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Public Sector Labor Law and History: The Politics of Ancient History?

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PUBLIC SECTOR LABOR LAW AND HISTORY: THE POLITICS OF ANCIENT HISTORY?

*William A. Herbert**

Books Discussed

Seymour P. Lachman and Robert Polner, *The Man Who Saved New York: Hugh Carey and the Great Fiscal Crisis of 1975*

Sterling D. Spero, *Government as Employer*

Philip Dray, *There is Power in a Union: The Epic Story of Labor in America*

Despite the increased availability of information from electronic books, journals, and websites, our society's appetite and appreciation for accurate historical knowledge continues to wane. Instead, the daily informational diet for some is comprised of opinion, laced with facts, and served on a bed of partisanship. While such a diet does have peculiar advantages, such as satisfying the related hungers for ideological reaffirmation and conformity, it is not an antidote for historical amnesia or myopia. Instead, it has the unfortunate long-term societal consequence of decreasing intellectual curiosity and retarding the motivation to understand contemporary policy and legal disputes through the lessons of history.

The adage that learning begins at home has many meanings, depending upon one's family circumstance. Education, on the other hand, does not end with standardized test results, the receipt of academic degrees, or admission to the bar. Indeed, it takes a lifetime of study and practice to recognize the vastness of the unknown, the constant need for

* Deputy Chair and Counsel, New York State Public Employment Relations Board ("PERB"). From 1991 to 1997, the late Eric J. Schmertz was a member of the PERB Board. The views expressed in this article do not reflect the views of PERB or the State of New York. Mr. Herbert thanks Marty Malin and Judith A. Lee for their input and suggestions. The article is dedicated to Benjamin N. Cardozo School of Law Professor David Rudenstine who taught, among other things, an appreciation for the interrelationship between law, history, and public policy.

questioning, and the nuance needed for the resolution of problems.

While scholarship and education regarding legal theory have obvious value, the presentation of law as a subject unattached and unshaped by history, politics, economics, and practice does not prepare students for the legal workplace or to be constructive citizens. The teaching of law within an artificial and incurious vacuum does not increase the value of a law degree, nor does it enhance practical advocacy skills and provide the skills necessary to solve legal disputes and societal problems. Nevertheless, like jazz, legal scholarship has room for melodies, modalities, and abstractions, even though such literature is frequently unmindful of the blues.

Legal theory alone cannot explain the recent resurrection of the related, but distinct, subjects of public sector union representation and collective bargaining as burning public policy issues on the state and federal level.¹ Renewed disputes over these issues have important and relevant antecedents. Without historical knowledge about concerted activities by government workers, the reaction and approach by earlier political leaders, the mutuality inherent in agreements reached through collective bargaining and with a firm grounding in traditional labor law and principles, the renewed debate over public sector unionism has appeared, for some, in the form of an apparition.

The long-term existence of enforceable legal rights, like collective bargaining, has the tendency to cause complacency and an expectation of perpetuity. At the same time, committed opponents of such rights, and their descendents, await circumstances that provide an opportunity to end or substantially limit those rights. Over time, the historical, political, and economic forces that gave rise to the birth of the rights are frequently forgotten by both proponents and opponents. Therefore, the potential adverse consequences of eliminating or substantially changing established rights, including the resurrection of old problems and injustices, and the creation of new ones, are frequently absent from debate.

1. Alan Hyde has written a compelling meditation on the role and value of legal theory in the field of labor law. See Alan Hyde, *The Idea of the Idea of Labour Law: A Parable* 94 (Rutgers Sch. of Law-Newark Research Papers Series Paper No.: 091, 2011), available at <http://ssrn.com/abstract=1787611> (follow "One-Click Download" hyperlink) ("But up in the tower, the Idea of Labour Law grew increasingly baroque, mannered. Nothing tethered it any more. Nobody was really going to use The Idea of Labour Law to guide his or her own practice. Perhaps nobody ever did. The Idea of Labour Law became increasingly recondite, unrelated to the practice of legal officials, employers, or unions. Unrelated to earth, really.").

In the past year, there have been well-publicized state legislative initiatives to substantially end or restrict public sector collective bargaining in various states, including Wisconsin, Idaho, Ohio, Indiana, and Michigan. These actions have provoked pro-labor protests on a scale that has not been seen in decades.²

During the same period, union representation and collective bargaining rights have been extended in the federal sector to employees previously denied those rights, with less dispute or controversy. In November 2010, the Federal Labor Relations Authority (“FLRA”) decided to process representation petitions to determine the appropriate unit(s) for airport screeners working for the United States Department of Homeland Security, Transportation Security Administration (“TSA”), and to determine the exclusive collective representative for those employees.³ In its decision, the FLRA concluded that a 2003 TSA prohibition against collective bargaining for airport screeners, issued pursuant to the powers vested in the TSA by Congress,⁴ did not equally prohibit the screeners from having union representation for purposes other than collective bargaining under the Federal Service Labor-Management Relations Statute.⁵ The FLRA decision reversed an earlier agency decision, which had held that the absence of the right to collectively bargain precluded a statutory right to exclusive union representation for other purposes.⁶ More recently, the TSA modified its complete ban on collective bargaining to permit bargaining on performance management process, awards and recognition process, attendance management guidelines process, and shift bids.⁷ At the same

2. See Sabrina Tavernise & A.G. Sulzberger, *Thousands March on State Capitols as Union Fight Spreads*, N.Y. TIMES, Feb. 28, 2011, at A11, available at http://www.nytimes.com/2011/02/23/us/23ohio.html?_r=1&scp=9&sq=public%20sector%20protest%202011%20wisconsin&st=cse; Julia Edwards, *Union Protests Spread Across the U.S.*, NAT’L J. (Apr. 8, 2011, 3:55 PM), http://nationaljournal.com/union-protests-spread-across-the-u-s-20110318?mrefid=site_search; Reginald Fields, *Crowd Descends on Ohio Statehouse to Protest Changes to Collective Bargaining*, CLEVELAND.COM (Feb. 17, 2011, 12:25 PM), http://www.cleveland.com/open/index.ssf/2011/02/hundreds_descend_on_ohio_state.html; Nancy Folbre, *Revolt of the Cheeseheads*, N.Y. TIMES ECONOMIX (Feb. 28, 2011, 6:00 AM), <http://economix.blogs.nytimes.com/2011/02/28/revolt-of-the-cheeseheads/?scp=2&sq=public%20sector%20protests%202011%20wisconsin&st=cse>.

3. U.S. Dep’t of Homeland Sec. Transp. Sec. Admin., 65 F.L.R.A. 242, 242 (2010).

4. 65 F.L.R.A. at 242-43 (citing 49 U.S.C. § 44935 (2006)).

5. See *id.* at 245-46.

6. *Id.* at 245-47 (overruling U.S. Dep’t of Homeland Sec. Border and Transp. Sec. Directorate Transp. Sec. Admin., 59 F.L.R.A. 423 (2003)).

7. Memorandum from John S. Pistole, Administrator, TSA, to All TSA Employees (Feb. 4, 2011), available at <http://www.govexec.com/pdfs/02041112.pdf>.

time, TSA reinforced the prohibitions against bargaining over security policies and procedures, deployment of security personnel or equipment, wages, pensions and other forms of compensation, proficiency testing, job qualifications, and disciplinary standards. The administrative actions by the TSA and FLRA led to an internet and telephonic based representation election, under the auspices of the FLRA, involving 43,000 airport security screeners nationwide. The election was completed on April 20, 2011, but neither of the competing unions received a majority of votes cast, requiring the FLRA to order a runoff election.⁸

Analyses of these state and federal changes to the rights of public sector unionism and collective bargaining primarily focus on political questions, reflecting a general lack of available information on the history of public sector labor relations. The nescience with respect to this history is attributable, in part, to the general absence of ongoing historical and legal scholarship and the conscious decision by many law schools to abandon the teaching of traditional labor law. Furthermore, many labor historians and labor law scholars ignore the public sector.⁹ For various reasons, scholars prefer to focus their attention on other important subjects, such as the development of industrial unions, the decline in private sector union density in the age of globalization and deregulation, private sector labor law reform, and individual rights under federal and state employment laws. The relative scarcity of historical and legal scholarship regarding public sector labor issues is surprising in light of the 2010 statistics from the United States Department of Labor Bureau of Labor Statistics (“BLS”) demonstrating that the aggregate number of unionized public-sector workers exceeds the number of private sector workers in unions, with nationwide union density in the

8. See Memorandum from John S. Pistole, *supra* note 7. Steven Greenhouse, *Unions Woo Airport Security Screeners*, N.Y. TIMES, Apr. 16, 2011, at B1, available at <http://www.nytimes.com/2011/04/16/business/16screeners.html>; Steven Greenhouse, *Airport Screeners Need Runoff to Pick a Union*, N.Y. TIMES, Apr. 21, 2011 at B3, available at <http://www.nytimes.com/2011/04/21/business/21screener.html>. The administrative actions to grant limited collective bargaining rights to TSA workers are not without criticism. See John Fund, *How to Make Air Travel More Infuriating*, WALL ST. J. (Nov. 26, 2010), <http://online.wsj.com/article/SB10001424052748703572404575634750552843856.html>. In fact, several federal lawmakers have introduced legislation to prohibit collective bargaining by TSA employees. Emily Long, *TSA Workers Granted Limited Collective Bargaining Rights*, GOVERNMENTEXECUTIVE.COM (Feb. 4, 2011), <http://www.govexec.com/dailyfed/0211/02041112.htm>.

9. See Joseph A. McCartin, *Bringing the State's Workers In: Time to Rectify an Imbalanced US Labor Historiography*, 47 LAB. HIST. 73, 73-74 (2006).

public sector at 36.2%, and only 6.9% of all private sector workers unionized.¹⁰

Nevertheless, there are scholars and practitioners who write and teach about public sector labor law and history.¹¹ In fact, state legislative measures in Wisconsin, Ohio, Indiana, and Michigan to end or curtail public sector collective bargaining have provoked critical commentary from historians.¹² Other scholars have published articles that revive traditional policy arguments against public sector collective bargaining and that decry the growth and political strength of public sector unions today.¹³

This article discusses three books addressing varying aspects of public sector labor history. Two of the books were published in 2010 and apply very different approaches to the topic. The third book is a long-forgotten 1948 treatise on the subject, originally published at the dawn of public sector collective bargaining in the United States.

Last year, one major political leader referenced the first book under

10. News Release, Bureau of Labor Statistics, Union Members—2010 (Jan. 20, 2011), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

11. See generally JOSHUA B. FREEMAN, IN TRANSIT: THE TRANSIT WORKERS UNION IN NEW YORK CITY, 1933-1966 (1989); JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW AND THE STATE, 1900-1962 (2004); Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1 (2011); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735 (2009); Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L. REV. 1369 (2009); Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Implications*, 47 LOUISVILLE L. REV. 679 (2009).

12. See William Cronon, *Wisconsin's Radical Break*, N.Y. TIMES, Mar. 21, 2011, at A27; Melvyn Dubofsky, *Anti-Union Measures About Power, Not Money*, HIST. NEWS NETWORK, (Mar. 14, 2011, 3:32 PM), <http://hnn.us/articles/137543.html#>; Nelson Lichtenstein, *The Long History of Labor Bashing*, CHRON. REV., Mar. 6, 2011, available at <http://chronicle.com/article/The-Long-History-of-Labor/126555/>. Such scholarly commentary can be threatening to some, particularly when an academic opinion is adverse to an ideological or partisan position. See A.G. Sulzberger, *Wisconsin Professor's E-Mails Are Target of G.O.P. Records Request*, N.Y. TIMES, Mar. 26, 2011, available at <http://www.nytimes.com/2011/03/26/us/politics/26professor.html?hp>; *A Shabby Crusade in Wisconsin*, Editorial, N.Y. TIMES, Mar. 25, 2011, at A26, available at <http://www.nytimes.com/2011/03/28/opinion/28mon3.html?ref=opinion>.

13. See Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT'L AFF., Fall 2010, available at <http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>; Fred Siegel, Opinion, *How Public Unions Took Taxpayers Hostage*, WALL ST. J., Jan. 25, 2011, available at <http://online.wsj.com/article/SB10001424052748703909904576052150177439350.html>. At the same time, others have criticized the growth in the demonization of public servants during the current recession. See Peter Harkness, *Public Servants as Public Enemy #1*, GOVERNING, Mar. 2011, available at <http://www.governing.com/columns/potomac-chronicle/Public-Servants-Public-Enemy-1.html>.

consideration as part of his emphasis that history offers important lessons to help solve contemporary problems. During his successful campaign, New York Governor Andrew Cuomo discussed and distributed to labor leaders a book on former New York Governor Hugh S. Carey.¹⁴ The book is titled *The Man Who Saved New York: Hugh Carey and the Great Fiscal Crisis of 1975*, by Seymour P. Lachman and Robert Polner.¹⁵ It recounts Governor Carey's underappreciated leadership in responding to separate fiscal crises in 1975 involving a state public authority, the Urban Development Corporation, and the City of New York. Although each crisis had distinct origins, they metastasized during Carey's first six months following a change in the *status quo* by the financial community with respect to state and municipal borrowing, which had evolved over a period of more than a decade.

In the face of these fiscal storms, Carey commenced his administration with pragmatism and without threats, vitriol, or demonization.¹⁶ His first State of the State address set the tone that enabled New York's successful response to the two real and interrelated fiscal emergencies: "So we must first recognize the immediate burdens we inherit. We do this not in a spirit of recrimination, not in criticism of any man or party. There is responsibility enough to go around for all. But if we would master our fate, we must first acknowledge our condition."¹⁷

One of the most illuminating sections in Lachman and Polner's book is the description of how New York City's fiscal crisis was stabilized through the bold leadership of Governor Carey, and public sector labor leader Victor Gotbaum, and, to a lesser extent, Albert Shanker. Significantly, Carey did not utilize the crisis as a basis for attacking public sector unions for his own political gain or as grounds for seeking permanent changes to New York's system of public-sector collective bargaining.¹⁸ The negotiated labor-management agreements eventually reached were substantially aided by Carey's decision to be

14. Andrew Cuomo, *Labor, Be Part of the Solution: Public Employees Unions Must Make Sacrifices for Sake of the State*, N.Y. DAILY NEWS (Sept. 6, 2010), http://articles.nydailynews.com/2010-09-06/news/27074541_1_labor-day-unions-american-spirit.

15. SEYMOUR P. LACHMAN & ROBERT POLNER, *THE MAN WHO SAVED NEW YORK: HUGH CAREY AND THE GREAT FISCAL CRISIS OF 1975* (2010).

16. *See id.* at 82.

17. *Id.* at 83.

18. *See generally id.* at 99-122 (discussing Carey, Gotbaum, and Shanker's response to the fiscal crisis).

both candid and detailed about New York City's dire situation, along with the recognition by both sides that municipal bankruptcy was the worst possible option.¹⁹ The filing of a bankruptcy petition by New York City would have further impaired its ability to borrow, placed judicial limits on municipal operations, and would have probably resulted in a federal judge voiding the collective bargaining agreements with municipal unions.²⁰

After intense negotiations, major unions representing New York City workers reluctantly agreed to a graduated wage increase deferral schedule for most workers, with the highest paid workers forfeiting their negotiated salary increase.²¹ Later, the unions also agreed to support emergency legislation, the New York State Financial Emergency Act for the City of New York,²² which established the Emergency Financial Control Board ("EFCB"), with the power to impose a wage freeze on workers of New York City and other covered public entities.²³ Finally, those municipal unions agreed to utilize their members' pension funds to purchase substantial amounts of bonds issued by a state entity, the Municipal Assistance Corporation ("MAC"), for the purpose of

19. *See id.* at 118.

20. *Id.* at 118, 131-32; *see* JOSHUA B. FREEMAN, WORKING-CLASS NEW YORK: LIFE AND LABOR SINCE WORLD WAR II 263 (2000) (noting the "disastrous implications" of bankruptcy for city workers).

21. LACHMAN & POLNER, *supra* note 15, at 120; *see also* KIM MOODY, FROM WELFARE STATE TO REAL ESTATE: REGIME CHANGE IN NEW YORK CITY, 1974 TO THE PRESENT 43 (2007).

22. N.Y. UNCONSOL. LAW § 5401-20 (McKinney 2011) (originally enacted 1975 N.Y. Laws, chs. 868-70).

23. *See* LACHMAN & POLNER, *supra* note 15, at 132, 136-37. The orders by the EFCB suspending wage increases under unexpired collective bargaining agreements led to unsuccessful state court lawsuits by other New York City unions challenging the wage freeze under the Contract Clause of the United States Constitution. U.S. CONST. art. 1, § 10, cl. 1; *see Subway-Surface Supervisors Ass'n v. N.Y. City Transit Auth.*, 375 N.E.2d 384, 388-91 (N.Y. 1978); *Patrolmen's Benevolent Ass'n of N.Y. v. City of N.Y.*, 359 N.E.2d 1338, 1340-41 (N.Y. 1976). The Contract Clause states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." As Stephen F. Befort has shown, since the mid-1970s, the Contract Clause has been the basis for lawsuits in federal and state courts by public-sector unions challenging state legislation unilaterally altering contractual terms and conditions of employment in response to government financial crises. *See generally* Befort, *supra* note 11, at 23 (explaining the revitalization of the Contract Clause in the context of government contracts). The success of these lawsuits has been dependent upon objective evidence with respect to the necessity for the legislation along with the analytical standards applied by the particular court. Befort identifies the following primary factual issues considered by courts when applying the standards articulated in the seminal modern Contract Clause case, *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977): the severity and foreseeability of the fiscal crisis; the availability of less intrusive alternatives; the prospective, as opposed to retroactive, nature of the impairment; and the fair distribution of the burdens resulting from the crisis. *See* Befort, *supra* note 11, at 40-45.

providing cash to New York City to enable the refinancing of its debt.²⁴

Years later, a state official conceded that he learned during those negotiations “that unions knew more about what was going on than many of the city officials did.”²⁵ Similarly, investment banker Felix Rohatyn, a pivotal player for Carey during the crisis, acknowledged the persuasiveness of union advisor Jack Bigel during the negotiations based upon the latter’s knowledge of both municipal labor history and finance.²⁶ The fact that the crisis brought Rohatyn and Bigel together at the negotiation table is not a minor historical irony. Rohatyn’s career with the investment firm Lazard Frères commenced in 1949, the same year that Bigel’s career as a municipal union activist began its rapid decline during the destruction of his union—the United Public Workers of America—as part of the concerted purge of left-wing unions and activists from the American labor movement.²⁷ The trajectories of their respective careers that placed them at the table in the Americana Hotel in 1975 are worthy of a dramatic play.²⁸

The negotiated agreements reached in 1975 were never a certainty because of the intense economic and political forces facing state, city, and union leaders. Lachman and Polner provide a vivid portrait of the multiple obstacles faced by Governor Carey in Washington, Albany, and New York City, as he and his aides sought federal assistance, state remedial legislation, and voluntary changes in New York City’s fiscal management, all aimed at ending the steep and deepening contraction of available credit for the city.

In writing a book about Governor Carey and the 1975 fiscal crisis, the authors understandably focus their primary attention on telling the story from the perspectives of Carey administration officials and aides. To a lesser extent, the book references the issues facing the municipal union leaders, who generally opposed making any concessions regarding negotiated wages and benefits.²⁹ In light of the book’s purpose, it does not detail the internal pressures and obstacles faced by the union leaders, who ultimately agreed to compromises to avoid municipal bankruptcy.

24. See LACHMAN & POLNER, *supra* note 15, at 114-18, 126, 130-33.

25. *Id.* at 120 (quoting William Ellinghaus, former president of New York Telephone).

26. See *id.* at 120.

27. See William A. Herbert, *Card Check Labor Certification: Lessons from New York*, 74 ALB. L. REV. 93, 114 n.68, 123 n.105, 126 n.121 (2011).

28. Lachman and Polner quote Rohatyn describing Bigel as “tough as a boot . . . and the closest thing to a real Marxist I ever met.” LACHMAN & POLNER, *supra* note 15, at 120.

29. See *id.* at 112, 126.

Major concessions were made during negotiations, despite intense anger and frustration by rank and file union members to the adverse consequences of that fiscal crisis. Although the book mentions some of the employee protests in 1975, including a one-week teachers' strike, a two-day wildcat strike by 10,000 sanitation workers, and a widely distributed provocative flyer by the police and firefighters unions, the authors do not closely examine the interrelationship between those events and the ability of union leaders and their aides to reach agreements.³⁰ For example, unexplored are the internal forces that enabled Gotbaum and his union, District Council 37 AFSCME, to transition from spearheading demonstrations in New York and Washington to participating in concessionary bargaining at the Americana a few months later.³¹

The negotiations with the municipal unions, which helped avoid an historic default in New York City's financial obligations, took place within the context of a system of public sector collective bargaining in New York that was less than two decades old. Collective bargaining was introduced on a municipal level by New York City Mayor Robert F. Wagner, Jr. through a 1958 executive order, and it was extended statewide with the passage of the New York State Public Employees' Fair Employment Act and the New York City Collective Bargaining Law in 1967.³²

By the time of the 1975 fiscal crisis, public officials and labor leaders had experience together resolving disputes through collective bargaining, statutory impasse procedures, and negotiated grievance arbitration procedures. It is fair to conclude from Lachman and Polner's book that without collective bargaining in place, New York City would

30. *See id.* at 116-17, 138-39. There were significant differences between Gotbaum and Albert Shanker, president of the United Federation of Teachers ("UFT"), with the latter opposed to concessionary bargaining and reluctant to invest his unions' retirement funds in MAC bonds. *See* RICHARD D. KAHLBERG, *TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY* 180-87 (2007); FREEMAN, *supra* note 20, at 267-68 (discussing the successful pressure placed on Shanker to reverse his stand regarding the use of UFT pension funds to purchase MAC bonds as part of an emergency funding package).

31. MOODY, *supra* note 21, at 42-43. According to one account, the success of a New York demonstration against Citibank "and the anger it revealed seemed to frighten Gotbaum, too, who soon became one of the strongest union advocates of seeking an accommodation with the city and business leaders to avoid default." FREEMAN, *supra* note 20, at 261.

32. N.Y. CIV. SERV. LAW §§ 200-214; N.Y. CITY ADMIN. CODE §§ 12-301 to -316; *see also* Herbert, *supra* note 27, at 118-50 (discussing the events leading up to Mayor Robert F. Wagner, Jr.'s Executive Order and the later enactments of the Public Employees' Fair Employment Act and the New York City Collective Bargaining Law).

not have been able to avoid the potential ruinous impact of municipal bankruptcy on the city and its employees. Although the consequences of New York's severe economic crisis three decades ago, which included substantial layoffs and the diminution of wages, benefits, and working conditions for public workers, placed an immense strain on public sector labor-management relations, the rights and remedies under New York's system of collective bargaining survived despite fears to the contrary.³³

Without referencing the New York experience in 1975, a recent report by a group of academics in the field of labor-management relations emphasizes that collective bargaining constitutes an effective means for developing workplace solutions and innovations in the public sector, particularly during difficult financial times.³⁴ Another study, which focused on labor-management partnerships in public education, found that the genesis for long-term collaboration toward education reform was a crisis such as a strike or potential strike.³⁵ The abolition or curtailment of collective bargaining can stifle needed partnerships and dialogue in a time of crisis, and can cause public employee unions and employees to rely primarily upon mass-based strategies and tactics, such as continual organizing, demonstrations, boycotts, lobbying, and strikes.³⁶

33. See LACHMAN & POLNER, *supra* note 15, at 133; MOODY, *supra* note 21, at 43; FREEMAN, *supra* note 20, at 263-64.

34. DAVID LEWIN ET AL., EMPL. POL'Y RES. NETWORK, GETTING IT RIGHT: EMPIRICAL EVIDENCE AND POLICY IMPLICATIONS FROM RESEARCH ON PUBLIC-SECTOR UNIONISM AND COLLECTIVE BARGAINING, 19, 24 (2011), available at <http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/EPRN%20PS%20draft%203%2016%2011%20PM%20FINALtk-ml4%20edits.pdf>. In contrast, one critic of the 1975 concessions by the municipal unions has stated that "the Americana agreement was a turning point for the unions—away from potential opposition to one of cooperation, a stance that would affect collective bargaining for years." MOODY, *supra* note 21, at 45. Another historian describes the unions' 1975 approach as constituting a "narrow interest-group strategy" that continues today, thereby impairing the ability of those unions to lead a progressive movement against austerity measures in the face of the current financial crisis. See Michael Spear, *In the Shadows of the 1970s Fiscal Crisis: New York City's Municipal Unions In the Twenty-First Century*, 13 WORKING USA: J. LAB. & SOC'Y 351, 358, 361-62 (2010).

35. SAUL A. RUBENSTEIN & JOHN E. MCCARTHY, COLLABORATING ON SCHOOL REFORM: CREATING UNION-MANAGEMENT PARTNERSHIPS TO IMPROVE PUBLIC SCHOOL SYSTEMS 3-4 (2010), available at smlr.rutgers.edu/content/collaborating-school-reform.

36. See Hodges, *supra* note 11, at 755-56, 769-71; see also Todd C. Dvorak, Note, *Heeding "The Best of Prophets": Historical Perspective and Potential Reform of Public Sector Collective Bargaining in Indiana*, 85 IND. L.J. 701, 705-06 (2010). In response to the massive layoffs and other austerity measures imposed during the New York City fiscal crisis, some union leaders called for a general strike, while other leaders doubted whether that tactic would receive wide support among union members. FREEMAN, *supra* note 20, at 267.

In comparison to the public sector, the history and legal structure of private sector labor relations both before and after the National Labor Relations Act (“NLRA”)³⁷ and the Railway Labor Act of 1926³⁸ is relatively uniform nationwide. Public sector labor relations history and collective bargaining is a complicated patchwork of varying sizes, shapes and colors.³⁹ Each state has a unique political and legal history, with different policies regarding public sector collective bargaining. Many state collective bargaining laws differentiate between state and local employees and/or between occupations. To compound the complexity of the public sector field, federal sector labor relations and collective bargaining has its own distinct history and set of rules. Despite the vast array of federal, state, and local subjects, there is a scarcity of relevant and detailed historical and legal literature in the field.

Sterling D. Spero’s 1948 book *Government as Employer*⁴⁰ is a valuable prequel to the literature on public sector labor relations even for those who disagree with his perspectives and analyses regarding public sector unionism. Unlike most histories of American labor, the book focuses on the public sector, providing an important antidote to the dominance of the private sector narrative in United States labor historiography. While Spero discusses the historical relationship between the public and private sectors throughout his book, that interrelationship is presented as a means of enhancing and contextualizing the public sector narrative.

Spero was a professor of public administration at New York University for more than three decades, beginning in 1939.⁴¹ During his academic career, he published numerous books, articles, and studies on the relationship between the government and its workers and other labor-

37. 29 U.S.C. §§ 151-169 (2006).

38. 45 U.S.C. §§ 151-188 (2006).

39. See Hodges, *supra*, note 11, at 735-737. In 1967, Kurt L. Hanslowe described the wide variations in public sector labor policies at that time: “As might be expected in a field undergoing vigorous change, the policies of the states vary considerably along a spectrum ranging from prohibition of organized activity of public employees, to the authorization of collective negotiations, all the way to the *requirement* that units of government engage in collective bargaining when certain conditions are met by the employees and their organizations.” KURT L. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 49 (1967).

40. STERLING D. SPERO, *GOVERNMENT AS EMPLOYER* (1972) [hereinafter *GOVERNMENT AS EMPLOYER*].

41. Obituary, *Sterling Spero of N.Y.U Dead; Public Administration Professor*, N.Y. TIMES, Jan. 4, 1976, at L47.

related topics.⁴² The significance of Spero's *Government as Employer* is reflected by the fact that the book was the subject of reviews in major legal and political science journals at the time of its original publication.⁴³

His book is a rich treasure trove of historical information about labor relations at all levels of government. The book was published well before the enactment of *de jure* rights to public sector collective bargaining. At the time, the American Federation of Labor ("AFL") and the Congress of Industrial Organizations ("CIO") were actively competing to represent workers at all levels of government with increased public sector militancy and strikes nationwide. The book provides a wide-angle examination of the past, unaffected by subsequent events over the next six decades. His study of public sector unionism through 1948 provides important and relevant lessons, and also suggests the possible future path of contemporary efforts to restrict public sector unions and collective bargaining rights, and the countervailing wave of opposition aimed at preserving and expanding those rights.

The first part of the book examines the public policy arguments and assumptions tied to the government as sovereign with respect to efforts to limit the rights of government workers to organize, to strike, and to engage in political action. Spero takes the view that the legal structure for public sector employee rights should be equivalent to the private sector, except where the nature of a particular public job requires a different balance.⁴⁴

However, the heart of the book, and the most useful for our times,

42. See, e.g., STERLING DENHARD SPERO, *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY* (1971) [hereinafter *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY*]; STERLING D. SPERO & ABRAM L. HARRIS, *THE BLACK WORKER* (1959); Sterling D. Spero & Samuel Paul Puner, *Uncle Sam, Privileged Boss*, *THE NATION*, Jan. 8, 1938, at 41; Sterling D. Spero, *The State as Boss*, *THE NATION*, Sept. 20, 1941, at 246; Sterling D. Spero, *Collective Bargaining in Public Employment: Form and Scope*, 22 *PUB. ADMIN. REV.* 1 (1962); Sterling D. Spero & John M. Capozzola, *The Right to Strike*, *N.Y. TIMES*, Dec. 22, 1971, at L35.

43. Reinhard Bendix, *Review of Government as Employer*, 37 *CALIF. L. REV.* 336 (1949); Philip Taft, *Review of Government as Employer*, 64 *POL. SCI. Q.* 440 (1949); Arnold S. Zander, *Review of Government as Employer*, 58 *YALE L. J.* 508 (1949); *Recent Books*, 47 *MICH. L. REV.* 601 (1949).

44. A contemporary reader may be struck by the historical irony regarding the argument that public employees should have fewer rights to engage in collective action because the government is the sovereign. Under First and Fourth Amendment precedent over the past four decades, the Supreme Court has held that because a government employer is not acting in its sovereign capacity, it has greater powers to suppress employee speech and to conduct searches of employees. See *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598-99 (2008); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion).

is his history of the relationship between government officials and public sector unions and associations from the 19th century to the post-World War II era. In an early chapter, Spero demonstrates that the demands for a shorter workday for public employees, dating back to the 1830s, played an important role in the movement for an eight-hour workday in the United States.⁴⁵ For example, the City of Philadelphia enacted local legislation in 1835 limiting summer hours of municipal workers to twelve hours, with one hour for breakfast and one hour for dinner.⁴⁶ Petitions, lobbying, and strikes by federal shipyard workers resulted in President Martin Van Buren issuing an 1840 executive order prescribing a ten-hour day without a reduction in wages.⁴⁷ A seven-week strike in 1863 by unionized federal bookbinders at the Government Printing Office (“GPO”) in Washington, D.C. for an eight-hour day was unsuccessful.⁴⁸ However, a year-and-a-half after Appomattox, concerted union activities resulted in the Superintendent of Public Printing implementing an eight-hour day for GPO employees.⁴⁹ During Reconstruction, lobbying of Congress ultimately led to an eight-hour work day for all federal workers.⁵⁰

In subsequent chapters, Spero presents a history of unionizing efforts among different categories of government workers: civilian employees in the federal military branches; postal employees;⁵¹ federal white collar employees; state and local government employees; police; firefighters; and teachers. Each chapter contains substantial details about concerted activities by a particular group in various jurisdictions,

45. See GOVERNMENT AS EMPLOYER, *supra* note 40, at 77-92.

46. *Id.* at 78.

47. *Id.* at 79-83.

48. *Id.* at 85-86. In light of the breadth of the literature on Lincoln and the Civil War, it is surprising that the 1863 bookbinders’ strike has not received greater attention from historians. While Spero and one other historian have referenced the strike, it has not received the same level of attention as other events that took place during the Civil War, such as the draft riots of the same year. See Mark A. Lause, *Wartime Employment*, in *WOMEN IN THE AMERICAN CIVIL WAR* 80, 84-85 (Lisa Tendrich Frank ed., 2007). For example, the seven-week GPO strike is not mentioned in histories of the draft riots and other civilian acts adverse to Lincoln’s conduct of the war. See IVER BERNSTEIN, *THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR* (1990); MARK E. NEELY JR., *THE FATE OF LIBERTY; ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991); BARNET SCHECTER, *THE DEVIL’S OWN WORK: THE CIVIL WAR DRAFT RIOTS AND THE FIGHT TO RECONSTRUCT AMERICA* (2005); JENNIFER L. WEBER, *COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPONENTS IN THE NORTH* (2006).

49. GOVERNMENT AS EMPLOYER, *supra* note 40, at 79-83.

50. *Id.* at 87-92.

51. There is a far more comprehensive history of postal unions in Spero’s earlier book on the topic. See *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY*, *supra* note 42, at 79-95.

and the reaction of public officials to those activities, in the decades preceding the Cold War.

As part of his historical tour de force, Spero describes executive efforts to curb the right of public employees to petition legislative bodies for improvements in their working conditions, to deny or regulate the right of public sector organizing, including prohibiting affiliations with outside labor unions, and to prohibit public sector strikes.

The most well-known manifestation of the first form of restrictions, which are commonly referred to as gag orders, is the federal one initiated by Postmaster General Wilson in 1895 prohibiting postal workers from visiting Washington, D.C. “whether on leave with or without pay, for the purposes of influencing legislation before Congress.”⁵² Efforts to enforce a federal ban on employees petitioning Congress, however, did not commence in earnest until President Theodore Roosevelt and federal departmental leaders became irritated by persistent lobbying efforts for improved working conditions by postal worker unions.⁵³ Despite Roosevelt’s historical reputation as a reformer, and a self-described “strong believer in the rights of labor,”⁵⁴ his January 31, 1902 executive order broadened the legal ban on petitioning Congress for improved terms and conditions of employment to be applicable to all federal employees:

All officers and employees of the United States of every description serving in or under any of the Executive Departments and whether so serving in or out of Washington are hereby forbidden either direct or indirect, individually or through associations, to solicit an increase of pay, or to influence or to attempt to influence in their own interest any legislation whatever, either before Congress or its Committees, or in any way save through the heads of the Departments in or under which they serve, on penalty of dismissal from the government service.⁵⁵

The purpose of the 1902 order was self-evident. It was a broad assertion of executive power over the federal workforce aimed at restricting “the growing political power of the civil servants as a special

52. GOVERNMENT AS EMPLOYER, *supra*, note 40, at 118.

53. *Id.* at 121-22.

54. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 207 (1913).

55. John T. Woolley & Gerhard Peters, *Executive Order*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=69698#axzz1HjOA5wtA> (last visited May 16, 2011).

interest group”⁵⁶ and diminishing effective congressional oversight over federal departments. Despite the explicit terms of his executive order, Roosevelt was not embarrassed to state during a meeting with representatives of other federal workers that the order was targeted only at postal workers, and it was not intended to be applicable to them. Nevertheless, four years later, he reissued the order extending the ban to employees of “independent Government establishments” as well.⁵⁷ The federal ban on public employee lobbying remained in effect during the Taft Administration⁵⁸ and did not end until Congress enacted the Lloyd-LaFollette Act of 1912, which provided that “[t]he right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.”⁵⁹ As Spero demonstrates, efforts by public officials to ban public-sector unions and employees from lobbying for legislative action to improve their working conditions were not limited to the federal government.⁶⁰

Despite lay expectations to the contrary, the unconstitutionality of imposing discipline upon a public employee today for lobbying for improved terms and conditions remains uncertain. Over the past half-century, the Supreme Court has held that public employee speech regarding working conditions is not a matter of public concern and, therefore, unprotected under the free speech clause of the First

56. Note, *Dismissals of Public Employees for Petitioning Congress: Administrative Discipline and 5 U.S.C. Section 652(d)*, 74 YALE L.J. 1156, 1160 (1965).

57. *Bush v. Lucas*, 462 U.S. 367, 382 n.19 (1983) (citing Exec. Order No. 1142 (Nov. 26, 1909)); *GOVERNMENT AS EMPLOYER*, *supra* note 40, at 122. Without referencing his prohibition on public employees petitioning Congress for improved working conditions, Roosevelt states in his autobiography that: “we must recognize the fact that to-day the organization of labor into trade unions and federations is necessary, is beneficent, and is one of the greatest possible agencies in the attainment of a true industrial, as well as a true political, democracy in the United States.” ROOSEVELT, *supra* note 54, at 493-94. During his presidency, however, Roosevelt angered labor unions and their supporters with his insistence upon open shop at the GPO. NATHAN MILLER, *THEODORE ROOSEVELT: A LIFE* 378 (1992); EDMUND MORRIS, *THEODORE REX* 259, 266, 271 (2001). In addition, Roosevelt’s injudicious presidential remark regarding two leaders of the Western Federation of Miners facing murder charges in Idaho and Eugene V. Debs, led to strong public attacks upon Roosevelt. RAY GINGER, *THE BENDING CROSS* 251-52 (1949); J. ANTHONY LUCAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* 459-62 (1997).

58. Exec. Order No. 1142 (Nov. 26, 1909); *Bush v. Lucas*, 462 U.S. at 382-83.

59. Lloyd-LaFollette Act, ch. 389, § 6, 37 Stat. 555 (1912) (codified at 5 U.S.C. § 7211 (2006)).

60. *GOVERNMENT AS EMPLOYER*, *supra* note 40, at 58-59, 255.

Amendment.⁶¹ Indeed, the following 19th century dictum by Oliver Wendell Holmes, while a member of the Massachusetts Supreme Court, continues to have resiliency despite judicial recognition of expanded free speech rights in other contexts:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.⁶²

At present, the vast majority of United States circuit courts apply the public concern requirement to public employee claims under the right to petition clause.⁶³ The application of the public concern test excludes from First Amendment protections public employee speech regarding workplace conditions and issues. In March 2011, the Supreme Court heard oral argument in a case that will resolve the question of whether or how the public concern test applies to the right to petition by public employees under the First Amendment.⁶⁴ A broadly worded Court decision applying the public concern test to all public employee right to petition claims may be viewed by some state and local government

61. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Connick v. Myers*, 461 U.S. 138, 146-48 (1983).

62. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1982). The holding in *McAuliffe* with respect to the political activities of public employees has been largely rejected. See *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990); *Branti v. Finkel*, 445 U.S. 507, 514-15 (1980); *Elrod v. Burns*, 427 U.S. 347, 360 (1976). Nevertheless, the Holmes' dictum continues to be cited favorably in public employee free speech cases. See *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting); *Pappas v. Giuliani*, 290 F.3d 143, 147 (2d Cir. 2002), *cert. denied*, 539 U.S. 958 (2003). Permissible restrictions and punishments regarding political activities by public employees are greater than those permissible for private corporations under the First Amendment. Compare *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 102 (1947) ("Congress may regulate the political conduct of government employees within reasonable limits."), with *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 886 (2010) (holding that government may not suppress political speech on the basis of the speaker's corporate identity).

63. See *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007); *San Filippo v. Bongiovanni*, 30 F.3d 424, 440 n.19 (3d Cir. 1994).

64. *Guarnieri v. Duryea Borough*, 364 F. App'x 749 (3d Cir. 2010) *cert. granted*, 131 S. Ct. 456 (2010). The following is the question presented in the case: "Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue." *Duryea v. Guarnieri*, No. 09-01476 (3d Cir. Oct. 12, 2010), available at <http://www.supremecourt.gov/qp/09-01476qp.pdf>.

officials as a green light for the imposition of new gag orders to stifle public employee lobbying with respect to terms and conditions of employment.⁶⁵

Restrictions and prohibitions regarding public sector unionism can have unintended consequences, as the 1919 Boston police strike and its aftermath demonstrate. For over two decades prior to the strike, the AFL refused affiliations by local police unions and associations on the grounds that these groups were dominated by municipal officials, and because of the use of police departments in suppressing 19th century private sector strikes.⁶⁶ Following the AFL's abandonment of that policy at its 1919 convention, dozens of police unions and associations, including the Boston Social Club, applied for charter applications.⁶⁷ Prior to seeking affiliation, the Boston police were dissatisfied with the city's response to their demands for wage increases, shorter hours, and other improvements in working conditions.⁶⁸ Spero demonstrates, however, that those issues were not the immediate cause for over a thousand police officers participating in the two-day strike. Instead, the strike was precipitated by official efforts to enforce a ban on the police officers' union from associating with the AFL.

Three days after the Boston police learned that their charter application had been approved by the AFL, Boston Police Commissioner Edwin U. Curtis issued the following order:

No member of the force shall join or belong to any organization, club or body composed of present or present and past members of the force which is affiliated with or a part of any organization, club or body outside the department, except that a post of the Grand Army of the Republic, the United Spanish War Veterans, and the American Legion of World War Veterans may be formed within the department.⁶⁹

When the Boston Social Club refused to disaffiliate consistent with the directive, Commissioner Curtis sought to enforce the anti-affiliation order by suspending and terminating over a dozen police officers for insubordination. The unwillingness of local officials to countenance

65. However, executive orders that constitute a prior restraint on lobbying would be subject to heightened constitutional scrutiny. *See* *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468-70 (1995).

66. *See* *GOVERNMENT AS EMPLOYER*, *supra* note 40, at 251; *SLATER*, *supra* note 11, at 14-15.

67. *GOVERNMENT AS EMPLOYER*, *supra* note 40, at 256-58.

68. *Id.* at 252-56.

69. *Id.* at 258.

particular associational rights for police officers was the genesis of the strike.⁷⁰

In his narrative, Spero presents a very critical portrayal of then Massachusetts Governor Calvin Coolidge, describing his unwillingness to intervene to help avoid the strike, and then taking undue credit for suppressing the strike, which catapulted him to national fame and the presidency.⁷¹ While the police strike paid multiple political dividends for Coolidge, it had a significant adverse consequence on subsequent efforts at unionizing police officers, as well as other public employees.⁷² Anti-strike legislation was enacted in many jurisdictions in direct reaction to the Boston police strike, and in reaction to the subsequent wave of post-World War II public sector strikes.⁷³ In addition, the 1919 strike resulted in “the complete destruction of the policemen’s trade union movement,” with municipal officials throughout the country opposing unionization and collective bargaining for police officers.⁷⁴

This year, Wisconsin enacted legislation substantially curbing collective bargaining and other labor rights, which have existed for a half-century, for all state and local employees except those in public safety.⁷⁵ The public safety exception in Wisconsin’s legislation is an irony of history in light of the consequences of the Boston strike. The inclusion of the statutory exemption also undermines the purported rationale for the legislation: claims that the system of collective bargaining was broken and was the cause of the state’s current budget

70. *Id.* at 260-67.

71. *Id.* at 268-81. As Philip Dray demonstrates, Coolidge’s use of the police strike for his own political advantage was similar to the unsuccessful efforts by Seattle Mayor Ole Hanson following the Seattle general strike earlier in the same year. PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 372-74 (2010). Two more recent examples of elected officials successfully capitalizing on their strong negative responses to public-sector strikes were the popularity gains by New York City Mayor Edward I. Koch resulting from the 1980 New York City transit strike and President Ronald Reagan’s popularity increase stemming from his retaliatory actions in response to the air traffic controllers’ strike in 1981. *See* LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* 497 (1991); FREEMAN, *supra* note 20, at 284-87; SOFFER, *ED KOCH AND THE REBUILDING OF NEW YORK CITY* 212-19 (2010).

72. *See* SLATER, *supra* note 11, at 14.

73. *GOVERNMENT AS EMPLOYER*, *supra* note 40, at 29-31.

74. *Id.* at 281. In New York City, police officers were the last category of municipal employees to be granted the right of collective bargaining under Mayor Wagner’s Executive Order. *See* Herbert, *supra* note 27, at 131, 133, 137.

75. *See* Jeannette Neumann, *Sparing Police, Firefighters Makes Cost-Cutting Tough*, WALL ST. J. (Mar. 11, 2011), <http://online.wsj.com/article/SB10001424052748703726904576192952699125170.html>.

shortfall.⁷⁶ The exemption, however, has not deterred public safety unions from actively opposing the legislation and joining a boycott of companies supporting the Wisconsin governor.⁷⁷

During the renewed debate over public sector collective bargaining, critics have dusted off a 1937 letter by President Franklin D. Roosevelt to assert that he was a fellow opponent of public sector unions.⁷⁸ As Spero's book demonstrates, the use of this letter by opponents of public sector unionization is not a new phenomenon, nor is it particularly persuasive.⁷⁹

As early as 1919, when Roosevelt was Assistant Secretary of the Navy, he ordered local commanders to meet with union representatives, he prohibited subordinates from considering the time utilized by an employee union representative for processing grievances when making discharge selections, and he included an AFL representative on the department's wage board.⁸⁰

During a July 9, 1937 presidential press conference, Roosevelt stated that federal workers did not have the right to strike or the ability to engage in effective collective bargaining because Congress controlled their salaries.⁸¹ At a meeting one month later with leaders of two of the three unions representing federal workers, Roosevelt agreed to send a letter outlining his views on public sector unionism to Luther C. Steward, who headed the National Federation of Federal Workers, one of the three federal worker unions.⁸² In his August 16, 1937 letter to Steward, Roosevelt stated:

The desire of government employees for fair and adequate pay,

76. See Scott Walker, Governor, State of Wisconsin, State Address (Feb. 22, 2011), available at <http://staff.onmilwaukee.com/buzz/articles/walkeraddresstranscript022211.html>.

77. See Jeanne Cummings, *Cops, Firefighters Turn on GOP*, POLITICO (Apr 1, 2011, 4:35 AM), <http://www.politico.com/news/stories/0411/52359.html>; Natasha Vargas-Cooper, *Opinion, We Work Hard, but Who's Complaining?*, N.Y. TIMES (Apr. 2, 2011), <http://www.nytimes.com/2011/04/03/opinion/03vargascooper.html?ref=opinion>; Letter from James L. Palmer et al., to Tom Ellis (Mar. 10, 2011) available at <http://www.thewheelerreport.com/releases/March11/0310/0310wppa.pdf>.

78. See DiSalvo, *supra* note 43; Edward Achorn, *Why FDR Opposed Public Unions*, UNION LEADER (Mar. 9, 2011), <http://www.unionleader.com/article.aspx?headline=Edward+Achorn%3A+Why+FDR+opposed+public+unions&articleId=dcfe96cd-236e-43c8-8332-007bce796ea4>.

79. See GOVERNMENT AS EMPLOYER, *supra* note 40, at 346.

80. *Id.* at 100-01.

81. *Roosevelt Gives Views on Government Unions*, N.Y. TIMES, Aug. 11, 1937, at 4.

82. *Id.*

reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities for fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical, but meticulous attention should be paid to the special relationships and obligations of public servants to the public itself and to the government.

. . . .

Particularly I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. . . . Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an attempt of their part to prevent or obstruct the operations of Government until their demands are satisfied.⁸³

In the same letter, Roosevelt expressed his belief that “the process of collective bargaining, as usually understood, cannot be translated into the public service.”⁸⁴ He justified this view with the following:

The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employers alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures or rules in personnel matters.⁸⁵

The content of Roosevelt’s letter reveals two essential points. He opposed public-sector strikes and militant tactics by unions representing government workers. At that time, the CIO held a similar position.⁸⁶

83. John T. Woolley & Gerhard Peters, *Franklin D. Roosevelt: Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=15445#axzz1H3WQu6EX> (last visited May 23, 2011), see also *Roosevelt Bars Federal Strikes*, N.Y. TIMES, Sept. 6, 1937, at 14.

84. GOVERNMENT AS EMPLOYER, *supra* note 40 at 346.

85. *Id.*

86. See Herbert, *supra* note 27, at 102. In response to the letter, the United Federal Workers of America (“UFWA”), a CIO affiliate, issued a statement commending Roosevelt and describing

Secondly, Roosevelt believed that the scope of collective negotiations in the public sector is proscribed due to existing legislation setting the terms and conditions of government employment. In his letter, however, Roosevelt did not oppose public sector unions nor did he reject the possibility of future federal, state, or local legislative initiatives to extend collective bargaining to the public sector.⁸⁷

Other actions during the Roosevelt Administration, however, suggest that his views were not constant and that his comments are subject to more than one interpretation. As Spero mentions, on September 2, 1940, three years after his letter, Roosevelt gave a speech praising the collective bargaining agreements negotiated between the Tennessee Valley Authority (“TVA”) and multiple unions representing TVA employees. During his speech, given at the opening of the Chickamauga Dam, Roosevelt stated:

This Dam, all the dams built in this short space of years, stand as a monument to the productive partnership between management and labor, between citizens of all kinds working together in the public weal. Collective bargaining and efficiency have proceeded hand in hand.⁸⁸

The TVA negotiations were consistent with that federal government entity’s 1935 policy granting its employees the right to union representation for purposes of collective bargaining. The 1940 negotiated agreement contained provisions dealing with various issues, including wages and grievance procedures⁸⁹ Similarly, negotiations at

the letter as a “significant document” in the history of labor relations with federal government unions. *Roosevelt Bars Federal Strikes*, *supra* note 83, at 14. Thereafter, the letter was utilized by UFWA as part of its organizing drive among federal employees. *Lewis Union Gets Treasury Members*, N.Y. TIMES, Oct. 6, 1937, at 1.

87. As one commentator recognized in 1941, Roosevelt believed that there was “a right to collective bargaining over those minor matters where administrative officers have some discretion.” Note, *Government Employees and Unionism*, 54 HARV. L. REV. 1360, 1364 (1941). New York City Mayor Fiorello LaGuardia, however, actively opposed local legislative proposals in the 1930s and 1940s to grant collective bargaining rights to New York City employees. See Herbert, *supra* note 34, at 105 n.31.

88. Franklin D. Roosevelt, Address at Chickamauga Dam (Sep. 2, 1940), available at <http://quod.lib.umich.edu/cgi/t/text/pageviewer-idx?c=ppotpus;cc=ppotpus;q1=roosevelt%2C%20franklin;rgn=works;rgn1=author;idno=4926581.1940.001;didno=4926581.1940.001;view=image;seq=397;page=root;size=100>.

89. MICHAEL H. MOSKOW ET. AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 27 (1970). As these authors note, the TVA experience during the Roosevelt Administration had a

various federal agencies and authorities during the Roosevelt Administration, such as the National Labor Relations Board and the United States Housing Authority, resulted in written collective agreements.⁹⁰ Spero devotes a full chapter to the terms of those negotiated agreements.⁹¹

In determining the weight to be given to Roosevelt's letter or to the subsequent actions of his administration, it is important to also consider an observation by Frances Perkins, his key labor advisor. According to Perkins, Roosevelt followed trends in labor relations in only a superficial manner.⁹² In addition, Perkins observed that the process of collective bargaining was not well-suited for Roosevelt's particular personality:

Contrary to public belief, Roosevelt took almost no part in the labor disputes, strikes, and settlement of strikes that went on during his administration. He was not a good negotiator in a labor dispute. He was too imaginative. He had too many ideas, and they sometimes were not in harmony with ancient policies, prejudices, and habits of the union or industry he was dealing with. That made them think him impractical. Also, he was in too much of a hurry. It takes unlimited patience to wait for the slow process of negotiation in collective bargaining. . . . He always felt that they ought to come to their conclusions more quickly and concisely. But this is not the way of collective bargaining, as the most experienced negotiators, employers and workers, will agree.⁹³

Fundamentally, the use of a single presidential letter, speech or quotation can be misleading, and contradicts the old Kentucky saying that "if you want to know what a politician is up to, watch his feet, not his mouth."⁹⁴ While referencing Roosevelt's letter may have rhetorical

significant impact in the development of collective bargaining in the federal sector: "The TVA experience proved to employee organizations and other supporters of collective bargaining in public employment that collective bargaining for federal employees could be effective. At the same time it destroyed many of the shibboleths of the opponents to the wide-scale introduction of collective bargaining in the federal service." *Id.*

90. See GOVERNMENT AS EMPLOYER, *supra* note 40, at 346-47. The Works Progress Administration ("WPA") also guaranteed the right to organize and prohibited discrimination based upon union activity. Chad Alan Goldberg, *Contesting the Status of Relief Workers during the New Deal: The Workers Alliance of America and the Works Progress Administration, 1935-1941*, 29 SOC. SCI. HIST. 346 (2005).

91. See GOVERNMENT AS EMPLOYER, *supra* note 40, at 351-74.

92. See FRANCES PERKINS, THE ROOSEVELT I KNEW 326 (1946).

93. *Id.* at 303.

94. MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF, at v (1960).

value for individuals ideologically opposed to public employees having the rights to organize and engage in collective bargaining, it does not necessarily elevate the dialogue on public policy. In fact, a similar problem would arise by anyone seeking to use a selective quotation from a speech given by Ronald Reagan on September 1, 1980 to suggest that he was a supporter of public sector strikes and collective bargaining.

During his prepared speech in 1980, candidate Ronald Reagan praised the then striking Polish government shipyard workers and referred to the right of collective bargaining as an essential element of freedom:

These are the values inspiring those brave workers in Poland. The values that have inspired other dissidents under communist domination. *They remind us that where free unions and collective bargaining are forbidden, freedom is lost. They remind us that freedom is never more than one generation away from extinction. You and I must protect and preserve freedom here or it will not be passed on to our children.* Today the workers in Poland are showing a new generation not how high is the price of freedom, but how much it is worth that price.⁹⁵

It is likely that contemporary opponents of public-sector unions and collective bargaining who revere Reagan would treat this public statement from 1980 as a mere inconvenient distraction or as an unfortunate flashback to his days as president of the Screen Actors Guild.⁹⁶ They would prefer to remember him for his 1981 actions against the striking air traffic controllers represented by the Professional Air Traffic Controllers Organization (“PATCO”),⁹⁷ rather than the former California governor who signed the 1968 state law, Meyers-Milias-Brown Act, which extended collective bargaining rights to local

95. Ronald Reagan, Presidential Candidate, Defense of Collective Bargaining Speech at Liberty State Park (Sept. 1, 1980), *available at* http://www.truthdig.com/report/item/reagans_defense_of_collective_bargaining_20110311/ (emphasis added).

96. DRAY, *supra* note 71, at 618-19.

97. A month after giving his 1980 campaign speech, Reagan wrote to PATCO indicating his support for their efforts to obtain increased staffing, shorter hours and better equipment. Three days later, PATCO endorsed Reagan, believing that he would be a PATCO ally in the Oval Office. However, when PATCO represented employees went on strike in 1981, the Reagan Administration applied all legal means at its disposal to suppress the strike and punish the striking workers. *See* DRAY, *supra* note 71, at 625-630.

government employees.⁹⁸

One of the great values of Spero's book is that he examines the continuities and contradictions of historical trends in the history of public sector labor relations without the pitfall of overreliance on the actions or statements of particular individuals. Although written at a time when public sector collective bargaining was in its infancy, the book remains a valuable resource for present-day policy disputants, academics, and practitioners in the field of public sector labor relations. The book illustrates that the abolition of collective bargaining rights may be the impetus for the regeneration of a more aggressive form of public sector union activism, involving greater member mobilization tied to a broader American social movement for economic justice. At the same time, the book suggests that efforts to deprive collective bargaining to public employees may be followed by other possible executive and/or legislative efforts to interfere with the formation and affiliation of employee organizations, and to suppress the ability of public employees to petition for improved working conditions.

In *There is Power in a Union: The Epic Story of Labor in America*, Philip Dray has written an episodic history of American unionism from the rise of industrialization in the early 19th century. The book is a useful primer for the general reader by introducing significant events, organizations, and individuals in private sector labor history that are frequently not taught in the classroom. With his fine literary skills, Dray has woven together gripping stories about union organizing, particularly the campaigns among workers in the mills, mines, and railroads of the 19th century aimed at obtaining higher wages, improved benefits, and shorter hours. The book highlights trends in American labor history, including labor conflict, the changing role of government toward such conflict, the impact of discrimination and immigration, and the tensions between skilled and unskilled workers. The title, which is borrowed from a 1913 song by International Workers of the World organizer and songwriter Joe Hill, is indicative that the book has a tendency to romanticize leading figures from labor and radical history. Nevertheless, it is an important modern introduction to the individuals and events that helped shape the American labor movement.

Based upon the ambitious scope of the period covered, as well as

98. 1968 CAL. STAT. 2725, § 1 (codified at CAL. GOV'T CODE §§ 3500-3511 (West 2011)); see Joseph A. McCartin, *What's Really Going On in Wisconsin*, NEW REPUBLIC (Feb. 19, 2011), <http://www.tnr.com/article/politics/83829/wisconsin-public-employees-walker-negotiate>.

the complexity of the general topic, it is not surprising that the book centers primarily on dramatic events involving strikes and violence over the course of private sector labor history. Two-thirds of the book is devoted to the period up to the enactment of the NLRA in 1935, when a general federal right to organize in the private sector was codified. In the final third of the book, Dray squeezes together too many important subjects over seven decades. Each of those decades was filled with significant labor and political events. This part of the book has a rushed quality, and is the least satisfying. Complex subjects like the stabilization and destabilization of union-management relations since World War II, the impact of the Cold War and corrupt practices on the labor movement, the decline in private sector union membership, and labor's complex relationship with the civil rights, anti-war, and environmental movements deserve greater attention.

Dray's book has the same endemic flaw found in many histories of American labor: it barely mentions the public sector side of that history. For example, his lengthy discussion of the eight-hour day movement in the 19th century is silent regarding the portion of that movement that was successful at the GPO in 1866.⁹⁹ Furthermore, without supplemental historical knowledge, a reader might mistakenly believe that public sector labor history commenced in 1919 with the Boston police strike over the question of AFL affiliation. Rather than presenting the Boston police strike as part of a continuum of public sector labor activities until that point, including the Cincinnati police strike in September 1918,¹⁰⁰ Dray describes the strike as an outgrowth of "the toxic mixture of political paranoia over Bolsheviks and labor unions struggling to manage the postwar economic reconversion."¹⁰¹ His reference to other public sector unions at the time is limited to an oblique reference to the AFL affiliation of three dozen police unions nationwide and the Boston firefighters' union.¹⁰²

As part of his description of the Boston strike, Dray discusses the difficulties public sector unions have historically faced in gaining public support for strikes "not only because they deprive citizens of services integral to the public's safety and well-being, but because government

99. See DRAY, *supra* note 71, at 73, 76-77, 87, 126-28, 140-42. Dray devotes two sentences to the 1835 Philadelphia ordinance and Van Buren's 1840 executive order shortening the workday for public employees. See *id.* at 44.

100. GOVERNMENT AS EMPLOYER, *supra* note 40, at 252.

101. DRAY, *supra* note 71, at 376.

102. See *id.* at 376-82.

workers are compensated by tax dollars.”¹⁰³ In light of this observation, it is surprising that the primary episodes in public sector history described in his book are three strikes: the Boston police strike, the 1968 Memphis sanitation strike, and the PATCO strike. Although each of these strikes had major historical significance and provide multiple lessons, the strikes alone do not provide a framework for understanding the rise of public sector unionism since World War II. Indeed, two of the strikes backfired on the unions, and the third is remembered primarily as the reason Dr. Martin Luther King, Jr. was present in Memphis at the time of his *assassination*. In a book aimed at presenting the epic story of American labor, it would have been preferable for Dray to have given greater emphasis to labor’s numerous accomplishments in improving the standards of living and working conditions of public employees through collective bargaining, and in integrating the public workplace.

In a fragment of a sentence toward the end of his book, Dray mentions President John F. Kennedy’s Executive Order 10,988 in 1962.¹⁰⁴ The Executive Order granted federal workers a legal right to join and participate in unions, permitted recognition of a union as the exclusive representative of a unit of employees, and granted a right to engage in collective bargaining over personnel policies and practices.¹⁰⁵ Although Joseph McCartin has described Kennedy’s order as doing “more to organize millions of public workers in the 1960s than any other single event,”¹⁰⁶ the events leading up to the order, the substance of the order, and the results of the negotiations that immediately followed are not given any attention by Dray. Similarly, New York City’s 1958 executive order granting collective bargaining rights to 100,000 municipal workers is buried in a footnote¹⁰⁷ and the first state law to grant public sector collective bargaining rights goes unmentioned. That public sector law was enacted, in 1959, in Wisconsin.¹⁰⁸

In conclusion, the instantaneous availability of information in our electronic age is not a guarantor of a sober public policy dialogue nor is it an assurance of intellectual substance. Indeed, new media constitutes a convenient vehicle for the deliberate perpetuation of opinion disguised

103. *Id.* at 376-77.

104. *Id.* at 621.

105. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962).

106. McCartin, *supra* note 9, at 75.

107. See DRAY, *supra* note 71, at 721-22 n.78.

108. HANSLOWE, *supra* note 40, at 67-70.

in the form of misinformation. The three books discussed in this article contain historical information that can counterbalance the quality of the current debate on labor relations, laws and policies in the public sector. Although Dray's *There is Power in a Union* has only a limited discussion of public sector labor history, his vivid description of the intense private sector battles for labor rights, particularly before the New Deal, is a reminder of the old and possibly new societal problems that might result from the elimination of public sector collective bargaining laws.

To effectively present a public sector labor narrative requires scholarly emersion in relevant political and legal history. Further historical and legal scholarship with respect to government employment at the federal, state, and local levels can help change the tone and elevate the debate over public-sector unions and collective bargaining. Fundamentally accurate and accessible scholarship in these fields can be an essential tool in subverting the proposition that “[t]he long memory is the most radical idea in America.”¹⁰⁹

109. Amy Goodman, ‘Utah’ Phillips: *The music lives on*, SEATTLEPI.COM, May 29, 2008 available at <http://www.seattlepi.com/local/opinion/article/Utah-Phillips-The-music-lives-on-1274898.php>.