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TEACHING PRIVATE-SECTOR LABOR LAW AND PUBLIC- SECTOR LABOR LAW TOGETHER

JOSEPH E. SLATER*

INTRODUCTION

It is a pleasure to be part of a symposium focused on how to teach a subject. Especially with recent trends in law practice and employment,¹ law professors should regularly consider how best to prepare their students to be effective practitioners.

In the field of labor law, this means students need to learn both traditional private-sector labor law and public-sector labor law. Public-sector law is an inescapably large part of the field. In 2012, union density, measured by union membership, in the public sector was 35.9%, while the private sector figure was 6.6%.² In 2012, union density in the public sector, measured by counting all the employees unions represent, was 39.6%.³ Combining this high density in the public sector with the declining union density rates in the private sector has meant that since 2009, public workers have made up over half of all union members in the United States since 2009.⁴

This paper is about an idea that is completely obvious: teaching private-sector and public-sector labor law together in one class. Because the National Labor Relations Act (NLRA)⁵ excludes government employers,⁶ laws governing unions of public employees are typically at the state or local level, and these laws contain some significant variations from private-sector labor

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1. See, e.g., BRIAN TAMANAHA, *FAILING LAW SCHOOLS* (2012).

2. *Union Members Summary*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Jan. 23, 2013, 10:00 AM), <http://www.bls.gov/news.release/union2.nr0.htm>.

3. *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/union2.t03.htm> (last modified Jan. 23, 2013).

4. In 2009, 37.4% of public employees were members of unions, and 41.1% were covered by union contracts. Also in 2009, 7.9 million public-sector workers and 7.4 million private-sector workers were union members. See *Union Members – 2009*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Jan. 22, 2010, 10:00 AM), http://www.bls.gov/news.release/archives/union2_01222010.pdf.

5. 29 U.S.C. §§ 151–69 (2006).

6. *Id.* § 152(2).

law.⁷ Yet even though the idea is obvious, it is, to my knowledge, not done anywhere. Indeed, public-sector labor law generally is taught much less frequently than private-sector law. A recent survey by Nicole Porter (another participant in this symposium) found that while 153 law schools offer a course in private-sector labor law, only eighteen offer a class in public-sector labor law.⁸

This state of affairs is, frankly, not adequately preparing law students for the practice of labor law in the twenty-first century. As discussed below, while many rules in public-sector labor laws are mostly the same as NLRA rules, very significant differences exist in some very important areas. In those areas, knowing the private-sector rules is not nearly sufficient for handling public-sector cases. For example, public-sector unions in the vast majority of jurisdictions cannot legally strike,⁹ and the substitute procedures to resolve bargaining impasses in the public sector (mediation, fact-finding, and interest arbitration) are a world unto themselves.

One solution, of course, is to teach full classes in both private- and public-sector labor law. But, as shown, fewer than 12% of law schools currently do that,¹⁰ and it is unlikely that this will change (for reasons discussed further in Section III below). Even if it did change, there would be no guarantee that students would take both courses. Put simply, professors who teach labor law have a responsibility to try to teach at least some aspects of public-sector laws, and the vast majority are not doing so.

This paper not only argues that professors should teach public-sector and private-sector law together, but also it describes a way to do this which will be straightforward and accessible for professors and students. Full disclosure: I am, in some ways, promoting a new casebook I have co-authored. The book is Seth Harris, Joseph Slater, Anne Lofaso, and David Gregory, *Modern Labor Law in the Private and Public Sectors*, published by Lexis in June 2013. This work is the first labor law casebook to give extensive coverage to both the private and public sectors.¹¹

7. See generally SETH D. HARRIS, JOSEPH E. SLATER, ANNE MARIE LOFASO & DAVID L. GREGORY, *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS* (2013); MARTIN H. MALIN, ANN C. HODGES & JOSEPH E. SLATER, *PUBLIC SECTOR EMPLOYMENT* (2d ed. 2010).

8. Nicole Buonocore Porter, *A Proposal to Improve the Workplace Law Curriculum from a Corporate Compliance Perspective*, 58 ST. LOUIS U. L.J. 155 (2013).

9. See HARRIS ET AL., *supra* note 7, at 806.

10. See Porter, *supra* note 8 and accompanying text.

11. There is only one current casebook on public-sector labor law: MALIN, HODGES & SLATER, *supra* note 7. There are many more casebooks on private-sector labor law, but none give significant coverage to public-sector rules—indeed, only one even mentions public-sector rules. See e.g., ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW* (15th ed. 2011); TIMOTHY J. HEINSZ, DENNIS R. NOLAN & RICHARD A. BALES, *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* (6th ed. 2009); THEODORE J. ST.

This Article will first stress why it is important to teach public-sector labor law as well as private-sector labor law. It will then speculate as to the reasons why public-sector labor law is taught relatively infrequently, noting some of the traditional obstacles involved. It then will show how labor law professors—including those with little or no prior experience with or knowledge of public-sector rules—can conveniently and effectively teach these subjects together.

I. WHY TEACH PUBLIC-SECTOR LAW AND PRIVATE-SECTOR LAW TOGETHER?

There are three reasons to teach public-sector and private-sector labor law together. First, as noted above, union membership is now split more-or-less fifty-fifty between the public and private sectors, and that means the vast majority of labor law jobs will likely involve representation work in both. Second, the subjects naturally fit together. There are many important similarities as well as differences; the two types of labor law certainly have more in common than the various subjects typically covered in “Employment Law” and “Workplace Law” courses. Finally, it is more efficient and pedagogically valuable to teach private- and public-sector labor law together than to teach them as separate courses.

Because there are now more public-sector union members in the United States than private-sector members, it is very likely that students who go into practice in this area will handle public-sector cases and clients. This trend has, in fact, existed for decades. Union density in the public sector in 1980 was already close to 40%.¹² Yet the field of teaching labor law has not caught up.

To give a personal anecdote, when I started practicing labor law in the late 1980s, fresh out of law school, I expected to encounter a host of issues covered in the private-sector labor law course I took: strikes, secondary boycotts, maybe even some hot cargo clauses. Instead, I was assigned to work with a union of school employees in Virginia, a state where public-sector unions can neither strike nor even bargain collectively.¹³ I admit I spent some time

ANTOINE, CHARLES B. CRAVER & MARION G. CRAIN, *LABOR RELATIONS LAW* (12th ed. 2011); MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, *LABOR LAW* (6th ed. 2007); KENNETH G. DAU-SCHMIDT, MARTIN H. MALIN, ROBERTO L. CORRADA, CHRISTOPHER DAVID RUIZ CAMERON & CATHERINE L. FISK, *LABOR LAW IN THE CONTEMPORARY WORKPLACE* (2009) makes some references to public-sector laws, but it mainly focuses on the private sector (e.g., there is no discussion of public-sector impasse resolution rules). This distinction is not meant as a criticism of any of these books. They all do a very good job of discussing the subjects they cover.

12. Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 1 (Princeton Univ. Indus. Relations Section, Working Paper No. 503, 2005), available at <http://harris.princeton.edu/pubs/pdfs/503.pdf>.

13. See Ann C. Hodges & William Warwick, *The Sheathed Sword: Public Sector Union Efficacy in Non-Bargaining States*, 27 A.B.A. J. LAB. & EMP. L. 275 (2012).

puzzling over exactly what such unions could actually do. I later represented other public-sector unions in jurisdictions that granted public-sector unions significantly more rights. But still, the legal rules differed in important respects from NLRA rules. For example, I was a chief negotiator for a federal sector union negotiating its first collective bargaining agreement. While federal sector unions have collective bargaining rights and a robust impasse resolution process (including mediation and binding arbitration), the scope of bargaining is extremely narrow: among other things, most federal sector unions cannot bargain about wages or other forms of compensation.¹⁴ I admit I spent some time puzzling over what to propose in negotiations, and more time later puzzling over the byzantine rules in the federal sector governing what are and are not mandatory subjects of bargaining.¹⁵

The continuing decline of private-sector labor unions has caused the practice of labor law to involve even more public sector work than when I was in practice. Further, public-sector labor statutes are significantly amended much more frequently than private-sector labor law—this includes, but is not limited to, the wave of laws restricting or eliminating public-sector labor rights in 2011. Indeed, over the past couple of decades, some jurisdictions have enacted public-sector bargaining rights where none existed before, and some have eliminated such rights entirely.¹⁶ Thus, the amount of legal work in the public sector is likely an even greater percentage of all labor law work, as parties on both sides must spend even more time figuring out what the new rules are and how they work. In short, most lawyers today who practice labor law will almost certainly encounter a significant number of public-sector issues, and a class in private-sector labor law alone does not prepare students adequately for that.

Second, teaching public-sector and private-sector labor law together will work well both because the laws have many rules, procedures, and policy issues in common, and because teaching the differences will help students

14. 5 U.S.C. § 7103(14) (2006); Joseph E. Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 303–04 (2004).

15. One hornbook on federal-sector law devotes over 700 single-spaced pages to this topic, and more than seventy additional pages on procedures to bring negotiability cases. PETER BROIDA, *A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE* 311–84, 385–1088 (2003).

16. For the 2011 laws, see Joseph E. Slater, *Public-Sector Labor Law in the Age of Obama*, 87 IND. L.J. 189, 203–12 (2012); Martin H. Malin, *The Legislative Upheaval in Public Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149, 150 (2012). For some of the significant changes in public-sector labor law in the past few decades, see *id.* and Joseph E. Slater, *The Strangely Unsettled State of Public-Sector Labor Law in the Past Thirty Years*, HOFSTRA LAB. & EMP. L.J. (forthcoming 2013). Meanwhile, the NLRA has not been significantly amended since 1959. HARRIS ET AL., *supra* note 7, at 3.

understand in more depth the policy reasons for and practical effects of different labor law rules. Some of the differences are big, but the two most important differences have already been mentioned: what happens at impasse (most public-sector laws bar strikes and instead use some combination of mediation, fact-finding, and interest arbitration) and scope of bargaining (it is often narrower in the public sector).¹⁷ Meanwhile, though, many parts of most public-sector labor laws are modeled on the NLRA, so significant similarities exist as well.

Teaching the differences will help illuminate policy choices and alternative possibilities in labor law generally, in part by showing paths not taken in private-sector labor law. For example, seven states have passed laws requiring public employers to recognize unions that have shown majority support through signed cards.¹⁸ This is the “mandatory card-check” rule that was so controversial when proposed for the private sector in the Employee Free Choice Act (EFCA).¹⁹ In a combined course, instead of teaching EFCA as a dead-end, a professor could show how mandatory card-check rules actually work in the public sector, and lead a more informed debate on the pros and cons of this rule.²⁰ Also, unlike the NLRA, some public-sector labor statutes cover supervisors. So, instead of leaving students with the idea that strictly excluding supervisors from unions is simply common sense, professors can point to states such as Illinois, New Hampshire, and New Jersey, where the public-sector labor laws cover some or all supervisors.²¹ Even smaller differences can demonstrate interesting policy choices: for example, unlike the current NLRA rule, Iowa’s public-sector law bars both parties from making material misstatements of fact during organizing campaigns.²²

17. See *supra* notes 9, 14 and accompanying text.

18. The states are New York, Illinois, New Jersey, Oregon, New Hampshire, California and Massachusetts. See Malin, *supra* note 16, at 152; Timothy D. Chandler & Rafael Gely, “*Before Wisconsin and Ohio*”: the Quiet Success of Card-Check Organizing in the Public Sector, 16 EMP. RTS. & EMP. POL’Y J. 629, 632–34 (2012).

19. H.R. Res. 1409, 111th Cong. (2009).

20. Showing how mandatory card-check recognition rules work in the United States would likely be a more effective way of teaching this practice than what labor law professors often do: noting that some Canadian provinces have used this rule. For Canadian rules, see Sara Slinn & William A. Herbert, *Some Think of the Future: Internet, Electronic, and Telephonic Labor Representation Elections*, 56 ST. LOUIS U. L.J. 171, 202 (2011).

21. See, e.g., HARRIS ET AL., *supra* note 7, at 106–09.

22. For the current NLRA rule under which generally the truth or falsity of statements made during organizing campaigns is irrelevant, see *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982). In contrast, IOWA CODE § 20.15(4) (2013) provides that: “[I]f the [Iowa Public Employment Relations Board] finds that misconduct or other circumstances prevented the public employees eligible to vote from freely expressing their preferences, the board may invalidate the election and hold a second election for the public employees.” Pursuant to § 20.15(4), the Iowa Public Employment Relations Board promulgated subrule 5.4(3), which provides that

Moreover, many important similarities between private-sector and public-sector labor laws exist. On quite a few major topics, the rules in both sectors are almost always very similar or entirely the same. Public-sector labor laws generally have analogs (and sometimes exact matches) to employee rights under NLRA section seven. Most public-sector labor laws have most of the same unfair labor practices (ULPs). To pick just a few examples, it is a ULP for an employer to discriminate on the basis of union activity in the public sector and the private sector; “employer-dominated labor organizations” and their ilk are generally ULPs in both sectors; illegal threats and promises of benefits during organizing campaigns are also generally ULPs; and duty of fair representation rules (DFR) and “agency fee payer” rules are usually identical in both sectors.²³

Certainly, labor laws in the two sectors are more similar to each other than are the statutes and other legal rules combined in other, commonly taught courses on the workplace. Employment Discrimination classes routinely cover laws with significantly different approaches to coverage, methods of proof, procedures, remedies, and more. These include (but are not necessarily limited to) Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the U.S. Constitution’s Equal Protection Clause rules.²⁴ Employment Law classes take on an even wider variety of state and federal laws that govern very different aspects of the workplace in very different ways: the Fair Labor Standards Act (the federal law covering, among other things, minimum wage and overtime rules); state statutes on unemployment compensation and workers’ compensation; state common law regulation of discharge (the tort of wrongful discharge and various contract theories); and, perhaps also the Occupational Health and Safety Act, the Employee

“misstatements of material facts by any party to the election or its representative without sufficient time for the adversely affected party to adequately respond” constitutes objectionable conduct during union election campaigns sufficient to invalidate the results of the election. IOWA ADMIN. CODE r. 621–5.4(3) (2013). For a case using this rule to overturn an election, see *In re Broadlawn Med. Ctr., IOWA PUB. EMP’Y RELATIONS BD., No.5944* (Mar. 20, 2000), available at [http://g3.iowaperb.org/Document?db=IOWA-STATE-PERBS&query=\(select+0+\(byhits+\(andf+\(field+PERB_CASE_NUMBER+\(phrase+%605944\)\)+ \(match+PERB_DECISION_OR_COURT_DECISION+IOWA%60+PERB%60+DECISIONS\)\)\)\)&paged=1](http://g3.iowaperb.org/Document?db=IOWA-STATE-PERBS&query=(select+0+(byhits+(andf+(field+PERB_CASE_NUMBER+(phrase+%605944))+ (match+PERB_DECISION_OR_COURT_DECISION+IOWA%60+PERB%60+DECISIONS))))&paged=1), excerpted in HARRIS ET AL., *supra* note 7, at 216–18.

23. HARRIS ET AL., *supra* note 7, at 189, 330, 1073; MALIN ET AL., *supra* note 7, at 320, 326, 328, 335, 772.

24. For employment discrimination casebooks, see, e.g., MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 39, 185, 313, 358 (8th ed. 2013); ARTHUR B. SMITH, JR., CHARLES B. CRAVER, & RONALD TURNER, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* 183, 501, 672, 766 (7th ed. 2011); DIANNE AVERY, MARIA L. ONTIVEROS, ROBERTO L. CORRADA, MICHAEL SELMI & MELISSA HART, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* (8th ed. 2010).

Retirement Income Security Act, Title VII, and constitutional rules (for public employees).²⁵ Some “work law” casebooks have even combined private-sector labor law topics with topics generally taught in Employment Law.²⁶

These are all valuable courses, but as anyone who has tried to teach Employment Law knows, it can be hard to find common themes and an overall structure for the class. Public-sector and private-sector labor laws are obviously more related to each other than the laws combined in the courses described above, yet, until now, no casebook has combined them. Because there are often significantly overlapping (or identical) rules and policy concerns,²⁷ it will be easier to teach public-sector and private-sector labor laws together than it will be to do any of the classes described above.

Further, in a class combining public-sector and private-sector labor laws, students will be exposed to a wider debate about the fundamental purposes and effects of labor law by considering the extent to which public employment is similar to private employment and the extent to which it is different. For example, from the point-of-view of the employee, concerns about work are often the same: wages, hours, and working conditions. From the point-of-view of the employer, however, there are additional concerns about the role of private bodies, such as unions, influencing democratically accountable public institutions. More narrowly, this goes to the issue of scope of bargaining in the public sector: when should it be narrowed because certain decisions should be made only by democratically accountable officials? More broadly, it raises the issue of what labor law, at its root, is trying to accomplish, and what its potential benefits and costs are.

The attacks in 2011, on the right to bargain collectively in the public sector could be seen as a fundamental attack on the right to bargain collectively for all workers. These attacks can and should be used as an opportunity to reflect on the very existence of this right.

Also, students will profit from the broad question of what the experiences of both sectors can teach us that could be used to improve all labor laws. Because public-sector labor law developed after private-sector labor law,²⁸ much of the debate in designing public-sector rules has centered on whether

25. For employment law casebooks, *see, e.g.*, STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR. & GILLIAN L. L. LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS* 117, 196, 593, 637, 726, 865, 1005 (5th ed. 2012); MARK A. ROTHSTEIN & LANCE LIEBMAN, *CASES AND MATERIALS: EMPLOYMENT LAW* 200, 390, 500, 683, 758, 838 (7th ed. 2011); KENNETH G. DAU-SCHMIDT, ROBERT N. COVINGTON & MATTHEW W. FINKIN, *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* 187, 332, 475, 680, 940 (4th ed. 2011).

26. *See* MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* 74, 397 (2d ed. 2010); KENNETH M. CASEBEER & GARY MINDA, *WORK LAW IN AMERICAN SOCIETY* 14, 491 (2d ed. 2010).

27. *See supra* note 17 and accompanying text.

28. HARRIS ET AL., *supra* note 7, at 2.

and how private-sector rules should be imported: when to essentially copy NLRA rules in state public-sector statutes or in court and agency decisions interpreting the statutes, and when NLRA rules should be modified or avoided entirely because of concerns specific to the public sector. Students will get a richer understanding of the purposes and practical effects of various labor law rules by not just reading the classic private-sector cases but also by adding public-sector cases in which courts and agencies are deciding whether or not to adopt the same rules. Moreover, the relative success of unions in the public sector in the past several decades as compared to private-sector unions raises the question of whether certain aspects of public-sector labor law should be used in the private sector. For example, has the public sector developed alternatives to strike weapon for resolving bargaining impasses that might improve private-sector labor relations?²⁹

Treating the two types of labor law together, and acknowledging that public-sector unions are now a significant part of the labor movement, also challenges some conventional wisdom about workers and unions in the United States. The “rise and fall” narrative about United States labor focuses on the private sector; this story changes considerably if we include what is now many decades of experience in the public sector. Also, the claim that American workers are too “individualistic” to join unions is problematic if we count public employees as workers.³⁰

Finally, if we are going to teach public-sector labor law—and we should—it makes more sense to teach discrete topics in the private and public sectors together, in sequence, rather than teaching an entire course on the NLRA in one semester, then at best offering an upper-level class on the public sector later. In this latter model, even the students who take the public-sector class will need to be reminded of private-sector rules before getting into the public-sector variations.

First, it makes more sense to teach public-sector scope of bargaining rules and policy issues in a class or two after teaching private-sector scope of bargaining rules than it does to teach all the private-sector rules in one semester, and then go through related public-sector rules in the middle of some later semester. This is especially true in areas where public-sector rules are often mostly the same as the private-sector rule, but significant variations exist

29. Consider here the section of EFCA that would have brought binding interest arbitration to the private sector to settle some impasses over first contracts. *See* H.R. Res. 1409, 111th Cong. (2009).

30. For a quick summary of the conventional wisdom, *see History of Labor Unions*, SHMOOP, <http://www.shmoop.com/history-labor-unions/summary.html> (last visited Sept. 12, 2013) (“Historically Americans have held conflicted attitudes about unions; often specific union objectives have been supported, but most Americans prefer individualism and are uncomfortable with collective action.”).

in some public-sector jurisdictions. Examples of this include the “Steelworkers Trilogy” rules and many “duty to bargain in good faith” rules.³¹ Instead of teaching the “Steelworkers Trilogy” in the private-sector class and then having to review those rules in a subsequent public-sector class to highlight variations, it would be much more efficient to teach the Trilogy cases in a single class and then say, “most public-sector jurisdictions follow these rules, but a few don’t. For example”

Teaching the two subjects together also avoids a practical problem: whether to require the private-sector course as a prerequisite for the public-sector course. The downside for making private-sector labor law a prerequisite is that, predictably, fewer students will take the public-sector course. But if it is not a prerequisite, then the public-sector class will, predictably, have some students who have taken the private-sector class and some who have not. The students who have taken the private-sector class will be familiar with a range of concepts, rules, and acronyms that come up in both sectors, while the students who did not take the NLRA class will lack this familiarity. That discrepancy in knowledge poses a challenge for the professor.³²

II. WHY HAVEN’T WE BEEN TEACHING PUBLIC AND PRIVATE SECTOR LABOR LAW TOGETHER IN ONE CLASS?

Given all of the above, why is it that public-sector and private-sector labor law are not taught together in a single class? Again, as far as I know, nobody in a United States law school teaches such a class. Thoughts on this matter are necessarily speculative.³³ But I am fairly confident that the answer lies in a combination of the following: tradition and familiarity; a fear that public-sector labor law is very different from private-sector law; a fear that it will be hard to learn the differences; and an inability to teach the subject because of the lack (until now) of any casebook that combines the subjects.

First, law schools have a tradition of teaching private-sector labor law, and law professors often feel unfamiliar with public-sector labor laws. Given how few law schools teach public-sector labor law even today, it is likely that most current labor law professors did not take a public-sector class when they attended law school simply because the class was not available. Further, even

31. See HARRIS ET AL., *supra* note 7, at 582, 1010; MALIN ET AL., *supra* note 7, at 415, 676.

32. I have traditionally taught two separate classes, and I do not require private-sector labor law as a prerequisite for the public-sector class. In every public-sector class I have taught, some students have not taken the private-sector class. The challenge described in the text is manageable, but it is real.

33. This caveat may not be reassuring to the law review students who were kind enough to invite me to this symposium and who are now responsible for citechecking this article. But in this matter, I can only rely on personal observations, anecdotes, and educated guesses. Having said that, especially after seeing audience reaction to my thoughts on this when I presented this paper, I am pretty sure I am right.

those of us who did some public-sector work in practice likely only did so in one or two states—and labor law professors generally at least know that public-sector laws vary considerably state to state. Contrast working in the private sector, or for the National Labor Relations Board (NLRB), where the federal law applies nationwide. Practicing in the private sector in Ohio or Missouri involves the same rules as private-sector practice in California, New York, and other states, because the law is the same. But even an expert in the public-sector rules of one or two large states might well feel insecure about her knowledge of public-sector rules in other large states.

Of course law professors teach other subjects governed by state laws that vary. For example, I teach Torts. But unlike torts and many other state law subjects, there is no hornbook, nutshell, or similar source setting out the black-letter law rules of all, most, or even a substantial number of state public-sector labor laws. Even though excellent treatises exist on some other state employment law topics (*e.g.*, covenants not to compete), there is no public-sector analog to the classic private-sector labor law treatises such as *The Developing Labor Law*.³⁴ This makes public-sector labor law, as a field, more difficult to learn.

The wave of laws affecting the public sector in 2011, likely exacerbated these concerns. Labor law professors know that public-sector labor laws change with some regularity, sometimes significantly.³⁵ Keeping up with shifts in the NLRB's interpretations of the NLRA may sometimes seem like a challenge; speaking from personal experience, keeping up with changes in public-sector labor laws in 2011, often felt like a full-time job. But the recent and unusual turmoil in this field likely exaggerated the sense of how difficult it is to keep up with public-sector labor law.³⁶

Further, labor law professors may sometimes overestimate the differences between public-sector and private-sector labor laws because high-profile events in the real world often seem to underscore the differences rather than the similarities. We know that the Professional Air Traffic Controllers Organization and the New York City Transit Workers Union could not legally strike because they led famous, unsuccessful strikes.³⁷ We hear less about

34. For the list of treatises sponsored by the ABA's Section on Labor and Employment Law and published by BNA *see Employment and Labor Law*, BLOOMBERG, <http://www.bna.com/employment-law-p12884902596/> (last visited Aug. 7, 2013). This list includes *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* (John E. Higgins, Jr. ed., 6th ed. 2012), and *BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY* (8th ed. 2012).

35. Hodges & Warwick, *supra* note 13, at 275.

36. *See id.*

37. *See generally* JOSEPH MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* (2011); Erin Audra Russ,

routine cases in the public sector involving alleged discrimination because of union activities, duty of fair representation violations, and enforcement of labor contracts through grievances and arbitrations, where the rules are usually largely or entirely the same.³⁸ Also, those of us who write about public-sector labor law often stress the differences, not the similarities, because the differences are what we think readers will find most interesting.³⁹ In short, labor law professors may sometimes overestimate how much they would need to learn to be able to effectively teach public-sector labor law.

Finally, though, even if a labor law professor knew enough and was motivated to teach a course combining public-sector and private-sector labor law, until now there has not been a casebook or similar materials to use. But now such a casebook exists. The remaining issue is how best to use it.

III. HOW TO TEACH PRIVATE-SECTOR AND PUBLIC-SECTOR LABOR LAW TOGETHER IN ONE COURSE

This is where the Harris, Slater, Lofaso, and Gregory casebook—*Modern Labor Law in the Private and Public Sectors*—comes in. First, get the casebook. As an overview, it is more than 1200 pages long, about two-thirds devoted to the private sector and one-third to the public sector. Thus, one could use the book to teach a traditional private-sector class or use it for at least the majority of the materials in a traditional public-sector class. But the focus here will be on using it to teach public-sector and private-sector labor law together.

Professors who are used to teaching only the private-sector class will not have to learn every public sector statute in the country, nor do they need to learn special public-sector rule on every labor law topic. Rather, the book goes through all the classic private-sector labor law topics: the history before collective bargaining rights; rules on organizing and employer responses to organizing; all the major ULPs; the duty to bargain; remedies; the scope of bargaining; strikes, lockouts, and other forms of impasse resolution; secondary activity; enforcing labor contracts; DFR and agency fee payer rules; and preemption. In some areas, the book has little or no material on public-sector rules because either: (1) the public sector rules are generally essentially the same as the NLRA rules (again, as are many of the basic ULPs, DFR and agency fee payer rules, etc.); or (2) the issue does not arise in the public sector. As to the latter, for example, permanent replacement of strikers and secondary

Strike Three—You're Out! Revamping the New York State Taylor Law in Response to Three Transport Workers' Strikes, 9 CARDOZO J. CONFLICT RESOL. 163, 202 (2007).

38. See HARRIS ET AL., *supra* note 7, at 3.

39. See, e.g., Slater, *supra* note 16, at 203–04; Martin H. Malin, *The Paradox of Public-Sector Labor Law*, 84 IND. L. J. 1369, 1369 (2009); Hodges & Warwick, *supra* note 13, at 275.

activity ULP rules are very important areas in the private-sector, but these topics simply do not arise in the public sector.⁴⁰

But, where public-sector rules vary in important ways, there are detailed materials from the public sector: statutory language, court and agency cases, notes, and problems.⁴¹ Again, the biggest two examples of this are scope of bargaining rules and impasse dispute resolution rules. Also, in these and other areas where public-sector rules differ significantly from private-sector rules, there is usually considerable variety within the public sector. Here, the casebook treats state variations the same as a casebook on a common law or other state-law topic. The book discusses the major approaches to the issue, with examples (either in case excerpts or notes), and it reviews the policy arguments for and against the different approaches. As with any other state-law topic, the point is not that professors or students need to know to learn the rule of any given state (although teachers may want to highlight the rule of the state in which the school is located). Rather, the point is to show in broad brush strokes the different types of approaches states take on some issues, both to prepare students for working in different jurisdictions and to see how different approaches to basic labor law issues actually work.

Obviously, the extent to which a professor can integrate various public-sector rules will depend on how many credit hours the professor has to teach a combined labor law course. A professor who has four, five, or even six hours can incorporate more public-sector materials than a professor with three credit hours. But even in a three-hour course, a professor can and should work in some of the most important differences.

At a minimum, a labor law course that is serious about integrating public-sector rules would do the following. First, include some discussion of public-sector labor history and policy at the beginning, focusing on why and how the law of public-sector labor relations developed so much later and, in some ways, differently, than private-sector labor law.

Second, the course should at least touch on coverage issues. For example, a discussion on whether collective bargaining and related rights are more appropriate for some types of public employees than others (noting that some states give rights to, say, teachers, police officers, and/or firefighters, but not other types of public workers). Also, the course should at least note that some public-sector labor laws cover supervisors and briefly describe how such systems function (e.g., supervisors cannot be in the same bargaining unit as the employees they supervise).

40. See Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 86–87 (2007) (discussing the striker replacement issue. I am not aware of any published public-sector case dealing with an allegedly illegal secondary action by a union).

41. See HARRIS ET AL., *supra* note 7, at 733–34, 806.

Third, the course should spend a minimum of one class on the scope of bargaining rules in the public sector. The professor should stress that the scope in the public sector is often narrower. Additionally, the course should discuss representative rules and approaches. Some states specify in their statutes what topics unions may and may not negotiate over. More commonly, though, courts and agencies use balancing tests to interpret broad statutory language that makes something like “wages, hours, and working conditions” mandatory subjects of bargaining while simultaneously reserving, as a management right, topics that affect the mission of the agency and/or the public interest.⁴² The course should discuss the reasons for added concern over the scope of bargaining in the public sector (in short, because collective bargaining may interfere with decisions that should be made by accountable elected officials). Also, give some examples, such as should teachers be able to negotiate about a school’s curriculum? Class size? Teaching loads? Most broadly, how do we decide when an issue is mostly about wages, hours, and working conditions, or when it is about a public policy or political choice? If you have a little more time, discuss the effects of the many laws specifically governing public-sector employment—tenure laws, civil service laws, even constitutional rules—on scope of bargaining.

Fourth, the course should spend at least one class on impasse resolution mechanisms: strikes and their alternatives. Ideally, you would have two classes on this topic: one on strikes (legal and illegal) and one on alternatives—especially interest arbitration. Important issues here include the following: Should any public employees be allowed to strike? What should the penalties be for an illegal strike? Where strikes are legal, what are the effects? How do different variations of interest arbitration (conventional, final offer issue-by-issue, and final offer “total package”) work? What if interest arbitration is not mandatory or not binding? And in all cases, how do local politics play into these procedures?

If you teach the above, you will have at least covered the basics of the most important topics in public-sector labor law. These are the topics with the most practical significance and the topics that vary the most from private-sector rules. They also raise the most interesting and provocative policy questions. Teaching them will require cutting a week or two from your private-sector materials. But when a former student, now in practice, is representing a public-sector union that cannot bargain over various issues a private-sector union could, and/or a union that cannot strike at impasse, that student will be glad you covered these topics as opposed to, say, extra cases on hot cargo clauses, preemption, featherbedding, jurisdictional disputes, Boys Market injunctions, or whatever topics you feel are most expendable at the margin.

42. *See id.* at 709–10.

Also, again, there are built-in efficiencies to teaching these subjects in the same class. In many areas, one can teach the private-sector rule then simply announce that the rule is almost always the same in the public sector, or that there are a handful of interesting variations explained in a few short notes. This casebook will give professors not generally familiar with public-sector labor law the knowledge and confidence to do that. And then you will have taught the public sector.

With four or more credits, one could do the public-sector subjects described above in more detail, cut less from the private-sector materials, or add a few more public-sector topics. My suggestions for additional topics would be: mandatory card-check recognition rules; wrinkles in the duty to bargain in good faith (e.g., how does the rule permitting an employer to impose its final offer at impasse work where there are impasse resolution procedures ending in mandatory, binding interest arbitration?); the politics and policy behind the attacks on public-sector collective bargaining in 2011, and beyond; and/or what public-sector unions do in states where collective bargaining is not authorized.

Furthermore, the book covers a number of smaller variations in the public sector that are interesting, worth knowing, and that individual professors may find worth covering. They are set out conveniently in the casebook, next to the analogous private-sector materials. Beyond that, there will, of course, be a teachers' manual with more ideas, and I would be happy to talk to share ideas with other professors.

CONCLUSION

It is generally wise to be skeptical of someone promoting a pedagogical idea that, through an amazing coincidence, is in the promoter's financial self-interest. But I do sincerely believe that teaching public-sector and private-sector labor law together is in the best interests of students interested in practicing labor law. I also think it will be rewarding for professors to teach the topics together. The casebook I have described makes it possible to do this without having to learn all the details of the many state and local public-sector labor laws. Again, many parts of public-sector labor laws are quite similar to private-sector labor laws. Some very important differences exist in certain areas, but professors should no longer be intimidated by those differences. You can learn which areas contain the most important differences and what those differences are, especially if you use this casebook.