The Wisconsin Public-Sector Labor Dispute of 2011

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I. Introduction

On Valentine’s Day, February 14, 2011, the new conservative Republican Governor of Wisconsin, Scott Walker, dropped a “bomb.”1 He publicly introduced a “budget repair bill,”

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Senate Bill 10,\(^2\) to limit state public-sector unions’ ability to bargain collectively with their employers over wages, benefits, and other terms and conditions of work. This anti-collective bargaining bill, later known as Wisconsin Act 10, was supposedly a necessary reaction to the effects of the global economic crisis on the state budget.\(^3\) Yet, to many Wisconsinites, the Governor’s actions appeared to be an exercise in political retribution rather than budgetary restraint.

What was so surprising was not only the unprecedented attack on public-sector bargaining, but that such action did not square at all with the positive history of public-sector labor relations in Wisconsin.\(^4\) In 1959, Wisconsin was the very first state to enact public-sector sweeping right turn from a half century of developments in the rights of its public employees to unionize, collectively bargain and collect union dues.”).


\(^3\) See A.G. Sulzberger & Monica Davey, Union Bonds in Wisconsin Begin to Fray, N.Y. TIMES (Feb. 21, 2011), http://www.nytimes.com/2011/02/22/us/22union.html (“Mr. Walker, the new Republican governor who has proposed the cuts to benefits and bargaining rights, argu[es] that he desperately needs to bridge a deficit expected to reach $3.6 billion for the coming two-year budget.”).

\(^4\) See Kevin M. Kniffin, Organizing to Organize: The Case of a Successful Long-Haul Campaign for Collective Bargaining Rights, 36 LAB. STUD. J. 333, 334 (2011) (“In the case of Wisconsin, the state’s rich history of union organizing contrasted sharply with the newly elected
bargaining laws\(^5\) similar to those provisions adopted under the National Labor Relations Act.\(^6\)

Yet, Governor Walker maintained that there was a short-term deficit of about $140 million through June 30, 2011, and a long-term deficit of some $3.6 billion.\(^7\) Walker believed those deficits could be more quickly erased by severely disabling public-sector union bargaining power.

\(^5\) See Jason Stein & Patrick Marley, *Walker Budget Plan Would Limit State Unions to Negotiating Only on Salaries*, MILWAUKEE J. SENTINEL (Feb. 10, 2011), http://www.jsonline.com/news/statepolitics/115726754.html (“Unlike unions of private-sector workers, which are governed by federal law, state and local unions in Wisconsin are largely governed by two 40-year-old state laws . . . . State unions are covered under the State Employment Labor Relations Act [WIS. STAT. §§ 111.80–111.94], and school and local government unions are covered under the Municipal Employment Relations Act [WIS. STAT. §§ 111.70–111.77].”); see also Kniffin, *supra* note 4, at 336 (“With a history that includes figures such as ‘Fighting Bob’ La Follette along with policy innovations such as unemployment insurance and workers’ compensation, Wisconsin has often been recognized as ‘a Progressive showcase for social legislation.’”) (citations omitted).


\(^7\) See Stein & Marley, *supra* note 5.
However, the economic conditions surrounding the recession did not require enactment of Act 10. While the law certainly had economic and social implications, its motivation appeared to be largely a matter of partisan politics. Unions, whether public or private, are democratic organizations that provide workers a collective voice in society and in the workplace. They also act as a countervailing force to employers, employer organizations, and governments that promote business interests at the expense of working people. 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. The fact that similar attacks against public unions took place simultaneously across the country suggests conservative anti-union groups orchestrated these reforms. Indeed, Wisconsin set the tone for similar anti-collective bargaining legislative movements in the public sector in Florida, Indiana, Nevada, Michigan, and Ohio.\(^8\)

More specifically, Walker’s claim that Act 10’s anti-collective bargaining approach was required to balance Wisconsin’s budget is belied by two unassailable facts. First, there were a number of provisions in the law, including an annual union recertification requirement and an

\(^8\) See Editorial, Gov. Walker’s Pretext, N.Y. TIMES (Feb. 17, 2011), http://www.nytimes.com/2011/02/18/opinion/18fri1.html; see also Kniffin, supra note 4, at 334 (“[B]oth proponents and opponents of the governor’s proposal to erode collective bargaining rights presumed that Wisconsin’s legislature and governor were establishing a new ‘test’ pattern that would influence actions in other states (e.g., Ohio).”). For a survey of state enactments, see Martin H. Malin, The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements, 27 A.B.A. J. LAB. & EMP. L. ___ (2012).
anti-dues checkoff provision, which had absolutely nothing to do with cost savings. Second, and perhaps even more tellingly, when Act 10 was finally enacted, Walker and his allies in the legislature employed a legislative procedure which could only be utilized if Act 10 did not have any impact on state fiscal policy. In short, Governor Walker used the economic crisis, and, more specifically, Wisconsin’s budget situation, as a ruse to enact a punitive bill against public-sector unions.

Although unions and their allies have drafted, and continue to draft, procedural and substantive legal challenges to Act 10 based on state open meeting laws and constitutionally-based freedom of speech provisions and Equal Protections provisions, these legal challenges, with some notable exceptions, have been largely unsuccessful. The subsequent loss of

9 Indeed, in striking down the recertification and anti-dues checkoff provisions for non-public safety employees, the district court found that there was little to no connection between Act 10’s asserted justifications and these plainly punitive provisions. See Wis. Educ. Ass’n Council v. Walker, 11-cv-428-wmc, slip op. at 3–4 (W.D. Wis. Mar. 30, 2012).

10 Though initially successful at trial, a divided Wisconsin Supreme Court overturned the open meeting law challenges. See State ex rel. Ozanne v. Fitzgerald, 798 N.W.2d 436, 438 (Wis. 2011). The Ozanne decision is currently the subject of a motion for relief from judgment. See District Attorney’s Motion for Recusal of Justice Michael Gableman and for Relief from Judgment, State ex rel. Ozanne v. Fitzgerald, No. 2011AP000613-LV (Wis. Dec. 30, 2011). As far as the Equal Protection and free speech challenges, the District Court for the Western District of Wisconsin upheld the anti-collective bargaining provisions, but enjoined the dues checkoff and recertification provisions. See Wis. Educ. Ass’n Council, , slip op. at 3–4.
workplace rights not only adversely impacts public-sector workers, but also the citizens of Wisconsin, who will be stuck with a demoralized and likely less effective public-sector workforce.

II. The Remarkable Story Behind the Enactment of Wisconsin Act 10

When Wisconsin Governor Scott Walker announced his intention to hold an emergency budget repair session to address the state’s short-term and long-term budget deficit, some observers were taken aback by his proposed radical departure from past labor relations practices. But as Walker freely admitted, and given Walker’s notoriety as being an ardent opponent of public-sector unions as the former Milwaukee County Executive, one would have had to have been asleep not to see this move coming. Walker argued that overly-generous labor contracts,

11 At a February 22, 2011, press conference, Walker stated that, “[t]he simple matter is I campaigned on [passing anti-collective bargaining legislation] throughout the election. Anybody who says they are shocked on this has been asleep for the past two years.” See POLITIFACT WIS., supra note 1. In March of 2010, then-Milwaukee County Executive Walker asserted that a financial emergency allowed him to lay off twenty-six unionized courthouse security guards and contract the work to a private company. Yet, the County Board had rejected the outsourcing idea just months before Walker’s unilateral action. Rejecting Walker’s asserted financial emergency, in January of 2011, an arbitrator reinstated the security guards with backpay. Steve Schultze, Milwaukee County Must Offer to Reinstate Courthouse Security Guards, MILWAUKEE J. SENTINEL (Jan. 10, 2011), http://www.jsonline.com/news/milwaukee/113212479.html.
which he asserted gave 200,000 Wisconsin public workers lucrative salaries, pension benefits, and health insurance, had finally taken an insuperable financial toll on the state.\textsuperscript{12}

Walker had the advantage of Republican majorities in both the Wisconsin State Senate and the General Assembly and sought to fast-track Act 10. Although the majority was smaller in the Senate, Republican leadership thought that Walker could propose his plan without negotiating with Democrats and ram his bill through both chambers. The Democrats in the legislature, for their part, made it clear that the proposed “budget repair bill” really had nothing to do with fixing the state’s budget and characterized the bid as an unacceptable attack on public unions.\textsuperscript{13} Indeed, Act 10 would strip the rights of most public employees to bargain over most terms and conditions of employment.


As far as collective bargaining, public workers were still permitted to bargain over wages, but such bargaining was limited to no more than the year’s inflation rate.\textsuperscript{14} If the public employees wanted wage increases beyond the rate of inflation, they would have to initiate a costly and time-consuming statewide referendum.\textsuperscript{15} Additionally, in a move that many thought was aimed to divide and conquer public-sector unions, Walker conspicuously excluded public safety officers (i.e., police, firefighters, and paramedics) from coverage under Act 10.\textsuperscript{16}

\textsuperscript{14} \textit{Id.} The inflation rate is calculated by measuring the Consumer Price Index for a year’s period ending on a date 180 days prior to the expiration of the contract. Thus, for contracts ending March 31, 2012, the maximum possible increase is 2.65%; for contracts ending June 30, 2012, the maximum possible increase is 3.16%. \textit{Consumer Price Index Calculation Developments and Chart}, Wis. Emp. Rel. Commission (Mar. 19, 2012), http://werc.wi.gov/selected_press_releases_and_werc_world_articles.htm#pi_developments_and_chart.

\textsuperscript{15} Stein & Marley, \textit{supra} note 5.

If those were the worst parts of Act 10, that would have been quite enough. However, there were a number of clearly punitive provisions that made it more difficult for public-sector unions effectively to organize their workers. Chief among these punitive provisions were annual recertification provisions and anti-dues checkoff provisions.\textsuperscript{17} The annual recertification provisions required already-existing unions annually to recertify that they continued to represent a majority of the employees. Snuck into this provision was the harsh condition that not just a majority of those voting had to vote for the union, but at least 51% of all employees, voting or not, had to vote for recertification.\textsuperscript{18} This bargaining-unit-wide majority provision made it much more difficult for unions to be recertified as the representative of their employees.\textsuperscript{19}

\textsuperscript{17} Id.

\textsuperscript{18} Act 10 requires unions representing general employees, but not those representing “public safety” employees, to undergo annual automatic recertification elections to retain their status as the certified bargaining representatives, regardless of whether any represented employee actually seeks a vote. See 2011 Wis. Act 10, §§ 242, 289, 9132, 9155, http://docs.legis.wisconsin.gov/2011/related/acts/10.pdf. A union subject to a recertification election under Act 10 is decertified unless at least fifty-one percent of those eligible to vote cast ballots in favor of retaining the union. Id. § 242.

The anti-union dues checkoff provision makes it unlawful for public employers to withhold monthly union dues from employees’ paychecks.\textsuperscript{20} For administrative convenience, dues checkoff provisions had been a staple of both private-sector and public-sector collective bargaining contracts. Without the ability to collect union dues in this efficient manner, under Act 10, unions will have to spend more of their time tracking down members to collect dues and less time on everyday union duties such as processing grievances.\textsuperscript{21}

\textsuperscript{20} Act 10 prohibits state and municipal employers from deducting union dues for employees, including for employees who desire the deductions and present their employers with written authorizations. \textit{See} 2011 Wis. Act 10, §§ 58, 227, 298, \texttt{http://docs.legis.wisconsin.gov/2011/related/acts/10.pdf}.

\textsuperscript{21} One of the plaintiffs in the federal lawsuit against Act 10, the Wisconsin Education Association, estimated “that the loss of an automatic dues deduction option for its voluntary members will amount in an \textit{additional} $375,000 reduction in the portion of its dues contributions set aside for certain types of political activity.” Wis. Educ. Ass’n Council v. Walker, 11-cv-428-wmc, slip op. at 15 (W.D. Wis. Mar. 30, 2012) (emphasis in original). When the New York City MTA transportation union lost its ability to use dues checkoff in 2005–06, the President of the Transport Workers Union swore in an affidavit that ninety percent of the Union’s income came from dues checkoffs from employees. Because of the loss of the dues checkoff, the MTA Union
Many Wisconsinites were outraged by the Governor’s proposal. There were massive demonstrations throughout February and March of 2011 in Madison, with as many as 100,000 protestors marching on the State Capitol to show their displeasure with Walker’s attack on public unions.\textsuperscript{22} The protests in support of public-sector bargaining rights were not limited to Wisconsin,\textsuperscript{23} and they received international attention.\textsuperscript{24}

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had to have its staff focus almost exclusively on collecting dues. \textit{See MTA Bus Co. v. TWU, No. 2005-37468, 2005 WL 6242982 (N.Y. Sup. 2005) (Trial Motion, Memorandum and Affidavit)} (“Our staff has been deployed to the field in an aggressive campaign to push our members to pay their dues. . . . In spite of these efforts, we have experienced a significant drop in income.”).

\textsuperscript{22} \textit{See James B. Kelleher, Up to 100,000 Protest Wisconsin Law Curbing Unions, Reuters} (Mar. 12, 2011), http://www.reuters.com/article/2011/03/13/usa-wisconsin-idUSN1227540420110313. This was as large as the biggest crowd of protestors in Madison during the Vietnam War; \textit{see also James Kelleher & David Bailey, Largest Crowds Since Vietnam War March in Wisconsin, Reuters} (Feb. 26, 2011), http://www.reuters.com/article/2011/02/26/us-wisconsin-protests-idUSTRE71O4F420110226.


\textsuperscript{24} \textit{See, e.g., Roger Wilkinson, Wisconsin Unions Rally for Rights, AL-JAZEERA} (Feb. 20, 2011), http://english.aljazeera.net/video/americas/2011/02/2011220115031136309.html (“In the state of Wisconsin, roughly 100,000 people turned up for a fifth straight day of protests. Public
Meanwhile, Democratic members of the two houses of the Wisconsin Legislature undertook different strategies to prevent a final vote on the bill. Democratic Assembly members, vastly outnumbered, sought to introduce endless amendments to make their Republican colleagues take unpopular votes, but also to stall a vote on the final bill. Although this approach had some success, Act 10, unmodified by any amendment, was passed easily in the Republican-controlled Assembly.

In the more closely divided Senate, quite a different series of events unfolded. In that chamber, Republicans held a nineteen to fourteen majority over Democrats. However, because in its initial form the budget repair bill included concededly fiscal measures, a sixty percent supermajority vote was necessary for passage. This required that at least twenty senators vote for the bill. Not only would the Democratic state senators not agree to support Act 10, they physically fled from Wisconsin to the neighboring state of Illinois, hoping to ensure that there would be no quorum to act on the Governor’s budget repair bill.\(^{25}\) Republicans responded by calling on the state police to round up the lawmakers and bring them back to Madison, but the state police had no power to bring the Democratic state senators back from Illinois.\(^{26}\)

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sector workers accuse the state’s Republican governor of using the [financial] crisis as a reason to attack their union rights.”


\(^{26}\) *Id.*
Unable to goad the Democratic state senators back to Wisconsin, Governor Walker and his Republican allies in the legislature devised a new plan they believed would not require a supermajority vote on Act 10. On March 9, 2011, with little notice, the Senate majority leader, Scott Fitzgerald, quickly held a special conference committee meeting with representatives from the Wisconsin Senate and Assembly. He introduced a new version of the bill, which was said not to have any fiscal provisions and, therefore, needed only a normal majority vote. Although the Democrats present at this conference committee, including Assembly Minority Leader Peter Barca, vehemently objected to this unusual legislative process, the amended bill was first passed by the conference committee and then by simple majorities in the Senate and the House. On March 11, 2011, Governor Walker signed Act 10 into law with all of the same anti-collective bargaining provisions.

Ismael Ozanne, the Democratic district attorney for Dane County, immediately challenged Act 10. The lawsuit alleged that enactment of Act 10 violated Wisconsin’s open meetings law, which requires that the public and interested parties be given adequate notice before legislation is considered. The lawsuit maintained that such notice was lacking under the

27 Patrick Marley & Lee Bergquist, With Democrats Absent, Republicans Advance Collective Bargaining Changes, MILWAUKEE J. SENTINEL (Mar. 9, 2011), http://www.jsonline.com/news/statepolitics/117656563.html (“Just before the Senate vote, a committee stripped some financial elements from the bill, which they said allowed them to pass it with the presence of a simple majority. The most controversial parts of the bill remain intact.”).

28 Id.

29 Dane County is the county in which Madison, the capital of Wisconsin, is located.

open meetings law and, therefore, the legislative process had to be redone with proper notice. On May 26, 2011, the trial court voided Act 10, finding that the manner of the law’s enactment violated the open meetings law.\(^\text{31}\)

\(^{31}\) See Ozanne v. Fitzgerald, No. 11-CV-1244, 2011 WL 2176815 (Wis. Cir. May 26, 2011). During this same time period, conservative supporters of Walker were seeking to silence critics of Act 10 through public record act requests seeking the emails of prominent public university professors. The most notorious example of such tactics was by the Wisconsin Republican Party, which sought to gag the expression of University of Wisconsin–Madison history professor William Cronon. Dr. Cronon had written an op-ed in the New York Times about the ongoing dispute surrounding the Wisconsin budget repair bill. Based on the fact that similar conservative legislation was percolating in many state legislatures throughout the country, Dr. Cronon surmised that the American Legislative Exchange Conference (ALEC) and other conservative advocacy groups had crafted Walker’s anti-union legislation. Dr. Cronon did not draw any ultimate conclusions on these matters, but only suggested that other people conduct research to determine what role ALEC and these other conservative clearinghouses had played in the Wisconsin labor crisis. The University of Wisconsin was subsequently served with a public records request from the Wisconsin Republican Party that demanded all of Dr. Cronon’s university emails that included certain political terms (including Scott Walker, recall, Republican, and collective bargaining) from January 1, 2011, and beyond. John Nichols, Wisconsin GOP Seeks to Silence a Distinguished Dissenter. McCarthyism Is Back, The Nation (Mar. 25, 2011), http://www.thenation.com/blog/159489/wisconsin-gop-seeks-silence-
The Act 10 story subsequently became even more convoluted and bizarre. Justice David Prosser of the Wisconsin Supreme Court, a conservative on the seven-member court, had come up for reelection for another ten-year term. Including Justice Prosser, there were four conservative Justices and three progressive Justices. If Justice Prosser lost his election, the court would flip to a progressive majority, and the thought was that the court would uphold the trial judge’s decision. As it turned out, Justice Prosser barely defeated his progressive challenger after an April 6, 2011 formal recount, keeping a four-to-three conservative majority.32

At the time, I criticized the Wisconsin GOP in my own blog post, concluding:

[T]he Wisconsin Republican party is seeking to chill [Dr. Cronon’s] speech in order to further self-serving political aims. The intent of such requests appears to be nothing less than to suppress efforts to disseminate important information about whether out-of-state conservative organizations are funding legislation being pushed currently by the Wisconsin governor.


32 Larry Sandler & Patrick Marley, *Prosser, Kloppenburg Virtually Deadlocked as Supreme Court Race Remains Tight*, MILWAUKEE J. SENTINEL (Apr. 6, 2011), http://www.jsonline.com/news/statepolitics/119303544.html (“Interest groups on both sides had portrayed the election as a referendum on Gov. Scott Walker’s agenda and particularly on a controversial law sharply restricting public employee unions. Conservatives backed Prosser, and liberals supported Kloppenburg, even though the candidates themselves insisted they were politically neutral.”).
In June of 2011, just two months after his reelection, after a heated argument over whether the court should uphold the open meetings law violation, allegations arose that Justice Prosser had attempted physically to choke a fellow Supreme Court Justice, progressive Justice Ann Walsh Bradley.33 Although Justice Prosser was later cleared of any criminal conduct,34 many people wondered what impact this event had on the Wisconsin Supreme Court’s June 14, 2011 four-to-three ruling to vacate the judgment of the trial court and permit Act 10 to go into effect.35 Justice Prosser wrote a vitriolic concurrence providing a pro-Walker tilt to the political background of Act 10 and reasons for finding no violation.36 Chief Justice Shirley Abrahamson


34 As this article goes to press, the Wisconsin Judicial Commission has a pending ethics complaint against Justice Prosser for his conduct towards Justice Bradley. See John Israel, Justice Prosser Attempts To Kill Ethics Case Against Him By Asking All Colleagues To Recuse Themselves, THINKPROGRESS (Mar. 21, 2012, 11:15 AM), http://thinkprogress.org/justice/2012/03/21/448919/prosser-attempts-to-kill-ethics-case/?mobile=nc.

35 State ex rel. Ozanne v. Fitzgerald, 798 N.W.2d 436 (Wis. 2011).

36 Id. at 447. Justice Prosser’s concurrence noted:

The circuit court concluded that the legislature should have provided public notice of the special session conference committee 24 hours in advance. The court did not acknowledge that thousands of demonstrators stormed and occupied the State
wrote a scathing dissent which took Justice Prosser and the majority to task for rushing publication of the decision for political reasons.\textsuperscript{37} In the end, Act 10 went into effect on June 28, 2011.\textsuperscript{38}

Following affirmation of Act 10’s lawful enactment, yet another drama was playing out. Union supporters had vowed to seek the recall of Republican state senators who had voted to strip public-sector collective bargaining rights. Wisconsin recall laws only permit recalls to be filed against those who have been in office for at least one year since their last election.\textsuperscript{39} This meant Governor Walker could not initially be subjected to recall, nor could any members of the State Assembly who had all just been reelected to a new two-year term in November 2010. Instead, six Republican and three Democratic state senators faced recall efforts in July and August of 2011.\textsuperscript{40} The outcome was a plus-two gain for Democrats, as all Democrats retained Capitol within a few hours of the notice that a conference committee meeting would be held.

\textsuperscript{37} Id. at 451 (Abrahamson, C.J., dissenting) (“Justice Prosser’s concurrence is longer than the order. The concurrence consists mostly of a statement of happenings. It is long on rhetoric and long on story-telling that appears to have a partisan slant. Like the order, the concurrence reaches unsupported conclusions.”).


\textsuperscript{40} Republicans ran fake “Democrats” in the Democratic recall primaries to delay the process. Wisconsin Recall Elections: Six Fake Democrats Force Primaries in Recall Races,
their seats and four out of the six Republicans targeted retained theirs. The recall efforts reduced the Republican majority to a wafer thin seventeen to sixteen.41 Of course, these first recall efforts did not repeal or amend Act 10.

Nor will the effort to recall Governor Walker, which began on November 15, 2011 and will culminate in a June 8, 2012 recall election,42 lead to a repeal of Act 10. Though the recall

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42 Governor Walker, along with Lieutenant Governor Rebecca Kleefisch and four additional Republican state senators, will be subject to the 2012 recall process. The recall primaries will be held on May 8, 2012, and the general recall election will take place on June 5, 2012. See Tim Jones, All-Out Walker War Ahead as Wisconsin Board Approves Recall, BLOOMBERG BUSINESSWEEK (Mar. 30, 2012), http://www.businessweek.com/news/2012-03-30/all-out-walker-war-loats-as-wisconsin-recall-uncertainty-ends.
supporters had only sixty days to collect 540,000 petition signatures to recall Walker, the Wisconsin Government Accountability Board certified over 900,000 recall signatures.\footnote{See id. 540,000 signatures represents twenty-five percent of the people who voted in the November 2010 gubernatorial election.}

Yet, even if the recall of Governor Walker is successful, it will likely not alter the continuing effects of Act 10. This is because, in order to repeal the law, one of three events will have to happen. First, Democratic majorities will likely have to be elected in both the State Senate and Assembly. Although, in the Senate, this may happen in due course through additional recalls and elections, it is unlikely to happen in the near future in the Assembly where Republican majorities are more substantial.\footnote{Redistricting has made legislative change even more unlikely as “[a] three-judge panel of the U.S. District Court for the Eastern District of Wisconsin . . . upheld all but two state legislative districts drawn by a Republican-controlled Wisconsin Legislature. It also upheld a congressional redistricting map.” See Joe Forward, \textit{Federal Court Panel Largely Upholds Republican-Drawn Legislative Redistricting Maps}, \textit{St. Bar Wis.} (Mar. 22, 2012), http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=109866. \textit{See also id.} (“The panel lamented on the secrecy and partisan nature of this cycle’s redistricting process.”).} A Democratic governor would be powerless to undo the damage to public-sector unions without majorities in both legislative houses that are willing to overturn Act 10.
Second, supporters of public-sector unions can follow an approach other states have used by seeking to enshrine the right of public-sector bargaining in the Wisconsin Constitution. This approach would have the advantage of not only immediately repealing Act 10, but making it less likely that attacks against public unions could take place again in the future. Although this appears to lead to the best results for those who support public-sector bargaining, the process is even more cumbersome than the recall effort and, of course, there is no guarantee that Wisconsin state voters would support such an initiative.

The third, and final, approach depends on litigation in the federal courts. Unlike the open meetings law litigation in Wisconsin state courts, this litigation more broadly argues that

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For example, Missouri has a right to organize and to engage in collective bargaining in its state constitution. Joseph E. Slater, Lessons from the Public Sector: Suggestions and a Caution, 94 MARQ. L. REV. 917, 927 (2011) (“In 1945, Missouri added the following clause to its state constitution: ‘[E]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing.’”) (quoting Mo. CONST. art. I, § 29).


In addition, there is a fourth approach, which would have Wisconsin public employees shut down the state government by engaging in an unlawful general strike. Although there was some early discussion about such a possibility among the unions, a general strike never did occur. Grace Wyler, Wisconsin Unions Call for General Strike, BUS. INSIDER (Feb. 22, 2011),
Act 10 is in violation of federal constitutional rights of free speech and Equal Protection.\(^48\) On March 30, 2012, the district court upheld the anti-collective bargaining provisions against an Equal Protection attack, and struck down the dues checkoff and recertification provisions as in violation of Equal Protection and First Amendment free speech rights.\(^49\) More specifically, the court held:

[P]laintiffs have not met their burden with respect to their Equal Protection challenge to Act 10’s principal provisions limiting the collective bargaining rights of general employees and their unions. The State, however, has not articulated, and the court is now satisfied cannot articulate, a rational basis for picking and choosing from among public unions, those (1) that must annually obtain an absolute majority of its voluntary members to remain in existence or (2) that are entitled to voluntary, assistance with fundraising by automatic deduction, at least not a rational basis that does not offend the First Amendment. So long as the State of Wisconsin continues to afford ordinary certification and dues deductions to mandatory public safety unions with sweeping bargaining rights, there is no rational basis to deny those rights to voluntary general unions with severely restricted bargaining rights.\(^50\)

Interestingly, the unions attacking Act 10 did not even challenge it on freedom of association grounds because the United States, unlike Canada,\(^51\) does not have a history of


\(^{50}\) Id.

\(^{51}\) See Ontario (AG) v. Fraser, 2011 SCC 20 [2011] 2 S.C.R. 3 (Can.) (discussing constitutional right to organize and collectively bargaining under Canadian law).
protecting constitutional rights to picket or to bargain collectively.\textsuperscript{52} In any event, it expected that both sides to the dispute will now continue this litigation in the Seventh Circuit Court of Appeals and it is unclear to what extent non-public safety, public unions will continue to be burdened by Act 10 in the future.

III. Conclusion

With some notable exceptions, including Illinois,\textsuperscript{53} most governments, including the federal government and Wisconsin, have taken an austerity approach to their current economic woes. Under this approach, the government contends that the only remedy is to cut government services to citizens and, by extension, public employment and compensation. In this vein, Governor Walker has pledged that he will not, under any circumstances, raise taxes.\textsuperscript{54} Rather, he

\textsuperscript{52} See, e.g., Smith v. Ark. State Highway Emp., 441 U.S. 463, 465 & n.2 (1979) (per curiam) (“[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.”); Dorchev v. Kansas, 272 U.S. 306, 311 (1926) (holding that there is no absolute right to strike under the federal Constitution).


has cut taxes for corporations by $130 million as a way to spur job growth in the state.\textsuperscript{55} Of course, cutting corporate taxes requires additional spending cuts and public employees are the perfect target when government services need to be cut. They make up a relatively small percentage of the total voting population and yet are perceived by voters to enjoy lucrative compensation packages, including great health care insurance and pension plans.

Although it is generally true that public employees in Wisconsin and other states have more generous health care plans and pension plans, the overall compensation of employees tends to be less than comparable private-sector workers. This is because compensation is comprised of both wages and benefits, and wages for public-sector workers in Wisconsin are less than comparable private-sector workers. In the end, recent studies have shown that when looking at wages and benefits together, public-sector workers make four to seven percent less than comparable private-sector employees.\textsuperscript{56}

Furthermore, public employees, regardless of their ability to protest and bring public attention to the attacks on their unions, have a mixed record in convincing fellow citizens to support their unions. On the one hand, voters in Ohio recently voted by referendum, sixty-two


\textsuperscript{56} Keefe, \textit{supra} note 12.
percent to thirty-eight percent, to repeal a similar anti-collective bargaining bill.\textsuperscript{57} Wisconsin does not have such a referendum process. Moreover, even if the ongoing recall efforts of Republican state senators and Governor Walker are successful, as discussed above, such an outcome will likely not lead to the repeal of Act 10. Although public-sector unions have had some success attacking Act 10 constitutionally in federal court, so far what victories there have been have been partial ones.

At the end of the day, Governor Walker, and his allies in the legislature, have chosen to respond to budget deficits caused by the state’s economic crisis by scapegoating public-sector unions. The saga of the enactment of Wisconsin Act 10, therefore, is a simple story about an attack on public unions for exclusively political purposes. Yet, even daunting economic problems, like the ones currently faced by Wisconsin, can be successfully addressed by governments without attacking the basic workplace and democratic rights of public-sector workers. The hope is that in the coming months and years that Wisconsin and other states find less partisans ways to get their financial houses in order.