

Heeding “The Best of Prophets”: Historical Perspective and Potential Reform of Public Sector Collective Bargaining in Indiana

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“The best of Prophets of the future is the Past.”
– Lord Byron¹

INTRODUCTION

On December 11, 2008, Indiana Governor Mitch Daniels sent a letter to state employees. He thanked them for their hard work in helping to make Indiana “strong and solvent,” but informed them they would see no pay raises in 2009.² Later that day, the Governor publicly warned that this move was “only the first and hardly the last of [his] hard decisions” that might affect state employees.³ Conceding that workers would be “disappointed by these actions,” the Governor boasted that the state’s \$1.4 billion surplus would remain “untouched.”⁴ Governor Daniels knew that the employees could do little to oppose him. He knew this because he stripped them of their collective bargaining rights when he entered office in 2005.⁵

This Note explores how Indiana labor relations reached this low point and offers guidance about how to move forward. It argues that collective bargaining is in the best interest of both public employees *and* the state. It acknowledges the political complexities inherent in public-sector labor relations. This issue has significant implications for the thousands of Hoosiers working for their government and the millions more who make up the taxpaying public.⁶ Their interests demand reform.

To map the road ahead, reformers must study the paths already traveled. A significant portion of this Note is thus devoted to providing necessary political, historical, and economic context. After Part I addresses the unique nature of collective bargaining in the public sector, the focus shifts to an examination of the historical events that determined public workers’ bargaining rights. Part II provides an overview

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1. 8 George Gordon Byron, *Ravenna Journal: January 28th, 1821*, in ‘BORN FOR OPPOSITION’: BYRON’S LETTERS AND JOURNALS 37 (Leslie A. Marchand ed., 1978).

2. Letter from Mitch E. Daniels, Jr., Governor, State of Indiana, to State Employees [hereinafter Daniels’s Letter] (Dec. 11, 2008) (on file with the Indiana Law Journal).

3. Mary Beth Schneider, *Daniels Seeks to Freeze State Workers’ Pay*, INDYSTAR.COM, Dec. 11, 2008, <http://www.indystar.com/apps/pbcs.dll/article?AID=200881211044>.

4. Mary Beth Schneider, *Forecast Grim for Indiana*, IND. STAR, Dec. 12, 2008, at A1.

5. See *infra* Part II.E.1.

6. Vijay Kapoor, *Public Sector Labor Relations: Why it Should Matter to the Public and to Academia*, 5 U. PA. J. LAB. & EMP. L. 401, 401 (2003) (“No topic has more importance for millions of people yet has recently received such short shrift by academia than public sector labor law.”).

of similar developments in Indiana, with an eye to the national context. Finally, Part III applies lessons from history to the current situation of public employees in Indiana in a call for legislative and political reform.

I. PUBLIC SECTOR V. PRIVATE SECTOR: A CRITICAL DIFFERENCE?

Collective bargaining rights encompass (1) the right of employees to organize in appropriate bargaining units and select exclusive bargaining representatives, and (2) the obligation of employers to bargain with employees' exclusive representatives over designated subjects (e.g., salary, hours, and working conditions).

Opponents of collective bargaining attempt to highlight differences between public and private employment to justify limits on public workers' rights.⁷ They argue that, due to these differences, private sector rights should not be available to public workers. These arguments have taken many forms over the years in legislatures, courthouses, and public debates.

On the whole, however, any differences relevant to collective bargaining are immaterial and artificial.⁸ Arguments relying upon them often seem antiquated or overblown. The following discussion exposes the weaknesses of the most persistent of these arguments, and aims to dispense with the theoretical obstacles to securing collective bargaining rights for public employees.

A. State Sovereignty

One traditional obstacle for workers has been the state-sovereignty doctrine. This doctrine derives from the "old English common law notion that the 'king can do no wrong,'" and implies that public employees are "servants of the sovereign" who owe "extra loyalty" to their employer.⁹ Opponents of public-employee collective bargaining rights assert that the "traditional American notion of governmental supremacy" rejects any requirement that the government bargain with its servants.¹⁰

7. One difference concerns function. Private employers generally focus on profit, but the mission of public employers "is to provide a service deemed sufficiently important to have it provided by a branch of government." JOSEPH R. GRODIN, JUNE M. WEISBERGER & MARTIN H. MALIN, *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* 1 (2004). Another difference concerns employment conditions. "[M]any more terms and conditions of employment in the public sector are set by statute." *Id.* Market forces largely shape terms and conditions in the private sector, but public sector terms and conditions are matters of public policy determined by "governmental officials and shaped by political processes." Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441, 441-43 (2003).

8. The current status of public workers is the result of affirmative steps taken by legislators, executives, and judges. See JOSEPH SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962*, at 2 (2004) (describing the "distinctions between all government and all private employees in U.S. law and policy [as] neither natural nor inevitable").

9. Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1232 (1985).

10. Kapoor, *supra* note 6, at 402-03.

This view dominated the early days of public-sector labor relations, but has largely been discredited as "archaic and unworkable."¹¹ The expansion of government's role throughout the twentieth century "produced basic changes in thought[,] which make the foundations of any absolute notions of sovereignty obsolete."¹² Democratically elected officials are not infallible, and they serve at the will of the voters. Furthermore, their decisions often yield the best results when the decision-making process is open to input from various parties with conflicting interests.

B. Nondelegation

Another obstacle for workers comes from the idea that the government is prohibited from delegating authority "properly within its legislative discretion" to private parties.¹³ Nondelegation theorists argue that, because legislative bodies retain the sole authority to allot government expenditures, bargaining representatives—even governors and mayors—should not be able to take this power away from them.¹⁴ Public sector collective bargaining agreements are seen as more than mere contracts,¹⁵ because they are "inherently political" and deal with "[d]ecisions to reallocate individual income and redistribute government benefits."¹⁶

This theory may appear sound, but only when detached from reality. The actual experience of modern government runs counter to its hypothesis in two primary ways. First, governmental officials involved in bargaining or approving other agreements often retain "significant discretion."¹⁷ Most government contracts require the approval of legislative bodies, which means that public sector "negotiators [almost] never have authority to make binding commitments."¹⁸ Second, because governments already frequently enter into agreements with private business contractors, this theory is "at best self-serving and at worst hypocritical."¹⁹

11. Befort, *supra* note 9, at 1233.

12. Harry T. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 360–61 (1972) (arguing that the vague and conclusory nature of the state sovereignty doctrine reveals it to be "clearly a vestige from another era," which "is hardly a viable alternative in our modern society").

13. Befort, *supra* note 9, at 1232.

14. See Summers, *supra* note 7, at 443.

15. See *id.* at 442.

16. Mary Volk Gregory, *Proposed Public Sector Bargaining Legislation for Colorado*, 51 U. COLO. L. REV. 107, 127 (1979); see also GRODIN ET AL., *supra* note 7, at 18–19 ("Even basic issues, such as wages and fringe benefits, involve the allocation of scarce public resources and can affect tax rates and user fees.").

17. SLATER, *supra* note 8, at 79–80 ("One could easily distinguish such grants of *complete* discretion to private bodies from collective bargaining in the public sector, which involves compromises between the employer and the union, or from arbitration, which involves enforcing provisions in a collective agreement to which the government employer had already agreed." (emphasis in original)).

18. GRODIN ET AL., *supra* note 7, at 2 (adding that some legislative bodies may themselves lack the authority to enter into agreements if issues of nondelegation are involved).

19. SLATER, *supra* note 8, at 80 ("[S]tate and local governments 'have for over two centuries negotiated contracts with private sector entities without the express permission of the electorate.'" (quoting 1 JOHN MCBRIDE, THOMAS TOUHEY & BARBARA MCBRIDE, GOVERNMENT

C. Political Process

The political process-theory is directly tied to the issue of government delegation. Opponents of workers' rights fear that public-sector collective bargaining "might skew the democratic process by giving public sector unions an inordinate degree of power in comparison with other interest groups."²⁰ They fear the political process will be "significantly change[d] . . . [by] removing subjects of bargaining from effective public discussion."²¹

This fear is exaggerated.²² Public-employee unions "are no more threatening than other organized interest groups having multiple means of influencing political decision-making and perhaps are even relatively powerless in comparison to such groups."²³ Collective bargaining does not stifle public input that comes "through lobbying, political action committees, and elections."²⁴ Furthermore, union influence is often limited by structural checks like legislation²⁵ or ratification requirements.²⁶

D. Divided Loyalty

A final theoretical obstacle to public-sector collective bargaining arises from the notion that government employees must maintain allegiance to the state, and that membership in a labor organization—whose interests may run counter to those of the government—conflicts with this allegiance. This divided-loyalty theory is best illustrated by examining the role of strikes.

While the right to strike is "fundamental" to private-sector employees,²⁷ a strike by public employees "is sometimes characterized as a challenge to a state's sovereignty,

CONTRACTS: LAW, ADMINISTRATION, PROCEDURE (1984)).

20. Befort, *supra* note 9, at 1234–35; *see also* GRODIN ET AL., *supra* note 7, at 19 (stating that the fear of antidemocratic processes exists because bargaining "provides one interest group, the employees' union, with an avenue of access to the public decision making process that all other interest groups lack"); Gregory, *supra* note 16, at 113 ("Granting bargaining rights to public employees was said to redistribute political power by providing employees with two points of access to the decision-making process: the ballot box and the bargaining table. This gave them too much influence and disturbed the traditional balance of power.").

21. Summers, *supra* note 7, at 447.

22. *See, e.g.*, Befort, *supra* note 9, at 1256.

23. Gregory, *supra* note 16, at 113; *see also* Summers, *supra* note 7, at 447 (arguing that this influence is "not necessarily bad," because the unions "need the advantages they gain through collective bargaining to offset the voters' effective voice in determining the budget and taxes").

24. Befort, *supra* note 9, at 1261–62 (adding that, "[i]n the absence of collective bargaining, public officials do not hold a referendum on each issue they confront").

25. *See id* at 1256. "Political process considerations sometimes are embodied in statutes that either reserve certain matters for management determination or restrict mandatory bargaining to certain enumerated items." *Id.*; *see, e.g.*, CAL. GOV'T CODE § 3523 (West 1995 & Supp. 2009); FLA. STAT. ANN. § 286.011 (West 2008); WIS. STAT. ANN. § 111.70(4) (West 2007).

26. Gregory, *supra* note 16, at 128. Many agreements are not "final until ratified by the . . . legislative body. If the terms and issues are made public prior to the ratification vote but after the negotiation process has drawn to a close, there is ample opportunity for citizen input." *Id.*

27. Summers, *supra* note 7, at 450 ("While it may be limited in time, place, manner, and

bordering on insurrection."²⁸ Some fear that chaos and government paralysis will result if public workers walk off the job.²⁹ While this fear has been occasionally validated by past experiences with police and firefighters, "for most public employee strikes, the fear of paralysis or chaos is much greater than the pain of the reality."³⁰ In short, this concern—like the previous obstacles—may be overblown, and the trend of recent legislation may be quieting the fears.³¹

The trauma of past public employee strikes is nonetheless deeply ingrained into the collective conscience of government officials and the public. The Boston police strike of 1919 is a frequently cited catastrophe that "opponents of public sector unions would invoke . . . as a cautionary tale of the evils of such unions."³² The dispute arose because police officers wanted better wages, reasonable working hours, and healthy working conditions; tensions escalated quickly.³³ When the Boston police commissioner forbade officers from joining a union and then suspended nineteen officers for violating this policy, the officers struck.³⁴ The ensuing mayhem led to looting and violence, with hundreds of citizens injured and nine killed.³⁵

Such scenes are atypical, especially where employees have recourse to structural mechanisms like collective bargaining to channel their complaints. Contrary to critics' warnings, "[t]he collective bargaining process itself tends to eliminate strikes because it promotes compromise, brings a sense of responsibility to the unions, improves wages and working conditions by equalizing bargaining power, and delineates employers' and employees' rights and obligations."³⁶ When Wisconsin public workers fought for

purpose, a broad prohibition of the right to strike would be politically rejected, if not considered unconstitutional.").

28. *Id.* ("In the public sector, the starting assumption is . . . that public employees have no right to strike. . . . Employee recourse is solely through the political process where their demands for higher pay are pitted against the voters' resistance to increased taxes.").

29. *See id.* at 451. This fear is evidenced by the prohibition on public employee strikes in many states that provide statutory protection of collective bargaining rights. *See, e.g.,* Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313 (1993).

30. Summers, *supra* note 7, at 451. "[U]nlike private sector strikes, they do not cut off the income of the employer. The [government] continues to collect taxes, even though it is not providing services or paying wages and salaries." *Id.*

31. *See* Malin, *supra* note 29, at 313. "Two of the three most recent jurisdictions to adopt comprehensive public employee collective bargaining statutes, Illinois and Ohio, have granted public employees the right to strike." *Id.* Notably, Ohio's statute was passed not long after Toledo faced the chaos of a public-safety workers' strike that wreaked havoc on the city's services and residents. *See* Andrew Douglas, *Public Sector Employee Bargaining: Contract Negotiations and Case Law*, 55 CLEV. ST. L. REV. 1, 2–3 (2007).

32. SLATER, *supra* note 8, at 14.

33. *See id.* at 26.

34. *See id.*

35. *See id.* at 27.

36. Gregory, *supra* note 16, at 107–08; *see also* IND. CODE ANN. § 20-29-1-1(2) (West 2008) ("Recognition by school employers of the right of school employees to organize and acceptance of the principle and procedure of collective bargaining between school employers and school employee organizations can alleviate various forms of strife and unrest."); Edward L. Suntrup, *Enabling Legislation for Collective Action by Public Employees and the Veto of Indiana House Bill 1053*, 9 Ind. L. Rev. 994, 1007 (1976) ("[T]he peaceful implementation of the [collective bargaining] process is immensely enhanced by statutory protection.").

collective bargaining rights, “the risk of strikes in the public sector came from refusing to recognize unions, not from bargaining.”³⁷

Despite the strength of the arguments aimed at tearing down the theoretical obstacles to public employee collective bargaining, political realities can still stand in the way. The chaos in Boston served as a constant reminder of how “dangerous and destructive”³⁸ public sector unions could be and “significantly postponed this coming of the better day for public sector unions.”³⁹

II. A BRIEF HISTORY OF INDIANA PUBLIC SECTOR LABOR RELATIONS

Theory provides fodder for rhetoric, but history is the better guide to understanding the rights of public workers. Because the legal progress of labor relations is inextricably linked with the political, economic, and social history in which it develops, this Part provides a contextual background to public-sector labor relations in Indiana.

A. *The Background Story: The National Public Workers’ Movement*

Though meaningful developments did not begin in Indiana until the 1970s, the story of public workers’ rights in other states and at the national level is relevant to understanding Indiana’s progress.

The World War I era signaled the “false dawn of public sector organizing.”⁴⁰ As the size and scope of the federal government expanded, legislators and public workers seized the opportunity to fight for bargaining rights.⁴¹ The events in Boston in 1919,⁴² however, cut short this progress.⁴³ The legal and political fallout from the Boston police strike “lingered for decades,” and was partly responsible for depriving public employees of the rights gained by their private counterparts in the 1930s under the National Labor Relations Act.⁴⁴ Without this statutory protection, public workers confronted hostility in the courts,⁴⁵ mistrust in state legislatures,⁴⁶ and almost indifference from organized labor.⁴⁷

37. SLATER, *supra* note 8, at 164.

38. *Id.* at 14.

39. *Id.* at 35. The Boston strike “contributed far more than any other single event to the peculiarly American view that public sector labor relations were something entirely distinct from private sector labor relations.” *Id.* at 14.

40. *Id.* at 36.

41. In 1912, Congress passed the Lloyd-LaFollete Act, granting federal employees the right to organize. Ch. 389, § 6, 37 Stat. 555 (1912). Post Office Clerks organized later that same year, the American Federation of Teachers (AFT) formed in 1916, the National Association of Letter Carriers and the Railway Mail Carriers formed in 1917, and the International Association of Fire Fighters formed in 1918. All were affiliated with the American Federation of Labor (AFL). *See* SLATER, *supra* note 8, at 17–19.

42. *See supra* notes 32–35 and accompanying text.

43. *See* SLATER, *supra* note 8, at 36 (“[T]he rapid rate of unionization in the public sector . . . stagnated.”).

44. 29 U.S.C. §§ 151–69 (2006); GRODIN ET AL., *supra* note 7, at 5.

45. SLATER, *supra* note 8, at 72–73 (“[S]tate courts controlled most labor relations in state and local government employment for at least thirty years after the NLRA set federal statutory rules for private employment. . . . In the public sector through at least the late 1950s, judges

Deprived "of the standard weapons of labor," workers employed political tactics.⁴⁸ The expansion of public sector employment in the 1960s coincided with shifts in population demographics and public attitudes about governance that favored government-worker unions.⁴⁹ Public workers capitalized on the popularity of political pluralism, which "stressed that democracy functioned best when government facilitated resolutions of the interests of competing groups, including unions."⁵⁰ These efforts led to "an explosion of growth in public sector unionism."⁵¹ State governments began showing a willingness to "rethink their approaches to collective bargaining."⁵² Developments at the federal level mirrored this changing view of labor relations.⁵³

As union ranks swelled, public workers exercised political muscle by demanding bargaining rights.⁵⁴ The first major battleground came in Wisconsin. The Wisconsin Federation of Labor "passed a resolution pledging to 'exert constant efforts' to enact laws to rectify the 'discriminatory, unfair, and un-American' legal status of public workers."⁵⁵ Claiming that "the only remedy . . . is a political one," Wisconsin's

across the nation were unwilling to permit government employees to bargain or to strike, and courts routinely upheld bars on their organizing."). This hostility was justified by judges who were "quick to apply the anti-union doctrines and rhetoric" of nondelegation, political process, and divided loyalty. *Id.*; see also *supra* Part I; cf. *Ry. Mail Ass'n v. Murphy*, 44 N.Y.S.2d 601 (N.Y. Sup. Ct. 1943) (warning that public sector unions "would inevitably lead to chaos, dictators, and annihilation of representative government"), *rev'd*, *Ry. Mail Ass'n v. Corsi*, 47 N.Y.S.2d 404 (N.Y. App. Div. 1944); *Hutchinson v. Magee*, 122 A. 234, 234 (Pa. 1923) (describing public-sector unions as "subversive of the public service and detrimental to the general welfare").

46. See SLATER, *supra* note 8, at 94 ("After World War II cities and states finally began to pass laws which explicitly covered public sector unions, but these statutes were designed chiefly to provide draconian penalties for government workers who struck.").

47. GRODIN ET AL., *supra* note 7, at 14 ("In contrast to the private sector, organized labor did not view government workers as a particularly inviting target.").

48. SLATER, *supra* note 8, at 95–96.

49. See *id.* at 158–63; see also GRODIN ET AL., *supra* note 7, at 14.

50. SLATER, *supra* note 8, at 162.

51. GRODIN ET AL., *supra* note 7, at 3. The number of unionized state and local government employees rose "from 3,560,000 workers in 1946 to 6,380,000 in 1962." SLATER, *supra* note 8, at 162.

52. GRODIN ET AL., *supra* note 7, at 14.

53. "In 1962, President Kennedy issued Executive Order 10988, giving all federal employees the right to join organizations of their choosing and to bargain collectively on non-economic issues." Kapoor, *supra* note 6, at 403. President Lyndon B. Johnson's Great Society programs increased federal funding for "public services in health, education and social services." GRODIN ET AL., *supra* note 7, at 15. When Congress provided funds to local governments to purchase private mass-transit systems through the Urban Mass Transit Act in 1964, it "required that the collective bargaining rights of transit employees be preserved." *Id.*

54. See SLATER, *supra* note 8, at 164–65 (The President of the American Federation of State, County and Municipal Employees (AFSCME) advocated "'a shift in emphasis,' . . . to a 'clearly defined policy of gaining formal recognition and establishing . . . collective bargaining.'" (citation omitted)). The International Brotherhood of Teamsters, the Service Employees International Union (SEIU), and the AFL-CIO also "aggressively organized public employees" and developed similar political strategies. GRODIN ET AL., *supra* note 7, at 16.

55. SLATER, *supra* note 8, at 176–77.

determined public workers helped to elect a Democratic governor and state assembly.⁵⁶ The newly elected officials were sympathetic to the workers' cause, and enacted legislation over the next several years that granted collective bargaining rights to state and local government employees.⁵⁷

The impact of these laws was monumental. Public-sector labor relations entered an "enlightened era."⁵⁸ The success in Wisconsin reignited the struggle for public-workers' rights, both as "an opening salvo and a historic watershed in Wisconsin and the nation."⁵⁹ Referring to Wisconsin's law as "the Magna Carta for public employees," one labor leader claimed, "it meant as much as the NLRA did in private industry."⁶⁰ As the momentum quickly spread to other states,⁶¹ public workers' union membership and political influence skyrocketed.⁶² This "first crack" in the oppressive legal structure was a milestone: it was "the end of the beginning for public sector unions, and the start of an American labor movement increasingly composed of public workers."⁶³

After two decades of statutory successes, public employees again faced staunch opposition as the political pendulum swung back in the other direction. "[B]eginning with President Ronald Reagan in the 1980s and continuing into the Republican revolution of 1996, public outcries for smaller government and less aid to cities forced [government officials] to reduce spending. Unions also began to take some of the blame" for the financial crises that shook the economy.⁶⁴ This antiunion political sentiment still thrives in Indiana, where values of efficiency and privatization dominate the rhetoric and policies of elected state officials.⁶⁵

In 2009, public workers across the nation still largely depend upon specific legislation granting bargaining rights.⁶⁶ Most states grant these rights to at least some

56. *Id.* at 178–79. The workers and their unions also engaged in letter-writing and door-to-door campaigns, through which "legislators at home on weekends were deluged with visits by the local public employees." *Id.* at 182–83.

57. *See id.* at 183–91.

58. *Id.* at 183.

59. *Id.* at 191.

60. *Id.* at 189 (referring to the President of the Wisconsin Council of County and Municipal Employees) (internal quotation marks omitted).

61. *See id.* at 191 (Within one year, "sixteen states had enacted laws extending at least some organizing and bargaining rights to at least some public employees.").

62. *See* GRODIN ET AL., *supra* note 7, at 3 (noting that AFSCME membership "quadrupled in size in twenty years, growing from 254,000 members in 1965 to 1,005,000 members in 1985").

63. SLATER, *supra* note 8, at 158.

64. Kapoor, *supra* note 6, at 404.

65. One of the most highly publicized acts of privatization of state functions occurred in 2006, when the state leased the Indiana Toll Road to a private consortium. Tom Coyne, *Indiana Lawmakers at Odds Over Toll Road*, WASH. POST.COM, June 27, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/27/AR2007062700395.html>. Though the plan for the seventy-five year, \$3.8 billion lease was met with hostility across much of the state, Governor Mitch Daniels justified it as a "great deal" for the state. *Id.*

66. *See* Kapoor, *supra* note 6, at 404 ("[N]o constitutional right requires municipalities or states to bargain" with employee unions.).

of their employees.⁶⁷ However, coverage is far from comprehensive.⁶⁸ In the end, while "[t]he law in the United States reflects a clear policy choice favoring public employee collective bargaining,"⁶⁹ the legal history and politics within each state is controlling. Because public-sector labor relations are intimately tied to local political realities, any state-level reform must be accompanied by analysis of that state's own labor history.

B. The Birth of the Indiana Movement: Victory and Setback in the 1970s

Indiana's public workers missed out on the progress of the 1960s. Prior to 1973, the Indiana Code "dealt generally with the regulation of labor relations in Indiana, but did not enable collective action" for public-sector employees.⁷⁰ The 1970s marked a new era for public-sector collective bargaining in Indiana, and progress came in the form of legislation.

The state legislature enacted Public Law 217 in 1973, granting collective bargaining rights to public school teachers.⁷¹ Though not the end of the road in securing an equal footing for public workers,⁷² it was definitely a step in the right direction.

In 1975, the General Assembly passed House Bill 1053, which intended to expand public sector collective bargaining rights to police officers and firefighters.⁷³ Although Governor Otis Bowen vetoed the bill, his veto was more instructive than destructive. Bowen complained of structural and wording problems in the bill but seemed fully in favor of the spirit of the legislation.⁷⁴ This was a subtle, yet significant, advancement of

67. Many states have comprehensive public-employee labor-relations statutes. *See, e.g.*, CAL. GOV'T CODE §§ 3500–3510 (West 2009); FLA. STAT. ANN. §§ 447.201–.609 (West 2008); IOWA CODE ANN. §§ 20.1–.31 (West 2008); N.Y. CIV. SERV. LAW §§ 200–214 (McKinney 2008). Some others grant statutory bargaining rights to specific groups of employees. *See, e.g.*, GA. CODE ANN. § 25-5-3 (West 2008) (firefighters); IDAHO CODE ANN. § 33-1271, 44-1802 (2008) (teachers and firefighters, respectively). A few states ban public-sector collective bargaining entirely. *See, e.g.*, N.C. GEN. STAT. ANN. §§ 95–98 (West 2008); Commonwealth v. County Bd., 232 S.E.2d 30, 40 (Va. 1977); *see also* Malin, *supra* note 29, at 313 n.13.

68. While three of Indiana's neighbors—Illinois, Michigan, and Ohio—require the state to bargain with almost all of their employees, *see* 5 ILL. COMP. STAT. ANN. §§ 315/1 to 315/27 (West 2008); MICH. COMP. LAWS ANN. §§ 423.201–.216 (West 2008); OHIO REV. CODE ANN. §§ 4117.01–.24 (West 2008), another neighbor—Kentucky—requires bargaining only with selected public-safety employees, KY. REV. STAT. ANN. §§ 78.470, 345.010–.130 (West 2008) (county police and firefighters, respectively).

69. Malin, *supra* note 29, at 313 n.13.

70. Suntrup, *supra* note 36, at 995.

71. IND. CODE §§ 20-7.5-1-1 to -14 (1973) (repealed 2005). Though the original statute was replaced by IND. CODE §§ 20-29-1-1 to -5, it still protected the collective bargaining rights of certified teachers working for public schools.

72. The law was not necessarily even the end of the road for teachers in securing meaningful collective bargaining rights. *See* Lisa B. Bingham, *Teacher Bargaining in Indiana: The Courts and the Board on the Road Less Traveled*, 27 IND. L. REV. 989, 1032 (1994) (arguing, upon reflection of the law's twenty years in existence, that "a broader scope of bargaining, combined with a brighter line as to managerial prerogative, might enhance labor relations and serve the public interest").

73. *See* Suntrup, *supra* note 36, at 996.

74. *See Id.* at 996–1000.

the cause of Indiana's public workers. A Republican Governor not only showed support for extending collective bargaining rights to state public-safety employees; he assumed that Indiana's other public employees were entitled to these rights.⁷⁵

Later that same year, the enactment of the Public Employee Labor Relations Act (PELRA) embodied this sentiment.⁷⁶ Like the landmark statute passed in Wisconsin a decade earlier, PELRA ushered Indiana into the progressive column of government employers who valued the rights of their employees. The Act required the state to recognize and bargain with exclusive representatives of most of its employees.⁷⁷ It also directed the Educational Employment Relations Board (EERB)—established to administer teacher collective bargaining—to administer public-sector labor relations by determining the composition of bargaining units and adjudicating labor disputes.⁷⁸

PELRA contained several other provisions, however, which would lead to the entire Act's undoing. "Section 8(g) of the law authorized judicial review for any 'person aggrieved' by any 'final order' of the EERB. Sections 8(d) and 8(i) of the statute, however, specifically excluded from the court consideration or review of the EERB's determination of employee organization majority in an appropriate unit."⁷⁹ This provision meant that the determination and certification of a state employees' organization as exclusive bargaining representative were expressly excluded from the purview of judicial review.

The constitutionality of this aspect of PELRA came before the Indiana Supreme Court in *Indiana Educational Employment Relations Board v. Benton Community School Corp.*⁸⁰ A school board contested the EERB's determination of an appropriate bargaining unit for noncertified school employees. EERB argued that its preelection determination was subject to judicial review, but the court disagreed.⁸¹ The court held that the Act violated article 1, section 12, of the Indiana Constitution because it precluded judicial review of EERB preelection decisions.⁸² Despite the limited scope

75. See *id.* at 996–97 n.13 (quoting Message from the Governor, 1975 IND. HOUSE J. 1031–32). The Governor's message to legislators described the bill as "well-meaning but open-ended legislation," adding that "[i]t is only fair that policemen and firemen be allowed to exercise collective bargaining privileges as are granted to other public employees." *Id.*

76. IND. CODE §§ 22-6-4-1 to -13 (1975), *invalidated by* Ind. Educ. Employment Relations Bd. v. Benton Cmty. Sch. Corp., 365 N.E.2d 752 (Ind. 1977).

77. The Act applied to all public employees, except policemen, firemen, professional engineers, university faculty members, certificated employees of school corporations (who were covered by Public Law 217), confidential employees, or municipal/county health-care institution employees. *Id.* § 22-6-4-1(c).

78. See *id.*

79. Edward P. Archer, *Labor Law: Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 212, 212–13 (1979).

80. 365 N.E.2d 752 (Ind. 1977).

81. EERB's contention relied upon the applicability of the Indiana Administrative Adjudication Act (IAAA), IND. CODE § 4-22-1-14 (1971), to its decisions, but the court "argued that . . . such representation questions were not 'final' administrative orders as would be ripe for review" under the IAAA. Archer, *supra* note 79, at 213. This reasoning was strengthened by the fact that PELRA lacked a provision specifically allowing for appeals to be taken under the IAAA, while Public Law 217 included such language. See *Benton Cmty. Sch. Corp.*, 365 N.E.2d at 758–59.

82. See Archer, *supra* note 79, at 212. The court was guided by its holding in *Warren v.*

of PELRA's constitutional flaws, the court refused to sever the unconstitutional provisions from the rest of the Act, because the provisions apparently were "so unique and shape the fundamental character of Indiana's public employee bargaining statute."⁸³ Therefore, the court voided the entire Act.

"The impact of this decision on collective bargaining for Indiana public employees [wa]s, of course, devastating."⁸⁴ Workers, voters, organized labor, and elected officials attempted to use the democratic process to usher in a new era of public sector labor relations. *Benton Community* thwarted those attempts. The Indiana Supreme Court erased PELRA from the books. Public employees were faced again with the reality of employment without collective bargaining rights. They would live with this reality for over another decade.

C. The Judiciary's Effect on Indiana Public Workers: Retrenchment in the 1980s

While legislative action dominated Indiana's progress in public-sector labor relations in the 1970s, judicial action dominated its regress in the 1980s. Indiana state court decisions after *Benton Community* signaled "a retrenchment from prior decisions which permitted public employee bargaining even absent statutory authorization."⁸⁵

The courts acted by curtailing public employees' constitutional protections. In *County Department of Public Welfare v. American Federation of State, County and Municipal Employees*,⁸⁶ the Indiana Court of Appeals for the Third District addressed whether a county had to continue negotiations—which began before *Benton Community* invalidated PELRA—with its employees' exclusive bargaining representative.⁸⁷ Though the court based its decision upon the law of contract,⁸⁸ in dicta it attacked the premise of a constitutional right to engage in collective bargaining.⁸⁹ Later that year, the same court explicitly addressed collective bargaining

Ind. Telephone Co., 26 N.E.2d 399 (Ind. 1940). See *Benton Cmty. Sch. Corp.*, 365 N.E.2d at 760.

83. *Benton Cmty. Sch. Corp.*, 365 N.E.2d at 761. Justice De Bruler's dissent agreed that the provisions were unconstitutional, but argued that they should have been severed from the remainder of the Act. See *id.* at 762–63 (De Bruler, J., dissenting).

84. Archer, *supra* note 79, at 214.

85. Edward P. Archer, *Labor Law: Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 269, 280 (1982).

86. 416 N.E.2d 153 (Ind. Ct. App. 1981).

87. *Id.*

88. See *id.* at 156 (holding that the prior agreement between the parties was "illusory and . . . unenforceable," since it was "at most an agreement to make an agreement").

89. See *id.* at 155 ("The common law of this state does not, of course, grant to one group of individuals the right to impose their will upon another group merely because the whole number work for the same employer and the former group constitute something more than 50% of the total. . . . Similarly, the notion that between employer and employee there should be not only the right but a duty to bargain over the terms of employment is a creature of statute." (emphasis omitted)). Despite the persuasive Indiana authority for the proposition that, even absent statutory authority, a public employer may enter into a collective bargaining agreement providing for exclusive representation of all employees by their majority representative, the court found ways to distinguish this case from that precedent and struck another blow at public workers' rights. *Id.* at 157–60 (Slaton, J., concurring).

in *Michigan City Area Schools v. Siddall*.⁹⁰ The court returned to the constitutional question, highlighting the “critical” distinction between employees’ constitutional right to organize, and the lack of a constitutional duty on the employer to collectively bargain.⁹¹ The court held that a state does not engage in any “illegal interference . . . where [it] does no more than refuse to recognize . . . some employee selected organization or its agents.”⁹²

Three primary lessons emerged from these cases. First, Indiana state employees could join a union, but their employer did not have to recognize that union. Second, state employees could engage in collective bargaining, but could not compel their employer to bargain. Third, if the government voluntarily agreed to collective bargaining, it could “impose qualifications and restrictions on its participation.”⁹³ This approach created a distorted view of collective bargaining rights. It also rendered the prospect of bilateral labor agreements a distant dream. Though public workers retained a constitutional right to join unions, they incurred “substantial difficulties . . . without the benefit of an authorizing statute.”⁹⁴

Even when the government agreed to bargain with its employees, any subsequent agreements were at risk of being voided by the judiciary. In *Fort Wayne Patrolman’s Benevolent Ass’n, Inc. v. City of Fort Wayne*,⁹⁵ the Fourth District Court of Appeals voided an agreement between a Mayor and a police officers’ union.⁹⁶ Adhering to a “very restrictive interpretation of the authority of public employers to bargain,”⁹⁷ the court declared the Mayor’s actions a “usurpation of unwarranted power, not authorized by the Common Council’s resolution or any legislative enactment of the State of Indiana.”⁹⁸ This decision sent a message to any party involved in public sector collective bargaining that they “must be extremely careful to obtain approval of any agreement reached from all governmental bodies which control the public employees

90. 427 N.E.2d 464 (Ind. Ct. App. 1981).

91. *Id.* at 466–67 (referring implicitly to the voiding of PELRA, the court stated, “[i]f there is no legal obligation statutorily or at common law to engage in good faith collective bargaining . . . the employer has the same freedom of choice to deal with or reject dealing with a ‘bargaining’ agent”).

92. *Id.* at 467 (emphasis omitted).

93. Edward P. Archer, *Labor Law: Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 225, 229 (1983). These lessons were confirmed by the Third District in *City of Michigan City v. Fraternal Order of Police*, which held that “the law imposes no duty upon the City to bargain collectively with its policemen or firemen, or to accredit (recognize) any organization that wishes to serve as their spokesman.” 505 N.E.2d 159, 160 (Ind. Ct. App. 1987).

94. Archer, *supra* note 85, at 279.

95. 408 N.E.2d 1295 (Ind. Ct. App. 1980).

96. *Id.*

97. Archer, *supra* note 85, at 280.

98. *Fort Wayne Patrolman’s Benevolent Ass’n*, 408 N.E.2d at 1302 (The Mayor of Fort Wayne recognized the Patrolman’s Benevolent Association (PBA) as the exclusive bargaining representative of the city’s police officers. After the Fort Wayne Common Council resolved to approve the Mayor’s recognition, the Mayor entered into an agreement with PBA. Relying on a state law that required any change in city employees’ salaries to be “fixed by the mayor subject to the approval of the common council,” the court found that the Mayor had not received the council’s approval—despite the council’s earlier resolution—to enter the agreement).

covered by the agreement: executive, administrative, and perhaps even legislative."⁹⁹ Overlapping state statutes and municipal ordinances, however, often makes it difficult to determine the approval needed.¹⁰⁰

This string of decisions led Professor Edward P. Archer to observe that, if these cases "set the trend, the need for a public employees' bargaining bill is great if any meaningful bargaining is to occur."¹⁰¹ The trend continued, and the years ticked by without another statute. But as the 1980s came to a close, the political winds began shifting again.

D. Indiana's Alternative Path: Executive Orders from 1990–2004

After over a decade of indifference, public-sector labor relations in Indiana returned to the spotlight.¹⁰² Indiana's first Democratic Governor in twenty years, Evan Bayh, "pushed a legislative fix" to secure collective bargaining rights for the majority of the state's workers.¹⁰³

Unfortunately for the workers, conditions in the economy were not ripe for such a fix.¹⁰⁴ Furthermore, private-sector labor-management conflict was on the upswing across the nation.¹⁰⁵ This made employers balk at the prospect of extending rights to workers and voters less sympathetic to the workers' cause. "Ultimately . . . no collective bargaining legislation passed . . ."¹⁰⁶

99. Archer, *supra* note 85, at 280.

100. Although *Fort Wayne Patrolman's Benevolent Association* concerned municipal government, "[s]tructural problems are more complex on the state level than on the local level." Befort, *supra* note 9, at 1242. "[C]ollective bargaining in the public sector requires an accommodation between bargaining legislation and a host of other statutes that frequently are not compatible with private sector notions of bargaining." *Id.* at 1235. Often, "statutory provisions . . . provide for a diffused management structure in which multiple officers or agencies share decision-making authority concerning public employee terms and conditions of employment, causing confusion over which entity is the "public employer." *Id.* at 1235. "[S]tatutes in the public sector frequently vest multiple agencies or officials with shared responsibility over employment matters. Identifying the appropriate "public employer" in this context is no easy task." *Id.* at 1236.

101. Archer, *supra* note 85, at 273.

102. During the 1990 legislative session, "the right of state and local government employees to bargain collectively over the terms and conditions of their employment was the subject of much legislative debate and media attention." Mitzi H. Martin & Todd M. Nierman, *Survey of Recent Developments in Indiana Employment Law*, 24 IND. L. REV. 951, 967 (1991).

103. *White House 2008—The Democrats Bayh: The New Labor Dem*, HOTLINE, May 4, 2006 [hereinafter *New Labor Dem*].

104. See William M. Davis, *Collective Bargaining in 1990: Health Care Cost a Common Issue*, MONTHLY LABOR REVIEW, Jan. 1990, at 3, 3–5 ("As the 1980's [sic] drew to a close, signs pointed to continuing but slower economic growth. . . . Meanwhile, the budget and trade deficits were continuing major concerns . . . [as well as] the steep rise in the cost of health benefits.").

105. See *id.* at 5 ("The general decline in labor-management conflict (as measured by work stoppage activity) that prevailed in the 1980's [sic] suffered a setback as the decade closed.").

106. Martin & Nierman, *supra* note 102, at 967.

Governor Bayh took an alternative route, which was similar to that taken by President Kennedy in 1962.¹⁰⁷ On July 1, 1990, “[o]ver the objection of [the] business lobby, he signed an executive order granting 30,000 state employees collective bargaining rights.”¹⁰⁸ Although this order fell short of the legislative goal workers sought, it was a victory nonetheless. It also “sparked a massive union organizing drive in 1990.”¹⁰⁹ Bayh directed a course for public-sector labor relations that respected workers’ rights without sacrificing fiscal responsibility or the interests of taxpayers.¹¹⁰ Contrary to the fears of critics, this new labor environment dramatically reduced tensions.¹¹¹ This successful beginning laid the groundwork for fifteen years of harmonious and cooperative relations between state employees and their employer.¹¹²

Success by executive order had one primary limitation: the continued existence of collective bargaining rights hung in the balance with each gubernatorial election.¹¹³ Though the Indiana General Assembly repeatedly tried to pass legislation to avoid this uncertainty, the Republican-controlled Senate—and sometimes House Republicans—thwarted these efforts on every try.¹¹⁴ Despite the legislative failures, Bayh’s

107. See Kapoor, *supra* note 6, at 403.

108. *New Labor Dem*, *supra* note 103; see also Ind. Exec. Order No. 90-6, 13 Ind. Reg. 10 (1990).

109. Kevin Corcoran, *Daniels Leaves State-Union Bargaining in Doubt*, IND. STAR, Jan. 11, 2005, at B01. Organizing was dominated by three national labor organizations: the American Federation of State, County and Municipal Employees (AFSCME), the United Auto Workers (UAW), and the American Federation of Teachers (AFT). Over the next decade, these unions came to “represent nearly two-thirds of the state’s roughly 35,000 executive branch employees.” *Id.*

110. See Kevin Corcoran & Mary Beth Schneider, *Daniels Ends Union Pacts for 25,000*, IND. STAR, Jan. 12, 2005, at A01 (In addition to negotiating for traditional matters like salary and seniority, the unions “bargained for health care subsidies, handled workers’ job-related grievances and protected employees’ rights during disciplinary hearings.”); see also *New Labor Dem*, *supra* note 103 (“Bayh’s team structured negotiations to make sure that taxpayers could afford the bill,” and established structural limitations on bargaining that prevented undue influence by the labor unions. . . . Contracts couldn’t be negotiated, for example, when the legislature was in session and therefore [susceptible] to intense lobbying.”).

111. See *New Labor Dem*, *supra* note 103.

112. The booming economy of the 1990s also likely played a role.

113. Corcoran & Schneider, *supra* note 110 (“Indiana is unusual among states because this negotiating authority, not found in state law, had depended on each incoming governor signing a new executive order.”).

114. See Corcoran, *supra* note 109; see also H.R. 1176, 112th Gen. Assem., Reg. Sess. (Ind. 2004) (extending collective bargaining rights to noncertificated school employees; made it out of committee but did not pass House vote); H.R. 1337, 113th Gen. Assem., Reg. Sess. (Ind. 2003) (extending collective bargaining rights to most state employees; made it out of committee but did not pass House vote); H.R. 1220, 112th Gen. Assem., Reg. Sess. (Ind. 2002) (extending collective bargaining rights to most state employees; passed the House 55-42 but died in committee in the Senate); H.R. 1540, 112th Gen. Assem., Reg. Sess. (Ind. 2001) (extending collective bargaining rights to most state employees; passed the House 56-40 but died in committee in the Senate); H.R. 1332, 111th Gen. Assem., Reg. Sess. (Ind. 2000) (extending collective bargaining rights to noncertificated school employees; passed the House 54-45 but died in committee in the Senate); H.R. 1442, 111th Gen. Assem., Reg. Sess. (Ind. 1999) (extending collective bargaining rights to noncertificated school employees; passed the House

Democratic successors—Frank O’Bannon and Joe Kernan—continued his policy.¹¹⁵ By 2004, almost 25,000 Indiana state employees were represented by organized labor.¹¹⁶

Republican Mitch Daniels challenged Governor Kernan in 2004. The challenger offered voters his antiunion budget-slashing expertise gained as Director of the Office of Management and Budget under President George W. Bush.¹¹⁷ A self-styled “decider,”¹¹⁸ Daniels took “cues on his leadership style” from mentors like President Bush and claimed *The Godfather*¹¹⁹ was “the best business textbook [he] ever read.”¹²⁰ To some, he seemed fearless; to others, he was foolhardy.¹²¹ Since the fate of Indiana’s public employees depended once again upon the outcome of an election, the public employees’ unions supported Kernan.¹²² When Daniels won, the unions’ future—and that of the workers they represented—looked grim.

E. Turning Back the Clock in Indiana: Rescission of Workers’ Rights in 2005

The incoming Daniels’ administration wasted no time in addressing public-employee collective bargaining. The Governor’s swift, unilateral actions stripped unions of their political and economic power and left public workers at the mercy of the administration’s decisions regarding terms and conditions of employment.

1. Indiana Executive Order 05-14

On his second day in office, Governor Daniels signed Executive Order 05-14, which impacted state workers in three primary ways. First, it rescinded Executive Orders 90-6, 97-8, and 03-35,¹²³ which effectively revoked the collective bargaining rights of almost 25,000 state workers.¹²⁴ Second, it canceled existing contracts between the state

52-44 but died in committee in the Senate).

115. See Corcoran, *supra* note 109; see also Ind. Exec. Order No. 03-35, 27 Ind. Reg. 1007 (Oct. 1, 2003); Ind. Exec. Order No. 97-8, 20 Ind. Reg. 2222 (Oct. 1, 1997).

116. AFSCME Council 62 represented over 8500 hospital attendants, welfare caseworkers, and professional health-care workers. The Unity Team (a coalition of UAW and AFT) Local 9212 represented over 14,600 employees, including mechanics and secretaries. The International Union of Police Associations (IUPA) Local 1041 represented almost 1400 State Police troopers, State Excise Police officers, and Department of Natural Resources conservation officers. See Corcoran & Schneider, *supra* note 110.

117. See GRODIN ET AL., *supra* note 7, at 13–14 (“On January 7, 2002, President George W. Bush issued Executive Order 13252, which, on national security grounds, prohibited collective bargaining by employees in five subdivisions of the Department of Justice . . .”).

118. According to Daniels, “once a decision is made, he doesn’t second-guess it. ‘Take the best available course and get on with it’ . . . ‘Success is for others to judge.’” Mary Beth Schneider, *The First 100 Days in Office*, IND. STAR, Apr. 19, 2005, at A01.

119. MARIO PUZO, *THE GODFATHER* (1969).

120. Schneider, *supra* note 118.

121. See Mike Smith, *Fearless or Foolhardy? Verdict Out on Daniels*, MERRILLVILLE POST-TRIB., Jan. 8, 2006, at A8.

122. See Corcoran, *supra* note 109.

123. Ind. Exec. Order 05-14, 28 Ind. Reg. 1904, 1905 (Jan. 1, 2005).

124. See Corcoran & Schneider, *supra* note 110. Most state employees lost the ability to negotiate with the state, through an exclusive bargaining representative, for pay, benefits, work

and state employees' unions, which were supposed to run through 2007.¹²⁵ Third, the order established a new employee complaint procedure, to be administered under the State Employees Appeals Commission (SEAC).¹²⁶ Although Daniels claimed "unions can still have a role in the process,"¹²⁷ the order left state employee unions virtually ineffective.¹²⁸

Following through on a campaign promise to restructure government, Daniels began his reforms by rescinding workers' rights.¹²⁹ In the words of the Governor, the state employee collective bargaining system "only existed by fiat of former governors and was 'absolutely inadequate for the challenges [Indiana] face[s].'"¹³⁰

The talking points for the new leadership focused on efficiency, flexibility, and control. Daniels envisioned that his structural "overhaul" would "free government from the paralysis of this [collective bargaining] system."¹³¹ The paralyzing aspect of collective bargaining, according to the Governor, was "the way it really encumber[ed] the ability of government to change."¹³² Republican House Speaker Brian Bosma stated Governor Daniels believed the Executive Order was "appropriate . . . because it freed [Daniels] to reform state government without union approval."¹³³ According to the State Director of Personnel, Daniels wanted to be able to move "nimble and with flexibility" in reshaping Indiana government.¹³⁴

Behind the rhetoric lay the purpose of Executive Order 05-14: to silence the voice of state employees, thereby freeing the Governor to act unilaterally in state personnel decisions. Daniels' governing style required action and did not allow for the hassle of

rules, and seniority rights. *Id.*

125. *See id.* The order "rescinded and declared null and void" Executive Orders 03-44, 03-45, 04-01, Ind. Exec. Order 05-14, 28 Ind. Reg. at 1905, all created by Governor Kernan.

126. *See id.* The procedure allowed some state employees to "file a complaint concerning the employee's dismissal, demotion, or suspension without pay," whereupon SEAC would "determine whether the suspension, demotion, or dismissal was based on inadequate performance or inappropriate behavior," and might reverse personnel decisions. *Id.* The Governor appointed all five members of the SEAC, and previous appeals commissions had upheld virtually all management decisions. Nonetheless, Daniels insisted that the procedure would ensure "full protection of employees against any arbitrary or unfair actions." Corcoran & Schneider, *supra* note 110. Daniels also claimed the "new arrangements [would] expand workers' freedoms while better serving the public interest." Mike Smith, *Daniels Rescinds Orders Allowing for Collective Bargaining*, EVANSVILLE COURIER, Jan. 12, 2005, at A8.

127. Niki Kelly, *Workers for State Non-Union Daniels Voids Collective Bargaining*, J.-GAZETTE (Fort Wayne), Jan. 12, 2005. Daniels said that unions would be able to represent state employees in a grievance procedure and would be able to meet and confer with the State Personnel Department on a quarterly basis. *Id.*

128. *See* Corcoran & Schneider, *supra* note 110.

129. The text of the Order reads, "the State must move forward with meaningful reforms, including improvements in the State's personnel system." Ind. Exec. Order 05-14, 28 Ind. Reg. at 1905.

130. Kelly, *supra* note 127.

131. Chuck Jordan, *Labor to Advance Bargaining Rights for State Employees*, CONGRESS DAILY, July 23, 2007, http://www.nationaljournal.com/congressdaily/am_20070723_6.php.

132. Kelly, *supra* note 127.

133. Jim Stinson, *Daniels: No More Work Rules Governor Terminates Bargaining Rights for 25,000 State Employees*, MERRILLVILLE POST-TRIB., Jan. 12, 2005, at A1.

134. Ruth Holladay, *Opinion Column*, IND. STAR, Jan. 27, 2005.

consulting with other interested parties.¹³⁵ When he wanted to create the Family and Social Services Administration (FSSA), Daniels wanted to do so "without having to consult union officials" and saw the soon-to-be-rescinded union contracts as standing in the way of his plans.¹³⁶ Even though "[h]alf of the 35,000 state executive branch employees earn[ed] less than \$29,738 a year,"¹³⁷ the new administration viewed the workers' collective economic and political influence as a threat.

Many Hoosiers were deeply troubled by Daniels' decision. The Governor "hope[d] fervently" that all would "work out very, very well for every worker in government in the state of Indiana."¹³⁸ Employees may have shared his hope, but few approved of his actions.¹³⁹ Democratic legislators were also concerned.¹⁴⁰ The reactions of Indiana union leaders perhaps best captured the workers' mood in the wake of the Order. Francis "Fuzz" LeMay, president of Unity Team Local 9212, stated plainly, "There's nobody who will speak up for state employees now."¹⁴¹ David Warrick, executive director of AFSCME Local 62, "seemed shell-shocked by the sudden executive

135. Reflecting upon President Eisenhower's admonition that "big decisions should be made in the calm," Daniels stated, "I don't think he meant sit around and dither for weeks." Schneider, *supra* note 118. House Minority Leader B. Patrick Bauer commented on Daniels' decision-making approach: "He tells you what he thinks, and sometimes he tells you before he thinks." *Id.* "One of Daniels' pet phrases is 'seek forgiveness, not permission.' . . . 'If we make mistakes, let's make mistakes of action.'" *Id.* When confronted with the prospect of union protests in the wake of his Order, Daniels responded, "If it happens, it happens." Stinson, *supra* note 133.

136. Corcoran & Schneider, *supra* note 110. According to the head of FSSA, Mitch Roob, the newly restructured state government would be fashioned according to Daniels' will alone. "The vision is completely his vision. . . . [My job is] very easy for me. I ask, 'What would Mitch Daniels do?' and try to answer that." Schneider, *supra* note 118. When Daniels asked business leaders to serve on the newly created Indiana Economic Development Corporation (IEDC), he "insisted on being chairman of the group." Smith, *supra* note 121.

137. Corcoran & Schneider, *supra* note 110.

138. *Id.*

139. James Patterson, *State Workers Ready to Fight to Keep Their Unions*, IND. STAR, Feb. 5, 2005, at A10. According to caseworker Diana Joslin, "the cancellation of the bargaining agreement wipe[d] away years of efforts to improve conditions for social workers and children in the state's care. 'Why would we be happy about [the cancellation of] something that we were voluntarily choosing to be a part of?'" *Id.* (alteration in original). State Library employee Irene Hansen saw the Order as "a horrible idea 'The union is the only safeguard against management taking advantage of employees. This turns back the clock for Indiana.'" Corcoran & Schneider, *supra* note 110.

140. Representative Greg Porter, the leader of the Black Legislative Caucus, responded, "Daniels has spoken long and loud about supporting those hard-working state employees who dedicate their lives to helping the people of Indiana, but now it appears that he does not support their efforts to earn a decent wage." Corcoran & Schneider, *supra* note 110. House Minority Leader, B. Patrick Bauer, claimed the "rescission harmed state employees and their families." Jim Stinson, *Dems and Unions Say Bargaining Ban Risky*, MERRILLVILLE POST-TRIB., Jan. 13, 2005, at A1.

141. Corcoran & Schneider, *supra* note 110. These concerns were echoed by Ruby James, president of AFSCME Local 3146, who felt "Daniels had made too hasty of a decision 'The problem is the state has been taking advantage of [employees].'" Stinson, *supra* note 133 (alteration in original).

order,”¹⁴² and had “no doubt in [his] mind this [wa]s about busting the unions.”¹⁴³ Although Warrick predicted that “The union is not gone,”¹⁴⁴ LeMay was “telling employees the union’s over.”¹⁴⁵ The better prediction would have fallen somewhere in between the two.

2. The Aftermath of the Executive Order

While state employees still retained the right to belong to a union, the lack of collective bargaining rights rendered the unions toothless.¹⁴⁶ In fact, several unions almost immediately disbanded.¹⁴⁷ With unions effectively sidelined, the new administration did not wait long to exercise its unilateral power. The most significant early changes affecting state workers came in the following four areas: employee leave time; privatization of state functions; departmental restructuring; and employee pay.

Governor Daniels appointed Debra Minott to head the Indiana State Personnel Department (SPD). His goal was that she “transform the executive branch of state government into an energized, high-performance organization.”¹⁴⁸ State employees began to feel the effects of this transformation when Minott unilaterally changed SPD’s policy regarding leave time.

In August of 2005, Minott “cracked down” on what she saw as abuses of then-existing policies.¹⁴⁹ Her changes significantly limited employee access to family medical leave and other paid leave time.¹⁵⁰ In a more drastic move, she “eliminated

142. Stinson, *supra* note 133.

143. Holladay, *supra* note 134.

144. Kelly, *supra* note 127 (“‘We were here before Bayh signed the order,’ he said. ‘Obviously this is a setback, but we’re still here.’”).

145. *Id.*

146. According to Keith McGill, president of IUPA Local 1041, there was no use for his union in the absence of collective bargaining rights, because, “[q]uite frankly, how many people are going to want to pay for something they’re not getting that much out of?” Corcoran & Schneider, *supra* note 110.

147. *Board Votes to Dissolve State Police Union*, IND. STAR, Jan. 18, 2005, at B02. Less than one week after Governor Daniels signed the Order, the executive board of IUPA Local 1041 “voted unanimously to dissolve the union.” *Id.* In a similar move, LeMay said that Unity Team Local 9212 would “close up shop and about 10 union representatives [would] go back to their regular state jobs.” Corcoran & Schneider, *supra* note 110.

148. Ind. State Pers. Dep’t, Training Plan for Fiscal Year 2008, *available at* http://www.in.gov/spd/files/training_plan.pdf (The mission of SPD is “[t]o support the Governor . . . in meeting [his] goals and objectives by proactively providing integrated human resource services”).

149. Niki Kelly, *State Workers’ Leave Time Pinched, Limits Placed on Family Medical, Funeral, Vacation*, J.-GAZETTE (Fort Wayne), Aug. 26, 2005, at 1C.

150. *See id.* Under previous agreements, state employees were eligible for the following benefits: they were entitled to “family medical leave as soon as they were hired”; they “had to use only up to 10 of their earned sick days” before using family medical leave; and, they were allowed paid leave to attend a family funeral or when road conditions were bad. *Id.* Under Minott’s new policies, employees would not be eligible for family medical leave until they had accrued “12 months’ employment with at least 1,250 hours worked.” *Id.* They would be “required to use all of their available sick leave concurrently” with family medical leave. *Id.*

progressive discipline, giving agency heads more flexibility to fire an employee without going through the steps such as letters of reprimand and suspensions."¹⁵¹ Minott said she understood many employees would not "like the new changes," but stressed that SPD's officials were "stewards of the state's resources and . . . need to use these resources for the benefit of the state."¹⁵² This rationale seemed to deny the possibility that providing reasonable benefits to the state's employees *could* benefit the state—either in the prevention of labor strife or in the pursuit of an economically stable working class.

Governor Daniels also viewed privatization of state functions as a necessary step in achieving greater efficiency and productivity. This approach raised questions concerning the burdens and dilemmas that come with delegation of state authority and whether this approach is even a sound economic approach.¹⁵³ For state employees, privatization meant something more important: a loss of jobs. Workers felt this impact immediately in the Indiana Department of Correction (IDC) and the FSSA.

Several months after signing Executive Order 05-14, Daniels announced that the state had "awarded a 10-year, \$248 million contract to Philadelphia-based Aramark to oversee food operations at 30 correctional facilities statewide."¹⁵⁴ The IDC Commissioner admitted the contract would mean "a projected reduction in manpower," but Daniels said any workers who lost their jobs could compete with out-of-state workers for the Aramark jobs.¹⁵⁵ Despite the likely drop in wages, benefits, and working conditions for former state employees, the governor felt that competition based on "local market factors" would be good for the state.¹⁵⁶ IDC soon announced another deal, under which prison nursing would be privatized to a St. Louis company.¹⁵⁷ The fact that IDC employees were still represented by AFSCME revealed the irrelevance of Indiana's public-sector unions in the post-collective-bargaining era.¹⁵⁸

They would not be paid to attend the funeral of "greats" (e.g. great-grandmothers or great-grandsons) or some "steps" (e.g. step-children's funerals merited paid leave, but not step-sister's). *Id.* They also had to "take an unpaid day or use one of their personal days" if law enforcement ordered the roads closed. *Id.*

151. *Id.*

152. *Id.*

153. See Stephen Goldsmith & Mark E. Schneider, *Partnering for Public Value: New Approaches in Public Employee Labor-Management Relations*, 5 U. PA. J. LAB. & EMP. L. 415, 421 (2003) (arguing that "privatization alone will not reform the public workplace," and that "[r]eformed labor-management relations arise by partnering with labor to pursue competition").

154. Mike Smith, *Private Company to Manage Meal Service in State Prisons*, EVANSVILLE COURIER, May 18, 2005, at B5. The move was based on the idea that Aramark, because of the broad scope of its operations, would be able to bargain for cheaper subcontracting deals than IDC could, and thereby reduce the average cost per meal. See *id.*

155. See *id.*

156. *Id.* Many of the IDC workers who would be affected were making only \$24,000 annually prior to the deal. Untroubled by their plight, Daniels said, "My view is I'm indifferent to who wins, as long as the taxpayer wins." *Id.*

157. See *Indiana to Privatize Prison Nursing Services*, MERRILLVILLE POST-TRIB., Aug. 6, 2005, at A9 (The contract was seen as "continu[ing] the trend toward privatization in the agency under . . . Gov. Mitch Daniels.").

158. In response to the deal, an AFSCME spokesman said, "This is just another example of the governor walking away from state employees." *Id.* This point is underscored by the fact that

In 2006, FSSA entered into a \$1 billion contract with IBM and Affiliated Computer Services to process “applications for Medicaid, food stamps and other public safety net benefits received by about 1.1 million children, seniors, people with disabilities and other needy Hoosiers.”¹⁵⁹ The scheme was similar to that employed by IDC; “a private consortium [was] being paid . . . to handle initial intake functions formerly done by state workers.”¹⁶⁰ Aside from the questionable economic gains and the deterioration in essential services, many state workers lost their jobs in this deal.¹⁶¹

Governor Daniels candidly acknowledged that his decision to rescind bargaining rights “would make it easier to fire some employees.”¹⁶² On the day he signed the Order, his press secretary said the rescission of collective bargaining rights would “make performance pay and employee transfers easier.”¹⁶³ One of the administrations’ first major restructuring efforts showed that employee transfers were going to be offered on a “take-it-or-leave-it” basis.

The Indiana Department of Workforce Development (IDWD) implemented a “cost-driven consolidation plan” in 2005 that would move all of its 120 unemployment claims deputies—who were employed throughout the state—to Indianapolis.¹⁶⁴ According to IDWD Deputy Commissioner Sarah Steele, the affected employees could “either relocate or they w[ould] be laid off.”¹⁶⁵ Steele predicted, “about 50 will choose not to move to Indianapolis.”¹⁶⁶ Notably, the claims deputies were still represented by AFSCME Council 62.¹⁶⁷

In December 2008 Governor Daniels sent a letter to his “fellow state employees,”¹⁶⁸ notifying them that 2009 would bring “[n]o pay raises for state employees [and] [f]ew, if any, new hires.”¹⁶⁹ Daniels justified the pay freeze by offering an alternative plan to give out bonuses “to reward exceptional performers.”¹⁷⁰ Addressing potential concerns

both of IDC’s privatization deals gave many jobs to out-of-state workers.

159. Tim Evans, *Privatization Efforts Targeted*, IND. STAR, Aug. 21, 2008, at B01.

160. *Id.*

161. *Id.* FSSA Secretary Roob “admitted . . . that we’re not seeing any cost savings,” and the project “spurred myriad complaints about bad service from advocates for the poor, elderly and disabled.” *Id.*

162. Stinson, *supra* note 133.

163. *Id.* (“Let me just say that I think it will be a lot harder, for instance, for an employee who has [sic] found to have failed multiple drug tests to get back on a snow plow,” [Daniels] said.”).

164. *Unemployment Layoffs Planned*, J.-GAZETTE (Fort Wayne), May 21, 2005, at 3C. IDWD “prides itself” on this sort of innovation, “which challenge[s] the status quo.” Ind. Dep’t of Workforce Dev., Mission, Priorities, and Shared Values, <http://www.in.gov/dwd/2365.htm>.

165. *Unemployment Layoffs Planned*, *supra* note 164.

166. *Id.*

167. *See id.*

168. Daniels’s Letter, *supra* note 2.

169. Schneider, *supra* note 4.

170. Schneider, *supra* note 3. In his letter, Daniels explained, “all employees who do a good job deserve more than they are earning today, and top performers much more, and we are headed in that direction in our approach to compensation . . . so that outstanding work will be amply rewarded.” Daniels’s Letter, *supra* note 2. After granting pay raises of two percent to all state employees in his first three years in office, 2008 saw the first good-worker/bad-worker distinction: most received a 4.5 percent raise, but some received a ten percent raise. Schneider, *supra* note 4.

of employees deemed unexceptional by the administration, Daniels noted, "[t]hese are only the first and hardly the last of the hard decisions that will need to be made."¹⁷¹ He further warned, "the trimmed-down 2009 budget [would] be the base for the 2010 and 2011 budgets"¹⁷² To soften the blow, he concluded his letter in a tone of appreciation: "[t]hanks in large part to your work over the past four years, Indiana is in better shape than most Best regards, Mitch."¹⁷³

F. Recent Efforts in the Indiana General Assembly

In response to the governor's rescission of collective bargaining rights, Democratic legislators tried to remedy the situation through legislation. Each attempt, however, met with the same fate as proposed legislation from earlier in the decade.¹⁷⁴ Not one bill made it to the Governor's desk—though it is doubtful Daniels would have signed one if it had.

The 2006 legislative session included two relevant bills. Representative Clyde Kersey proposed House Bill 1078, which would have required the state to bargain collectively with the exclusive representatives of "certain governmental employees and noncertificated employees of school corporations."¹⁷⁵ House Minority Leader Bauer authored a similar proposal. Bauer's House Bill 1372 included the possibility for state elected officers "to opt in to collective bargaining for the officer's employees."¹⁷⁶ Both bills died in the House Labor and Employment Committee.¹⁷⁷

The 2006 November elections saw the resurgence of the Democratic Party nationwide. Indiana did not miss out on this shift in power. While Republicans maintained control of the State Senate, Democrats regained the State General Assembly by a slim majority of 51 to 49.¹⁷⁸

Indiana's Democratic legislators used this position to renew the fight for public workers' collective bargaining rights. In 2007 Representative Kersey authored another bill—House Bill 1088—that would have established collective bargaining rights for most state employees.¹⁷⁹ The bill made it out of committee and passed the House, both

171. Schneider, *supra* note 3.

172. *Id.*

173. Daniels's Letter, *supra* note 2.

174. *See supra* note 114 and accompanying text.

175. H.R. 1078, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006) Kersey's bill also would have established the Public Employees Relations Board (PERB) to administer procedures for selecting bargaining representatives and adjudicating disputes, and would have limited strikes by some employees. *See id.*

176. H.R. 1372, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006). Bauer's bill also would have reinstated the bargaining unit assignments, the exclusive bargaining representatives, and the agreements that were rescinded by Executive Order 05-14. *See id.*

177. *See* H.R. 1078, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006) (Action List); H.R. 1372, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006) (Action List). Since Republicans controlled the General Assembly and thus each House committee in 2006, this was not a surprising result.

178. *Daniels Seeks Dems Cooperation—Or Not; Governor Extends Olive Branch, Drops It for Welfare Privatization*, IND. STAR, Dec. 3, 2006, at B3.

179. H.R. 1088, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007). Arguing for the necessity of his bill, Kersey reminded the public that Indiana "had 16 years of collective bargaining with state employees, and it worked very well." Mary Beth Schneider, *State Workers' Rights Get*

by party-line votes.¹⁸⁰ This led House Democrats to claim a victory, asserting that the bill would “give[] public employees a voice in government.”¹⁸¹ Others rightly viewed the short-lived success as merely symbolic.¹⁸² Upon being sent over to the Senate, the bill was referred to committee and never heard from again.¹⁸³ Perhaps anticipating this result, several House Democrats took a less ambitious legislative approach.¹⁸⁴ Each proposed bill met a fate similar to that of Kersey’s House Bill 1088.¹⁸⁵ In 2008 Representative Kersey tried one more time.¹⁸⁶ His public employees collective bargaining bill fared even worse this time. Whether public employees and their unions lacked the political muscle or whether legislators lacked the will to support another symbolic “goodwill gesture”¹⁸⁷ was irrelevant. The bill never even made it to the House floor for a vote.¹⁸⁸

Boost, IND. STAR, Jan. 26, 2007, at B05. In a show of public worker solidarity, the Indiana State Teachers Association (ISTA) and the Indiana Federation of Teachers (IFT)—whose members already enjoyed statutory collective bargaining rights—supported the bill. The unions stated publicly, “school bus drivers, custodians, teaching assistants and others are crucial employees and should have the right to be protected from being fired at will.” *Id.*

180. See H.R. 1088, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (Committee Vote). “The fact the bill got a hearing . . . is a direct result of the November election If Republicans had remained in charge, the bill never would have gotten this far.” Schneider, *supra* note 179. After a second and third reading and debate on the House floor, the bill passed the House by a vote of 51 to 49. H.R. 1088, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (Action List).

181. Mike Smith, *Some Bills That Clear House Likely to Die in Senate*, EVANSVILLE COURIER & PRESS, Feb. 13, 2007, at B9.

182. According to the *Evansville Courier and Press*, “passing the bill likely will amount to nothing more than a goodwill gesture to labor unions that back the party,” and the bill “likely will be dead on arrival in the Republican-ruled Senate.” *Id.* (observing that “[m]ost Republicans are not big fans of union powers, and the GOP-ruled Senate isn’t about to buck their party’s governor on this issue”).

183. See H.R. 1088, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (Action List) (the bill died in the Senate Committee on Pensions and Labor).

184. Representative Dennis Tyler authored House Bill 1133, which would have extended collective bargaining rights for police officers and firefighters at the “county, city, town, or township” level. H.R. 1133, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007). Representatives Scott Pelath and Peggy Welch authored bills that aimed directly at the terms and conditions of employment for state employees—matters that would previously have been bargained for by employees’ unions. See H.R. 1203, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (altering the state employee complaint procedure in a way that limited the discretion of employee supervisors and SEAC); H.R. 1737, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (requiring the state to “provide for reasonable” accommodations for breast-feeding mothers in the workplace).

185. Representative Tyler’s bill never made it out of committee (perhaps because its coverage would have conflicted with that of House Bill 1088). See H.R. 1133, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (Action List). Representative Pelath’s bill made it through the House by an overwhelming vote of ninety to eight but died in the Senate’s Pensions and Labor Committee. See H.R. 1203, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (Action List). Representative Welch’s bill never made it out of the House Labor and Employment Committee. See H.R. 1737, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007) (Action List).

186. See H.R. 1212, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2008).

187. See Smith, *supra* note 181.

188. H.R. 1212, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2008) (Action List).

As it stands in 2010, Indiana public employees enjoy the right to organize,¹⁸⁹ but this right provides little substantive benefit. Collective bargaining is only possible when the state voluntarily agrees to it, and the state may generally dictate the scope and nature of any bargaining that occurs. Workers are also limited in exercising their political and economic influence in the labor market.¹⁹⁰ They have the right to appeal workplace grievances through SEAC,¹⁹¹ but their compensation, employment terms, and working conditions are at the discretion of the governor through SPD.¹⁹² This vulnerable status of Indiana's state employees demands reform.

III. RECOMMENDATIONS FOR REFORM: HOW TO PROMOTE, PROTECT, AND ENFORCE PUBLIC EMPLOYEE COLLECTIVE BARGAINING RIGHTS IN INDIANA

To effectuate meaningful reform of Indiana's public sector labor law, advocates for public workers should work for both legislative and political gains. In the short-term, they should continue fighting for a collective bargaining statute. Their more important task, though, is to develop an effective, long-term political strategy. This strategy should try to break free from the partisan battlelines surrounding labor issues in Indiana by framing public workers' rights as truly in the best interest of the whole government and the voting public.

A. Short-Term Legislative Goal: Continue Fighting for a Statute

A comprehensive public sector collective bargaining statute should protect state employees' rights while accommodating the state's managerial and economic interests. Collective bargaining should be seen not as an end in itself, but as a means of achieving peaceful labor relations. By promoting stable and predictable labor relations,

189. "No worker or group of workers who have a legal residence in the state of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association . . ." IND. CODE ANN. § 22-7-1-2 (West 2008). The "State Employee Bill of Rights" also guarantees that "[n]o employee shall be denied the right to be a member of an organization of employees," IND. CODE ANN. § 4-15-10-3 (West 2002), and that "[n]o employee shall suffer a penalty or the threat of a penalty because he exercised his rights under this chapter." *Id.* § 4-15-10-5.

190. Gregory J. Utken, *Labor Law: Survey on Recent Developments in Indiana Law*, 11 IND. L. REV. 196, 198 (1978) ("In Indiana, strikes by public employees are illegal."); *see also* Anderson Fed'n of Teachers, Local 519 v. Sch. City of Anderson, 251 N.E.2d 15 (Ind. 1969); Individual Members of the Mishawaka Fire Dep't v. City of Mishawaka, 355 N.E.2d 447 (Ind. Ct. App. 1976).

191. IND. CODE ANN. § 4-15-1.5-6 (West 2002). SEAC is "authorized and required. . . to hear or investigate those appeals from state employees . . . and fairly and impartially render decisions as to the validity of the appeals or lack thereof." *Id.*

192. *See* IND. CODE ANN. § 4-15-1.8-7 (West 2002) ("(a) The Department shall . . . (1) Develop personnel policies, methods, procedures, and standards for all state agencies. (2) Formulate, establish, and administer position classification plans and salary and wage schedules, all subject to final approval by the governor. . . (4) Approve employees for transfer, demotion, promotion, suspension, layoff, and dismissal. (5) Rate employees' service. . . (8) Promulgate and enforce personnel rules. (9) Make and administer examinations for employment and for promotions.").

a state can protect its interest in delivering public services and simultaneously acknowledge employee rights.¹⁹³ This legislative approach would also help the state—as an employer—elicit valuable contributions from employees who have been deprived of a meaningful voice in the workplace. The resulting bilateral decision-making process would incentivize the innovation necessary to reform governance in Indiana.

1. A Statute Would Encourage Stable and Predictable Labor Relations

A comprehensive statute would replace confusion and unpredictability with certainty and consistency. “[I]n the absence of legislation the parties must depend on *ad hoc* procedures, with their rights and duties in doubt, the scope of bargaining uncertain, and no agency to determine bargaining units or conduct elections’ This results in piecemeal development of public sector collective bargaining by judicial fiat[,]” unilateral decisions, or a patchwork of overlapping statutory requirements.¹⁹⁴ This framework is confusing at best, and allows the existence and shape of bargaining to be determined by individual biases of judges and governors.¹⁹⁵

A statute is also the most appropriate and effective way to obtain public employees’ collective bargaining rights. Legislatures are better equipped than the other two branches of government to weigh the competing interests involved.¹⁹⁶ Legislatures are also better equipped to fit new bargaining rights within the existing statutory scheme.¹⁹⁷ Because of the significant rights at stake, “[t]he legislature should not avoid its policy-making function where there is a demand that policy be made.”¹⁹⁸

2. A Statute Would Help Unlock the Potential Value of Employee Voice

One compelling reason for reform is that public employees have been deprived of their voice. “The concept of ‘voice’ in the employment context refers to the ability of workers to communicate viewpoints, complaints, and desires to their employers in a meaningful way. This voice is beneficial in terms of enhancing individual dignity, employee satisfaction, workplace productivity, and civic responsibility.”¹⁹⁹ Governor Daniels claimed to address this demand through SEAC but this measure is

193. See Gregory, *supra* note 16, at 109.

194. *Id.* at 114 (quoting Joel Seidman, *State Legislation on Collective Bargaining by Public Employees*, 2 LAB. L.J. 13, 21 (1971)).

195. See *id.*

196. See *id.* at 107. Legislative action is “far more likely to find acceptance among citizens with economic, social, and political differences, since, unlike the judiciary, the legislature may take divergent opinions into account as part of its law-making function.” *Id.*

197. See Befort, *supra* note 9, at 1245.

198. Gregory, *supra* note 16, at 115–16; see also Befort, *supra* note 9, at 1250 (“The legislature is not merely an employing entity like a private company or even a public school board. It is charged with the constitutional responsibility of protecting the public interest through the enactment of legislation and must retain the capability of responding to fiscal emergencies.”).

199. Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 609 (2004).

insufficient.²⁰⁰ Statutory collective bargaining rights would liberate public employees from the unilateral—and potentially arbitrary—power of the executive to dictate the terms and conditions of their employment.

These rights would also further the state's goals regarding worker productivity and economic efficiency. "On the enterprise level, employee participation purportedly enhances an employee's sense of efficacy over his or her work environment. This democratic empowerment serves basic notions of human dignity and autonomy."²⁰¹ While critics may argue that dignity and autonomy are lofty ideals that fail to address realistic budgetary and personnel concerns, research has disproved this claim. Private-sector studies have found that "employee involvement generally enhances the economic productivity of the firm."²⁰² Meaningful voice can also lead to improved delivery of government services,²⁰³ as well as higher employee retention.²⁰⁴

3. Bilateral Decision Making Would Incentivize Innovation

The bilateral structure of public-sector collective bargaining is also in the best interest of the state. Assuming that restructuring based upon market-based competition is needed to revitalize state government, excluding unions from this process—depriving state employees of participation in necessary reforms—will set the stage for failure. A unilateral approach to state labor law reform may possess theoretical value, but it produces questionable results in practice.

Critics may argue that state officials need to respond quickly and aggressively to financial and political pressures, and that the unique nature of public employment provides adequate safeguards to protect employees' interests in the absence of collective bargaining rights. They emphasize the four following points: (1) workers "can influence management through the electoral process"; (2) workers "are assured that their employers will not move"; (3) workers "cannot be dismissed without due

200. See *supra* note 126; *supra* note 192 and accompanying text.

201. Befort, *supra* note 199, at 612.

202. *Id.* at 611–12 ("[E]mployee participation fosters an increased flow of information in the workplace. This information aids in better problem solving and in the creative design of workplace systems. This improved information flow also may facilitate better coordination among production functions. . . . [Also,] employee participation boosts employee motivation to perform well at work. By having a say in workplace decisions, employees are more likely to buy into the firm's processes and objectives. In short, a worker who perceives herself as valued is more likely to be a productive worker."); see also RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 16, 103–05 (1999); DAVID I. LEVINE, REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN 38, 80–81 (1995); Brian Becker & Barry Gerhard, *The Impact of Human Resource Management on Organizational Performance: Progress and Prospects*, 39 ACAD. MGMT. J. 779 (1996); Casey Ichniowski, Thomas A. Kochan, David Levine, Craig Olson & George Strauss, *What Works at Work: Overview and Assessment*, 35 INDUS. REL. 299 (1996).

203. See Daniel E. Ashyk, *Public Sector Collective Bargaining in Ohio, 1984–1993: A Statistical Overview* 19 (Ctr. for Labor Research, The Ohio St. Working Paper No. 014, 1995) ("[T]he derivative impact of higher teacher salaries and a lower pupil to teacher ratio achieved through collective bargaining has enhanced student achievement.").

204. See Jordan, *supra* note 131 (concerning the comments of AFSCME's collective bargaining director on the passage of Delaware's 2007 public sector labor relations statute).

process of law”; and (4) workers “can rely upon the force of statute, rather than contract, to establish their compensation packages.”²⁰⁵

The reality facing Indiana’s public workers in 2009, however, undercuts each of these arguments. First, the electoral check on the executive is meaningless in the short-term, because Governor Daniels—under whom the SPD dictates terms and conditions of employment—is prohibited from seeking reelection in 2012.²⁰⁶ Second, while state jobs may not move to another state, privatization and restructuring efforts have shown that these jobs can be easily outsourced or moved to other distant locations within the state.²⁰⁷ Third, due process considerations are nearly worthless to a former state employee whose former job is being performed by private contractors.²⁰⁸ They will also not offer much support to employees concerned about the loss of benefits such as leave time.²⁰⁹ Fourth, arguments about compensation packages seem flimsy in the wake of Governor Daniels’ recent pay freeze.²¹⁰

A bilateral approach can successfully accommodate the interests of employees *and* employers. It would allow management to retain significant discretion in the bargaining process and incentivize innovation in the workplace. For example, “[b]roadly worded management rights clauses [in collective bargaining statutes] may give public managers the right to ‘maintain the efficiency of government operations,’ or insist that management has no duty to bargain on matters of inherent management policy.”²¹¹ Even the former Republican mayor of Indianapolis, Stephen Goldsmith, has suggested a “joint labor-management” approach for unlocking the “untapped” and “substantial” potential of state and local workers.²¹² This untapped potential can be a vital source of innovation for state government as it continually seeks reform of its own structure and services.

4. Potential Statutory Language

One helpful source for lawmakers drafting a new statute is the collection of previous Indiana bills, dating back to 1975.²¹³ Learning from the constitutional invalidation of PELRA, legislators must ensure that no aspect of the collective bargaining process is excluded from judicial review.²¹⁴ Since each of these attempts failed to realize statutory rights for workers, legislators should also look outside Indiana’s own experience.

205. Gregory, *supra* note 16, at 111.

206. See IND. CONST. art. V, § 1.

207. See *supra* Part II.E.2.

208. See *supra* Part II.E.2.

209. See *supra* Part II.E.2.

210. See *supra* Part II.E.2.

211. Gregory, *supra* note 16, at 128 (quoting HAW. REV. STAT. § 89-9(d) (Supp. 1971).

212. Goldsmith & Schneider, *supra* note 153 (“States and municipalities today form the locus of innovation in American government.”). Among his suggestions were the following: “The foundation of good labor relations is built on taking workers seriously, addressing their concerns, and treating them as colleagues[;] . . . [w]orking collaboratively with union leaders to enhance internal labor mobility[;] . . . [and] remov[ing] obstacles that prevent labor from competing successfully.” *Id.* at 422–23.

213. See *supra* Parts II.B, II.D, II.F.

214. See Public Employee Labor Relations Act (PELRA) of 1975, IND. CODE §§ 22-6-4-1 to

One helpful model is the Ohio Public Employee Collective Bargaining Act of 1984.²¹⁵ Like Indiana, Ohio had "a history of strong unionization in certain sectors of public employment"²¹⁶ and a legacy of failed attempts at similar legislation.²¹⁷ The Act "regulates virtually all aspects of labor relations in the public sector in Ohio," and the "quasi-judicial" State Employment Relations Board (SERB) is responsible for its implementation.²¹⁸ Collective bargaining under the act is "a several tiered process," which includes a structured negotiation process overseen by SERB-appointed mediators, fact finders, and arbitrators.²¹⁹ According to a study by the Center for Labor Research at The Ohio State University, the affect of the first ten years of the Act on labor relations was encouraging for both workers and the state government. "Ohio public employees have voted overwhelmingly to join unions,"²²⁰ and "[t]he collective bargaining process under SERB [was] remarkably stable with very little strike activity."²²¹ Services provided by the Ohio government were also markedly improved in certain areas.²²²

For Indiana to follow the Ohio approach might be a political gamble, but it could pay huge dividends for public workers. The comprehensive nature of such a statute—encompassing *all* public-sector labor relations—would necessary alter the current status of Indiana's teachers who already enjoy statutory collective bargaining rights.²²³ By throwing their lot in with fellow government workers, however, teachers could retain separate representation and contractual status under their current agreements while simultaneously boosting the political strength of the public workers' cause. The teachers would also not necessarily risk losing their collective bargaining rights, because they would retain their current status if the bill were not enacted.

Whatever approach the Indiana legislature takes in drafting a new statute, lawmakers should develop a statutory structure that not only guarantees bargaining rights, but also promotes peaceful and productive labor relations. This can best be accomplished by staying committed to the values of employee voice and innovation in the public workplace.

-13, *invalidated by* Ind. Educ. Employment Relations Bd. v. Benton Cmty. Sch. Corp., 365 N.E.2d 752 (Ind. 1977); *see also supra* notes 79–83 and accompanying text.

215. OHIO REV. CODE ANN. §§ 4117.01–4117.24 (LexisNexis 2007 & Supp. 2009).

216. Ashyk, *supra* note 203, at 8.

217. *See id.* at 4 (Lawmakers from both houses of the Ohio legislature introduced bills in 1947, 1967, 1975, and 1977, which met with varying success, ranging from dying in committee to being vetoed by the Governor.).

218. *Id.* at 4. Coverage includes "any political subdivision of the state, such as school districts, universities, state agencies, authorities, and commissions, counties and municipalities." *Id.* at 7.

219. *Id.* at 10.

220. *Id.* at 8.

221. *Id.* at 14.

222. *See, e.g., id.* at 19 ("[T]he derivative impact of higher teacher salaries and a lower pupil to teacher ratio achieved through collective bargaining has enhanced student achievement.").

223. *See* IND. CODE ANN. §§ 20-29-1-1 to -9-5 (West 2008).

B. Long-Term Political Goal: Reframe Public Workers' Rights as in the Public Interest

Resurgence of the movement for Indiana's public workers' rights is possible, but workers must adopt a new political strategy. The public sector labor movement in Indiana should implement a strategy that is practical, educational, and nonpartisan. Despite the merit of arguments in favor of a comprehensive public-sector collective bargaining statute in Indiana, political realities dictate that such legislation may not be in the cards anytime soon. The 2008 elections strengthened the Democratic Party's control of the General Assembly but Governor Daniels will serve until 2012. Also, the Senate is solidly in the hands of the Republican majority and—with scheduled legislative redistricting in 2010—likely will be so for many years to come.

These difficulties are compounded by the problems confronting private-sector labor, which may contribute to unfavorable opinions of unions generally.²²⁴ Professor Dau-Schmidt argues that, for private-sector collective bargaining to survive, “unions will need to adopt new strategies to succeed in organizing and representing workers.”²²⁵ This is advice worth heeding for public-sector workers, but the struggle lies in shaping the nature and scope of the strategy.

Lord Byron once wisely stated, “The best of [p]rophets of the future is the [p]ast.”²²⁶ Learning from the successes and failures of public workers who have already fought this battle would be wise, indeed.

This Note's content is devoted so much to the history of public-sector labor relations, in part, to help workers chart their future course. “[I]t is important to understand that the successes of the 1960s and later decades were built on a foundation laid by previous decades of determined struggle,” and that progress was possible due to “the agency of workers themselves, matched with new political and social circumstances.”²²⁷ Workers never wavered on their fundamental right to organize and bargain, and they “became especially adept at lobbying, elections, and other political strategies.”²²⁸ Most importantly, public workers succeeded in the past because they “frame[d] their demands as being in the public interest, and [sought] broad political coalitions rather than simply asserting power in the labor market.”²²⁹

Bare assertion of power leads to divisive partisanship, which will doom future attempts at progress. The political parties in Indiana have seemingly already taken sides on the “labor issue,” but public employees cannot choose to continue digging deeper this line in the sand.²³⁰

224. Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 918 (2007) (“There currently exists a vigorous debate within the American labor movement as to how to respond to this problem. The crux of the debate seems to be whether to commit resources to innovative methods of organizing and then to rally the new membership to address limitations in the current law, or to commit resources to politics in hopes of amending the law to facilitate future organizing.”).

225. *Id.* at 922.

226. Byron, *supra* note 1, at 37.

227. SLATER, *supra* note 8, at 194.

228. *Id.* at 200.

229. *Id.* at 201.

230. Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3

The aim of true labor law—indeed, any law reform—should not be to confer selected *political* benefits on the constituencies that happened to support the governing party in the last election. Instead, reform should reflect systematic *policy* analysis of real world problems and *principled* adoption of appropriate solutions—no matter who happens to be the winner or loser on a particular item. This is the only way we can ensure that the government will be fair to the people who are directly affected by its actions, and not just react to the positions of those organizations with political clout.²³¹

A personality-driven approach to politics can also prevent voters from making decisions based upon policy and principle, and may hurt the union cause in the long-term.²³² It may lead to more “goodwill gestures” from legislators,²³³ but will fail to achieve lasting public sector labor law reform. In the end, public employees would still be without collective bargaining rights.

Utilizing the lessons of history and arguments of policy outlined in this Note, Indiana workers and their advocates should apply a simple, three-pronged approach. First, they should inform the public about why publicsector collective bargaining is in the state’s (and the voters’) best interest. Second, they should help elected officials of both parties to realize and appreciate this valuable public interest. Third, they should engage citizens and policy makers in a productive dialogue aimed at reforming Indiana’s public-sector labor law.

This approach led Wisconsin to pass its landmark statute in 1959. It led Indiana’s Republican governor to sign PELRA in 1975. It may be the only possibility for legislation in Indiana.²³⁴

CONCLUSION

Indiana’s state employees should be granted collective bargaining rights. These rights should be guaranteed in the form of a comprehensive public-sector labor-relations statute—similar to the statute enacted in Indiana in 1975 and those currently existing in other states. Granting these rights to state workers would establish a framework for peaceful labor relations that promotes workplace innovation and reaps the benefits of employee voice. Thus, collective bargaining can be an invaluable asset

U. PA. J. LAB. & EMP. L. 177, 179 (2001). (“The fact that labor law reform . . . has . . . been so partisan and logjam-generating has created another institutional flaw” in the accepted path to progress).

231. *Id.* at 178 (emphasis in original). Another possible “by-product” of inducing “American employee-citizens to focus their attention on whom they want to support in political campaigns is that it would also induce politicians (and workers) to focus their attention on the needs and options for improving the situation of ordinary workers on the job.” *Id.* at 183.

232. Leading into the 2006 elections, Indiana Democratic Party Chairman Dan Parker said, “the biggest issue firing up Democrats is Mitch Daniels himself. ‘I think it’s been his governing style He has this arrogance about him that he knows best, and he doesn’t care about other opinions out there.’” Mike Smith, *Daniels Isn’t on the Ballot, But He’s Focus for Democrats*, MERRILLVILLE POST-TRIB., June 6, 2006, at B3. A revealing fact about this diversionary strategy was that Daniels was not even on the ballot.

233. *See, e.g.,* Smith, *supra* note 181.

234. *See* Dau-Schmidt, *supra* note 224, at 904 (“Even with the Democrats’ [2006] electoral gains in Congress and the states, the prospects for labor’s legislative agenda seem dim.”).

to a smoothly functioning state government and need not unduly hamper managerial discretion or executive efficiency.

To accomplish this goal, public employees should learn from past progress and setbacks. Drawing upon the experience of earlier workers struggling for their rights, Indiana's public employees should chart a new course for this struggle. They should entertain new approaches to their role in the public workplace. They must craft new political tactics and begin a new public dialogue. Until workers can convince Hoosiers of both parties that collective bargaining is in the state's best interest, political discourse will be burdened by antiquated theoretical obstacles, Indiana's elected officials will remain mired in the stagnated politics of labor, and Indiana's public employees will still be working without collective bargaining rights.