchon, *In Wisconsin, Private Sector Pays Less*, *USA Today*, Mar. 1, 2011, at 1A (relying on a report from the Bureau of Economic Analysis, identifying Wisconsin as one of the states where public employees earn higher average pay and benefits than private workers in the same state). For a report exclusively on Wisconsin, see Joan Gucciardi, *The Imbalance Between Public and Private Pensions in Wisconsin*, *Wis. Policy Research Inst.*, <http://www.wpri.org/Reports/Volume23/ Vol23No2/Vol23No2.html> (last visited Mar. 19, 2012).

n9 See, e.g., Armstrong Williams, *Righteous Indignation: Principle over Political Expediency*, *Wash. Times*, Feb. 28, 2011, at A2 ("From 2001 to 2010, Wisconsin taxpayers paid more than \$ 8 billion for state employee health care coverage, while state employees contributed \$ 398 million, less than 5 percent of the total costs. From 2000 to 2009, taxpayers paid \$ 12.6 billion for public employee pensions, while the employees contributed \$ 55.4 million, less than 0.5 percent of the total cost.").

n10 For a discussion about unionization as a right, see generally David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 *Miss. C. L. Rev.* 135 (1989).

n11 See, e.g., Terry M. Moe, *Special Interest: Teachers Unions and America's Public Schools* (2011); Jane Hannaway & Andrew J. Rotherham, *Collective Bargaining in Education: Negotiating Change in Today's Schools* (2006); Charles Taylor Kerchner & Julia E. Koppich, *A Union of Professionals: Labor Relations and Educational Reform* (1993).

n12 The 43rd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools revealed mixed results with regard to teacher unions. William J. Bushaw & Shane J. Lopez, *Betting on Teachers: The 43rd Annual PDK/Gallup Poll of the Public's Attitudes Toward the Public Schools*, *Phi Delta Kappan*, (Sept. 2011), at 9, 12-13. On the one hand, Table 10 reports 47% of respondents (up from 38% in 1976, apparently the last time that this question was asked) indicated that unions hurt public education, 26% thought that they helped (up from 22% in 1976), and 2% (down from 13% in 1976) did not know or refused to answer. *Id.* at 13. Conversely, in response to a question about whether they supported governors or unions in attempting to limit collective bargaining, Table 11 reveals that 52% of respondents supported the unions, 44% agreed with the governors, and 4% did not know or refused to answer. *Id.* For a report on another poll indicating that 46% of respondents consider it bad for most teachers to be members of unions as opposed to 37% who think teacher unions are good, see Kevin Derby, *Rasmussen: Americans Oppose Stricter Gun Laws and Teachers' Unions*, *Sunshine State News*, July 7, 2011,



<http://www.sunshinestatenews.com/story/rasmussen-americans-oppose-strict-gun-laws-and-teachers-unions>. See also Maureen Callahan, *State of the Unions: How Public Opinion Turned So Sharply and Suddenly Against Worker Groups*, N.Y. Post, Sept. 4, 2011, at 26 (reporting on an array of studies in which respondents displayed unfavorable attitudes toward unions).

n13 See C. Emily Feistritzer, Nat'l Ctr. for Educ. Info., *Profile of Teachers in the U.S. 2011* 42 (2011), available at [http://www.ncei.com/Profile Teachers US 2011.pdf](http://www.ncei.com/Profile%20Teachers%20US%202011.pdf) (reporting that according to a random sample of teachers, "[g]etting rid of teacher unions is seen by nearly one in five teachers (19 percent) as a way to strengthen teaching as a profession - a change from 13 percent in 2005 and 15 percent in 1996"). For more general attitudes toward unions, see Jeffrey M. Jones, *New High of 55% of Americans Foresee Unions Weakening*, Gallup (Sept. 1, 2011), <http://www.gallup.com/poll/149300/New-High-Americans-Foresee-Labor-Unions-Weakening.aspx> ("Forty-two percent of Americans would personally like to see unions have less influence than they have today, tying the high from 2009. Thirty percent want unions to have more influence, and 25% would prefer no change. The last three years mark a significant shift in what Americans want to see from labor unions. Since 2009, at least 4 in 10 Americans have preferred a reduction in union influence, compared with no more than 32% from 1999-2008.").

n14 See, e.g., Myron Lieberman, *The Teacher Unions: How the NEA and AFT Sabotage Reform and Hold Students, Parents, Teachers, and Taxpayers Hostage to Bureaucracy* (1997); Editorial, *The Politics of Learning*, Wall St. J., July 31, 2000, at A22 (including a criticism of the National Education Association for spending \$ 34.7 million on political activity as opposed to only \$ 3.3 million on ensuring educational excellence and only \$ 3 million on working conditions for employees); Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 Cato J. 155 (2010).

n15 There are significant differences between unions and less formal professional associations that typically exist in right-to-work states. Even so, since this is a topic beyond the scope of this Article, the manuscript relies on national data which group unions and professional associations as one in order to demonstrate how many teachers are involved in some form of collective action.

n16 According to the most recent federal report, 76.4% of public school teachers in 2007-2008, down from 77.6% in 2003-2004 and 79.1% in 1999-2000, belong to unions of employees' associations. Nat'l Ctr. for Educ. Statistics, *Schools and Staffing Survey, Total number of public school teachers and percentage of public school teachers in a union or employees' association, by state: 1999-2000, 2003-04, and 2007-08*, available at [http://nces.ed.gov/surveys/sass/tables/sass0708\\_043\\_tls.asp](http://nces.ed.gov/surveys/sass/tables/sass0708_043_tls.asp) (last visited Mar. 15, 2012). See also George Will, *Liberals' Wisconsin Waterloo*, Bismark Tribune, Aug. 25, 2011, at 10 ("After Colorado in 2001 required public employees [sic] unions to have annual votes reauthorizing collection of dues, membership in the Colorado Association of Public Employees declined 70 percent. In 2005, Indiana stopped collecting dues from unionized public employees; in 2011, there are 90 percent fewer dues-paying members. In Utah, the end of automatic dues deductions for political activities in 2001 caused teachers' payments to fall 90 percent. After a similar law passed in 1992 in Washington state, the percentage of teachers making such contributions declined from 82 to 11.").

n17 As a reflection of how little activity there is in this area, see generally Charles J. Russo & David L. Gregory, *An Update on Collective Bargaining in Catholic Schools*, Sch. Bus. Affairs, Apr. 1999, at 1, 14-19. See also Marisela Pena, *Comment, The "Catholic Union" Dichotomy: Are The Catholic Church's First Amendment Rights and the Collective Bargaining Rights of Catholic Church Employees Mutually Exclusive?*, 42 Hous. L. Rev. 1, 165 (2005). One national group representing educators in Catholic schools, The National Association of Catholic School Teachers, headquartered in Philadelphia, Pennsylvania, is discussed in a syndicated column by a reporter from the Wall Street Journal, see Suzanne Sataline, *Clashes Between U.S. Dioceses, Workers Emblematic of Catholic Church Struggle: Scranton Diocese Withdraws Recognition of Local Parochial Teachers' Union as Catholic Church Nationwide is Forced to Make Due With Less*, Pittsburgh Post-Gazette, July 13, 2008, at B5.

n18 Data from the United States Department of Labor reveals that 6.9% of employees in the private sector were unionized in 2010 as opposed to 36.2% for all workers in the public sector. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Members-2010*, (Jan. 21, 2011), available at [http://www.bls.gov/news.release/archives/union2\\_01212011.pdf](http://www.bls.gov/news.release/archives/union2_01212011.pdf). A news analysis reported that "[t]he percentage of private sector workers in unions fell to 6.9 percent, down from 7.2 percent, the lowest rate for private sector workers in more than a century . . . . The peak unionization rate was 35 percent during the mid- 1950s, after a surge in unionization during the Great Depression and after World War II." Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. Times, Jan. 22, 2011, available at 2011 WLNR 1337961. The report added that "[t]he [overall] number of American workers in unions declined sharply last year, the Bureau of Labor Statistics reported on Friday, with the percentage slipping to 11.9 percent, the lowest rate in more than 70 years." Id.

n19 Given the dearth of academic writing on this topic, particularly since the situations in Wisconsin and Ohio were still unfolding at the time of writing, the sections of this Article dealing with the issues in these states rely heavily on newspaper reports.

n20 Ben Wolfgang, *Teachers Union Leader Says Battle's Just Begun: Predicts Labor Inroads Against GOP*, Wash. Times, Nov. 21, 2011, at A1.

n21 Sean Cavanagh, *State-by-State Battle on Bargaining Rights Continuing to Unfold*, 30 Educ. Wk. 21, 21 (Mar. 9, 2011). For an overview of reforms of collective bargaining in states other than Wisconsin and Ohio, most notably, Idaho and Tennessee, see Stephen Sawchuk, *States Aim to Curb Collective Bargaining*, 30 Educ. Wk. 1, 1 (Feb. 9, 2011).

n22 See Michele McNeil, *Ohio Vote to Scrap Bargaining a Labor Victory-For Now*, 31 Educ. Wk. 1, 1 (Nov. 16, 2011).

n23 For an article from an urban educational, rather than legal, perspective, a context in which unions tend to be particularly influential, see Bruce S. Cooper & Marie-Elena Liotta, *Urban Teachers Unions Face their Future: The Dilemmas of Organizational Maturity*, 34 Educ. & Urb. Soc'y 101 (2001).

n24 For an article on how unions can remain relevant at this time, see Tamara V. Young, *Teacher Unions in Turbulent Times: Maintaining Their Niche*, 86 Peabody J. of Educ. 338, 349 (2011).

n25 For descriptions of this approach, see, for example, Jerry J. Herman & Janice L. Herman, *Successful Negotiation in Schools: Management, Unions, Employees, and Citizens* (1998); William G. Keane, *Win/ Win or Else: Collective Bargaining in an Age of Public Discontent*

(1996); but see Lisa D. McNary, *The Term "Win-Win" In Conflict Management: A Classic Case of Misuse and Overuse*, 40 *J. Bus. Comm.* 144, 144-59 (2003) (a critique of its application, albeit in business settings).

n26 For a more detailed discussion of this point, see generally Ralph D. Mawdsley, Charles J. Russo & James L. Mawdsely, "A 'Law' Too Far"? The Wisconsin Budget Repair Act: Counterpoint, 275 *Educ. L. Rep.* 16, 16-22 (Mar. 1, 2012).

n27 See 29 U.S.C. § 158(d) (2006): For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . . See also 29 U.S.C. §§ 102, 2614.

n28 Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 *U.C. Davis L. Rev.* 597, 598 (1986).

n29 For a preliminary move in this direction, see Charles Taylor Kerchner & Douglas E. Mitchell, *The Changing Idea of A Teachers' Union* 230-33, 255-56 (1988) (discussing a move beyond traditional bargaining to a model supporting shared decision making).

n30 Charles Taylor Kerchner & Julia E. Koppich, *Organizing Around Quality: The Frontiers of Teacher Unionism*, in *Conflicting Missions: Teachers Unions and Educational Reform* 281, 284-85 (Tom Loveless ed., 2000).

n31 *Id.* at 293.

n32 See, e.g., Jane Hannaway & Andrew J. Rotherham, *Collective Bargaining in Education: Negotiating Change in Today's Schools* (2006).

n33 See *Conflicting Missions: Teacher Unions and Educational Reform* (Tom Loveless, ed., 2000); Myron Lieberman, *Teachers Evaluating Teachers: Peer Review and the New Unionism* (1998).

n34 29 U.S.C. § 152(5) (2006): The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

n35 For a summary of a poll indicating that 42% of respondents had a favorable opinion of the NEA while 37% thought unfavorably of it, see Kevin Derby, *Rasmussen: Americans Oppose Stricter Gun Laws and Teachers' Unions*, *Sunshine State News*, July 7, 2011, <http://www.sunshinestatenews.com/story/rasmussen-americans-oppose-stricter-gun-laws-and-teachers-unions>.

n36 See, e.g., William P. Hoar, *The Real School Scandal*, *The New American*. 41, 43 (Sept. 5, 2011) ("The National Education Association, since 1990, has handed out \$ 36 million to various federal campaigns; over the same period the American Federation of Teachers, about \$ 26 million. Of those [sic] total, 93 percent of the NEA's contributions went to Democrats, as did 99 percent of the total from the AFT."); Brian T. Schwartz, *Will Proposition 103 Really Help Colorado Schools? NO It's About More Money for the Teachers Union*, *Denver Post*, Oct. 2, 2011, at D1 (repeating some of the same data as in the Hoar column about a proposed tax increase to fund public education, specifying that in 2010 "the Colorado Education Association gave '\$ 1 to Republicans for every \$ 235 given directly to Democrats'). See also Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 *Cato J.* 155, 155 (2010) (discussing disparities in financial contributions from unions to Democrats rather than Republicans).

n37 In a speech addressing broader labor issues, but not directly involving teacher unions, President Barack Obama made his support clear in a speech to Congress: "I reject the idea that we have to strip away collective bargaining rights." Transcript: *Obama's Speech to Congress on Jobs*, *N.Y. Times*, Sept. 9, 2011, available at 2011 WLNR 17829215.

n38 Jeff Archer, *NEA Board Approves AFT 'Partnership' Pact*, 30 *Educ. Wk.* 3, 3 (Feb. 21, 2001) ("A plan to forge closer working relationships between the nation's two largest teachers' unions falls far short of the merger that leaders of the National Education Association and the American Federation of Teachers have been working toward for nearly a decade.").

n39 Editorial, *Mega-Union on Hold: Two Main Teacher Groups Should Keep Talking*, *Sacramento Bee*, July 13, 1998, at B6; *National Education Association Rejects Merger with American Federation of Teachers*, *The Chron. of Higher Educ.*, July 17, 1998, at A16.

n40 See Linda Jacobson, *Teachers' Unions in New York State Take Steps to Merge*, 24 *Educ. Wk.* 10 (Jan. 5, 2005) (noting mergers in Montana and Florida); Vaishali Honawar, *NEA, AFT State-Level Affiliates Merge in New York*, 25 *Educ. Wk.* 5 (May 17, 2006) (reporting on the merger in New York).

n41 Anthony M. Cresswell & Michael J. Murphy with Charles T. Kerchner, *Teachers, Unions, and Collective Bargaining in Public Education* 58-59 (1980).

n42 *Id.* at 58.

n43 *Id.* at 61.

n44 *Id.*

n45 *Id.* at 71-72.

n46 *Id.* at 72-73.

n47 The American Federation of Labor was founded for private sector, craft-oriented employees in 1886. Kerchner & Mitchell, *supra* note 29 at 48-50. A maverick faction of the AFL, the Congress of Industrial Organizations, split off to focus on industrial workers. *Id.*

n48 *People ex rel. Fursman v. City of Chicago*, 116 N.E. 158, 160 (Ill. 1917).

n49 *Seattle High Sch. Chapter No. 200 of Am. Fed'n of Teachers v. Sharples*, 293 P. 994, 998 (Wash. 1930).

- n50 The United States Supreme Court subsequently invalidated a law from Arkansas that would have required public school teachers to file annual affidavits listing all organizations to which they belonged or regularly contributed within the preceding five years. *Shelton v. Tucker*, 364 U.S. 479, 490 (1960).
- n51 See generally Michael D. Yates, *Should We Return to the Policy of the Wagner Act?*, 4 U. Pa. J. Lab. & Emp. L. 559 (2002).
- n52 National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (2006)).
- n53 See 29 U.S.C. § 153(a).
- n54 Cresswell et al., supra note 41, at 80.
- n55 *Hagerman v. City of Dayton*, 71 N.E.2d 313, 314, 337 (Ohio 1947).
- n56 Ohio Rev. Code Ann. § 4117.09 (West 2007) (authorizing employee dues check-offs).
- n57 *Norwalk Teachers' Ass'n v. Bd. of Educ. of Norwalk*, 83 A.2d 482, 485-86 (Conn. 1951).
- n58 See, e.g., *Anchorage Educ. Ass'n v. Anchorage Sch. Dist.*, 648 P.2d 993 (Alaska 1982); *Warwick Sch. Comm. v. Warwick Teachers' Union Local 915*, 613 A.2d 1273 (R.I. 1992); *Curley v. Bd. of Sch. Dirs. of Greater Johnstown Sch. Dist.*, 641 A.2d 719 (Pa. Commw. Ct. 1994); *Mountain Valley Educ. Ass'n v. Maine Sch. Admin. Dist. No. 43*, 655 A.2d 348 (Me. 1995); *Franklin v. St. Louis Bd. of Educ.*, 904 S.W.2d 433 (Mo. Ct. App. 1995).
- n59 Cresswell et al., supra note 41, at 150.
- n60 Ohio enacted its first bargaining statute, the Public Employees' Collective Bargaining Act, effective April 1, 1984 (codified at Ohio Rev. Code Ann. §§ 4117.01-4117.24 (West Supp. 2011)).
- n61 Gus Tyler, *Why They Organize*, in *Education and Collective Bargaining: Readings in Policy and Research* 12, 19 (Anthony M. Cresswell & Michael J. Murphy eds., 1976). See also Cresswell et al., supra note 41, at 150 (noting that officials in cities such as Philadelphia had a history of negotiated contracts as early as 1939).
- n62 Tyler, *Why They Organize*, supra note 61, at 19-20.
- n63 *Employee-Management Cooperation in the Federal Service*, 27 Fed. Reg. 551 (Jan. 17, 1962).
- n64 Cresswell et al., supra note 41, at 84.
- n65 *Id.* at 85. "The AFT had a long-standing, no-strike policy." *Id.* at 80.
- n66 Kerchner & Mitchell, supra note 29, at 1.
- n67 For an article reporting on the status of collective bargaining in Roman Catholic High Schools, see Charles J. Russo, *NLRB v. Catholic Bishop of Chicago: Collective Bargaining in Roman Catholic Secondary Schools Ten Years Later*, 57 *Educ. L. Rep.* 1113 (1990).
- n68 Cresswell et al., supra note 41, at 150.
- n69 For a complete list of collective bargaining statutes, see Charles J. Russo & Ralph D. Mawdsley, *Education Law* (2012 update), Appendix C, *Collective Bargaining Statutes*.
- n70 For books on the actual process of bargaining, see, for example, Gene Geisert & Myron Lieberman, *Teacher Union Bargaining: Practice and Policy* (1994); William L. Sharp, *Winning at Collective Bargaining: Strategies Everyone Can Live With* (2003).
- n71 For a report on salary and benefits in right-to-work states, see Elise Gould & Heidi Shierholz, *The Compensation Penalty of "Right-to-Work" Laws*, Economic Policy Institute, Feb. 17, 2011, at 8 (revealing that workers in right-to-work states earn 3.2% less in pay as well as 2.6% and 4.8% reductions in health employer-sponsored benefits and pensions, respectively).
- n72 Terrence Dopp & Simone Baribeau, *Republican Governors Slap Reins on Unions Undeterred by Backlash*, *Bloomberg Businessweek* (Dec. 7, 2011), <http://www.businessweek.com/news/2011-12-07/republican-governors-slap-reins-on-unions-undeterred-by-backlash.html>.
- n73 For a brief discussion of right-to-work laws, see Charles J. Russo, *Right-to-Work and Fair-Share Agreements: A Delicate Balance*, *Sch. Bus. Aff.*, April 2002, at 12-15.
- n74 N.C. Gen. Stat. § 95-98 (2000) ("Any agreement, or contract, between the governing authority of any town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect."); see also *Winston-Salem/Forsyth Cnty. Unit of N. Carolina Ass'n of Educators v. Phillips*, 381 F. Supp. 644, 646 (M.D.N.C. 1974).
- n75 Tex. Gov't Code Ann. § 617.002 (West 2004) ("(a) An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees. (b) A contract entered into in violation of Subsection (a) is void. (c) An official of the state or of a political subdivision of the state may not recognize a labor organization as the bargaining agent for a group of public employees.").
- n76 Va. Code Ann. § 40.1-57.2 (West 2001) ("No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with

respect to any matter relating to them or their employment or service."); see also *Commonwealth v. Cnty. Bd. of Arlington Cnty.*, 232 S.E.2d 30, 37 (Va. 1977).

n77 *Unified Sch. Dist. No. 501 v. Baker*, 6 P.3d 848, 855 (Kan. 2000).

n78 See, e.g., *Federaci?n de Maestros de Puerto Rico v. Acevedo-Vila*, 545 F. Supp. 2d 219, 229 (D.P.R. 2008) (reiterating the general rule that public employees, such as teachers, who carry out traditional governmental functions, lack constitutional rights to organize, to engage in collective bargaining, to strike, and/or to participate in picketing).

n79 See, e.g., *Columbus Educ. Ass'n v. Columbus City Sch. Dist.*, 623 F.2d 1155, 1159 (6th Cir. 1980); *Roberts v. Van Buren Pub. Schs.*, 773 F.2d 949, 957 (8th Cir. 1985); *Morfin v. Albuquerque Pub. Schs.*, 906 F.2d 1434, 1438 (10th Cir. 1990).

n80 For a representative definition of an agreement, see N.Y. Civ. Serv. § 201 (McKinney 2000): The term "agreement" means the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract, for the period set forth therein, except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval.

n81 See, e.g., *Ohio Rev. Code Ann. § 4117.02* (West Supp. 2011).

n82 *Appeal of Londonderry Sch. Dist.*, 707 A.2d 137, 138 (N.H. 1998).

n83 *Independence Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 162 S.W.3d 18, 23 (Mo. Ct. App. 2005).

n84 *Bd. of Educ. of Region 16 v. State Bd. of Labor Relations*, 7 A.3d 371, 382-83 (Conn. 2010).

n85 See, e.g., *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1346 (6th Cir. 1992); *Fratus v. Marion Cmty. Schs. Bd. of Trs.*, 749 N.E.2d 40, 45 (Ind. 2001); *Serv. Emps. Int'l Union Local No. 150 v. Wisconsin Emp't Relations Comm'n*, 791 N.W.2d 662, 666 (Wis. Ct. App. 2010), review denied, 793 N.W.2d 69 (Wis. 2010); *Piteau v. Bd. of Educ. of Hartford*, 15 A.3d 1067, 1077 (Conn. 2011).

n86 The Supreme Court has addressed aspects of fair share arrangements on four separate occasions. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1997) (holding that the Constitution does not prohibit agency fee provisions in bargaining contracts as long as unions do not use these funds to support ideological activities that members and nonmembers oppose and that are unrelated to the process of negotiations); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301 (1986) (rejecting a rebate system because it did not avoid the risk that funds of non-union members might have temporarily been used for improper purposes); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 511 (1991) (addressing specific activities unions may charge to nonmembers in higher education); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 191 (2007) (unanimously ruling that "it does not violate the First Amendment for a State to require that its public-sector [teacher] unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes").

n87 If oral arguments are any indication of how the Supreme Court is likely to rule, the Justices appear to be willing to place even further limitations on the ability of public-sector unions to use and collect political fees from non-members. *Knox v. California State Emps. Ass'n, Local 1000, Service Emps. Int'l Union*, 628 F.3d 1115, 1117 (9th Cir. 2010), cert. granted, 131 S. Ct. 3061, (U.S. 2011) (holding that under *Hudson*, supra note 86, union officials were not required to send a second notification along with an annual fee notice to non-members when adopting a temporary, mid-term fee increase). Although it did not involve education, it would probably impact teacher unions. *Id.* at 1125. For commentary on the oral arguments, see Mark Walsh, *Justices Weigh Public-Sector Unions' Political Fees*, *Educ. Wk. Blog* (Jan. 10, 2012, 5:55 PM), <http://blogs.edweek.org/edweek/school-law/2012/01/justices-weigh-public-sector-u.html?cmp=SOC-SHR-FB>.

n88 See, e.g., *Neshannock Educ. Support Prof'ls Ass'n v. Pennsylvania Labor Relations Bd.*, 22 A.3d 1103 (Pa. Commw. Ct. 2011) (holding that an accounts payable clerk could join the bargaining unit for non-professional staff because she was not a confidential employee); see also *Baker v. Bd. of Educ., Hoosick Falls Cent. Sch. Dist.*, 770 N.Y.S.2d 782, 785 (N.Y. App. Div. 2004) (a union had no duty to represent retired teachers since they did not belong to the same community of interest as active employees).

n89 See, e.g., *Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd.*, 608 A.2d 1126, 1135 (R.I. 1992); *Papillion/La Vista Schs. Principals and Supervisors Org. v. Papillion/LaVista Dist. No. 27*, 562 N.W.2d 335, 337 (Neb. 1997); *Chicago Teachers Union v. Illinois Educ. Labor Relations Bd.*, 695 N.E.2d 1332, 1336 (Ill. App. Ct. 1998); *Pennsylvania Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs*, 805 A.2d 476, 488 (Pa. 2002).

n90 See *Ohio Rev. Code Ann. § 4117.01(F)(1)* (West 2007) ("Employees of school districts who are department chairpersons or consulting teachers shall not be deemed supervisors."); see also *id.* at (F)(4): No teacher as defined in section 3319.09 of the Revised Code shall be designated as a supervisor or a management level employee unless the teacher is employed under a contract governed by section 3319.01, 3319.011, or 3319.02 of the Revised Code and is assigned to a position for which a license deemed to be for administrators under state board rules is required pursuant to section 3319.22 of the Revised Code.

n91 *Colonial Sch. Bd. v. Colonial Affiliate*, 449 A.2d 243, 246 (Del. 1982).

n92 *In re W. Irondequoit Teachers Ass'n v. Helsby*, 315 N.E.2d 775, 776 (N.Y. 1974); *Kenai Peninsula Borough Sch. Dist. v. Kenai Peninsula Educ. Ass'n*, 572 P.2d 416, 422-23 (Alaska 1977).

n93 *Decatur Bd. of Educ., Dist. No. 61 v. Illinois Educ. Labor Relations Bd.*, 536 N.E.2d 743, 776 (Ill. App. Ct. 1989).

n94 See *Fargo Educ. Ass'n v. Fargo Pub. Sch. Dist. No. 1*, 291 N.W.2d 267, 272 (N.D. 1980).

n95 *Waterloo Cmty. Sch. Dist. v. Pub. Emp't Relations Bd.*, 650 N.W.2d 627, 630 (Iowa 2002).

n96 see, e.g., *In re Hillsboro-Deering Sch. Dist.*, 737 A.2d 1098 (N.H. 1999); *Webster Educ. Ass'n v. Webster Sch. Dist.*, 631 N.W.2d 202 (S.D. 2001).

- n97 See, e.g., *Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 643, 657 (1990) (affirming that proposals for salary, leave, and mileage reimbursement for teachers at schools owned and operated by the United States Army were mandatory subjects of bargaining); *Neshaminy Fed'n of Teachers Local Union 1417 v. Pennsylvania Labor Relations Bd.*, 986 A.2d 908, 910, 914 (Pa. Commw. Ct. 2009).
- n98 *Sec'y of Admin. & Fin. v. Commonwealth Emp't Relations Bd.*, 904 N.E.2d 468, 469 (Mass. App. Ct. 2009) (dealing with parking as a fringe benefit).
- n99 *Sch. Dist. of Indian River Cnty. v. Florida Pub. Emps. Relations Comm'n*, 64 So.3d 723, 725 (Fla. Dist. Ct. App. 2011).
- n100 *Barnett v. Durant Cmty. Sch. Dist.*, 249 N.W.2d 626, 629 (Iowa 1977).
- n101 *Local 1186 of Council No. 4 v. State Bd. of Labor Relations*, 620 A.2d 766, 767 (Conn. 1993).
- n102 *Cadott Educ. Ass'n v. Wisconsin Emp't Relations Comm'n*, 540 N.W.2d 21, 22 (Wis. Ct. App. 1995).
- n103 *In re Watkins Glen Cent. Sch. Dist. v. Watkins Glen Faculty Ass'n*, 628 N.Y.S.2d 824, 825 (N.Y. App. Div. 1995); *Morrisville Sch. Dist. v. Pennsylvania Labor Relations Bd.*, 687 A.2d 5, 8 (Pa. Commw. Ct. 1996).
- n104 *Ringgold Sch. Dist. v. Ringgold Educ. Ass'n*, 694 A.2d 1163, 1167 (Pa. Commw. Ct. 1997).
- n105 *Webster Educ. Ass'n v. Webster Sch. Dist.*, 631 N.W.2d 202, 203 (S.D. 2001).
- n106 *Governing Bd. of Special Educ. Dist. of Lake Cnty. v. Sedol Teachers' Union, Lake Cnty. Fed'n of Teachers, Local 504*, 772 N.E.2d 847, 854 (Ill. App. Ct. 2002).
- n107 *Polk Cnty. Bd. of Educ. v. Polk Cnty. Educ. Ass'n*, 139 S.W.3d 304, 311 (Tenn. Ct. App. 2004).
- n108 *Walter v. Scherzinger*, 121 P.3d 644, 645 (Or. 2005).
- n109 *Ekalaka Unified Bd. of Trs. v. Ekalaka Teachers' Ass'n*, 149 P.3d 902, 902 (Mont. 2006).
- n110 *Bonner Sch. Dist. No. 14 v. Bonner Educ. Ass'n*, 176 P.3d 262, 268 (Mont. 2008); *Lawrence Cnty. Educ. Ass'n v. Lawrence Cnty. Bd. of Educ.*, 244 S.W.3d 302, 314 (Tenn. 2007) (recognizing that a bargaining agreement could modify the authority of school officials to transfer tenured teachers).
- n111 *Central City Educ. Ass'n v. Merrick City Sch. Dist.*, 783 N.W.2d 600, 606 (Neb. 2010).
- n112 *Blount Cnty. Educ. Ass'n v. Blount Cnty. Bd. of Educ.*, 78 S.W.3d 307, 320 (Tenn. Ct. App. 2002); *Sch. Dist. of Seward Educ. Ass'n v. Sch. Dist. of Seward*, 199 N.W.2d 752, 759 (Neb. 1972).
- n113 *In re Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 358 N.E.2d 878, 880 (N.Y. 1976); *Mindemann v. Indep. Sch. Dist. No. 6 of Caddo Cnty.*, 771 P.2d 996, 1002 (Okla. 1989).
- n114 *Kenali Peninsula Borough Sch. Dist. v. Kenali Peninsula Educ. Ass'n*, 572 P.2d 416, 422 (Alaska 1977); *Montgomery Cnty. Educ. Ass'n, Inc. v. Bd. of Educ. of Montgomery Cnty.*, 534 A.2d 980, 987-88 (Md. 1987); *Pub. Emp. Relations Bd. v. Washington Teachers' Union Local 6*, 56 A.2d 206, 206-07 (D.C. 1989).
- n115 *Berkshire Hills Reg'l Sch. Dist. Comm. v. Berkshire Hills Educ. Ass'n*, 377 N.E.2d 940, 941 (Mass. 1978).
- n116 *Maine Sch. Admin. Dist. No. 61 Bd. of Dirs. v. Lake Region Teachers Ass'n*, 567 A.2d 77, 77 (Me. 1989).
- n117 *Bd. of Educ. v. Bernards Twp. Educ. Ass'n*, 399 A.2d 620, 627 (N.J. 1979).
- n118 *Cent. Dauphin Sch. Dist. v. Cent. Dauphin Bus Drivers' Ass'n*, 996 A.2d 47, 59 (Pa. Commw. Ct. 2010) (affirming that impasse procedures applied to a mid-contract bargaining dispute); *Mt. Vernon Educ. Ass'n v. Illinois Educ. Labor Relations Bd.*, 663 N.E.2d 1067, 1069 (Ill. App. Ct. 1996).
- n119 *Drivers, Chauffeurs and Helpers Local Union No. 639 v. District of Columbia*, 631 A.2d 1205, 1216 (D.C. 1993).
- n120 *W. Bend Educ. Ass'n v. Wisconsin Emp't Relations Comm'n*, 357 N.W.2d 534, 539 (Wis. 1984).
- n121 *Racine Educ. Ass'n v. Wisconsin Emp't Relations Comm'n*, 571 N.W.2d 887, 890 (Wis. Ct. App. 1997).
- n122 *Office of State Emp't Relations, Questions and Answers Regarding 2011 Wisconsin Act 10 (Budget Repair Bill) & 2011 Wisconsin Act 32 (Biennial Budget Bill) 1 P A.2.* (2011), available at <http://oser.state.wi.us/docview.asp?docid=7246>.
- n123 *Ohio Rev. Code Ann. §§ 4117.01-4117.24* (West Supp. 2007).
- n124 *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 439 (Wis. 2011).
- n125 See *infra*, notes 157-67 and accompanying text.
- n126 *Laura A. Bischoff & Lynn Hulsey, Unions Celebrate Decisive Victory, Dayton Daily News, Nov. 9, 2011, at A1.*
- n127 For developments in other states, most notably, Idaho and Tennessee, see Sean Cavanagh, *State-by-State Battle on Bargaining Rights Continuing to Unfold*, 30 *Educ. Wk.* 21, 21 (Mar. 9, 2011).
- n128 For the "mark-up" of the Act, see 2011-2012 Wis. Leg., Assemb. Bill 11, Jan. 2011 Special Sess. (Wis. 2011), available at <http://docs.legis.wisconsin.gov/2011/related/acts/10.pdf>.

- n129 Amy Merrick, *Wisconsin Union Law to Take Effect*, Wall St. J., June 15, 2011, at A2.
- n130 Office of State Emp't Relations, *supra* note 122, at 1 P A.1.
- n131 Sean Cavanagh, *Money, Policy Tangled in Wisconsin Labor Feud*, 30 Educ. Wk. 1, 1 (Mar. 2, 2011).
- n132 James B. Nelson, *Vandalism Claim was a Bit Overstated*, Milwaukee J. Sentinel, June. 15, 2011, at A2 (reporting that although estimates of damages may have been overstated, vandalism did occur); Jason Smathers, *Protest Tab: Cops \$ 7.8M, Repairs \$ 270K Initial Repair Estimate was \$ 7.5M*, St. Paul Pioneer Press, May 14, 2011, at A10 ("Protests at the Wisconsin Capitol over public workers' collective bargaining rights cost more than \$ 7.8 million for police, and damages to the Capitol will cost about \$ 270,000 to repair.").
- n133 Tom Kertscher, *GOP Claim on Doctors' Excuses Mostly Hits Mark*, Milwaukee J. Sentinel, Feb. 22, 2011, at A1. See also Steven Verburg, *Madison School District Agrees to Release Teachers' Sick Notes*, Wis. State J., Nov. 30, 2011 ("The Madison School District has agreed to terms for releasing more than 1,000 sick notes submitted by teachers who missed work in February during mass protests over collective bargaining.").
- n134 See, e.g., Matthew DeFour, *Madison Schools Closed Today, Too Emotional Meeting Ends with Teachers Voting to Return to Work Tuesday*, Wis. State J., Feb. 21, 2011, at A1; Erin Richards, *Teachers Sadly Ready to Return to Work: Consequences Uncertain for Those who Called in Sick to Participate in Protests*, Milwaukee J. Sentinel, Feb. 22, 2011, at B3. See also Larry Kudlow, *Madison Madness, Kudlow's Money Politic\$*, Feb. 19, 2011 (discussing who should be on strike in light of the poor performance of Milwaukee's public schools, where the teachers were out in protest even though the system had a meager graduation rate of 34% for students who are African-American and 46% overall).
- n135 See Scott Bauer, *All Wisconsin Dems Flee Capitol to Slow Anti-Union Steamroller*, Chicago Sun-Times, Feb. 18, 2011, at 2; Kris Maher & Amy Merrick, *Democrats to End Union Standoff*, Wall St. J., March 7, 2011, at A1.
- n136 Sean Cavanagh, *Money, Policy Tangled in Wisconsin Labor Feud*, 30 Educ. Week 1, 1 (Mar. 2, 2011) ("Wisconsin face[d] a budget shortfall of \$ 137 million for the remainder of the current fiscal year, and a projected shortfall of \$ 3.6 billion over the next two years.").
- n137 According to a report by the John K. MacIver Institute for Public Policy, in Wisconsin, as of September 1, 2011, the use of competitive bids allowed twenty-five school boards to switch health care providers or lower costs. The average premium savings has been \$ 730,635 which is about \$ 211 per student. Christian D'Andrea, *How Wisconsin's School Districts are Saving Money as a Result of 2011's Act 10 Legislation 4* (2011). See also M.D. Kittle, *Act 10 Realizing Collective Savings for School Districts*, WisconsinReporter.com (Sept. 26, 2011), <http://www.wisconsinreporter.com/act-10-realizing-collective-savings-for-school-districts>; Byron York, *Wisconsin Schools Buck Union to Cut Health Cost*, Washington Examiner, (July 7, 2011), <http://washingtonexaminer.com/politics/2011/07/wisconsin-schools-buck-union-cut-health-costs>.
- n138 Erin Richards & Tom Tolan, *Districts Reassess Teacher Evaluation: Building a Better Teacher Update*, Milwaukee J. Sentinel, Oct. 25, 2011, at A1.
- n139 Sean Cavanagh, *Money, Policy Tangled in Wisconsin Labor Feud*, 30 Educ. Week 1, 1 (Mar. 2, 2011).
- n140 Amy Merrick, *Wisconsin Union Law to Take Effect*, Wall St. J., June 15, 2011, at A2. See, e.g., Armstrong Williams, *Righteous Indignation: Principle over Political Expediency*, Wash. Times, Feb. 28, 2011, at A2.
- n141 Patrick Marley, *Dane County DA Says Legislative Panel Violated Open Meetings Law*, Milwaukee J. Sentinel, Mar. 17, 2011, at A1.
- n142 See, e.g., Patrick Marley & Bill Glauber, *Collective Bargaining Measure Back in Court*, Milwaukee J. Sentinel, Mar. 29, 2011, available at 2011 WLNR 6075304.
- n143 *State of Wisconsin v. Fitzgerald*, No. 11CV1244, 2011 WL 924048 (Wis. Cir. Ct. March 18, 2011); amended, *State of Wisconsin ex rel. v. Fitzgerald*, No. 11CV1244, 2011 WL 1197661 (Trial Order) (Wis. Cir. Ct. Mar. 31, 2011). See also Douglas Belkin & Kris Maher, *Judge Blocks Union Law: Wisconsin Move to Curtail Collective Bargaining by Public Workers is Put on Hold*, Wall St. J., Mar. 19, 2011, at A3.
- n144 See *State ex rel. Ozanne v. Fitzgerald*, No. 2011AP613-LV, 2011 WL 1051274 (Wis. Ct. App. Mar. 24, 2011) (certified question for an appeal to the Supreme Court of Wisconsin).
- n145 Amy Merrick, *Wisconsin Union Law to Take Effect*, Wall St. J., June 15, 2011, at A2.
- n146 *Battle is Over in Wis., And the Unions Lost*, Arizona Republic, Aug. 12, 2011, at B4.
- n147 Sean Cavanagh, *New Laws Curbing Public-Worker Bargaining Besieged*, 30 Educ. Week 26, 28 (Apr. 20, 2011).
- n148 Jason Stein & Don Walker, *Kloppenborg Concedes Race*, Milwaukee J. Sentinel, May 31, 2011, at A1.
- n149 *Opinion, It's a Wake-Up Call, All Right: The Latest Mud- Bath Judicial Election Should Lead to Merit Reform*, Wis. State J., June 1, 2011, at A17.
- n150 *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 438 (Wis. 2011).
- n151 *Id.* at 439.
- n152 *Id.* at 439-40.
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- n190 See supra notes 86-87 and accompanying text.
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- n198 This figure is based on the \$ 43.9 million associated with the recall elections for the legislators and \$ 9 million for Governor Walker. See supra notes 154, 158.



n199 Nick Schulz, *Why U.S. Should Cheer for Wisconsin Gov. Scott Walker*, USA Today, Jan. 10, 2012, at A9 (citing to a December 31, 2011, editorial from JSONline, the Milwaukee J. Sentinel Editorial Board's blog, available at <http://www.jsonline.com/news/opinion/get-ready-voters-its-going-to-be-another-wild-ride-k13ivkk-136450033.html>).

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n202 See Tyler, *Why They Organize*, supra note 61, at 19-20; Cresswell et al., supra note 41, at 23-26.

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n204 For a commentary raising concerns about allowing public employees to act in this manner, see Nick Schulz, *Why U.S. Should Cheer for Gov. Scott Walker*, USA Today, Jan. 10, 2012, at 9A.

n205 *Id.*

n206 See supra note 135 and accompanying text.

n207 "The General Assembly finds and declares that the basic policy of KRS 61.805 to 61.850 is that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for by KRS 61.810 or otherwise provided for by law shall be strictly construed." Ky. Rev. Stat. Ann. § 61.800 (West 2007) (While it does not deal with unions per se, the need for such openness is well stated in this "Legislative statement of policy.").

n208 See supra notes 86-87 and accompanying text.

n209 See Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §§ 441i, 441k, 441a, 438a (2006); 36 U.S.C. § 510 (2006). Parts of the law were upheld and other parts were struck down in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003). However, in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), the Supreme Court held that parts of the federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment.

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n211 See Kerchner & Mitchell, supra note 29, at 230-57 (discussing a move beyond traditional bargaining to a model supporting shared decision-making).

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n215 For representative recent commentary see, for example, Frederick M. Hess, *Spend Money Like It Matters*, *Educ. Leadership*, Dec. 2010, at 51; Gary W. Ritter & Nathan C. Jensen, *The Delicate Task of Developing an Attractive Merit Pay Plan for Teachers*, *Phi Delta Kappan*, May 2010, at 32; Susan Moore Johnson & John P. Papay, *Merit Pay for a New Generation*, *Educ. Leadership*, May 2010, at 48.

n216 For representative recent commentary see, for example, Al Ramirez, *Merit Pay Misfires*, *Educ. Leadership*, Dec. 2010, at 55; Ben Levin, *Why Paying Teachers in Student Results is a Bad Idea*, *Phi Delta Kappan*, May 2011, at 89. See also Robert E. Wright, *Difficulties in Marketing the Concept of Merit Pay for Primary and Secondary Teachers*, *Res. for Educ. Reform*, 2003, at 38.

n217 For recent developments, see Nora Fleming, *Some Efforts On Merit Pay Scaled Back*, 31 *Educ. Wk.* 1, 1 (Sept. 21, 2011); Sean Cavanagh, *Union Challenges New Fla. Law on Merit Pay, Tenure*, 31 *Educ. Wk.* 4, 4 (Sept. 21, 2011); Sarah D. Sparks, *N.Y.C. Ends Merit-Pay Program*, 30 *Educ. Wk.* 5, 5 (Aug. 10, 2011); Virginia Governor Rolls out Teacher Merit-Pay Plan, 30 *Educ. Wk.* 5, 5 (Apr. 27, 2011); Sean Cavanagh, *Idaho Gov. Signs Merit Pay, Collective Bargaining Bills*, 30 *Educ. Wk.* 4, 4 (Mar. 30, 2011); Stacy Morford, *Baltimore Teachers Reject Contract's Shift to Merit Pay*, 30 *Educ. Wk.* 4, 4 (Oct. 20, 2010).

n218 For opposition to such rhetoric, see the comment of John Kline (R-Minn.), ranking member of the House Education and Labor Committee: "[t]he truth is, a bailout for the teachers' unions will not improve the quality of education for our children, and spending \$ 10 billion on the education status quo will not create permanent jobs," in response to a \$ 26.1 billion bill designed in part to keep more than 140,000 public school teachers working. Edward Epstein, *House Leaders Expect State-Aid Bill To Pass*, *Aides Say*, *Cong. Q. Today*, Aug. 9, 2010.

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n220 See supra notes 133-34 and accompanying text.

n221 See, e.g., Editorial, Have Civil Debate this Election Year, Sheboygan Press (Wis.), Jan. 1, 2012, at A7.

n222 See supra notes 131-32 and accompanying text.

n223 For an interesting development in this regard that is illustrative of labor relations in education, albeit in New York City rather than Wisconsin or Ohio, see David W. Chen & Fernanda Santos, Bloomberg Takes on Union With Education Proposals, N.Y. Times Blogs (Jan. 12, 2012). See also Sally Goldenberg & Yoav Gonen, Bloomberg Vows to Nix Under-Performing Teachers in Bombshell State of the City Address, N.Y. Post Online, Jan. 12, 2012, [http://www.nypost.com/p/news/local/bloomberg\\_vows\\_city\\_nix\\_underperforming\\_U6s4mWua8Lz-TvBhjOi4TaO](http://www.nypost.com/p/news/local/bloomberg_vows_city_nix_underperforming_U6s4mWua8Lz-TvBhjOi4TaO) (also acknowledging that the teachers' union has been at odds with evaluation proposals and has long opposed merit pay).

n224 See supra note 193 and accompanying text.

n225 Although it is well beyond the scope of this Article, it is worth noting that there is a constant stream of school finance litigation over whether states have provided adequate resources for public education. For a representative recent commentary on this expansive area, see, for example, William E. Thro, School Finance Litigation As Facial Challenges, 272 Educ. L. Rep. 687 (2011).

n226 See supra note 166 and accompanying text.

n227 See, e.g., Mike Nichols, Independents are Starting to Make their Voices Heard, Green Bay Press-Gazette (Wis.), June 10, 2012, at A9 ("No politician in Wisconsin has ever been attacked on a more personal level than Scott Walker, and that backfired in the end on the left-wing partisans who, over and over again, called him Adolf Hitler and a tyrant."). See also Merv Benson, Black Caucus Chairman Says Dems Should Dial Back Their Rhetoric, Prairie Pundit, April 8, 2012, available at 2012 WLNR 7433508 ("We've got to quit exaggerating our political differences," [Black Caucus Chairman, Rep. Emanuel Cleaver (D-Mo.)] said. He pointed out that he had condemned fellow Democrats for comparing Wisconsin GOP Gov. Scott Walker to Adolf Hitler.").

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n229 David Kocieniewski, Unions, at Center of Wisconsin Recall Vote, Suffer a New Setback in Its Outcome, N.Y. Times, June 7, 2012, at A17.

n230 Scott Bauer, All Wisconsin Dems Flee Capitol to Slow Anti-Union Steamroller, Chicago Sun-Times, Feb. 18, 2011, at 2.

n231 Patrick Marley & Jason Stein, Walker Wins Historic Recall: Governor Beats Barrett, Becomes 1st to Win Recall, Milwaukee J. Sentinel, June 6, 2012, at A1.

n232 Esther, Cepeda, Editorial, Not Everyone is Looking for the Union Label, Fresno Bee, June 8, 2012, available at 2012 WLNR 12073600.

n233 Jan C. Ting, Opinion, Where Obama's Supporters and Scott Walker's Agree, Philadelphia Inquirer, June 8, 2012, available at 2012 WLNR 12001151.

n234 Leo Morris, Opening Arguments: No Bargain Here, Fort Wayne News-Sentinel Blog (Ind.), June 11, 2012, <http://nscontent.news-sentinel.com/?q=blog/post/201206/no-bargain-here>.