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LESSONS FROM THE LABORATORY: THE POLAR OPPOSITES ON THE PUBLIC SECTOR LABOR LAW SPECTRUM

*Ann C. Hodges**

INTRODUCTION

One of the widely touted advantages of the multiple public sector labor law regimes is that the jurisdictions serve as laboratories for experimentation and evaluation of various approaches to the complex issues involved in the field. In order for the laboratory approach to work most effectively, it is necessary to analyze the law and its impact in various jurisdictions. This Article conducts such an analysis with respect to two of the jurisdictions at opposite ends of the legal spectrum, Illinois and Virginia.[1] The range of state laws in the public sector includes states with constitutional bargaining rights[2] and comprehensive statutes[3] at one

* Professor of Law, University of Richmond. The author wishes to thank the members of the Labor Law Group who commented on an earlier version of this research presented in June 2006 and Professor Joseph E. Slater for his comments on a later draft. She also thanks Jonathan Hruska, Theresa Childress, Jemika Davenport, Christopher Rathlev, and Joseph Laws for valuable research assistance and the University of Richmond for research support.

[1] The focus of this Article is the law relating to state and local government employees rather than federal sector employees. Some of the data, however, include all public sector employees. Where that is the case, it will be noted.

[2] Three states, Florida, Hawaii, and Missouri, have constitutional provisions establishing the right of public sector employees to bargain collectively. *See* FLA. CONST. art. I, § 6; HAW. CONST. art. XIII, § 2; MO. CONST. art. I, §§ 8–9.

[3] Constitutional bargaining rights and comprehensive statutes do not necessarily parallel one another. Missouri, which recently recognized as constitutional the right to collectively

end and states where collective bargaining is illegal on the other.[4] Illinois has a long history of public sector bargaining and has enacted two comprehensive bargaining statutes which took effect in 1984.[5] The statutes are patterned after the private sector National Labor Relations Act (NLRA), but they are more favorable for public sector employees in a number of respects.[6] By contrast, Virginia outlawed public sector collective bargaining by court decision in 1977 and later confirmed the decision by statute in 1993.[7] A comparison of the two approaches and the resulting realities in the two states provides lessons for both the remainder of the public sector and the private sector.[8]

Section I analyzes the legal framework and history of collective bargaining in Illinois, and Section II follows with a similar analysis for Virginia. Each section includes current data about public sector employees and union activity in the two states. Section III follows with a discussion of possible explanations for the differences in the law of the two states.

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bargain, *see* Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 139 (Mo. 2007), has yet to amend its bargaining statute to conform to the decision. *See* MO. REV. STAT. § 105.510 (2000) (barring some classes of public employees, such as teachers, from collective bargaining). Recently, numerous bills have been intoduced in the Missouri General Assembly that would allow all public employees to bargain collectively. *See, e.g.*, H.B. 1159, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009); S.B. 473, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009); S.B. 1115, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008). A number of states have comprehensive bargaining statutes in the absence of a constitutional right. *See, e.g.*, Public Employment Relations Act, MICH. COMP. LAWS §§ 423.201–423.512 (2000); N.Y. CIV. SERV. LAW §§ 200–214 (1999); OHIO REV. CODE ANN. §§ 4117.01–4117.24 (2004).

[4] Virginia and North Carolina outlaw bargaining in the public sector and six other states do not formally allow bargaining by any public employees. *See* RICHARD C. KEARNEY WITH DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR 62–63 (3d ed. 2001). Indiana and Missouri governors revoked executive orders that gave executive branch employees bargaining rights in 2004. *See* MARTIN M. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS, Professor's Update 2 (2007). As noted above, however, in 2007 the Missouri Supreme Court held that the state constitution protected bargaining rights. *See Independence Sch. Dist.*, 223 S.W.3d at 139. Even in the absence of bargaining rights, however, there is a federal constitutional right to join unions under the First Amendment. *See, e.g.*, McLaughlin v. Tilendis, 398 F.2d 287, 288 (7th Cir. 1968); Atkins v. City of Charlotte, 296 F. Supp. 1068, 1075 (W.D.N.C. 1969).

[5] *See infra* notes 9–13 and accompanying text.

[6] *See infra* notes 14–39 and accompanying text.

[7] *See infra* notes 60, 90, and accompanying text. Recently introduced legislation in Congress would require states to authorize bargaining for public safety officers. *See* Public Safety Employer-Employee Cooperation Act, H.R. 980, 110th Cong. (2007); Public Safety Employer-Employee Cooperation Act, S. 2123, 110th Cong. (2007). If this bill is passed and upheld by the courts, Virginia would have to amend its laws to conform. The House passed H.R. 980 by a vote of 314–97 on July 17, 2007, but no vote has been taken in the Senate. House Vote On Passage: H.R. 980: Public Safety Employer-Employee Cooperation Act of 2007, http://www.govtrack.us/congress/vote.xpd?vote=h2007-633 (last visited Dec. 2, 2008).

[8] As Joseph Slater has correctly pointed out, the public sector has often been ignored in the study of United States labor relations. *See* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE 1900–1962 1–2 (2004).

Section IV looks at the lessons from this analysis for state and federal lawmakers, unions, employers, and labor relations advocacy groups.

An examination of Illinois and Virginia law and labor relations, and comparisons to the private sector, reveal that state labor law strongly affects public sector labor relations. Whether law is the cause or the effect, or more likely both, where the law is more favorable to unions and collective bargaining, unions are more prevalent and more active, and where unions are more prevalent and more active, the law is more favorable to unionization and bargaining. This conclusion provides support for those advocates and lawmakers who contend that changing the law will positively affect unionization rates and bargaining.

Equally important, however, this Article shows that parties operating in different legal regimes adapt their strategies to fit their environment. The success of those strategies is not unique to the particular environment, however, and thus they may be useful in other contexts. In today's constantly changing workplace, investigation of different strategies in anticipation of future changes will help preserve employee representation. The representational strategies used in Virginia's hostile legal environment share similarities with strategies that some unions and other employee advocacy groups are beginning to use in the private sector. The constant organizing done out of necessity in Virginia could also benefit unions in more traditional legal environments. Finally, more flexible and cooperative relationships may flourish in less traditional settings. The labor relations field is, and will continue to be, in a state of flux. Those that explore alternatives (lawmakers and participants in the systems alike) are more likely to have surviving and even thriving labor relations systems and relationships, and accordingly, more successful governmental and business operations.

I. ILLINOIS

A. *The Law and History*

There is a long history of collective bargaining in the Illinois public sector, although the comprehensive Illinois bargaining statutes were late in coming to fruition.[9] Although the Illinois legislature passed a collective bargaining law in 1945,[10] the governor vetoed it, allowing Wisconsin to become the first state to enact a comprehensive collective bargaining law for public employees in 1959.[11] In 1967, labor opposed a

[9] Employees in Illinois do not have a state constitutional right to bargain.

[10] *See* R. Theodore Clark, Jr. & F. Donal O'Brien, *Illinois Public Sector Collective Bargaining Legislation: The First Fifteen Years*, *in* COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 195, 195 (Joyce M. Najita & James L. Stern, eds., 2001).

[11] *Id.*

collective bargaining bill introduced in the Illinois legislature because of its broad prohibitions on the right to strike; the bill failed to pass.[12] Finally in 1983, after repeated efforts, the Illinois legislature enacted two comprehensive collective bargaining statutes, one covering educational employees (the Illinois Educational Labor Relations Act or "IELRA") and the other covering state and local government employees outside the educational sector (the Illinois Public Labor Relations Act or "IPLRA").[13]

Both statutes, like most in the public sector, were patterned after the private sector NLRA.[14] Unlike many public sector statutes, however, the IELRA and the IPLRA allow strikes by all employees except police officers, firefighters, paramedics, and security personnel.[15] Other significant features of the legislation are the grandfathering of existing bargaining units, including those that are inconsistent with the law, and a requirement that the parties to existing collective bargaining agreements continue to bargain about subjects included therein even if they are not mandatory subjects under the Illinois statutes.[16] For example, the IPLRA allows police and fire bargaining units to include supervisors if the units existed before the enactment of the statute.[17] These provisions exceed the protections under the NLRA.

The broader protections for employees contained under the Illinois statutes, as compared to the NLRA, are captured in many other ways.[18] The definition of a supervisor, an individual who is excluded from the protection of the statutes, is narrower under the Illinois statutes than

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12 *Id.*

13 *See id.* at 196–99 (describing the political process of enactment of the two statutes and noting that Chicago mayors' opposition likely precluded earlier passage of a comprehensive collective bargaining law). *See also* 5 ILL. COMP. STAT. 315/1–315/27 (2006); 115 ILL. COMP. STAT. 5/1–5/21 (2006).

14 *See* Clark & O'Brien, *supra* note 10, at 198.

15 *See id.* Only ten states have legislation allowing some public employees to strike while thirty-five outlaw some or all strikes. *See* KEARNEY WITH CARNEVALE, *supra* note 4, at 235.

16 *See* Clark & O'Brien, *supra* note 10, at 199.

17 *See* 5 ILL. COMP. STAT. 315/3(s)(1) (2006).

18 Notably, suggestions for reform and revitalization of the NLRA have included changes that would make the NLRA more like the Illinois statutes. *See, e.g.*, CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 126–155 (1993); WILLIAM B. GOULD IV, AGENDA FOR REFORM 151–179 (1993); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW, 243–252 (1990) [hereinafter WEILER, GOVERNING THE WORKPLACE]; THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT (1994) [hereinafter DUNLOP COMMISSION], *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace; Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 1011–21 (1990); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1804 (1983) [hereinafter Weiler, *Promises to Keep*].

under the NLRA, thereby including more employees under the protection of the laws.[19] Interns and residents at public hospitals are included as employees under the IPLRA.[20] The IPLRA also covers certain personal care attendants and day care home providers, classifying them as employees of the state for purposes of bargaining.[21] Both Illinois statutes limit the use of public funds to influence union representation elections,[22] while the use of employer funds for anti-union campaigns has

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19 *Compare* 5 ILL. COMP. STAT. 315/3(r) (2006) (defining "supervisor," for all personnel except police officers, under the IPLRA, as an individual who spends a preponderance of his or her employment time conducting supervisory activities), *and* 115 ILL. COMP. STAT. 5/2 (g) (2006) (defining "supervisor," under the IELRA, as an individual who spends a preponderance of his or her time conducting supervisory activities), *with* 29 U.S.C. § 152(11) (2000) (defining "supervisor," under the NLRA, as an individual who conducts supervisory activities, regardless of the amount of time spent on those activities, as long as they are not occasional temporary supervisory assignments). *See also* NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 713 (2001) (stating that an employee is a statutory supervisor if (a) he or she holds the authority to engage in any one of the twelve listed supervisory functions, (b) the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (c) the authority is held in the interest of the employer); Ohio Power Co. v. NLRB, 176 F.2d 385, 387 (6th Cir. 1949) (finding that the test of the performance of supervisory duties under the NLRA is not the frequency of the exercise of such duties, but the existence of authority for such purpose); Edward Street Daycare Center, Inc. v. NLRB, 189 F.3d 40, 46 (1st Cir. 1999) (same); NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 576 (6th Cir. 1949) (noting that the listed supervisory function should be read in the disjunctive so that if an employee has authority to do any of the twelve functions, the employee is a supervisor).

20 *See* 5 ILL. COMP. STAT.315/3(n) (2006). In 1999, the NLRB held that interns, residents, and fellows are employees under the statute, reversing a decision twenty years earlier that ruled such persons were primarily students and therefore not statutory employees. *See* Boston Med. Ctr., 330 N.L.R.B. 152, 159, 168 (1999). In 2004, the Board overturned its previous decision in *New York University*, 332 N.L.R.B. 1205 (2000), which was based in part on *Boston Medical Center*, and declared that graduate assistants were not employees, but rather primarily students. *See* Brown Univ., 342 N.L.R.B. 483, 493 (2004).

21 *See* 5 ILL. COMP. STAT. 315/3(n), (o) (2006); 305 ILL. COMP. STAT. 5/9A-11(b-5) (2006). Home care workers were given collective bargaining rights by gubernatorial executive order prior to the amendment that included them under the statute. *See* Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1410–11 (2008). Illinois was the first state to cover publicly subsidized family day care providers under its collective bargaining law. *Id.* at 1415. Inclusion of such workers is significant for the labor movement. In 2005, more than 49,000 family child care workers in Illinois voted for union representation, the second largest membership election for the labor movement since 1941. *Id.* at 1390–91. In 1999, home care workers in Los Angeles were responsible for the largest increase in new union membership in one union election since 1941. *Id.* at 1390. Home care workers are often excluded from the coverage of the NLRA as either independent contractors or domestic employees. *Id.* at 1400–03. The NLRB has used the right to control test to determine if such workers qualify as employees. *See* Peggie Smith, *Union Representation of Family Child Care Providers*, 55 U. KAN. L. REV. 321, 347 (2007). *See also* Rosemount Ctr. Workers Ass'n, 248 N.L.R.B 1322, 1324 (1980) (including family home mothers in the unit because of the center's right to control); Cardinal McCloskey's Children & Family Servs., 298 N.L.R.B. 434, 436 (1990) (excluding family child care providers because control was only pursuant to state regulations and guidelines, suggesting that the providers might be state employees).

22 *See* 5 ILL. COMP. STAT. 315/10(a)(6) (2006); 115 ILL. COMP. STAT. 5/14(a)(9) (2006).

been credited with reducing the unionization rate in the private sector.[23] Further, the Illinois statutes have time limits for conducting elections.[24] These time limits are in place to prevent the delays that have characterized representation proceedings in the private sector, which have made it more difficult to unionize private sector employees seeking representation.[25] Finally, the Illinois statutory Boards[26] can designate a union as the exclusive representative of employees based on evidence of majority status (e.g., dues deduction authorizations); the Boards do not need to hold a representation election.[27]

The Illinois laws require inclusion of grievance and arbitration procedures in collective bargaining agreements, a common, but not required, feature in the private sector.[28] Generally, the Boards and courts that interpret the Illinois statutes have read the duty to bargain quite broadly, requiring negotiation on some subjects that many other states have excluded from negotiations.[29] During the hiatus between collective bargaining agreements, dues and fair share fees still must be deducted.[30]

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23 *See* Weiler, *Promises to Keep*, *supra* note 18, at 1769.

24 *See* 5 ILL. COMP. STAT. 315/9 (2006); 115 ILL. COMP. STAT. 5/7(c)(2) (2006).

25 *See* Weiler, *Promises to Keep*, *supra* note 18, at 1787–95.

26 The IELRA is enforced by the Illinois Educational Labor Relations Board (IELRB), while the IPLRA has two enforcement panels of the Illinois Labor Relations Board, one for Chicago and Cook County (the Local Panel), and one for the remainder of the state (the State Panel). *See* Clark & O'Brien, *supra* note 10, at 203; 5 ILL. COMP. STAT. 315/5.1 (2006); 115 ILL. COMP. STAT. 5/5 (2006).

27 *See* 5 ILL. COMP. STAT. 315/9 (a-5) (2006); 115 ILL. COMP. STAT. 5/7(c-5) (2006). The Employee Free Choice Act, which would include a similar provision in the NLRA, has passed in the House but has not had enough votes to overcome a Republican-led filibuster in the Senate. *See Supporters of Card Check Bill Fall Short of Votes Needed to Limit Senate Debate*, 21 LAB. REL. WEEK (BNA) 925 (June 28, 2007). Based on the results of the 2008 elections, supporters have been hopeful for passage again in 2009. *See Union Groups Rally for Card Check Bill At Capitol as Chamber Reiterates Opposition*, 23 LAB. REL. WEEK (BNA) 258 (Feb. 12, 2009). Post-election, there were at least fifty-eight votes for the bill in the Senate according to some counts. *Congress Gears Up With Large Job-Creation Package, Pay Equity, Card Check Bills*, 23 LAB. REL. WEEK (BNA) 5 (Jan. 29, 2009). Early in Congress' first session of 2009, with the Senate race in Minnesota still undecided and the only Republican Senator to previously support the bill having reversed his position, however, passage of the Employee Free Choice Act was far from assured. *See* Kate Phillips, *Specter Says He Won't Back Union Bill Again*, N.Y. TIMES, Mar. 25, 2009, at A17. Both labor and management groups continue to campaign hard for and against the legislation, respectively. *See id.*

28 *See* 5 ILL. COMP. STAT. 315/8 (2006); 115 ILL. COMP. STAT. 5/10(c) (2006). Such a provision might be viewed as less protective of employee rights than the NLRA since, under the NLRA, a union can negotiate the right to strike over grievances. However, in today's labor relations climate, it probably benefits both employees and the union. The right to strike under the Illinois statutes requires contract expiration. *See* 115 ILL. COMP. STAT. 5/13(b-4) (2006); 5 ILL. COMP. STAT. 315/17(2) (2006).

29 *See* Clark & O'Brien, *supra* note 10, at 206–07.

30 *See* 5 ILL. COMP. STAT. 315/9 (a-5) (2006); 115 ILL. COMP. STAT. 5/7(c-5) (2006). In *Hacienda Hotel*, 331 N.L.R.B. 665 (2000), the NLRB held that the contractual obligation to deduct dues expired with the contract, regardless of whether dues deduction was tied to a union security provision. The Ninth Circuit vacated and remanded, finding that the Board did

The union violates the duty of fair representation it owes to all employees it represents only if its conduct is intentional.[31] Attorneys' fees are available as sanctions for frivolous litigation.[32] Under the IPLRA, contracts can bar decertification of the union or a petition by another union for a longer period than under the NLRA, increasing the stability of union-management relationships.[33] The primacy of collective bargaining is further emphasized by statutory provisions that make the bargaining laws controlling in the event of conflict with other laws.[34]

Not only do the Illinois statutes favor employee bargaining rights,[35] but a review of the administrative and judicial decisions reveals that state administrative agencies and courts have broadly interpreted the statutes to further the goals of encouraging bargaining and protecting employee rights.[36] This is in contrast to many decisions made by the National Labor Relations Board (NLRB) and courts narrowly interpreting the NLRA.[37] Where the Illinois courts have restricted bargaining rights, the

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not adequately explain its conclusion that a dues deduction clause without a union security provision should be treated differently than other contract provisions that cannot be changed unilaterally during a contract hiatus. *See* Local Joint Exec. Bd. of Las Vegas v. N.L.R.B, 309 F.3d 578 (9th Cir. 2002). On remand the Board maintained that the Respondents "did not violate Section 8(a)(5) and 8(a)(1) of the Act by unilaterally ceasing dues checkoff after the parties' collective-bargaining agreements expired . . . ." Hacienda Hotel, 351 N.L.R.B. No. 32, at *1 (2007). The Board, however, did not rely on the legal precedent cited in its earlier decision but instead based its finding on the factual circumstances of the case, in which the dues checkoff provisions in the parties' agreement contained explicit language limiting the dues checkoff obligation to the duration of the agreements. *See id.* at *3.

31 *See* 5 ILL. COMP. STAT. 315/10 (b)(1) (2006); 115 ILL. COMP. STAT. 5/14(b)(1) (2006). This may not be viewed as protective of employees, but rather of unions. Limitations on union liability, however, may encourage unionization and therefore, collective bargaining. In the private sector, the interpretation of the duty of fair representation does not limit violations to situations where the union's conduct is intentional. *See* THE DEVELOPING LABOR LAW 1906 (4th ed., Patrick Hardin et al. eds. 2001).

32 *See* 5 ILL. COMP. STAT. 315/11(c) (2006); 115 ILL. COMP. STAT. 5/15 (2006). The NLRA does not contain a provision for awarding attorneys' fees to prevailing parties, but the agency does adjudicate those cases in which it finds reasonable cause to believe a violation has occurred so a charging party does not need legal representation. *See* 29 U.S.C. §160 (2000). Under the Equal Access to Justice Act, the respondent can get fees from the agency if the respondent wins the case and the agency's position was not substantially justified. *See* 5 U.S.C. § 504(a)(1) (2000).

33 *See* 5 ILL. COMP. STAT. 315/9(h) (2006) (5 years). Under the NLRA, the contract bar is limited to three years. *See* Gen. Cable Corp., 139 N.L.R.B. 1123, 1125 (1962).

34 *See* 5 ILL. COMP. STAT. 315/15(a), (b) (2006); 115 ILL. COMP. STAT. 5/17 (2006).

35 The Illinois statutes are not exclusively favorable to the collective bargaining rights of employees. For example, in 1995 the legislature imposed limitations on bargaining applicable only to the Chicago public schools. *See* P.A. 89-15, §10 (amending 115 ILL. COMP. STAT. 5/4.5 and 105 ILL. COMP. STAT. 5/34-8.1a). In 2003, the legislature again altered the statute, making previously prohibited subjects of bargaining for the Chicago public schools permissive. *See* P.A. 93-3, §10 (amending 115 ILL. COMP. STAT. 5/4.5). For further discussion of these amendments, see Clark & O'Brien, *supra* note 10, at 202.

36 *See* Clark & O'Brien, *supra* note 10, at 206-07.

37 *See generally* Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board,* 28 BERKELEY J. EMP. & LAB. L. 569 (2007)

legislature has often responded with statutory amendments. For example, the Illinois Supreme Court ruled that the state Board could not assert jurisdiction over certified court reporters because the Court was a co-employer of the reporters.[38] The legislature amended the statute to provide bargaining rights to the court reporters.[39]

Two further legal provisions in Illinois are worthy of note, as they bear on labor relations and differ substantially from the law of Virginia. Illinois is a home rule state. The Illinois Constitution provides in Art. VII, § 6 (a):

> A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.[40]

The IPLRA states that it supersedes home rule powers except where specifically authorized by the statute.[41] Finally, Illinois has no right-to-work law.

B. The Reality

Although collective bargaining in the public sector was extensive in Illinois prior to the enactment of its labor statutes, passage of the legisla-

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(discussing NLRB decisions weakening statutory rights); ELLEN DANNIN, TAKING BACK THE WORKERS' LAW 7–10, 80–98 (2006) (discussing judicial distortion of NLRA); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1559–64 (2002) (discussing United States Supreme Court cases that have forced the NLRB to more restrictively interpret the NLRA and arguing that NLRB decisions are accorded little deference under judicial review); James J. Brudney, *Symposium: The Changing Workplace: Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1572–75 (1996) (discussing dramatic decline in support for concerted activity and collective bargaining in NLRA cases decided by the Supreme Court since 1970).

[38] *See* AOIC v. Teamsters Local 726, 657 N.E.2d 972 (Ill. 1995).

[39] *See* 5 ILL. COMP. STAT. 315/2.5, 3(o-5)(1), (2), (3) (2006).

[40] *See* ILL. CONST. art. VII, § 6 (a).

[41] 5 ILL. COMP. STAT. 315/15(c) (2006). This limitation on home rule is protective of collective bargaining as it would prevent a locality from opting out of the statute. The IELRA has no similar provision expressly relating to home rule but does provide that if the statute conflicts with "any other law, executive order or administrative regulation," the IELRA controls. 115 ILL. COMP. STAT. § 5/17 (2006).

tion increased unionization substantially.[42] As of 2008, 50.3% of public employees in the state were union members and 52.8% were covered by collective bargaining agreements.[43] Average hourly earnings are $23.32 for unionized public sector workers in Illinois and $21.61 for nonunion public sector workers.[44] The Illinois Education Association, an affiliate of the National Education Association (NEA), is the largest public sector union in Illinois, while the Illinois Federation of Teachers (IFT), affiliated with the American Federation of Teachers (AFT), also has a significant presence, especially in Chicago.[45] Both represent teachers and educational support personnel.[46] The American Federation of State, County, and Municipal Employees (AFSCME) also represents a substantial number of public employees in Illinois state and local government.[47] Unionization among police and firefighters is widespread.[48] In terms of overall unionization, Illinois ranks third in the nation in the total number of union members in the state and tenth in the nation in percentage of workers who are union members.[49]

The public sector unionization rates in Illinois are very high as compared to the national private sector rates, which have continued to decline as the NLRB has narrowly interpreted the NLRA in ways less favorable to unionization and bargaining. Current private sector union membership stands at 7.6%,[50] as compared to 50.3% among Illinois public sector employees.[51] There is also a dramatic difference between public sector unionization rates in Illinois and Virginia, as Virginia law is even more hostile to bargaining than the NLRA.

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42 *See* Clark & O'Brien, *supra* note 10, at 199; Martin H. Malin, *Public Sector Collective Bargaining: The Illinois Experience*, (NIU Center for Government Studies, Policy Profiles), Jan. 2002, at 4.

43 *See* BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK 31 (2009).

44 *Id.*

45 Clark & O'Brien, *supra* note 10, at 199–200. The IFT currently has approximately 90,000 members, and its Chicago presence includes the Chicago Teachers Union Quality Education Standards and Teaching (QUEST) Center. IFT Home Page, http://www.ift-aft.org/Forms/index3.aspx?TID=top6&PID=16 (last visited Aug. 18, 2008) [hereinafter IFT Home Page]. The IEA currently has approximately 130,000 members. IEA Home Page, http://www.ieanea.org/about.aspx (last visited Aug. 18, 2008) [hereinafter IEA Home Page].

46 Clark & O'Brien, *supra* note 10, at 200. *See also* IEA Home Page, *supra* note 45; IFT Home Page, *supra* note 45.

47 Clark & O'Brien, *supra* note 10, at 200. *See also* AFSCME 2007, Council 31, Form LM-2, http://erds.dol-esa.gov/query/ (follow "Union or Trust Search" hyperlink; then enter "542-218" in box titled "File Number"; click "Submit"; click "2007 Report") (indicating 62,129 members in Illinois). A number of smaller AFSCME locals in Illinois have several thousand additional members. *Id.*

48 *See* Clark & O'Brien, *supra* note 10, at 200.

49 HIRSCH & MACPHERSON, *supra* note 43, at 28.

50 *Id.* at 31.

51 *See id.* at 31 and accompanying text.

While both the IPLRA and the IELRA allow strikes, relatively few strikes have occurred under the IPLRA, while more have occurred among teachers covered by the IELRA.[52] Scholars' explanations for the greater number of teachers' strikes focus on the limited costs incurred by striking teachers, since the teachers will likely make up the days lost in order to maintain state funding and therefore will be able to keep most, if not all, of their wages.[53] Moreover, it is difficult to enjoin teacher strikes under the law.[54] The explanation for the lower number of strikes under the IPLRA may be that many of the pre-statute strikes occurred to establish union recognition, which is now determined through statutory procedures.[55] Furthermore, since collective bargaining was a familiar process from the pre-statute days, the parties were already experienced at successfully resolving disputes at the time the Illinois statutes were passed.[56] The enactment of the Illinois statutes coincided with a general drop in the number of strikes and a relatively stable and predictable economy. This may have made it easier to resolve disputes.[57]

II. VIRGINIA

A review of the law, history, and reality in Virginia shows dramatic differences from Illinois and the private sector.

A. The Law and History

As far back as 1946, the Virginia General Assembly expressed its opposition to collective bargaining for public employees in the form of a joint resolution.[58] Nevertheless, like Illinois, Virginia has a history of collective bargaining in the public sector, at least at the local level.[59] However, legal collective bargaining came to an abrupt halt in 1977 with the decision of the Virginia Supreme Court in *Virginia v. Arlington*

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52 *See* Clark & O'Brien, *supra* note 10, at 209; Malin, *supra* note 42, at 4–5.

53 *See* Clark & O'Brien, *supra* note 10, at 209. Professor Malin's research on strikes before and after the statutory legalization of strikes demonstrated that, perhaps contrary to expectations, legalization did not increase the number of strikes and probably contributed to a decrease instead. *See* Malin, *supra* note 42, at 4–5.

54 *See* Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 341–42 (1993).

55 *See* Clark & O'Brien, *supra* note 10, at 209.

56 *See id.*

57 *See id.* The final reason offered by these authors is that the right to strike and corresponding preparations by employers reduced posturing and fostered agreement. *Id.*

58 *See* Senate Joint Resolution No. 12, *Unionization of Officers and Employees of the Commonwealth,* February 8, 1946.

59 *See* Commonwealth of Virginia, *Rights of Public Employees, Report of the Study Commission,* House Document No. 28, at 6 (1974) [hereinafter *1974 Commission Report*] (describing collective bargaining agreements covering teachers in at least ten school districts, other school employees, county workers, sanitation employees, and firefighters).

County.[60] At the time of the case, Arlington County had multiple collective bargaining agreements with unions representing the county's firefighters, teachers, nonprofessional school employees, school administrators, and all other county employees.[61] The state filed an action against the county arguing that Arlington County had exceeded its powers by entering into the agreements.[62] The court noted that Virginia follows the Dillon Rule, which holds that subdivisions of the state have only those powers that the state expressly gives to them, or those which follow from express powers by necessary implication.[63] Where the power is granted, but without express direction as to how it should be carried out, the governmental unit may choose a reasonable method of execution.[64] In this case, there was clearly no express grant of power from the state to engage in collective bargaining.[65] The court then moved to the question of whether the express power given to state governmental units to enter into contracts, hire employees, and determine the terms and conditions of employment also contained an implied power to bargain collectively or if their express powers permitted the local governments to select collective bargaining as a reasonable method of executing their powers.[66] The court answered in the negative, stating that it was contrary to legislative intent and not "necessary to promote the public interest."[67] The court relied on Virginia's failure to enact legislation authorizing collective bargaining, except in the limited arena of transportation employees; several opinions from the Attorney General suggesting that local governments lacked the power to enter into binding collective bargaining agreements; and the fact that the enumerated powers to hire, contract, and set working conditions preceded public sector bargaining.[68]

Prior to this decision, nearly one-third of Virginia's teachers were covered by collective bargaining agreements, along with thousands of police officers, firefighters, and other government employees.[69] Shortly after the *Arlington County* decision, the Virginia Supreme Court struck another blow to the state's teachers, ruling that binding arbitration for

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60 Commonwealth v. County Bd. of Arlington County, 232 S.E.2d 30, 45 (Va. 1977).

61 *See id.* at 33.

62 *See id.* at 31.

63 *See id.* at 39–40.

64 *See id.* at 40–41.

65 *See id.* at 41.

66 *See id.* at 40–41.

67 *Id.* at 43.

68 *See id.* at 43–44.

69 Jeffrey F. Webb, *A Decade After* Commonwealth v. County Board of Arlington: *Public Employee Bargaining in Virginia Reconsidered*, 18 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 59, 61 (1989). *See* also Robert R. Richards & Patrick W. Carlton, *Relative Deprivation and Teacher Militancy in Virginia: A Model and its Application*, 12 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 355, 359 (1983) (noting that more than 30,000 public employees were covered by collective bargaining agreements in 1977).

disputes between school boards and their employees was an unconstitutional delegation of power.[70] Preceding *Arlington County*, several Virginia study commissions had considered whether to recommend legislation relating to bargaining for public employees.[71]

In 1973, the appointed Commission recommended that the General Assembly of Virginia adopt grievance procedures for public employees and enact legislation regarding the enforceability of agreements relating to terms and conditions of employment.[72] The report also recommended that any legislation be uniform,[73] and that "the General Assembly should encourage a policy of providing methods whereby public employees, both state and local including those of constitutional offices, may effectively express their views concerning matters which affect them."[74] However, this latter recommendation was not a majority recommendation for collective bargaining legislation. Six Commission members added an addendum stating their belief that collective bargaining was not appropriate for public employees.[75] Nevertheless, a draft "meet and confer" bill, which had been discussed by the Commission, accompanied the report.[76]

In response to the report, the General Assembly enacted legislation requiring grievance procedures for employees of the state and localities with fifteen or more employees.[77] In addition, a recommendation for inclusion of public employees in the right-to-work law was enacted into legislation.[78] The "meet and confer" bills and the bills making collective bargaining agreements enforceable were all defeated.[79] The 1973 Commission recommended that it continue to operate, and in 1974 the Commission issued another report.[80] The 1974 report recommended

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70 *See* Sch. Bd. of City of Richmond v. Parham, 243 S.E.2d 468, 473 (Va. 1978). The case involved an arbitration provision of a grievance procedure adopted by the State Board of Education, not a collectively bargained procedure. *Id.* at 469.

71 *See* Webb, *supra* note 69, at 60–61. The Commission was created by the General Assembly and composed of twelve members, five appointed by the Speaker of the House, two appointed by the Committee on Privileges and Elections of the Senate, and five appointed by the Governor from the state at large. Commonwealth of Virginia, *Report of the Commission to Study the Rights of Public Employees,* House Document No. 12, at 1 (1973) [hereinafter *1973 Commission Report*]. The members appointed by the General Assembly could be members of that body, but were not required to be. *Id.*

72 *See* 1973 Commission Report, *supra* note 71, at 3.

73 *See id.* at 6. This recommendation was likely in response to pressure to authorize bargaining for some groups of public employees, as many states have done through piecemeal legislation.

74 *Id.* at 4.

75 *See id.* at 8–9.

76 *See id.* at 23–35.

77 *See 1974 Commission Report, supra* note 59, at 1.

78 *See id.*

79 *See id.* at 1–2.

80 *See id.* at 2.

legislation to legalize contracts between labor unions and employers that chose to enter into such agreements.[81] A "meet and confer" bill did not command the support of a majority of Commission members.[82]

Additionally, the Commission studied the progress of the implementation of grievance procedures pursuant to the legislative enactment. The Commission also studied opportunities for employees to provide input on employment policies pursuant to a legislative resolution passed by the General Assembly the previous session, indicating that public policy requires creation of such opportunities.[83] The Commission concluded that there was significant progress in establishing grievance procedures at the state level, limited progress at the local level, and little progress in creating opportunities for employee input.[84] The Commission was reappointed for the following year (1975), but with several changes in membership.[85]

The year 1974 was the high point for advocates of legislation establishing collective bargaining in Virginia. A majority of the 1975 Commission did not support even limited legislation to permit localities and unions to enter into enforceable collective bargaining agreements.[86] Although the legislative subcommittee recommended such legislation, the Commission as a whole split 6–6 on the proposal.[87] The 1975 Commission also analyzed the progress in implementation of the grievance procedures, finding that at the state level, fifty grievances had been filed, while at the local level, only 98 of the 127 local governments that were required to implement grievance procedures had done so.[88] The 1975 Commission did not address the issue of employee input.

Subsequent to the *Arlington County* decision, there were additional efforts to legalize public employee collective bargaining, but none were

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81 *See id.* at 6.

82 *Id.* at 5.

83 *See id.* at 1, 6–11.

84 *See id.* at 8–11.

85 *See* Webb, *supra* note 69, at 60.

86 Commonwealth of Virginia, *Rights of Public Employees, Interim Report of the Commission to Study the Rights of Public Employees to The Governor and The General Assembly of Virginia,* House Document No. 28, at 4–5 (1975) [hereinafter *1975 Commission Report*].

87 *See id.* at 4 (stating that the Commission was not successful in reaching a majority opinion).

88 *See id.* at 26. Notably, the Commission suggested that the fact that only 0.07% of state employees had filed grievances indicated that the Commonwealth was providing excellent working conditions for its employees. Of course, there are other possible explanations for the limited number of employee grievances. Indeed, a General Assembly Committee Report from 1978 identified a number of criticisms of the procedure and made special accommodations to obtain information from employees who feared reprisal for testifying in regards to those criticisms. Commonwealth of Virginia, *Report of the Joint Senate and House General Laws Committees Study on Grievance Procedures to the General Assembly of Virginia*, Senate Document No. 23, at 6–7 (1978).

successful.[89] In fact, the results were quite the opposite. In 1993, the General Assembly felt the need to codify the *Arlington County* decision by enacting a statutory bargaining prohibition.[90] However, the statute allows employees to form associations to promote their interests to their employer.[91] In addition, several opinions and reports of the Attorney General have recognized that employers can discuss working conditions with their employees.[92] Further, another relevant legislative mandate is the section of the Virginia code on the standards of quality for education, which requires each school board to establish a "system of two-way communication between employees and the local school board and its administrative staff whereby matters of concern can be discussed in an orderly and constructive manner."[93] The General Assembly also has modified the legislation relating to grievance procedures over the years, but still requires the use of the procedure for state employees as well as employees of local governments which have more than fifteen employees.[94]

B. The Reality

The change in the legal climate had a dramatic effect on public sector union membership in Virginia. Between 1972 and 1978, union membership dropped from 38.5% to 19.5% of public sector workers.[95] Despite the judicial and legislative decisions to ban binding collective bargaining, however, unions still play an active role in Virginia's public sector, albeit a much smaller role than Illinois unions play. The current percentage of public employees who are union members in Virginia is

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89 *See* Webb, *supra* note 69, at 61; Patrick W. Carlton & Richard T. Johnson, *Teacher-Board Relations in Virginia: A Case of Perceptual Discontinuity*, 10 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 267, 271–73 (1981).

90 *See* VA. CODE ANN. § 40.1–57.2 (2008).

91 *See* VA. CODE ANN. § 40.1–57.3 (2008). This provision merely codifies what is already a federal constitutional right, however. *See* Henrico Prof'l Firefighters Ass'n v. Bd. of Supervisors, 649 F.2d 237, 246–47 (4th Cir. 1981).

92 *See Bd. of Supervisors*, 649 F.2d at 240; 1979–1980 Op. Atty Gen. Va. 298, 298–99, 1980 Va. AG LEXIS 240.

93 VA. CODE ANN. § 22.1–253.13:7.C.1 (2008).

94 *See* VA. CODE ANN. §§ 15.2-1506–1507 (2008); VA. CODE ANN. §§ 2.2-3000, 3003–3006 (2008). Local government compliance with the grievance procedure requirements has been mixed. *See, e.g., Report of the Department of Employee Relations Counselors on the Statutory Compliance of Local Government Grievance Procedure to the Governor and the General Assembly of Virginia*, Senate Document No. 9 (1986).

95 *See* Lon S. Felker et al., *Public Sector Unionization in the South: An Agenda for Research*, 13 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 1, 4, 9 (1984). While the decision outlawing bargaining was issued in 1977 by the Virginia Supreme Court, the legal efforts began earlier. *See* Commonwealth v. County Bd. of Arlington County, 232 S.E.2d 30, 43–44 (Va. 1977).

9.3%, while 11.7% are covered by collective bargaining agreements.[96] The average earnings of unionized public sector workers in the state are $28.81 per hour, while nonunion public sector workers average $27.29 per hour.[97] In terms of overall union membership, Virginia ranks twenty-sixth in the number of union members and forty-eightth, very near the bottom, in the percentage of workers who are union members.[98] The unions that are most active in Virginia's public sector are predominantly the same unions that are most active in Illinois, including affiliates of the NEA, the AFT, the International Association of Firefighters (IAFF), and AFSCME.[99]

What options are available for unions that cannot negotiate binding collective bargaining agreements? As noted previously, employees have a constitutional right to join labor unions and these unions represent employees in a number of forums. Unions in the public sector promote legislation that favors public employees and oppose legislation that they identify as detrimental to public employees.[100] These unions speak

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96 HIRSCH & MACPHERSON, supra note 43, at 35. Presumably those employees covered by collective bargaining agreements are federal employees or perhaps employees covered by nonbinding memoranda of agreement. *See infra* notes 117, 210, and accompanying text.

97 HIRSCH & MACPHERSON, supra note 43, at 35.

98 *Id.* at 29.

99 *See 1973 Commission Report, supra* note 71, at 6 (reporting, *inter alia,* contracts with AFSCME and IAFF); *1975 Commission Report, supra* note 86, at 10 (reporting testimony by various locals of the Virginia Education Association (VEA) and the IAFF); Virginia Professional Fire Fighters (VPFF), *Who are the Virginia Professional Fire Fighters,* http://www.vpff.org/Membership/WhoAreVPFF.htm (last visited Nov. 18, 2008) (indicating affiliation with the IAFF and organization of 51 local unions representing over 6000 firefighters and paramedics); Interview with David Pulliam, President, Richmond Fire Fighters (June 7, 2006) (indicating Richmond Fire Fighters have 84% membership); Interview with Marian Flickinger, President, Norfolk Federation of Teachers (NFT) (June 5, 2006) (indicating 99% membership among teachers in the Norfolk Public Schools); Interview with Dena Rosenkrantz, Staff Attorney, VEA (June 6, 2006) (indicating that the VEA has over 60,000 members in Virginia); Interview with Donald Baylor, President, AFSCME Council 27 (June 6, 2006) (indicating that the union has almost 1000 members working in corrections, mental health, juvenile justice, social services, alcoholic beverage control, and medical facilities).

100 *See, e.g.*, VEA, *2009 VEA Legislative Agenda,* http://www.veanea.org/legislative/leg-agenda-2009.html (last visited Nov. 17, 2008); VPFF, *Recent Accomplishments of the VPFF/IAFF Partnership,* http://www.vpff.org/Membership/VPFFAccomplishments.htm (last visited Nov. 18, 2008) (listing legislative accomplishments and initiatives); IAFF Local 2068, Fairfax County, *Legislative Information,* http://www.fairfaxfirefighters.org/Legislative_Info.htm (last visited Aug. 18, 2008) (listing 2007 legislative priorities); Virginia Troopers Alliance (VTA), *Why Join the VTA,* http://www.virginiatroopersalliance.com/vta_apr_15,_2007_003.htm (last visited Nov. 18, 2008); Fraternal Order of Police of Virginia, *Legislation,* http://www.vastatefop.com/legislation.htm (last visited Nov. 17, 2008) (listing 2008 legislative priorities); Interview with Marian Flickinger, *supra* note 99; Interview with Donald Baylor, *supra* note 99 (describing lobbying as a lifeline of the organization and identifying successful initiatives to include corrections officers under the law enforcement retirement act, reducing age and service requirements for full retirement). *See also* VA. CODE ANN. § 51.1-212 (2008) (amending the Virginia Law Officers' Retirement System's definition of employee to include corrections officers).

before legislative commissions,[101] county boards,[102] city councils,[103] school boards,[104] and other governmental bodies to advocate for employee rights. Unions also represent employees in the existing grievance procedures established by law.[105] Such representation may obviate the need for legal representation, which can be costly for employees. The existence of the grievance procedure, while it may have been intended to forestall unionization and substitute in part for collective bargaining, provides a vehicle for unions to prove their value to current and potential members. Unions also represent employees in other legal proceedings related to their employment.[106] In some jurisdictions, employees have even engaged in concerted activities such as "working to the rule" or taking down from the classroom all items paid for by the teachers.[107] In short, public sector unions in Virginia, like public sector unions in Illinois and nationwide, serve as a voice for the workers they represent. In addition to representation in various legislative, judicial, and administrative forums, unions provide other value-added benefits to their members such as insurance, educational workshops, and support for families of members who have been killed or injured.[108] Unions also engage in

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101 *See 1975 Commission Report, supra* note 86, at 10; *Report of the Joint Subcommittee Studying The Continuing Contract Status Law for Instructional and Administrative Personnel to the Governor and General Assembly of Virginia,* S. Doc. No. 31, at 9-10 (1988) (reporting testimony of VEA representatives before the Joint Subcommittee).

102 *See, e.g., Bd. of Supervisors,* 649 F.2d at 239–240 (describing efforts by president of association to speak to county board on behalf of the association and its members regarding county's handling of heart-lung disability claims).

103 *See* Interview with David Pulliam, President, *supra* note 99 (describing importance of relationships with city council and successful efforts to convince former lobbyist for the organization to run for city council).

104 *See* Memorandum from VEA Legal Staff, Collective Bargaining in Virginia: What's Prohibited – What's Not (Jul. 19, 2004).

105 *See, e.g.,* VEA, *Legal Services: Your Safety Net,* http://www.veanea.org/legal-services/index.html (last visited Nov. 18, 2008) (listing various situations where VEA assisted employees in grievance proceedings); VTA, *Why Join the VTA, supra* note 100; Interview with Michael Mohler, President, Virginia Association of Professional Firefighters (June 20, 2006); Interview with Guy Horsley, Senior Assistant Attorney General, Virginia Attorney General's Office (June 20, 2006); Interview with Marian Flickinger, *supra* note 99.

106 *See, e.g.,* VEA *Legal Services: Your Safety Net, supra* note 105 (listing various situations where VEA assisted employees in other legal proceedings, including defense against criminal charges and efforts to obtain benefits); VPFF, *Recent Accomplishments of the VPFF/IAFF Partnership, supra* note 100 (listing legal action on behalf of members); VTA, *Why Join the VTA, supra* note 100 (listing various legal proceedings for which the VTA provides legal assistance to members); Interview with Marian Flickinger, *supra* note 99; Interview with Donald Baylor, *supra* note 99 (indicating that the union provides some limited legal assistance to membership but such assistance is limited by the small number of members and when membership was higher, additional services were provided).

107 *See* Interview with Dena Rosenkrantz, *supra* note 99; *Stafford Teachers Take a Stand,* http://www.veanea.org/vea-on-your-side/stafford.html (last visited April 27, 2009) (describing work to the rule action by teachers in Stafford County, Virginia).

108 *See* VPFF, *Recent Accomplishments of the VPFF/IAFF Partnership, supra* note 100 (listing support for the family of a firefighter killed on the job); VPFF, *What the VPFF Does,*

charitable endeavors to benefit their communities.[109] These activities can generate support for the union. When the union needs political support, it may contact those who have benefited from union largesse to make calls and write letters to political leaders in support of union objectives.[110]

The limits on Virginia unions, however, preclude them from negotiating binding collective bargaining agreements. Once a union in Illinois is certified as an employee representative, the focus shifts to negotiating successive contracts governing terms and conditions of employment, and administering those agreements by representing employees in the grievance and arbitration procedure.[111] Illinois statutes allow the union to negotiate fair share provisions requiring nonmembers to pay the costs of collective bargaining, contract administration, and other activities affecting wages, hours, and conditions of employment through payroll deduction.[112] In Virginia, by contrast, the unions must convince employees to join the union and pay dues despite the inability to negotiate a binding agreement. Unions must convince members to continue to pay dues, whereas in states like Illinois the typical contract provides for dues to be deducted from the employee's paycheck and remitted to the union.[113] Union leaders in Virginia describe a continual need to organize the workforce.[114] The organizing campaign does not end with certification, as it often does in states with collective bargaining and fair share rights.[115]

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http://www.vpff.org/Membership/WhatTheyDo.htm (last visited Aug. 18, 2008) (same); VTA, *Why Join the VTA*, *supra* note 100 (listing benefits of membership); Norfolk Federation of Teachers, *Reasons to Join*, http://nft4261.org/reasonstojoin.htm (last visited Aug. 18, 2008) (describing benefits of membership); Fraternal Order of Police of Virginia, *Membership Information and Benefits*, http://www.vastatefop.com/membership.htm (last visited March 19, 2008) (listing benefits of membership); Interview with Marian Flickinger, *supra* note 99 (describing professional development workshops and parent workshops offered by the union); Interview with Dena Rosenkrantz, *supra* note 99 (detailing professional training benefits provided by the union); Interview with David Pulliam, *supra* note 99 (describing insurance benefits).

109 *See* VPFF, *Recent Accomplishments of the VPFF/IAFF Partnership*, *supra* note 100 (listing charitable work of the local unions); Interview with David Pulliam, *supra* note 99 (describing union's charitable activities, including building playgrounds, enhancing parks, working with school programs, and raising money for fuel assistance).

110 *See* Interview with David Pulliam, *supra* note 99.

111 *See* Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885, 918 (2007).

112 *See* 5 ILL. COMP. STAT. 315/6(e) (2006); 115 ILL. COMP. STAT. 5/11 (2006).

113 *See id.*

114 *See* Interview with Marian Flickinger, *supra* note 99; Interview with Dena Rosenkrantz, *supra* note 99.

115 Wise unions, however, recognize that it is necessary to continue a form of organizing to maintain the connection of employees to the union. Moreover, in right-to-work states, where no union security clause can be negotiated, the same need to organize continually exists.

Furthermore, because any agreements that are reached are nonbinding, unions in Virginia must also work continually to sustain relationships with employers and legislative bodies that control the terms and conditions of employment.[116] Even in the absence of collective bargaining rights, however, several unions in Virginia have negotiated nonbinding memoranda of agreement with employers.[117] According to the unions, employers generally comply with such agreements.[118] Employers and unions in some areas of Virginia have reported healthy, productive relationships where they work together on a regular basis.[119] For example, the Norfolk Federation of Teachers (NFT) and the Norfolk School System worked together and succeeded in winning the Broad Prize for the top urban school system in the nation in 2005.[120]

Given the absence of collective bargaining rights, how have unions been able to achieve such agreements? One possible explanation is that some of the union-management relationships preceded the elimination of collective bargaining in Virginia.[121] In addition, some of the union officers have been leaders of their organizations for many years, allowing for continuity and stability within both the union and the union-employer

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116 *See* Interview with Marian Flickinger, *supra* note 99.

117 *See id.*; Interview with Dena Rosenkrantz, *supra* note 99.

118 *See* Interview with Marian Flickinger, *supra* note 99 (indicating that the union is included in the making of all major decisions, and that the union and the employer have an effective working relationship); Interview with Dena Rosenkrantz, *supra* note 99 (indicating that the Richmond Education Association, which has a very high percentage of teachers as members, and the Richmond School Board have a relationship that functions like a traditional bilateral union-management relationship).

119 *See* Interview with Marian Flickinger, *supra* note 99; Interview with David Pulliam, *supra* note 99; Interview with Dena Rosenkrantz, *supra* note 99.

120 *See* Press Release, Norfolk Public Schools, Norfolk Public Schools Wins Top Urban Education Award (Sept. 2005), *available at* http://www.nps.k12.va.us/index.php?option=com_content&view=article&id=149:norfolk-public-schools-wins-top-urban-education-award&catid=111:september-2005&Itemid=133 (last visited Nov. 16, 2008). In the two previous years, the school system was one of five finalists for the award. *Id.*; Interview with Marian Flickinger, *supra* note 99.

121 *See* Interview with Dena Rosenkrantz, *supra* note 99 (indicating that school districts in Norfolk, Richmond, Virginia Beach, Fairfax, Alexandria, and Arlington bargained with unions prior to 1977); *1973 Commission Report*, *supra* note 71, at 6 (describing collective agreements with firefighters and county workers in Fairfax County; teachers in Fairfax, Arlington, Alexandria, Prince William, and Newport News, with negotiations in progress in Powhatan, Page, Waynesboro, Virginia Beach, and Prince George Counties; sanitation workers in Alleghany County; and county workers and school employees in Arlington County); *1974 Commission Report*, *supra* note 59, at 6 (indicating that collective agreements covering teachers had increased 100% over the previous year and that agreements also existed covering firefighters, school employees, county government workers, and sanitation workers); *1975 Commission Report*, *supra* note 86, at 15 (indicating that about nineteen jurisdictions in the state had entered into collective bargaining agreements covering at least some employees to which the localities adhered despite several opinions from the Attorney General stating that the localities had no authority to enter into such agreements).

relationship.[122] Those unions that operate most effectively in Virginia are concentrated in firefighting and education—areas with strong national organizations and a strong history of organizational activity.[123] Further, public sector unions have an advantage that private sector unions lack, as public sector unions can play a role in electing their employers through the exertion of political influence in campaigns for the same public offices that are responsible for negotiating with unions. Thus, they can mobilize political power to help them accomplish their goals by supporting candidates that are more sympathetic to unions' positions.[124] Notably, the average wages for both union and nonunion public sector workers in Virginia exceeded those in Illinois, and in both states unionized workers had a wage advantage over their nonunion counterparts.[125]

All is not rosy for unions in Virginia, however. The unions that are thriving represent workers primarily in local government in large metropolitan areas.[126] As noted, the unions in firefighting and education have been particularly successful.[127] This success may be attributable to the

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122 *See* NFT History, http://nft4261.org/history.htm (last visited Nov. 16, 2008) (indicating that the charter president has been continually reelected, leading to continuity and effective leadership); Interview with Marian Flickinger, *supra* note 99 (same); Interview with David Pulliam, *supra* note 99 (indicating that he has been union president for twenty two years).

123 *See* KEARNEY WITH CARNEVALE, *supra* note 4, at 66. While there are other effective unions, they are often smaller in number.

124 *See* Interview with Michael Mohler, *supra* note 105 (noting that the political arena is the bargaining table for his union and that the union has been able to obtain wages and benefits comparable to firefighters in similar jurisdictions where bargaining is lawful); Interview with David Pulliam, *supra* note 99 (describing extensive grassroots lobbying and creation of relationships with various civic groups to develop political base); Norfolk Federation of Teachers, Reasons to Join, http://nft4261.org/reasonstojoin.htm (last visited Nov. 16, 2008); *see also* KEARNEY WITH CARNEVALE, *supra* note 4, at 124–26 (describing electoral activities of unions).

125 *See supra* notes 44, 97, and accompanying text. Since average wage data does not control for the type of job, the effect of unionization on wages is not clear from this data.

126 *See, e.g.*, Interview with Marian Flickinger, *supra* note 99 (indicating 99% membership among teachers in the Norfolk Public Schools); Interview with David Pulliam, *supra* note 99 (describing success of Richmond Fire Fighters in obtaining wages and retirement benefits comparable to the best in the nation); Interview with Dena Rosenkrantz, *supra* note 99 (describing success of Richmond Education Association); IAFF Local 2068, Fairfax County, *President's Message*, http://www.fairfaxfirefighters.org/index.cfm?section=11&pagenum=131 (last visited Nov. 16, 2008) (indicating that the Fairfax County local union has over 1700 members, staffing over 35 fire stations in the suburbs of Washington, D.C.); VPFF, *VPFF Member Locals*, http://www.vpff.org/Membership/MemberLocals.htm (last visited Nov. 16, 2008) (listing local unions in Virginia); VPFF, *Who are the Virginia Professional Fire Fighters, supra* note 99 (indicating that over 6000 firefighters and paramedics are represented by the VPFF).

127 By comparison among 96 sheriff's offices in Virginia, there is only one active local union although several more are chartered. Interview with Kevin Pittman, Secretary of Local 5016, International Union of Police Associations (June 16, 2006). Organizing among sheriff's deputies has been difficult because of the lack of collective bargaining and the lack of civil service protection for the deputies. *Id.* Furthermore, the Sheriff's Association is a strong political force which opposes legislative initiatives of the unions. *Id.*

existence of these unions as professional associations with substantial membership prior to widespread unionization in government. It has been more difficult for unions to organize effectively at the state level[128] and in smaller localities. While unions that have been able to build effective, politically savvy organizations have prospered, many employees remain without any union representation. Although some employees would not choose union representation regardless of the state of the law, there are likely other employees who would prefer union representation, yet currently have none.[129] In addition, a downside to the lack of collective bargaining and the reliance on personal relationships to uphold agreements is, in most cases, the absence of formal written documentation of agreements.[130] When union leadership changes, institutional memory may be lost and the status of agreements may be cast into doubt.[131]

Specific salary data for some job categories suggest that, compared to Illinois, in the less unionized environment of Virginia, average pay is lower.[132] For example, as of 2007, teachers in Illinois were the sixth highest paid in the country, while teachers in Virginia were ranked twentieth.[133] While other data on teacher salaries, both public and private, shows a slight advantage in wages for middle school teaching positions in Virginia, other jobs frequently unionized elsewhere, such as police and

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128 *See* Interview with Donald Baylor, *supra* note 99 (describing difficulty in organizing state employees).

129 *See* Richard B. Freeman, *Through Public Sector Eyes: Employee Attitudes toward Public Sector Labor Relations in the U.S.*, *in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 59, 60, 71–72 (Dale Belman et al. eds., 1996) (showing that 39% of the public sector nonunion workers in the survey, primarily from one southern state, would vote for union representation, more than their private sector counterparts despite the higher rate of unionization in the public sector); Webb, *supra* note 69, at 66–68.

130 *See* Interview with Michael Mohler, *supra* note 105.

131 *Id.*

132 *See, e.g.*, AMERICAN FEDERATION OF TEACHERS, AFT PUBLIC EMPLOYEES COMPENSATION SURVEY 42–45, 68–73 (2006), http://www.aft.org/salary/2006/download/PECompSurvey06.pdf (listing average annual base salary):

	Illinois	Virginia
Correctional Officers	$44,252	$22,188 – $45,539
Correctional Officer Sr./Lead	$61,851	$29,167
Teacher, State Institution	$52,897	$42,014
Licensed Practical Nurse	$38,891	$34,517
Registered Nurse	$59,795	$43,992

Because these were state jobs and public sector unionization is very low in Virginia, this may well reflect a significant wage premium resulting from unionization. *See also* U.S. DEPARTMENT OF LABOR, *infra* note 134 and accompanying text (showing lower mean wages for police and sheriff's officers and firefighters in Virginia). The largest gap is for police and sheriff's officers where unions have had limited success in Virginia. *See supra* note 127 and accompanying text.

133 *See* AMERICAN FEDERATION OF TEACHERS, SURVEY AND ANALYSIS OF TEACHER SALARY TRENDS, 2007, at 16, http://www.aft.org/salary/2007/download/AFT2007SalarySurvey.pdf.

firefighters, rank far lower on the pay scale in Virginia than they do in Illinois.[134] Average wages overall in the public sector are higher in Virginia, however.[135] The average wage data does not control for the type of job and the higher average salaries in Virginia may be explained by a larger number of jobs in higher paying job categories.

It is clear that there are significant difficulties for unions in states where bargaining is outlawed. Union membership in such states is significantly lower than in more favorable legal environments, and the wages for many of the same positions in those states are lower as well. Nevertheless, some unions have survived in hostile legal climates such as Virginia, and some have even prospered. For example, it is interesting that public sector union membership in Virginia is higher than national private sector union membership although federal law is less hostile to collective bargaining. Clearly then, the law is not the only factor. The next section examines possible explanations for the different legal regimes.

III. ACCOUNTING FOR THE DIFFERENCES

As noted by Kearney & Carnevale in *Labor Relations in the Public Sector*, the relationship between legal bargaining policy and unionization levels is a chicken and egg problem.[136] Joseph Slater makes this same point in his study of the history of public sector unionization.[137] The existence of collective bargaining laws clearly affects the extent of unionization.[138] Illinois and Virginia follow this pattern, with much higher unionization in Illinois. Virginia's loss of union membership between 1972 and 1978, a year after the elimination of lawful collective

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134 *Compare* U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, MAY 2007 STATE OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, ILLINOIS, *available at* http://data.bls.gov/cgi-bin/print.pl/oes/current/oes_il.htm (last visited Nov. 16, 2008), *with* U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, MAY 2007 STATE OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, VIRGINIA, *available at* http://data.bls.gov/cgi-bin/print.pl/oes/current/oes_va.htm (last visited Nov. 16, 2008) (listing annual mean wages, not limited to public employment):

	Illinois	Virginia
Secondary School Teachers	$63,640	$56,740
Middle School Teachers	$52,630	$53,560
Elementary School Teachers	$54,760	$54,190
Police and Sheriff's patrol officers	$59,110	$46,990
Firefighters	$47,280	$42,880

Teacher data in this survey did not include special education and vocational education teachers. *Id.* The largest gap is for police and sheriff's officers, where unions in Virginia have had limited success. *See supra* note 127 and accompanying text.

135 *See supra* notes 44, 97, and accompanying text.

136 *See* KEARNEY WITH CARNEVALE, *supra* note 4, at 29.

137 *See* SLATER, *supra* note 8, at 194.

138 *Id.*

bargaining in the public sector, also illustrates the effect of law on union membership.[139] On the other hand, strong unions can exert political pressure that leads to favorable changes in the law. Public sector unions in Illinois were active long before collective bargaining legislation was enacted.[140] The unions helped legislators defeat unfavorable legislation and helped those legislators enact favorable collective bargaining laws.[141] Unions have continued to promote legislative change, resulting in collective bargaining laws that are more union-friendly than the federal private sector legislation.[142]

Virginia's unions have not been without legislative victories. While collective bargaining legislation has eluded them, a statutory grievance procedure, which allows representation by unions, provides some protection to employees. The creation of this grievance procedure, growing as it did out of legislative commissions that were established to consider collective bargaining legislation, almost certainly was an effort to construct a system that would provide employees with some protection that might relieve the pressure for collective bargaining rights.[143] Other legislation promoted by unions has become law. For example, while AFSCME has a relatively small membership in Virginia, it successfully pushed for legislation improving the retirement benefits of corrections officers, many of whom are active in the union.[144]

Kearney and Carnevale single out the "Sunbelt states" for particular consideration in analyzing the determinants of union strength.[145] They note that despite the presence of characteristics that have been associated with unionization in other regions (e.g., strong levels of urbanization and industrialization), unionization has lagged in the southern states, a fact that they attribute to political culture and resistance by employers.[146] The "traditionalistic" culture of the South, which is elitist and hierarchical, is hostile to unions and generally favors business.[147] Similarly, the conservative political ideology that is prevalent in the South impedes

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139 *See* Felker et al., *supra* note 95, at 9 (showing Virginia's change in union membership from 38.5% of the public sector workforce in 1972 to 19.5% in 1978, and attributing it to the negative legal climate). Notably, while the Virginia Supreme Court decision was in January 1977, the efforts to eliminate collective bargaining began earlier. *See* Webb, *supra* note 69, at 60; Carlton & Johnson, *supra* note 89, at 268–69.

140 Both collective bargaining statutes grandfathered bargaining about subjects previously negotiated and embodied in collective bargaining agreements. *See* 115 ILL. COMP. STAT. 5/4 (IELRA) (2006); 5 ILL. COMP. STAT. 315/4 (IPLRA) (2006).

141 *See supra* notes 9–12 and accompanying text.

142 *See supra* notes 13–39 and accompanying text.

143 *See* Interview with Guy Horsley, *supra* note 105.

144 *See* Interview with Donald Baylor, *supra* note 99.

145 *See* KEARNEY WITH CARNEVALE, *supra* note 4, at 32.

146 *See id.*

147 *See id.*

union growth and strength.[148] Kearney and Carnevale conclude: "In most of the Sunbelt, a vicious cycle seems to be present in which the traditionalistic political culture and the absence of public union strength diminish the chances of new collective bargaining legislation, while in the absence of a favorable legal environment union membership gains remain arduous."[149] Carlton and Johnson, who surveyed the attitudes of teachers and school board members on issues relating to public employee bargaining for their article *Teacher-Board Relations in Virginia: A Case of Perceptual Discontinuity*, noted the historically grounded and "deep-seated antipathy felt by southerners toward labor unions and union-like organizations."[150]

Felker, Griffith, and Durant also looked at union determinants in the public sector in the South in their article *Public Sector Unionization in the South: An Agenda for Research.*[151] They placed the southern states into four categories based on the authors' analysis of the effect of the size of public sector employment on unionization, which they identify as a key determinant.[152] Virginia follows a relatively unique pattern, joined only by Texas, in which unionization reached a peak and then began to decline despite growth in public sector employment.[153] The authors concluded that the hostile legal climate in Virginia and Texas caused the states to vary from the normal pattern of strong association between the growth of public sector employment and growth of unionization.[154] Accordingly, the authors posited that significant public sector employment is an important, but not sufficient determinant of unionization.[155] The legal climate also plays an important role in restricting union growth despite gains in public sector employment.[156]

In his book, *Public Workers,* Joseph Slater conducted a more focused legal analysis based on the history of public sector unionization.[157] Slater looked at the role of the law in public sector unionization, filling a gap in the scholarly analysis which had focused extensively on the role of law in the private sector.[158] Slater concluded that the law historically

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148 *See id.*

149 *Id.* at 33.

150 Carlton & Johnson, *supra* note 89, at 276–77 (citing W. J. Cash's *Mind of the South* which discussed the anger that many southerners expressed toward textile strikers in the 1930s).

151 *See* Felker et al., *supra* note 95, at 9. Although the analysis is dated, the authors examined an important time period in Virginia's history during which collective bargaining was outlawed and contracts voided. *See id.*

152 *See id.* at 6.

153 *See id.* at 8.

154 *See id.* at 8-9.

155 *See id.* at 11.

156 *See id.*

157 *See* SLATER, *supra* note 8, at 5–10.

158 *See id.* at 6.

played an important role in frustrating the efforts of public employees to unionize.[159] Slater identified three significant factors that caused judges to apply the law in ways unfavorable to unionization: judges were "hostile to labor"; constrained by state structures and legal doctrines; and interpreted the term "union" inaccurately due to fear of strikes, despite the assurances of unions and the predominant history to the contrary.[160] Each of these factors is demonstrably evident when comparing the law and its impact in Virginia and Illinois, confirming that the pattern Slater observed historically continues today.

The judicial hostility toward unions in Virginia is reflected in the Virginia Supreme Court's decision in *Arlington County*.[161] The court stated that there was no "support for the proposition that collective bargaining by the boards is necessary to promote the public interest."[162] By way of contrast, courts in Illinois allowed unions to play a significant role in the public sector even before the enactment of the collective bargaining statutes.[163] In Virginia, the at-will employment doctrine is repeatedly described by courts as a strong presumption, not to be overcome easily, however sympathetic an employee's case and however poorly the employer behaves.[164] In the area of workers' compensation, Virginia's laws are among the most business-friendly in the nation, restricting workers' ability to obtain benefits in several areas where most other

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159 *See id.* at 95.

160 *See id.* at 7.

161 *See* Commonwealth v. County Bd. of Arlington County, 232 S.E.2d 30, 44–45 (Va. 1977).

162 *Id.* at 43.

163 *See, e.g.*, Bd. of Trustees v. Cook County Coll Teachers Union, 343 N.E.2d 473 (Ill. 1976) (upholding arbitration award in favor of teachers based on collective bargaining agreement in effect in 1971); Naperville Police Union v. City of Naperville, 422 N.E.2d 869 (Ill. App. Ct. 2d Dist. 1981).

164 *See, e.g.*, County of Giles v. Wines, 546 S.E.2d 721, 725 (Va. 2001) (reversing the lower court's decision that the county's personnel policy created a binding contract to terminate only for cause). The manual in *Giles* said the "employee may be discharged for inefficiency, insubordination, misconduct, or other just cause." *Id.* at 73. The Virginia Supreme Court found that such language did not rebut the presumption because it did not say that employees will only be fired for just cause or cannot be fired without just cause. *See id.* The court also precluded reliance on any evidence other than the manual. *See id.* at 79–80. *See also* Cave Hill Corp. v. Hiers, 570 S.E.2d 790 (Va. 2002) (relying on the strong at-will doctrine to reverse trial court's decision to send to the jury a case challenging the employee's termination, finding that the contract was unambiguous although it included both a specific contract term and a thirty day notice provision for termination of the agreement); Willey v. Roanoke County, No. 702CV00901, 2005 WL 1719948 (W.D. Va. July 21, 2005) (relying on presumption of at-will employment to defeat employee's claim based on handbook provisions); Mizell v. Sara Lee Corp, No. Civ. A. 2:05CV129, 2005 WL 1668056 (E.D. Va. June 9, 2005) (finding at-will relationship despite claims of intentional employer misrepresentations that the handbook was binding).

states award such benefits.[165] The United States Court of Appeals for the Fourth Circuit, the federal circuit court covering Virginia, has a reputation as the most conservative appeals court in the country.[166] The Fourth Circuit's decisions on labor matters reflect a suspicion of unions and a reluctance to rule against employers except in the clearest of cases.[167]

Hostility is not limited to judges, of course, but rather judges reflect the expressed views of the most powerful and vocal citizens.[168] Public officials and candidates running for office in Virginia from both political parties proclaim allegiance to both the right-to-work law and the ban on

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165 *See* ARTHUR LARSON & LEX K. Larson, Larson's Worker's Compensation Law § 103.02 (2008) (indicating that most states do not hold intentional acts to be accidents under workers' compensation laws, permitting employees to sue employers for intentional torts); *cf.* Haddon v. Metropolitan Life, 389 S.E.2d 712, 714 (Va. 1990) (finding intentional tort to be accident). *See also* LARSON & LARSON, *supra* at § 50.01 (noting that most states award benefits for gradually occurring injuries); *cf.* Stenrich Group v. Jemmott, 467 S.E.2d 795 (Va. 1996) (holding that gradually incurred injuries are not covered by workers' compensation in Virginia). *See also* Commonwealth of Virginia, Office of the Attorney General, Press Releases, July 16, 2007, http://www.oag.state.va.us/PRESS_RELEASES/NewsArchive/071607_Business.html (last visited Aug. 18, 2007) (noting Virginia's recognition as the number two state in the country for favorable business liability climate); Steven B. Hantler, *Risky Business: The Annual Boardroom Guide to Litigation in the 50 States*, Directorship, June/July 2007, at 52–53, http://www.legalreforminthenews.com/2007PDFS/AJPDirectorshipGuideStateLegalClimates_6-28-07.pdf.

166 *See* Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1 (stating that by 1999, the Fourth Circuit had "quietly but steadily become the boldest conservative court in the nation in the view of scholars, lawyers and many of its own members"); *see also* Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, (Magazine), at 40 (stating that the Fourth Circuit is considered the "shrewdest, most aggressively conservative federal appeals court in the nation"); Carl Tobias, *A Note on the Neutral Assignment of Federal Appellate Judges*, 39 SAN DIEGO L. REV. 151, 152 (2002) (stating empirical research confirmed several studies which found that a majority of the court's members "invoke the rehearing en banc mechanism to reverse three-judge panel opinions which the majority considers too liberal politically").

167 For example, in two studies dealing with enforcement of NLRB decisions, the Fourth Circuit was one of the circuits least likely to enforce the Board's orders. *See* Terry Bethel & Catherine Melfi, *Judicial Enforcement of NLRB Bargaining Orders: What Influences the Courts?*, 22 U.C. DAVIS L. REV. 139, 157, 162 (1988) (finding that the Fourth Circuit was the third lowest court in enforcing NLRB bargaining orders as remedies for employer unfair labor practices in election campaigns); Catherine Fayette, *Judicial Decisions on an Employer's Duty to Bargain: Objective Analyses or Personal Biases?*, 50 WAYNE L. REV. 1221, 1239–40 (2005) (finding in study of enforcement of NLRB decisions ordering employers to bargain that the more conservative courts, including the Fourth Circuit, reversed for the employer more often).

168 *Cf.* Editorial, *Prosperity Busters*, RICHMOND TIMES-DISPATCH, Apr. 14, 2008, at A14 (suggesting that most private employees do not want unions; that unions will make it hard for American businesses to compete; and that election of Democrats at the national level, who are "union pawns," will destroy the economy and eliminate right-to-work laws, which will, in turn, devastate Virginia's economy). Notably, Virginia has been ranked as the best state for business by Forbes.com for three years in a row. *See* Tierney Plumb, *Virginia named 'best state to do business' by Forbes.com*, WASHINGTON BUS. J., (Aug. 1, 2008), *available at* http://washington.bizjournals.com/washington/stories/2008/07/28/daily59.html.

public employee collective bargaining.[169] Recently, when a Democratic governor sought to appoint the president of the state AFL-CIO to the position of Secretary of the Commonwealth,[170] public statements by members of the legislature and letters to the editors of local papers reflected anti-union views and fears of union power in a state where little exists.[171] The appointment was derailed and the AFL-CIO president was

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169 *See, e.g.*, Warren Fiske, *House Panel Rejects Kaine Nominee for Cabinet Post*, THE VIRGINIAN-PILOT (Mar. 8, 2006), *available at* http://hamptonroads.com/node/74981 (noting that Governor Kaine, a Democrat, supports the right-to-work law); Editorial, *Democrats Favor Unions Over Growth*, RICHMOND TIMES-DISPATCH, Apr. 30, 2008, at A12 (criticizing legislation that would have compromised the right-to-work law and suggesting that Democrats outside the state would undermine the law and thus weaken the economy and the free enterprise system). *See also* Kurt Badenhausen, *Virginia: The Best State For Business*, FORBES.COM (Aug. 16, 2006), *available at* http://www.forbes.com/2006/08/15/virginia-business-climate_cz_kb_0815virginia.html (last visited Aug. 18, 2008) (quoting Democratic Governor Kaine praising the bipartisan tradition of keeping the legal and regulatory climate favorable for business).

170 The Secretary of the Commonwealth helps the governor in appointments to various state boards and commissions, vets appointees to insure compliance with various state laws, and handles various official documentations for the state, including commissioning notaries and authorizing the use of the state seal. *See* Secretary of the Commonwealth, *What We Do*, http://www.commonwealth.virginia.gov/index.cfm (last visited Mar. 4, 2008); Secretary of the Commonwealth, *State Government Information*, http://www.commonwealth.virginia.gov/StateGovernment/index.cfm (last visited March 4, 2008); Secretary of the Commonwealth, *Official State Documents*, http://www.commonwealth.virginia.gov/OfficialDocuments/index.cfm (last visited Mar. 4, 2008).

171 *See* Michael D. Shear, *GOP Delegates Stymie Kaine's Cabinet Choice*, WASH. POST, Mar. 8, 2006, at A1 (quoting Del. Timothy Hugo stating "LeBlanc's appointment would lead to a 'unionization of the state workforce'"); Fiske, *supra* note 169. Dan LeBlanc's appointment was the only cabinet appointment ever to be rejected by the legislature since the initiation of the cabinet system. *See* Fiske, *supra* note 169. Reactions in the General Assembly were hostile: "'Other than the governor himself, the secretary of the commonwealth has the greatest power to affect policy of any other position in the commonwealth,' said Del. Timothy Hugo, R-Fairfax. 'He would possess the ability to fill these positions entirely with people who share his views on right to work.' Republicans complained that LeBlanc over the years had made derogatory comments about several of Virginia's largest employers. Del. John Cosgrove, R-Chesapeake, noted that LeBlanc once called Newport News Shipbuilding a "plantation." Cosgrove said LeBlanc's appointment would "send the wrong message" to businesses considering locating in Virginia." *Id.* Notably, LeBlanc found it necessary to disavow any intent to undermine the right to work law in an effort to obtain General Assembly support for his appointment. *Id.* The interrogation of LeBlanc in front of the General Assembly was revealing.

> Del. Terrie Lynne Suit (R-Virginia Beach) led the questioning, citing an article in an online publication, the People's Weekly World, which she said quoted LeBlanc as saying that white executives of Newport News Shipbuilding ran the shipyard and its black workers like "a plantation." She said the site, which bills itself as "a progressive, leftist, socialist and communist weekly," quoted LeBlanc as comparing 'right-to-work' lawmakers with segregationists. "How will you reach out to Newport News Shipbuilding and work with them . . . given that you have no respect for that corporation?" Suit asked.
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> In the 75-minute session, lawmakers queried LeBlanc about being arrested during a United Mine Workers strike in the 1980s. LeBlanc said he was arrested along with about 5,000 other people. "You affirmatively disobeyed a lawful order. That's what

placed in a job which did not require approval of the General Assembly.[172]

The issue of public sector bargaining reared its head again in the 2008 legislative session. In an unprecedented procedural move, the sponsor of a bill to allow bargaining was denied the right to withdraw the bill, forcing a vote by the full House of Delegates.[173] The purpose of this rare move was to force Democrats in the Virginia House to vote on the bill; if the Democrats voted against the bill, it would alienate their labor supporters and if the Democrats voted for the bill, the vote could be used against them in next election.[174] The Democrats refused to vote altogether, illustrating once again that even Democrats with labor support are reluctant to support labor issues in Virginia.[175] As for the Republicans, the Majority Leader of the House, in speaking about the bill, echoed the earlier associations of strikes and public sector bargaining,[176] asserting that the Democrats were leading Virginia toward the demise of the right-to-work law and the consequent end of Virginia's status as the best state in the nation in which to do business.[177] Delegate Griffith's speech asserted that a vote on the bill would show whether the delegates were for Virginia or for the unions, clearly implying that one could not support unions and public sector bargaining and still support the state.[178] Conversely, in Illinois, labor has a strong voice in the legislature, pushing for favorable legislation and opposing legislation with negative conse-

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you are telling me?" asked Del. David B. Albo (R-Fairfax). "That's correct," LeBlanc said and added that it was an act of civil disobedience.

Michael D. Shear, *Va. Delegates Question "Right-to-Work" Views*, WASH. POST, Feb. 8, 2006, at B05.

172 *See* Virginia.gov, Senior Advisor to the Governor for Workforce, Biography of Daniel G. LeBlanc, http://www.workforce.virginia.gov/OfficeInfo/LeBlancBio.cfm (last visited Mar. 4, 2008); VA. CODE ANN. § 2.2-435.6B (providing for governor to designate senior staff member from the governor's office to handle responsibilities of chief workforce development officer).

173 *See* WVEC.com, Virginia House Floor Clash Provokes Partisan Meltdown, Jan. 24, 2008, http://www.wvec.com/news/topstories/stories/wveclocal012408politics.546ddf56.html (last visited Aug. 18, 2008).

174 *See id.*

175 *See id.*

176 *See infra* notes 193– 201 and accompanying text.

177 *See* Stand Up and Vote!, http://www.youtube.com/watch?v=bZD6o3uHcQY (last visited Aug. 18, 2008) (Majority Leader Morgan Griffith calling on Democrats to cast a vote).

178 *See id.*

quences for labor.[179] Illinois Democratic legislators and other officials do not fear association with union-supported legislation.[180]

The laws and state structures in Virginia and Illinois also differ, providing support for Slater's notion that laws and state structures affect public sector unionization. An obvious difference is that bargaining in Virginia is outlawed, while in Illinois, it is not only permitted but encouraged. As noted above, Virginia follows the Dillon rule, which restricts the authority of local government to those powers expressly conferred by the state or those conferred by necessary implication.[181] The *Arlington County* court relied on the Dillon Rule to find that local government entities had no authority to bargain collectively with unions despite their expressed desire to do so as reflected in the existing agreements.[182] Illinois has adopted Home Rule, which allows local governments to exercise those powers not clearly and expressly withheld by the state.[183] Thus, local governments that choose to bargain with unions can do so, even in the absence of a statute authorizing collective bargaining. Historically, bargaining occurred well prior to the enactment of the bargaining laws.[184]

The nondelegability doctrine, long used to preclude public sector collective bargaining, persists in Virginia despite its virtual abandonment in many states.[185] Opponents of bargaining legislation have used the nondelegability doctrine to justify the refusal to permit negotiations, arguing that the legislature cannot delegate its responsibility to govern the relations of public sector employees through bargaining nor can it permit

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179 *See, e.g.*, Kerry L. Smith, *Pro-labor, Anti-employer 'Replacement Worker' Law Effective Jan. 1*, ILL. BUS. J. (Dec. 15, 2003), *available at* http://www.ibjonline.com/printreplacementworkerlaw.html (last visited Aug. 18, 2008); Dave McKinney, *Illinois Labor Flexes New Political Muscle*, STATELINE.ORG Dec. 6, 2002, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15090 (last visited Aug. 18, 2008); Pat Guinane, *Labor Friendly*, ILLINOIS ISSUES (Jun. 2004), *available at* http://illinoisissues-archive.uis.edu/features/2004june/labor.html (last visited Aug. 18, 2008).

180 *See Smith*, *supra* note 179; McKinney, *supra* note 179; Guinane, *supra* note 179.

181 *See* Commonwealth v. County Bd. of Arlington County, 232 S.E.2d at 39–40 (Va. 1977).

182 *See id.* at 43.

183 *See* ILL. CONST. art. VII, § 6; City of Oakbrook Terrace v. Suburban Bank & Trust Co., 845 N.E.2d 1000, 1007 (Ill. App. Ct. 2006) ("The intent and purpose of the home rule provisions [in the Illinois Constitution] is to limit severely the judiciary's authority to preempt home rule powers [of municipalities] through judicial interpretation of unexpressed legislative intent."); Neri Bros. Constr. v. Vill. of Evergreen Park, 841 N.E.2d 148, 152 (Ill. App. Ct. 2005) (holding that "any limitation on the power of home rule units by the General Assembly must be specific, clear, and unambiguous. Absent such a limitation, we will not find preemption.").

184 *See* Clark & O'Brien, *supra* note 10, at 199.

185 *See, e.g.*, Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 136 (Mo. 2007).

the executive branch or administrative agencies to do so.[186] The Virginia Supreme Court relied on the doctrine in two important cases involving school teachers. In *School Board of City of Richmond v. Parham*, the court held that school boards could not be required to submit to binding arbitration of grievances because arbitration improperly delegated to the arbitrator the authority that belonged to local school boards.[187] Subsequently, the court relied on the nondelegability doctrine in *Russell County School Board v. Anderson* to find that the decisions of statutory fact-finding panels in disciplinary proceedings for school teachers are not binding on school boards.[188] By way of contrast, the Illinois bargaining statutes require contracts to contain provisions for arbitration of grievances.[189] In addition, Illinois education law provides for binding decisions of hearing officers in teacher discipline cases, subject to limited appellate review.[190] Finally, Virginia remains a right-to-work state, while Illinois is not.[191]

Slater's third factor, the judicial misunderstanding of public sector unions, focuses primarily on judges' unwillingness to recognize and acknowledge that public sector unions largely eschewed strikes.[192] As Slater documents, this factor played an historic role in the limited growth of public sector unions.[193] The reports of the Commissions that studied the rights of public employees preceding the Virginia Supreme Court's decision in *Arlington County* reflect the fear of strikes. The 1973 Commission, which recommended legislation making contracts enforceable and encouraged a policy of providing a way for public employees to express their views to their employers, also contained a recommendation to enact legislation to deter strikes.[194] The 1974 Commission, which recommended legislation making negotiated agreements enforceable, was accompanied by a five member dissent stating, "[o]rganization and collective bargaining is meaningless without the concurrent right of eco-

186 *See 1975 Commission Report, supra* note 86, at 6–7. The report quotes the 1947 decision of the Missouri Supreme Court in *City of Springfield v. Clouse*, 206 S.W.2d 539, 545 (Mo. 1947), in support of its position. *1975 Commission Report, supra* note 86, at 7. The Missouri Supreme Court recently overturned *Clouse,* holding that the Missouri constitution protects the right of public employees to bargain collectively. *See Independence Sch. Dist.*, 223 S.W.3d at 137.

187 *See* School Bd. of City of Richmond v. Parham, 243 S.E.2d 468, 472 (Va. 1978).

188 *See* Russell County School Board v. Anderson, 384 S.E.2d 598, 604–05 (Va. 1989).

189 *See* 5 ILL. COMP. STAT. 315/8 (2006); 115 ILL. COMP. STAT. 5/10(c) (2006).

190 *See* 105 ILL. COMP. STAT. 5/24-12 (2006).

191 *See* VA. CODE ANN. § 40.1-58 (2005); National Right to Work Legal Defense Foundation Inc., http://www.nrtw.org/ (last visited March 4, 2008). Indeed, the headquarters of the Right to Work Foundation is located in Virginia. *Id.*

192 *See* SLATER, *supra* note 8, at 82.

193 *See id.* at 7.

194 *See 1973 Commission Report, supra* note 71, at 3.

nomic action and *always* leads to work stoppages whether lawful or not."[195]

The rhetoric about strikes escalated in the 1975 report, in which the Commission divided equally on the need for bargaining legislation. The Commissioners all agreed that strikes in the public sector should be prohibited.[196] Those opposed to legislation that would authorize voluntary collective bargaining stated:

> Thus, the question involved in the issue of public employee collective bargaining is whether it is necessary or desirable to equalize the bargaining power between public employees and public employers by encouraging the organization of employees for the purpose of collective bargaining—in full knowledge of the fact that the process does not equalize anything unless it is supported by a 'right to strike' with protection from reprisal . . . .
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> States which have adopted collective bargaining or meet and confer legislation for public employees have experienced an increase in the number of strikes as a result, even though such strikes were unlawful. Thus, the process of collective bargaining invites strikes and threats thereof and no legislation has been found which can prevent such strikes—action which challenges the very sovereignty of government.[197]

As Slater has carefully documented, this same fear, using the specter of the Boston police strike of 1919, was used in an earlier era to frustrate the efforts of public sector unions.[198]

Even the proponents of legislation authorizing bargaining in Virginia felt the need to address the strike issue. Of the ten legislative recommendations, five addressed enhanced and severe penalties for strikes, including authorizing employers to impose additional penalties beyond those required by the legislature.[199] In addition, the proponents supported their call for legislation by suggesting that government officials' refusal to meet with employees who had legitimate concerns had caused employees to seek assistance from "more militant national unions."[200]

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195 *1974 Commission Report*, *supra* note 59, at 12 (emphasis added).

196 *See 1975 Commission Report*, *supra* note 86, at 6.

197 *Id.* at 5–6. As noted previously, *supra* notes 52–57 and accompanying text, there was no increase in the number of strikes in Illinois when bargaining legislation was passed.

198 *See* SLATER, *supra* note 8, at 27–38, 81–84.

199 *See 1975 Commission Report*, *supra* note 86, at 14–15, 16–17.

200 *Id.* at 18.

Further, the proponents argued that a rightful denial of the right to strike would require providing some mechanism for employee input.[201]

As indicated above, unions in Virginia are largely in the same place today as public sector unions generally were in an era when the courts and legislatures, not to mention at least some members of the public, were hostile to public sector unionization.[202] The factors identified by Slater to explain the delay in the development of public sector bargaining in the first sixty-two years of the twentieth century continue to discourage bargaining in Virginia. The interrelated factors of a hostile legal climate, traditional hierarchical culture, and conservative political ideology have combined to limit unionization in Virginia's public sector. As is true historically, however, some unions have been successful despite these barriers.[203] In Illinois, with a more favorable legal and political climate, collective bargaining and unionization have been widespread and successful.[204] The success of unionization, aided by the favorable legal climate, has enabled unions to achieve legislation that is even more protective of employee rights and bargaining.[205] The next section will explore the implications of this analysis for the private sector and other states in the public sector.

IV. LESSONS FROM THE PUBLIC SECTOR DIVIDE

Having explored the distinctions between Illinois and Virginia and possible explanations for those distinctions, the next question is whether there are any other lessons to be drawn from this analysis for either public sector or private sector labor relations.

A. *The Private Sector*

There is a longstanding debate among scholars and legislators about the role that the law has played in the decline of unionization in the private sector.[206] While the law is certainly not the only contributing

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201 *See id.* at 22.

202 For historical documentation of public sector unionism in the era from 1900–1962, which reveals that unions in that era used many of the same strategies for success as current unions in Virginia, see generally SLATER, *supra* note 8.

203 Slater has complied data on the historical success of public sector unions. *See id.* For union successes in Virginia, *see supra* notes 100-127 and accompanying text.

204 *See supra* notes 42– 51 and accompanying text.

205 *See supra* notes 15– 34 and accompanying text.

206 *See, e.g.*, DUNLOP COMMISSION, *supra* note 18, at 8–13; CRAVER, *supra* note 18, at 34–55; GOULD IV, *supra* note 18, at 20–25; WEILER, GOVERNING THE WORKPLACE, *supra* note 18, at 239; Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 401–02 (1992); Estlund, *supra* note 37, at 1527–43; Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62–68 (1993); Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103, 110–15 (2001);

factor in unions' loss of membership in the private sector, the comparison of Virginia and Illinois suggests that the law does have an effect on unionization rates. In Illinois, where the law is more favorable, unions have thrived in the public sector, whereas in Virginia they have struggled. However, higher unionization rates also lead to more favorable laws. Thus, where the law is not favorable, successful efforts to spread unionization may later lead to changes in the law, as unionized employees gain political power. The analysis also demonstrates that while legislation that authorizes bargaining may encourage and promote unionization, unions can succeed in representing employees without favorable legislation. Given the decline of legal protection for unionization in the private sector and the ineffectiveness of the NLRA,[207] can the success of some unions in Virginia's public sector provide a blueprint for private sector unions, helping them to reverse the long decline in union density?

First, it must be noted that there are significant differences between the public sector and the private sector. Most public sector employees have some legal protection against termination, while most private sector employees are terminable at-will.[208] Thus, the risks of termination for attempting to unionize are greater in the private sector and the fear of job loss may be a greater deterrent to unionization. Furthermore, public employers in general tend to be less hostile to unionization than private employers,[209] although, as noted above, negative attitudes toward unionization in Virginia are widespread. Nevertheless, those employers that deal with unions in Virginia in the absence of legal requirements have concluded that the benefits outweigh the costs. These differences may help explain the fact that unionization is now higher in Virginia's public sector, where bargaining is outlawed, than it is in the private sector.[210]

Second, much of the success of public sector unions in Virginia has come through the political process. While private sector employees and unions can obtain important benefits through the political process as

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Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 575 (1992); Weiler, *Promises to Keep*, *supra* note 18, at 1771–86.

207 *See* Cynthia Estlund, *The Story of* NLRB v. Washington Aluminum*: Labor Law as Employment Law*, *in* EMPLOYMENT LAW STORIES 175, 208–11 (Samuel Estreicher & Gillian Lester eds., 2007); Liebman, *supra* note 37, at 570.

208 JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 105 (2004).

209 *Id.* at 100–01, 115.

210 Public employee union membership in Virginia is 9.3%. *See* HIRSCH & MACPHERSON, *supra* note 43, at 35, while national private sector membership is 7.6%. *Id.* at 12. Private sector membership in Virginia is even lower, 2.6%. *Id.* at 35. Another factor to consider is that the public sector numbers in Virginia include employees who can bargain lawfully under federal law despite Virginia's prohibition on bargaining for state and local government employees. *See* Title VII of the Civil Service Reform Act, 5 U.S.C. §§ 7101-7134 (2000).

well, the process is far less direct. Employees in the private sector can rarely directly influence their employers with political activity, while public sector employees have the potential to do so because their employers are almost always elected. At the local level, the influence is far more direct for groups like teachers, firefighters, and police officers who can participate actively in campaigns for school board members, city council representatives, county board members, and mayors. Finally, it is worth noting that the most successful public sector unions in Virginia did not start from scratch under a regime where collective bargaining was clearly unlawful. Instead, like many public sector unions in other areas, public sector unions in Virginia evolved from professional associations,[211] and began to engage in collective bargaining when it was not clearly prohibited by law.[212] When the legal regime changed, there was a large loss of membership, but some unions survived and eventually thrived. Thus, the parallel with the private sector is far from exact. Nevertheless, some lessons might be drawn.

While many Virginia public sector employees have greater job security than most private sector employees, some public sector employees in Virginia do not have the same job security as similarly situated public sector employees in other states. For example, as noted above, in tenure proceedings, a Virginia school board can reject the findings of neutral hearing officers.[213] Nevertheless, the employment protection for Virginia teachers far exceeds that of most private employees. A comparison can be made, however, between the strategies of successful Virginia unions and those of worker centers in the private sector, as worker centers represent employees with little job security.

In recent years, there have been substantial efforts to organize and empower low-wage workers, who often are immigrants, outside the bounds of traditional labor unions. While these efforts have been supported by traditional unions in some cases, much of the work has been done by worker advocacy organizations and attorneys.[214] One can scarcely imagine a group with less job security and political clout than low-wage, immigrant, and in some cases, undocumented workers. They are easily replaced, may risk deportation, do not have money to contrib-

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211 *See* GRODIN ET AL., supra note 208, at 16.

212 *See* Webb, *supra* note 69, at 61; Richards & Carlton, *supra* note 69, at 359; Felker, *supra* note 95, at 4, 9.

213 *See* Sch. Bd. of City of Richmond v. Parham, 243 S.E.2d 468, 473 (Va. 1978).

214 *See generally* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005) (describing the Long Island Workplace Project); JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006) (documenting the work of numerous worker centers around the country); Victor Narro, *Finding the Synergy Between Law and Organization: Experiences from The Streets of Los Angeles*, 35 FORDHAM URBAN L.J. 339, 340 (2008) (describing two campaigns of worker centers in Los Angeles).

ute to political candidates, and in some cases, cannot even vote. Yet, these organizing efforts have not been without success.

Worker centers, based on the nineteenth century model of the mutual benefit society, have been established in many areas.[215] Worker centers are "community-based mediating institutions that provide support to low wage workers."[216] These institutions focus on three prongs: service, advocacy, and organizing.[217] Worker centers have had some documented successes in changing conditions for low-wage workers, through law and organizing, often working in conjunction with other worker advocacy organizations.[218] Workers from Long Island were able to change New York law, achieving enactment of the Unpaid Wages Prohibition Act, which improved enforcement of the law requiring payment of wages for time worked.[219] A coalition of worker centers and workers' rights advocacy organizations was able to obtain unpaid wages, legal relief for workers discharged for protesting poor and unlawful working conditions, and agreements to improve working conditions for garment workers, in a campaign against Forever 21, based in Los Angeles.[220] The campaign included boycotts, picketing, legal actions, and national speaking tours by affected workers.[221]

A similar coalition worked with car wash workers in Los Angeles after discovering many legal violations and other abusive practices.[222] The coalition successfully represented workers to remedy violations of wage and hour laws, helped obtain reinstatement for workers fired for attempting to improve working conditions, and ultimately succeeded in obtaining legislation to regulate the industry to limit the most abusive practices.[223] As conceived by the advocates, the legislation provided a vehicle for organizing the car wash workers into a union, a campaign

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215 *See* David Rosenfeld, *Worker Centers; Emerging Labor Organizations – Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 472–73 (2006).

216 FINE, *supra* note 214, at 2.

217 *See id.*

218 *See generally* FINE, *supra* note 214 (providing a thorough review and analysis of various worker centers).

219 *See* GORDON, *supra* note 214, at 8–9; Jennifer Gordon, *The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law* 1 (International Migration Policy Program, Working Papers, Carnegie Paper No. 4, August 1999), *available at* http://www.carnegieendowment.org/files/imp_wp4gordon.pdf (describing the act that significantly increases penalties for unpaid wages from a 25% civil fine to a 200 percent civil fine and from a misdemeanor with a maximum $10,000 penalty to a felony with a maximum $20,000 penalty). The law also provides workers with more tools to collect back pay owed. GORDON, *supra*.

220 *See* Narro, *supra* note 214, at 344.

221 *See id.* at 353.

222 *See id.* at 344.

223 *See id.* at 362.

which was undertaken by a traditional labor union, the United Steelworkers of America.[224]

These campaigns illustrate several different models of combining legal strategies with organizing to achieve protection for workers. Like the worker centers, public sector unions in Virginia, without the ability to strike or to negotiate binding collective bargaining agreements,[225] use similar strategies of lobbying, service (including legal actions), and organizing to accomplish their goals. Traditional unions utilizing these strategies have some advantages over the worker centers. One of the major issues facing the worker centers is financing.[226] Traditional unions can rely on member dues for financial stability if they are able to organize workers effectively or can lawfully negotiate a union security clause requiring payment of dues by bargaining unit members.

Worker centers and the most successful Virginia unions share an additional characteristic. The most successful unions in Virginia are primarily those in workplaces where the employees share not only an employer, but a profession.[227] Many worker centers focus on employees from particular ethnic groups.[228] Thus, both groups organize employees with shared characteristics that create bonds which may aid in organizing.[229] Without either of these shared traits, nontraditional private sector organizing may be more difficult.[230]

Finally, in the private sector, there is a concern that organizations engaged in organizing and legal actions for workers rights may run afoul of the NLRA. David Rosenfeld has pointed out the possibility that organizations like worker centers may be found to be labor organizations under the NLRA and thus be subject to a number of legal restrictions under the statute.[231] In addition, if a union is trying to organize employees under the NLRA, providing legal assistance to workers may be considered an improper inducement for union support.[232] These risks do not exist where collective bargaining is banned, most notably, the Virginia public sector.

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224 *See id.* at 368.

225 While the workers affiliated with worker centers typically retain the right to strike, the centers rarely choose such a strategy. *See* FINE, *supra* note 214, at 257–59.

226 *See* Rosenfeld, *supra* note 215, at 479.

227 Even the AFSCME local that has achieved legislative success has a membership that is composed primarily of employees who share a profession and employer—corrections officers. *See supra* notes 99, 144, and accompanying text.

228 *See* Rosenfeld, *supra* note 215, at 471–72; FINE, *supra* note 214, at 42–71.

229 *See* FINE, *supra* note 214, at 42–45.

230 For a discussion of some of the challenges of multicultural organizing, see FINE, *supra* note 214, at 61–69.

231 *See* Rosenfeld, *supra* note 215, at 499–503.

232 *See* Freund Baking Co. v. N.L.R.B., 165 F.3d 928 (D.C. Cir. 1999); Catherine Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 60 (2002).

Despite these differences between the public and private sectors, the Virginia experience may provide further support for alternative union strategies in the private sector. Professor Dau-Schmidt has suggested that traditional collective bargaining may continue to be effective only where international competition is not a threat.[233] The success of some Virginia public sector unions suggests that unions can survive, and in some cases thrive, without traditional bargaining. Virginia provides a model for unionization in an uncertain or even hostile legal environment. By studying the factors that contributed to success in Virginia, unions may find additional strategies for the private sector.

One factor that Virginia union leaders have stressed is the need for continual organizing in situations where there is no collective bargaining agreement and no union security clause.[234] These leaders distinguished their unions from those in states which authorize bargaining in this regard, suggesting that their counterparts in other states relied on the contracts more heavily and did not feel the same need to engage in constant organizing and political activity.[235] The value of this strategy should not be lost on unions with collective bargaining agreements, however. While organizing for support may be essential in a hostile legal environment, it can also provide valuable benefits for any union. Support from the employees is essential to establish union strength and solidarity for bargaining, grievance actions, and any other activity that the union undertakes. Indeed, many scholars and union activists are suggesting and experimenting with new union activities that involve employees more directly in the work of the union.[236] Under this model, the union is not a servicing organization for the members; rather the union is driven by the members themselves and its members' activism leads to more successful results in disputes with management.[237] The experience of some Virginia unions supports the conclusion that this model can be successful even where formal bargaining is not permitted.

B. The Public Sector

The comparison of Virginia and Illinois may offer a blueprint for public sector labor relations as well. The trajectory of the public sector

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233 *See* Kenneth Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 922 (2007).

234 *See supra* notes 114– 115 and accompanying text.

235 Interview with Marian Flickinger, *supra* note 99; Interview with Dena Rosenkrantz, *supra* note 99; Interview with David Pulliam, President, *supra* note 99; Interview with Michael Mohler, *supra* note 105.

236 *See* Michael M. Oswalt, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 718–19 (2007) (highlighting scholarly research and anecdotal evidence from union efforts supporting the value and success of "relational organizing" and "sustained internal union activism").

237 *See id.*

union movement has followed that of the private sector movement (although some years later). While there are certainly some differences between the two, trends in unionization show that in both the private and public sectors, it rose to similar heights in the years after legalization of collective bargaining. Private sector union density peaked at 35% in 1954, almost twenty years after the passage of the NLRA, and has been declining ever since.[238] Public sector union density followed a similar path in the first twenty years after the beginning of legalization in the late 1950s.[239] Since that time, growth has leveled off, but there has not been a precipitous decline.[240] The steady decline in private sector union density did not begin until the 1980s, however, so it is too early to tell whether the public sector may follow a similar but perhaps slightly delayed pattern.

While the pressures of global competition (one of many factors in the private sector union decline) are less likely to affect public sector employees, the issue of outsourcing (whether local or international) poses a very real threat to the jobs of public workers.[241] Traditional collective bargaining may continue to be effective only where neither international nor private sector competition is a threat.[242] In workplaces where traditional collective bargaining is no longer effective, the Virginia model (which uses active and continual organizing, public pressure, legislative advocacy, and legal action) may provide an alternative approach to thwart the decline of unionization. Since some Virginia unions have been successful where bargaining is outlawed, their approach may work effectively where bargaining is permissible but no longer as effective due to external pressures.

Finally, the Virginia experience suggests that at least some employers are willing to work with unions in a cooperative way in the absence

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238 *See* Charles B. Craver, *The Clinton Labor Board: Continuing a Tradition of Moderation and Excellence*, 16 LAB. LAW. 123, 148 (2000). Private sector union membership stood at 7.6% in 2008. HIRSCH & MACPHERSON, *supra* note 43, at 12.

239 In 1979, twenty years after the passage of the first state public sector bargaining statute, public sector union membership reached 37%. *See* HIRSCH & MACPHERSON, *supra* note 43, at 16.

240 *See id.* The data book shows membership patterns from 1979–2007 ranging between a low of 34.3% in 1981 to a high of 38.7% in 1994. In 2008, membership was at 36.8%.

241 While there is significant debate about the advantages and disadvantages of privatization of government, there is a significant move toward outsourcing of government operations. *See* Ellen Dannin, *Counting What Matters: Privatization, People with Disabilities and the Cost of Low-Wage Work*, 92 MINN. L. REV. 1348, 1349 (2008); Ellen Dannin, *Red Tape or Accountability: Privatization, Publicization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 114 (2005); Drury Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 83 (2003); Demetra Smith Nightingale & Nancy M. Pindus, *Privatization of Public Social Services*, URBAN INSTITUTE, Oct. 15, 1997, http://www.urban.org/url.cfm?ID=407023 (last visited July 11, 2008).

242 *See* Dau-Schmidt, *supra* note 233, at 922.

of binding collective bargaining.[243] While the evidence is purely anecdotal and quite limited, it suggests the possibility that employers may be more willing to work out agreements with unions when such agreements are non-binding and the law does not direct the parties to a particular type of relationship. The risk to the employer posed by an agreement with the union is obviously reduced if the agreement is not enforceable. Agreements can be quietly negotiated and compliance may proceed under the radar of public scrutiny, unlike the situation where negotiations are public and contracts require legislative approval. Experimental approaches may be tried without fear on either side that an unsuccessful trial will be set in stone.

Martin Malin and Charles Kerchner make a related point in their article *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*[244] Malin and Kerchner suggest that traditional collective bargaining, as cabined by the laws authorizing bargaining, results in negotiation of agreements relating to wages and working conditions.[245] Efforts by teachers to obtain a voice in educational policy are discouraged by existing bargaining laws.[246] Where teachers seek such a role, they must couch their interest in terms of wages and working conditions, regardless of their true motivation, because the laws typically grant them rights to bargain only about teacher working conditions and not issues related to educational policy.[247] Unions shape their agendas accordingly, focusing their efforts and their appeals to the membership on the basis of their ability to negotiate higher wages and better benefits and to protect workers against arbitrary management action.[248] Management focuses on resisting the union's demands. Accordingly, both the employer and the union are discouraged, or at least diverted, from creating a different kind of workplace, where employees have more involvement and management and the union work together to achieve identified objectives and improve agency performance.[249] Neither party has the incentive to risk trying to establish a relationship where employees are empowered to participate with management in setting and achieving goals. Both parties direct their focus to traditional bread and butter issues.

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243 *See supra* notes 119-120 and accompanying text.

244 *See* Malin & Kerchner, *supra* note 111, at 898.

245 *See id.* at 921–23.

246 *See id.* While Malin and Kerchner's work is focused on teachers, the points that they make would apply in many other public sector workplaces where the employees sought a greater voice or the parties sought to create a high performance workplace characterized by employee involvement and flexibility. *See id.* at 892.

247 *See id.* at 921.

248 *See id.* at 923.

249 Malin and Kerchner do identify and describe instances where teacher unions have participated in alternative models to traditional labor relations. *See id.* at 903–11.

To the extent that either party is interested in negotiating about non-traditional issues, the employer may fear being bound by a contract and the union may fear that it will have to trade off benefits that its membership has learned to expect, risking member dissatisfaction. Further, bargaining about issues unrelated to traditional working conditions typically will not be required by law. Thus, the employer can resist without penalty and the union cannot lawfully compel the employer to bargain. Indeed, if the union tried to force the employer to negotiate using either economic or political pressure, it would likely violate the law, with potentially severe penalties.[250] When there is no collective bargaining law, none of these risks exist.

Of course, it is true that the employer and the union cannot work together in such a situation unless both are willing and the union's ability to pressure the employer to do so is limited. However, the union may have avenues of political pressure available to it, particularly in localities with elected representatives.[251] The employer also may need employee cooperation to achieve a particular goal, such as the Broad Prize awarded to the Norfolk School District.[252] The union provides a convenient vehicle for obtaining employee cooperation. Thus, regimes where no collective bargaining law exists may offer opportunities for the development of workplace cooperation between employers and unions that may be less likely in areas where traditional collective bargaining exists by statute.

This is not to suggest the repeal of existing collective bargaining laws, nor to promote the legal approach adopted by the Virginia legislature. A regime that encourages employers and unions to work together to find creative approaches to resolve workplace issues and to accomplish goals important to the organization and its employees could be easily achieved through amendments to collective bargaining legislation.[253]

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250 *See* Southern S.S. Co. v. N.L.R.B., 316 U.S. 31, 48 (1942) (finding that participation in an unlawful strike under the NLRA justifies termination of employees); Bd. of Trustees v. Illinois Educ. Labor Relations Bd., 612 N.E.2d 1365, 1371 (Ill. App. Ct. 1993) (finding employer violated IELRA by bargaining to impasse over a nonmandatory subject); County of Cook v. Ill. Local Labor Relations Bd., 574 N.E.2d 754, 759 (Ill. App. Ct. 1991) (finding insistence on nonmandatory bargaining subject violated the IPLRA); Detroit Newspaper Agency, 327 N.L.R.B. 799, 808 (1999) (economic action in support of nonmandatory bargaining proposals is unlawful under the NLRA); THE DEVELOPING LABOR LAW, *supra* note 31, at 792; ROBERT GORMAN & MATTHEW FINKIN, BASIC TEXT ON LABOR LAW 587 (2d ed. 2004); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WIS. L. REV. 1, 134 (noting that under the NLRA, workers who use economic pressure to force agreement on permissive subjects of bargaining can be terminated without legal recourse).

251 As noted above, it is more difficult to mount political pressure in larger units like the state as a whole.

252 *See supra* note 120 and accompanying text.

253 Malin and Kerchner suggest that for charter schools, the charter could require teacher involvement in decision making, while leaving the choice of the method of involvement to the school. *See* Malin & Kerchner, *supra* note 111, at 935. Minnesota requires the public em-

Such an approach would avoid the unfriendly legal climate that has hampered union organizing in Virginia. But where no collective bargaining law exists, the savvy union will seize the opportunity for employee involvement in decision-making that the union can achieve through a combination of political pressure and emphasis on the lack of risk to the employer.

CONCLUSION

The comparison of public sector labor relations and the labor law of Illinois and Virginia leads inevitably to the conclusion that the law affects the ability of unions to organize. As others have persuasively argued, however, the law is probably both chicken and egg, as the level of unionization impacts the law and the law impacts the level of unionization. The larger and more powerful unions in Illinois have helped to persuade the legislature to enact laws favorable to unionization and bargaining. The favorable laws in turn have led to an increase in union membership, where the new members then supported additional favorable changes in the law. In Virginia, unfavorable legal developments reduced, but did not eliminate, unionization. Resistant employers can effectively exploit the law to thwart union efforts to represent employees without legal protection. This Article, however, shows that the absence of legal protection for bargaining does not make it impossible for a determined group of employees to organize effectively, to utilize their available power, and to bring employers to the table to create acceptable and even favorable terms and conditions of employment. Unions and employees in both the public and private sectors should consider the factors that have contributed to the success of those Virginia unions that have managed to survive in a hostile legal and political environment. Adoption of similar strategies could benefit unions struggling to survive in the private sector and help public sector unions, not only to consolidate their current positions, but also to increase their membership.

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ployer to meet and confer with the representative of the public professional employees on matters that are not mandatory bargaining subjects. MINN. STAT. ANN. § 179A.08 (2006). The legislature's rationale for the requirement is to enable the knowledgeable professional employees to help employers develop policies for the benefit of the public. MINN. STAT. ANN. § 179A.08 (2006). In *The Paradox of Public Sector Labor Law*, Malin suggests a number of other ways that jurisdictions can move away from the model which encourages unions to focus exclusively on terms and conditions of employment toward a model that encourages unions and employers to work together to solve the problems of the organization. *See* Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. (forthcoming 2009).