State Legislation as a Fulcrum for Change:
Wisconsin's Public Sector Labor Law, and the Revolution in Politics and Worker Rights

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Abstract

The rise of public sector unions is one of the most significant but least examined movements for legal rights and social change. Through the 1950s, government employees typically had no right to bargain collectively or even to organize unions–rights often regarded as fundamental human rights–and public sector unions were small and relatively powerless. Yet today, unions represent more than 40 percent of all public workers, government employees make up about 40 percent of the entire U.S. labor movement, and public sector unions are among the strongest political advocacy groups in the country. This became possible only through a revolution of reform in state legislation in the past forty years: state laws that grant public workers the right to organize and bargain collectively. This sea-change in law and politics and the accompanying vast expansion of a social movement is notable in that it was done neither through federal laws nor a Supreme Court decision, but rather through state statutes and political action. In this era of federalism, such mechanisms of legal reform deserve increased scrutiny.

Using archival documents of the groups involved, this article analyzes the first political victory on this issue: Wisconsin's public sector laws of 1959 and 1962. These laws created the first state statute to grant organizing and collective bargaining rights to public employees. The passage of this law required a decade-long battle over ideas, political power, and legal doctrines. The article traces this struggle in all of these arenas, describing how the interaction of theory, evolving societal norms, and political muscle started a wave of reform in a crucial area: the legal regulation of a social and economic movement. The result was a fundamental turning point in the legal rights of workers in this country and in American politics. It is also a case study of how significant social and political change can be accomplished at the level of state statutes.

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Of all the movements for legal rights and political power in the second half of the twentieth century, one of the most significant but least examined has been the rise of public sector labor unions. Well into the 1950s, government employees in the United States typically had no right to bargain collectively or even to organize into unions–rights often regarded as fundamental human rights[2]–and public sector unions were small and relatively powerless. Yet

[2]As James Gross has explained, Article 23 (4) of the United Nation's Universal Declaration of Human Rights issued in1948 includes the right to form and join unions. Article 22 of the International Covenant on Civil and Political Rights, which the United States ratified in 1992, incorporates the language of the Universal Declaration: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." And Article 8 of the International Covenant on Economic, Social and

today, more than 40 percent of all public workers are represented by unions; government employees make up about 40 percent of the entire American labor movement; and public sector unions are among the strongest political advocacy groups, on both national and local political levels, in the country.[3]

This became possible only through a revolution of reform in state legislation in the past forty years: state laws that grant government employees the right to organize and bargain collectively. Public sector labor laws developed much later and more unevenly than did private sector law. While many private sector workers won the right to organize, bargain, and strike in the 1930s with the National Labor Relations Act (NLRA),[4] such rights did not even begin to be granted in the public sector until the 1960s (even today, about twenty states deny bargaining rights to most or all public workers).[5] Yet when public sector unions began winning the rights to organize and bargain, it resulted in decades of successful union organization that has no parallel in any form of employment in U.S. history.

Cultural Rights also affirms the "right of everyone to form trade unions and join the trade union of his choice." James A. Gross, *Human Rights Perspective on United States Labor Relations Law: a Violation of the Right of Freedom of Association*, 3 EMP. RIGHTS & EMP POLICY J. 65 (1999), at 71-72.

[3]*See, e.g.*, Gregory Saltzman, *Bargaining Laws as a Cause and a Consequence of the Growth of Teacher Unionism*, 38 INDUSTRIAL AND LABOR RELATIONS REVIEW 335 (1985); Vijay Kapoor, *Public Sector Labor Relations: Why it Should Matter to the Public and to Academia* 5 U. PA. J. LAB. & EMP. L. 401 (2003) (the "political clout" of public sector unions is "quite great," and "one could argue that the political power that public sector unions now enjoy would never have existed but for their right to collectively bargain"), id. at 407 & n. 29.

[4]29 U.S. C. § 151, *et seq.*, 49 Stat. 449 (1935).

[5]*See* RICHARD KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR (3d ed. 2001), 58-59.

This sea-change in law and politics and the accompanying vast expansion of a social movement was aided by the law, but in a different way than the more familiar narratives of other previously disempowered groups. While legal scholarship often focuses more on fights for rights that end in courtroom victories, from Brown v. Bd. of Education[6] through Lawrence v. Texas,[7] or federal legislation such as the NLRA or Title VII,[8] public workers won their fight through statutes, not the courts, and in state legislatures, not at the federal level. In this era of federalism, such mechanisms of legal reform deserve increased scrutiny.

This article analyzes the first political and legal victory on this issue: Wisconsin's public sector laws of 1959 and 1962. These laws created the first state statute to grant organizing and collective bargaining rights to public employees. The passage of this law required a decade-long battle over ideas, political power, and legal doctrine. The result was a fundamental turning point in the legal rights of workers in this country and in American politics. It is also a case study of how significant social and political change can be accomplished at the level of state statutes.

The fight in Wisconsin was won primarily by local bodies of AFSCME, today the largest public sector union in America. Union advocates encountered a range of objections that were steeped in history and indeed still resonate somewhat today: real and alleged differences between public and private employment; a fear of strikes and "divided loyalty," especially by police; constitutional doctrines involving state structure and sovereignty; and concerns over labor's influence on government. Unions employed a range of political tactics common not only

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[6]354 U.S. 1 (1952).

[7]539 U.S. 538 (2003).

to labor law reform but to legal reforms of all kinds: "bottom up" pressure on candidates and officeholders; a contest of ideas fought in the context of attitudes made more hospitable to reform by actual practices on the ground; gradual erosion of outdated legal rules; and a seminal victory that sparked change across the nation.

This is the story of that seminal victory. Part One traces the evolving context in which the battle was waged. A prerequisite for legal reform is evolving attitudes toward a subject in the broader society. The 1950s saw an increasing acceptance of public sector union rights in various popular, professional, and academic circles. This change was necessary but not sufficient: courts still rejected any legal rights for public sector unions. This Part also describes the growth of public sector unions, including AFSCME and Wisconsin's political history. Part Two studies the various failed attempts at passing a public sector labor statute, beginning in 1951, focusing on the types of objections reformers needed to overcome and what it took–in terms of political strategies, advocacy of ideas, and legislative compromises–to get the final laws passed. Part Three discusses the passage of the 1959 bill, its successes and problems. Part Four studies the 1962 bill and continuing legal issues in this area, and draws some conclusions about the nature of legal reform.

I. The Context for Reform.

A. Evolving Views of Public Sector Unions.

For labor as a whole, the 1950s in some ways featured unequaled successes. Overall union density climbed to nearly 35 percent, an all-time high. In some senses, private sector

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[8]Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*.

unions now were now viewed as a legitimate part of the economic order, and courts routinely enforced the rights of private workers to organize, bargain, and strike.[9] Yet public sector workers still lacked the basic rights to bargain and even to organize that private sector workers had won two decades earlier.

This lag was largely due to a prevailing attitude that public sector unions were entirely different from private sector unions. As one court put it, rejecting public employees' claim for the right to organize, "Nothing can be gained by comparing public employment with private employment; there can be no analogy in such a comparison."[10] Notably, the prospect of public workers striking horrified judges, and those judges assumed that granting the right to organize and bargain would necessarily mean that government employees would strike. This was true despite the facts that both AFL and CIO public sector unions had renounced the right to strike, and public sector strikes after the infamous Boston police strike of 1919 were small and rare.[11]

On the other hand, by the 1950s, outside courtrooms, public sector unions were winning increased acceptance. The growth of government and civil service rules had created more professionalized public sector management, reflected in publications such as Public Personnel Review.[12] Discussions of the role of unions had become more realistic. An essay in the 1946

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[9]*See, e.g.*, MELVYN DUBOFKSY, THE STATE AND LABOR IN MODERN AMERICA (1994); 208-13; 60.

[10]Perez v. Board of Police Commissioners of the City of Los Angeles (Cal.App. 1947). For more on such pronouncements by courts, see SLATER, PUBLIC WORKERS, Chapters 1-3.

[11]SLATER, PUBLIC WORKERS, 166. For details on the Boston strike itself, see id., Chap. 1.

[12]*See, e.g.*, Rollin Posey, *Employee Organizations in the United States Public Service*, PUBLIC PERSONNEL REVIEW, Oct. 1956; W.G. Torpey, PUBLIC PERSONNEL MANAGEMENT

book Elements of Public Administration argued that while collective bargaining would have to take "different forms" in government employment, there was "considerable room for constructive participation of unions in grievance procedures and work relations generally." Another essayist decried the old "authoritarian attitude" of government managers simply invoking governmental sovereignty as an excuse not to bargain. A third author pointed out that the sheer number of union members made them "an important facet of personnel administration." This article also critiqued the notion that unions could not be allowed in government for fear of loss of public services, noting that private sector workers in utilities, transportation, and food industries could strike. In addition, it argued that the government had some authority to bargain, and it rejected the idea that unionized public workers would be biased in labor disputes.[13]

Academics increasingly stressed the similarities between private and public sector workers. Morton Godine wrote in 1951 that public employees "are essentially wage earners" with the same economic interests and desire for a voice in their working conditions as private sector workers. Rollin Posey agreed in 1956 that "the essence of unionism in the public service–as in private employment–is the endeavor to improve wages, hours, and working conditions." Harry Rains, a professor of industrial relations at Hofstra University, argued that public workers were "entitled to rights similar to those enjoyed by the rest of the working population." Godine quoted Franklin Roosevelt's observation that the desire of public employees for reasonable pay, hours, and working conditions "is basically no different from that of employees in private

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(1953); W.E. MOSHER, J.D. KINGSLEY, AND O.G. STAHL, PUBLIC PERSONNEL ADMINISTRATION (1950); FRITZ MARX, ED., ELEMENTS OF PUBLIC ADMINISTRATION (1946).

[13]Harvey Mansfield and Fritz Marx, *Informal Organization*, in MARX, ED., 313; Henry Reining, Jr., *The Art of Supervision*, id., 487-88; Milton Mandell, *Personnel Standards*, id., 574-

industry." Irving Bernstein, then associate director of the University of California Institute of Industrial Relations, explained in 1959 that public sector unions were "going through the same struggle for the right to organize and bargain collectively as unions in private industry were going through in the early '30s."[14]

A huge obstacle to legal reform in this area had been fears dating from the disastrous Boston police strike of 1919. While this issue had not gone away, the most dire predictions were somewhat muted by the reality that, in the following several decades, public sector unions rarely struck. "The power of a strike lies at the root of all suspicion of public unions," the Providence Evening Bulletin editorialized in 1957, but it added that in exchange for a bar on strikes, public sector unions should have binding mediation and arbitration to settle bargaining impasses. A related fear, that public employees, especially police, would side with striking private sector workers, had also proven unfounded. Godine explained that "the fear that unity with trade unions in private industry will lead to sympathetic strikes. . . has not been supported by experience."[15] Still, these concerns were far from dead, as debates in Wisconsin would show.

Mainstream organizations showed similar evolving attitudes. In the 1950s, the National Civil Service League endorsed the right of government employees to organize. In 1959, the ACLU issued a statement arguing that public workers should have the right to organize,

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[14]MORTON GODINE, THE LABOR PROBLEM IN THE PUBLIC SERVICE (1951), 14, 11, 25, 36-40, 133; Edward Cling, *Industrial Labor Relations Policies and Practices in Municipal Government, Milwaukee, Wisconsin*," unpublished Ph.D. diss. (Northwestern University, 1957). 738; Posey, 241; Harry Rains, *Collective Bargaining in PublicEmployment* ," LABOR LAW JOURNAL, (Aug. 1957): 548-550; PUBLIC EMPLOYEE, July 1959, 3.

[15]PUBLIC EMPLOYEE, June 1957, 14; DAVID ZISKIND, ONE THOUSAND STRIKES OF

negotiate conditions of employment, and, except in essential services, strike. In 1955, the American Bar Association's Section on Labor Relations Law declared that public employees should have the right to organize, and that statutory bars on organizing, negotiating, and even striking were "not satisfactory approaches." Again, however, the precise solution was unclear. The ABA concluded that wherever "practicable," rights in the private sector should be extended to the public sector, "modified to meet the unique needs of the public service."[16]

Even some public employers were becoming more amenable. A 1950 study of public administrators noted "an increased sense of responsibility on the part of unions." In a nod to the reality that public sector workers were organizing even in the absence of formal rights to do so, the International City Managers' Association (ICMA), observed that the emergence of municipal unions would "have to be dealt with" and labeled AFSCME a "responsible" organization. Employers were more tolerant of organizing than of bargaining or arbitration. Still, a 1958 report by the ICMA listed "guidelines for constructive negotiation" with unions and even contained a call for state laws that would allow recognition and written bargaining agreements. This was in part, as AFSCME national president Arnold Zander suggested, simply a result of the persistence of organized public workers. "Unions are here to stay on the municipal level," the ICMA explained, "and it would be practical to recognize the fact."[17]

GOVERNMENT EMPLOYEES (1940) 195; Cling 161.

[16]Cling, 87, 283, 743; Wisconsin City & County Employee Union News (Union News), April, 1959, 2; PUBLIC EMPLOYEE, May, 1959, 3; American Bar Association, Section of Labor Relations Law, *Summary of the Committee on Labor Relations of the Governmental Employees*, 1955 PROCEEDINGS (1956), 90-91, 89.

[17]MOSHER, KINGSLEY, AND STAHL, 355; Cling, 195,174; Public Employee, Jan. 1961, 4-5; ICMA, "Negotiations with Municipal Employee Organizations," quoted in id., Dec. 1958, 18,

Thus began explorations of how labor law could be adjusted to fit the public sector. Reformers stressed that the tights to organize and to do some bargaining were reasonable, but their descriptions of how far to extend such rights and, especially, what to do if bargaining reached impasse–remained unclear. Godine suggested that bargaining in some form was "inevitable," and he rejected a legal argument that various courts had accepted: that obliging sovereign governments to bargain with private parties such as unions would violate constitutional prohibitions on the non-delegation of state power. Also, while Godine agreed that strikes by public workers should be barred, he argued that grievance machinery should be created to resolve labor-management issues. Banning strikes alone was a "barren approach to a critical problem." His solution, however, was vague. Godine called for "a measure of employee participation" less than full collective bargaining: "some system of collective consultation which would recognize the right of public employees to share in the determination of their conditions of employment."[18] Creating specific legal rules would be central in Wisconsin and in the development of all modern public sector labor law.

B. Growth of the Public Sector and Unions.

Legal change is not exclusively or primarily about ideas, however, and it is extremely unlikely that reform would have been successful without a strong national labor movement and its very determined public sector membership. Overall, union membership had risen from about 3.6 million in 1929 to about 18 million in 1954. Moreover, by the later 1950s, government employees were a growing part of labor. In 1956, there were 915,000 members of public sector

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[18]GODINE, 28, 84, 87-89, 173, 2-3, 29, 9, 42; Cling, 152; PUBLIC EMPLOYEE, Sept. 7, 1962, 5, 7.

unions; by 1964 there were 1,453,000, increasing the proportion of public workers in the labor movement from 5.1 to 8.1 percent.[19] Also, the leadership of the now-merged AFL-CIO had become more supportive. The 1948 AFL national convention urged state federations to press for state laws granting public workers "the same legal rights and privileges. . . now enjoyed by other workers in organized labor." AFSCME's national journal, the Public Employee, claimed that the "national AFL-CIO is taking an active interest" in public sector rights; "never before has the word gone down from the top to every state." In 1959, the AFL-CIO convention resolved to make intensified efforts to pass laws guaranteeing organizing and bargaining rights.[20]

Also, the overall expansion of public employment contributed to the cause. From 1947 to 1956, the number of government workers nationally grew from 5.4 million to almost 7.3 million. By 1962, the 8.8 million public employees were approximately one-eighth of the nation's labor force. Notably, this growth took place almost entirely in state and local government: from 3,560,000 workers in 1946 to 6,380,000 in 1962. This increased scale caused legislatures to give administrators more authority to deal with public workers, which in turn made collective bargaining seem more realistic.[21]

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[19]U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, PART I (1975), 176-77 (figures for 1929 are from the Bureau of Labor Statistics, data in possession of the author); Everett Kasalow, *Recent Developments in Collective Bargaining for Public Employees*, in JACK TRIPLETT, ED., COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES (1966), 10.

[20]Union News, Nov.-Dec. 1948, 1, 4-5; PUBLIC EMPLOYEE, Feb. 1957, 20; id., July 1959, 4; id., Nov. 1959, 4.

[21]KASALOW, 10; PUBLIC EMPLOYEE, September 7, 1962, 5.

The boom in state and local government employment greatly benefitted AFSCME, the "Union of the Future," according to an article in Business Week. "Industrial unions seem to be at the end of a line. . . as more and more plants are automated," the article explained, and employment for craft unions "is growing only slowly. In public employment, however, there is an "expanding reservoir of workers." AFSCME would, the article accurately predicted, eventually rival the Teamsters in size and influence. Similarly, the Christian Science Monitor asked, "Is there another star for organized labor to hitch its wagon to?" There "lies outside industry an entire untapped pool of potential union membership–local and state government employees." AFSCME "holds the inside track in this virgin territory."[22] And indeed, AFSCME would be the most important union backing legal change.

C. Law and Practice in the 1950s.

The law lagged behind these trends considerably. By the mid-1950s, the biggest court victory for public sector unions was still a lone, 1951 Connecticut Supreme Court decision, Norwalk Teachers' Association v. Bd. of Education.[23] This case held that, if a public employer had not prohibited it, organizing a union was legal and some very limited bargaining would not violate constitutional anti-delegation rules. Norwalk did not allow any bargaining without the employer's permission, rejected most forms of arbitration, did not allow strikes, and stated that an employer could always choose to bar even organizing. And it was good law only in Connecticut. In 1958, the Arkansas Supreme Court became the first court to strike down a ban

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[22]BUSINESS WEEK, March 21, 1959, quoted in PUBLIC EMPLOYEE, May, 1959, 8; CHRISTIAN SCIENCE MONITOR, Dec. 16, 1961, quoted in id., Feb. 5, 1962, 5.

[23]138 Conn. 269 (1951).

on organizing in the public sector. Ironically, Potts v. Hay[24] held that the ban violated the "right-to-work" clause in the state constitution, which provided that employment could not be based on union membership or the lack thereof. Still, while these decisions gave a limited right to organize, they did not allow public sector unions to actually do much of anything.

Helping to pave the way for reform, however, was a reality on the ground that was increasingly different from the law on the books. Despite the absence of legal authority permitting the practice, public sector negotiating, at least of informal agreements, was distinctly on the rise. In 1946, a study found that ninety-seven cities had written agreements with employee organizations. By 1957, AFSCME declared that it had "agreements" for 445 local unions or councils (although that was out of more than 1,500 locals). The increasing disparity between the law and practice focused attention on how and whether such contracts could be enforced in light of delegation and related sovereignty concerns. The National Civil Service League claimed that a city could join a union "not in a binding joint contract, but in a memorandum, freely accepted," which the employer would administer. The ABA argued that negotiated agreements could bind governments pursuant only to an unequivocal grant of power to the public employer in a statute.[25] And whether arbitration should or could constitutionally be allowed was still controversial.

Opponents of public sector union rights were numerous and influential. The anti-union National Institute of Municipal Law Officers and its general counsel Charles Rhyne argued

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[24]104 Ark. 438; 318 S.W.2d 826 (1958).

[25]Cling, 130, 123-24,126, 292; GODINE, 244; PUBLIC EMPLOYEE, Oct. 1957, 3; id., Feb. 1957, 13.

through the 1950s that without specific legislative authorization government workers could not bargain at all, and that such authorization should not be granted. Private sector business interests tended to agree. And these opponents of reform had real political power. In 1959, bills designed to limit explicitly the rights of public sector unions were introduced in Georgia, North Carolina, Texas, Tennessee, and Arkansas. The North Carolina bill became law, barring all public employees from organizing and forbidding contracts or even "understandings"–written or oral–between government employers and unions.[26]

Commentators noted the increasing discrepancy between law and reality. Edward Cling argued that the "great deal of informal collective bargaining" in the public sector meant that "the legalistic approach," that collective bargaining contracts inevitably were improper delegations of legislative power, "must be reviewed from a practical standpoint." Posey wrote that the risk of strikes in the public sector came from refusing to recognize unions, not from bargaining. Fundamentally, public workers had created a reality on the ground that made their call for bargaining rights seem both realistic and inevitable.[27] This made it possible for AFSCME in Wisconsin to wage its lengthy and ultimately successful campaign.

D. AFSCME Nationally.

AFSCME was chartered in 1936. It had emerged from the Wisconsin State Administrative Employees Association, which was established in 1932.[28] AFSCME's growth

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[26]PUBLIC EMPLOYEE, July, 1959, 5, 19.

[27]Cling, 1-80, 85-86; 90-93, 134, 136, 741, 750.

[28]JOSEPH GOULDEN, JERRY WURF: LABOR'S LAST ANGRY MAN (1982), 27-31

was stunning. In 1936, it had 5,355 members; in 1946, it claimed 78,164.[29] This rose to more than 100,000 in 1954. By 1959, with about 200,000 members, AFSCME was the twentieth largest of the AFL-CIO's 125 unions; by 1961, with 210,000 members, AFSCME was eighteenth. Contrary to the image of government employees as white-collar bureaucrats, in 1959 about 70 percent of AFSCME's membership were blue-collar workers.[30]

AFSCME had called for formal bargaining and organizing rights as far back as its 1936 convention, but by the mid-1950s, AFSCME was putting more emphasis on bargaining. In 1957, Zander wrote that AFSCME had "begun to seek true collective bargaining, with contracts wherever and whenever possible." In 1959, Zander insisted that "collective bargaining has emerged. . . as both the most effective operating tool this union possesses and the right we must struggle hardest to win."[31]

This program required changes in the law. In 1955, AFSCME asked the newly merged AFL-CIO to help pass state statutes granting organizing and bargaining rights, and in 1958, AFSCME announced a major push for such laws. The union had experienced limited success at the local level. In 1955, Philadelphia adopted a civil service regulation authorizing agreements with AFSCME Council 33 as the collective bargaining agent. In 1958, AFSCME Council 37 helped convince New York City Mayor Robert Wagner, Jr., to sign Executive Order 49, which

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[29]GODINE, 128; LARRY KRAMER, LABOR'S PARADOX: THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO (1962), 1-23.

[30]PUBLIC EMPLOYEE, March 1958, 12; Union News, June 1958, 1; id., April 1959, 4; PUBLIC EMPLOYEE, Nov. 1959, 5; id., May-June 1961, 3.

[31]KRAMER, 32, 33; Union News, Nov.-Dec. 1948, 1, 4-5; id., Sept.-Oct. 1955, 1; PUBLIC EMPLOYEE, Jan. 1957, 3; id., July, 1959, 3; id., March 1959, 3.

gave municipal workers organizing and bargaining rights.[32] But AFSCME wanted state laws, insisting that recognition and bargaining rights were "the central need of the union." AFSCME made international comparisons, noting that in seven of Canada's ten provinces, there was "no distinction" between private sector and municipal workers; public employees had the right to organize, bargain, and even strike. The "issue of legal sovereignty. . . does not seem to have become a factor." Also, in England, the "problem" of public sector bargaining and organizing "simply does not exist. . . . There are no special laws" for public employees. "They are governed by the same laws. . . as everyone else." Arbitration had been the norm since 1919; strikes were legal, but arbitration worked so well that strikes were "few and far between."[33]

E. AFSCME in Wisconsin.

Fittingly, AFSCME's first success at passing a state law would be in the state in which AFSCME was born. In 1938, there were around 6,000 members of AFSCME in Wisconsin; there were 12,000 by 1960, about 8 percent of Wisconsin's public workforce. Beyond their numbers, AFSCME became a potent political force. AFSCME members were fairly equally divided between the local government workers in the Wisconsin Council of County and Municipal Employees (WCCME), which became AFSCME Council 40, and AFSCME's State Employees Council. The county and municipal employees in the WCCME were the force behind the public sector labor laws. In 1951 the WCCME claimed seventy-nine locals, and by 1958 it had ninety-seven, spread among nearly all of the major cities and most of the counties in Wisconsin. In 1956, the WCCME had 4,500 members; and by 1960, 6,000. Many WCCME

[32]Cling, 460, 285-86; Union News, June, 1958, 1; GOULDEN, 54.

members worked on highway construction projects, as Wisconsin undertook massive road improvement and construction programs in the 1950s.[34]

The WCCME was always active in politics and related forms of bargaining. The WCCME's paper, the Union News, quoted Samuel Gompers: "There is not an action which the unions take, whether it be an increase of wages, [or] an hour more leisure. . . without it being at the same time a political act." The WCCME engaged in informal bargaining well before any law authorized it; for example, it claimed that "negotiations" with the Kenosha County Board in 1948 had yielded, among other things, a work week reduced to forty hours. As early as 1949, WCCME locals met to discuss "bargaining techniques. . . and the nature of requests to be made to county boards." Some agreements were written and signed by both parties. Through the 1950s, the WCCME touted significant successes from such processes; in 1950, Local 655, Jefferson County Highway Employees, had a signed agreement providing for a guaranteed work week, vacations, and arbitration. In 1956, the Union News declared that "negotiations with management are carried on so smoothly that it is almost like regular business meetings." Tellingly, however, the WCCME also referred to its practices as "petitioning." Certainly this "bargaining" had a different meaning than it had in the private sector. For example, one local

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[33]PUBLIC EMPLOYEE, Jan. 1957, 11, 17; id., April 1957, 5.

[34]Cling, 350-51; John Lawton to Walter Kohler (n.d., 1951), Walter Kohler Archives, State Historical Society of Wisconsin (Kohler Archives) box 77, folder 6; Industrial Commission of Wisconsin, "Wisconsin Employment Trends," Feb. 28, 1955, id., box 68, folder 3; Union News, April 1958, 1; id., March-April 1956, 2; id., May, 1956, 1; Madison Union Labor News, Sept. 1960, 2; GORDON HAFERBECKER, WISCONSIN LABOR LAWS (1958), 4; WILLIAM THOMPSON, THE HISTORY OF WISCONSIN: CONTINUITY AND CHANGE, 1940-65 (VOL. VI) (1988), 107, 467-473, 616.

appointed a seven-member "bargaining committee" which simply lobbied the Kenosha County Highway Board (successfully) for a pay increase.[35]

The WCCME's influence grew and informal bargaining spread. In the mid-1950s, of the state's seventy-one county highway departments (which employed around 6,000 workers) forty-seven had unions, thirty-one recognized their union as some form of bargaining agent, and eighteen had contracts or written agreements with unions. In 1955, out of forty-nine towns with populations of more than 5,000 responding to a poll, thirty-four had at least some unionized employees. Most of these (outside fire departments) were in AFSCME. Fifteen towns did some bargaining, and twenty-eight of the remaining thirty-four reported "informal" union participation in wage determinations. Ten towns had entered into a written agreement with their employees. On the other hand, highlighting historical objections to reform dating to the Boston police strike, four towns stated that they denied police the right to affiliate with the AFL or CIO.[36]

AFSCME was not satisfied, noting in1956 that wages and hours in the public sector were worse than in private employ. WCCME Executive Director Robert Oberbeck claimed that the majority of AFSCME members made less than $1.40 an hour, while the average wage for production workers in the state was $2.02. He also claimed that employees in sixty-seven of the seventy-one county highway departments worked forty-five to sixty hour weeks, while the

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[35]Union News, Sept.-Oct. 1952, 2; id., Nov.-Dec. 1948, 4; id., July-Aug. 1949, 1; id., Jan-Feb. 1950, 4; id., June 1956, 4; id., Nov.-Dec. 1949, 4; id., May-June 1950, 4.

[36]Cling, 352-55. The Boston police struck over whether they had to right to form a union affiliated with the labor movement (specifically, the AFL); opponents of the union argued that affiliated police could not be neutral when policing strikes by other affiliated unions. In the wake of that strike, many localities banned any such affiliation. SLATER, PUBLIC WORKERS, Chap. 1.

average in private industry was less than forty-two hours. Moreover, sixty county highway departments paid no premium for overtime. Also, Oberbeck argued that in Wisconsin, a number of local government employers discriminated against union supporters.[37]

Meanwhile, significant opposition to public sector labor rights remained. In 1943, Milwaukee garbage workers not affiliated with the labor movement had struck for several days, alarming the public. The Milwaukee Journal called for a law formally outlawing public sector strikes, and it remained skeptical of labor in government employment through the 1950s. In 1953, after AFSCME organized a union of Milwaukee County deputy sheriffs, the local civil service commission banned the union, citing fears of worker loyalties being divided between their union and their government employer. AFSCME took this to court and lost. In 1956, Milwaukee's city attorney opined that collective bargaining would constitute an improper delegation of legislative power.[38] AFSCME knew it needed new legal rules in the form of a new state law.

F. Wisconsin's Employment Laws and Politics.

Through the New Deal, Wisconsin had been a pioneer in employment legislation. It was the first state to enact a workers' compensation law in 1911, and it helped lead the way on unemployment compensation, industrial safety, and child labor. This was due to progressive movements in the state: most famously, the Republican party's progressive wing, led by governors Robert LaFollette, Sr., and Philip LaFollette; the strong and politically active state

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[37]Union News, Aug. 1956, 1.

[38]Cling, 363-64, 573-575.

AFL and CIO; and the close relationship of the University of Wisconsin to state government. The university was home to key industrial pluralists, such as John Commons and William Leiserson, who were central to New Deal labor policy. The American Association for Labor Legislation was organized in Madison in 1907 and later had its headquarters in Commons's office in the Wisconsin State Historical Library.[39]

The Wisconsin Labor Relations Act of 1937, modeled on the NLRA, was the first state labor statute. It applied only to private employers, and it was administered by a three-member board (with members representing employers, labor, and the public) called the Wisconsin Employment Relations Board (WERB). The Wisconsin Industrial Commission, which handled workers' compensation and other employment laws, also had authority to mediate and arbitrate private sector labor disputes. But no state agency or statute regulated unions in government employment, and the history of legislative action on that topic was scant: In 1923, the Wisconsin Assembly had debated but did not pass a bill that would have made it illegal for any public worker to belong to a union.[40]

Also, after the New Deal, in Cling's words, the state took a "conservative view" of labor legislation While ranking around tenth in the nation in industrialization, Wisconsin also had a strong agricultural industry that pushed for restrictive labor laws. The Progressive party fell apart after the pivotal elections of 1938, in which LaFollette lost the governor's seat and many

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[39]HAFERBECKER, vi, 5-6, 9-11, 13, 183; Arvid Anderson, *Wisconsin: A Pioneer in Labor Relations Law*, in STATE AND SOCIAL LEGISLATION: A SYMPOSIUM IN HONOR OF ELIZABETH BRANDEIS RAUSHENBUSH (1966), 60; Cling, 378.

[40]HAFERBECKER, 15, 162-67, 170; Cling, 320-21; Bill 565-A, Wisconsin Assembly Bills, 1923, Wisconsin Legislative Reference Bureau (WLRB).

other progressives were swept out of office. This election led to traditional Republican control of practically all arms of state government until 1958. Republicans held the governorship from 1939 to 1959, along with the offices of lieutenant governor, secretary of state, state treasurer, and attorney general (except from 1948 to 1951, when Democrat Thomas Fairchild was attorney general). And Republicans controlled both houses of the state assembly in this era.[41]

The rights of public sector unions would be a central battleground for a recovering Democratic party and the dominant Republicans in the 1950s. After the demise of the Progressives, liberal groups reorganized as Democrats. Labor was the most important of these constituencies, and labor and the Democrats increasingly looked to each other for support, which helped AFSCME. In contrast, the Republican leadership from the late 1930s through the 1950s was dominated by industrialists such as Thomas Coleman, president of the Madison-Kipp Corporation, and Governor Walter Kohler. The party was hardly friendly to labor or public workers. William Thompson, a leading historian of Wisconsin, wrote that from 1947 to 1957, it was "painful for many Republicans" to realize that public employment was increasing and that public employees would not work at "servant's wages. . . . Anathema to such Republicans was the possibility that these public employees would form unions."[42]

The legal rights of public sector unions became a recurring issue. In 1938, Wisconsin attorney general Orlando Loomis found "no rule of law that would prohibit governmental employees from. . . organizing," and the city attorney of Milwaukee declared organizing lawful. But then in 1940, Republican Attorney General John Martin wrote that in the absence of

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[41]Cling, 317, 323; THOMPSON, 401-02, 408-09.

specific statutory authority, public employers could not enter into collective bargaining agreements. In 1947, the Wisconsin Chamber of Commerce sponsored a bill that provided for discharge, fines, and imprisonment of government employees who struck. It did not pass, but a bill restricting strikes against public utilities did. This latter statute also provided collective bargaining rights for public utility workers, but the U.S. Supreme Court held that the NLRA pre-empted that provision. Also in 1947, the legislature rejected a bill that would have given government workers the right to organize and limited bargaining rights. In 1949, AFSCME, while claiming credit for defeating the strike bill, added that it would be "in large measure a success" simply to keep "anti-public employee legislation from passing."[43]

AFSCME tried to bend the law on the books to fit the reality of public sector organizing on the ground. The union made some use of the WERB, the state agency overseeing private sector labor matters. The WERB had no formal jurisdiction in the public sector, but it would still conduct representation elections in the public sector if both a government employer and a union requested it to do so, even though such elections were not legally binding. Also, if both sides requested, WERB would assign mediators or fact finders to help governments and unions resolve differences. So, for example, in the summer of 1950, WERB held a representation election for city workers in Mensasha, which AFSCME Local 1035 won, and in 1949 the Two Rivers City Employees Local requested WERB intervention in its wage dispute with the city. But these

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[42]THOMPSON, 407, 413-15, 434-39, 456-59, 482, 614.

[43]Cling, 326-28, 334-35, 344, *citing* 27 Opinions of the Wisconsin Attorney General (OAG) 245 (April 29, 1938) and 29 OAG 82 (Feb. 28, 1940); Union News, May-June 1950, 1; id., March-April 1949, 2; Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. WERB, 340 U.S. 383 (1951); HAFERBECKER, 174-75.

limited procedures required atypically agreeable employers. In 1956, Council 48 requested a formal collective bargaining contract with Milwaukee, noting that 2,700 of the city's employees were union members. AFSCME national president Zander came to Milwaukee to lobby for the cause. But the city merely referred the matter to its attorney for advice, and there the matter died.[44] AFSCME realized it needed a state law that would bind even anti-union employers.

II. Learning Lessons and Focusing the Issues: Battles over Bills from 1951-57.

A. The 1951 Bill and the Fear of Police Strikes.

The struggle for reform started in earnest in 1951 with a bill introduced by the WCCME, and it would continue for decades. The initial attempt in 1951 foundered on rocks frustratingly familiar to public sector activists: the historically-based fear of police strikes.

Union attorney John Lawton, a shrewd strategist, was central to the campaign. Lawton graduated from the University of Wisconsin Law School in 1942 and served as an assistant district attorney for Dane County, Wisconsin, from 1942 to 1946. While in that job, he became president of AFSCME Local 720 (Dane County Employees). Lawton was the WCCME's executive secretary-treasurer from 1944 through the 1950s. He also acted as its legislative representative in Madison and provided legal counsel to it and other public sector unions in Wisconsin from the late 1940s into the 1970s. While in private practice, Lawton briefly was a partner of future governor Gaylord Nelson, the man who would ultimately sign Wisconsin's first

[44]Cling, 330-32, 570-76; Union News, July-Aug. 1950, 4; id., June-July, 1949, 4.

public sector statute into law. In the late 1940s, Lawton began calling for a state law granting public workers the rights to organize and bargain.[45]

In early 1951, Lawton drafted Bill 462-S for the WCCME.[46] The bill covered municipal employees (employees of cities, towns, villages, counties, school boards, or other subdivision of the state). It provided a clear right to organize (giving employees the right to "form and join labor organizations of their own choice"), but, consistent with ambivalence of the time, was vague regarding bargaining. The bill stated that its purpose was to promote "collective considerations" and to "encourage mutual understandings" concerning wages, hours, and working conditions. "Collective considerations" were defined as "the study. . . of terms or conditions of employment in a mutually genuine effort to reach an agreement." There was only limited recourse in case of a bargaining impasse. If collective considerations failed to produce an agreement, then either party could petition the WERB for a conciliator. The bill did not propose formal collective bargaining along private sector lines, probably because of the opinion of Vernon Thomson, the Republican attorney general and future governor, indicating that collective bargaining contracts in the public sector would violate anti-delegation rules. The bill also made it an unfair labor practice for an employer to interfere with the rights that the bill provided.[47]

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[45]Union News, July 1956, 1, 4; id., March-April 1950, 1, 4.

[46]Union News, May-June 1951, 1.

[47]Bill 462-S, Wisconsin Senate Bills, 1951, WLRB; Memo from B. Lampert to [Vernon] Thomson, June 27, 1951, Kohler Archives, box 77, folder 6; 42 OAG 97 (1953); Union News, March-April 1951, 3; Cling 336-37.

The legislative battle that followed featured the interest groups and arguments common in debates over public sector labor rights before and after. The fight focused especially on the issue of police strikes, but it also foreshadowed new, practical issues involving the precise scope of union rights and the power of state labor agencies over local governments. Organized public employers, the Wisconsin County Boards Association and the League of Wisconsin Municipalities, opposed the bill, as did private sector business interests such as the state Chamber of Commerce and the Wisconsin Manufacturers Association. Opponents successfully sponsored an amendment that dropped the concept of "collective considerations" and added language stating that the bill did not confer a right to strike. The WCCME unsuccessfully tried to amend the bill to clarify that the WERB had some enforcement powers: the power to investigate complaints of violations of the law and issue findings of fact and recommendations. The state senate then passed the bill. In the state assembly, AFSCME defeated an amendment that would have eliminated police and fire personnel from the bill's coverage.[48]

Even though the bill stated that it did not grant a right to strike, opponents stressed that issue and related fears. The Wisconsin State Journal raised the classic specter of the police strike, agreeing with A. J. Thelen, the executive secretary of the Wisconsin County Boards Association, that the bill should explicitly bar strikes and exclude law enforcement. Lawton

[48]Union News, March - April 1951, 2; Substitute Amendment to No. 1, S., to Bill No. 462, S, Wisconsin Senate Bills, 1951; Lawton to Kohler (n.d., 1951), Kohler Archives, box 77, folder 6; JOURNAL OF THE SENATE PROCEEDINGS OF THE 70TH SESSION OF THE WISCONSIN LEGISLATURE (1951), 1183.

replied truthfully that there had never been a strike of police or firefighters in Wisconsin and that the rules of the relevant unions barred such actions. This fear, however, would prove fatal.[49]

The WCCME termed the right to organize "a basic right of citizenship," but also tried making milder, politically palatable appeals. The WCCME explained that the bill "does not require that the employer must give anything to his employees–it simply says they must talk to them about their problems." The WERB could conciliate but it could not force the parties to agree. Appealing to modern sentiments that at least tolerated public sector unions, Lawton focused on specific instances of discrimination against workers for union activity. Still, he felt compelled to answer older objections. Lawton stressed that by "no stretch of the imagination" could the bill be interpreted to permit strikes, that AFSCME required the constitutions of its police locals to bar strikes, and that no AFSCME police local had ever struck.[50]

The final version of the bill retained the right to organize, but the proto-bargaining and enforcement provisions were weakened even further. The concepts of "collective considerations" and "mutual understandings" were replaced with the even less specific idea of promoting "better relations" between the parties. Conciliation by the WERB was limited to situations in which both parties (as opposed to either party), requested it. The WERB could investigate alleged violations of the law and issue findings of fact and recommendations, but the recommendations were not binding and there were no sanctions for ignoring them. AFSCME

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[49]Union News, March - April 1951, 3; "Arguments on 462-S," (n.d., 1951), Kohler Archives, box 77, folder 6.

[50]Union News, March - April 1951, 2, 3; Lawton to Committee on Labor and Management (n.d., 1951); Lawton, "Memorandum re Bill No. 46-S" to Sen. Gordon Bubolz, May 4, 1951, Kohler Archives, box 77, folder 6.

did succeed in keeping coverage of police and fire services, and while the bill stated that it did not confer a right to strike, it did not specify penalties for striking. The bill thus amended passed and was sent to the desk of Governor Walter Kohler, Jr.[51]

Walter Kohler was the governor of Wisconsin from 1951 to 1957. "Born to wealth and power," in Thompson's words, Kohler was the son of leading businessman Walter Kohler, Sr. (who served a term as governor during the 1920s). He had past ties to his family's concern, the Kohler Company, and he was not especially sympathetic to labor. For example, he praised the Taft-Hartley Act and its "right to work" provisions as a "protection" for workers. Further, in 1951, Kohler had broken from tradition in his appointments to the WERB by replacing the labor representative with a second public representative.[52]

AFSCME lobbied Kohler to sign the bill, appealing to notions of rights now well established in the private sector. Hundreds of workers signed petitions stating that "public employees should have the same right to organize and negotiate. . . as our fellow workers in private industry." Local 1436, Jackson County Highway Employees, wrote Kohler that although "the county boards, the League of Wisconsin Municipalities, the State Chamber of Commerce and the Wisconsin Association of Manufacturers are urging you to veto this bill, we believe this is directly against the rights and privileges of the American way of life." There should be "better

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[51]Bill No. 462-S as amended, Kohler Archives, box 77, folder 5; Lawton to Kohler (n.d., 1951), id., folder 6; Memo from B. Lampert to Thomson, June 27, 1951, id.; Amendment 1-S to Substitute Amendment 1-S to Bill No. 462-S, WISCONSIN SENATE BILLS, 1951; JOURNAL OF THE SENATE PROCEEDINGS OF THE 70TH SESSION, 1365, 1399; Cling, 337.

[52]THOMPSON, 594, 620; Michael Essin, "Open Letter to Gov. Kohler," Nov. 22, 1952, Kohler Archives, box 68, folder 2; "History of Appointments to Labor Relations Boards in Wisconsin," Gaylord Nelson Archives, State Historical Society of Wisconsin (Nelson Archives),

understanding. . . through collective bargaining." Local 407, City of LaCrosse Employees, wrote that the bill would provide "a fair means" to discuss problems. Individual employees echoed Lawton's emphasis on anti-union discrimination. Highway employee Clayton Randorf explained that his co-workers had been "pushed around" for union activities. Other smaller public sector unions, such as the Wisconsin County Police and Police Radio Operators Association, wrote Kohler in favor of the bill. The Wisconsin Paid Firemen's Association argued that the bill "is a natural for Wisconsin, which has long led the way" in progressive legislation. Also, AFSCME president Zander wrote and telegraphed Kohler and even came to Madison to meet with him to promote the bill.[53]

Opponents—including many local government officials and their organizations—replied with arguments ranging from the old fears of police strikes and divided loyalty, to concerns about local control, to more technical legal issues. Oliver Grootemaat, president of the Village of Whitefish Bay, objected that the "mere elimination of one phrase could grant municipal employees the right to strike" and that permitting police to organize "might place them in the anomalous position of being called upon to police a strike called by a brother union." Similarly, the mayor of Wausau, Herbert Giese, argued that it was "very bad public policy" to permit police to organize, because in a strike the labor movement would pressure police to favor the striking union. The League of Municipalities, explicitly citing the Boston police strike (of more than

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box 107, folder 2.

[53]AFSCME Local 407 to Kohler, July 2, 1951, Kohler Archives, box 77, folder 5; Leo Flaherty (Wisconsin County Police) to Kohler, July 11, 1951, id.; Clayton Randorf to Kohler, id.; *see, e.g.*, Petition to Kohler by Green Bay employees, April 10, 1951, id., folder 6; Zander telegraph to Kohler, July 19, 1951, id.; Zander letter to Kohler, June 22, 1951, id.; Bob Madden (Paid Firemen) to Kohler, June 21, 1951, id.

thirty years earlier) added that allowing police to organize would undermine the "democratic system" which "depends upon the unbiased and impartial enforcement of laws." Another opponent claimed that allowing police to join the labor movement would be the same as "unionization of the army." The League added another argument that would be central in future debates: the state should not legislate in this area, but rather local officials should have complete authority in labor matters. Indeed, the League argued, the bill would violate home rule provisions of state laws. The League and others also raised delegation concerns about anything approaching bargaining. But the police issue was central. A memo to Attorney General Thomson stated that the main practical effect of the bill would be to allow police to organize, and added that "there is a strong sentiment in many sections of the country against" this.[54]

Kohler vetoed the bill, objecting to the affiliation of police with labor and specifically citing the need for police to maintain order in labor disputes. The Union News put the best spin it could on this, stressing Kohler's remark that "for the overwhelming majority of state and local employees, the present laws and customs embrace the privilege of belonging to labor unions." Kohler's objection was only to unionizing "employees in the uniformed services."[55]

But while concerns about police, strikes, and the proper extent and enforceability of bargaining rights remained, law and reality were becoming even more out of sync. The

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[54]Oliver Grootemaat to Kohler, July 2, 1951, id.; Herbert Giese to Kohler, id., folder 6; Frederick MacMillin to Kohler, July 2, 1951, 1, 2, id.; Cyrus Philipp to Kohler, June 14, 1951, id.; Memo from B. Lampert to Thomson, June 27, 1951, id.

[55]Union News, May-June 1951,1; Cling, 338.

WCCME continued to grow, its locals continued to engage in limited negotiations, and the WERB continued to help settle disputes in some public sector cases.[56]

B. The 1953 Bill and the Delegation Problem: Reform Meets Outmoded Legal Doctrine.

AFSCME's attempts in the next legislative session in 1953 foundered on the shoals of the non-delegation doctrine. Beyond this legal objection, AFSCME also faced a rough political terrain. In 1952, Kohler had been re-elected with 63 percent of the vote, the largest margin of victory to that date in Wisconsin history. Further, the Union News described the 1953 legislature as "generally unfavorable. . . toward public employees and toward labor generally."[57]

Nonetheless, on February 11, 1953, the WCCME introduced Bill 210-S, which provided that contracts between local government employers and unions with durations of up to one year would be enforceable. "The biggest problem in public employment," Lawton concluded in a report to the WERB, was "the lack of machinery for effective negotiations."[58] But the entire concept of public sector negotiations was still suspect due to the non-delegation doctrine. The delegation doctrine held that collective bargaining with a union unconstitutionally delegated

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[56]SLATER, PUBLIC WORKERS, 173.

[57]Union News, May-June 1953, 1. *See, e.g.*, id., Nov.-Dec. 1951, 3 ("negotiations" bring gains in Polk, Vernon, and LaCrosse Counties); id., Nov.-Dec. 1953, 3 (WERB hearing in Antigo City wage dispute).

[58]JOURNAL OF THE SENATE PROCEEDINGS OF THE 71ST SESSION OF THE WISCONSIN LEGISLATURE (1953), 202; WISCONSIN SENATE BILLS, 1953, WLRB; Union News, May-June 1953, 4; Cling, 338-40 (quoting Lawton).

sovereign decision-making power to a private party–a union. A number of courts had used this doctrine to block even limited bargaining in the public sector.[59]

The WCCME and other unions, including private sector labor bodies, once again squared off against private and public employers in the League of Municipalities, the County Boards Association, the Wisconsin Manufacturers Association, and the state Chamber of Commerce. This time, opponents took a legalistic tack. The state senate solicited an opinion on the bill from state Attorney General Thomson. Thomson said that the bill was probably unconstitutional on non-delegation grounds because it would allow contracts that would restrict the discretion of legislative bodies regarding governmental functions. Compensation of public workers was "a legislative function" which "may not be surrendered or delegated" to private parties. Issues of "wages and hours of employment–and probably most other working conditions normally dealt with in collective bargaining agreements–involve the exercise of legislative functions." Shortly after receiving this opinion, the Senate indefinitely postponed the bill on a vote of seventeen to fifteen. Most of the votes to kill the bill came from Republicans.[60]

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[59]*See, e.g.*, Mugford v. Mayor of Baltimore, 185 Md. 266, 44 A.2d 745 (1945) (city could not bargain a dues check-off provision, because "city authorities cannot delegate their continuing discretion" over labor relations); Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741 (Ct. App. 1946) (reversing a lower court ruling that permitted city workers to bargain collectively, because the authority of public officials "may not be delegated or surrendered to others, since it is public property"); *see generally* Slater, PUBLIC WORKERS, chap. 4.

[60]Hearing Records, 1953, SB 129-271, WLRB. Vernon Thomson to the Senate, May 5, 1953, Legislative Drafting Records, Bill 210-S, WLRB; 42 OAG 97 (1953). JOURNAL OF THE

C. Intensified Struggle, Compromise Results: the 1955 Bill Calls for a Study.

The 1955 round of the battle produced at best a draw in the form of a promise to study the issue. At the same time, the political struggle began to heat up. Kohler was re-elected in 1954, but this time with only 51 percent of the vote.[61] The WCCME increased its political activities. In December 1954, it held a legislative conference that attracted 150 delegates from various unions to discuss strategies. The WCCME tried to craft a compromise with the League of Municipalities, but the process broke down over whether a law should cover police, impasse resolution (AFSCME wanted alternative mechanisms in exchange for a strike ban), and the League's insistence that a state law would violate home rule. Still, the League took this matter seriously, cautioning local officials that to "avoid state interference in this essentially local matter," they must prove both willing and able "to handle their labor problems at home."[62]

The WCCME introduced Bill 89-S on January 27, 1955. Like the 1951 bill, Bill 89-S granted the right to organize and engage in "collective considerations" with employers, made employer interference with such rights unfair labor practices, and provided for WERB conciliation. Proponents of the bill at the hearings included an even greater range of private and public sector unionists from the CIO and the AFL. Again, the League of Municipalities, the County Boards Association, and the Chamber of Commerce led the opposition. Three key amendments were adopted to address the concerns of opponents. First, the WCCME reluctantly agreed to exclude law enforcement. Second, the concept of "collective considerations" was

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SENATE PROCEEDINGS OF THE 71ST SESSION, 1079; Cling, 341.

[61]Kohler Archives, Finding Aid, 2; Thompson, 604.

replaced with the phrase "better relations with unions through conferences and negotiations." Third, a clause was added stating explicitly that the law did not grant a right to strike.[63]

Both sides stressed points they believed would be politically appealing. Union opponents argued that "home rule" principles should give individual public employers the discretion to ban unions. The WCCME stressed that anti-union discrimination was wrong and that the bill would only "interfere" with home rule to the extent that local governments were engaged in such discrimination. Nor did the bill create a right to strike. The Chamber of Commerce pushed the "divided loyalty" point, arguing that government, which was responsible for regulating business and labor, was already pressured by private sector unions, and that such pressures should not come from within the government as well. The Milwaukee Journal focused its opposition on the concept of "negotiations." Public workers already had sufficient influence, the paper objected; in Milwaukee, they "sit in on discussions of wages, working conditions and other problems." Further, bargaining was incompatible with civil service rules.[64]

The senate rejected Bill 89-S on June 24, 1955, although the WCCME salvaged an agreement providing for a study. Joint Resolution 81-S stated that in view of the controversies over the rights of public workers to organize, whether the state should provide machinery for handling bargaining impasses, and the related constitutional and policy questions, the Legislative

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[62]Union News, Nov.-Dec. 1953, 1; id., Nov.-Dec. 1954, 1, 2.

[63]Bill 89-S, WISCONSIN SENATE BILLS, 1955, WLRB; A Substitute Amendment No. 1 to Bill 89-S, id.; "Bill History," 1955 Hearing Records, SB 2-142, id.; Amendment No. 2-S to Bill 89-S, id.; Cling, 342-43.

[64]Union News, Jan-Feb. 1955, 1; Cling, 343-345 (quoting Milwaukee Journal).

Council should investigate and make a report to the 1957 legislature. The League of Municipalities and Chamber of Commerce opposed even this, but it passed anyway.[65]

The WCCME bemoaned the power of its "two toughest opponents": the Chamber and the League, the latter of which was fighting "against granting some meager rights to its own employees." Further, labor as a whole was increasingly dissatisfied with Governor Kohler and the Republicans. The president of the Wisconsin Federation of Labor declared that the 1955 session featured "the worst legislature since Wisconsin was incorporated as a state." Still, AFSCME optimistically noted that the WERB's Advisory Committee had approved of Bill 89-S, and their opinion "should have some weight with the Legislative Council."[66]

D. Opponents of Reform Fight Back: The 1956 Study and the Attempt to Ban Public Sector Unions.

Both sides jockeyed over the study, seeking political advantage. The Union News stressed that government workers "were the only major group of employees in the state of Wisconsin that has not been granted collective bargaining rights." The Chamber of Commerce replied with claims of divided loyalty: Public sector organizing was "a threat to maintaining governmental functions available to all our people. . . . Loyalty of a public employee must be to all the people and should never be simply to a labor official or organization." The Chamber also warned that labor's political power would only increase with the merged AFL-CIO.[67]

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[65]JOURNAL OF THE SENATE PROCEEDINGS OF THE 72ND SESSION OF THE WISCONSIN LEGISLATURE (1955), 1702; Union News, May-June 1955, 1, 3.

[66]Union News, May-June 1955, 1, 2, 3, 4; HAFERBECKER, 178; THOMPSON, 604, 662-65.

[67]Union News, July-Aug. 1955, 1, 2; id., Aug. 1956, 2;id. , Jan. 1957, 1; Cling, 346-47 &

The debate turned much nastier, however, after a few public workers engaged in some secondary activity in support of a private sector strike, prompting opponents to call for a ban on all public sector unions. In July 1955, during a strike by private sector workers at the Kohler Company, some municipal employees at the Milwaukee docks represented by AFSCME temporarily refused to unload some goods destined for Kohler. Ship owners filed secondary boycott charges under the NLRA, but the National Labor Relations Board dismissed the charges on the grounds that the NLRA did not apply to the public sector. In reaction, on August 6, 1956, the Chamber of Commerce called on the Legislative Council to recommend laws that would bar public workers from forming AFL-CIO affiliated unions. Chamber representative Joseph Fagan used this event to bolster his argument that public workers "should owe their loyalty to all the people and not simply the big merged AFL-CIO."[68]

The Union News responded that the Chamber was "attempting to get revenge" and "to cripple public employee unions." The secondary action was an "isolated case." Lawton predicted the Chamber's proposal would be "soundly rebuffed" by the legislature. Needling, he noted that AFSCME would never propose legislation denying businessmen the right to form their own organizations. The Public Employee added that Fagan's name "sounds like that of a Dickens villain." Still, labor took the threat seriously, and marshaled considerable forces against it. George Haberman, president of the Wisconsin Federation of Labor, wrote a public letter insisting that "the labor movement feels very strongly that public employees should be given the

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n.33 (quoting Chamber of Commerce).

[68]Union News, Sept. 1956, 1 (quoting News Release dated Aug. 6, 1956); id., Oct. 1956, 4; Cling, 347-48, 711-19. *See generally*, WALTER UPHOFF, KOHLER ON STRIKE: THIRTY YEARS OF CONFLICT (1966).

legal right to organize and bargain collectively," and the Wisconsin Federation passed a resolution pledging to "exert constant efforts" to enact laws to rectify the "discriminatory, unfair, and un-American" legal status of public workers. Charles Schultz, president of the state CIO, also publicly pledged "wholehearted support." AFSCME Locals and national officers, including President Zander, promised to help fight the Chamber's "vicious attack."[69]

Opponents displayed equal fervor. The Chamber issued a memo on November 20, 1956, the day the Legislative Committee released its report, asking for a statewide referendum during the April 1957 elections on the right to organize. "We are convinced that the Wisconsin people will overwhelmingly support a prohibition of AFL-CIO affiliated labor unions in Wisconsin government." The memo emphasized "THE IMPORTANT DIFFERENCES BETWEEN PUBLIC AND PRIVATE EMPLOYMENT." Revealing the worries of some private employers, Fagan added that the AFL-CIO merger would mean that labor would be "nearly a third party," which "could mean the end of our capitalistic system." The League of Municipalities took a more moderate and more successful tack, again stressing that the unionization of municipal workers was a local concern, not a matter for state legislation. Robert Sundby, the League's legal counsel, also told the Legislative Council that municipal labor relations were generally good and thus no law granting rights to unions was needed.[70]

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[69]PUBLIC EMPLOYEE, Jan. 1957, 14; Union News, Sept. 1956, 1, 3; id., Oct. 1956, 1, 2, 3; id., Nov. 1956, 1, 2, 3-4.

[70]Union News, Jan. 1957, 1, 3; Cling, 348-349.

The Legislative Council's report of November 20, 1956, reflected contemporary attitudes that increasingly tolerated public sector unions, but had not yet worked out what rights they should have. The Council noted that in Wisconsin, government employees (except, in some cases, police) were usually allowed to form unions. Prohibiting all public workers from joining unions would be "unreasonable and extreme." But, the report continued, while "agreements" with these unions were legal, "contracts" were not; exclusive bargaining, compulsory arbitration, strikes, and pickets could not be permitted in public employment; and "no serious state-wide problem" existed in government labor relations. Also, as the League had argued, the Council concluded that because the "home rule principle" had produced "generally satisfactory labor relations. . . , state dictation of a labor policy would be unwise."[71]

The Union News promised that AFSCME would "continue to press for legislation" and that "political action at the local level will ultimately give us success!" Lawton emphasized that "the only remedy. . . is a political one."[72]

E. Partisan Politics: The 1957 Bill Is Tabled.

The year 1957 saw more delays, but an increasing probability that reform could happen through political action. In 1957, the WCCME tried compromising from the start by excluding law enforcement. Otherwise, Bill 235-S was familiar. It provided the rights to organize and be represented by unions "in conferences and negotiations" with employers about "wages, hours,

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[71]Governmental Labor Relations Committee Report, Nov. 20, 1956, Nelson Archives Box 22, Folder 5; Union News, Jan. 1957, 1; id., Feb. 1957, 1, 4.

[72]Union News, Jan.1957, 2, 3; id., Feb. 1957, 2, 4.

and conditions of employment." The WERB could appoint conciliators and then fact-finders to help resolve disputes. Again, Lawton appealed to evolving sensibilities. The bill was necessary because "a substantial minority" of employers opposed unionization through "threats of discharge, demotion, and other forms of discrimination." Again, the main opposition came from the League of Municipalities, the County Boards Association, and the Chamber of Commerce.[73]

The bill was killed in committee by a highly partisan vote. A motion to release the bill to the full senate failed seventeen votes to fifteen, with all seventeen "nays" coming from Republicans (ten of the fifteen "ayes" came from Democrats). The WCCME now turned its full attention to politics. "If we ever needed proof that political organization and political action are absolutely necessary," WCCME executive director Oberbeck fumed, this "Chamber of Commerce dominated legislature" provided it. The Union News listed the votes of senators on the bill, telling its readers: "Study it carefully! Find out who is friend and who is foe. Clip it out and carry it in your billfold. When you see your state senator, pull out the roll call to see how he voted."[74]

Crucially, the WCCME was finally in a position both to help cause political change at the state level and to take advantage of it. "Public employees are steadily growing in influence," the Union News noted. "With each succeeding legislative session we are listened to with a more attentive ear." A more objective source, the Waukesha Freeman, observed in late 1957 that the "public employees of Wisconsin are beginning to flex their political muscles" and were

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[73]Union News, May 1957, 2; id., July 1957, 2; id., April 1957, 1, 4.

"organized more effectively each year." The "public employee lobby can be a formidable one." AFSCME focused on elections. In October 1958, Oberbeck, protesting anti-union firings in a county highway department, insisted that the legislation was the only solution. With the following month's elections obviously in mind, he recalled the veto of the 1951 bill by "your present governor" and later bills blocked by "influential opponents in the legislature." He told AFSCME supporters to ask their representatives about organizing and collective bargaining rights. If a representative was opposed, "don't vote for him." The Union News regularly urged similar political action. "With this kind of activity at the local level," the Union News concluded prophetically, "we will succeed in the 1959 session of the legislature."[75]

III. The 1959 Law: Democrats in Power and Reform at Last.

A. The 1959 Bill Becomes Law.

The elections of 1958 produced a key change in this long drama. For the first time in decades, Wisconsin elected a Democratic governor, Gaylord Nelson, and a Democratic state assembly. Nelson defeated Vernon Thomson, who had succeeded Kohler. Nelson was much more friendly toward unions than his predecessors had been. He had worked in Lawton's law firm and served as a field representative for the WCCME. The Public Employee enthused that Nelson had "compiled an outstanding record as a legislator." For example, unlike Kohler, Nelson had opposed "right to work" laws. Further, 1958 was the first time Democrats had won a majority in the state assembly since 1932. Indeed, from 1947 and 1957, Republicans had at least

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[74]Union News, July 1957, 1, 2.

[75]Union News, Feb. 1958, 4: id., Oct. 1958, 1; id., Oct. 1957, 1.

a two-thirds majority in both houses of the state legislature in every year except 1955, when they held "only" sixty-four of the assembly's one hundred seats. Now Democrats had a fifty-five to forty-five advantage in the assembly. Democrats also won back the offices of lieutenant governor, attorney general, and state treasurer. They even gained three state senate seats, although Republicans retained a twenty to thirteen majority there.[76]

Sudden and important as the political shift was, the forces driving it had long been in motion, and unions were a central factor. State Republicans had been increasingly divided over issues ranging from legislative reapportionment (along "one person, one vote" lines) to anti-communism, and riven by internal factions. In 1958, Thomson was saddled with Republican support of the unpopular ideas of creating a sales tax and making Wisconsin a "right to work" state, along with a recession in which 90,000 Wisconsinites had lost their jobs. Meanwhile, by the mid-1950s the Democrats had become revitalized, with the help of former Progressive Republicans, including Nelson and future Democratic attorney general John Reynolds, and also labor. Democrats were increasingly successful at fusing their pro-labor ideals with a sizeable portion of Wisconsin's farm vote. The 1954 election produced the largest gains for the Democrats since the end of the war. In 1957, E. William Proxmire won the special election for

[76]THOMPSON, 676-77, 528, 534; LARRY SWOBODA AND GAIL SCHNEIDER, THE IMPACT AND EFFECT OF THE MUNICIPAL EMPLOYEE COLLECTIVE BARGAINING LAW UPON WISCONSIN'S PUBLIC ELEMENTARY AND SECONDARY EDUCATION ENVIRONMENT: ITS HISTORICAL CONTEXT AND POLITICAL PERSPECTIVE (1988) (available from the WLRB), 53; PUBLIC EMPLOYEE, Dec., 1958, 5; Gaylord Nelson to W. J. Tanking, Jr., Sept. 10, 1962, Nelson Archives, box 22, folder 5.

senator to replace Joe McCarthy after his death. Proxmire was Wisconsin's first Democratic senator since 1939, and the Democratic party had returned to respectability.[77]

Unions provided crucial money and manpower to these Democratic victories. In the mid 1950s, labor contributed from 25 to 33 percent of the money received by the state party, union political action committees made additional independent expenditures, and labor provided the mass of volunteers in voter registration drives and phone banks. "The triumph of the Democratic party in the late 1950s would have been difficult, perhaps impossible, without these various contributions of the unions," Thompson explains.[78]

Labor also helped turn the growth in the cities and decline in the farm population into a political advantage through reapportionment. Wisconsin was one of only two states at the time that gave equal weight to urban and rural districts. Thus in 1950, while Wisconsin's urban areas held 55 percent of the population, a working majority in both state legislative houses still represented rural areas. Large farm interests were often suspicious of unions, and urban Republicans tended to be less anti-labor. Powerful Republican Assemblyman Alfred Ludvigsen, representing the rural northen half of Waukesha County, complained that "both Republicans and Democrats elected in the big cities vote for labor bills." Tensions around legislative reapportionment heightened in the 1950s as urban areas grew by nearly 26 percent while the

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[77]THOMPSON, 52, 528-29, 538-553, 560-70, 669, 602-11; 671-73.

[78]THOMPSON, 662-65.

rural population grew by only 1 percent. Finally, after various battles, a reapportionment plan was adopted based on population, becoming effective with the election of the 1955 legislature.[79]

Meanwhile, the WCCME continued to try to devise an acceptable public sector statute, learning from its past defeats. In late 1958, it held a legislative conference that called for bargaining rights for all local government workers except law enforcement. The WERB could engage in mediation, conciliation, fact-finding, arbitration, or other services, if both parties consented. The WCCME stressed the reasonableness of its proposal. It would be unfair to ban strikes without some alternative for settling negotiating disputes. Basic organizing and bargaining rights did not usurp the government's sovereignty, Oberbeck insisted, and "sovereign" power should be accountable "to the people it represents." Lawton noted that the WERB had already successfully conducted elections and offered non-binding mediation and arbitration in the public sector, and thus it could safely be given such powers in a statute.[80]

Democratic victories did not ensure enactment of AFSCME's agenda. Even those generally sympathetic to public sector unions were unsure of the scope of formal rights that should be granted, and powerful forces still opposed any such rights. Thus AFSCME's Bill 309-A, introduced on February 26, 1959, contained compromises designed to help it pass. To counter objections of unconstitutional delegation and improper state control over local governments, the bill specified that the WERB would have the power to conduct representation

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[79]Id., 641, 661, 177, 644, 226-29, 645-52; HAFERBECKER, 188.

[80]Union News, Dec. 1958, 1; id., Jan. 1959, 1, 2; Madison Union Labor News, Dec. 1958, 16.

elections and do mediation and voluntary arbitrations only if both parties agreed. The bill again excluded public safety personnel. Beyond that, it again provided for the right to organize and the right for unions to engage in "conferences and negotiations" about "wages, hours, and conditions of employment." A modified version of the bill became law, but only after a lengthy struggle.[81]

AFSCME took advantage of new attitudes by characterizing traditional objections as outdated. After the Milwaukee Sentinel complained that collective bargaining would "mark the end of unprivileged, non-partisan government," Zander replied that "like those who once opposed child-labor laws and social security, the men of little minds today are fighting a rear-guard action." State senator Kirby Hendee (R-Milwaukee) introduced Bill 47-S, which would have mandated harsh penalties for strikers, and the Union News turned this into an argument for AFSCME's bill. Any such law that did not provide alternative dispute resolution mechanisms "is not fair. A union must have a way of getting its grievances and requests acted upon." AFSCME again made the moderate argument that the bill was needed because "a substantial minority" continued to discriminate against union supporters.[82]

The hearings on the bills were hotly contested, with unusually large numbers registering in favor and in opposition.[83] It soon appeared that the WCCME's bill was more viable than Hendee's: more than 150 people registered in favor of it and around 45 registered against it;

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[81]Bill 309-A, WISCONSIN ASSEMBLY BILLS, 1959, WLRB; Substitute Amendment No. 1-A to Bill No. 309-A, id.; Union News, March 1959, 2. The 1959 legislative session was the longest on record at that time. THOMPSON, 677.

[82]PUBLIC EMPLOYEE, March 1959, 3; Union News, Feb. 1959, 1, 2, 4; id., April 1957, 4.

[83]"Bill History," 1961, Hearing Records, AB 319-435, WLRB.

whereas only nine registered in favor of Hendee's bill and 85 registered against it. Lawton argued that the issues were whether public employers could discriminate against pro-union workers, and whether public employees could have dispute-resolution machinery. The Wisconsin AFL-CIO strongly supported the WCCME's bill.[84]

The WCCME was willing to make further compromises. The WERB's Advisory Committee was initially evenly split on the bill, with the six labor representatives favoring it and the six employer representatives in opposition. But after WERB chair Laurence Gooding said that a majority would support the bill if clauses were added providing for union unfair labor practices and stating that employees had the right to refrain from union activities, the WCCME quickly agreed to such amendments.[85]

AFSCME focused its rhetoric on the politically popular right of association and intensified its efforts on the ground. Public employers in the League of Municipalities and the County Boards Association had organized, AFSCME argued; how could they maintain that it was "unconstitutional, morally wrong, and bad " for public workers to do likewise? In senate testimony, Lawton cited cases of anti-union discrimination and again stressed the need for dispute resolution machinery. Oberbeck urged political action, sensing victory. "Now is the time for every union member . . . to buttonhole their assemblyman and senator and tell him that you want favorable action on bill 309-A." Pointing out that legislators were usually home at

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[84]Union News, April 1959, 1, 2.

[85]Gooding to Allen Flannigan, April 6, 1959, 1959 Drafting Records, Chaps. 505-09, WLRB; Union News, May 1959, 1, 3.

weekends, Oberbeck suggested that members "[g]et your legislative committee or your whole local together and make a trip over to your legislator's home" to discuss the bill. Indeed, a history of Wisconsin labor states that "[l]egislators at home on weekends were deluged with visits by the local public employees" supporting the bill. Oberbeck also recommended a letter-writing campaign. The WCCME was "standing on the threshold of a new era" and this legislative "Bill of Rights" was its "top goal."[86]

The League of Municipalities countered with its own moderate and previously successful arguments. The League claimed it did not oppose unionization *per se*, but state powers over local governments in this area were both bad policy and unconstitutional. "State control" by the WERB represented "unwarranted interference with municipal employee labor relations." The "prospect of an elected municipal official being called by subpoena to justify the exercise of his legislative discretion before a state agency" in a ULP hearing was "completely repugnant." While mediation and arbitration were voluntary under the bill, the League (correctly) predicted that unions would later try to make such procedures mandatory. The League also cited former attorney general Thomson's opinion that "there was grave doubt of the constitutionality" of collective bargaining. The mediation and arbitration provisions were also unconstitutional delegations, because while engaging in the process was voluntary, the results would be binding, and Thomson's opinion had disapproved of restricting the "free exercise of discretion" of public officials in labor matters. Pay and working conditions of public employees were "legislative functions" that could not be delegated. The League publicized a Milwaukee Journal editorial

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[86]Union News, April 1959, 4; id., May 1959, 1, 4; PUBLIC EMPLOYEE, June 1959, 11;

predicting (correctly) that unions would use this bill "as a wedge" for further bargaining rights, "which the courts have consistently held to be beyond the authority" of local governments. Various local public employers echoed these complaints. Racine's city counsel wrote Nelson that he had "very serious doubt as to the constitutionality" of the bill; further, it was "one step closer to recognition of the right of public employees to strike."[87]

The bill passed, albeit after further concessions. The original bill carried by a vote of 67 to 23 in the assembly, with all dissenting votes cast by Republicans. On July 23, the senate adopted a Republican amendment deleting the provisions authorizing the WERB to aid in elections, bargaining impasses, and arbitration of grievances. However, the senate rejected an amendment by Hendee that would have provided for harsh penalties for strikers. With the powers of the state agency WERB reduced, the delegation issue was apparently sufficiently diluted. The amended bill passed by 23 to 10 in the senate and then passed the assembly on a voice vote. Governor Nelson, who had always supported the bill, signed it into law on September 22. Attorney General Reynolds later told AFSCME that this law was won through labor's organization and efforts, but the friendly administration was crucial, as were various

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ROBERT OZANNE, THE LABOR MOVEMENT IN WISCONSIN (1984), 75.

[87]Sundby to Members of the Assembly, May 20, 1959, Nelson Archives, box 8, folder 21; League of Municipalities to Wisconsin Legislature, July 2, 1959, id.; Sundby to Wisconsin Senate, July 17, 1959, id.; James Wimmer to Nelson, Sept. 11, 1959, attaching Milwaukee Journal article of July 29, 1959, id.; Edward Krenzke (Racine) to Nelson, July 29, 1959, id. For local opponents, see, e.g., Harry Curry (Bayfield County Highway Commission) to Nelson, May 26, 1959, id.; Resolution, Washburn County Board of Supervisors, id.; Recommendation of (Dane) County Board on Certain Bills, Oct. 25, 1961, id.; Ted Holthusen (Wisconsin Association of School Boards) to Nelson, Jan. 17, 1962, id..

compromises, and, more broadly, the evolution in public attitudes caused in part by the actual activities of public sector labor on the ground.[88]

AFSCME was jubilant over this seminal legal victory. Employees of local governments (excluding police) for the first time anywhere had a statewide statutory right to organize and be represented by unions in "conferences and negotiations" over wages, hours, and working conditions. The Union News enthused that "the bill caps a long fight . . . to win for city and county workers the same rights enjoyed by workers in private employment." The law opened an "enlightened era." The national AFSCME lauded this "collective bargaining bill" that forbade public employers from impeding the right to organize. Speaking mostly for private sector unions, the Madison Union Labor News cheered that "[p]ublic employees of Wisconsin have finally gained the right to join a union. . . without interference from their employers." But mindful of the significant compromises as to impasse and enforcement procedures, the WCCME began looking ahead. The "legislative wheels in Wisconsin have been grinding for the last 13 years" on these issues, theUnion News observed. "Whether the Legislature has ground fine enough may arouse considerable debate."[89]

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[88]Amendment No. 1-S to Bill No. 309-A and Substitute Amendment No. 1-2 to Bill No. 309-A, WISCONSIN SENATE BILLS, 1959, WLRB; INDEX TO THE JOURNALS OF THE 74TH SESSION OF THE WISCONSIN LEGISLATURE (1989), 694. The law was codified as Chapter 509 of the laws of 1959, subchapter IV of chapter 111 of the Wisconsin statutes; its effective date was Oct. 3, 1959. Union News, July 1959, 1; id., Sept. 1959, 1; id., May 1960, 1; Lawton to James Wimmer, Sept. 9, 1959, Nelson Archives, box 8, folder 21; Ed Johnson to Wimmer, Sept. 15, 1959, id.

[89]Madison Union Labor News, Aug. 1959, 5;P UBLIC EMPLOYEE, July 1959, 20; Union

B. Using the New Law: Victories and Discontents.

The 1959 law was a historical landmark that spurred innovations in other states and facilitated improved labor relations in Wisconsin. Still, reflecting ongoing ambivalence about the proper extent of union rights for public workers, it was still woefully unclear on the extent of such rights. At first, bargaining seemed to be a success. In January 1960, the Union News claimed that negotiations under the bill "have produced the expected gratifying results" and that the law had promoted bargaining even where none had existed before. The Public Employee reported "considerable gains through negotiations completed by 94 locals" in Wisconsin in a variety of areas involving wages, hours, and conditions.[90]

But this was quite different from bargaining in the traditional private sector sense, and public sector unions in Wisconsin still relied in substantial measure on the good will of the local public employer. For example, the mayor of Madison, Ivan Nestingen, explained how bargaining worked in that city. A city bargaining committee negotiated with the union, and then a separate council of five aldermen made final decisions after considering the results of that bargaining. While the city negotiated over pay, benefits, leave, medical insurance, and dues check-off, it refused to bargain about promotions or what it termed "employment practices."

News, July 1959, 2, 4.

[90]Union News, Jan. 1960, 1, 4; PUBLIC EMPLOYEE, June 1960, 21; id., April 1960, 21-22. Those subjects included wages, benefits, hours, leave, seniority rights, grievance procedures, "maintenance of membership" union security agreements, and dues check-off. Id.

Bargaining resulted in an "agreement," but not a written contract, because Madison's city attorney had indicated that written labor contracts were still illegal under current law.[91]

Given these limits and ambiguities, it is not surprising that Oberbeck was soon complaining that "the law is not clear as to what the collective bargaining relationship should be." Again, AFSCME's answer was political: revised legislation that clarified procedures on bargaining and recognition. Oberbeck suggested that formal, written contracts should be the norm, demurring that any "question of legality" of such contracts "is a purely academic one." The Union News urged locals to insist on written agreements. Far from a legal problem, they were merely a "written record of what has been agreed to," analogous to a bank statement. Also, the WCCME called for amendments to specify enforcement and administrative procedures. Although provisions regarding the WERB had been removed, that body would still sometimes intervene in public sector matters. For example, in 1960, the WERB successfully mediated a dispute over wages and hours between the Green County Highway Committee and AFSCME Local 226. WERB member Arvid Anderson also called for amendments to clarify the WERB's authority in the public sector. The law "should be undergirded with enforcement procedures either in a circuit court, or before this agency, and not left in a nebulous fashion."[92]

Meanwhile, opponents of reform felt the law had already gone too far, and they now looked to the 1960 governor's race. In the fall of 1960, Nelson's opponent, Philip Kuehn, issued

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[91]Union News, Jan. 1961, 1, 3, 4.

[92]Union News, July 1960, 1, 3; id., Sept. 1960, 1, 3; id., March 1960, 1; Arvid Anderson to N. S. Heffernan, Nelson Archives, box 107, folder 2, 1-3.

a position paper that opposed all public sector bargaining, called for punitive measures for public sector strikers (as in the old Hendee bill), and opposed extending organizing rights to public safety workers. Adopting older visions of labor relations, Kuehn insisted that there could be no right to bargain with the government because there was no right to strike against the government. He even added that public workers beyond police and fire should be denied the right to organize "in other situations" that risked "divided loyalty."[93]

AFSCME fought back in the court of public opinion: "wealthy. . . men like Kuehn" wanted to make "the working man. . . a second class citizen." Lawton stressed new understandings born in the public sector: the term "negotiations" in the 1959 law meant a type of bargaining, and bargaining could exist without strikes. For example, arbitration could be used to resolve bargaining impasses, as the ABA had suggested. Lawton vowed that AFSCME would propose amendments in 1961 that would strengthen bargaining by providing for mediation, conciliation, and fact-finding by the WERB. Nelson and Reynolds also argued that the WERB should be more involved in the public sector, and that the legislature should clarify that the WERB could normally be used in elections or ULP cases. Rejecting fears that organizing or even bargaining necessarily meant strikes, Nelson added that the 1959 law did not provide a right to strike, and if Kuehn wanted "jail sentences, I disagree."[94]

In a sense, both Kuehn and AFSCME were wrestling with the same fundamental issue: what should happen after a bargaining impasse if the union is not allowed to strike. Kuehn

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[93]Union News, Sept. 1960, 1-3.

argued that with no right to strike, "collective bargaining is robbed of its mutuality," and therefore bargaining was impossible. AFSCME was also frustrated with a law that authorized "negotiations" but provided no method to resolve impasses. Modern public sector labor law provides a variety of answers to that question,[95] but the Wisconsin experience was the first attempt to deal with the issue seriously.

Still, AFSCME rightly claimed confidence in its political power as the November elections neared. Asserting that public sector labor rights would be one of the hottest issues in the election, the Union News concluded as to Kuehn that it was "a poor sailor indeed who does not knoweth which way the wind bloweth." AFSCME portrayed Kuehn's program as a key example of why public workers should be politically active: if Kuehn were elected and the Republicans retained their senate majority, it would mean "second-class citizenship." Wisconsin had 25,000 organized government workers, the Union News claimed, and "every public employee in the state must be at the polls" to vote "for candidates who are in favor of an enlightened labor policy for public employees." Governor Nelson, the Union News noted, was a "friend of the public employee.[96]

Nelson won a second term as governor in 1960 and Reynolds won a second term as attorney general. But Republican Warren Knowles recaptured the lieutenant governorship, the

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[94]Union News, Sept. 1960, 1-2, 4.

[95]Modern public sector law features a variety of impasse resolution mechanisms, featuring various combinations of voluntary or mandatory fact-finding, mediation, and binding and non-binding arbitration; some states even allow some public employees to strike. RICHARD KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR (3d ed. 2001), 45-80.

Republicans retook the state assembly (fifty-five to forty-five), and they kept a twenty to thirteen majority in the senate.[97] The stage was set for a battle over amendments to clarify the law, specifically over state powers in the area of bargaining impasses.

IV. The 1962 Law and Continuing Debates in Public Sector Labor Relations.

A. The 1962 Law and State Enforcement.

The 1962 bill was designed to plug gaps in the 1959 law, and, along with that law, constitutes the first example of state legislators seriously grappling with specific, modern issues of public sector bargaining.

On March 2, 1961, the WCCME introduced Bill 336-A, the point of which was to grant the WERB formal authority to enforce union rights and aid in bargaining. The original version of the bill provided that the WERB could act as a mediator or an arbitrator in bargaining. To blunt criticisms based on non-delegation and home rule concerns, the bill specified that participation in arbitration would be voluntary, but WERB decisions in such voluntary proceedings would be binding. Also, if negotiations reached an impasse, or if one side refused to bargain in good faith, either party could ask the WERB to name a fact-finder who would make recommendations. The bill provided that these procedures would also apply to public safety personnel, including police. Also, either side could petition the WERB to conduct a

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[96]Union News, Sept. 1960, 3, 4; id., Nov. 1960, 1, 4.

[97]THOMPSON, 697; SWOBODA AND SCHNEIDER, 61.

representation election. Finally, the bill explicitly authorized written contracts.[98] Opponents again contested even this level of state involvement, resulting in another set of compromises that was, nonetheless, another historic victory for labor.

Governor Nelson and leading Democrats supported the bill. Deputy Attorney General Nathan Heffernan explained that the absence of procedures to implement the rights in the 1959 law had created confusion. Still, opposition was fierce. The assembly finally passed the bill by a vote of sixty-four to fifteen in July, after adopting an amendment that expressly prohibited strikes. Attempting to avoid further amendments in the senate, Lawton argued that the bill was already modest: employers were not required to sign contracts or engage in arbitration, and recommendations by fact-finders would be only advisory. But the senate then added amendments which provided that arbitrations too would only advisory, and that fact-finding would be allowed only if both parties agreed to it.[99]

Neither side was entirely satisfied with the amended bill. Lawton still wanted fact-finding if either party requested it and binding arbitration if both sides were willing. Meanwhile, opponents felt the bill violated principles of home rule and sovereignty. The League again raised the specter of the WERB subpoenaing municipal officials, insisted that even voluntary, non-

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[98]Bill 336-A, WISCONSIN ASSEMBLY BILLS, 1961, WLRB; Union News, March 1961, 1-2.

[99]Union News, May 1961, 1-2; id., June-July 1961, 1; id., Sept. 1961, 1, 4; JOURNAL OF PROCEEDINGS OF THE 75TH SESSION OF THE WISCONSIN LEGISLATURE (1961), 1623, 1703; Amendment No. 3-A to Bill 336-A, WISCONSIN ASSEMBLY BILLS, 1961; Amendment No. 1-A to Bill No. 336-A, id.; Substitute Amendment 1-S to Bill No. 336-A, id.; Lawton to Members of the Assembly, July 5, 1961, Legislative Drafting Records, Ch. 663, 1961, WLRB.

binding arbitration was of questionable constitutionality and would cause "chaos and discord." Various local public employers echoed that the bill would give the WERB too much power. The Milwaukee Journal editorialized that the bill "ought to be killed," because "[s]quaring government sovereignty with the realities of employee-employer relations poses problems." The Wisconsin State Journal decried AFSCME's political power, adding that "[p]ublic and private employment are not the same and cannot be made so." The duties of public officials "cannot be delegated or shrugged off to some other body." The Milwaukee Government Service League objected that binding contracts violated the sovereign right of governments "to change their minds without restriction."[100] But opponents had no clear alternatives, and the tide of reform was too strong.

In contrast, labor succeeded by making specific, practical proposals and arguments. As to the erosion of local authority, AFSCME responded that nothing in the bill prevented public employers from making final decisions in bargaining. The bill did not require employers to submit to arbitration and, as amended, the employer was not bound by arbitration decisions. Local government already had to comply with state procedures in matters ranging from budgets to taxes to street design, so the limited requirements of the labor bill were constitutional. The Union News published excerpts from a Wisconsin Law Review article written by Arvid Anderson. Public sector unions would continue to grow, Anderson explained, and absent

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[100]Union News, Sept. 1961, 1; Lawton to the Assembly, "Analysis of Amendment No. 1-A (n.d., 1961), Legislative Drafting Records, Ch. 663, 1961; Thelen to the Senate, July 21, 1961, id., (attaching articles from the Milwaukee Journal, July 15, 1961, and the Wisconsin State Journal, July 14, 1961); Thelen to the Assembly, July 6, 1961, id.; Ed Johnson (League of Municipalities) to the Senate (n.d., 1961), id.

adequate grievance and bargaining procedures, public sector labor disputes would increase. He compared developments in the public sector to those in the private sector around the time the NLRA was passed. Anderson suggested principles for state laws, mostly along the lines of what AFSCME was advocating. Public sector unions should have the right to form written, binding, contracts. Both unions and public employers should be required to bargain in good faith concerning wages, hours, and working conditions. Strikes should be barred, and the parties should instead use mediation, voluntary arbitrations, and advisory fact-finding.[101]

AFSCME's political power was drawing notice. The WCCME "may well become any day now the most potent of the lobbying forces in the state capitol," wrote John Wyngaard, a correspondent for several Wisconsin newspapers, in an article titled "Public Employee Union Has Gained Real Political Power." As to the WCCME's bill, the union "has won a resounding, even an embarrassingly decisive victory" in the assembly. "A dozen years ago, the county boards could have knocked down such a rival power with scarcely a serious effort." But public sector unions have "grown rapidly and now represent a considerable voting power; they are well led; and they promise to grow even more powerful." Also contributing to the victory were the compromises made; the expanded clout of public and private sector labor generally; and more broadly, increased experience with public sector labor, which made it more difficult to link such unions with strikes, bias, or other old nightmarish scenarios. In any case, the October 1961

[101]Arvid Anderson, *Labor Relations in the Public Service*, 1961 WIS. L. REV. 601, 629-33; Union News, Sept. 1961, 2; id., Nov. 1961, 2.

Public Employee called the new Wisconsin bill one of the most "enlightened labor legislation bills" ever, and predicted a "bitter, showdown fight."[102]

Again, both sides were forced to compromise. Thelen asked that the bill be deferred until the 1963 legislative session. He cited editorials from relatively minor newspapers: the Marinette Eagle Star (a "dangerous bill") and the Appleton Post Crescent ("exhaustive study" still required). Even the League acknowledged that the "pressures which have been brought to bear" to pass the bill "are well known." Still, opponents were able to attach further amendments, most importantly eliminating the arbitration provisions entirely.[103]

Thus, the final bill provided for WERB mediation only if both parties requested it, but allowed for WERB-conducted representation elections or fact-finding at the request of either party. The fact-finder had the power to call hearings, issue subpoenas, and make non-binding recommendations. Indicating how much the winds had shifted, the provision allowing coverage of public safety personnel was retained, apparently with little controversy. The bill also required contracts to be in writing. Strikes were "expressly prohibited," but no penalties were specified. On January 10, 1962, the Legislature approved Bill 336-A, and Governor Nelson signed it on January 31.[104]

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[102]Union News, Sept. 1961, 2, 3; PUBLIC EMPLOYEE, Oct. 1961, 2.

[103]Thelen to the Senate, Jan. 8, 1962, Legislative Drafting Records, Ch. 663, 1961; Johnson to the Senate, Jan. 8, 1962, id.

[104]Codified as Chapter 663 of the laws of 1961, amending subchapter IV of chapter 111 (effective date, Feb. 6, 1962). JOURNAL OF THE PROCEEDINGS OF THE 75TH SESSION OF THE WISCONSIN LEGISLATURE, 2578; Union News, Jan. 2, 1962, 2; id., March 1962, 1.

This law represented "the culmination of nearly 15 years' work" by AFSCME, beginning with the defeat of the 1947 bill designed to punish strikers, Lawton proclaimed. The amendments were "meaningless." While the WERB could act as a mediator in bargaining and ULP cases only if both parties agreed, effective mediation was only possible if both parties agreed anyway. Further, either party could initiate fact-finding after a bargaining impasse or ask the WERB to conduct a representation election. The WERB was not authorized to do arbitrations, but employers could still agree to arbitrations conducted by other neutrals, such as the American Arbitration Association. "We gained our basic objectives," he insisted. Indeed, he called the new law "the Magna Carta for public employees" and said it meant as much as the NLRA did in private industry. For years, opponents had been "crying that public employees should not have the right to strike," the Union News exulted, but "they gave no alternative." The new law provides "a way to settle labor disputes successfully. . . mediation and fact finding." The Public Employee claimed the law provided "many of the collective bargaining rights now afforded workers in private industry." A later study concluded that this law "converted a statement of policy [the 1959 law] into a functional process for true collective bargaining."[105]

AFSCME had arrived, politically. Standing next to Governor Nelson at the signing ceremony were AFSCME national vice president Steven Clark, WCCME vice president Harmon Skown, and WCCME president Herb Einerson. Other public officials curried AFSCME's favor. At AFSCME's state convention, Attorney General Reynolds hailed the law as a "giant step

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[105]Union News, Jan. 1962, 1-2, 4; id., May 1962, 1; PUBLIC EMPLOYEE, Feb. 5, 1962, 1; Robert Krause, *The Short, Troubled History of Wisconsin's New Labor Law*, 25 PUBLIC ADMINISTRATION REVIEW 302, 303 (1965).

forward" born of the WCCME's "tireless" campaign. "In the century-long struggle to protect the rights of workers to bargain collectively with their employers, our public employees have been ignored. These new laws put Wisconsin in a leadership position in the nation." Reynolds was running for governor in the 1962 elections against Kuehn and would win, with AFSCME's support. A month before the election, Reynolds stated that the "objective of the law is to provide collective bargaining rights for municipal employees similar to that provided to employees in private industry. With this objective I agree."[106]

AFSCME linked the reform in Wisconsin law with an important victory at the national level. On January 17, 1962, President John F. Kennedy signed Federal Executive Order 10988, which gave limited bargaining rights to federal workers[107] "The sea of public controversy over the right of the public employee to belong to a labor union has been lapping against the dike of adverse legislative and legal opinion in Wisconsin and throughout the United States," the Union News proclaimed. "The dike was breached in Wisconsin. . . . Recently, President Kennedy. . . . breached the dike again. . . . The public employee movement is here to stay and thus must be dealt with realistically."[108]

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[106]Union News, March 1962, 1; id., May 1962, 2; id., Oct. 1962, 1.

[107]The executive order granted exclusive bargaining rights (over very limited topics) to a union chosen by a majority of employees in a bargaining unit; gave formal recognition to a union representing 10 percent of employees (entitling the union to consultation rights); and gave informal recognition to a union representing any employees (allowing it to express its views on policies affecting its members). PUBLIC EMPLOYEE, April 6, 1962, 4; id., Sept. 7, 1962, 7.

[108]Union News, March 1962, 4; Krause, 302; PUBLIC EMPLOYEE, May-June 1961, 2.

B. Results Under the 1962 Law and Beyond.

The WCCME quickly took advantage of various aspects of the new law, especially the WERB's enforcement powers. On July 27, 1962, the WERB told the Green Lake County Highway Commission to reinstate an employee fired because of anti-union discrimination. The first fact-finder's report involving AFSCME was issued on June 1, 1963, and the WCCME happily announced that it recommended a seven-cent per hour raise for Local 678, DePere City employees. Bargaining was improving. Oberbeck bragged that while in 1959 about 60 percent of WCCME's locals had signed contracts, by the fall of 1964 almost all had. Other public sector unions in Wisconsin, such as the American Federation of Teachers, also took advantage of the new law.[109]

AFSCME did encounter the limits of the new law as well, and fights over the scope of rights would continue for decades. For example, the WCCME was greatly annoyed when DePere City and some other employers simply rejected the fact-finders' recommendations. The Union News called for binding arbitration. In 1965 the law was expanded to extend limited bargaining rights to state employees. In 1966, however, the WCCME suffered a setback when the WERB held that the Wisconsin law did not actually impose a duty to bargain in good faith.[110]

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[109]Union News, Aug. 1962, 1, 2, 4; id., Sept.-Oct. 1964, 1; GOULDEN, 120; OZANNE, 76-77.

[110]Union News, Nov.-Dec. 1963, 4; id., Jan. 1963, 1, 4; id., Nov.-Dec. 1965, 1, citing Bill 389-A; SWOBODA AND SCHNEIDER, 57; Union News, March-April, 1966, 3; Anderson, 62; William Houlihan, *Interest Arbitration and Municipal Employee Bargaining: The Wisconsin Experience*, in JOYCE NAJITA AND JAMES STERN, EDS., COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES (2001), 72.

But by this time, legal reform on this issue had spread across the country. By 1966, sixteen states had enacted laws extending at least some organizing and bargaining rights to at least some public employees[111] Struggles continued in other states and in Wisconsin. In 1967, the Wisconsin Supreme Court held that a public employer's contractual agreement to submit grievances to binding arbitration was not an unlawful delegation of the city's legislative power. In 1971, the WCCME won legislative amendments providing for binding arbitration impasse procedures for firefighters and most police, requiring that both sides bargain in good faith, and allowing "agency shop" union security agreements. In 1977, Wisconsin enacted a law (backed by AFSCME) that provided for binding impasse arbitration for other local government employees and authorized a very limited right to strike, providing a relatively definite answer to the question both sides had struggled with for so long.[112]

Conclusion

The Wisconsin laws of 1959 and 1962 were both an opening salvo and a historic watershed in Wisconsin and the nation.[113] In 1966, Arvid Anderson wrote that the "fundamental

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[111]Allen Weisenfeld, *Collective Bargaining by Public Employees in the U.S.*, in GERALD SOMERS, ED., COLLECTIVE BARGAINING IN THE PUBLIC SERVICE (1966), 5, listing Alaska, California, Connecticut, Delaware, Rhode Island, Florida, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, Oregon, Washington, Wisconsin, and Wyoming.

[112]Local 1226, Rhinelander City Employees, AFSCME v. City of Rhinelander, 35 Wisc.2d 209 (1967); Union News, Nov.-Dec. 1971, 1; SWOBODA AND SCHNEIDER, 69; Chapt. 178, Laws of 1977 (S.B. 15); Jane Henkel, "Wisconsin Legislative Council Report No.3: Legislation Relating to Municipal Collective Bargaining" (April 6, 1981), State Historical Society, 3; Union News, Nov., 1976, 1; Houlihan, 73. The circumstances under which strikes are legal in Wisconsin are apparently so rare that this option has never been used. Id., 71, 84.

[113]See pages 1-2, infra.

question to be answered by this Wisconsin experiment is whether the principles and practices of collective bargaining. . . can be transferred in whole or in part to public employment. . . . [W]e think the tentative answer is 'yes.'" Indeed, in 1968 Ed Johnson, the executive director of the League of Municipalities, stated that "a pretty good law has been in effect for seven years which might stand some minor touch-ups but certainly is not in need of major surgery." Still, Johnson made a point of adding that the "word 'sovereignty' may be archaic, but I know of no better word to describe the responsibility elected officials have to their constituents. Such responsibility cannot be shared with representatives of public employees."[114] Similar objections, resonating with the history of public sector labor relations, are still made today, as disputes over the proper extent of public sector bargaining, impasse resolution procedures, and related rights have continued into the twenty-first century, still fought state-by-state, in legislatures. But after the Wisconsin laws, the legal rights of workers, public sector labor relations, the labor movement as a whole, and American politics have never been the same.

Even more broadly, this model of legal change represents some hope for liberals and progressives unlikely to win sweeping victories from the federal government or courts in at least the near term. Reforms in state legislation can have dramatic effects nation wide on politics and human rights. But such changes do not happen overnight. Among the lessons of the Wisconsin experience is that advocates of reform must simultaneously battle in the arenas of ideas, legal doctrine, and old-fashioned ground-level politics. The results may not be instantaneous, but they may eventually be rather astonishing.

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[114]Anderson, 62; Ed Johnson, *Emerging Problems in Labor Relations in Wisconsin Cities*

and Villages," in PAPERS ON BARGAINING RELATIONSHIPS AND PRACTICES (1968), 4, 6.