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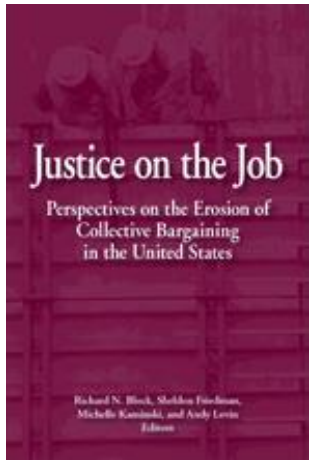

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Collective Bargaining Rights in the Public Sector

Promises and Reality

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When the National Labor Relations Act (NLRA) was enacted in 1935, unions in the public sector were virtually nonexistent, with a few notable exceptions. This was also true in many private sector industries, such as services and retail trade. Nevertheless, no private sector nonagricultural industry meeting interstate commerce standards was excluded, unless already covered by the Railway Labor Act. The framers of the NLRA did not consider covering public employees because at the time it was unthinkable to mandate that the sovereign (federal or state) bargain with its workforce. Until the 1960s, public workers were excluded from coverage of all worker protection and labor standards legislation enacted during the New Deal and beyond.

The legislative history of the NLRA lacks any suggestion that there was discussion concerning coverage of public employees (NLRB 1949). The only reference to this matter is a letter from a company president to New York Senator Robert Wagner stating that the exclusion of government workers may be reasonable in government agencies that perform purely governmental functions, but that the exclusion should not apply "where these governmental divisions are engaged in pursuits competing with private enterprise" (NLRB 1949, p. 325). The letter went on to cite several examples of such competing activity in federal and local government.

Almost a quarter of a century elapsed between the passage of the NLRA and Wisconsin's adoption of the first state collective bargaining statute in 1959, which provided bargaining rights to local government

employees. A subsequent statute enacted in 1966 extended limited bargaining rights to state employees. This was followed by legislation in other states (Schneider 1988).

In 1962, President Kennedy issued the landmark Executive Order 10988, which for the first time established a process for union recognition and extended a very limited form of collective bargaining to federal employees in the executive branch. Most importantly, it mandated the federal government to confer with unions and it stamped the federal government's imprimatur on unions of public employees at all levels of government. President Nixon's Executive Order 11491 in 1969 and the 1978 Civil Service Reform Act, with its Federal Service Labor-Management Relations Statute (FSLMRS), further codified the right of federal employees to a limited form of collective bargaining (Schneider 1988).

These limited and belated developments stand in contrast with International Labour Organization (ILO) Convention 87, adopted in 1948, and Convention 98, adopted in 1949 (ILO n.d.). Convention 87 covers the freedom of association and protection of the right to organize, while Convention 98 deals directly with the right to organize and bargain collectively. It was left to each nation to decide how these conventions applied to police and the armed forces. Apart from a few narrow exceptions, the rights of all public sector workers were protected by these conventions. In 1978, Convention 151 on Labor Relations in the Public Sector made it clear that employees covered by Convention 98's exclusion of those "engaged in the administration of the state" applied only to "high-level public employees" (ILO n.d.).

Although the United States has not ratified any of these conventions, it has submitted annual reports to the ILO that purport to demonstrate adherence to them (ILO 2001). As will be discussed below, however, U.S. practice with respect to providing legal protection for public sector workers' freedom to form unions and bargain collectively falls far short of the requirements of international law. During the Bush administration many more federal employees have lost or risked losing bargaining rights, based on stated concerns about national security, management flexibility, and efficiency. By early 2005 the rollback of legal protection spilled over to the states as Republican governors in Kentucky, Indiana, and Missouri issued executive orders rescinding collective bargaining rights for state employees.

Given this legal framework, unionization rates in the public sector remained relatively strong through the 1990s and into the early 2000s, staying high relative to the unionization rate in the private sector. Since 1992, the average public sector unionization rate has been four to five times larger than the private sector unionization rate. In 2004, only 7.9 percent of private nonagricultural employees were represented by unions, while the union representation rate in the public sector was approximately 36 percent (U.S. Bureau of Labor Statistics 2005).

Yet, when one looks underneath these data to the structure supporting public sector bargaining, the situation for the rights of public employees to bargain collectively is far less healthy than one might believe. Public sector unionization is declining. Although the rate of decline is far less than the rate in the private sector (between 1992 and 2004 the private sector rate declined by 31.5 percent, while the public sector rate declined by only 5.7 percent), the rate has declined steadily since 1994 (U.S. Bureau of Labor Statistics 2005).

Looking beyond the numbers, there is wide variation in the scope of bargaining rights provided to public employees. In addition, events in the past five years have demonstrated the precariousness of legal protection for public employee bargaining rights. This chapter will address these latter two issues in the context of examining bargaining in the federal government, and then bargaining in state and local government.

THE FEDERAL SECTOR

The Federal Service Labor-Management Relations Statute (FSLMRS) protects collective bargaining rights for a large majority of nonpostal federal employees. The FSLMRS declared that "labor organizations and collective bargaining in the civil service are in the public interest" (FSLMRS 1978). The scope of bargaining allowed by this law, however, is limited to conditions of employment. Any matter covered by federal statute is also outside the scope of bargaining including all of Title V of the United States Code, which covers many of the conditions of employment for federal employees. Moreover, no collective bargaining agreement provision may be contrary to a governmentwide regulation. The statute's management rights provision is very broad and

prohibits statutory management rights from being bargained away, even for the duration of a collective bargaining agreement.

This limited legal protection for workers' rights has been further eroded since 9/11. The Aviation Transportation Security Act (ATSA)[1] in November 2001 and the Homeland Security Act (HSA)[2] in November 2002 provided the Bush administration with virtually complete authority and flexibility in the management of these agencies and in establishing conditions of employment, including authority over the right to bargain.[3] ATSA provides for the establishment of a new Transportation Security Administration (TSA) in the Transportation Department. The HSA provides for the establishment of a new Department of Homeland Security (DHS) (Greenhouse 2002; Shimabukuro 2002).

In January 2003, the TSA stripped collective bargaining rights from airport screeners (Lee and Goo 2003). In March 2003, the TSA was transferred to the DHS. Both the ATSA and the HSA authorized the removal of employees from Title V coverage. This legislation was enacted despite the fact that Section 7112 of the FSLMRS provides the president with the authority to exclude from bargaining rights employees "engaged in intelligence, counter-intelligence, investigative, or security work which directly affects national security" (FSLMRS 1978).

Bush administration representatives have resisted permitting these employees to have bargaining rights, opposed bargaining rights for employees of the proposed DHS, and spoke against federal sector unions and the alleged inflexibility of collective bargaining (Greenhouse 2002). The administration took these positions despite the fact that the FSLMRS gives the president and/or agency heads sufficient authority to exclude from bargaining rights employees whose work directly affects national security. Additionally, Section 7103 (b)(1) specifically empowers the president to "issue an order excluding any agency or subdivision thereof from coverage under this chapter if the president determines that a) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and b) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations." Section 7103 also gives the president authority to "issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 states and the District of Columbia, if the president determines that the suspension is

necessary in the interest of national security." Finally, the same section excludes all employees of the CIA, FBI, and NSA from coverage under the statute. (FSLMRS 1978).

The administration's position is that ATSA gives the TSA director sole and exclusive discretion to determine screeners' conditions of employment, including collective bargaining rights (*DHS v. American Federation of Government Employees* 2003). In early January 2003, faced with representation petitions filed by screeners at 14 major airports, the TSA director declared that collective bargaining "is not compatible with the flexibility required to wage war against terrorism" (*DHS v. American Federation of Government Employees* 2003). In early July a Federal Labor Relations Authority (FLRA) regional director ruled that the TSA director, by then part of the DHS, had unfettered discretion to deny the screeners bargaining rights (*U.S.Department of Homeland Security v. American Federation of Government Employees* 2003).

When Congress debated the plan to create a Department of Homeland Security with 176,000 employees, President Bush threatened to veto any such government reorganization that did not give him the authority to strip the right of representation from workers who historically had these rights, as well as prevent new employees, such as screeners, from achieving collective bargaining rights (Greenhouse 2002). The Homeland Security Act, adopted soon after the 2002 elections, gave the president authority to act as final arbiter in disputes over which DHS employees will be entitled to or denied collective bargaining rights. In January 2005, the Bush administration used this authority to introduce a new system that further reduced the matters about which unions could bargain beyond even the limits in the FSLMRS (Lee 2005). At the same time, the administration said it would propose similar legislation covering all agencies (Lee 2005). In February 2005, rules similar to the DHS rules were proposed for the Department of Defense (DOD) (Kauffman 2005).

The potential for damage to federal workers' collective bargaining rights from these policies is illustrated by a recent FLRA decision. In that case, the FLRA granted a request from the Social Security Administration (SSA) to exclude from a bargaining unit—and therefore from collective bargaining—certain workers on the grounds that the positions were related to the security of the Social Security database (*SSA v. American Federation of Government Employees* 2003). Thus, using

incrementalism, national security is now being defined to include not only alleged terrorism, through the DHS, and foreign threats, through the DOD, but now identity theft and the productive capacity of the nation, through the SSA.

On August 12, 2005, Judge Rosemary M. Collyer of the U.S. District Court of the District of Columbia ruled, in a suit brought by a group of unions representing DHS employees, that the collective bargaining regulations issued by the DHS were illegal and therefore could not be implemented (*National Treasury Employees Union et al. v. Chertoff et al.* 2005). After being given "extraordinary authority" by Congress to rewrite employee bargaining rights, the administration exceeded that authority, according to Judge Collyer's ruling. Moreover, as noted, because the DOD proposed similar rules, it is likely that the DOD rules would fare no better in front of Judge Collyer than the DHS rules.

Judge Collyer is no stranger to labor law. President Ronald Reagan appointed her as General Counsel of the National Labor Relations Board in 1984 and she served until 1989 in that capacity, and President Bush appointed her to the federal bench in 2002 (Federal Judicial Center n.d.). Her decision stated in part that "significant aspects of the HR system fail to conform to the express dictates of the Homeland Security Act." As it specifically concerns collective bargaining, Collyer wrote, "Collective bargaining has at least one irreducible minimum that is missing from the HR System; a binding contract." She continued that, "Collective bargaining agreements would no longer be legally binding on the Secretary or enforceable by the Unions if management exercised its unreviewable discretion to declare some aspect of a contract inimical to the Department's mission." The judge also wrote that, "[w]hile DHS may be required to bargain in good faith, there is no effective way to hold it to that bargain . . . Under such circumstances, a deal is not a deal, a contract is not a contract, and the process of collective bargaining is a nullity." Also of interest is her upholding of the unions' complaint that the DHS regulations would dictate the role of the FLRA. The DHS had no authority to in effect direct the work of that agency. The Bush administration may appeal this decision (see, for example, Associated Press 2005).

An opportunity to rationalize federal sector labor relations in the 1990s through President Clinton's Executive Order 12871, issued in 1993, was revoked by President Bush in 2001 (Masters and Albright

2002; Olson and Woll 1999; U.S. National Archives and Records Administration n.d.). The Clinton executive order and its call for partnership set forth the blueprint for the parties to move to a more mature, collaborative, and mutually productive relationship. The unfulfilled promise of the executive order was that it provided a structure in which the parties could actually engage in problem solving outside of negotiations of the collective bargaining agreement. Executive Order 12871 afforded unions an opportunity to become involved on a predecisional basis, in subject matter otherwise considered permissive or outside the scope of bargaining.

In sum, the legal structure for federal sector collective bargaining is in need of repair. Although approximately 35 percent of federal sector employees were represented by unions in 2004 (U.S. Bureau of Labor Statistics 2005), a very high percentage relative to the private sector, this number masks a very narrow Scope of bargaining and collective bargaining "rights" that, increasingly, may be exercised only at the discretion of the employer. Furthermore, the proportion of the federal workforce for which even these limited rights are protected is declining.

PUBLIC SECTOR BARGAINING AT THE STATE AND LOCAL LEVEL

Table 4.1 provides a summary of state-level public sector laws and provides a clear picture of the unevenness of current arrangements. Twenty-five states and the District of Columbia have comprehensive laws that provide broad scope bargaining for a majority of state and local government employees. For purposes of this analysis, states with comprehensive statutes are those states with one or more laws that cover a substantial majority of public employees (excluding managers, supervisors, and confidential employees). Such statutes provide procedures for unit and representation determination and exclusivity; establish the duty to bargain on wages, hours and conditions of employment; and define unfair labor practices. These laws also provide for a neutral independent administrative agency, as well as procedures for resolving grievances and negotiating impasses.[4]

Table 4.1 State and Local Collective Bargaining Arrangements Provided by State Statute, Civil Service Law, or Executive Order

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Alabama	Firefighters	Meet and confer	No	Wages and conditions of employment	None
Alaska	All (unless local government opts out)	Collective bargaining	Alaska Labor Relations Agency	Wages, hours, and conditions of employment	Mediation, arbitration
Arizona	None				
Arkansas	None				
California	State civil service and Dept. of Education teachers	Collective bargaining (law states meet and confer)	Public Employment Relations Board (PERB)	Wages, hours, and conditions of employment	Mediation
	Local	Collective bargaining (law states meet and confer)	PERB or local agency	Wages, hours, and conditions of employment	Mediation
	School district and community college employees	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding
	Employees of UC, Hastings College of Law, and California State University and colleges	Collective bargaining (law states meet and confer)	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding

Colorado	None				
Connecticut	State	Collective bargaining	State Board of Labor Relations (SBLR)	Wages, hours, and conditions of employment	Mediation, arbitration
	Local	Collective bargaining	SBLR	Wages, hours, and conditions of employment	Mediation, arbitration
	Teachers	Collective bargaining	State Board of Education; SBLR	Wages, hours, and conditions of employment	Mediation, arbitration
Delaware	State and local (cities of under 100 employees must opt in to be covered)	Collective bargaining	PERB	Wages, hours, and conditions of employment: local government	Mediation, arbitration
				Conditions of employment: state employees	
	Teachers	Collective bargaining	PERB	Conditions of employment	Mediation, fact-finding
	Police officers and firefighters	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding
District of Columbia	All	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, arbitration

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Florida	All	Collective bargaining	Public Employees Relations Commissions (PERC)	Wages, hours, and conditions of employment	Mediation, fact-finding (local governments only)
Georgia	Firefighters (pop. 20,000+)	Meet and confer	No	Wages, hours, and conditions of employment	Fact-finding
	Atlanta Rapid Transit Authority		No	Wages, hours, and conditions of employment	
Hawaii	All	Collective bargaining	Hawaii Labor Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Idaho	Firefighters	Collective bargaining	No	Wages and conditions of employment	Fact-finding
	Teachers	Collective bargaining	No	Wages and conditions of employment	Mediation, fact-finding
Illinois	State and local (employing 35 or more)	Collective bargaining	Illinois (local) labor relations boards	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Education employees	Collective bargaining	Illinois Educational Labor Relations Boards	Wages, hours, and conditions of employment	Mediation, fact-finding

Indiana	Teachers	Collective bargaining	Indiana Education Employment Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	State employees (executive order)	Collective bargaining	PERB	Wages, hours, and conditions of employment	None
Iowa	All	Collective bargaining	PERB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Kansas	State and local government that opt in	Meet and confer	PERB	State: hours and conditions of emp. All others: Wages, hours, and conditions of emp.	Mediation, fact-finding
	Teachers	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
Kentucky	State employees (executive order)	Meet and confer	No	Wages, benefits, terms and conditions of employment	None
	Firefighters (pop. 300,000 if city opts in)	Collective bargaining	Kentucky State Labor Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding
	Police (pop. 300,000 with merit system)	Collective bargaining	No	Wages, hours, and conditions of employment	None

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Louisiana	None				
Maine	State	Collective bargaining	Maine Labor Relations Board (MLRB)	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Local and teachers	Collective bargaining	MLRB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	University employees	Collective bargaining	MLRB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Judicial employees	Collective bargaining	MLRB	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Maryland	State employees	Collective bargaining	State Labor Relations Board (not independent)	Wages, hours, and conditions of employment	None
	Higher education	Collective bargaining	Higher Ed. Labor Relations Board	Wages, hours, and conditions of employment	None

	Teachers	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
	Non-certified school employees	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
	Park and planning commission police	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, fact-finding
Massachusetts	All	Collective bargaining	Labor Relations Commission	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Michigan	State by civil service regulations	Collective bargaining	Employment Relations Board (Civil Service Commission) (not independent)	Wages, hours, and conditions of employment (exc. merit)	Mediation, fact-finding, arbitration
	Local and university system	Collective bargaining	Michigan Employment Relations Comm.	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Minnesota	All	Collective bargaining	Bureau of Mediation Services	Wages, hours, and conditions of employment	Mediation, arbitration
Mississippi	None				

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Missouri	All (except law enforcement and teachers)	Meet and confer	Board of Mediation	Wages and conditions of employment	None
	State (executive order)	Collective bargaining (Exec. order states meet and confer)	Board of Mediation	Wages and conditions of employment	Mediation, arbitration
Montana	All (except nurses)	Collective bargaining	Board of Personnel Appeals	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Nurses	Collective bargaining	Board of Personnel Appeals	Wages, hours, and conditions of employment	None
Nebraska	Local and county employees (except teachers)	Collective bargaining	Commission of Industrial Relations	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	State	Collective bargaining	Commission of Industrial Relations	Wages, hours, andconditions of employment	Mediation, fact-finding (binding)
	Teachers	Meet and confer	No	Conditions of employment	Fact-finding

Nevada	Local and county employees	Collective bargaining	Employee – Management Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
New Hampshire	All	Collective bargaining	Public Employee Labor Relations Board (PELRB)	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
New Jersey	All	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding
	Police and firefighters				Mediation, fact-finding, arbitration
New Mexico	All	Collective bargaining	PELRB	Wages, hours, and conditions of employment	Mediation, arbitration
New York	All	Collective bargaining	PERB or local board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
North Carolina	None				
North Dakota	Teachers and school administrators	Collective bargaining	Education Fact Finding Commission (not independent)	Wages, hours, and conditions of employment	Mediation, fact-finding
Ohio	All	Collective bargaining	State Employment Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Oklahoma	Teachers and non-certified school employees	Collective bargaining	No	Conditions of employment	Fact-finding
	Police and firefighters	Collective bargaining	PERB	Wages, hours, and conditions of employment	Arbitration (not binding)
Oregon	All	Collective bargaining	Employment Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Pennsylvania	All	Collective bargaining	Pa. Labor Relations Board	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Rhode Island	State employees	Collective bargaining	State Labor Relations Board (SLRB)	Wages, hours, and conditions of employment	Fact-finding, arbitration
	Local employees	Collective bargaining	SLRB	Wages, hours, and conditions of employment	Mediation, arbitration

	Police and firefighters	Collective bargaining	SLRB	Wages, hours, and conditions of employment	Arbitration
	Teachers	Collective bargaining	SLRB	Wages, hours, and conditions of employment	Mediation, arbitration
South Carolina	None				
South Dakota	All employees	Collective bargaining	South Dakota Department of Labor (not independent)	State: Hours and conditions of emp. All others: Wages, hours, and conditions of emp.	Conciliation
Tennessee	Teachers	Collective bargaining	No	Wages and conditions of employment	Mediation, fact-finding
Texas	Police and firefighters if approved by voters	Collective bargaining	No	Wages, hours, and conditions of employment	Mediation, arbitration
Utah	None				
Vermont	State employees	Collective bargaining	Vermont Labor Relations Board (VLRB)	Wages, hours, and conditions of employment	Mediation, fact-finding
	Local employees	Collective bargaining	VLRB	Wages, hours, and conditions of employment	Mediation, fact-finding

Table 4.1 (continued)

State	Employee coverage	Bargaining rights	Independent admin. agency	Scope of bargaining	Impasse procedure
Vermont	Teachers	Collective bargaining	None	Wages, hours, and conditions of employment	Mediation, fact-finding
	Judiciary	Collective bargaining	VLRB	Wages, hours, and conditions of employment	Mediation, fact-finding
Virginia	None				
Washington	State and state universities	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding
	Local and state police (except for wages)	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
	Teachers	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation, fact-finding
	Academic employees (community colleges)	Collective bargaining	PERC	Wages, hours, and conditions of employment	Mediation
West Virginia	None				

Wisconsin	State employees	Collective bargaining	Wisconsin Employment Relations Commission (WERC)	Wages, hours, and conditions of employment	Mediation, fact-finding
	Local employees	Collective bargaining	WERC	Wages, hours, and conditions of employment	Mediation, fact-finding, arbitration
Wyoming	Firefighters	Collective bargaining	No	Wages and conditions of employment	Arbitration

Sixteen states and the federal government have statutes that protect collective bargaining or meet and confer rights for 1) only specific occupations (police, fire fighters, teachers, or nurses) or classes (public safety or education); 2) only a specific level of government (municipalities).[5] Nine states have no legislation protecting either collective bargaining or meet and confer rights for any employees.[6]

Thus, this legal framework shows that a majority of public employees in half of the states lack reasonable bargaining rights and are unlikely to achieve them in the foreseeable future. Moreover, rights to only meet and confer provide employees with much less than rights to bargain collectively, most specifically the right to negotiate wages, hours and other economic terms of employment.

Overall, state and local government arrangements are problematic, largely because workers in so many states are denied meaningful bargaining rights. During the 1960s and 1970s, states demonstrated a diversity of responses in how they addressed or ignored public employees' interest in the right to unionize and bargain collectively, a right that was available to almost all private sector workers. In the 1960s several state administrations and legislatures debated and resolved the so-called sovereignty issue as well as issues revolving around impasse resolution. A handful of states permitted a limited right to strike while other states opted for fact-finding or arbitration provisions in their collective bargaining laws (Schneider 1988).

Frustrated by the slow pace of enactment of state legislation, public sector unions initiated efforts to secure federal legislation in the late 1960s and early 1970s. This effort was deflected, in part, when many scholars and writers as well as public employers embraced the idea of states as "laboratories of experimentation." Part of the rationale was the diversity of the 80,000 governments across the nation (Colosi and Rynecki 1975). These observers did not foresee that 35 years later fully one-half of the states would not provide meaningful bargaining rights to a majority of public workers.

In the last 20 years, only three states have enacted new comprehensive bargaining statutes covering state and local government employees: Illinois and Ohio in 1983, and New Mexico in 1992 and then again in 2003. (In 1999, the New Mexico law was effectively repealed as a result of a governor's veto of the legislature's attempt to extend the statute's sunset period.) Washington passed a bargaining law for state

employees in 2001, thereby joining the list of states with comprehensive coverage. In 2003, however, the governor of Kentucky acted to cancel an executive order providing for union representation and limited bargaining rights for state employees (Wolfe 2003). Additionally, in 2005, however, two states, Missouri and Indiana, stripped state employees of collective bargaining via gubernatorial executive order (Access Indiana 2005; Missouri, Governor of, 2005).

In 1990, the AFL-CIO filed a complaint with the ILO protesting the failure of the U.S. government to protect public employee (including federal employees) rights. The aforementioned Conventions 87, 98, and 151 formed the basis of the complaint (ILO 1990). The ILO accepted the complaint and requested that the U.S. government supply information with respect to bargaining rights in the states. The government did respond in both 1992 (Bush administration) and 1993 (Clinton administration). The 1992 response claimed that "a majority of public sector employees are workers which the ILO would view as being engaged in the administration of the state" (ILO 1990). The ILO Committee of Experts reminded the U.S. government that not only should governments give priority to collective bargaining in the fullest sense possible, but they also emphasized that bargaining which excludes wages and other benefits and monetary items does not meet the requirements of the principle of voluntary collective bargaining (ILO 1990).

In reality, the government's own estimates do not justify exempting more than a small fraction of public employees from coverage on these grounds. In October 1992, The U.S. Office of Personnel Management reported to the U.S. Census Bureau that about 7.2 percent of all federal employees were involved in administration. Even adding those employees "not elsewhere classified" would bring the proportion to only 12.6 percent. For state and local employees the comparable figure was just under 7 percent (U.S. Census Bureau 1994). A 2002 study by the U.S. General Accounting Office (USGAO) estimates that more than a third of the public sector employees in the United States do not have legally protected collective bargaining rights. According to the USGAO, close to 1 million of these are federal employees whose entire agency is exempt from FSLMRS or who are managers or supervisors, while roughly 6 million state and local government workers are without legally protected rights (USGAO 2002).

A Legislative Proposal

In the 10 years since the U.S. government's response to the ILO, only fire and police unions have initiated the introduction of federal bargaining legislation in Congress, most notably in the post–9/11 period. This proposed legislation has been limited to public safety workers. Indeed, it has been more than 30 years since the need for uniform national legal protection of public sector workers' freedom to form unions and bargain collectively has been seriously considered.

What might federal legislation look like? One principle worthy of consideration may be to think about the uniformity of process rather than of substance. It may be broadly applicable across states as a framework for public sector labor relations. Such a federal statute need not be comprehensive in its detail. Rather, it could establish standards for assessing the acceptability of a comprehensive law. States that opt to enact a law that conformed to the standards would be authorized to administer their statute. Some observers might view this as another exploration of the experimentation–diversity argument. Perhaps this is so with respect to details of its substance, but not as to the mandated basic elements of a statute. Alternatively, a state could opt to be covered by the federal standards, administered by a federal board that would be the arbiter of conformity, as well as maintain oversight authority. Certainly, this is not revolutionary or even an entirely new concept. However, it would extend to public employees in the United States the kind of legal protection of their fundamental human right to form unions and bargain collectively that they deserve—and which international law requires.

CONCLUSIONS

Collective bargaining rights of public employees in the United States have a much shorter history than collective bargaining rights of private sector employees. While broad-based collective bargaining rights of private employees in the United States can be traced to the NLRA of the 1930s, it was not until the mid-1960s that substantial numbers of public employees won protection for such rights.

The collective bargaining rights of federal sector employees have always been limited to a small number of issues. Relevant statutes and executive orders provide the administration with a great deal of control over collective bargaining coverage. Since 9/11, the Bush administration has attempted to use this control to remove collective bargaining rights from segments of the federal workforce in the interest of national security, without a definition of "national security" and without demonstrating that collective bargaining for employees engaged in national security (however defined) would compromise national security. That this can happen indicates the fragility and tenuousness of collective bargaining for federal sector employees, with "coverage" dependent on the administration in office and perceived policy needs.

Turning to the states, public sector state workers in Indiana and Missouri lost collective bargaining rights with a stroke of their governors' pen early in 2005; Kentucky state workers lost their meet and confer rights at the end of 2003. For more than two decades prior, there had been but a minimal expansion of bargaining rights for state and local workers nationwide. Today, public employees in roughly half of the states lack meaningful protection of their fundamental right to collective bargaining.

Legal protections for workers' rights to collective bargaining in the public sector in the United States are clearly out of step with international benchmarks, as established by the ILO. The only reason for this gap appears to be ideology and political will. The rights of public employees to bargain collectively should not depend on the prevailing political winds.

Notes

1. Aviation and Transportation Security Act (ATSA), Pub.L.107-71, codified as 49 U.S.C. § 114.
2. Homeland Security Act (HSA), Pub.L.107-296, codified as 6 U.S.C. § 101.
3. Federal Labor Relations Authority Boston Regional Director, Department of Homeland Security Border and Transportation Administration (Agency) and American Federation of Government Employees, AFL-CIO (Labor Organization/Petitionor), July 7, 2003.
4. The 25 states are Alaska, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Penn-

sylvania, Rhode Island, Vermont, Washington, Wisconsin. Admittedly, Maryland does not meet the "comprehensive" test. Not all of its statutes provide for an independent administrative agency or impasse procedures; local government employees in most municipalities and counties are provided collective bargaining rights by charter or ordinance not state statute; teachers and other education employees in most counties are covered by state statute as are employees of the state universities. In sum, a large majority of Maryland public employees do have the right to genuine collective bargaining through *de jure* arrangements; hence its qualified inclusion. New Mexico is the only state with a comprehensive statute that was effectively repealed, despite not being ruled unconstitutional. The law's sunset provision was extended by the legislature but failed to override the governor's veto in 1999. Subsequent to the 2002 election of Governor Richardson, New Mexico adopted an almost identical statute in March 2003.

5. Alabama, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Missouri, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Wyoming. The breadth of coverage, scope of rights, and degree of comprehensiveness of these statutes vary widely and are set forth in the table. For example, the statutes in Kansas, Missouri and South Dakota cover almost all employees but the scope of meet and confer rights differ not only between these states but within each state. A common thread is that local government workers are extended broader rights than state employees. For example, local government employees can negotiate wages, while state employees in Kansas and South Dakota cannot. In Kansas, however, local governments must opt in to be covered. Kansas also has a separate statute for teachers. Georgia and Texas are at the other end of this spectrum. The Georgia statute gives meet and confer rights to fire fighters only in those cities of over 20,000 population that opt in by ordinance. A Texas statute provides "consultation" rights to teachers only. A second Texas law extends bargaining rights to police and fire fighters only in those local governments where the union is able to meet the standard required to petition for an election open to all qualified voters in that local government. The union then must be successful in that election to achieve recognition and bargaining rights. The broadest Texas statute however, prohibits a public employer from recognizing a union as bargaining agent and prohibits collective bargaining by public employers. Arrayed elsewhere on this spectrum, Indiana has a bargaining statute covering teachers. Kentucky has a statute applicable to fire fighters in cities of at least 300,000 population (only Louisville) or to any other city that petitions for coverage by the law. Another statute covers police in counties of at least 300,000 population and which also have a merit system. Statutes covering fire fighters and/or police and/or teachers or education employees have been adopted in Alabama, Idaho, Kansas (as mentioned above), North Dakota, Oklahoma, Tennessee, Utah and Wyoming. Nevada's statute covers only municipal employees.
6. Arizona, Arkansas, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, Virginia and West Virginia. Even among these states the legal framework is not simple. A North Carolina law forbids an employer from bargaining or making an agreement with a union. The law also prohibits employees from join-

ing a union, which is clearly unconstitutional. A 1977 Virginia Supreme Court decision ruled that the state or local governments could not recognize a union as exclusive representative or negotiate an agreement. Prior to this decision local governments and school boards in several parts of the state had actually adopted collective bargaining ordinances. A subsequent 1993 statute, in effect, codified the earlier Supreme Court decision.

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Part 2

What's at Stake: Why Freedom to Form Unions Matters to Workers and Communities

Justice on the Job

Perspectives on the Erosion of Collective Bargaining in the United States

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