

Plenary One

Taylor Law at 50

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The Taylor Law in Context: National and International Comparisons

Including:

The Motive Power in Public Sector Collective Bargaining

The Motive Power in Public Sector Collective Bargaining
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I. Introduction

George Taylor is reported to have called the strike “the motive power for agreement” in collective bargaining in the private sector.¹ The committee he chaired whose recommendations led to enactment of the statute that bears his name similarly recognized that “the right to strike remains an integral part of the collective bargaining process in the private sector,”² and that public sector union officials maintained that eliminating the ban on public employee strikes would lead to meaningful negotiations thereby reducing strikes.³ Nevertheless, the committee flatly declared, “The strike cannot be a part of the negotiating process.”⁴

Indeed, the governor created the Taylor Committee and the state enacted the Taylor Law in recognition of the failure of the predecessor statute, the Condon-Wadlin Act to prevent strikes by public employees in New York.⁵ The committee concluded that the most effective way to prevent strikes was to enact legislation providing for the orderly recognition of employee collective representatives and an obligation on the part of the government employer to bargain in good faith with the recognized representative. It reasoned that strikes in violation of the Condon-Wadlin Act, were “often caused by a

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¹ See IRVING RICHTER, *LABOR’S STRUGGLES, 1945-1950: A PARTICIPANT’S VIEW* 52-53 (1994).

² STATE OF NEW YORK, GOVERNOR’S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 15 (Mar. 31, 1966) [hereinafter Taylor Committee Report].

³ *Id.* at 19.

⁴ *Id.* at 16; see also *id.* at 42 (“We are convinced that the strike must not be used in the field of government service.”).

⁵ The governor charged the committee “to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.” *Id.* at 9.

feeling of futility on the part of public employees because of the absence of other means by which they could participate in the determination of the terms and conditions of their employment.”⁶

But if the “motive power for agreement” relied on in the private sector was to be prohibited in the public sector, what force or forces would take its place. This paper examines the evolution of the motive power in public sector collective bargaining under the Taylor Law and compares it to the motive power in five other states, including three where public employees have a right to strike. It analyzes the policy concerns and trade-offs presented by the different approaches.

II. The Motive Power in New York Public Employee Collective Bargaining

A. From Condon-Wadlin to Taylor

New York enacted the Condon-Wadlin Act in 1947, the same year that Congress enacted, over President Truman’s veto, the Taft-Hartley Act. The immediate precipitator of the Condon-Wadlin Act was a week-long strike by teachers in Buffalo.⁷ The statute prohibited strikes by public employees and backed the prohibition with severe penalties, including immediate termination of strikers who, if they were reinstated, were ineligible for pay increases for three years and were on probation for five years.⁸ The penalties were so draconian that they were rarely enforced. Through 1964, although there were 21 strikes, the law was invoked only seven times and only a total of 17 employees were dismissed.⁹ In 1963, the legislature amended the statute, reducing the disqualification period for pay raises to six months

⁶ *Id.* at 42.

⁷ See Stuart R. Wolk, *Public Employee Strikes – A Survey of the Condon-Wadlin Acts*, 13 N.Y.L. FORUM 69, 70 (1967); Jason A. Zwara, *Left in the Dark: How New York’s Taylor Law Impairs Collective Bargaining*, 31 HOFSTRA LAB. & EMP. L.J. 193, 195 (2013).

⁸ N.Y. Civ. Serv. L. § 108(4), (5) (McKinney 1959).

⁹ See Mildred Warner, Cornell Univ. School of Architecture, Art & Planning, *Restructuring Local Government: Taylor Law History*, <http://www.mildredwarner.org/gov-restructuring/special-projects/taylor-law> (last accessed Mar. 4, 2018); see also Zwara, *supra* note 7, at 195 (observing that public employers regularly waived the penalties).

and the probation period to one year but adding a fine of two days' pay for every day on strike.¹⁰ The amendment expired by its own terms two years later.

The Condon-Wadlin Act's ineffectiveness was on display in 1965 when 6,000 Department of Welfare workers struck for 28 days and, as part of the settlement, all strike penalties were waived.¹¹ On January 1, 1966, New York City Transit workers struck for 12 days, costing the city's economy \$100 million per day. As part of the settlement, the state legislature passed an amnesty waiving all strike penalties.¹² Three days later, the governor appointed the Taylor Committee.¹³

The committee recommended that a process be developed, administered by a new agency to be established, to ensure employees the right to be represented for collective negotiations with their employer. As discussed above, the committee emphatically rejected allowing public employees to strike. It recognized that to guard against strikes, a substitute must be provided for resolution of bargaining impasses. Reflecting back on the committee's recommendations, George Taylor wrote:

A strike probation in public employment should be effective if ways and means other than the strike are available to insure a fair and equitable disposition of employee claims. We know from experience that finding a substitute for the strike is the formula successfully followed in other situations in which the work stoppage method of settling differences gave unsatisfactory results.¹⁴

The Taylor Committee considered and rejected interest arbitration as the strike substitute. The committee reasoned that mandating interest arbitration would chill collective negotiations, encouraging

¹⁰ See Warner, *supra* note 9; Zwara, *supra* note 7, at 195 n.15.

¹¹ See Warner, *supra* note 9.

¹² Zwara, *supra* note 7, at 196.

¹³ *Id.*

¹⁴ George W. Taylor, *Strikes in Public Employment*, 85 GOOD GOVERNMENT, Spring 1968 at 9, 13.

parties to take extreme positions, leaving it to the arbitrator to impose terms.¹⁵ The committee also doubted the legality of mandated interest arbitration “because of the obligation of the designated executive heads of government departments or agencies not to delegate certain fiscal and other duties.”¹⁶

Instead, the committee proposed that if the parties had not reached agreement 60 days prior to the employer’s budget submission date the Public Employment Relations Board (PERB), upon finding that the parties are at impasse would assist the parties with mediation. If mediation did not result in agreement, PERB would appoint a factfinding board of three neutrals who would make recommendations for settlement within 15 days of the budget submission date.¹⁷ The committee was optimistic that the factfinding process itself would often lead to agreement:

Fact-finding requires the parties to gather objective information and to present arguments with reference to these data. An unsubstantiated or extreme demand from either party tends to lose its force and status in this forum. The fact-finding report and recommendations provide a basis to inform and to crystalize thoughtful public opinion and move media comment.¹⁸

However, if factfinding did not lead to voluntary agreement, in keeping with democratic principles of legislative supremacy, the committee urged that final resolution of the matter should rest with the employer’s legislative body.¹⁹ The committee recommended that if either party rejected the factfinding recommendations, the employer’s legislative body hold a public hearing at which the parties

¹⁵ Taylor Committee Report, *supra* note 2, at 37-38, 46.

¹⁶ *Id.* at 46.

¹⁷ *Id.* at 37-38.

¹⁸ *Id.* at 37.

¹⁹ *Id.* at 38.

would be afforded the opportunity to show cause as to why the recommendations should not be adopted. The ultimate resolution would be made by the legislative body.²⁰

As initially enacted, the Taylor Law did not provide for legislative resolution of impasses that remained after factfinding.²¹ That was changed by amendments in 1969.²² When the dust settled, the motive power for collective bargaining under the Taylor Law was mediation, factfinding and legislative determination. The statute provides for PERB to appoint a mediator upon a finding that the parties are at impasse.²³ If impasse continues, PERB appoints a factfinding board of up to three members who must render recommendations for resolution 80 days before the end of the employer's fiscal year, which are made public five days later.²⁴ "[S]hould either the public employer or the employee organization not accept in whole or in part the recommendations of the fact-finding board, (i) the chief executive officer of the government involved shall, within ten days after receipt of the findings of fact and recommendations of the fact-finding board, submit to the legislative body of the government involved a copy of the findings of fact and recommendations of the fact-finding board, together with his recommendations for settling the dispute; (ii) the employee organization may submit to such legislative body its recommendations for settling the dispute; (iii) the legislative body or a duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the report of the fact-finding board; and (iv) thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved."²⁵

²⁰ *Id.* at 39.

²¹ *See Zwara supra* note 7, at 199.

²² *Id.* at 201. In 1974, educational institutions were exempted from the legislative determination provision and law enforcement and fire personnel was provided with compulsory interest arbitration. *See* NYPERB, Timeline of Notable Events, <http://perb.ny.gov/timeline.asp> (last accessed Mar. 4, 2018).

²³ N.Y. Civ. Serv. L. §209(3)(a).

²⁴ *Id.* §§ 209(3)(b), (c).

²⁵ *Id.* § 209(3)(e).

These procedures are coupled with strong penalties for illegal strikes. The most significant penalties are the bargaining representative's loss of dues checkoff,²⁶ and the penalizing of striking employees two days' pay for each day on strike, collected by the employer.²⁷ Unlike the Condon-Wadlin Act, the Taylor Law's strike penalties have been imposed after most of the strikes since the law was enacted.²⁸ The harsh penalties may be counterproductive. In at least one instance, the loss of dues checkoff so severely interfered with the union's ability to carry out its representational duties that PERB removed it.²⁹ The two-for-one penalty imposed on striking employees exacerbates tensions which were already high enough to motivate workers to strike in the face of such strong deterrents.³⁰ In a study published in 1981, Craig Olson and colleagues concluded that the Taylor Law's strike penalties shifted the parties' strike costs so dramatically that unions generally had no choice but to concede to the employer because of the union's strong need to avoid a strike.³¹ However, the motive power in New York public employee collective bargaining has evolved significantly since then.

A. The *Triborough* Doctrine and the Evolution of the Motive Power in New York Public Employee Collective Bargaining

In 1972, PERB decided *Triborough Bridge and Tunnel Authority*.³² PERB held that the employer breached its duty to bargain in good faith when it discontinued paying seniority-based wage increases after the collective bargaining agreement providing for such increases expired. Whereas

²⁶ *Id.* § 210(3)(a).

²⁷ *Id.* § 210(2)(f).

²⁸ See Robert F. Worth, *The Transit Showdown: The Taylor Law; A Powerful Tool to Use Against Striking Employees*, N.Y. TIMES, Dec. 13, 2002, <http://www.nytimes.com/2002/12/13/nyregion/transit-showdown-taylor-law-powerful-tool-use-against-striking-employees.html>. In 2005, the United Federation of Teachers reported that unions lost dues check-off in two-thirds of the strikes conducted since 1967 and employees suffered the two-for-one penalty in 80% of strikes since 1969. United Federation of Teachers, *The History of the Taylor Law: How Teacher Strikes Became Illegal*, NY TEACHER NEWSPAPER, June 9, 2005, <http://www.uft.org/labor-spotlight/history-taylor-law>.

²⁹ United Federation of Teachers, Local 2, 15 N.Y.P.E.R.B. ¶ 3091 (1982).

³⁰ See Zwara, *supra* note 7, at 234.

³¹ CRAIG A. OLSON ET AL., STRIKES AND STRIKE PENALTIES IN THE PUBLIC SECTOR: FINAL REPORT PREPARED FOR THE U.S. DEPT. OF LABOR 90, 129 (1981).

³² 5 P.E.R.B. ¶ 3037 (1972).

in the private sector, an employer may make unilateral changes in mandatory subject of bargaining after bargaining has reached impasse,³³ PERB reasoned that under the Taylor Law, the union may not respond to such changes with a strike and thus is at a systematic disadvantage. Consequently, PERB held that an employer commits an improper practice if it “unilaterally alter[s] existing mandatory subjects of negotiations while a successor agreement is being negotiated.”³⁴ PERB subsequently held that if the union engages in an illegal strike, the employer may make unilateral changes.³⁵ PERB reasoned that because the prohibition on unilateral employer action was intended to offset the disadvantage the union is under by not being allowed to strike, “only employees who do not strike are entitled to the maintenance of the status quo during negotiations.”³⁶

The New York Court of Appeals considered the *Triborough* doctrine in *Board of Cooperative Educational Services v. PERB*.³⁷ The court held that the rationale for the general *Triborough* rule did not apply to step increases after the contract has expired, reasoning that “it should not apply where the employer maintains the salaries in effect at the expiration of the contract but does not pay increments.”³⁸

Unions reacted to the court’s decision by advocating for amendments to the Taylor Law. Unions maintained that after the court’s decision, employers were prolonging negotiations to pressure employees and unions, and to rid themselves of provisions in the expired contract that did not concern mandatory subjects of bargaining.³⁹ In 1978 and 1979, the legislature passed bills that would have made it an improper practice for an employer “to refuse to continue all of the terms of

³³ See *NLRB v. Katz*, 369 U.S. 736 (1962).

³⁴ *Id.* at 3065.

³⁵ *Local 342, Long Island Pub. Serv. Employees Union*, 6 P.E.R.B. ¶ 3076 (1973).

³⁶ *Id.* at 312. See generally Mary Helen Moses, *Scope of Bargaining and the Triborough Law: New York’s Collective Bargaining Dilemma*, 56 Albany L. Rev. 53, 77-81 (1992).

³⁷ 363 N.E.2d 1174 (N.Y. 1977).

³⁸ *Id.* at 1177.

³⁹ See Moses, *supra* note 36, at 82.

an expired agreement until a new agreement is negotiated,” but the governor vetoed the bills.⁴⁰ In 1982, however, the governor signed such a bill. In an extraordinary session of the legislature in December 1982, an exception was added specifying that the provision did not apply if the union engaged in a strike.⁴¹ Thus, current Section 209 a-1(e) makes it an improper practice for an employer “to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article;” i.e. engaged in a strike.⁴² This provision is often referred to as the “Triborough Law.”⁴³

Unlike the original *Triborough* decision which froze the status quo with respect to mandatory subjects of bargaining, the Triborough Law freezes the status quo with respect to all provisions in the expired contract, including permissive subjects of bargaining. Moreover, the Appellate Division has held that when the employer’s legislature is presented with a bargaining impasse after rejection of factfinding recommendations, it may not “impose a settlement which diminishes employee rights under an expired collective bargaining agreement.”⁴⁴ Although PERB has held that a union waives this protection to the extent that it opts to participate in the legislative process,⁴⁵ there is little incentive for a union to do so. The Taylor Law appears to provide a significant incentive for a union to refrain from striking. As long as it does not strike, the Union is able to maintain the freeze on the

⁴⁰ *Id.* at 83.

⁴¹ *Id.*

⁴² N.Y. Civ. Serv. Code § 209a-1(e).

⁴³ See *Uniform Firefighters of Cohoes v. Cuevas*, 714 N.Y.S.2d 802, 806 App. Div. 2000).

⁴⁴ *County of Niagra v. Newman*, 481 N.Y.S.2d 563 (App. Div. 1984).

⁴⁵ *City of Buffalo*, 19 P.E.R.B. ¶ 3023 (1986).

status quo. Indeed, defenders of the Taylor law point to a substantial decrease in the incidence of strikes since its enactment.⁴⁶

What is clear is that since the Triborough Law, the motive power in New York public sector collective bargaining is the frozen status quo coupled with a heavy dose of mediation by PERB. The urgency that would be provided by a strike deadline is not present and even the lesser urgency that might be provided by a pending interest arbitration or a legislative resolution hearing does not exist. Of course, there are tools that skillful mediators may employ to deal with this.⁴⁷ Nevertheless, bargaining under this model is likely to be prolonged with substantial periods where the parties have no contract. Perhaps the poster child for this is the Buffalo teachers who went more than nine years without a contract.⁴⁸

As it has evolved, the Taylor Law may be comparable to the Railway Labor Act (RLA).⁴⁹ Although the RLA recognizes workers' right to strike, it lists as its first purpose "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein."⁵⁰ At any time after a party serves notice on the other party of a desire to modify the collective bargaining agreement, either party may request the National Mediation Board to appoint a mediator. The parties then are under a duty to maintain the status quo – the union may not strike and the employer may not change any terms and conditions of employment until the NMB mediator determines that further mediation would be fruitless, has offered the parties arbitration, at least one party has rejected the offer and a thirty-day cooling off period has expired.⁵¹ Even then, if the NMB determines that a strike would deprive any section of the country of essential transportation services, it reports such finding to the President

⁴⁶ See, e.g., Richard E. Casagrande & Deborah Milham, *Why We Defend Triborough*, NYSUT UNITED, Mar. 2011, available at <https://www.nysut.org/news/nysut-united/issues/2011/march-2011/why-we-defend-triborough>.

⁴⁷ See DEBORAH KOLB, *THE MEDIATORS* (1983).

⁴⁸ See Zwara, *supra* note 6, at 221-24.

⁴⁹ 45 U.S.C. §§ 151-88.

⁵⁰ *Id.* § 151a.

⁵¹ §§ 155, 156.

who appoints a Presidential Emergency Board (PEB). The status quo remains frozen while the PEB conducts its proceedings and makes recommendations for resolution. If either party rejects the recommendations, the parties must continue to maintain the status quo for another 30 days.⁵² Thus, although ultimately the union may strike and the employer may make unilateral changes, the RLA's emphasis is on coupling the freezing of the status quo with a heavy dose of mediation to avoid resort to economic warfare. The NMB mediator enjoys very broad discretion in deciding when to release the parties from mediation and the statute envisions prolonged negotiations and mediation as a tool for avoiding strikes and brining about agreements,. The D.C. Circuit has explained:

It may well be that the likelihood of successful mediation is marginal. That success of settlement may lie in the realm of possibility, rather than confident prediction, does not negative the good faith and validity of the [Mediation] Board's effort. The legislature provided procedures purposefully drawn out, the Board's process may draw on them even to the point that the parties deem "almost interminable."⁵³

Defenders of the Triborough Law argue that the freezing of the status quo and mandating of continued step increases after contract expiration are necessary to offset the bargaining disadvantage that the Taylor Law's strike prohibitions place on unions.⁵⁴ Critics maintain that the Triborough Law has inappropriately tilted the bargaining advantage to unions,⁵⁵ although at least one management advocate has observed that employers can gain bargaining leverage from resisting union efforts to make improvements in wages and benefits retroactive and insisting that step

⁵² *Id.* § 160.

⁵³ *Int'l Ass'n of Machinists v. NMB*, 425 F.2d 527, 540-41 (D.C. Cir. 1970).

⁵⁴ *See, e.g.,* Casagrande & Millham, *supra* note 46.

⁵⁵ *See, e.g.,* TERRY O'NEIL & E. J. MCMAHON, TAYLOR MADE: THE COSTS AND CONSEQUENCES OF NEW YORK'S PUBLIC SECTOR LABOR LAWS 21 (2007), available at <https://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf>; Moses, *supra* note 63; Zwara, *supra* note 6.

increases be considered a cost in calculating the contract settlement.⁵⁶ Regardless of whether the balance requires recalibration, and I do not attempt to address that issue, it is clear that under the Taylor Law as it has evolved the motive power in collective bargaining is the freezing of the status quo plus a heavy dose of mediation. The policy judgment has been made to trade off prolonged contract negotiations for significant reduction in strike incidents.

The next Part examines the Pennsylvania statute which, on its face, is vastly different from the Taylor Law. Whereas the Taylor Law flatly rejects a public employee right to strike under any circumstances and backs that rejection with draconian penalties, the Pennsylvania statute has a relatively liberal public employee right to strike. Yet, as the statute has evolved through labor board and court interpretations, the collective bargaining process closely resembles the Taylor Law's.

III. The Motive Power in Pennsylvania Public Employee Collective Bargaining

In 1970, Pennsylvania enacted its Public Employee Relations Act, also known as Act 195.⁵⁷ As originally enacted, the statute conferred a right to strike on all Pennsylvania public employees except police and firefighters who are covered by another statute which provides for interest arbitration,⁵⁸ and prison and mental hospital guards and court personnel who are granted interest arbitration by Act 195.⁵⁹ In 1972, Pennsylvania enacted Act 88,⁶⁰ which provides separate impasse procedures for public school employees. This paper focuses on Act 195 rather than the special school employee procedures.

⁵⁶ Karlee S. Bolanos, *Understanding Triborough: It is not Just a Complex of Bridges in the City*, MUNI BLOG, June 28, 2012, <https://www.harrisbeach.com/new-york-municipalities-blog/understanding-triborough-it-is-not-just-a-complex-of-bridges-in-the-city/>.

⁵⁷ Pa. Stat. Ann. Tit. 43, §§ 1101.101 - .2301.

⁵⁸ *Id.* § 1101.301(2) (excluding police and firefighters who are covered by another statute which provides for interest arbitration).

⁵⁹ *Id.* § 1101.1001.

⁶⁰ Pa. Stat. Ann. Tit. 24, §§ 11-1101-A to 1172-A.

Act 195 permits mediation if a "dispute or impasse" exists following "a reasonable period of negotiation."⁶¹ It further provides that if no agreement has been reached "21 days after negotiations have commenced, but in no event later than 150 days prior to the 'budget submission date'. . . both parties shall immediately" request the Pennsylvania Bureau of Mediation to intervene.⁶² If the parties do not reach agreement twenty-one days after the start of mediation "or in no event later than 130 days prior to the 'budget submission date,'" the Bureau of Mediation must so advise the Pennsylvania Labor Relations Board (PLRB), which has discretion to invoke factfinding.⁶³ As a matter of policy, the PLRB has invoked factfinding only when the parties jointly request it or the mediator indicates that factfinding would be helpful in settling the dispute.⁶⁴

The PLRB and the courts have interpreted Act 195 to place on the union the burden to take the initiative to ensure that mediation is exhausted prior to a strike. If the employer refuses to join in a request for mediation, the union must seek it unilaterally.⁶⁵

Mediation does not begin until the parties actually meet with the mediator, regardless of the length of time which passes between the mediator's appointment and the first meeting. Strikes which occur less than twenty days after the first mediation session are illegal.⁶⁶ The mandatory mediation period runs twenty calendar days following the first mediation session, however, regardless of whether there are any further mediation sessions held during that period.⁶⁷ If the PLRB fails to invoke factfinding

⁶¹ *Id.* Tit. 43, § 1101.801.

⁶² *Id.*

⁶³ *Id.* § 1101.802.

⁶⁴ See Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U.Mich. J. L. Ref. 313, 354 (1993).

⁶⁵ See *N. Clarion Cnty. Sch. Dist.*, 15 Pub. Emp. Rep Pa. ¶ 15208 (PLRB 1984).

⁶⁶ *Port Auth. of Allegheny Cnty. v. Amalgamated Transit Union*, Div. 85, 383 A.2d 954 (Pa. Commw. 1978); *United Trans. Union v. Southeast Pa. Trans. Auth.*, 347 A.2d 509 (Pa. Commw. 1975).

⁶⁷ *Peters Township Sch. Dist. v. Peters Township Fed'n of Teachers*, 501 A.2d 237 (Pa. Commw. 1985).

21 days after mediation began, the union may assume that the PLRB has decided that factfinding would not be helpful and the union may lawfully strike.⁶⁸

Act 195 provides for employers to sue to enjoin illegal strikes.⁶⁹ Employer unfair labor practices are not defenses to actions to enjoin illegal strikes.⁷⁰ Employees who defy strike injunctions are subject to prosecution by the employer for contempt and, thereafter, the employer may suspend, demote or discharge the employee.⁷¹ The employer, however, may not engage in self-help against illegally striking employees. It must obtain an injunction followed by a contempt finding if the employee defies the injunction.⁷²

Legal strikes in Pennsylvania may be enjoined upon petition by the employer and a court finding that the strike poses a clear and present danger to public health, safety or welfare.⁷³ As discussed *infra*, this standard makes injunctions more readily available in Pennsylvania than in Illinois and Ohio which require a showing of a clear and present danger to public health and safety. Prior to the 1992 removal of public education from coverage of the bargaining provisions of Act 195, a practice developed whereby strikes in public education that, if continued, would have precluded the school district from complying with the mandate of having 180 school days were enjoined routinely.⁷⁴

With respect to the motive power in Pennsylvania public sector collective bargaining, the most significant development came in 1993 when the Pennsylvania Commonwealth Court decided *Philadelphia Housing Authority v. PLRB*.⁷⁵ The court rejected the analogy to the private sector under the National Labor Relations Act where an employer may unilaterally change terms and conditions of

⁶⁸ Bellefonte Area Educ. Ass'n v. Bd. of Educ., 304 A.2d 922 (Pa. Commw. 1973).

⁶⁹ Pa. Stat. Ann. Tit. 43, § 1101.1002.

⁷⁰ *Id.* § 1101.1004.

⁷¹ *Id.* § 1991.1995,

⁷² City of Scranton v. PLRB, 505 A.2d 1360 (Pa. Commw.1986).

⁷³ Pa. Stat. Ann. Tit. 43, § 1101.1003.

⁷⁴ See Malin, *supra* note 64, at 357-58.

⁷⁵ 620 A.2d 594 (Pa. Commw. 1993).

employment after bargaining to impasse, and approved a PLRB holding that under Act 195 an employer commits an unfair labor practice when it unilaterally changes a mandatory subject of bargaining, even after impasse unless the employees have gone on strike. The court quoted favorably the PLRB's rationale:

In our view, it would not serve the legislature's declared goal of promoting orderly and constructive relationships between public employers and their employees through good faith collective bargaining to allow a public employer to implement its final offer when the employees in the unit have not disrupted the continuation of public services by striking. Unilateral action by an employer during a period of no contract while employees continue to work serves to polarize the process and would encourage strikes by employees who otherwise may wish to continue working under the terms of the expired agreement while negotiations continue.⁷⁶

In other words, the court accepted the PLRB's concern that allowing employers to make unilateral changes after reaching impasse would increase the incidence of public employee strikes. Dissenting Judge Collins expressed a different concern. In his view, not allowing unilateral employer changes following impasse would, in times of fiscal stress, prolong negotiations to the detriment of the public fisc. He wrote:

[T]he ramifications of the instant opinion create a precedent that compels municipal corporations or authorities to continue to operate indefinitely under expired labor agreements regardless of the financial impossibility of doing so. To compel any municipality to maintain financial commitments in perpetuity in the face of a declining population or a shrinking tax base

⁷⁶ *Id.* at 600.

or any other adverse circumstance, creates a precedent in this Commonwealth which is most dangerous and is contrary to the public interest.⁷⁷

Experience since *Philadelphia Housing Authority*, has shown both the majority and the dissent to be correct. Data available from the Pennsylvania Bureau of Mediation goes back only to 2004, but it shows that strikes under Act 195 have become relatively rare events. The data in Table 1 is current through February 8, 2018.

Table 1 Strikes Under Pa. Act 195

Year Contract Expired	Number of Expiring Contracts for Which Notices Were Filed	Strikes for Contracts that Expired This Year
2004	305	1
2005	290	4
2006	296	7
2007	244	2
2008	294	0
2009	282	5
2010	283	0
2011	317	1
2012	285	0
2013	294	1
2014	308	0
2015	280	2
2016	321	1

⁷⁷ *Id.* at 601-02 (Collins, J., dissenting).

2917	290	0
Average	292	1.71

An average of just 1.71 strikes per year with an average of 292 contracts expiring each year over a 14-year period is nothing short of amazing. However, there is also evidence of prolonged negotiations which may have stressed public employer budgets. Over a dissent by Chief Justice Castille, the Pennsylvania Supreme Court rejected a petition by the City of Philadelphia for extraordinary relief that would have enabled the court to consider the rule established in *Philadelphia Housing Authority*.⁷⁸ Negotiations for a new contract between the parties had been going on for four years but, because the union had not struck, wages and working conditions were frozen at levels provided for in the expired agreement.⁷⁹

The calibration of the balance of interests under Act 185 is somewhat different from the calibration under the Taylor Law and the Triborough Law. The status quo is frozen only with respect to mandatory subjects of bargaining and employees are not entitled to step increases provided in the expired contract.⁸⁰ Furthermore, Act 195 evolved from a very different starting point, i.e. reliance on a right to strike as the motive power, than the Taylor Law. However, they have ended up in the same place. It appears that under *Philadelphia Housing Authority*, the motive power in collective bargaining under Act 195 has evolved from relying on a right to strike to the freezing of the status quo even after impasse, until agreement is reached, as long as the union does not strike. In both New York and Pennsylvania the policy trade-off has been significant reduction in the incidence of strikes versus

⁷⁸ City of Philadelphia v. AFSCME Dist. 33, 68 A.3d 323 (Pa. 2013).

⁷⁹ See *id.* at 324 (Castille, J. dissenting).

⁸⁰ See Neshaminy Fed'n of Teachers Local Union 1417 v. PLRB, 986 A.2d 908 (Pa. Commw. 2009); Pa. State Park Officers Ass'n v. PLRB, 854 A.2d 674 (Pa. Commw. 2004).

prolongation of collective negotiations. The next Part considers Illinois and Ohio, two states where the right to strike provides a good deal of the motive power in public sector collective bargaining.

IV. The Motive Power in Public Sector Collective Bargaining in Illinois and Ohio

In 1983, Illinois and Ohio enacted their public sector collective bargaining statutes which took effect in 1984. Both states recognized a right to strike for most of their public employees, but had markedly different conditions for a lawful strike to occur. The two states thus provided an unintended but natural experiment in public sector collective bargaining.

Illinois has separate statutes and separate labor relations boards governing public education and the rest of the public sector. The Illinois Educational Labor Relations Act (IELRA)⁸¹ is administered by the Illinois Educational Labor Relations Board (ILRB).⁸² The Illinois Public Labor Relations Act⁸³ is administered by the Illinois Labor Relations Board, which is divided into two panels, a Local Panel with jurisdiction over Chicago, Cook County and other specialty districts serving the city and county, and a State Panel with jurisdiction over the state and all other units of local government.⁸⁴ Most Illinois public employees have the right to strike. Excepted are law enforcement, firefighters, security employees (primarily corrections officers) and paramedics employed by fire departments, all of whom have a right to interest arbitration.⁸⁵

Until 2011, the requirements for a lawful strike under both statutes were essentially the same. The employees had to be represented by an exclusive representative, the collective bargaining agreement must have expired or no collective bargaining agreement was ever in effect, mediation had been used unsuccessfully, there was no agreement to use interest arbitration, and at least five days'

⁸¹ 115 ILCS 5/1 to 5/21.

⁸² *Id.* 5/5.

⁸³ 5 ILCS 315/1 to 315/28.

⁸⁴ *Id.* 315/5.

⁸⁵ *Id.* 315/14.

notice of intent to strike was given.⁸⁶ In 2011, the legislature amended the strike provisions of the IELRA. For all jurisdictions, other than the Chicago Public Schools, after the parties have been in mediation for at least 15 days, either party or the mediator may initiate a posting process. Each party provides the mediator with its final offer and a cost analysis of the offer. The mediator transmits them to the IELRB which posts them on its website. The final offers remain posted on the IELRB website until an agreement is reached.⁸⁷ The union may lawfully strike after the final offers have been posted for at least 14 days and the union has given at least 10 days' notice of its intent to strike.⁸⁸

Since 2011, for a strike by employees of the Chicago Public Schools to be lawful, the parties must first resort to factfinding. The issuance of the factfinder's recommendations and their rejection by either party leads to the publication of the recommendations and a 30-day cooling off period.⁸⁹ For the strike to be lawful, it must be authorized by a vote of at least 75% of the union's members.⁹⁰ The union must also give at least 10 days' notice of intent to strike.⁹¹

At the time the special rules for the Chicago Public Schools were enacted, proponents declared that the requirement of strike authorization from at least 75% of the union membership meant that the Chicago Teachers Union would find it impossible to strike.⁹² They were wrong. Indeed, the strategy of deterring strikes by requiring a 75% authorization vote likely backfired.

⁸⁶ *Id.* 315/17(a); 115 ILCS 5/13.

⁸⁷ 115 ILCS 5/12(a-5).

⁸⁸ *Id.* 5/13(b)(2), (b)(3).

⁸⁹ *Id.* 5/12(a-10), 13(b)(2.5).

⁹⁰ *Id.* 5/13(b)(2.10).

⁹¹ *Id.* 5/13(b)(3).

⁹² See STEVEN K. ASHBY & ROBERT BRUNO, A FIGHT FOR THE SOUL OF PUBLIC EDUCATION: THE STORY OF THE CHICAGO TEACHERS STRIKE (2016).

In the first collective bargaining negotiations after the new rules took effect, the Chicago Teachers Union struck for seven school days. The strike began on Monday, September 10, 2012.⁹³ The parties reached a tentative agreement in the ensuing weekend. However, on Sunday, September 16, the union's House of Delegates did not endorse the tentative agreement.⁹⁴ The union leadership suspended the meeting until the following Tuesday, September 18. At the reconvened meeting, the delegates endorsed the tentative agreement and the schools reopened the following day.⁹⁵

What happened? The new requirement of a 75% strike authorization vote presented the union leadership with a challenge. They had to motivate the overwhelming majority of union members to vote. To do this, the union leadership engaged in a very effective internal organizing campaign.⁹⁶ They motivated the rank-and-file emotionally as well as intellectually and maintained the fervor throughout the strike with massive rallies.⁹⁷ The leadership became victims of their own success. The fervor of the membership made it impossible for the leadership to sell the tentative agreement to the House of Delegates on the first try that Sunday.

Lawful strikes in Illinois may be enjoined upon a showing that the strike poses a clear and present danger to public health and safety.⁹⁸ During the debates over the IPLRA, the legislature expressly rejected the Pennsylvania approach of enjoining strikes posing a clear and present danger to the public health, safety or welfare, in favor of the narrower public health & safety standard.⁹⁹ Thus,

⁹³ See Noreen S. Ahmed-Ullah et al., *Picket Lines Up After Teachers, CPS Fail to Prevent Strike*, CHI. TRIB., Sept. 10, 2012, http://articles.chicagotribune.com/2012-09-10/news/chi-chicago-public-schools-chicago-teachers-union-contract-talks-strike_1_picket-lines-teachers-strike-president-david-vitale.

⁹⁴ See Monica Davey, *As Chicago Strike Goes On, Mayor Digs In*, N.Y. TIMES, Sept. 17, 2012, <http://www.nytimes.com/2012/09/18/education/chicago-teachers-strike-enters-second-week.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

⁹⁵ See Monica Davey & Steven Yaccino, *Teachers End Chicago Strike on Second Try*, N.Y. TIMES, Sept. 18, 2012, <http://www.nytimes.com/2012/09/19/us/vote-scheduled-on-chicago-teachers-contract.html>

⁹⁶ See ASHBY & BRUNO, *supra* note 92.

⁹⁷ *Id.*

⁹⁸ 5 ILCS 315/8; 115 ILCS 5/13.

⁹⁹ See Martin H. Malin, *Implementing the Illinois Educational Labor Relations Act*, 61 CHI.-KENT L. REV. 101, 131-33 (1985).

unlike Pennsylvania where a pattern developed of enjoining strikes in public education when their duration threatened the ability to have a 180-day school year,¹⁰⁰ efforts to enjoin strikes in Illinois public education have been rare and unsuccessful.

In the 2012 Chicago teachers strike, after the union's House of Delegates failed to endorse the tentative agreement, the city sued the next day, Monday, and moved for a temporary restraining order. The court denied the motion and scheduled it for hearing the following Wednesday, i.e., the day after the scheduled reconvening of the union's House of Delegates. The House of Delegates' approval of the tentative agreement on Tuesday rendered the law suit moot.¹⁰¹ During a strike in fall 2017 by support staff in Palatine Township Elementary School District 15, a circuit court judge issued a temporary restraining order finding that the absence of nurses and special education aides posed a clear and present danger to special education students' health and safety,¹⁰² but dissolved the injunction a week later finding that the school district failed to establish the clear and present danger.¹⁰³

Outside of public education, the IPLRA requires an employer seeking to enjoin a lawful strike to petition the ILRB for a determination that the strike poses a clear and present danger and allows a suit to enjoin the strike only upon ILRB authorization.¹⁰⁴ If a court grants the injunction request it may order a return to work only by those employees necessary to avoid the clear and present danger and the bargaining unit must proceed to interest arbitration.¹⁰⁵ As I have previously summarized:

[T]he Illinois statutes rely primarily on the threat and use of economic weapons to settle bargaining impasses. The statutes minimize labor board and court intervention and place

¹⁰⁰ See *supra* notes 73-74 and accompanying text.

¹⁰¹ See Emmeline Zhao, *Chicago Teachers Strike Suspended, Students Head Back to School Wednesday*, HUFFINGTON POST, Sept. 18, 2012, https://www.huffingtonpost.com/2012/09/18/chicago-teachers-strike-s_n_1895082.html.

¹⁰² See Bob Sunsjara, *Judge Orders District 15 Nurses, Aids Back to Work*, DAILY HERALD, Oct. 17, 2017, <http://www.dailyherald.com/news/20171017/judge-orders-district-15-nurses-aides-back-to-work>.

¹⁰³ See *Judge Dismisses Case, Reaffirms Workers' Right to Strike*, IEA-NEA Press Release, Nov. 7, 2017, <https://ieane.org/2017/11/07/judge-dismisses-case-reaffirms-workers-right-to-strike/>.

¹⁰⁴ 5 ILCS 315/18(a).

¹⁰⁵ *Id.*

maximum control in the hands of the parties. Although both statutes require prestrike mediation, the parties control the timing of mediation and whether they will use any other third-party assistance.¹⁰⁶

Most public employees in Ohio have a right to strike after exhausting statutory impasse procedures. Exceptions are law enforcement, firefighters, emergency medical or rescue personnel, exclusive nurse's units, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, psychiatric attendants employed at mental health forensic facilities, and youth leaders employed at juvenile correctional facilities, all of whom have a right to interest arbitration.¹⁰⁷

Fifty days prior to the expiration date of a collective bargaining agreement, either party may petition the State Employment Relations Board (SERB) to intervene and 45 days prior to the expiration date, SERB must appoint a mediator.¹⁰⁸ Anytime thereafter, either party may initiate factfinding and SERB must appoint a factfinding panel of up to three members within 15 days of a request.¹⁰⁹ SERB provides the parties with a list of five factfinders and the parties have seven days to notify SERB of their selection of one to three factfinders. If the parties fail to so notify SERB, SERB appoints a single factfinder.¹¹⁰ No later than 14 days following appointment, the factfinder(s) issue(s) findings of fact and recommendations for settlement and serve(s) them on the parties and SERB.¹¹¹ Upon receipt the union must make the findings and recommendations available to all of its members and schedule an election within seven days.¹¹² The election must be by secret ballot.¹¹³ Within 24 hours of the vote tally, and not

¹⁰⁶ Malin, *supra* note 64, at 342.

¹⁰⁷ Ohio Rev. Code § 4117.14(D)(1).

¹⁰⁸ Ohio Rev. Code § 4117.14(C)(2).

¹⁰⁹ *Id.* § 4117.14(C)(3).

¹¹⁰ Ohio Adm. Code § 4117-9-05(B).

¹¹¹ *Id.* § 4117-9-05(L).

¹¹² *Id.* § 4117-9-05(M).

¹¹³ *Id.*

later than 24 hours following the seven-day period after issuance of the findings and recommendations, the union must serve on the employer and SERB the results of the vote. Failure to serve notice of rejection of the recommendations in a timely manner constitutes acceptance of the recommendations.¹¹⁴ A similar timeline applies to the employer which must submit the findings and recommendations to its legislative governing body upon receipt.¹¹⁵ The legislative body must vote within seven days and the employer must serve the results of the vote on the union and SERB within 24 hours and not later than 24 hours following the seven-day period. Failure to serve notice of rejection in a timely manner constitutes acceptance of the recommendations.¹¹⁶

Rejection of the recommendations requires a vote by three-fifths of all eligible voters, i.e. all members of the legislature and all members of the union.¹¹⁷ If either party rejects the recommendations, SERB publicizes them for seven days.¹¹⁸ The union may then strike, provided it gives ten days' notice of its intent to strike.¹¹⁹ In *East Cleveland Education Association*, SERB held that intermittent strikes are not authorized by the statute.¹²⁰

An employer may sue to enjoin an illegal strike and employer unfair labor practices are not a defense.¹²¹ The employer may also petition SERB for a determination that the strike is not authorized by the statute and SERB must rule within 72 hours.¹²² If SERB finds the strike unauthorized, the employer must give striking employees 24 hours' notice, after which if the employees remain on strike, the

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 4117-9-05(N).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 4117-9-05(O).

¹¹⁸ Ohio Rev. Code § 4117(C)(6)(a).

¹¹⁹ *Id.* §4117(D)(2).

¹²⁰ 11 Ohio Pub. Employee Rep. ¶ 1333 (SERB 1994).

¹²¹ Ohio Rev. Code §§ 4117.15(A),(B)

¹²² *Id.* §4117.23(A).

employer may suspend or terminate the strikers, freeze their compensation for a year and deduct from their wages two days' pay for each day on strike. The penalties are appealable to SERB.¹²³

As in Illinois, lawful strikes may be enjoined if they pose a clear and present danger to public health and safety.¹²⁴ An employer may obtain a temporary restraining order from the court of common pleas which may last no longer than 72 hours.¹²⁵ During the period that the order is in effect, SERB must determine whether the clear and present danger standard has been met. If SERB finds a clear and present danger, the court may extend the injunction to a total maximum period of 60 days.¹²⁶ During the period the injunction is in effect, SERB mediates and the mediator may decide to make the mediation sessions public. After 45 days, the mediator may issue a public report including each party's position statement and offers for settlement.¹²⁷ I previously contrasted the Ohio approach to Illinois's:

In general, Ohio's approach to public sector impasse resolution differs considerably from Illinois' approach. Ohio places such substantial restraints on the parties' use of economic weapons that it does not rely on the fear of economic warfare as the primary method of settling bargaining impasses. Rather, it relies primarily on fact-finding and on public pressure to bring the parties to an agreement. The extent of the reliance on fact-finding is evident from the requirement of fact-finding and the specific procedural detail required to reject fact-finder recommendations. A minor procedural error results in the recommendations being deemed accepted. The extent of the reliance on publicity is evident from the requirement that the OSERB publicize the fact-finder's recommendations, and from the authorization of public mediation sessions and public mediator reports following the enjoining of strikes which endanger public health and safety. This

¹²³ *Id.* § 4117.23(B).

¹²⁴ *Id.* § 4117.16.

¹²⁵ *Id.* § 4117.16(A).

¹²⁶ *Id.*

¹²⁷ *Id.* § 4117.16(B).

contrasts markedly with the Illinois labor boards' rules, which provide for private negotiations and mandate mediator confidentiality.¹²⁸

In 1993, I published a study of the effects of legalizing public employee strikes in Illinois and Ohio.¹²⁹ Although the pre- and post-legalization raw data were not completely comparable, the raw data clearly showed a reduction in strikes in both states despite an increase in bargaining. I summarized the raw data:

[T]he experiences in Ohio and Illinois run counter to the expectation that enactment of comprehensive public sector bargaining laws containing a right to strike would increase the incidence of strikes. Despite an increase in bargaining activity in the first eight years under the Ohio statute, strikes averaged 13.75 per year, compared with an average of 55.71 strikes per year from 1974 to 1980. In the first eight years of the Illinois statute, strikes averaged 15.75 throughout public education, despite an increase in bargaining, compared to an average of 24.56 strikes per year among K-12 teachers prior to the IELRA.¹³⁰

After comparing the raw data, I factored in the inflation and unemployment rates for each year. Single and multivariate analyses of the Ohio data showed a very strong correlation between the change in the law and the reduction in strikes in that state.¹³¹ The change in the law was consistently associated with a decrease of more than 35 strikes per year.¹³² In Illinois, the correlation was much weaker with the change in the law being associated with decreases of between seven and eleven strikes per year and the result, except in one instance, was not statistically significant.¹³³ I concluded that the data “do not firmly support a conclusion that the legalization of public employee strikes in Illinois and Ohio caused

¹²⁸ Malin, *supra* note 64, at 348.

¹²⁹ Malin, *supra* note 64.

¹³⁰ *Id.* at 372-73.

¹³¹ *Id.* at 374.

¹³² *Id.* at 374 n.301.

¹³³ *Id.* at 374-76.

their frequency to decrease . . . [but] there is no evidence that legalization caused strikes to increase in frequency.”¹³⁴

Why was the correlation between the change in the law and the reduction in strike incidence so much stronger in Ohio? One major difference between the two statutes was Ohio’s requirement of factfinding and rejection of the factfinder recommendations in accordance with stringent procedural requirements compared to Illinois’s requirement of resort to mediation. A key difference in the experience under the two statutes was in strike duration. In Illinois, more than 60% of all strikes lasted ten days or fewer and only one strike lasted more than 30 days, whereas in Ohio, fewer than half of the authorized strikes were over in ten or fewer days and more than 16% lasted more than 30 days.¹³⁵ A Chi Square analysis looking at strike duration in five-day intervals showed that strikes in Ohio were of significantly greater duration with the result being significant below the .01 confidence level.¹³⁶

It is likely that the longer duration of strikes in Ohio is due to the requirement of pre-strike factfinding. As I explained in my 1993 article:

Although Ohio's fact-finding process has contributed to the settlement of many contracts without a strike, it also is likely that when a party rejects a fact finder's report and a strike ensues, the fact-finding process adds to the difficulty of settling the strike. A fact-finding hearing is litigation and is therefore adversarial in nature. Parties are likely to perceive the fact finder's report in terms of whether they have won or lost. Certainly, a party that votes to reject a fact finder's report believes that it has lost. The party that has not rejected it is likely to react by saying, “Why should I change anything? A neutral objective fact finder found what is right and fair.”

¹³⁴ *Id.* at 378.

¹³⁵ *Id.* at 380.

¹³⁶ *Id.*

Thus, the fact-finding may serve to further polarize the parties, making the impasse more difficult to settle. This polarization can be particularly acute if the party that did not reject the fact finder's report views the report as vindicating its position. . . . At a minimum, the requirement of fact-finding injects a new issue at the bargaining table--why should we deviate from the fact finder's recommendations?--which diverts attention from the settlement issues. The fact-finding also may polarize the parties further and make it more difficult for the party that did not reject the fact finder's recommendation to change its position.¹³⁷

Other data reinforced the link between mandatory pre-strike factfinding and increase in strike duration. Ohio allows parties to adopt their own mutually agreed dispute settlement process (MAD),¹³⁸ and in Ohio a primary reason for adopting a MAD was to eliminate the factfinding process.¹³⁹ A comparison of the experience with negotiations pursuant to a MAD and negotiations under the statutory procedure revealed that there were more strikes under MADs.¹⁴⁰ Although strikes under MADs were equally likely to be resolved within ten days as strikes under the statutory procedures, over one-fourth of strikes under the statutory procedure lasted more than 30 days compared to less than one-eighth of strikes under MADs.¹⁴¹ A chi square analysis comparing strike duration in five day increments found strikes under the statutory procedure lengthier than strikes under MADs with the difference being significant at the .025 confidence level.¹⁴²

Data from Pennsylvania reinforced the link between factfinding and strike duration. In Pennsylvania, PLRB has discretion to impose pre-strike factfinding and does so when the parties or the mediator indicates it could be helpful. Yet strikes without factfinding were twice as likely as strikes

¹³⁷ *Id.* at 383-84.

¹³⁸ Ohio Rev. Code § 4117.14(C).

¹³⁹ Malin, *supra* note 64, at 384.

¹⁴⁰ *Id.* at 385.

¹⁴¹ *Id.* at 386-89.

¹⁴² *Id.*

following factfinding to be resolved within ten days and strikes following factfinding were more than twice as likely to last more than 30 days as strikes without it. A chi square analysis found strikes following factfinding were significantly longer with the result significant at the .05 confidence level.¹⁴³

In Illinois, the motive power in public sector collective bargaining is the strike. In Ohio, it is a combination of factfinding and a limited right to strike. Experience in the two states shows a clear policy trade-off: fewer strikes when the right to strike is limited by a requirement that the parties first resort to factfinding but those strikes that do occur last significantly longer.

Recent experience in Illinois and Ohio is particularly interesting. Data from SERB's annual reports show that Ohio had a total of 209 strikes during the fourteen year period through Fiscal Year 2008, which ended on June 30, 2008, or an average of approximately fifteen strikes per year. As the economy declined, so did the number of strikes, with only two in Fiscal Year 2009 and none in Fiscal Year 2010. There were none again in Fiscal Year 2011, One in Fiscal Year 2012, two in Fiscal Year 2013, one in Fiscal Year 2014 and two in Fiscal Year 2015.¹⁴⁴ Thus, strikes came close to disappearing in Ohio during the recession and have not come back.

In Illinois, the annual reports of the Illinois Educational Labor Relations Board are summarized in Table 2.

Table 2 Strikes Under the IELRA

Fiscal Year	Strikes	Strike Notices
1998-99	9	43
1999-2000	9	43
2000-01	7	50

¹⁴³ *Id.* at 390-93.

¹⁴⁴ Unfortunately, SERB stopped publishing strike data with its 2016 annual report.

2001-02	10	40
2002-03	7	47
2003-04	10	46
2004-05	4	36
2005-06	5	36
2006-07	3	24
2007-08	9	34
2008-09	1	11
2009-10	4	13
2010-11	2	23
2011-12	5	19
2012-13	6	23
2013-14	3	21
2014-15	3	14
2015-16	5	11
2016-17	5	14

Here too, there was a dramatic decline in strikes and in notices of intent to strike with the Great Recession. This is particularly noteworthy, as the recession marked a highly concessionary negotiating environment. This is likely due to the nature of a strike in the public sector. Whereas in the private sector, a strike is an economic weapon, in the public sector a strike does not interrupt the primary source of the employer's revenues – collection of taxes. In public education, where states mandate 180 school days as a condition of school district receipt of state aid, the prevalent practice of making up strike days means that neither the employer nor the striking workers are likely to lose revenue.

Consequently, in the public sector, the strike is primarily a political weapon. Success depends on the union's ability to garner support for its strike effort. During the recession, unions realized that a strike when unemployment was in double digits would not likely garner much public support. The decline in the number of notices of intent to strike reflects that unions were not even threatening to strike during these difficult economic times. In contrast, the use of interest arbitration by employees prohibited from striking increased dramatically during the recession.¹⁴⁵

Since the recession, unemployment rates have plummeted but wages have remained stagnated. Consequently, recognition of the low likelihood that strikes will garner public support has continued to keep strikes and threats to strike low. The high point for strikes in Illinois education since the recession came in 2012-13. The IELRB reports strike data by fiscal year but the state's fiscal year runs July 1 – June 30. Hence, the fiscal year reports roughly parallel the school year. The first strike in the 2012-13 school year was the Chicago Teachers Union strike against the Chicago Board of Education. The union did a masterful job of garnering public support. It emphasized such issues as overcrowded unairconditioned classrooms and the use of excessive classroom time for standardized testing, issues that garnered considerable public support. The union also worked closely with community groups and staged public rallies to maintain public support. The strike was very successful.¹⁴⁶ It is possible that the Chicago Public Schools strike inspired others. That inspiration, however, appears to have worn off by the next school year.

In New York and Pennsylvania, the motive power is the freezing of the status quo until agreement is reached. This trades off a lower rate of strikes for more prolonged bargaining. In Illinois, the motive power of a right to strike provides an urgency not present in New York and Pennsylvania. But just as strikes still occur in New York and Pennsylvania, prolonged bargaining can still occur in

¹⁴⁵ See Martin H. Malin, *Two Models of Interest Arbitration*, 28 Ohio State J. Disp. Resol. 145, 154-55 (2013).

¹⁴⁶ See Ashby & Bruno, *supra* note 92.

Illinois. The outlier in this regard is the AFSCME – State of Illinois negotiations which have been going on since 2015.¹⁴⁷

The collective bargaining agreement expired on June 30, 2015. The parties began negotiations for a successor on February 9, 2015. They entered into agreements to negotiate in good faith without threat of strike or lockout until reaching impasse. They further agreed that if there was a dispute over whether impasse had been reached, they would jointly submit the issue to the ILRB.

On January 8, 2016, the State declared impasse, presented its final offer and broke off negotiations. A week later the State filed unfair labor practice charges alleging that AFSCME's refusal to join the State is petitioning the ILRB to determine whether the parties were at impasse amounted to a failure to bargain in good faith. The State sought a declaration from the ILRB that it was free to implement its final offer. Interestingly, although there is dicta stating that an employer may unilaterally implement following impasse, no authority in Illinois has expressly so held.¹⁴⁸

On February 22, 2016, AFSCME filed unfair labor practice charges against the State, alleging, among other things that the State breached its duty to bargain when it cut off negotiations on January 8. AFSCME's charges enabled the ILRB to reach the impasse issue. It made the State's claim that the parties were at impasse, in effect, an affirmative defense to the failure to bargain charge. Had AFSCME not filed the charge, the ILRB would have to have decided whether it had authority to, in effect, provide a declaratory judgment or advisory opinion.¹⁴⁹

¹⁴⁷ The following description of the AFSCME – State negotiations comes from the decisions of the ILRB Administrative Law Judge and the Board, State of Ill. Dept. of Central Mgmt. Servs. and AFSCME Council 31, Nos. S-CB-16-017 & S-CA-16-087 (ILRB ALJ Sept. 2, 2016), *aff'd in part, rev'd in part*, Nos. S-CB-16-017 & S-CA-16-087 (ILRB Dec. 13, 2016) and from Martin H. Malin, *The AFSCME – State of Illinois Negotiations: Traveling in Uncharted Waters*, ILL. PUBLIC EMPLOYEE RELATIONS REP., Winter 2017, at 2.

¹⁴⁸ See Malin, *supra* note 147, at 14-16. The ILRB, in finding that the parties were at impasse, expressly disclaimed deciding whether the State was free to unilaterally implement all or even part of its final offer. *Id.* at 14.

¹⁴⁹ See *id.* at 9.

The ALJ found that the parties were at impasse on certain issues but were still making progress on others. With respect to a third group of issues, she found any impasse that might exist was tainted by the State's failure to provide AFSCME with relevant information that the union had requested. She rejected AFSCME's position that she order the parties to resume bargaining on all issues but also rejected the State's position that the issues on which she found impasse were sufficiently critical to the overall negotiations that the State was free to implement its final offer unilaterally. Instead, she recommended an order allowing the State to implement with respect to those issues on which the parties were at impasse but requiring that they resume bargaining on all others and that the State provide the requested information.

Both parties filed exceptions with the ILRB. The ILRB adopted the single critical issue doctrine developed under the National Labor Relations Act, found that the parties were at impasse over subcontracting which was a single critical issue and dismissed AFSCME's charge that the State had breached its duty by breaking off negotiations on January 8, 2016. The ILRB declined to rule on whether the State could unilaterally implement because that issue was not before it. Both parties appealed and on March 1, 2017, the Illinois Appellate Court granted AFSCME's motion for a stay.¹⁵⁰ The stay has stopped the State from unilaterally implementing and there is not likely to be any further progress in negotiations until after the gubernatorial election in November.

The extraordinary, for Illinois, duration of the AFSCME-State negotiations appears attributable to a high level of risk aversion on each side. AFSCME appears to be very reluctant to strike, probably realizing that in times of generally stagnant wages, a strike has a high risk of not garnering public support. The State appears unwilling to act unilaterally unless it has the prior approval of the labor board. The result is the current stalemate.

¹⁵⁰ State of Ill. v. AFSCME Council 31, 2017 Ill. App. (4th) 160827 (Mar. 1, 2017).

The other major outlier in Illinois's experience with the strike as motive power in its public sector negotiations poses more substantial policy issues. It occurred in what was then the Homer School District in rural Champaign County in 1986. The strike began on October 17, 1986 and did not end until after the end of the school year. The resulting contract did not resolve two of the issues that precipitated the strike. The students lost essentially a year of schooling, the school district lost considerable state aid and ultimately had to merge with another district and most of the striking teachers never returned to their jobs.¹⁵¹ Policymakers evaluating a right to strike as the motive power must determine whether to run the risk of an outlier strike such as Homer.

The true antidote to strikes is interest arbitration. As demonstrated in a comprehensive study of police and firefighter interest arbitration under the Taylor Law,¹⁵² interest arbitration provides almost total immunity to strikes. The next section examines Florida and Michigan which have neither a right to strike, a Triborough Law, nor interest arbitration.

V. Florida and Michigan: What Motive Power in Public Sector Collective Bargaining?

The Florida approach to impasse resolution is quite similar to what the Taylor Committee recommended. Florida prohibits strikes by all public employees.¹⁵³ Strikes may be enjoined by the circuit court.¹⁵⁴ Defiance of a court's injunction is punishable by fines for contempt of up to \$5,000 for the union and \$50 to \$100 per day for union leaders.¹⁵⁵ Striking unions may be liable to the employer for damages incurred by the employer because of the strike.¹⁵⁶ The Florida Public Employment

¹⁵¹ See Malin, *supra* note 64, at 397-98; Tim Mitchell & Rebecca Mabry, *Two Decades Later, Homer Teachers Strike Still Sore Subject*, THE NEWS-GAZETTE, Dec. 12, 2006, available at <http://www.news-gazette.com/news/education/2006-11-12/two-decades-later-homer-teachers-strike-still-sore-subject.html>.

¹⁵² Thomas Kochan et al., *The Long Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, 63 INDUS. & LAB. REL. REV. 565, 569 (2010) (finding that in the thirty years since New York adopted interest arbitration there was not a single complete work stoppage among police or firefighters in the state).

¹⁵³ Fl. Stat. § 447.505.

¹⁵⁴ *Id.* §§ 447.507(1),(2)

¹⁵⁵ *Id.* § 447.507(3).

¹⁵⁶ *Id.* § 447.507(4).

Relations Commission (PERC) may suspend or revoke the striking union's certification, revoke its dues checkoff and fine it up to \$20,000 per day for each day of the strike or an amount equal to the cost to the public of the strike.¹⁵⁷ PERC may also, after hearing, discharge striking employees or subject them to probationary periods of 18 months and disqualify them from raises for one year.¹⁵⁸

After a reasonable period of negotiations, either party may secure the appointment of a mediator, except that mediation is prohibited when the governor is the employer.¹⁵⁹ Thereafter, upon the request of either party, PERC appoints a "special magistrate," who is, in effect, a factfinder, except no magistrate is appointed where the governor is the employer.¹⁶⁰ The parties may agree to waive the special magistrate step in the process.¹⁶¹ The magistrate conducts hearings and issues recommendations for resolution. Parties may reject all or part of the recommendations but if they fail to do so within 20 calendar days, the recommendations are deemed accepted.¹⁶² When recommendations are rejected, the employer's chief executive officer and the union submit their positions, along with the magistrate's recommendations to the employer's legislative body which holds hearings and takes "such action as it deems to be in the public interest, including the interest of the public employees involved."¹⁶³ The parties must incorporate the legislature's determinations into their collective bargaining agreement and the union must submit the agreement for employee ratification. If the employees fail to ratify, the legislative resolution goes into effect anyway but only for the first fiscal year that was the subject of the negotiations.¹⁶⁴

¹⁵⁷ *Id.* § 447.507(6).

¹⁵⁸ *Id.* § 447.507(5).

¹⁵⁹ *Id.* § 447.403(1).

¹⁶⁰ *Id.* § 447.403(2).

¹⁶¹ *Id.*

¹⁶² *Id.* § 447.403(3).

¹⁶³ *Id.* § 447.403(4).

¹⁶⁴ *Id.* § 447.404(4).

PERC and the Florida courts have treated the legislature as a quasi-adjudicative body for impasse proceedings. For example, during the legislative resolution process, neither party may engage in ex parte contacts with the legislators.¹⁶⁵ Moreover, the chief executive, such as the mayor, has no authority to veto the legislature's resolution.¹⁶⁶ The Florida District Court of Appeal has recognized that often the legislators will also be the negotiators, creating a situation fraught with peril:

[F]requently, the negotiator and the legislative body are one and the same body wearing two hats. In this case, the Orlando City Commission is the public employer responsible for negotiating, in an adversary setting, a collective bargaining contract with the City's firefighters. Yet once a contract impasse occurs, the City Commission must put on its legislative hat because it is also the legislative body. It must depart from its adversary role and suddenly become neutral, an awkward position because the City Commission must adjudicate disputes as a legislative body to which it is a party in interest as a public employer. This situation becomes very difficult in cases of acrimonious contract disputes where the sides have polarized and waged political war through the news media.¹⁶⁷

When the employer is the governor, there is no special magistrate proceeding. Instead, the issues in dispute are referred to a legislative committee which conducts hearings, followed by legislative resolution of the contested issues.¹⁶⁸ Moreover, because the governor's veto power is rooted in the Florida Constitution, the governor may veto the legislative determination, at least when that determination is part of an appropriations bill.¹⁶⁹

¹⁶⁵ City of Jacksonville, 15 F.P.E.R. ¶ 2237 (PERC 1989).

¹⁶⁶ Dade Cnty. Police Benevolent Ass'n v. Miami-Dade Cnty. Bd. of Cnty. Comm'rs, 160 So.3d 582 (Fla. App. 2015).

¹⁶⁷ City of Orlando v. Int'l Ass'n of Fire Fighters Local 1365, 384 S.2d 941, 945 (Fla. App. 1980) (citation omitted).

¹⁶⁸ Fla. Stat. §§ 447.403(2)(b), (5)(a). The constitutionality of these provisions was upheld in Florida Pub. Employees Council 79, AFSCME v. Bush, 860 So.2d 992 (Fla. App. 2003).

¹⁶⁹ Int'l Ass'n of Fire Fighters Local S-20 v. State, 221 So.3d 736 (Fla. App. 2017).

The Florida approach which largely embodies the approach recommended by the Taylor Committee is not true collective bargaining. It is the employer that ultimately determines the resolution of negotiation impasses. The Taylor Committee recognized this and expressly declined to label what it recommended as collective bargaining.¹⁷⁰ Furthermore, it is important to realize that the Taylor Committee did not view affording employees a voice in determining their terms and conditions of employment as an end in itself; rather it was a means to the ultimate end of preventing strikes. Vesting final authority over employees' terms and conditions of employment with the legislature recognized the democratic principle of legislative supremacy.

The Taylor Committee, and the Florida approach, however, do not take into account a key reason for public employee collective bargaining. When employees' wages and working conditions are left to be decided in the political process, employees and their unions are inherently outnumbered by members of the public who as users and purchasers of the employees' services desire greater and better services at the lowest possible cost.¹⁷¹ Viewed in this light, a strike puts pressure on the very users and purchasers who outnumber the employees, causing them to reevaluate their cost-benefit calculations.¹⁷²

The recent West Virginia teachers strike illustrates this phenomenon. Public employees in West Virginia have no collective bargaining rights and strikes are prohibited. Teacher compensation is set by state statute. When the state legislature, catering to the desires of the majority of the public who desired to keep the costs of public education to a minimum, enacted pay raises of 2% in the first year

¹⁷⁰ Taylor Committee Report, *supra* note 2, at 11 ("The term 'collective bargaining' has thus come to denote a type of joint-determination by unions and private management which . . . cannot be transferred literally to the public employment sector. An objective evaluation of the questions before us will be assisted, we believe, by use of the term 'collective negotiations' to signify the participation of public employees in the determination of at least some of their conditions of employment . . .").

¹⁷¹ See Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

¹⁷² See Clyde W. Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L.REV. 265, 27-79 (1987).

and 1% in the following two years, raises that were offset by increases in the cost of health insurance,¹⁷³ teachers struck shutting down schools state-wide for nine days. This caused the public through their legislative representatives to reevaluate their cost-benefit calculations. The strike ended when the governor signed legislation giving teachers a 5% raise.¹⁷⁴

The motive power in public sector collective bargaining in Michigan has changed over the years. In 1947. As New York was enacting the Condon-Wadlin Act, Michigan enacted the Hutchinson Act which similarly prohibited public employee strikes.¹⁷⁵ However, in *School District for the City of Holland v. Holland Education Association*, the Michigan Supreme Court held that an illegal strike is not automatically enjoined.¹⁷⁶ The court opined that it was contrary to the state's public policy to enjoin a labor dispute in the absence of violence, irreparable injury or breach of the peace.¹⁷⁷ The court vacated an injunction issued by the trial court and suggested that on remand, the trial court "inquire into whether, as charged by defendants, the plaintiff school district has refused to bargain in good faith, whether an injunction should issue at all, and if so, on what terms and for what period in light of the whole record to be adduced."¹⁷⁸

After the *Holland* case, it became very difficult to enjoin illegal public employee strikes, particularly teacher strikes. As a result, the strike became the motive power, particularly in education employee collective bargaining. But everything changed in 1994.

¹⁷³ See Update: West Virginia House Passes Amended Bill to Give 2% Raise to Teachers, State Police Officers, WSAZ, WDTV, Feb. 13, 2018, 3:15 p.m., <http://www.thenewscenter.tv/content/news/Possible-PEIA-cutbacks-concern-teachers-public-employees-470180613.html>.

¹⁷⁴ See Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES, Mar. 6, 2018, <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>.

¹⁷⁵ See *Sch. Dist. v. Holland Educ. Ass'n*, 157 N.W.2d 206, 207 (Mich. 1968).

¹⁷⁶ *Id.* at 210.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 211.

John Engler was elected governor in 1990, defeating a Democratic incumbent, and re-elected in 1994, in part by demonizing the Michigan Education Association (MEA).¹⁷⁹ Under Engler, Michigan abolished property taxes for education and prohibited prohibited local school districts from raising additional funding through millages. In signing such legislation, Engler declared the end of the “power and control the teacher unions have had over education policies . . .”¹⁸⁰

In 1994, Michigan enacted P.A. 112 which mandated fines of one day’s pay for each day a public education employee is on strike, prohibited strikes over unfair labor practices and mandated that courts enjoin strikes in public education.¹⁸¹ The act also prohibited bargaining on the identity of a school district’s group insurance carrier, the starting day of the school term and the amount of required pupil contact time, composition of site-based decision-making bodies, decisions whether to provide interdistrict or intradistrict open enrollment opportunities, the decision to operate a charter school, the decision to contract out noninstructional support services, the decision to use volunteers for any services, and decisions to use instructional technology on a pilot basis.¹⁸²

Contemporary media commentary suggests that the act was a backlash aimed primarily at the MEA.¹⁸³ In urging support for the bill, the *Grand Rapids Press* editorialized that the MEA’s “longstanding stranglehold on the bargaining process has given Michigan teachers a Rolls-Royce health-insurance plan, some of the highest school salaries in the country and virtual immunity from the state law forbidding public employee strikes. A consequence is that Michigan school costs from 1980 through ’92 rose an

¹⁷⁹ See William Lowe Boyd, David N. Plank & Gary Sykes, *Teacher Unions in Hard Times*, in *CONFLICTING MISSIONS? TEACHER UNIONS AND EDUCATIONAL REFORM* 174, 176-77 (Tom Loveless ed. 2000).

¹⁸⁰ *Id.* at 179.

¹⁸¹ M.C.L.A. § 423.202a. The requirement that courts automatically enjoin teacher strikes was struck down as a breach of the separation of powers between the legislature and the courts and apparently is now of no effect. See Andrew Nickelloff, *Marching Headlong into the Past: 1994 PA 112 and the Erosion of School Employee Bargaining Rights*, 74 MICH. B. J. 1186 (1995).

¹⁸² M.C.L.A. § 423.215(3).

¹⁸³ See, e.g., John Foren, *Engler-GOP Drive to Cut School Costs Aims at MEA*, GRAND RAPIDS PRESS, Mar. 19, 1994, at A1.

average of 8.1 percent a year, with the difference being passed along to citizens in their property-tax bills.”¹⁸⁴ A stated rationale for restricting these subjects of bargaining was to foreclose disputes over these subjects from creating impasses in negotiations.¹⁸⁵

In 2011, Michigan expanded its list of prohibited subjects of bargaining. It added to the list: placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption and implementation of a policy regarding employee discharge or discipline; the format, timing and number of classroom visits; the development, content, standards, procedures, adoption and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.¹⁸⁶ Additionally, in 2011, Michigan prohibited for all public employees any step increases after the collective bargaining agreement has expired, required that following contract expiration prior to reaching agreement on a new contract, employees bear all increases in costs of health insurance and prohibited making increases in wages retroactive to the expiration date of the prior contract.¹⁸⁷

Sixty days prior to the expiration date of the collective bargaining agreement, the parties are required to notify the Michigan Employment Relations Commission (MERC) of the status of their negotiations for a successor agreement.¹⁸⁸ Thirty days thereafter, MERC is required to appoint a

¹⁸⁴ *Senate’s Turn on School Costs: House-passed Bill Shifts Control from MEA to Taxpayers,. Boards*, GRAND RAPIDS PRESS, Apr. 19, 1994, at A8.

¹⁸⁵ See Michael Matheson, Note, *Have Michigan Public School Teachers Lost Their Ability to Strike Under 1994 PA 112?*, 75 U. DET. MERCY L. REV. 415, 430 (1998).

¹⁸⁶ 2011 Mich. Pub. Act 103 (codified at M.C.L.A. § 432.215(3)(j)-(p)).

¹⁸⁷ 2011 Mich. Pub. Act. 54 (codified at M.C..A. § 432.215b).

¹⁸⁸ M.C.L.A. § 423.207(b).

mediator, if one has not yet been appointed.¹⁸⁹ Authority for factfinding is found in the Michigan Labor Mediation Act.¹⁹⁰ MERC Rules govern the appointment of a factfinder and the factfinding process.¹⁹¹ Police and firefighters have access to interest arbitration but for all other public sector bargaining units, factfinding is the final impasse resolution step available.¹⁹² Following receipt of the factfinder's recommendations, the parties are required to meet at least once within 60 days.¹⁹³ When the parties have reached impasse, the employer may implement its last best offer unilaterally.¹⁹⁴

The model of collective bargaining in Michigan is in marked contrast to the model under the Taylor Law. Whereas under the Taylor Law, all provisions of the expired contract remain in effect until a new agreement is reached, step increases continue and even the legislative body may not impose terms that detract from employee rights under the expired agreement, in Michigan, wages are frozen at their levels in the expired agreement, step increases are prohibited, following expiration the employees bear all increases in health insurance costs and agreements may not provide for wage increases to be retroactive. The motive power in Michigan is employer power. Unions are pressured to accept the employer's terms because the longer they go beyond contract expiration without an agreement, the worse off the employees are and, although the union may initiate factfinding, the employer may reject factfinder recommendations and unilaterally implement anyway.

VI. Conclusion

This exploration of different models with different motive power in public sector collective bargaining developed policy issues that legislators must confront in choosing among the models. Although they differ in how they calibrate the balance between unions and employers in the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* § 423.25.

¹⁹¹ Mich. Adm. Code R. 423.131 to 423.138.

¹⁹² See MICHIGAN EMPLOYMENT RELATIONS COMMISSION, GUIDE TO PUBLIC SECTOR LABOR RELATIONS LAW IN MICHIGAN 23 (2013).

¹⁹³ See Stephen O. Schultz, Helen "Lizzie" Mills, & Steven L. Koski, *Public-Sector Collective Bargaining: Labor Relations in the Public Eye*, Mich. Bar J., Sept. 2015, at 26, 28.

¹⁹⁴ See, e.g., Kalkaska Cnty. Rd. Comm'n, 29 MPER ¶ 65 (MERC 2016).

negotiations process, Florida and Michigan follow a model that relies on factfinding and ultimate employer determination of terms and conditions of employment to supply the motive power. The model was developed by the Taylor Committee. It does not provide for full collective bargaining but relies on a lesser form of worker voice, what the Taylor Committee called “collective negotiations,” combined with stiff penalties to prevent strikes while recognizing the supremacy of elected officials. But it ignores a major reason for public sector collective bargaining, that with respect to their wages and working conditions, public employees are at an inherent disadvantage in the general political process because they are outnumbered by the users and purchasers of their services who want more and better service at less cost.

New York and Pennsylvania rely on a freeze in the status quo coupled with mediation as the motive power for collective bargaining. Here too, the states differ on the precise calibration of power in the bargaining process, but they both trade off lengthier negotiations due to the absence of any source of urgency for reductions in strikes. In contrast, Illinois and Ohio rely on the strike as the motive power and trade off shorter negotiations for, depending on the political and economic climate, potentially greater strike activity. In states that rely on the strike as the motive power, there is another policy tradeoff concerning procedural requirements such as factfinding and mandatory strike authorization votes, which reduce the number of strikes but make those that occur more difficult to resolve.

The strongest inoculation against strikes is to mandate interest arbitration. Evaluation of the different approaches to interest arbitration is beyond the scope of this paper.¹⁹⁵ It is noteworthy, however, that most jurisdictions that mandate interest arbitration confine the mandate to those employees, primarily police and firefighters, where a strike has a great risk of disastrous consequences for public safety.

¹⁹⁵ For my views, see Malin, *supra* note 145.