

NOTES

“STAND UP, FIGHT BACK”: WHY THE ATTACK ON PUBLIC-SECTOR WORKERS VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

Megan M. Block

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2013.304
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

NOTES

“STAND UP, FIGHT BACK”: WHY THE ATTACK ON PUBLIC-SECTOR WORKERS VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

Megan M. Block^{*}

I. INTRODUCTION

Approximately 100,000 people stood in peaceful protest the day after Wisconsin Governor Scott Walker signed his “Budget Repair Bill” into law.¹ Similar scenes swept Michigan, Ohio and Indiana as Republican governors and legislators waged a war on unionized public employees.² Touting the myth of the “overcompensated public employee,”³ the purported object of this war is to address

^{*} Lead Executive Editor, Volume 75, University of Pittsburgh Law Review; J.D. Candidate, 2014, University of Pittsburgh School of Law; M.Ed., 2009, University of Pennsylvania; B.A., 2007, University of Missouri-Columbia. I would like to thank my family and friends for their support. I would also like to thank my former coworkers at the Service Employees International Union (SEIU) Local 32BJ for giving me a practical education on the importance of strong unions. Your passionate commitment to workers’ rights continues to inspire me. This article is dedicated to America’s workers, both union and non-union, who are at the frontline of these attacks.

¹ James B. Kelleher, *Up to 100,000 protest Wisconsin law curbing unions*, REUTERS (Mar. 12, 2011, 8:21 PM), <http://www.reuters.com/article/2011/03/13/us-wisconsin-protests-idUSTRE72B2AN20110313>.

² Sabrina Tavernise & A.G. Sulzberger, *Thousands March on State Capitols as Union Fight Spreads*, N.Y. TIMES, Feb. 22, 2011, <http://www.nytimes.com/2011/02/23/us/23ohio.html>.

³ See JEFFREY KEEFE, DEBUNKING THE MYTH OF THE OVERCOMPENSATED PUBLIC EMPLOYEE: THE EVIDENCE 3 (2010), http://epi.3cdn.net/8808ae41b085032c0b_8um6bh5ty.pdf (according to Mitt Romney, former Governor of Massachusetts and Republican presidential nominee, “Average government workers are now making \$30,000 a year more than the average private-sector worker.” No evidence confirms this proposition.).

the financial crisis in these states. However, public-sector unions' support of Democratic candidates, coupled with the increase in public-sector unionism, may explain the true motivations behind the recent attack on unionized public workers.

This note argues that public-sector labor reform laws—such as those passed in Wisconsin, Ohio, Michigan and Indiana—violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Part II of this note contextualizes the attack on public-sector workers, provides a snapshot of the contentious history of public-sector unions, and exposes the myth of the overcompensated public employee. Part III walks through a First Amendment analysis of these recent labor reform laws and distinguishes them from precedent in *Yursa v. Pocatello Education Association*.⁴ Part IV explores the possibility of challenging these laws under the Equal Protection Clause of the Fourteenth Amendment. Part V examines the successes and shortcomings of recent case law that addresses the attack on public-sector workers.

II. BACKGROUND

A. Contextualizing the Attack on Public-Sector Unions

It is no coincidence Republican governors and state legislators began targeting public-sector unions after the 2010-midterm elections. These elections came shortly after the Supreme Court's decision in *Citizens United v. Federal Election Commission*, which held it is unconstitutional to prohibit corporations and unions from using general treasury funds to make independent expenditures in elections.⁵ In practical terms, this liberalizes the spending that both unions and corporations can use to promote views about political candidates.⁶ As a result, public-sector unions, the largest union contributors in the 2010-midterm elections, spent approximately \$10 million on liberal candidates.⁷ However, independent expenditures are not the entire story. Unions made an additional \$96,574,695 in campaign contributions, 68% of which went to Democratic candidates.⁸ This

⁴ *Yursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009).

⁵ *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

⁶ Anne M. Lofaso, *In Defense of Public-Sector Unions*, 28 HOFSTRA LAB. & EMP. L.J. 301, 305 (2011).

⁷ *Id.* Combined, public-sector and private-sector unions spent a total of \$25.1 million in the 2010-midterm elections.

⁸ *Id.* at 305–06. Granted, these are pennies when compared to corporate contributions. Businesses contributed a total of \$1.3 billion to campaigns, representing 72.2% of the total contributions in the 2010-midterm elections. Forty-nine percent of business contributions went to Democrats.

illustrates the incentive that Republican leaders have to shrink the spending power of public-sector unions, either by slashing their collective bargaining rights or weakening these unions in general.⁹ After gaining eleven governorships, the control of eighteen state legislatures (including those in Wisconsin, Ohio and Michigan),¹⁰ and an estimable gain of 680 legislative seats throughout the country,¹¹ it was only a matter of time before Republican victors went after Democrats’ largest supporters in 2010: public-sector unions.¹²

Once they were sworn in, Republicans were armed with the impetus and economic climate—the Great Recession—to wage a war on public-sector workers. The Great Recession had a devastating effect on states. Approximately three-fourths of states struggled with severe budget deficits.¹³ From 2009–2012, states faced a combined \$540 billion in budget shortfalls, and continue to face an estimated \$55 billion budget shortfall for fiscal year 2013.¹⁴ Private-sector workers have also fallen victim to the Great Recession. The unemployment rate in the United States more than doubled from 4.6% in 2007 to 9.6% in 2010,¹⁵ and the hourly wage growth for private sector workers fell from 3.4% to 1.6% in the same period.¹⁶ Using the recession as a wedge issue between private-sector workers and

⁹ *Id.* at 306.

¹⁰ Michael Cooper, *Decisive Gains at State Level Could Give Republicans a Boost for Years*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04states.html>.

¹¹ *Id.*

¹² Brody Mullins & John D. McKinnon, *Campaign’s Big Spender*, WALL ST. J. (Oct. 21, 2010, 7:15 PM), <http://online.wsj.com/article/SB10001424052702303339504575566481761790288.htm>; see also Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407 (2012) (discussing the political forces behind these laws); Lofaso, *supra* note 6, at 305 (“[I]n the 2010 mid-term elections, unions spent approximately \$25.1 million on outside donations. This amounted to 23.9 percent of total outside spending reported. Of this total, only \$25,000 was donated to conservatives. Broken down further, public-sector unions, which represented the industry that disclosed the most amount of money, donated over \$10 million exclusively to liberals.”).

¹³ See KEEFE, *supra* note 3, at 1–2.

¹⁴ Phil Oliff, Chris Mai & Vincent Palacios, *States Continue to Feel Recession’s Impact*, CENTER ON BUDGET AND POLICY PRIORITIES (June 27, 2012), <http://www.cbpp.org/cms/index.CFM?FA=VIEW&ID=711>.

¹⁵ BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1941 TO 2011, available at <http://www.bls.gov/cps/cpsaat01.pdf>.

¹⁶ Lawrence Mishel & Heidi Shierholz, *Recession Hits Workers Paychecks*, ECONOMIC POLICY INSTITUTE (Aug. 31, 2010), <http://epi.org/publication/bp277>.

their public-sector counterparts, Republicans began touting the myth of the “overcompensated public employee.”¹⁷ It was no surprise that these governors and legislators turned to public-sector unions as a source of their state’s financial woes.¹⁸

B. *Waging a War*

Within the first few months of 2011, more than a dozen states proposed and passed public sector labor reform laws under the guise of balancing the state budget.¹⁹ Wisconsin led the charge with Governor Walker’s “budget repair bill,” or Act 10.²⁰ In essence, Act 10 slashes the collective bargaining rights for unionized public employees who supported the Democratic candidate for Wisconsin’s gubernatorial election.²¹ The act creates two classes of public employees: “public safety employees,” which includes police officers or firefighters, and “general employees,” which includes every other classification of public worker.²² The first class of employees, public safety employees, retain all of their collective bargaining rights, as well as the right to have their dues automatically deducted from their paychecks. Meanwhile, workers belonging to the second class, general employees, are severely restricted. Their collective bargaining rights are limited to base wages, their union dues cannot be automatically deducted from their paychecks, and they are required to recertify their union annually.²³ The classes of

¹⁷ See KEEFE, *supra* note 3, at 3.

¹⁸ See Martin H. Malin, *Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149 (2012); see also Steven Greenhouse, *In Indiana, Clues to Future of Wisconsin Labor*, N.Y. TIMES, Feb. 26, 2011, www.nytimes.com/2011/02/27/business/27collective-bargain.html.

¹⁹ See Malin, *supra* note 18. These states include Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Tennessee and Wisconsin. See also Greenhouse, *supra* note 18.

²⁰ Editorial, *Gov. Walker’s Pretext*, N.Y. TIMES, Feb. 17, 2011, <http://www.nytimes.com/2011/02/18/opinion/18fri1.html>. Act 10 was a particularly harsh blow, because Wisconsin was the first state to allow public-sector workers to collectively bargain.

²¹ See Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 A.B.A. J. LAB. & EMP. L. 293, 294 (2012) (“In other words, Act 10 appeared to be a political initiative by American conservatives to undermine unions as the champion of lower-and-middle-class voters and to aggrandize their own political power in the process.”).

²² *Wisconsin Educ. Ass’n Council v. Walker*, 824 F. Supp. 2d 856, 863 (W.D. Wis. 2012), *aff’d in part and rev’d in part*, 705 F.3d 640 (7th Cir. 2013).

²³ *Id.*

workers created by the “budget repair bill” are inconsistent with other Wisconsin statutes.²⁴ The only clear distinction between the two groups of workers is that public safety employees belong to unions who supported Governor Walker in his campaign, while general employees belong to unions who supported his opponent.²⁵

While Wisconsin was facing weeks of public outcry around Act 10, Michigan legislators were busy crafting and approving a financial emergency manager law at the request of Governor Rick Snyder.²⁶ The law enabled Governor Snyder to appoint a financial manager for townships and school districts that are in a state of “financial emergency.”²⁷ These managers would have the unilateral authority to dissolve cities and school districts, break collective bargaining agreements, and eliminate public services.²⁸ Although this law was repealed,²⁹ Governor Snyder continues to attack unions. On March 15, 2012, Governor Snyder signed Act 53 into law, which “deem[s] it unlawful interference for a school employer to utilize public school resources to collect membership dues and fees for a labor organization.”³⁰ On December 11, 2012, Michigan passed a “right-to-work” law that prevents unions from requiring workers to pay union dues.³¹ A few days later, Governor Snyder signed a replacement emergency financial manager bill into law.³²

²⁴ *Id.* at 863.

²⁵ *Walker*, 824 F. Supp. 2d at 865, *aff’d in part and rev’d in part*, 705 F.3d 640 (7th Cir. 2013).

²⁶ Stephanie Condon, *Michigan bill would impose “financial martial law,”* CBS NEWS (Mar. 11, 2011, 5:52 PM), http://www.cbsnews.com/8301-503544_162-20042299-503544.html.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Jonathan Oosting, *Michigan Proposal 1: Voters reject measure, repeal controversial emergency manager law*, MICH. LIVE (Nov. 7, 2012, 12:08 PM), http://www.mlive.com/politics/index.ssf/2012/11/election_results_michigan_vote.

³⁰ See Act No. 53 § 10(1)(b), available at <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0053.pdf>. See also *Bailey v. Callaghan*, 873 F. Supp. 2d 879 (2012) (arguing that Act 53 “by its application, not by its terms, affects speech”), *rev’d*, 715 F.3d 956 (6th Cir. 2013).

³¹ *Now Michigan: Anti-union legislation in the home of the car industry*, ECONOMIST (Dec. 15, 2012), <http://www.economist.com/news/united-states/21568430-anti-union-legislation-home-car-industry-now-michigan>.

³² *Michigan: Legislators Pass Law on Emergency Manager Powers*, N.Y. TIMES, Dec. 13, 2012, <http://www.nytimes.com/2012/12/14/us/michigan-legislators-pass-law-on-emergency-manager-powers.html>.

Nearly three weeks after the initial measures in Wisconsin and Michigan, Ohio Governor John Kasich followed suit with Senate Bill 5.³³ Senate Bill 5 barred public-sector strikes and slashed the collective bargaining rights of all public employees, either by expressly prohibiting them from collective bargaining or by limiting the terms and conditions of collective bargaining to the extent that workers no longer had these rights.³⁴ However, this legislation was repealed by 63% of voters during a ballot referendum on November 8, 2011.³⁵

Since 2010 several other states have passed public-sector labor reform laws, including Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, Oklahoma, and Tennessee.³⁶ Not only does this illustrate the magnitude of the attack on unionized public-sector workers, but it also demonstrates how far Republican legislators are willing to go in order to suppress the “unpopular” viewpoints of public-sector unions.

C. *The Contentious History of Public Sector Unionism*

Public-sector unions have always been controversial. While private-sector workers won the right to bargain collectively in the early half of the twentieth century,³⁷ public-sector workers did not gain these rights until the 1960s. Perhaps ironically, Wisconsin was the first state to pass a law enabling public-sector workers to unionize.³⁸ Shortly thereafter, President John F. Kennedy signed Executive Order 10988,³⁹ which allowed federal service employees to join unions. By the late 1960s, courts finally accepted the argument that the “First Amendment barred public employers from discriminating against a public employee because of

³³ Joe Guillen, *Gov. John Kasich signs Senate Bill 5 as supporters and opponents gear up for huge referendum*, CLEVELAND.COM (Apr. 1, 2011, 8:53 AM), http://www.cleveland.com/open/index.ssf/2011/03/gov_john_kasich_signs_senate_b.html.

³⁴ Doug Oplinger, *Summary of Senate Bill 5*, OHIO.COM (Apr. 2, 2011, 10:11 PM), <http://politics.ohio.com/2011/04/summary-of-senate-bill-5>.

³⁵ Sean Sullivan, *Ohio Voters Repeal SB 5*, NAT'L J. (Nov. 9, 2011, 7:15 AM), <http://www.nationaljournal.com/blogs/hotlineoncall/2011/11/ohio-voters-repeal-sb-5-08>.

³⁶ See Malin, *supra* note 18, at 149, 150.

³⁷ National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as 29 U.S.C. §§ 151–167). This act expressly exempts public employers and public employees from coverage. 29 U.S.C. §§ 152(2) and 152(3) (2012).

³⁸ See Secunda, *supra* note 21.

³⁹ Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962).

membership in or support of a union.”⁴⁰ By the end of the decade, most states had adopted similar laws.⁴¹

Over fifty years later, public-sector bargaining rights are determined on a state-by-state basis. At the turn of the twenty-first century, 29 states and the District of Columbia allowed major groups of public employees to collectively bargain.⁴² Since the mid-1950s, public-sector unionism has increased from almost 0% to more than 35% today.⁴³ Compared to private-sector unionism, which declined from approximately 40% to less than 8% during the same period, the growth of public-sector unionism means that public employees are five times more likely to belong to a union than their private-sector counterparts.⁴⁴

Although some argue there is no true reason to treat public-sector workers differently from their private sector counterparts,⁴⁵ a fear of public-sector strikes continues to pervade the debate around public-sector unionism.⁴⁶ Most recently, the argument against public-sector unionism is the “overcompensated public employee,” who drains state budgets despite the escalating budget deficits. As Part II.D., *infra*, will demonstrate, this argument is not only unpersuasive; it is also blatantly unfounded.

⁴⁰ Joseph E. Slater, *The Rise and Fall of SB-5: The Rejection of an Anti-Union Law in Historical and Political Contexts*, 43 U. TOL. L. REV. 473, 477 (2012).

⁴¹ *Id.*

⁴² *Id.* at 478.

⁴³ Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 108 (2009).

⁴⁴ *Id.*

⁴⁵ See Slater, *supra* note 40, at 474–75 (“It is worth noting at the outset that there is nothing inherently natural about treating public-sector workers differently from private-sector workers. Most other industrial democracies have long covered both private- and public-sector workers with basically the same laws and legal rules.”).

⁴⁶ See *Wisconsin Educ. Ass’n Council v. Walker*, 824 F. Supp. 2d 856, 865 (W.D. Wis. 2012) (explaining the government’s proffered reason for creating the two classes of workers was to “avoid the prospect of law enforcement and fire fighting employees striking”), *aff’d in part and rev’d in part*, 705 F.3d 640 (7th Cir. 2013). Ironically, Wisconsin already outlaws strikes for these workers. *Id.* at 867; see also Slater, *supra* note 40, at 479 (“[I]n 2000, only 12 states allowed any public workers to strike.”).

D. The Myth of the Overcompensated Public Employee

“We have a new privileged class in America.” “We used to think of government workers as underpaid public servants. Now they are better paid than the people who pay their salaries Who serves whom here? Is the public sector—as some of us have always thought—there to serve the rest of society? Or is it the other way around?”

—Governor Mitch Daniels of Indiana⁴⁷

Governor Daniels’ sentiment has become the anthem of the attack on public-sector unionism. Pointing to the alleged overcompensation of unionized public workers, Republican governors and legislators claim that slashing the collective bargaining rights of public employees will help balance their states’ budgets.⁴⁸ However, unless public employees are overpaid, this anthem is merely pretext for a conservative anti-union agenda.⁴⁹

Several factors must be considered when comparing public-sector workers with their private-sector counterparts. For instance, several occupations—such as police and firefighters—do not exist in the private sector, making it difficult to draw a perfect comparison.⁵⁰ The difference between teaching in the public sector and teaching in the private sector is also significant.⁵¹ As a result, making a direct comparison between the two sectors may be impossible. The best alternative is to compare workers with similar human capital.⁵² A human capital comparison

⁴⁷ Pat Garafalo, *Gov. Daniels Bashes Public Employees as a ‘New Privileged Class,’* THINK PROGRESS (June 7, 2010, 11:16 AM), <http://thinkprogress.org/economy/2010/06/07/173307/daniels-public-pay>.

⁴⁸ See KEEFE, *supra* note 3, at 2 (“Some prominent public officials believe that excessive public employee compensation has contributed to [their state’s] financial emergency, and they are mobilizing the public and legislatures to . . . modify collective bargaining measures.”).

⁴⁹ See Editorial, *supra* note 20.

⁵⁰ David Lewin et al., *The New Great Debate About Unionism and Collective Bargaining in U.S. State and Local Governments*, 65 INDUS. & LAB. REL. REV. 749, 755–56 (2012).

⁵¹ *Id.* at 756 (“[P]ublic schools accept all students whereas private schools are sometimes highly selective and may exclude or remove poor performers, special needs students, or disruptive students.”).

⁵² *Id.*

accounts for an employee’s level of education and professional experience,⁵³ as well as the size of the employer.⁵⁴

An employee’s level of education is the most important factor in determining an employee’s earning potential.⁵⁵ Over half of the full-time public-sector workforce has earned at least a four-year degree, compared to 35% of private-sector workers.⁵⁶ While this data may lead some to predict that public-sector workers are better compensated, that is not necessarily the case. The relatively high unionization rate in the public sector has created a wage floor for workers, which means that public employees with a high school education are better compensated than their private-sector counterparts.⁵⁷ However, this advantage disappears when employees are college-educated. Public employees with some college earn approximately 25% less total compensation than their private-sector counterparts.⁵⁸ The wage gap increases to 37% for public-sector workers with a professional degree.⁵⁹

While the disparity in wages between sectors is staggering, it is also somewhat misleading. A more accurate comparison between sectors must also include total compensation, not just wages, since public employees receive most of their compensation through benefits.⁶⁰ To determine whether public-sector workers are overcompensated, their high benefits must offset their lower wages. Data analysis reveals that they do not. Even when these benefits are factored into the equation, public-sector workers are still *undercompensated* by 9–10% compared to

⁵³ *Id.*

⁵⁴ *Id.* at 753–54 (“Larger employers, that is, those with more than 100 employees, are significantly more likely to provide employees with benefits, in part, because they can spread administrative costs over a larger group and, for insurance purposes, can more readily diversify risk and self-insure. State and local governments resemble larger size private employers.”).

⁵⁵ See Lewin et al., *supra* note 50, at 756.

⁵⁶ *Id.* at 754.

⁵⁷ See KEEFE, *supra* note 3, at 5.

⁵⁸ *Id.* at 6. This figure jumps to thirty-two percent when comparing wages alone.

⁵⁹ *Id.*

⁶⁰ See Lewin et al., *supra* note 50, at 754 (“State and local government employees receive a higher portion of their compensation in the form of employer-provided benefits.”); see also Maury Gittleman & Brooks Pierce, *Compensation for State and Local Workers*, 26 J. ECON. PERSP. 217, 223 (2012).

their private-sector counterparts.⁶¹ This percentage drops to between 5.8% and 8.5% once the data is adjusted for the number of work hours per employee.⁶²

E. The Impact of Unionization on Wages

Considering the growth in public-sector unionism discussed in Part II.C., *supra*, it is no surprise that over half of all unionized workers are employed in the public sector.⁶³ The disparity between private-and-public-sector unionism is an important factor to consider when comparing the total compensation between workers in both sectors, because it makes it difficult—if not impossible—to compare the wages of unionized public-sector workers with unionized private-sector workers. However, the impossibility of this comparison does not handicap the analysis. Research suggests that union status has little impact on the wage disparity between workers in the two sectors, as illustrated by the wage penalty incurred from working in the public sector.⁶⁴

III. FIRST AMENDMENT ANALYSIS

While no fundamental right to collective bargaining exists under the United States Constitution,⁶⁵ the First Amendment harbors the freedoms of speech and association. As the Supreme Court has acknowledged, “the First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others . . . [a]nd it protects the right of associations to engage in advocacy on behalf of their members.”⁶⁶ Although the First Amendment is not a “substitute for

⁶¹ See Lewin et al., *supra* note 50, at 756.

⁶² *Id.* This is because, on average, public employees work fewer hours than employees in the private sector. It is also important to note that other studies have reached different conclusions. For instance, Maury Gittleman and Brooks Pierce claim that the disparity in compensation between public-sector workers and their private sector counterparts is “ambiguous.” See Gittleman & Pierce, *supra* note 60, at 239. Their results are even more nuanced, and perhaps less accurate, because they do not account for employer size or occupation. *Id.* at 226-27. However, the overwhelming consensus is that public-sector workers are not overpaid compared to the private sector counterparts. See KEITH A. BENDER & JOHN S. HEYWOOD, *OUT OF BALANCE?* (2010); see also ALICIA H. MUNNELL ET AL., *COMPARING COMPENSATION* 5 (2011) (illustrating the 9.5% wage penalty of public-sector workers and stating that the public-sector workers earn 6.8% less in total compensation when compared to their private sector counterparts).

⁶³ See Slater, *supra* note 40, at 478.

⁶⁴ See MUNNELL ET AL., *supra* note 62, at 5. However, some studies show that unionism has a positive wage effect of 3.7% in the public sector. See Lewin et al., *supra* note 50, at 758.

⁶⁵ See *Smith v. Ark. State Hwy. Emp.*, 441 U.S. 463, 465 (1979).

⁶⁶ *Id.* at 464.

national labor relations laws,”⁶⁷ it does protect the rights of public employees to join a union, pay union dues, and petition the government for a redress of grievances. By joining a union, workers exercise their freedom of association. By paying union dues, workers exercise their freedom of speech. In return, the union advocates on behalf of these workers, its members, through grievance procedures, legislative campaigns, electoral campaigns, and other expressive activities. In other words, “[a] union by its very nature is in existence to engage in speech.”⁶⁸

In *Ysursa v. Pocatello Education Association*, the Supreme Court used rational basis review to uphold Idaho’s Voluntary Contribution Act, which prohibited “payroll deductions for political purposes.”⁶⁹ Although the Court acknowledged that “[r]estrictions on speech based on its content are ‘presumptively invalid,’”⁷⁰ it held that the state did not abridge the unions’ speech by barring political payroll deductions because the state “is not required to assist others in funding the expression of particular ideas, including political ones.”⁷¹ Furthermore, Idaho’s law applied to all employees, regardless of their union status.⁷² The recent labor reform laws in Wisconsin, Michigan, and Ohio are different from the law at issue in *Ysursa* for several reasons: 1) they do not pertain to payroll deductions for political purposes, 2) they discriminate against the viewpoint of public-sector unions,⁷³ and 3) they are an *actual burden* on the speech of public-sector employees (rather than a refusal to subsidize political speech).

Placing the attack on unionized public-sector workers in context, it is clear that these labor reform laws target the viewpoint of public-sector unions that

⁶⁷ *Id.*

⁶⁸ *Bailey v. Callaghan*, 873 F. Supp. 2d 879, 886 (E.D. Mich. 2012), *rev’d*, 715 F.3d 956 (6th Cir. 2013).

⁶⁹ *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 356 (2009).

⁷⁰ *Id.* at 358.

⁷¹ *Id.* at 358–59.

⁷² *Id.* at 356 (“The Act covers all employees, ‘including all employees of the state and its political subdivisions.’”).

⁷³ The Supreme Court has long recognized that a union’s speech is protected under the First Amendment. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 900 (2010) (“Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”) (internal citations and quotation marks omitted).

support Democratic candidates.⁷⁴ Wisconsin's Act 10 is perhaps the most blatant violation of the First Amendment for this reason: not only does the law create two classes of public-sector employees, but it also targets the speech of public-sector workers whose unions did not endorse Governor Walker in 2010.⁷⁵ Similarly, Michigan's Act 53 only targets the speech of public school employees that are unionized.⁷⁶

The laws highlighted in this note also burden the speech rights of public-sector workers and their unions. For instance, while Wisconsin's Act 10 prohibits the automatic deduction of dues for general employees and requires annual recertification for the unions representing them, these same restrictions do not apply to public safety employees.⁷⁷ The application of Michigan's Act 53 prohibits the automatic deduction of union dues from public school employees, which is the "most convenient way to raise funds to support the Union's expressive activities."⁷⁸ Ohio's Senate Bill 5 severely restricted public employees' rights to submit grievances.⁷⁹ And so-called "right-to-work" laws, such as the one passed in

⁷⁴ See Part II.A., *supra*. The political attack on public-sector unions is apparently being carried out by the judiciary based upon the party of the deciding judge's nominating president. For instance, Democratic President Barack Obama appointed Judge William J. Conley of the Western District of Wisconsin, who held that Act 10 violates the First Amendment. His opinion was reversed in part by Judge Joel M. Flaum on the Seventh Circuit Court of Appeals, who was nominated by former Republican President Ronald Reagan, the president who threatened to fire nearly 13,000 air traffic controllers that were on strike. See Joseph A. McCartin, Op-Ed. *The Strike That Busted Unions*, N.Y. TIMES, Aug. 2, 2011, <http://www.nytimes.com/2011/08/03/opinion/reagan-vs-patco-the-strike-that-busted-unions.html>. Similarly, former Democratic President Bill Clinton appointed Judge Denise Paige Hood of the Eastern District of Michigan, who found for the unions in *Bailey*. Judge Raymond Kethledge of the Sixth Circuit Court of Appeals, who was nominated by former Republican President George W. Bush, reversed her opinion.

⁷⁵ See *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 873 (W.D. Wis. 2012), *aff'd in part and rev'd in part*, 705 F.3d 640 (7th Cir. 2013).

⁷⁶ *Bailey*, 873 F. Supp. 2d at 886 ("Act 53 by its application, not by its terms, affects speech. . . . The amendment by its application would burden speech for school unions and no other."), *rev'd*, 715 F.3d 956 (6th Cir. 2013).

⁷⁷ See *Wis. Educ. Ass'n Council*, 824 F. Supp. 2d at 864. Traditionally, union certification only occurs when workers initially seek to select a union as the exclusive bargaining agent or when workers request recertification.

⁷⁸ See *Bailey*, 873 F. Supp. 2d at 886, *rev'd*, 715 F.3d 956 (6th Cir. 2013).

⁷⁹ See Oplinger, *supra* note 34.

Michigan, also make it more difficult for unions to collect the revenue they need in order to engage in speech.⁸⁰

Strict scrutiny analysis applies when the freedom of speech is burdened,⁸¹ or when the law discriminates against a single viewpoint.⁸² The laws in Wisconsin, Michigan, and Ohio arguably do both. To survive strict scrutiny, a law must be narrowly tailored to achieve a compelling state interest.⁸³ The only reason proffered for these labor reform laws, at least publicly, is the interest of balancing state budgets. Given the Great Recession and the financial crisis faced by many states,⁸⁴ this proffered reason may constitute a compelling state interest. However, having a compelling state interest only satisfies one part of the analysis.

These laws also fail the second part of strict scrutiny analysis, because they are not narrowly tailored to achieve the compelling state interest of balancing a state’s budget (if this is a compelling state interest at all). These laws are underinclusive by definition, because they discriminate against a particular viewpoint: the viewpoint of public-sector unions that support Democratic candidates. As Professor Lofaso writes,

⁸⁰ Even so, it is important to note that right-to-work laws are legal. Under the Taft-Hartley amendments to the National Labor Relations Act, Congress expressly allows states and territories to pass right-to-work laws. See National Labor Relations Act, 29 U.S.C. § 164(b) (2006). For a more extended discussion of right-to-work laws, see James C. Thomas, *Right-to-Work: Settled Law or Unfinished Journey*, 8 LOY. J. PUB. INT. L. 163 (2007) (arguing that right-to-work laws deserve more attention in the national debate). Although right-to-work laws are legal, a problem can still arise when states burden the speech of a particular speaker. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

⁸¹ See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010) (“Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”) (internal citations and quotation marks omitted).

⁸² See *Bailey*, 873 F. Supp. 2d at 885 (“Prior precedent dictates that when the law discriminates against a small and identifiable group that is engaged in the business of speech, the Court may apply heightened or strict level scrutiny to determine whether a challenged regulation violates the First Amendment.”), *rev’d*, 715 F.3d 956 (6th Cir. 2013).

⁸³ See *Citizens United*, 130 S. Ct. at 898 (“Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”) (internal citations and quotation marks omitted).

⁸⁴ See *supra* Part II.A.

By blaming public unions for the debt caused by Wall Street's financial crisis and stock market crash, politicians divert attention to what they are really doing—coercively removing the economic and political rights of their civil servants. . . . In the meantime, public unions have been weakened by false and misleading messaging as well as by curtailment of their right to engage in collective bargaining. These measures would predictably result in lower public-sector union membership, which in turn results in less money in their general treasuries available to spend on Democratic Party candidates.⁸⁵

In other words, the campaign contributions of public-sector unions are the true motivation behind these laws. Republican lawmakers are attempting to stomp out the voices of opposition by weakening the largest supporter of Democratic candidates: public-sector unions. By discriminating against a particular viewpoint, or speaker, these laws are the type of restriction on speech that the First Amendment finds abhorrent.⁸⁶ As the Supreme Court has stated, free speech is a necessary means to hold public officials accountable to the people, and “[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”⁸⁷ These laws frustrate the plain language and policies of the First Amendment, and are therefore unconstitutional.

IV. CHALLENGING THESE LAWS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Fourteenth Amendment of the United States Constitution provides, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁸⁸ Acknowledging the “practical reality that most legislation classifies for one purpose or another,” the Supreme Court has stated that it will “uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the classification bears a rational relation to some legitimate end.”⁸⁹ A rational basis exists if a classification is rationally related to a legitimate government objective.⁹⁰

⁸⁵ Lofaso, *supra* note 6, at 307.

⁸⁶ See *Citizens United*, 130 S. Ct. at 898 (“Premised on mistrust of government power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”).

⁸⁷ *Id.* (internal citations and quotation marks omitted).

⁸⁸ U.S. CONST. amend. XIV, § 1.

⁸⁹ *Romer v. Evans*, 517 U.S. 620, 621 (1996).

⁹⁰ *Id.* at 631.

While this standard of review is deferential, it is also used to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”⁹¹ For instance, in *Romer v. Evans*, the Supreme Court used rational basis review to strike down Amendment 2 in Colorado, which prohibited the legislature from passing statutes protecting citizens because of their sexual orientation.⁹² Rejecting the state’s justification for the law—that it would prevent homosexuals from having “special treatment” under the law⁹³—the Supreme Court concluded that Amendment 2 “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”⁹⁴ Consequently, Amendment 2 violated the Equal Protection Clause.⁹⁵

Public-sector labor reform laws, such as those passed in Wisconsin, Michigan, and Ohio, create two classes of public-sector workers: those who belong to a union, and those who do not. While this classification implicates the Equal Protection Clause, these workers are not members of a suspect class, nor do they have a fundamental right to collective bargaining. Therefore, laws that target unionized public-sector workers will be upheld as long as they survive rational basis review.

Republicans purport, at least publicly, that balancing the state budget is the underlying goal of these recent public-sector labor reform laws. As newly elected governors inherit serious state financial woes, it is logical for them to propose measures to reduce or eliminate the state budget deficit. Consequently, reducing the state budget deficit is a legitimate goal for governors and state legislatures. However, having a legitimate goal is only half of the required analysis under rational basis review: the law must also bear a rational relation to the legitimate goal.⁹⁶ To determine whether laws that target unionized public workers are constitutional, there must be a rational relation between the recent attack against unionized public employees and reducing a state’s budget deficit.

The proffered explanation behind the recent public-sector labor reform laws is that since unionized public employees are overcompensated, cutting their wages

⁹¹ *Id.* at 633.

⁹² *Id.* at 635–36.

⁹³ *Id.* at 638 (Scalia, J., dissenting).

⁹⁴ *Id.* at 635.

⁹⁵ *Id.* at 635–36.

⁹⁶ *Id.* at 631.

and collective bargaining rights will save the state millions of dollars.⁹⁷ Yet, research indicates that public employees are not overcompensated. While unionization in the public sector has established a wage floor that better compensates public employees with a high school education, college-educated employees are compensated 25% less than their private-sector counterparts.⁹⁸ Although public employees receive more of their total compensation through benefits, they are still undercompensated by 11%.⁹⁹ The fact that public employees are significantly undercompensated means that “[p]ublic-sector workers’ compensation is neither the cause, nor can it be the solution to a state’s financial problems.”¹⁰⁰ The unionization of public employees is also not the cause of state budget deficits. On average, states that allow public-sector collective bargaining have a 14% budget deficit, while states that bar public-sector collective bargaining have a 16.5% budget deficit.¹⁰¹ Thus, there is no correlation between unionized public-sector workers and state budget deficits, nor is there a rational relation between these labor reform laws and the legitimate goal of reducing state budget deficits.

The political climate surrounding the passage of these labor reform laws sheds light on the true reasons behind the classification of unionized public-sector workers: that is, “for the purpose of disadvantaging the group burdened by the law.”¹⁰² In an effort to weaken public-sector unions, Republican leaders and lawmakers have slashed the political and collective bargaining rights of civil servants. These laws not only disadvantage public-sector unions by lessening the amount available for campaign contributions, but they also place public employees, who already take a significant pay penalty by entering the public sector, at even more of a disadvantage. Consequently, these laws violate the Equal Protection Clause of the Fourteenth Amendment.

⁹⁷ See Greenhouse, *supra* note 18.

⁹⁸ KEEFE, *supra* note 3, at 6.

⁹⁹ *Id.* at 9; see also *supra* Part II.D.

¹⁰⁰ KEEFE, *supra* note 3, at 12.

¹⁰¹ See Slater, *supra* note 40, at 491–92.

¹⁰² *Romer v. Evans*, 517 U.S. 620, 633 (1996).

V. FIGHTING BACK

“When workers’ rights are under attack, what do we do? Stand up! Fight Back!”

Across the country, public-sector unions, workers and community members have stood up and fought back against the laws passed in Wisconsin, Michigan, and Ohio. In Wisconsin, protests topping the size of those against the Vietnam War¹⁰³ stormed the state capital, and Democratic lawmakers fled the state to force negotiations among Republicans.¹⁰⁴ With scenes reminiscent of those in Wisconsin, hundreds of protestors occupied the Michigan state capitol for weeks protesting the emergency financial manager law.¹⁰⁵ They returned when Republican lawmakers passed Michigan’s right-to-work law.¹⁰⁶ From Michigan the fight moved to Ohio, where a main hall of the state capital was overflowing with thousands of workers.¹⁰⁷ Despite the public outcry surrounding the attack on public-sector unions, Republican lawmakers passed all of these bills. And once these measures were signed into law, the fight went from state capitols to federal courts¹⁰⁸ and ballot measures.

A. Wisconsin

The Wisconsin Education Association Council and several other public-sector unions brought an action against Governor Walker and members of his administration in federal court, alleging that Act 10 violates the Equal Protection

¹⁰³ See Kelleher, *supra* note 1.

¹⁰⁴ *Wisconsin Democrats Flee to Prevent Vote on Union Bill*, NPR (Feb. 17, 2011, 4:26 PM), <http://www.npr.org/2011/02/17/133847336/wis-democratic-lawmakers-flee-to-prevent-vote>.

¹⁰⁵ David Bailey, *Michigan workers jam capitol to protest union plan*, REUTERS (Mar. 8, 2011, 4:48 PM), <http://www.reuters.com/article/2011/03/08/us-michigan-protest-idUSTRE7276NQ20110308>.

¹⁰⁶ *Right-to-work legislation introduced in the state House as protesters pack Capitol*, DETROIT FREE PRESS (Dec. 6, 2012, 4:35 PM), <http://www.freep.com/article/20121206/NEWS06/121206079/right-to-work-legislation-introduced-in-state-house>.

¹⁰⁷ See Tavernise & Sulzberger, *supra* note 2.

¹⁰⁸ At least one state court case was also filed in Wisconsin’s Dane County Circuit Court. See Sarah Posner, *Wisconsin judge denies stay on public worker union law*, JURIST (Oct. 23, 2012, 10:54 AM), <http://jurist.org/paperchase/2012/10/wisconsin-judge-denies-stay-blocking-public-worker-union-law.php>. However, for the purposes of this note, I limit the scope of this section to federal court challenges and ballot referenda.

Clause of the Fourteenth Amendment and their First Amendment rights.¹⁰⁹ Judge William J. Conley of the Western District of Wisconsin granted summary judgment for plaintiffs on their equal protection challenge to Act 10's restrictions on the collective bargaining of general employees and their unions, as well as the annual recertification requirement for general employees unions.¹¹⁰ However, Judge Conley denied plaintiff's other equal protection claims, stating that they passed rational basis review.¹¹¹ This was because, according to the court, the distinction between "public service employees" and "general employees" is rationally related to the defendant's proffered goal of preventing public safety strikes.¹¹² Judge Conley also held that Act 10's prohibition of dues withholding for general employees violated the First Amendment.¹¹³ On appeal, the Seventh Circuit reversed Judge Conley's holdings and found for defendants.¹¹⁴ Although working families collected enough signatures to have a recall election, Governor Walker won by a 53-46 margin.¹¹⁵

B. Michigan

Public-sector unions in Michigan took a similar approach to those in Wisconsin by filing an equal protection and First Amendment challenge to Act

¹⁰⁹ Wis. Educ. Ass'n Council v. Walker, 824 F. Supp. 2d 856, 873 (W.D. Wis. 2012), *aff'd in part and rev'd in part*, 705 F.3d 640 (7th Cir. 2013). The other unions joining the action are the Wisconsin Council of County and Municipal Employees; AFSCME, District Councils 40, 24, and 48; Wisconsin State Employees Union; AFT Wisconsin; SEIU Healthcare Wisconsin; and Wisconsin State AFL-CIO.

¹¹⁰ *Id.* at 877.

¹¹¹ *Id.* at 866.

¹¹² *Id.* at 867. It is important to note that the state of Wisconsin already outlaws strikes for public sector workers. Judge Conley dismissed this, stating, "this [fact] alone does not undermine the State's rationale. As defendants note, public sector employees have gone on strike in the past despite statutory, anti-strike provisions." *Id.* Still, if statutory provisions do not prevent strikes, it is difficult to understand how drawing a distinction between two classes of employees will accomplish this goal. Moreover, this was the first time that the goal of preventing strikes was mentioned in regard to Act 10. Up until federal court, Wisconsin's budget crisis was Governor Walker's proffered reason for passing Act 10 was budgetary concerns—hence the bill's popular name, the "budget repair bill."

¹¹³ *Id.* at 877.

¹¹⁴ Wis. Educ. Ass'n v. Walker, 705 F.3d 640, 672 (7th Cir. 2013).

¹¹⁵ John Helton & Tom Cohen, *Walker's Wisconsin win big blow to unions, smaller one to Obama*, CNN ELECTION CENTER (June 6, 2012, 10:11 AM), <http://www.cnn.com/2012/06/05/politics/wisconsin-recall-vote>.

53.¹¹⁶ Judge Denise Page Hood of the Eastern District of Michigan found that plaintiffs would likely prevail on their equal protection challenge because attacking education-sector unions is not rationally related to the purported goal of cost savings for the state of Michigan.¹¹⁷ For starters, the “[d]efendants were [] unable to explain, let alone show, how cost savings was not applicable to any other similarly situated union in the public sector that is facing budgetary crisis.”¹¹⁸ Taking a close look at the political context in which Act 53 was passed, Judge Hood concluded that the “attempt to undercut union power coupled with the legislative history of Act 53 strongly supports the argument that Defendants’ real motive for the amendment was to suppress an unpopular group.”¹¹⁹ Judge Hood also found it was likely that plaintiffs would prevail in their First Amendment challenge because Act 53 targets “only one viewpoint and one set of speakers for discrimination: the unions.”¹²⁰ After her careful analysis, Judge Hood enjoined the defendants, which included the chairman and members of the Michigan Employment Relations Commission, from enforcing Act 53’s prohibition on the payroll deduction of union’s dues and service fees.¹²¹ On appeal, the Sixth Circuit reversed, finding the unions were unlikely to succeed in their First Amendment and Equal Protection claims, and remanded the case for further proceedings.¹²²

C. Ohio

In Ohio, unions and community members chose a different forum: the ballot initiative. On November 8, 2011, Ohioans voted to repeal Senate Bill 5.¹²³ Individuals and organizations on both sides of the issue poured over \$50 million into the ballot initiative, making it one of the most expensive ballot initiatives ever waged.¹²⁴ After the repeal, Governor Kasich responded by taking a pause and

¹¹⁶ Bailey v. Callaghan, 873 F. Supp. 2d 879, 886 (E.D. Mich. 2012), *rev’d*, 715 F.3d 956 (6th Cir. 2013).

¹¹⁷ *Id.* at 883.

¹¹⁸ *Id.* at 884.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 886.

¹²¹ *Id.* at 887.

¹²² Bailey v. Callaghan, 715 F.3d 956 (6th Cir. 2013).

¹²³ See Glenn Thrush, *Ohio Senate Bill 5’s repeal buoys Dems*, POLITICO (Nov. 9, 2011, 6:46 PM), www.politico.com/news/stories/1111/67918.html.

¹²⁴ *Id.*

vowing to listen to the public: “The people have spoken clearly. You don’t ignore the public. Look, I also have an obligation to lead. I’ve been leading since the day I took this office, and I’ll continue to do that. But part of leading is listening and hearing what people have to say to you.”¹²⁵

VI. CONCLUSION

Since sweeping the 2010-midterm elections, Republican leaders have used the severe budget deficits in their states to justify a war against public-sector unions. Touting the myth of the “overcompensated public employee,” Republicans passed labor reform laws in over a dozen states, including Wisconsin, Michigan, and Ohio. Yet, the overwhelming consensus among economists and researchers is that unionized public-sector workers are *underpaid* compared to their private sector counterparts. This points to one conclusion: the Republican anthem surrounding this issue is merely pretext for a conservative anti-union agenda.

This anti-union agenda costs public-sector workers more than their collective bargaining rights and on-the-job protections. It also costs public-sector workers their First Amendment right to free speech and their Fourteenth Amendment right to equal protection. That is, by targeting a specific viewpoint, that of public-sector unions supporting Democratic candidates, these labor reform laws violate the First Amendment. And by creating two classes of public employees—those who belong to unions and those who do not—for the sake of disadvantaging public-sector unions, these laws violate the Equal Protection Clause of the Fourteenth Amendment. While public-sector unions, workers and community members have answered the call to stand up and fight back, more must be done to ensure that the rights of public employees are protected.

¹²⁵ *Ohio Issue 2: Controversial Anti-Union Law Defeated By Voters*, HUFFINGTON POST (Nov. 9, 2011, 12:38 PM), http://www.huffingtonpost.com/2011/11/08/ohio-issue-2-_n_1083100.html.