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Sifting Through the Wreckage of the Tsunami that Hit Public Sector Collective Bargaining

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SIFTING THROUGH THE WRECKAGE OF THE TSUNAMI
THAT HIT PUBLIC SECTOR COLLECTIVE BARGAINING

BY
MARTIN H. MALIN*

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I. INTRODUCTION

Beginning with New Jersey in December 2010, more than a dozen states modified their statutes governing collective representation of public employees. The most visible nationally were Wisconsin, where the bill pushed by Governor Scott Walker and ultimately enacted produced the largest demonstrations in Madison since the Vietnam War and led to the recall of two Republican state senators and an effort to recall the governor,¹ and Ohio, where the enactment that radically changed the state's public employee collective bargaining statute was overwhelmingly rejected in a voter referendum.² Receiving less national attention were changes in numerous other states that ranged from relatively minor tweaks to radical overhauls and outright repeal of collective bargaining rights.

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1. Scott Bauer, *Union Anger Reflected in Lobbyist Report: The Four Groups That Spent the Most in the First Half of 2011 Opposed Gov. Walker's Agenda*, WIS. STATE J., Sept. 16, 2011, at A3.

2. Editorial, *Humble Pie*, 32 CRAIN'S CLEV. BUS., Nov. 14, 2011, at 10.

Fueling this tsunami of legislative reform was the view that public employee collective bargaining is bad for the public.³ Under this view, unions exercising outsized power have been able to use a privileged position of exclusive access to decision makers to extract excessive wages and benefits, protect employees who are mediocre or worse performers, stifle incentives to excel, and stifle innovation.

Joseph Slater's path-breaking work on the history of public sector collective bargaining has shown how the law has channeled public sector unions, often not for the better. For example, he has shown how courts through the early 1960s, in upholding public employer prohibitions of union membership, ignored union structures, bylaws, and intended purposes, and instead attributed to them all of the attributes of private sector unions, seeking to engage in traditional collective bargaining backed by the threat and, when necessary, use of economic weapons.⁴

Perhaps channeled by this judicial view, when states began enacting public employee collective bargaining statutes, they modeled them largely on the National Labor Relations Act (NLRA). They changed the model as they believed appropriate for the public sector, most commonly with respect to the definition of bargaining units and the prohibition of work stoppages. But they adopted the basic NLRA approach to classifying subjects for collective bargaining. Under this all or nothing approach to worker voice in workplace decision-making; if a subject is considered a mandatory subject of bargaining, duties to act in subjective good faith, to not bypass the exclusive representative and deal directly with employees, to provide the exclusive representative with relevant information, and the right to insist on a position to the point of impasse and resort to economic pressure attach. If the subject is not one of mandatory bargaining, it is subject to complete unilateral employer control. There is no requirement that employees be given a voice, and, if the employer wishes to give employees a voice, it may do so selectively and ignore

3. For example, in a March 10, 2011, op. ed. in the *Wall Street Journal*, Wisconsin Governor Walker attacked collective bargaining agreements for their wage rates, health insurance and pension provisions, and use of seniority. He compared public employee health and pension benefits to those of the private sector. He argued that his budget repair bill would give public employers "the tools to reward productive workers and improve their operations. Most crucially, our reforms confront the barriers of collective bargaining that currently block innovation and reform." Scott Walker, Op.-Ed., *Why I'm Fighting in Wisconsin*, WALL. ST. J., Mar. 10, 2011, at A17.

4. See JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEES, UNIONS, THE LAW AND THE STATE 1900-1962, at 71-95 (2004).

their exclusive representative.

Regardless of the merits of this model in the private sector, it has many negative consequences in the public sector. In prior articles, I have shown how, out of concern that many subjects which in the private sector would clearly be mandatorily bargainable implicate important issues of public policy in the public sector, the scope of bargaining in the public sector has been narrowed considerably. Moreover, when such subjects are considered mandatorily bargainable, the emphasis is placed on their impact on employees' economic interests rather than on employee interests in having a voice in improving the delivery of public services. For example, the majority view is that class size is not a mandatory subject of bargaining because it raises issues of educational policy, but those jurisdictions that require bargaining over class size do so to give teachers a voice in determining their workload rather than as a means for giving teachers a voice in the impact of class size on the quality of instruction.⁵

When worker voice is channeled so narrowly, it is not surprising that workers' representatives exert the full force of their bargaining power in those narrow areas. For example, in Wisconsin in the 1990s, the legislature enacted the qualified economic offer (QEO) which essentially ended bargaining over teacher salaries as long as the employer made an offer in accordance with a statutorily prescribed formula.⁶ The effect was to channel teacher unions into negotiating benefits which were not subject to the QEO and it is not surprising that they did so successfully.⁷ Nor is it surprising that unions will act to stifle innovations when they have been excluded from having a voice in the formulation of such innovations.

Experience indicates, however, that when, in spite of the legal doctrine, workers are given a voice in issues concerning the quality of public services, they respond very positively. For example, when teacher evaluation standards are developed and implemented unilaterally by management, we should not be surprised to see

5. See Martin H. Malin, *The Paradox in Public Sector Labor Law*, 84 IND. L.J. 1369 (2009); Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J. L. & PUB. POL'Y 885 (2007).

6. Wis. Act 16, 1993 Wis. Sess. Laws 26 (codified at WIS. STAT. § 111.70(1) (2010)). In 2009, Wisconsin repealed the QEO in Wis. Act 28, 2009 Wis. Sess. Laws 179 (Assemb. 75, 2009-10 Leg. (Wis. 2009)). The text of the Act is available at <<https://docs.legis.wisconsin.gov/2009/related/acts/28.pdf>>.

7. I acknowledge Bruce Meredith, former general counsel of the Wisconsin Education Association Council, for this point.

teacher unions employ all methods at their disposal to protect their members from attack under the unilaterally imposed regime. However when, in spite of the law, school districts and teachers collaborate on developing and implementing evaluation standards through peer review processes, teacher unions tend to be transformed from defenders of the irremediably incompetent to protectors of professional standards.⁸

In my prior work, I have related numerous examples of the positive impact of worker voice in the public sector enterprise that occurred in spite of rather than because of the law.⁹ Other scholars have pointed to additional examples.¹⁰ Many employers have recognized the benefits of involving employees through their exclusive bargaining representatives in the decision-making process. For example, during the debates over the Wisconsin Budget Repair Bill, the Wisconsin Association of School Boards reported that many of its members were “gravely concerned” that the bill would “immeasurably harm the collaborative relationships that exist between school boards and teachers.”¹¹ And hundreds of local government officials in Wisconsin signed an open letter to the governor opposing the bill on similar grounds.¹²

A particularly striking example of management recognition of the benefits of organized worker voice comes from the federal government. On October 1, 1993, President Clinton issued Executive Order 12,871, which, among other things, established the National Partnership Council and called for the creation of labor-management partnerships throughout the Executive Branch. The goal of such partnerships was to “champion change in Federal government agencies to transform them into organizations capable of delivering the highest quality services to the American people.”¹³ The

8. See Malin & Kerchner, *supra* note 5, at 904-06.

9. See Malin, *supra*, note 5, at 1392-96; Malin & Kerchner, *supra* note 5, at 903-11.

10. See, e.g., DAVID LEWIN ET AL., EMP'T POLICY RESEARCH NETWORK & LABOR AND EMP'T RELATIONS ASS'N, GETTING IT RIGHT: EMPIRICAL EVIDENCE AND POLICY IMPLICATIONS FROM RESEARCH ON PUBLIC-SECTOR UNIONISM AND COLLECTIVE BARGAINING 16-22 (2011), available at <<http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/EPRN%20PS%20draft%203%2016%2011%20PM%20FINALtk-ml4%20edits.pdf>>.

11. Letter from John H. Ashley, Executive Director, Wis. Ass'n of Sch. Bds. to Hon. Alberta Darling & Hon. Robin Vos, Co-chairs, Wis. Legislature Joint Comm. on Fin. (Feb. 15, 2011) (copy on file with author).

12. See Erin Richards et al., *Clash Continues: Budget Battle: Day 12 Many City Officials Think Union Limits Go Too Far*, MILWAUKEE J. SENTINEL, Feb. 27, 2011, at B1, available at 2011 WLNR 3854288.

13. Exec. Order No. 12,871, 3 C.F.R. 655 (1993).

partnerships established under the executive order produced numerous outcomes beneficial to the public.¹⁴ Nevertheless, in one of his first acts as president, President George W. Bush repealed the executive order.¹⁵

There are many reasons why management desires employee involvement through exclusive representatives in workplace decision-making. Studies find that the most productive workplaces are unionized workplaces with high levels of employee involvement.¹⁶ Black and Lynch's work simulated a base case of a non-union manufacturer with little employee involvement. They found that unionized firms with little employee involvement had productivity levels 15 percent lower than the base case. Non-unionized firms with high employee involvement had productivity levels 10.6 percent higher than the base case. But "adding unionization to this already high-performing workplace is associated with an impressive 20 percent increase in labor productivity."¹⁷ They then examined the actual mean characteristics of unionized and nonunionized firms in a sample of manufacturers. They found that the unionized firms averaged productivity 16 percent higher than the base case while the nonunionized firms' productivity averaged 11 percent lower than the base case.¹⁸

Why do unionized workplaces with high levels of employee involvement outperform all other types of workplaces? Black & Lynch attribute some of this to greater levels of job security in unionized workplaces.¹⁹ It seems intuitive that employees who need not fear job loss in retaliation for suggestions with which their superiors disagree will be more forthcoming with those suggestions. I suggest the advantages go beyond that, however. In unionized environments, management has a specific representative, one freely chosen by the employees, to turn to as a partner. Moreover, decisions resulting from such management-union partnerships are more likely to be perceived as legitimate by the workforce as a whole, thereby smoothing their implementation.

14. See Malin, *supra* note 5, at 1395-96.

15. Exec. Order No. 13,203, 3 C.F.R. 761 (2001).

16. See LEWIN ET AL., *supra* note 10, at 22-26.

17. Sandra E. Black & Lisa M. Lynch, *The New Workplace: What Does It Mean for Productivity?*, in INDUS. RELATIONS ASS'N, PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING 60, 65 (Paula B. Voos ed. 1998).

18. *Id.*

19. *Id.*

In his Wall Street Journal op. ed., Wisconsin Governor Walker maintained that the legislative reform in Wisconsin would “confront the barriers of collective bargaining that currently block innovation and reform.”²⁰ I submit that, to the extent that barriers to innovation and reform exist, they stem from the NLRA model that mandates that matters are subject either to traditional collective bargaining or left to complete unilateral employer control. Meaningful reform must look for vehicles to expand worker voice in positive ways by looking at models outside the traditional NLRA approach to all or nothing collective bargaining.

In this article, I evaluate the legislative “reforms” enacted in the current tsunami against this goal. Part II examines the changes in the various states to their public sector labor relations regimes and finds that generally, rather than provide reforms which will improve the delivery of public services, the tsunami that hit the public sector workplace only enhanced unilateral employer control. Part III concludes that these reforms are doomed to failure and will serve to further inhibit innovations by increasing legal barriers beyond those that the traditional collective bargaining regime posed. Part IV examines reforms in two states, Indiana and Tennessee, that on their face appear promising. However, as Part IV demonstrates, those appearances are deceiving and the reforms are illusory. Part V finds a few glimmers of hope in recent developments and suggests ways that might lead to meaningful reform through redirected employee voice in the public sector workplace.

II. THE TSUNAMI²¹

In this part, I review the changes enacted in twelve states: Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Tennessee, and Wisconsin. The Ohio legislation was overturned by voters in a referendum in November 2011 and, therefore, never went into effect. The Idaho legislation was rejected by voters in a referendum in November 2012. However, they are included because they fit within the overall tone of the tsunami that hit public sector labor law in the past year two years.

The numerous state enactments share a common characteristic. They replace collective representation with unilateral employer

20. Walker, *supra* note 3.

21. This Part draws on my article, *The Upheaval in Public Sector Labor Law: A Search for Common Elements*, 27 ABA J. LAB. & EMP. L. 149(2012).

control. They do so by eliminating collective bargaining rights, restricting the scope of bargaining and, where bargaining is allowed, changing impasse procedures to strengthen employer control, and in the case of interest arbitration, to strengthen legislative control over the process. Finally, they facilitate the abrogation of collective bargaining agreements during times of fiscal distress. Rather than proceed state-by-state, I will highlight these characteristics and explain which states' enactments exhibit them.

A. Eliminating Collective Bargaining Rights

Two states, Oklahoma and Tennessee, repealed statutes that provided public employees with collective bargaining rights. On April 29, 2011, Oklahoma Governor Mary Fallin signed House Bill 1593 repealing the Oklahoma Municipal Employee Collective Bargaining Act, which had guaranteed the rights to organize and bargain collectively to employees of municipalities with populations above 35,000.²² The repeal leaves the decision to bargain to the municipalities' discretion. The repeal's sponsors argued that it was necessary to restore local control over the decision to bargain collectively.²³ The governor maintained that it would control costs.²⁴

Tennessee repealed the Education Professional Negotiations Act, which had provided teachers with the right to organize and bargain collectively since 1978, and replaced it with the Professional Educators Collaborative Conferencing Act of 2011.²⁵ The Tennessee Senate had voted to repeal the collective bargaining law but the state House of Representatives had voted to limit the scope of bargaining rather than repeal it.²⁶ The following day, a conference committee

22. Okla. H.R. 1593, 53d Leg., 2d Sess. (Okla. 2011); see *Bill Information for HB 1593 (2011-2012)*, OKLA. STATE LEGISLATURE, <<http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1593&Session=1100>> (last viewed Dec. 3, 2012).

23. See Barbara Hoberock, *Oklahoma Gov. Fallin Signs Bill to End Collective Bargaining*, TULSA WORLD, Apr. 29, 2011, at A8 (quoting Representative Steve Martin); Sean Murphy, *Oklahoma Senate Approves Anti-Union Rights Bill*, TULSA WORLD (last modified Apr. 19, 2011, 2:24 PM), <http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20110419_336_0_OKLAHO385498> (quoting Senator Cliff Aldridge).

24. Hoberock, *supra* note 23. Interestingly, the Oklahoma House defeated another bill, House Bill 1576, which would have amended Oklahoma's police and firefighter collective bargaining statute by giving municipalities the option of accepting the award of an interest arbitrator or rejecting it and returning to negotiations. *Bill Information for HB 1576 (2011-2012)*, OKLA. STATE LEGISLATURE, <<http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1576&Session=1100>> (last viewed Dec. 3, 2012).

25. 2011 Tenn. Pub. Acts 378 (codified at TENN. CODE ANN. § 49-5-601 (2011)).

26. See Richard Locker, *Teacher Collective Bargaining Bill Hinges on GOP*, MEMPHIS COM. APPEAL (updated May 19, 2011, 11:30 PM), <<http://www.commercialappeal.com/>

voted for the repeal which passed later that day in both houses.²⁷ The details of the Collaborative Conferencing Act are discussed in Part III.

Several states, while not repealing their public employee collective bargaining statutes, amended them to deny collective bargaining rights to certain groups of employees. Nevada took bargaining rights away from doctors, lawyers, and some supervisors.²⁸ Had it not been rejected by voters, the Ohio enactment would have taken bargaining rights away from university faculty who participate in faculty governance and certain police and firefighter supervisors.²⁹

The Wisconsin statute took away collective bargaining rights from state university faculty, all employees of the UW Hospitals and Clinics, and day care and home health care providers.³⁰ Although the act did not repeal the Municipal Employee Relations Act or the State Employee Relations Act, it effectively abolished collective bargaining for all public employees except for many law enforcement and fire protection personnel by prohibiting bargaining on any subject other than “base wages,” which the act expressly provides excludes overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions.³¹ Furthermore, base wages may not increase more than the increase in the consumer price index (CPI) as of 180 days before the expiration of the collective bargaining agreement unless higher base wages are approved in a public referendum.³² In many respects, employees in Oklahoma have more protection for collective bargaining than employees in Wisconsin. Although Oklahoma repealed its statute that mandated collective bargaining rights in mid-sized municipalities, it allows collective bargaining at the option of the employer. Wisconsin prohibits

[news/2011/may/19/tennessee-house-votes-limit-collective-bargaining/](http://www.commercialappeal.com/news/2011/may/19/tennessee-house-votes-limit-collective-bargaining/)>.

27. See Richard Locker, *Tennessee Legislature OKs Ban of Teacher Bargaining*, MEMPHIS COM. APPEAL (updated May 21, 2011, 7:40 AM), <<http://www.commercialappeal.com/news/2011/may/20/new-version-bill-repeals-collective-bargaining-tea/>>. Critics of the repeal charged that it was Republican retaliation against the Tennessee Education Association for supporting more Democrats than Republicans in the 2010 elections, noting that Representative Glen Casada, chair of the Republican caucus had asked the union prior to the elections to increase its campaign contributions to Republicans to equal what it was giving to Democrats. Locker, *supra* note 26.

28. S. 98, §§ 5, 6, 76th Sess. (Nev. 2011) (codified at NEV. REV. STAT. § 288.140 (2011)).

29. S. 5, 29th Gen. Assemb. (Ohio 2011) (amending OHIO REV. CODE ANN. §§ 4117.01(K), (C)(10), (F)(2)).

30. 2011 Wis. Act 10 §§ 265 (state university faculty), 279 (UW Hospitals and clinics), 280 (day and home healthcare providers).

31. *Id.* §314.

32. *Id.*

collective bargaining even if the employer is willing to engage in it.³³ It is not surprising that the Wisconsin act repealed the declarations in the Municipal and State Employee Relations Acts which had found public employee collective bargaining to be in the public interest.³⁴

B. Limiting the Scope of Bargaining

By far, the most numerous changes made in the tsunami of 2011 concerned the scope of bargaining. Numerous state legislatures have removed, and in many cases prohibited, bargaining over a wide range of subjects. Some subjects removed from the bargaining table are directly related to compensation, while others deal with working conditions. Regardless, the legislatures are giving public sector employers the tools of command, control, and unilateral imposition.

The item of compensation most frequently removed from the bargaining table has been health care. Although most law enforcement and fire protection personnel were exempted from the Wisconsin budget repair act's prohibition on bargaining anything other than base wages, the state's regular biannual budget act prohibited bargaining over law enforcement and firefighter health insurance.³⁵ Ohio's enactment deemed "not appropriate" for bargaining inter alia health care benefits, except that the parties may agree that the employer will pay up to 85 percent of the premiums.³⁶

New Jersey suspended bargaining over health care benefits for four years while a new statute is phased in. The statute sets a sliding scale according to salary of mandatory employee contributions to health care premiums and provides for health care plans to be designed by two state committees, one for education and one for rest of public sector.³⁷

Massachusetts enacted a new method for local governments to make changes in health insurance. The governing body may adopt changes along with estimated cost savings and proof of the savings. It gives notice to each bargaining unit and a retiree representative. The retiree representative and the bargaining unit representatives form a public employee committee which negotiates with the employer for

33. *Id.* § 169.

34. *Id.* § 261.

35. 2011 Wis. Act 32 § 2409.

36. S. 5, 29th Gen. Assemb. (Ohio 2011) (amending OHIO REV. CODE ANN. §§ 4117.08(B)(2), (E)).

37. 2011 N. J. Laws 78.

up to thirty days. After thirty days, the matter is submitted to a tripartite committee which, within ten days, can approve the employer's proposed changes, reject them, or remand for additional information. The committee's decision is final.³⁸

Idaho limited negotiations for teachers to "compensation," which it defined as salary and benefits, including insurance, leave time, and sick leave.³⁹ Previously, the subjects of negotiations were specified in a negotiations agreement between the parties. The Idaho enactment also limited collective bargaining agreements to one fiscal year, July 1 through June 30, and prohibited evergreen clauses or other provisions to the effect that an agreement continues until a new agreement is reached.⁴⁰ In November 2012, voters rejected the Idaho enactment by a vote of 57.1 percent to 42.7 percent.⁴¹

Similar to Idaho, Indiana limited collective bargaining for teachers to wages and salary and wage related fringe benefits including insurance, retirement benefits, and paid time off.⁴² The statute permits collective bargaining agreements to have grievance procedures, but strikes the prior law's express authorization for the grievance procedure to culminate in binding arbitration.⁴³ The new statute prohibits bargaining on everything else, including express prohibitions on bargaining school calendar, teacher dismissal procedures and criteria, restructuring options, contracting with an educational entity that provides post-secondary credits to students, and teacher evaluation procedures and criteria.⁴⁴ It also prohibits any contract that would place a school district in a deficit⁴⁵ and prohibits collective bargaining agreements from extending beyond the end of the state budget biennium.⁴⁶ The new law repeals a prior provision

38. 2011 Mass. Acts 69 (approved July 12, 2011). Media reports suggested that in April when the Massachusetts House passed more restrictive legislation, President Obama's director of intergovernmental affairs telephoned Massachusetts Governor Deval Patrick. The governor negotiated changes with labor leaders whose attitude changed from a vow to fight the legislation "to the bitter end" to support and congratulations to the governor for "listening to labor's concerns." See Michael Levenson, *National Scrutiny for Mass. Labor Law*, BOSTON GLOBE, July 12, 2011, Metro, at 1.

39. S. 1108 § 17, 61st Leg. (Idaho 2011).

40. *Id.* § 22.

41. Idaho Sec'y of State, Election Div., Nov. 6, 2012 General Election Results, Proposition 1, <http://sos.idaho.gov/elect/RESULTS/2012/General/tot_stwd.htm> (last viewed Dec. 28, 2012.)

42. 2011 Ind. Acts 575 §14.

43. *Id.* § 17.

44. *Id.* § 15.

45. *Id.* § 13.

46. *Id.* § 16.

that authorized parties to agree to arbitrate teacher dismissals.⁴⁷

In addition to health care benefits, the Ohio enactment deemed the following inappropriate for collective bargaining: provisions restricting contracting out or providing severance pay to employees whose jobs are contracted out; provisions that grant more than six weeks of vacation, more than twelve holidays, or more than three personal days; payment of employee contributions to retirement systems; minimum staffing provisions; and restrictions on school district authority to assign personnel, class size, reductions in force of educational employees, and the use of seniority as the sole factor in reductions in force.⁴⁸

Michigan added to an already lengthy list of prohibited subjects of bargaining for educational personnel. Decision and impact bargaining are now prohibited with respect to: placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption, and implementation of a policy regarding employee discharge or discipline; the format, timing, and number of classroom visits; the development, content, standards, procedures, adoption, and implementation of the method of employee compensation and decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content, and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.⁴⁹

Illinois amended its Educational Labor Relations Act to provide that in the Chicago Public Schools, the length of the school day and the length of the school year are permissive, rather than mandatory, subjects of bargaining.⁵⁰ The amendment responded to calls from the Mayor of Chicago to authorize his appointed school board and management team to increase the school day unilaterally in light of the Chicago Teachers Union's failure in the past to agree to such

47. *Id.* § 6.

48. S. 5, 29th Gen. Assemb. (Ohio 2011) (amending OHIO REV. STAT. ANN. §§ 4117.08(B)(4) (contracting out), 4117.105(B)(contracting out), 4117.108(A)(1) (vacation), 4117.108(A)(2)-(3) (holiday & personal time), 4771.08(B)(3), 4117.08(B)(5) (staffing), 4117.081(B)(1) (school district authority to assign), 4117.081(B)(3) (class size), 4117.081(B)(4) (RIF-educational employees), 306.04(B) (seniority-transit), 709.012 (seniority-firefighters), 3316.07(A)(11) (seniority-teachers)).

49. 2011 Mich. Pub. Acts 103.

50. S. 7 § 10, 97th Gen. Assemb. (Ill. 2011).

increases.⁵¹

C. *Advantaging the Employer in Impasse Resolution*

It seems intuitive that the type of impasse resolution procedure a state adopts will have a significant effect on collective negotiations.⁵² The most extreme approach, and the one which gives the employer the most power, leaves terms and conditions of employment up to the employer if negotiations do not lead to agreement. This approach, often decried by labor as “collective begging” rather than collective bargaining was adopted in the Idaho enactment that voters overturned. The Idaho legislation repealed the prior requirement of factfinding.⁵³ Under the Idaho enactment, the parties were authorized but not required to enter mediation if they had not reached agreement by May 10.⁵⁴ If they did not reach agreement by June 10, the school board was required to unilaterally set the terms and conditions of employment for the coming school year by June 22.⁵⁵ The statute did not expressly restrict the school board’s actions, thereby leaving open the possibility that the school board could have established terms never offered to the union. With evergreen clauses prohibited, Idaho school boards may have been tempted to surface bargain, run out the clock, and unilaterally set terms.⁵⁶

Wisconsin prohibited interest arbitration for all employees except most law enforcement and firefighters.⁵⁷ Wisconsin now has no impasse procedures for most public employees. Of course, with bargaining limited to base wages and further effectively limited to the change in the CPI, there may not be much need for impasse resolution.

51. See Noreen S. Ahmed-Ullah & Kristen Mack, *Emmanuel Sees Longer School Days*, CHI. TRIB., Apr. 16, 2011, at 6.

52. *But see* Thomas Kochan et al., *The Long Haul Effects of Interest Arbitration: The Case of New York State’s Taylor Law*, 63 INDUS. & LAB. REL. REV. 565 (2010) (finding no significant differences on wage rate outcomes when negotiated under interest arbitration or non-binding factfinding regimes).

53. S. 1108 § 22, 61st Leg. (Idaho 2011).

54. *Id.* § 20.

55. *Id.*

56. Interestingly, the Idaho Supreme Court has held that teacher strikes are not automatically enjoined but are subject to a defense of school board unclean hands due to bad faith in the negotiations process. *Sch. Dist. No. 351 Oneida Cnty. v. Oneida Educ. Ass’n*, 567 P.2d 830 (Idaho 1977). The court assumed, but did not decide, that teacher strikes were illegal, and one concurring justice opined that teacher strikes were lawful, there being no express statute prohibiting them. *Id.* at 836 (Bakes, J., concurring the judgment and dissenting in part).

57. 2011 Wis. Act 10 §234.

Since 1984, Ohio has recognized a right to strike for most public employees and a right to interest arbitration for the others. Ohio voters rejected the legislative enactment which would have prohibited strikes by all public employees and enforced the prohibition with fines for strikers of two days' pay for each day on strike, discipline or discharge of strikers, loss of dues checkoff for striking unions, and strike injunctions.⁵⁸ The Ohio enactment also would have prohibited interest arbitration.

In place of strikes and interest arbitration, the Ohio enactment mandated factfinding if no agreement was reached forty-five days before the scheduled expiration of an existing contract. The statute required that the factfinder's primary consideration be the public interest and welfare and the employer's ability to pay, and limited the factfinder to considering the employer's financial status as of time period surrounding negotiations, precluding consideration of potential increases in employer revenue or employer ability to sell assets. The enactment allowed either party by majority vote within fifteen days following the factfinder's recommendations to reject them, leading to the State Employment Relations Board publicizing the recommendations. Absent agreement reached within five days after publication, the parties were to submit their last best offers to the employer's legislative body which was to have its chief financial officer certify which offer cost more and hold a public hearing. Within fifteen days following contract expiration, the legislative body was to pick one party's final offer, with the employer's offer governing if no selection was made.⁵⁹

States that did not prohibit interest arbitration severely restricted arbitrator discretion. New Jersey amended its police and firefighter interest arbitration provisions to eliminate party selection of the arbitrator; the arbitrator is randomly selected by the Public Employment Relations Commission from a special PERC panel; the award must issue within forty-five days of arbitrator appointment (prior law allowed 120 days). The parties must present written estimates of the financial impact of their final offers. The award must address all statutory criteria and certify that the arbitrator took statutory limitations imposed by a local levy cap into account. The award may be appealed to PERC which must decide the appeal

58. S. 5, 29th Gen. Assemb. (Ohio 2011) (amending OHIO REV. CODE ANN. § 4117.12(B)(4)).

59. *Id.* (amending OHIO REV. CODE ANN. §4117.14 (D)(2)).

within thirty days, must address all statutory factors and must certify that it took the levy cap into account. The statute caps arbitrator fees at \$1000 per day and \$7500 total, and caps cancellation fees at \$500; it fines arbitrators \$1000 per day for being late. The award may not increase base salary items by more than 2 percent of the aggregate amount expended by the employer in the twelve months immediately preceding expiration of the prior contract and may not include base salary items and other economic issues that were not included in the prior contract. The cap on base salaries sunsets on April 1, 2014.⁶⁰

In Nebraska, interest arbitration is performed by the Commission of Industrial Relations (CIR), whose members are appointed by the governor. The new Nebraska act provides detailed criteria for selecting an array of comparable communities, specifies how many comparable communities must be selected, and mandates that if the employer at issue pays compensation that is between 98 percent and 102 percent of the average of the comparables, including fringe benefits, then the CIR must leave compensation as it is. If the employer's compensation is below 98 percent of the average, the CIR is to order it raised to 98 percent and if it is above 102 percent, the CIR is to order it lowered to 102 percent. The targets are reduced to 95 to 100 percent during periods of recession, defined as two consecutive quarters in which the state's net sales and use taxes and individual and corporate income tax receipts are below those of the prior year.⁶¹

Illinois tweaked its right to strike for most employees in public education and substantially restricted it for employees of the Chicago Public Schools. For school districts other than the Chicago Public Schools (CPS), if there is no agreement within forty-five days of the start of the school year, the Illinois Educational Labor Relations Board must invoke mediation. After fifteen days of mediation, either party may declare impasse. Seven days later, each party submits its final offer and cost summary. Seven days thereafter, the final offers are made public. No strike is allowed until at least fourteen days after publication of final offers.⁶²

For the Chicago Public Schools, if no agreement is reached after a reasonable period of mediation, the dispute is submitted to factfinding upon demand of either party. Factfinding is tri-partite

60. 2010 N.J.Laws 1204.

61. Leg. 397, 102d Leg., 1st Sess. (Neb. 2011).

62. S. 7 §13(b)(2), 97th Gen. Assemb. (Ill. 2011).

unless the parties agree otherwise. If there is no settlement within seventy-five days, the factfinder issues a private report with recommendations, which the parties have fifteen days to reject. If rejected, the recommendations are made public. There may be no strike for thirty days following publication and no strike unless authorized by 75 percent of union membership.⁶³

D. Abrogating Contracts in Times of Fiscal Distress

In *National Treasury Employees Union v. Chertoff*,⁶⁴ the D.C. Circuit, in an opinion written by Chief Judge Harry Edwards, invalidated regulations of the Department of Homeland Security (DHS) because they were inconsistent with the Homeland Security Act's requirement that DHS's personnel system ensure that employees may bargain collectively. Among other grounds for the invalidation was the regulations' provision allowing management to abrogate collective bargaining agreements. The court quoted with approval the district court's observation that the "sine qua non of good faith collective bargaining is an enforceable contract once the parties reach an agreement,"⁶⁵ and its analysis that "[a] contract that is not mutually binding is not a contract. Negotiations that lead to a contract that is not mutually binding are not true negotiations. A system of 'collective bargaining' that permits the unilateral repudiation of agreements by one party is not collective bargaining at all."⁶⁶

The tsunami of 2011 that hit the states looks toward the abrogation of collective bargaining agreements in times of fiscal distress. Nevada required contracts to provide for reopening in times of fiscal emergency.⁶⁷ The voter-rejected Ohio enactment provided for modification or termination of contracts if the state placed a local government on fiscal watch or fiscal emergency.⁶⁸ The most far reaching enactment was the Michigan Local Government and School District Fiscal Accountability Act of 2011.⁶⁹ It specified procedures

63. *Id.* §13(b)(2.10).

64. 452 F.3d 839 (D.C. Cir. 2006).

65. *Id.* at 851.

66. *Id.*

67. S. 98 §7(2)(w), 76th Reg. Sess. (Nev. 2011).

68. S. 5, 29th Gen. Assemb. (Ohio 2011) (amending OHIO REV. CODE ANN. § 4117.104(A)).

69. 2011 Mich. Pub. Acts 4 (2011). The law was rejected by referendum in the November 2012 election. See Nancy Kaffer, *Voters Reject Attacks on Constitution*, DETROIT FREE PRESS,

that could lead to a finding by the state of financial emergency. Upon such a finding, the governor would have appointed an emergency manager who, among other things, would have the power to reject all or part of a collective bargaining agreement upon finding that the financial emergency created a circumstance where it was reasonable and necessary for the state to intervene, the rejection was reasonable and necessary to deal with a broad, generalized economic problem, rejection was directly related to and designed to address the financial emergency, and rejection was temporary and did not target specific classes of employees.

A potentially very significant development concerning the integrity of collective bargaining agreements will likely come from the Illinois courts. AFSCME and the State of Illinois entered into a collective bargaining agreement effective September 5, 2008 through June 30, 2012. The contract provided for raises totaling 15.25 percent over the life of the agreement.⁷⁰ In response to the Great Recession, the union agreed to concessions that saved the state approximately, \$400,000,000.00. These concessions included agreement to defer a 4 percent wage increase that was to take effect July 1, 2011, to 2 percent effective effective July 1, 2011 and 2 percent effective February 1, 2012. The state also agreed not to lay off any bargaining unit employees through the end of the 2012 fiscal year.⁷¹

As the July 1, 2011 raise approached, the state sought additional concessions but the union refused. The state then refused to put the 2 percent wage increase into effect, and the union grieved. An arbitrator sustained the union's grievance and awarded that the state pay the 2 percent wage increase.⁷² Subsequently, the state announced layoffs. The union grieved, and the matter proceeded before the same arbitrator who issued an award prohibiting the layoffs because they

Nov. 7, 2012, at 1. However, the lame duck legislature reenacted it and included in the enactment an appropriation provision, intended to prevent another referendum. 2012 Mich. Pub. Acts 436 (2012); see Chad Livengood & Shaun D. Lewis, *New EM Law Could be Used to Appoint a Financial Czar in Detroit*, DETROIT NEWS, Dec. 28, 2012, at <<http://www.detroitnews.com/article/20121228/POLITICS02/212280373>>.

70. See AFSCME Council 31 and State of Illinois Contract Changes 22-23 (Sept. 5, 2008-June 30, 2012), available at <http://www2.illinois.gov/cms/employees/personnel/documents/emp_afscme08chg.pdf>

71. See State of Illinois & AFSCME Council 31, Arb. Ref. 10.251 2011-2012 Layoffs and Facility Closures, at 3 (October 3, 2011) (Edwin H. Benn, Arb.), available at <<http://www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/State%20of%20Illinois%20&%20AFSCME,%20Layoffs%20&%20Facility%20Closures.pdf>>.

72. State of Illinois & AFSCME Council 31, Arb. Ref. 10.251 July 1, 2011 Increases (July 19, 2011) (Edwin H. Benn, Arb.), available at <<http://www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/State%20of%20Illinois%20&%20AFSCME,20pay%20raises.pdf>>.

violated the state's agreement not to lay off bargaining unit employees in exchange for economic concessions.⁷³

The state has sued to vacate both awards. The state argues that section 21 of the Illinois Public Employment Relations Act, which authorizes multi-year collective bargaining agreements "[s]ubject to the appropriation power of the employer,"⁷⁴ precludes enforcement of the award because the state legislature failed to appropriate sufficient funds to fund the wage increases or the no-layoff commitment. The state also argues that enforcement of the awards would violate the Illinois Constitution which, it contends, prohibits the executive branch from expending funds that the legislature has failed to appropriate. The Circuit Court of Cook County ordered the state to pay the raises to the extent it has appropriated funds and to pay the balance plus interest at a later date.⁷⁵ The state has appealed. If the state is successful, Illinois public employers will have the power to abrogate the economic provisions of multi-year collective bargaining agreements by refusing to appropriate funds needed to comply.

III. THE TSUNAMI'S WRECKAGE

The tsunami of 2011 has swept in new regimes in many states that allow for unilateral, top-down employer control over employees' work lives.⁷⁶ We have seen this before, and the picture was not pretty.

On October 1, 1993, President Clinton issued Executive Order 12,871, which, among other things, established a National Partnership Council and required the establishment of labor-management partnerships throughout the executive branch. Among the many successful labor-management partnerships was one between the National Treasury Employees Union (NTEU) and the U.S. Customs Service. That partnership designed a seven-step strategy to increase seizures of illegal drugs which, during its six month life, resulted in a 42 percent increase in narcotics seizures and a 74 percent increase in

73. State of Illinois & AFSCME Council 31, Arb. Ref. 10.251 2011-2012 Layoffs and Facility Closures, *supra* note 71.

74. 5 ILL. COMP. STAT. 315/21 (2010).

75. Doug Finke, *Judge Orders Quinn to Honor State Employee Raises*, ST. J. REGISTER, Dec. 7, 2012, at <<http://www.sj-r.com/breaking/x1665846618/Judge-orders-Quinn-to-honor-state-employee-contract-raises>>.

76. Early results in Wisconsin indicated a mixed bag with some employers unilaterally changing working conditions while others work cooperatively with employees' representatives. See Steven Verburg, *New Work Rules Set in as Contracts Lapse*, WIS. STATE J., Dec. 25, 2011, at A1, available at <http://host.madison.com/wsj/news/local/govtandpolitics/newworkrulesetinasccontractslapse/article_da55410c_bb86_55a6_8ffa_71bb933fe4be.html?mode=story>.

currency seizures.⁷⁷ Following the election of President George W. Bush, the Heritage Foundation urged him to rescind Executive Order 12,871 because it impeded the type of top-down control thought necessary to implement the administration's policy agenda.⁷⁸ President Bush appeared to listen. During his first month in office, he revoked the Clinton executive order and directed heads of all executive agencies to "[p]romptly move to rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12,871 . . ."⁷⁹ Adopting the model of unilateral, top-down control, the Bureau of Customs and Border Protection, the successor agency to the Customs Service, among other things, imposed a rule prohibiting CBP agents from having facial hair. This led to a lengthy battle with NTEU in which NTEU successfully fought the new rule.⁸⁰ Which is the better use of the time of unions and public managers: cooperatively devising improvements in the interdiction of illegal narcotics and currency or fighting over whether the agent who greets persons entering the country may have a beard or mustache?

As discussed earlier, experience suggests that the most efficient, productive environments are those in which organized employees are highly involved in workplace decision-making. Despite Governor Walker's belief that top-down unilateral control will lead to better government, the likelihood is that improvements in workplace efficiency, productivity, and public service, if they occur at all, will do so in spite of, rather than because of, the tsunami.

IV. ILLUSIONS OF HOPE: INDIANA AND TENNESSEE

As we sift through the tsunami's wreckage, enactments from Indiana and Tennessee appear to shine as potential diamonds in the rough. Closer examination, however, reveals that the diamonds are fake and any hope they may offer as a path to constructive employee involvement in workplace decision-making that leads to improved

77. U.S. OFFICE OF PERS. MGMT., *LABOR-MANAGEMENT PARTNERSHIP: A REPORT TO THE PRESIDENT* § III (2000).

78. GEORGE NESTERCZUK ET AL., *THE HERITAGE FOUND., TAKING CHARGE OF FEDERAL PERSONNEL* (2001).

79. Exec. Order 13,203, 3 C.F.R. 761 (2001).

80. See *Nat'l Treasury Emps. Union v. FLRA*, 550 F.3d 1148 (D.C. Cir. 2008); *Dep't of Homeland Sec., Customs & Border Protection & Nat'l Treasury Emps. Union*, 10 FSIP 10 (2011); *Dep't of Homeland Sec., Customs & Border Protection*, 65 F.L.R.A. 98 (2010); *Nat'l Treasury Emps. Union*, 64 F.L.R.A. 395 (2010); *Dep't of Homeland Sec., Customs & Border Protection*, 62 F.L.R.A. 263 (2007); *Nat'l Treasury Emps. Union*, 62 F.L.R.A. 267 (2007).

public service is illusory.

As discussed above, Indiana severely restricted the scope of bargaining for its public school teachers. But buried in the statute is a provision that the parties shall discuss curriculum development and revision, textbook selection, teaching methods, hiring, evaluation, promotion, demotion, transfer, assignment and retention, student discipline, expulsion or supervision of students, pupil/teacher ratio, class size or budget appropriations, safety issues, and hours.⁸¹ This provision suggests that Indiana might be requiring educational employers to involve their employees in constructive dialogue concerning the delivery of educational services. Hopes engendered by this suggestion are quickly crushed, however. The same section declares that any agreements reached in such discussions may not be included in the contract.⁸² The message to employees and their unions is, “Why bother? Anything that results from your discussions will not be enforceable.”

Tennessee did not simply abolish collective bargaining for its public school teachers. It replaced it with what the new statute calls “collaborative conferencing.” Under the Collaborative Conferencing Act, between October 1 and November 1, employees may file with the school district a petition for collaborative conferencing supported by a 15 percent showing of interest.⁸³ The school board must appoint a committee with equal representation of board members and employees to conduct an election whereby employees vote whether to engage in collaborative conferencing and, if so, who shall represent them. The choices for representation must include “unaffiliated.”⁸⁴ If a majority vote for collaborative conferencing, the school board appoints a team of between seven and eleven management personnel. An equal number of employee representatives completes the committee. Each employee representative option that received at least 15 percent of the vote is entitled to proportional representation.⁸⁵ The committee that conducted the election selects the representatives of the unaffiliated.⁸⁶ The collaborative conferencing committee remains in effect for three years after which the

81. 2011 Ind. Acts 575 §18.

82. *Id.*

83. 2011 Tenn. Pub. Acts 378, § 49-5-605(b)(1).

84. *Id.* §§49-5-605(b)(1) & (2).

85. *Id.* § 49-5-605(b)(4).

86. *Id.* § 49-5-605(b)(5).

election process is repeated.⁸⁷

The act defines collaborative conferencing as “the process by which [the parties] meet at reasonable times to confer, consult, and discuss and to exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving.”⁸⁸ The act prohibits refusing or failing to participate in collaborative conferencing.⁸⁹ The Tennessee statute mandates collaborative conferencing with respect to salaries, grievance procedures, insurance, fringe benefits other than retirement benefits, working conditions, leave, and payroll deductions.⁹⁰ It requires the parties to jointly prepare a written memorandum of understanding of any agreement reached but conditions portions of an agreement requiring funding on the appropriation of such funding by the relevant authority.⁹¹

At first glance, the act appears to be an experiment in proportionate representation and constructive employee involvement in workplace decision-making. Closer scrutiny suggests that it may well be a sham for unilateral employer control. The statute expressly declares that the parties are not required to reach agreement and provides that if no agreement is reached, the school board sets employee terms and conditions of employment by board policy.⁹² The act also appears to expressly authorize the director of schools to bypass the employees’ representatives and deal directly with individual employees.⁹³ Beyond these provisions, the act is silent as to the content of the duty to engage in collaborative conferencing. Because Tennessee does not have a labor relations board to administer the act, it presumably will be up to the Tennessee courts to determine the content of the duty and the extent to which the generally well-defined duty to bargain will be carried over to the duty to engage in collaborative conferencing.

But perhaps good faith collaborative conferencing might lead to constructive employee involvement in other areas of workplace decision-making. Unfortunately, the Tennessee statute dashes such

87. *Id.* § 49-5-605(b)(6)(A).

88. *Id.* § 49-5-602(2).

89. *Id.* §§ 49-5-606(a)(3) & (b)(2).

90. *Id.* § 49-5-608(a).

91. *Id.* § 49-5-609(b).

92. *Id.* § 49-5-609(d).

93. *Id.* § 49-5-608(c).

hopes. It expressly prohibits collaborative conferencing with respect to differential pay plans and incentive compensation, expenditure of grants or awards, evaluations, staffing decisions, personnel decisions concerning assignment of professional employees, and payroll deductions for political activities.⁹⁴ In so doing, it begs the question, if the statute does not mandate bargaining but instead mandates only interest-based problem solving, why prohibit the parties from talking about anything? The prohibition strongly suggests that the statute's true purpose is to erect a sham that gives an illusion of collective representation without the reality. As in Indiana, to the extent that we see positive employee involvement in workplace decision-making, it will be in spite of rather than because of the new law.

V. GLIMMERS OF REAL HOPE

Tsunamis and other natural disasters generally provide glimmers of hope. People are found alive buried for days in the wreckage and go on to complete recoveries. The tsunami that hit public sector labor law may be no exception. In this part, I highlight a few glimmers of hope, alive beneath the wreckage, that may blossom into thinking outside the divide between mandatory traditional collective bargaining and unilateral employer control.

The tsunami certainly left Michigan with a good deal of wreckage. As discussed above, Michigan greatly expanded its list of prohibited subjects of bargaining and provided for the abrogation of collective bargaining agreements by employers in fiscal distress. However, recently concluded bargaining between the state and a coalition of unions representing state employees offers an alternative approach that could blossom into true creative labor law reform. Personal involvement from Michigan Governor Rick Snyder and UAW President Bob King led to a major breakthrough in the impasse that the parties faced. The agreement includes a letter of understanding embracing a New Solutions report produced earlier in the year by the unions which recommended cost savings that included making government less top-heavy and spending less on contractors. The letter of understanding commits to "[l]ean practices [that] rely on joint participation between employees and management at all levels within the state. World class service cannot occur without such employee participation." The contract calls for a New Solutions

94. *Id.* § 49-5-608(b).

Committee – joint labor-management committee – to explore innovative solutions.⁹⁵ Successful constructive employee voice at the state level could, perhaps, spread to local government and stimulate innovative efforts at labor law reform that break out from the divide between traditional adversarial bargaining and unilateral employer control.⁹⁶

Ohio presents another glimmer of hope. On November 8, 2011, the Ohio enactment was defeated by almost 62 percent of the electorate.⁹⁷ In the aftermath of this crushing rejection of the Ohio legislature and Governor Kasich's efforts to impose unilateral employer control, Governor Kasich has acknowledged the need to step back and reassess the approach to public sector labor relations.⁹⁸ Ohio embodies some very successful innovations in teacher representation that go beyond the traditional divide between mandatory subjects of bargaining and unilateral employer control. These include some very successful peer review programs.⁹⁹ As the parties take a step back, perhaps they will focus on these successes and look beyond the mandatory subjects-complete employer control divide and consider creative approaches to labor law reform.

Perhaps the picture painted in this Part is overly optimistic. Before we dismiss it as such, we should recognize that the tsunami has led to traditional adversaries rethinking approaches to collective representation of employees in workplace decision-making. For example, the American Federation of Teachers and the American Association of School administrators have partnered on a joint approach to teacher evaluation and improvement of teacher quality.¹⁰⁰

95. See Paul Egan, *Snyder, King Meeting Helped Break Contract Impasse*, DETROIT FREE PRESS, Dec. 20, 2011, at A1, available at <<http://www.freep.com/article/20111220/NEWS06/112200395/How-Gov-Rick-Snyder-UAW-President-Bob-King-broke-impasse-led-way-to-new-union-deal?odyssey=tab|topnews|text|FRONTPAGE>>.

96. Unfortunately, this glimmer of hope may be fading. Following the 2012 election, the lame duck Michigan legislature passed Right to Work legislation and Governor Snyder signed it, 2012 Mich. Pub. Acts 348, 349 (2012), severely straining his relationship with UAW President King, See Brent Snavelly, *UAW President Bob King Tried to Talk Snyder Out of Right-to-Work Push*, DETROIT FREE PRESS, Dec. 6, 2012, at <<http://www.freepress.com/article/2012-1206/News06/121206082>>.

97. The official vote tally is available at *State Issue 2: November 8, 2011*, OHIO SEC'Y OF STATE, <<http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2011results/201108Issue2.aspx>> (last viewed Dec. 3, 2012).

98. See Joe Vardon, *Kasich Moves on from Loss on Issue 2*, COLUMBUS DISPATCH, Nov. 16, 2011, at 3B.

99. See Malin & Kerchner, *supra* note 5, at 904-06.

100. AM. FED'N OF TEACHERS & AM. ASS'N OF SCH. ADM'RS, EDUCATOR QUALITY FOR THE 21ST CENTURY: A COLLABORATIVE EFFORT OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE AMERICAN FEDERATION OF TEACHERS (undated),

The AASA-AFT collaboration suggests that we may be seeing moves toward constructive leadership at the highest levels which could lead to creative public-sector labor law reform.

School reform in Illinois provides an encouraging example of collaboration resulting in creative alternatives to traditional collective bargaining for providing for employee voice in workplace decision-making.¹⁰¹ In January 2010, Illinois enacted the Performance Evaluation Reform Act (PERA).¹⁰² PERA requires school districts to incorporate in their teacher evaluation plans indicators of student growth as a significant factor in evaluating teacher performance. The decision as to how to do so must be made by a committee consisting of equal numbers of members appointed by the school district and the teachers and their union. PERA makes clear that the use of student growth in teacher evaluations is not a mandatory subject of bargaining. In place of traditional bargaining, PERA calls for a cooperative effort by school districts and their teachers but provides that if, after 180 days, the joint committee is unable to agree on a plan, the school district must adopt a default plan developed by the Illinois State Board of Education.¹⁰³

In 2011, a lengthy series of meetings led by the Chair of the State Senate Special Committee on Education Reform involving the major teacher unions, school board and school administrator associations, business, and community groups resulted in agreed-on reform legislation enacted by the state legislature and signed by the governor. The PERA model was used in part for reform of the process for laying off teachers during a reduction in force. Prior to the new act, state law required that untenured teachers be laid off first. When tenured teachers had to be laid off, state law required that they be selected in inverse order of seniority and that a teacher who lacked seniority to retain his or her position could bump a junior teacher from another position as long as he or she met the minimal state

available at <<http://www.aft.org/pdfs/teachers/AFTAASA062811.pdf>> (last viewed Dec. 3, 2012).

101. For an excellent discussion of the process and the results, see Mitchell Roth, *S.B. 7: A Union Perspective*, ILL. PUB. EMP. REL. REP., Spring 2012, at 1; James Franczek & Amy Dickerson, *Education Reform in Illinois: Making Performance Count*, ILL. PUB. EMP. REL. REP., Winter 2012, at 1.

102. Pub. Act No. 96-0861, 2009 Ill. Laws 8655, available at <<http://www.ilga.gov/legislation/publicacts/96/PDF/096-0861.pdf>>.

103. 105 ILL. COMP. STAT. 5-24A-4(b) (2010). PERA makes an exception for the Chicago Public Schools, allowing the Chicago School Board to implement its last best offer if the joint committee is unable to reach agreement. *Id.* 5-24A-4(c).

qualifications for that position.¹⁰⁴ The new statute groups teachers into four categories based on their most recent performance evaluations. The first group to be laid off are non-tenured teachers with no evaluation as of the date of the layoff notices. They are selected for layoff first with the order within the group determined by the school district. Next are teachers with unsatisfactory or needs improvement ratings in one of their last two evaluations. They are laid off based on their performance ratings, with the lowest rated laid off first. The third group are teachers with satisfactory evaluations. If layoffs penetrate this group, they are conducted in inverse order of seniority. The final group is teachers who received ratings of excellent in their last two or two of their last three evaluations. Teachers in this group are laid off in inverse order of seniority.¹⁰⁵

The reform law follows the PERA model by requiring each school district to establish a joint labor-management committee. The committee may, by majority vote, provide for teachers who would otherwise be grouped in the second lowest performance classification to be moved into the next higher classification and may, by majority vote, modify the criteria for the highest performance grouping. Members of the committee also serve as watchdogs against school district manipulation of evaluations to lay off the most senior, and hence the most highly paid, teachers. If committee members in good faith believe that there is a pattern where senior faculty are receiving performance evaluations lower than their prior ones, they may receive and review relevant data from the district and issue a report to the district and the union.¹⁰⁶

The 2011, Illinois school reform law also addressed dismissal of tenured teachers and acquisition of tenure, provisions beyond the scope of this article.¹⁰⁷ However, the approach of the reduction in force provisions, like the approach in PERA to incorporating student growth as an element in teacher evaluation plans, bears watching to see if it develops into a creative alternative to traditional collective bargaining for providing meaningful worker voice in workplace decision-making. The joint labor-management committee is designed

104. See 105 ILL. COMP. STAT. 5-24-12(a) (Supp. 2011).

105. *Id.* § 5/24-12(b).

106. *Id.* § 5/24-12(c).

107. As indicated earlier, it also made length of the school year and length of the school day permissive subjects of bargaining for the Chicago Public Schools and modified the bargaining impasse resolution procedures, most notably restricting the right to strike in the Chicago Public Schools.

to work cooperatively on matters of common concern. If it does not reach agreement or consensus, the result is not a strike or an interest arbitration or an assertion of power through employer unilateral implementation followed by challenge to that power via union-filed unfair labor practice charges. Rather, the result is that the matter is governed by default rules established by the state.

Proponents of the Illinois education reform law hailed the process that resulted in its enactment, contrasting it to the highly polarized partisan battles in Wisconsin and elsewhere.¹⁰⁸ As notable as that process was, the 2011 reform act and PERA may, in the long run, be even more notable for developing a creative alternative to traditional collective bargaining for providing meaningful worker voice in workplace decision-making. If implementation yields positive result, the model may be examined for adaptation to other groups of public workers and to adoption in other states.

VI. CONCLUSION

Conservative Republican victories in state elections in 2010 powered a tsunami that hit public sector collective bargaining in 2011, leaving worker voice in its wreckage and a legacy of unilateral employer control in its wake. Although supporters of this upheaval argued that restoration of unilateral employer control was necessary to improve the functioning of public services, experience tells us that the approach is likely to fail. As Annie tells us in the play that bears her name, “The sun will come out tomorrow.” When it does, there are reasons to be optimistic that policy-makers may move away from the traditional dichotomy between mandatory subjects of collective bargaining and unilateral employer control and develop creative methods for worker voice that empower workers to contribute to the discourse on how best to serve the public.

108. See Tara Malone, *Education Reform Law is Signed and Lauded*, CHI. TRIB., June 14, 2011, at C5, available at <<http://www.chicagotribune.com/news/local/breaking/chibrknews-quinn-to-sign-education-overhaul-package-20110613,0,4441949.story>>.