
Joseph A. McCartin

The explosive rise of public sector unions in the United States in the 1960s and the early 1970s resembled in many ways the breakthrough of industrial unionism in the 1930s. The unionization of teachers, police officers, fire fighters, secretaries, sanitation workers, and other government employees was every bit as sudden and unexpected as the depression-era industrial union upsurge had been. Membership in public sector unions grew tenfold between 1955 and 1975, topping four million by the early 1970s. Moreover, newly organized government workers behaved just as militantly as did auto and steel workers a generation earlier. In 1958 there were a mere 15 public sector strikes recorded in the United States; in 1975 the number hit 478.1 It is little wonder then that so many observers compared public sector unionism to the rise decades before of the Congress of Industrial Organizations (cio). Describing a scene reminiscent of a famous history of the 1930s by Irving Bernstein, the journalist Irwin Ross suggested in 1968 that the upsurge in government workers’ activism had created a “turbulent state” by the late 1960s. Ralph J. Flynn, a lobbyist for the fastest growing public sector union, the American Federation of State, County, and Municipal Employees (afscme), also used a depression-era benchmark. Surveying afscme’s prospects in 1974 he concluded that “today is 1934 in the public sector.” And, when a Pennsylvania state official tried to understand the unionization of state workers, he also drew on history: “We went through this in the ’30s in the private sector,” he explained. “Now we are going through it in the public.”2

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While similarities between the CIO and public sector unions were apparent to contemporary observers, it is the differences between these two waves of union organization that loom larger now, a generation later. One crucial difference between the heyday of 1930s industrial unionism and the public sector union upsurge has become clear: unlike the CIO, the public sector unions were unable to revive the rest of the labor movement. Rather, the rise of public sector unions in the 1960s and 1970s coincided with the accelerating decline of private sector unions. By the end of the twentieth century, overall U.S. union membership had dipped below 15 percent of all non-agricultural workers, and, although government workers made up 40 percent of labor's total membership, public sector unions had lost their forward momentum. This article argues that the failure of the public sector unions to ignite a broad and enduring labor movement revival owes in part to another heretofore unexamined difference between the rise of the CIO and the emergence of the government workers' unions. The labor agitation of the 1930s produced the National Labor Relations Act of 1935, better known as the Wagner Act, the passage of which opened the way for the CIO. By contrast, the public sector labor agitation of the 1960s and 1970s never achieved a national law granting all government workers the right to organize and bargain collectively. Labor's inability to win what organizers called "a Wagner Act for public employees" in the 1970s was a profound failure that historians have so far ignored. Explaining labor's failure helps illuminate important connections between U.S. labor and political history.

Between 1970 and 1976, organized labor fought hard for a public sector Wagner Act that would have extended collective bargaining rights to all state and local government workers; moreover, the prospects of passing such legislation had once seemed so bright that in the minds of labor strategists only the final provisions were in doubt. In 1974, even labor's foes seemed resigned to the fact that labor would win "the real prize they're after." If unions had won such legislation, U.S. labor history might have taken a different path after the mid-1970s. Public sector unions, freed from an array of state and local laws that sharply constricted the union rights of government workers, could have entrenched their influence across the nation much more successfully than they did. As it was, U.S. public sector unions never approached the 70 percent union density (union membership as a proportion of workers eligible for membership) figure achieved by Canadian public sector unions; indeed, by 2000 only 37 percent of U.S. public sector workers were organized. Labor's failure to pass national legislation meant that government workers' unions achieved little power across large, significant stretches of the country, including states such as South Carolina where public sector collective bargaining rights were never won. The inability of public sector unions to sink roots in those regions in turn contributed to organized labor's growing geographical isolation. Fully one-half of all union members lived in only six states by 2000, a fact that helps explain why labor has yet to gain the political leverage necessary to reform the nation's increasingly ineffectual private sector labor laws. The story of labor's failure to pass a Wagner Act for public workers thus adds a new dimension to the narrative of organized labor's decline since the 1960s.


This story also illuminates another facet of recent history: the rise of conservatism in the 1970s. Like the signing of the Wagner Act in the 1930s, the effort to enact a national collective bargaining law for government workers in the 1970s sheds light on a profound moment of political transition. But whereas the Wagner Act’s passage in 1935 consummated a potent labor–Democratic party alliance that would influence U.S. politics for decades, labor’s unsuccessful fight to pass such a bill for public employees in the 1970s revealed something ominous for both unions and Democrats: the extent to which the political-economic underpinnings of the New Deal order had begun to give way by the mid-1970s, deepening divisions in the labor–Democratic political coalition and handing conservatives new issues that would help propel them to national power by 1980.

The dream of a Wagner Act for public employees was conceived in the late 1960s and early 1970s, when the central tenets of liberal economics still commanded something resembling a consensus—years when even President Richard M. Nixon could declare, “I am now a Keynesian.” But labor took up the fight at precisely the moment when the Keynesian order began to dissolve amid the stagflation of the mid-1970s, when Democrats began to divide over how to respond to growing budget deficits, and when government-bashing conservatives began to perfect ways of blaming high taxes and bloated government on public workers and their unions. In this uncongenial context, the fight for a public sector Wagner Act not only failed to replicate the breakthrough of 1935, it revealed an insoluble dilemma for 1970s liberals: How could they maintain a union-friendly political economy amid rampant inflation, slowing economic growth, and exploding deficits? Ironically, the harder government workers pushed for national legislation during the tumultuous mid-1970s, the more they strained their alliance with congressional Democrats, galvanized conservatives, and made themselves a target for public outrage. By 1976, not only had the drive for a public sector Wagner Act been quashed, but a backlash had been unleashed against public sector union power, fed in part by labor’s drive for national legislation, and its effects extended all the way to the U.S. Supreme Court. Labor’s fight for a national public sector bargaining law set the stage for a majority of the Court to revive the long-dormant doctrine of federalism, dusting off the Tenth Amendment of the U.S. Constitution for the first time since the New Deal era, in order to thwart labor’s ambitious plans.

In the end, the struggle to achieve a Wagner Act for public workers played a significant, if unheralded, role in the rise of the conservative movement that would ultimately help propel Ronald Reagan into the White House. That story makes clear just how important labor questions were to crystallizing the conservative upsurge, a factor neglected by most of conservatism’s recent historians.


A rich literature on conservatism’s rise has emerged in the past decade that has illuminated the roles played by the growth of suburbia; struggles over racial justice and taxes; and cultural conflicts in building the conservative movement. Yet those works generally have not analyzed the extent to which labor conflicts also influenced the rise of conservatism. See, for example, Matthew Dallek, The Right Moment: Ronald Reagan’s First Victory and the Decisive Turning Point in American Politics (New York, 2000); Lisa McGirr, Suburban Warriors: The Origins of the New American Right (Princeton, 2001); Kevin M. Kruse, White Flight: Atlanta and the Making of Modern Conservatism
Birth of a Dream

During the 1960s, laws affecting the union rights of public sector workers were reformed in ways that made eminently plausible the dream of national legislation granting collective bargaining rights to the 18 percent of U.S. workers who labored in the public sector by 1970. During those years public workers benefited enormously from a liberalization of public policy regarding union organizing, an effort led by Democratic politicians from the local to the national level. Following the example set in the 1950s by mayors Robert F. Wagner Jr. of New York and Joseph S. Clark Jr. of Philadelphia, many big cities began bargaining with municipal workers in the 1960s. In 1962, President John F. Kennedy imparted enormous momentum to this movement when he issued Executive Order 10988, giving bargaining rights to more than two million federal workers. Over the course of the decade, twenty-two states enacted collective bargaining laws for government workers. These reforms prompted a wave of organizing by unions such as AFSCME and the American Federation of Teachers (AFT). In 1970, a national wildcat strike helped postal workers win legislation that allowed them to bargain with the newly created U.S. Postal Service over wages and benefits. And, by 1975, unions had helped push through laws granting public sector union rights in thirty-six states.

If public sector union rights were gaining greater acceptance by the late 1960s, the extent of those rights was initially limited. For the most part, state laws in the 1960s were premised on the assumption that public sector labor relations should not be organized on the private sector model. A preponderance of opinion held that collective bargaining in the public sector ought to be sharply constrained. President Franklin D. Roosevelt once explained that unions could never play the same role in the public sector that they played in industry because the “very nature and purposes” of government made it “impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations.” Even many reformers in the 1960s accepted that there was an immutable distinction between public and private labor models. As a member of the Michigan Civil Service Commission put it in 1967, “collective bargaining as it is known in the private sector . . . is a practical impossibility within the framework of our democratic government structure.”

Shaped by such thinking, early state laws generally offered sharply limited bargaining rights for public sector workers. States circumscribed the categories of workers eligible for representation, limited the scope of issues over which unions could bargain, and levied harsh penalties against public sector strikers. Moreover, states did not provide mechanisms for union security. This meant that public sector unions, like their private sector


counterparts in "right-to-work" states, faced the problem of "free riders." Once a majority of workers selected a union as their designated bargaining agent, laws obligated the union to represent all the workers in a bargaining unit. But those workers were not obligated to pay union dues.†

In the early 1970s, however, that limited-rights approach began to encounter resistance. In its place, an alternative view—that public sector bargaining laws ought to be modeled on those in the private sector—gained support. The factor most responsible for this shift was the skyrocketing number of public sector strikes, which rose ten-fold between 1965 and 1975. Union leaders blamed the strikes on inadequate or nonexistent state bargaining laws. Workers were forced to strike, they argued, because unions did not have the legal support necessary to bargain effectively. Until workers enjoyed the full "benefits of collective bargaining," argued Howie McClennan, the president of the International Association of Fire Fighters, they would be "forced to take strike action, which is a symbol of the breakdown of the bargaining process." As another union leader, Vincent J. Paterno, insisted, government workers needed the right to strike in order to "create equality at the table." Only when employers knew that workers had a credible strike weapon would they bargain in good faith, leading to mature labor relations and a less turbulent public sector. As Thomas R. Donahue of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) explained it, "The closer the public employee unions can bring themselves and their styles to the private sector model, the more productive their efforts are going to be."°

Union leaders were not alone in calling for the convergence of public sector labor relations practices with those in the private sector. By the early 1970s, a growing number of labor relations experts seconded this view. Professor Phillip Ross of Cornell University believed that the conduct of labor relations in the public sector should soon come "close to current private sector practice," because the "unilateral decision-making power" retained by government employers was "utterly inconsistent with the American tradition of collective bargaining." The mediator Arnold Zack even predicted that government strikes would soon be legalized. The public had already "learned to adapt its daily living to the illegal action," Zack observed in 1972. He believed that accommodating and regulating government workers' strikes, rather than foolishly trying to ban them, was necessary if the nation hoped to restrain growing government worker militancy.†

This shift in thinking began affecting key policy makers by the early 1970s. The House Post Office and Civil Service Committee reported out a bill in 1973 that would have granted postal workers the right to strike. As Rep. Charles H. Wilson, a Democrat from


California, explained, the bill was necessary to give the unions an “equal hand” in bargaining with management. The chairman of the Senate Post Office and Civil Service Committee, Senator Gale McGee, a Democrat from Wyoming, meanwhile, called for a law that would place labor-management relations within the federal government “on a statutory foundation similar to the National Labor Relations Act.” A shift in approach was also evident in the states. Pennsylvania, Hawaii, Vermont, and Oregon granted government workers strike rights in the early 1970s. By January 1975, New York legislators were considering changes to the New York City charter that would legalize municipal strikes. A legislative commission in California recommended that the state should recognize the right of government workers to strike and should establish agency shop agreements with public sector unions (which would allow the unions to charge all state and municipal workers a fee for representation).

Nothing better symbolized the legitimization of this “convergence model” of public sector labor relations than the views held by William J. Usery, who served as an under-secretary of labor and the director of the Federal Mediation and Conciliation Service (FMCS) in the Nixon administration. Usery, a former official of the International Association of Machinists, advocated importing the private sector labor relations model into government and used his influence to advance this cause. In August 1973, Usery announced that the FMCS would “become an active advocate of collective bargaining in federal employee units,” setting “an example for the rest of the country.” His views on public sector strike rights were similarly progressive. Speaking to police chiefs in June 1974, Usery insisted that efforts to prevent police strikes by penalizing strikers were wrongheaded: only negotiations between governments and unions would bring labor peace. This view led him to call for collective bargaining legislation for federal workers, even extension of some rights to strike. Unless such legislation was enacted, he worried, “we may soon see the federal employee isolated from the rest of the nation’s workforce as the only group denied the legal right to strike,” a situation that “would not be acceptable.” Naturally, Usery’s ideas enraged the Right, and many conservatives demanded his removal. But, in 1976 President Gerald R. Ford made Usery his secretary of labor, a clear indication of how mainstream Usery’s views had become.

By the early 1970s, then, a broad liberalization of public sector labor laws was underway, animated by the view that government workers ought to have the same rights as private sector workers. As the “convergence model” gained ground, it is not surprising that some public sector unionists, frustrated by the patchwork of restrictive state laws under which they labored, began to call for a national law akin to the Wagner Act. As Jerry Wurf, the president of AFSCME, put it, “public employees won’t be first-class citizens until Congress passes a Wagner Act for public employees, guaranteeing every teacher, every


Jerry Wurf, the president of the American Federation of State, County, and Municipal Employees from 1964 to 1981, speaks with characteristic passion at a 1972 union conference. In the early 1970s, Wurf spearheaded the drive for federal legislation to guarantee government workers a minimum wage, overtime pay, and collective bargaining rights. Courtesy Walter Reuther Library, Wayne State University.

nurse, every clerk the right to join a union, to bargain for decent wages and proper working conditions, and to do so free from fear and recrimination.” With Democrats in control of both houses of Congress, allies such as Usery ensconced in influential positions, and the Republican administrations of Nixon and Ford weakened in the aftermath of the Watergate scandal, such a law began to seem like a realistic goal.  

The Drive to Pass a Wagner Act for Public Employees

The drive to enact a national collective bargaining law for state and local government workers was spurred by AFSCME, the fastest growing union in America in the 1960s. As early as 1969, AFSCME staffers began working on versions of a “government workers’ Wagner Act” that would resemble the National Labor Relations Act. “We decided that it made much more sense to seek relief through a federal law,” explained AFSCME president Jerry Wurf, “than to dribble out our lives trying to convince 50 state legislatures, 5,000 city councils, and 10,000 school boards and who knows how many other public bodies to devise an impartial mechanism at the lower level.” AFSCME leaders believed that political currents would favor them in the 1970s and were also optimistic that the courts

14 Flynn, Public Work, Public Workers, viii.
would support their efforts to gain a national law. While critics contended that AFSCME's proposed legislation would overstep the boundaries of federalism by putting state and local government labor relations under Washington's control, it appeared that the Supreme Court would not share that view. In its 1968 decision in *Maryland v. Wirtz*, the Court upheld an extension of the federal Fair Labor Standards Act (FLSA) to employees of public hospitals, giving them the protection of minimum wage and overtime laws for the first time. In doing so, the Court seemingly validated the principle that the federal government could regulate the labor relations practices of state and local governments.\(^5\)

AFSCME saw the extension of FLSA coverage to state and local workers as an entering wedge in their struggle to secure federal authority over state and local government labor relations. Thus the union developed a two-track strategy in the early 1970s. On one track, AFSCME pushed for FLSA coverage for all state and local workers, as a way to confirm the principle that federal law superseded state and local government labor relations policies. On the other track, the union drafted a national collective bargaining law that would use that principle to extend Wagner Act–like protections to all state and local government workers. This document, a proposed national public employee relations act (NPERA), emerged over a period of four years of drafting and revision. It was an enormously ambitious proposal that closely paralleled the 1930s private sector law on which it was based. Like the Wagner Act, it guaranteed the right of workers (in this case government workers) to organize and bargain collectively. To enforce its provisions, the proposed law called for a national public employee relations board analogous to the National Labor Relations Board. The NPERA even exceeded the Wagner Act's protections in some areas. For example, it provided for an automatic dues check-off (or agency shop provision) wherever unions were recognized, potentially eliminating the "free rider" problem in the public sector.\(^6\)

The union moved aggressively to line up support for its vision, and the NPERA quickly received the endorsement of influential Democratic legislators. In August 1970, AFSCME's congressional allies, including Rep. Peter Rodino of New Jersey, on the House Judiciary Committee, introduced a bill patterned on AFSCME's proposal. Speaking on behalf of the bill, Rep. Abner Mikva of Illinois argued that the time had come when public employees "should be accorded the same rights which their nongovernmental brothers have had for over a generation." To push for this early version of the NPERA, AFSCME joined forces with the International Association of Fire Fighters and the National Education Association to lobby on Capitol Hill. These unions considered the bill “just as essential as a federal right to vote act."\(^7\)

AFSCME also pushed the AFL-CIO to support the legislative drive. Pursuant to an AFSCME-inspired directive from the AFL-CIO Executive Council, in 1970 the AFL-CIO launched a Subcommittee on Collective Bargaining Rights for State and Local Govern-


\(^6\) Winn Newman to Jerry Wurf, memo, Oct. 2, 1969, file 16, box 75, American Federation of State, County, and Municipal Employees President’s Office Records, Wurf Collection.

ment Employees, which included representatives from those unions with a major interest in government workers: Wurf of AFSCME; Matthew Guinan of the Transport Workers Union; John Griner of the American Federation of Government Employees; Peter Fosco of the Laborers’ International Union of North America; and David Sullivan of the Service Employees International Union. Yet it turned out that AFSCME had more difficulty lining up other unions behind its proposal than it did recruiting legislators. When the AFL-CIO subcommittee held its first meeting on July 29, 1970, Winn Newman of AFSCME passed out copies of the proposed law and urged a “strong push” for its enactment. To his surprise, he met with a cool reception. Indeed, Guinan, the subcommittee’s chair, opposed AFSCME’s approach on the grounds that “legislation at the federal level could be an encumbrance rather than a help.” The conflict only deepened when the subcommittee reconvened three months later. Newman argued again that “state legislation was not very promising and that federal legislation was the only hope.” But the other unions were still not ready to commit, evidently fearing that AFSCME would enjoy a special advantage under a law designed by AFSCME strategists. The obstructionism incensed Wurf, AFSCME’s feisty president. To Andrew J. Biemiller, the director of the AFL-CIO Department of Legislation, he privately fumed: “I understood the purpose of the committee was to discuss Federal legislation for State and local employees.”

Unaware of the divisions within organized labor’s ranks, anti-union forces grew alarmed at the level of political support that the NPERA had begun to attract. In March 1971, the Journal of Commerce, a weekly business magazine, warned its readers that if cities and states did not improve public employee labor relations, “they may find themselves confronted with the National Public Employee Relations Act, which the AFSCME is now pushing vigorously in Washington.” If AFSCME’s plan passed, the journal predicted, unions would take over the nation’s cities, and governments would “find themselves unable to control their own workers.”

To outflank anti-union forces, AFSCME first concentrated on enacting the FLSA extension, a less controversial measure, since it did not require state and local governments to deal with unions. Around that objective, labor achieved quick unity, and unions began lobbying hard in 1971 for the extension of FLSA coverage to 2.6 million state and local government workers. If enacted, the extension would further legitimize the unions’ demands for the NPERA by reinforcing the precedent set in Maryland v. Wirtz, allowing federal control of state and local government labor relations. The National League of Cities, which opposed any federal regulation of municipal labor relations, fought the FLSA initiative in the halls of Congress, contending that legislation extending the FLSA “would adversely affect municipal home rule.” But municipal leaders were scarcely united against AFSCME’s drive. The union picked up key endorsements for FLSA extension from liberal mayors such as John V. Lindsay of New York and Kevin White of Boston.


20 National League of Cities, press release, Sept. 27, 1971, file 16, box 78, ibid.; John V. Lindsay to Wurf, June
The FLSA extension campaign began in earnest once the Ninety-third Congress was seated in January 1973. After a year of maneuvering, the public sector unions succeeded in enacting the law they wanted. They shrewdly enfolded their measure into a larger bill that raised the minimum wage from $1.60 to $2.30 per hour and extended its protections to other previously uncovered workers in the private sector, such as domestic servants. Framed in that way, the FLSA extension passed the Democratic-controlled House and Senate by wide margins and was sent to President Nixon in April 1974. The timing was fortuitous. Nixon had vetoed a minimum wage bill in 1973, and conservatives hoped he would do so again. But, as the New York Times concluded, “with possible impeachment hanging over his head, Mr. Nixon could not afford to risk a second veto.” To the consternation of conservatives, Nixon signed the bill on April 8, 1974. By doing so, he not only brought state and local workers under minimum wage protection; he also tacitly endorsed the principle that Washington could control state and local government labor policies. The National League of Cities immediately challenged the constitutionality of the act in court, inaugurating what would become one of the most important and least appreciated legal battles of the 1970s.17

Convinced that the Supreme Court would ultimately uphold the FLSA extension, and buoyed by their recent legislative victory, AFSCME leaders began to recruit support for a version of the NPERA that had been introduced on June 14, 1973, by Rep. William Lacy Clay, a civil rights leader (and former AFSCME activist) from St. Louis. Clay’s version of the NPERA was sweeping in scope. It extended collective bargaining rights to all state and local workers, mandated the agency shop (where workers were required to pay a fee for union representation whether they were union members or not) in organized workplaces, allowed unions to negotiate a union shop (where workers could be required to join the union), and offered limited strike rights to all public employees. It contained “just about every right a union could want,” as one journalist put it. Such sweeping legislation was necessary, AFSCME strategists argued. Wurf told Congress that there could be no “reasonable and responsible labor-management relations in the public sector without a uniform national law;” the existing state laws, he explained, were little more than “a shameful hodgepodge.” Howie McClennan of the International Association of Fire Fighters seconded Wurf’s assessment, warning that state collective bargaining laws were in “chaos” and could only be remedied by strong national legislation. Powerful legislators, such as the chairman of the Senate Labor Committee, Harrison A. Williams, began to support labor’s view. Williams argued that it was “unrealistic” to expect state and local governments to “willingly write laws protective of their employees if such laws in any way threaten the employers’ autonomy.” Williams insisted that “a uniform national approach is the answer.” In light of the growing support for the measure, Donald Elisburg, the Senate Labor Committee’s general counsel, believed that it would pass before the Ninety-third Congress left office.22

17. 1971, ibid; Kevin White to Wurf, June 22, 1971, ibid.
But the more progress AFSCME made on its proposal, the more anti-union forces coalesced against it. Opponents attacked what one group called "Jerry Wurf's vicious campaign to extract dues from government employees in America." Reliably conservative organizations picked up on this theme. The United States Industrial Council, an anti-union lobbying association, called the NPERA a "union organizer's dream." The National Association of Manufacturers termed it an "anti-public interest bill." More importantly, local government officials also opposed the Clay bill. The National Association of Counties charged that it would "usurp local prerogatives." And even some Democratic municipal administrations spoke against the measure. Arvid Anderson, the director of New York City's Office of Collective Bargaining under Democratic mayor Abraham D. Beame, saw the bill as meddling in municipal affairs. Mayor Robert B. Blackwell of the National League of Cities contended that public sector labor relations practices in localities around the nation were "too diverse and too underdeveloped to move decisively and definitively on a national scale."

It is possible that unions could have overcome such opposition to bring a bill to the floor of the Ninety-third Congress had they been able to coalesce behind a single approach. But the divisions that hampered the unions when they met on the issue in 1970 had not been entirely resolved by 1974. At the root of those disagreements was the resentment that some powerful union leaders felt toward AFSCME and its president, Jerry Wurf. Wurf had quarreled publicly with AFL-CIO president George Meany over the war in Vietnam and the AFL-CIO's failure to endorse George McGovern's 1972 presidential campaign. Relations between the two men remained strained. Complicating matters, President George Hardy of the Service Employees International Union (SEIU) viewed the fast-growing AFSCME as a competitor in his union's efforts to organize government workers. Thus SEIU proposed its own law, which aimed to extend the Wagner Act to public sector employees rather than establishing the parallel legal structure envisioned by AFSCME. There was no need for AFSCME's "duplicate law, duplicate Board, and almost duplicate set of ground rules," SEIU contended. The AFL-CIO was slow to settle this internal conflict. Not until the AFL-CIO created a Public Employees Department (PED) in 1974 was there a mechanism that could encourage public sector unions to pull in harness. Once Howie McClennan of the fire fighters union took the reins of the PED he began to soothe relations among the competing unions, helping them find common ground on a national law. But McClennan's department was not operative until after the crucial 1974 congressional elections.

Fortunately for labor, the outcome of those elections strengthened its hand in Congress. Riding a wave of public revulsion over Watergate, Democrats swept to a 291-144
majority in the House and 61–39 majority in the Senate. Those margins encouraged Democrats to mount an aggressive legislative agenda. And when the newly seated Senate changed its long-standing filibuster rule in March 1975, reducing the proportion of votes required to invoke cloture from two-thirds to three-fifths, it meant that Democrats were nearing a veto-proof majority that could overcome obstructionist filibusters. The time finally seemed right to advance the NPERA. “Watergate politics and the voting power of 23 million union members” had seemingly reshaped the “future of public sector labor legislation,” noted one analyst. Labor was ready to seize its opportunity. McClennan called a meeting of the public sector union heads for January 21, 1975, at AFL-CIO headquarters to strategize for the final push for national legislation. It appeared that the unions might finally unite behind a single bill. Privately, AFSCME leaders agreed to “compromise at the eleventh hour” with their rivals to secure legislation that would “establish minimum standards” for collective bargaining in the states. Representative Clay did his best to foster such cooperation, urging labor factions to “work out the small differences that divide us.” Surveying the improving situation, AFSCME’s lobbyist Ralph Flynn predicted “certain passage” of the NPERA.^[1]

Conservatives braced themselves for an all-out fight. The National Right to Work Committee (NRTWC), which had been battling the union shop since 1955, sounded the first alarm. “The wax was hardly dry on U.S. House corridors when a union-run Congressional clique” began pushing legislation “which would give them the keys of government through compulsory unionism,” charged the National Right to Work Newsletter. Should the NPERA pass, the NRTWC warned, “union rabble rousers” would have the power to “shut down any unit of government” and erect a “new spoils system” in which government workers would be “compelled to buy their jobs... from union officials,” and labor would take “control of the machinery of government.” Other union opponents took up similar arguments. “If the state permits authority to slip from its possession into the hands of a covetous union bureaucracy,” the right-wing thinker Russell Kirk groused, then “we will know the servile state.” The like-minded columnist Ralph de Toledano warned that “big labor lobbyists” were crafting a bill that would “destroy the Civil Service System,” “make education the ideological plaything of big labor,” and “switch the power of local, state, and federal government over to the leaders of the trade union movement.” In his syndicated column, James J. Kilpatrick called the Clay bill “a time bomb” and declared, “The stakes are enormous.”^[2]

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The drumbeat of conservative attacks echoed from the hinterlands to the halls of Congress. The Capital News of Jefferson City, Missouri, warned that if the NPERA passed, taxpayers would end up financing the "social, economic and political schemes of union officialdom." The Chattanooga News urged Congress to "smother" the Clay bill, "lest its enactment serve to foster annual epidemics of teacher and other public employee strikes where such collective bargaining has foolishly been instituted." On the floor of the U.S. Senate the attacks were no less shrill. On March 6, 1975, eight Republican senators took to the floor to attack the NPERA. "It is legislation that would create chaos out of order and serfdom out of liberty," thundered Senator Jesse Helms.27

But despite the best efforts of anti-unionists, opposition to the NPERA in the early months of 1975 remained largely confined to right-wing Republicans. Also encouraging to labor was the fact that the Supreme Court was about to hear a case that addressed the constitutionality of the 1974 FLSA extension. Believing that the Court would uphold and extend the principles of federal authority outlined in its 1968 Wirtz decision, union strategists anticipated a decision on the FLSA extension that would breach the last redoubt of opposition to NPERA: the argument that federalism forbade a national collective bargaining law for state and local workers. Thus the attention of public sector unions was on the Supreme Court on April 16, 1975, as it heard arguments in National League of Cities v. Dunlop.28

When the National League of Cities first challenged the FLSA extension, observers believed that four justices would certainly vote to uphold the law: Thurgood Marshall, William Brennan, Byron White, and William O. Douglas. Most also believed that four justices—Potter Stewart, William H. Rehnquist, Lewis F. Powell Jr., and Chief Justice Warren E. Burger—might vote to overturn it. The decisive vote appeared to rest with the moderate justice Harry A. Blackmun. The colloquy during oral argument revealed little about where Blackmun stood on the case. But a review of Blackmun's private files indicates that labor was right to suspect that he was inclined to rule in favor of the FLSA extension. Blackmun's clerks strongly endorsed the FLSA law on the basis of recent precedent; the Court's 1968 Wirtz decision "should be reaffirmed and applied to permit the federal legislation involved here," advised one clerk. Moreover, Blackmun's position in Fry v. United States (1975) suggested that he would uphold the FLSA extension. In Fry, Blackmun joined a 7–1 majority upholding the power of the federal government to require local governments to abide by President Nixon's anti-inflationary wage guidelines. If the federal government had the authority to force local governments to observe wage ceilings, as Fry held, then it seemed logical that the federal government could also require local governments to abide by minimum wage rates, as the amended FLSA provided.29 Although

29 Karen Nelson Moore, bench memorandum, April 11, 1975, folder 5, box 217, Harry A. Blackmun Papers (Manuscript Division, Library of Congress, Washington, D.C.). Fry v. United States, 421 U.S. 542 (1975). Only Justice William H. Rehnquist dissented in this case, citing a "danger to our federal system" implied in the case. See Fry v. United States, 421 U.S. at 550. The Fry case was argued on November 11, 1974, and its decision announced on May 27, 1975, but the justices had circulated their opinions on Fry prior to the hearing on National League of Cities v. Dunlop (docket no. 74-878) on April 16, 1975. For Harry A. Blackmun's comments on these circulated opinions, see Harry A. Blackmun to Thurgood Marshall, Jan. 9, Jan. 15, April 7, 1975, folder 8, box 196, Blackmun Papers.
Blackmun leaned toward upholding the FLSA extension, he held back from expressing any opinion until the justices met in their private conference on *National League of Cities* on April 18, 1975.30

Blackmun’s notes on that conference are revealing. During the meeting, liberals such as Justice Brennan argued that the case was clear cut. “This is Wirtz,” Blackmun quoted Brennan as saying. The liberals believed that the Court had already held that the federal government could regulate the labor relations of state and local governments, and now it must stand by that interpretation. But, according to Blackmun’s notes, three justices—Chief Justice Burger and associate justices Powell and Rehnquist—strongly disagreed. They argued that *Wirtz* had been wrongly decided and that the *Fry* case had no bearing on the issues at stake in the FLSA extension. Powell insisted that the issues before the Court in *National League of Cities* were too important for simple restatement of past precedent. That view apparently resonated with the moderate Blackmun. He hesitated to override the impassioned minority, since he shared some misgivings about “the intrusion of federal policies into state governmental functions.” Thus, even though he leaned toward upholding the extension, Blackmun endorsed holding the case over for re-argument in the Court’s next term to give the justices more time to consider the implications.31

The Supreme Court’s delay of its FLSA ruling was crucial. AFSCME and its allies had been poised to unleash their campaign for the NPERA had the Court ruled to uphold the FLSA extension in April 1975; and it is possible that Congress would have enacted the bill, overriding a veto by President Ford. But the Court’s delay forced the NPERA’s supporters to wait. The law’s strategists needed to read the Court’s opinions in order to draft a final version of the NPERA that could also pass constitutional muster. Unfortunately for labor, over the next eleven months its plans fell apart. By the time the Supreme Court reconsidered the FLSA case in March 1976, under the title *National League of Cities v. Usery* (William Usery had since become the secretary of labor charged with enforcing the act), support for a Wagner Act for public workers was evaporating, conservatives had begun to arouse mainstream opposition to the law, and even many one-time Democratic supporters were distancing themselves from the initiative.

**Turning Point: The Summer of 1975**

In the mid-1930s, as the struggle to win a strong national labor relations law was reaching its critical juncture, grassroots labor militancy strengthened the position of reformers in Congress. Historians widely agree that the strike wave of 1934, which included a general strike in San Francisco and a national textile strike, aided those who sought strong national labor legislation by giving the nation what the historian Melvyn Dubof-
sky called, "a practical education in industrial warfare." Senator Robert Wagner and his allies pointed to the militancy of 1934 as evidence that strong legislation was necessary to pacify American workers. In the mid-1970s, labor militancy also rose among public sector workers at a critical point in their push for national legislation, yet history did not repeat itself. Instead of galvanizing reformers behind progressive legislation, the labor militancy of 1975 fragmented unions' alliances and emboldened labor's opponents.

During the summer of 1975, the drive to enact a Wagner Act for federal workers ran headlong into the chaos of public sector labor relations caused by the nation's deepening fiscal crisis. During 1975, the U.S. gross domestic product declined by 1.3 percent even as unemployment rose to 8.5 percent and inflation hit 9.1 percent. The combination of those circumstances contributed to ballooning budget deficits at every level of government. Nor was there a Keynesian solution to the problem. Soaring inflation discouraged governments from engaging in deficit spending to combat rising unemployment. Instead, politicians of both parties dealt with the crisis by enacting stringent budget measures. Yet public workers were in no mood to accept wage freezes or reductions in scheduled raises, particularly as they watched inflation eat away at their paychecks. The result was a 24 percent jump in public sector strikes in 1975, as an unprecedented 478 walkouts disrupted state and local governments. Unfortunately for the public sector unions, the strikes introduced new tensions between the unions and their Democratic allies—many of whom were struggling to balance budgets. As those tensions grew, support for the legislative demands of government workers diminished.

If there was a single turning point in the campaign to pass the NPERA, it came on July 1, 1975. On that day, conflicts between Democratic politicians and public employee unions erupted in Pennsylvania, New York City, and Seattle. Those clashes made clear how explosive public sector labor relations had become during the fiscal crisis. Although these three sites provided flashpoints, the tensions visible there were growing in virtually every part of the country.

The labor conflict in New York City was especially significant. On July 1, thousands of city workers walked off the job to protest layoffs that had been ordered by Mayor Abraham Beame, who was desperately trying to keep New York City solvent amid the worst budget crisis in its history. As sanitation workers staged a wildcat strike, letting garbage pile up in the stifling city, laid-off police officers marched on city hall and blocked access ramps to the Brooklyn Bridge, carrying signs that read: "Cops Out, Crime In" and "Burn City Burn." The president of the Patrolmen's Benevolent Association warned that the entire police force might strike if furloughed officers were not rehired.


New York City sanitation workers, shown picketing at 180th Street and Third Avenue in the Bronx, staged a wildcat strike on July 1, 1975, letting garbage pile up throughout the city. Like the other protests by public sector workers held that day in other U.S. cities, the New York City strike secured short-term benefits, but this militancy ultimately reinforced popular perceptions that public employees had gained too much power. Photo by Tom Gallagher. Courtesy New York Daily News.

On the same morning that labor turmoil spilled into the streets of New York, AFSCME took 76,000 Pennsylvania state workers out on strike, demanding a 10 percent wage increase. AFSCME's wage demands were nearly triple what Pennsylvania negotiators had offered. The Democratic governor Milton J. Shapp, determined to hold taxes down, announced that he would not give in to AFSCME's demands. The union's response was militant. "Let's go out and close down this God-damned state," AFSCME's leader in Pennsylvania, Gerald W. McEntee, reportedly told his members. Unions of nurses, prison guards, and retail clerks in the state-operated liquor stores threatened to join AFSCME's job action. Picket line violence led to seventeen arrests on the strike's first day, and Pennsylvanians worried about vital services being maintained over the Fourth of July holiday.35

As AFSCME was launching the largest public sector strike in Pennsylvania history, a union of public employees on the West Coast was preparing to depose a sitting mayor. In Seattle, voters went to the polls on July 1 in an unusual recall election. The recall effort had been mounted by members of Seattle's fire fighters' union who were determined to oust their former ally, Democratic mayor Wes Uhlman. The fire fighters had endorsed Uhlman in two previous elections but felt betrayed when Uhlman proposed severe budget cuts in response to a ballooning deficit in early 1975. In May 1975, the aggrieved

fire fighters gathered over sixty thousand signatures on a petition demanding the recall of Uhlman, and on July 1 voters went to the polls to decide if the mayor would be recalled.\(^5^6\)

As the events of July 1, 1975, in New York, Seattle, and Pennsylvania made clear, public employees were aggressively defending their interests. In all three cases, the militancy of the unions paid short-term dividends. New York's Democratic governor, Hugh Carey, helped secure state funding to rehire most of the laid-off sanitation workers, calming labor turmoil in New York City. In Pennsylvania, AFSCME ultimately forced Governor Shapp to consent to an 11 percent wage increase for state workers spread over three years. And in response to the fire fighters' campaign to oust Uhlman, Seattle officials restored most of the budget cuts the union had been protesting (which helped Uhlman survive the recall vote).\(^5^7\)

Yet those fights and others like them around the country, occurring as they did during a fiscal crisis, reinforced a growing popular perception that public employee unions had garnered too much power. That perception introduced new tensions into the relationship between labor and the Democrats, while also allowing conservatives to shift their campaign against the legislative agenda of public sector unions into the political mainstream. The editorial pages of prominent newspapers had criticized public workers' unions in the past, but, by July 1975, the arguments that began appearing there sounded increasingly like those of the anti-union conservatives who had been raising alarms about "union control of government" for years. In the aftermath of New York City's July 1975 public sector strikes, the New York Times fumed that the "real power in the city" was exercised by "power-giddy unions" that had established "ironclad control over every essential civic department." The Philadelphia Inquirer argued that it was time "to protect the public from [the] excessive exercise of power by unionized civil servants." And the Seattle Times warned against public employees who "point the recall gun at the heads of elected officials who do not cave in to their demands."\(^5^8\)

Even Democratic politicians once allied with public sector unions began to use some of the menacing language that had once been confined to the right wing. In Seattle, the Democrat Wes Uhlman defused the recall campaign by charging that municipal workers were trying to put the next mayor under their thumb. Uhlman called the fire fighters' recall effort a crass "power grab to put heat on at the bargaining table." If Uhlman was ousted, his press secretary warned, then "God help the successor." The director of the Association of Washington Cities sprang to Uhlman's defense, asking whether Seattle government would "operate for the benefit of all the people or is to become the captive of its own employees." Such charges helped place Uhlman in a more favorable light. At the beginning of the recall effort his approval ratings were low, and many analysts gave him little chance to survive. But when Uhlman went on the offensive against union power, he turned the tables on his opponents by reframing the issue to focus on whether "elected officials or public employees are going to manage the city's business," as one analyst put


Ultimately, twenty thousand fewer voters cast ballots to recall Uhlman than had signed the petition calling for the recall vote in the first place. The 1975 backlash against public sector union power was widespread among Democratic mayors, many of whom characterized labor demands as bids to control government. “New York’s situation is in the front or back of every mayor’s mind in the nation,” explained William McNichols, the Democratic mayor of Denver. When New York City’s mayor Abe Beame attended the 1975 meeting of the U.S. Conference of Mayors in Boston, only days after ending New York’s wildcat garbage strike, he was greeted as a hero. As Beame looked on, San Francisco’s mayor Joseph Alioto lauded him for standing up to the unions and called on other mayors to follow Beame’s example. In the future, illegal government strikers ought to be fired, Alioto announced. “I mean, fire anybody who strikes—really fire them,” bellowed the San Francisco Democrat. Mayors such as Alioto knew how to gauge shifting public opinion: polls showed a marked decline after 1974 in support for public sector strikes. In that context, fewer Democratic mayors were willing to endorse the idea of the federal government regulating their labor relations practices. “When we sit down with our unions to negotiate,” Mayor Uhlman explained, “we do not want the federal government telling us what we can or cannot agree to.”

Conservative Opposition to “Union Control of Government”

As concerns about public sector union power entered the political mainstream in 1975, a network of anti-union conservatives was prepared to amplify the charge that unions were out to “control government.” The network was organized around the Public Service Research Council (PSRC), a group founded in 1973 by right-to-work activists determined to fight the rapidly growing government workers’ unions. The PSRC was more ideologically extreme than the right-to-work movement that spawned it. Whereas right-to-work advocates merely opposed the union or agency shop, the PSRC argued that public sector collective bargaining must be thoroughly eliminated. The existence of such bargaining, the PSRC alleged, would lead inevitably to union control of government. The PSRC brought together conservative ideologues, skilled researchers, lobbyists, and direct-mail fund-raisers, all of whom were dedicated to spreading the gospel that public sector unions imperiled the very fabric of the republic.

The inspiration for the PSRC came from the work of Sylvester Petro, a law professor at Wake Forest University. In his 1957 treatise, The Labor Policy of the Free Society, Petro advocated eliminating most of the nation’s existing labor laws. He had long argued that the 1935 National Labor Relations Act infringed on the liberty of individual workers. But


his opposition to public sector unionism was even more radical. He believed that "public sector bargaining laws are incompatible with governmental sovereignty and that they constitute a fatal threat to popular sovereignty itself." To Petro, it was therefore insufficient to oppose "compulsory unionism" as the right-to-work movement did; it was necessary to eliminate public sector collective bargaining altogether. The Clay bill represented a special menace in Petro's mind because it threatened to spread the poison of collective bargaining through all levels of government. If it were enacted, he warned, then "the time will have arrived for us to take to the hills and the fields and the caves once more, as our ancestors have frequently had to do when integral—sovereign—government has broken down."\(^2\)

David Y. Denholm, who took the helm of the newly created PSRC in 1974, subscribed to Petro's conclusions. The son of a U.S. Navy pilot, Denholm grew up in northern California and in 1968 joined the staff of California's chapter of the National Right to Work Committee. He decided to make the fight against public sector unions his life's work after hearing Petro lecture in the early 1970s. An energetic organizer, Denholm built the PSRC into an effective force just in time for it to be at the forefront of the fight to block the NPERA. Under Denholm's leadership, the PSRC in 1974 widely circulated Public Sector Bargaining and Strikes, a pamphlet that purported to show that the enactment of public sector collective bargaining laws had triggered an increase in public sector strikes in the states with such laws. "In the overwhelming majority of cases," it argued, "strike activity was notably higher in the period following legislation." That argument posed a grave threat to AFSCME's hopes for the passage of the NPERA.\(^3\)

During the PSRC's first year of activity, its views were not taken seriously. The respected labor relations expert Benjamin Aaron, for example, dismissed as "anachronistic" Petro's contention that collective bargaining challenged government sovereignty. But in the context of the exploding union militancy of 1975, the ideas of the PSRC suddenly seemed more reasonable. Over the next few years, the PSRC launched an academic journal, a bi-weekly newsletter, and a lobbying organization called Americans against Union Control of Government. With the help of a new breed of conservative direct-mail fund-raisers, such as Richard Viguerie, the PSRC also began building a sizable network of donors. The PSRC's success prompted the NRTWC to make the fight against government unions a priority. By featuring this issue, the NRTWC began recruiting a record number of new members, fifteen thousand per month in 1975. Indeed, on the strength of this effort, the NRTWC predicted that it would become the "largest single-purpose citizens' organization" in America by 1976.\(^4\)

When Congress returned from holiday recess in mid-July 1975, newspapers were still running stories about labor conflicts in New York and other cities. A group of sixteen conservative Republicans including Edward Derwinski of Illinois, Charles Grassley of Iowa, and Delwin Clawson and Robert Lagomarsino of California seized the opportunity to take to the floor of the House, armed with material supplied by the PSRC and ideologues

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\(^3\) Denholm interview; Public Service Research Council, Public Sector Bargaining and Strikes (Vienna, Va., 1974). Quotation from Public Service Research Council, Public Sector Bargaining and Strikes (Vienna, Va., 1982), 16.

In 1975, the conservative journalist Ralph de Toledano (left) presented his book *Let Our Cities Burn* to his ally North Carolina Republican senator Jesse Helms. De Toledano's lurid prose warned mainstream Americans of the growing power of public sector unions, especially bids by the American Federation of State, County, and Municipal Employees to gain federally guaranteed collective bargaining rights. *Courtesy National Right to Work Committee.*

such as Sylvester Petro. “If government is to maintain its sovereignty,” argued a member of this group, Rep. John H. Rousselot of California, it “cannot share this responsibility with a handful of professional union men who are not answerable to an electorate.” The conservatives served notice that they would use every means at their command to block passage of the NPERA. As Rep. Philip Crane of Illinois put it, the legislation was forcing a decisive question upon the nation: “Shall Government be sovereign or shall there be collective bargaining with Government?” Away from the House floor, conservatives used the threat of the NPERA to raise money. A letter from Rep. William L. Dickinson of Alabama warned that the NPERA would “put your policemen, firemen, and teachers under union control—all of your local government employees will have to join union or be fired.” If the act passed, Dickinson predicted, “ruthless union officials” would “order your public employees out on strike—and who'll be able to stop them?”

Conservatives received another weapon in the fall of 1975 with the release of *Let Our Cities Burn*, by the right-wing journalist Ralph de Toledano. The book was written specifically to thwart the NPERA and purported to be an exposé detailing abuses of power.

by government unions, taking its title from a statement attributed to AFSCME president Jerry Wurf during a 1974 strike in Baltimore. When city officials refused to negotiate, de Toledano alleged, Wurf responded, “Let Baltimore Burn!” While the book made a special effort to discredit Wurf, its real purpose was to warn Americans about AFSCME’s drive for national legislation, making Petro’s academic arguments accessible to mainstream readers through lurid prose. De Toledano saw the Clay bill as nothing less than a “karate chop that would destroy completely the merit system,” deliver “some fourteen million government workers to the tender mercies of Big Labor,” and give unions “the power to paralyze government.” Senator Jesse Helms wrote a foreword for the book, enthusiastically endorsing de Toledano’s attacks. The only way to deal with the public sector union menace, Helms contended, was to follow North Carolina’s example, where “all public-sector ‘collective bargaining’ is prohibited by law.” Senator Jake Garn of Utah also touted the book, and right-to-work activists energetically promoted it.

Still, the activities of the opponents of the NPERA may not have resonated well outside the ranks of conservatives if not for two other controversies involving public sector unions boiling over in the fall of 1975. Clyde M. Webber, the president of the American Federation of Government Employees (AFGE), touched off the first controversy when he announced that his union was preparing to organize the nations armed services. As he explained, “organizing the military would be only a logical extension” of the AFGE’s mission. Webber’s plan did not get far. The initiative was met with a tidal wave of outrage and ridicule, the latter typified by a column in which the humorist Art Buchwald imagined what would have happened had the army been bound by strict union job classifications during World War II. As Buchwald imagined it, a wounded sergeant’s pleas for help during the Battle of the Bulge would have been met with, “Sorry, Sarge. If I touched you the Corpsmen’s Union would never forgive me.” Buchwald’s nightmare scenario was quickly dispelled when a bill sponsored by Senator Strom Thurmond, designed to block military unionization, passed. This snuffed out the AFGE’s initiative in its infancy, but not before the PSRC turned the threat into a fund-raising and membership-generating bonanza.

The second controversy emerged from the AFL-CIO’s quadrennial convention, held in San Francisco in October 1975. As labor delegates to the convention celebrated the AFL-CIO’s twentieth anniversary, they took up a controversial resolution: “Resolved, that the AFL-CIO urges Congress to pass legislation to give all public employees the right to strike.” Well aware of how such a resolution might fuel fears of public employee power, AFSCME delegates opposed the resolution. AFSCME’s Jerry Wurf offered a substitute motion, calling for binding arbitration in cases involving public safety workers. But George Meany, who opposed binding arbitration in principle, heaped scorn on Wurf’s proposal. “I hope I never see the day when the AFL-CIO sitting in convention will ask Congress to impose compulsory arbitration on anybody anywhere any time,” the labor chieftain grumbled.

Much to the delight of anti-union conservatives, the convention dutifully backed Meany and put the AFL-CIO on record as supporting strike rights for all government workers, no matter how vital their duties. In the following weeks, the AFL-CIO did little to dampen the spirits of the NPERA’s opponents. Indeed, Meany’s heir apparent, AFL-CIO secretary-treasurer Lane Kirkland, compounded labor’s image problem by telling government union leaders that “the only ‘illegal’ strike is an unsuccessful one by a very weak union.” While that line drew loud applause from unionists, it caused a good deal of disquiet among many of labor’s Democratic allies.

Controversies such as these strengthened the backlash against government unions and crystallized a growing perception that they were power hungry. Labor leaders knew this perception could complicate efforts to pass the NPERA, but they still believed that they had the votes to pass the bill once the Supreme Court upheld the FLSA extension, as expected. Of course, labor and its allies had no way of knowing how the events of 1975 would influence the Court when it sat for the re-argument of the FLSA case on March 2, 1976.

The Resurrection of the Tenth Amendment

In 1937, an abrupt change of opinion by Justice Owen Roberts led the Supreme Court to uphold the Wagner Act in National Labor Relations Board v. Jones & Laughlin Steel Corp. In the decades that followed, scholars debated whether Roberts had been persuaded by arguments on behalf of the Wagner Act or whether he had merely gracefully retreated from a confrontation with President Roosevelt in light of the president’s smashing 1936 reelection victory. While scholars differ on that question, most agree that after November 1936 the Supreme Court tended to follow “th’ iliction returns,” as Finley Peter Dunne’s character Mr. Dooley once famously put it, by endorsing major New Deal initiatives. The Court was no less politically sensitive in 1976. When the justices convened to reconsider the constitutionality of the all-important FLSA extension—the enactment of which had laid the legal foundation for passing a public sector Wagner Act—they were every bit as aware of political context as Roberts had been forty years earlier. The problem for labor was that the political mood in 1976 did not favor extensions of new rights to workers, as it had in 1937.

It boded ill for labor that Solicitor General Robert J. Bork was charged with defending the constitutionality of the FLSA extension in the March 2, 1976, re-hearing. An unenthusiastic counsel, Bork confessed that his argument had “the social policy attractiveness of a nuclear holocaust.” Nonetheless, Bork told the Court that “to strike down this case you would have to have a constitutional counterrevolution.” In the end, though, Bork’s tepid defense mattered less than did the opinions the justices had formed before the re-hearing. Their opinions had obviously been affected by months of news coverage of municipal budget crises and government strikes. When Justice Powell suggested during oral

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argument that, if it upheld the constitutionality of FLSA extension, the Court would be granting Congress the authority “to say to the states that they . . . have no authority to outlaw strikes against the government,” it was clear that he had been reading the newspapers. Democratic governor Calvin L. Rampton of Utah, who helped argue the case against the FLSA extension on behalf of the National League of Cities, played to Powell’s concerns. “Right now there are pending before the Congress bills that would extend all provisions of the National Labor Relations Act to states, including . . . giving employees the right to strike,” Rampton reminded the justices, and those bills were being held up “only because of the pendency of this case.” If the Court let the FLSA extension stand, then it would open the legislative floodgates, after which the anxious governor could foresee “no logical stopping point.”

According to Justice Blackmun’s notes on the secret March 5 conference the justices held on this case, Rampton need not have worried: all of the justices were acutely aware of the political significance of the FLSA ruling. In notes to himself, Blackmun recalled Justice Powell, who had been appointed to the Court by President Nixon in 1971, calling it the “most impt case since I hv b here [most important case since I have been here].” Chief Justice Burger worried about the implications of the FLSA for the fiscal health of the nation’s cities, especially its “impact on NYC.” It was clear Blackmun now shared those concerns. In his pre-hearing memos, written in the context of the roiling nationwide fiscal crisis, he fretted that the potential cost of the FLSA extension would exceed “over a billion dollars annually” and would “promote inflation.” “All the Act does is increase the cost to taxpayers and thereby to reduce government employment and services,” Blackmun argued in one memo. He too had been reading the newspapers.

Influenced by such concerns, Blackmun reprised in 1976 the role that Roberts had played as the swing vote in 1937, but with unfortunate results for organized labor. Blackmun’s vote created a 5–4 majority overturning Congress’s extension of the FLSA protections to state and local government workers. Having once leaned the other way on the case, Blackmun had difficulty rationalizing his decision. Unable to join Justice Rehnquist’s states’-rights-based majority opinion, which Blackmun considered too hostile to the federal government’s power, the swing justice wrote a separate 143-word concurrence. Blackmun’s exceedingly short opinion suggested the extent to which his decision sprang more from current political concerns than deep-rooted principles. Blackmun took pains to argue that this ruling should not be read as compromising federal power to regulate the states in “areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.” Yet his reasoning left unexplained why environmental standards were “demonstrably” more worthy of protection than workers’ rights. Justice Brennan drove home that point in a bitter dissent, calling the majority opinion “a catastrophic judicial body blow at Congress’ power.”


51 Harry A. Blackmun, conference notes on case nos. 74-878 and 74-879, March 5, 1976, folder 5, box 217, Blackmun Papers; Harry A. Blackmun, supplemental memo, 74-878 and 74-979, Feb. 26, 1976, ibid.

52 For Blackmun’s concurrence, see National League of Cities v. Usery, 426 U.S. 833, 856 (1976). For Brennan’s dissent, see ibid. at 880. For further evidence of Brennan’s sympathies, see CarlHelton to William J. Brennan, Feb.
The decision shocked many in the nation's legal community. To some it signaled nothing less than the destruction of a key pillar of the New Deal legal order, for Rehnquist's majority opinion in the case revived the long-dormant Tenth Amendment, which the New Deal Court seemingly buried a generation earlier. In 1941, Justice Harlan Fiske Stone had written an obituary of sorts for the Tenth Amendment, calling it "but a truism." The amendment merely noted the obvious, Stone had argued: "all is retained which has not been surrendered." For decades jurists agreed with Stone. In the 1950s, segregationists had tried to revive the Tenth Amendment as a defense for Jim Crow only to be thwarted at every turn by the Supreme Court. But in National League of Cities v. Usery the Court resurrected the amendment from its legal tomb. An astonished Washington Post feared that this was the opening salvo in a "revival of states' rights." "It has been 40 years since the Court used concepts of state sovereignty to strike down federal legislation," the newspaper reminded readers. Conservatives naturally celebrated the ruling. The decision was "immensely encouraging," wrote the columnist James J. Kilpatrick, a bit of "good news for all us old-fashioned fellows who cling to the 10th Amendment." Years later, Blackmun expressed second thoughts on his decision, but by then the damage had been done.53

When the Court released its National League of Cities v. Usery ruling on June 24, 1976, the implications for the NPERA were starkly clear. One observer described it as "a dramatic change in the Court's views, a drastic rejection of previously settled authority," and a decision that "precludes" any "direct collective bargaining legislation." If Congress had no power to set minimum wages for local and state government employees, it was surely unable to extend to them the right to organize and bargain collectively. Support for the passage of the public sector Wagner Act thus swiftly evaporated.54

Unanticipated Consequences

By July 1976 many Democrats in Congress must have felt relieved that the Supreme Court had taken them off the hook. Casting a vote on the NPERA that summer would have forced Democratic members to choose between their insistent union allies and their constituents who were growing concerned about public sector union power. By postponing indefinitely a congressional vote on the NPERA, the Usery decision allowed the 1976 Democratic presidential nominee, Jimmy Carter, to evade the issue on the stump. But other Democrats were less reticent about expressing their views. One official who worked for New York City mayor Beame gloated that 1976 had been a banner year in which people began "standing up and saying 'no,'" to public sector labor demands and finally "stopped a federal collective bargaining law."55


54 Sachs, "Federal Regulation of the Public Sector," 19.

In 1976, the American Federation of State, County, and Municipal Employees newsletter *Public Employee* reprinted this cartoon depicting a Supreme Court justice dismantling the Liberty Bell. The accompanying article in the newsletter decried the Supreme Court’s July 1976 ruling, in *National League of Cities v. Usery*, against federal minimum wage and overtime standards for state and local public workers. The Court’s decision sounded the death knell of efforts to legislate public workers’ rights on the national level. A 1976 Herblock Cartoon. ©The Herbert Block Foundation.

Still, the defeat of the NPERA did not spell a sudden catastrophe for government employee unions. Although they came under increasing attack in the second half of the 1970s as budget deficits continued to plague municipal and state governments, the unions held on to most of their recent gains, and in some areas even made advances. Yet if the unions did not retreat, they did lose momentum. The failure to pass the NPERA marked the turning point for the once expansive public sector labor movement. The share of government workers organized never crested 50 percent, and by the 1980s it had begun to sink below 40 percent, where it remained at the end of the century. The sudden shift in political currents could scarcely have been more shocking for union leaders who had believed as recently as January 1975 that passage of the NPERA was “certain.”

The failure of public employee unions to win their own Wagner Act also boded ill for labor unions in general as they headed into the 1980s. By almost every measure, the 1970s were disastrous for private sector unions. Union density figures declined from 27 percent of all workers organized in 1970 to 23 percent organized at the end of the decade, even though the ranks of organized government workers swelled during this period. Private sector unions found it increasingly difficult to organize amid 1970s stagflation. Although unions had won a majority of workplace representation elections each year since the passage of the Wagner Act in 1935, their luck abruptly turned in 1974. Thereafter and through the 1980s, they lost the majority of representation elections each year. Moreover, deindustrialization had begun to weaken labor where it had been strong, as

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the unionized auto, steel, and electrical manufacturing industries began to lay off workers and close plants. The loss of momentum for public sector unions after the defeat of the NPERA thus further clouded an already dim picture for organized labor in the second half of the 1970s. It also foretold disappointments to come, such as the failure of the AFL-CIO to win labor law reforms during the Carter administration that would have lowered barriers to union organization and toughened penalties against employers who violated workers' rights to organize.57

But the most enduring legacy of the NPERA crusade may have been the role that it played in catalyzing one passionate wing of the conservative upsurge of the 1970s. To be sure, the rise of conservatism in the 1970s was fueled by a confluence of many events and forces. The political impact of suburbanization, battles over busing and affirmative action, cultural conflicts emerging from the social movements of the 1960s, and economic stagnation, among other developments, all served to energize the conservative cause.58 Yet labor conflict and workplace struggles also played a role in galvanizing conservatives. As the fruitless struggle for the NPERA introduced new tensions into the relationship between unions and Democratic office holders, it also created new openings for right-wing Republicans. They seized those opportunities with gusto, blaming government unions for inflation, bloated government, and rising taxes. When the tax rebellion emerged in California in the 1978 campaign for Proposition 13, a massive statewide referendum to cut property taxes, conservatives revived the attacks on "union control of government" they had honed in their battle against the NPERA. According to the architect of Proposition 13, Howard Jarvis, the initiative's supporters were determined not to "permit public employee unions to run this country."59

When unions and their allies enacted the Wagner Act in 1935, they helped forge a liberal political coalition that would hold sway over American politics for a generation. But the mid-1970s were a far less propitious time for progressive coalition building. Instead of coalescing liberal forces, labor's efforts to pass a public sector Wagner Act unintentionally contributed to the forging of a very different kind of coalition. The conservative movement was ascendant at the end of the 1970s, and its leaders were determined to continue the fight against public sector union power. "Public sector unionism and collective bargaining are in essence a product of the 1960s," explained the activist David Denholm. The "job of ridding society of this blight will be a long and arduous one," he allowed.60 Yet, rooting out that "blight" had become a crucial component of the conservative creed. That was the final irony of the struggle to pass a Wagner Act for public workers.


58 On the relationship between these developments and conservatism, see, for example, McGirt, Suburban Warriors; Kruse, White Flight; Lassiter, Silent Majority; Ronald P. Formisano, Boston against Busing: Race, Class, and Ethnicity in the 1960s and 1970s (Chapel Hill, 2004); and Kevin M. Kruse and Thomas J. Sugrue, eds., The New Suburban History (Chicago, 2006).

