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A CASE STUDY IN SUBNATIONAL CONSTITUTIONALISM: THE STATE CONSTITUTIONAL RIGHTS OF PUBLIC EMPLOYEES IN THE UNITED STATES TO COLLECTIVELY BARGAIN

I. INTRODUCTION

The individual states which comprise the federal United States may in some sense be viewed as "legal laboratories". While the Supremacy Clause of the United States Constitution guarantees that federal law shall be the supreme law of the land, and thus higher than state law, the states do have significant room for legal innovation in their respective sphere of jurisdiction. In the best case, such innovations may be used as a model for other states which face the same issue or problem.

In general, the federal government in the United States has jurisdiction over labor law matters, to the extent that the regulation of labor effects interstate commerce[1]. This jurisdiction has been exercised by the federal legislature (Congress) by the passage of the National Labor Relations Act[2]. The NLRA, however, covers only certain private sector employees, and specifically excludes public sector employees – i.e., employees of state and local governments. Thus, the rights of these employees to organize labor unions

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[1] Much of the power of the federal government is derived from the Commerce Clause of the United States Constitution.

[2] 29 U.S.C. §151 *et seq.,* "NLRA".

and collectively bargain with their employers is left unregulated by federal law, and therefore, in this case, these areas are subject to the jurisdiction of the respective states.

Some states, such as Virginia and other southern states, either expressly prohibit collective bargaining for public employees or provide no affirmative right for these employees to engage in such bargaining. In contrast, other, typically Northern and Mid-Western states, do provide extensive labor protection for public employees. In the middle of both extremes are states who provide public employees with limited bargaining rights.

Albert Shanker, the former president of the American Federation of Teachers (AFT), aptly summarized the limitations teachers and other public employees endure under the patchwork of state and local labor laws by pointing out that without a requirement on the employer to negotiate in good faith and the absence of a right to strike, there is no meaningful pressure on the employer to reach an agreement with its employees[3].

Presently, even in those jurisdictions with extensive statutory labor laws, severe public budget crises had led legislatures to either severely curtail or altogether eliminate these rights for public employees[4]. When public employees have turned to federal constitutional law to guarantee and/or protect certain minimum bargaining rights or the right to strike, the federal courts have essentially held that no such rights may be derived from the federal constitution. Specifically, their First Amendment (freedom of speech and association), Fifth and Fourteenth Amendment (due process and equal protection), and Thirteenth Amendment (involuntary servitude) arguments to create a constitutional right to collectively bargain and strike have all been rejected by the federal courts[5].

This article suggests that state constitutional rights are (and would be) a better means of protecting the bargaining rights of state public employees.

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[3] *Statement of Albert Shanker,* Hearings on S.3295 and S.3294 (bills proposing that state and local government employees be covered by the NLRA), before the Subcommittee on Labor of the Senate Committee on labor and Public Welfare, 93rd Congress, Second Session, 281-284 (1974).

[4] Over the course of 2011, Wisconsin severely restricted the rights of public employees to collectively bargain, as did Ohio to a lesser extent.

[5] *See, e.g., Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 99 S.Ct. 1826 (1979) (no constitutional right to collective bargaining); *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd* 404 U.S. 802 (1971) (no constitutional right to strike).

Such rights are really of a fundamental nature, and thus are deserving of constitutional protection. To the extent these rights are not granted by the federal constitution, states have the authority to extend them through their own state constitutions, which possess an independent vitality.

The jurisprudence of those states which already possess such state constitutional provisions providing bargaining rights to public sector employees will be examined first. A focus will be placed on problems with the interpretation and application of these provisions, and also best practices. Through this analysis, a model or template for other states to follow will be presented.

II. STATE CONSTITUTIONAL PROTECTION OF THE RIGHTS OF PUBLIC EMPLOYEES

The largest group of employees protected by labor related state constitutional provisions are non-federal public employees. In many cases, public employees are covered by a variety of state labor relations statutes, often known as Public Employee Relations Acts (PERA's). However, even where such PERA's exist, the rights afforded to employees subject to them may be extremely limited, in terms of the right to organize, bargain, and strike. Whether a PERA exists or not, the baseline protection for all public employees were established by the U.S. Supreme Court in *Smith v. Arkansas State Highway Employees, Local 1315*[6]. In that case, the Court held that the First Amendment protected a public employee's right to associate with a labor organization. However, the First Amendment provided no guarantee that the speech of the employees, through their labor organization, would be persuasive or effective. Thus, under the U.S. Constitution, public employees do not have the right to bargain with their employers over wages, hours or other terms and conditions of employment, as the employers have no obligation to listen or consider the employees petitions or grievances.

The effect of the *Smith* decision was to severely impair the value of an employee joining a union, as such a union would not even have the right to get to the bargaining table with the employer. Thus, in states without their own constitutional provisions guaranteeing bargaining and organizational rights, PERA's that do exist often (especially in the South) limit their scope

[6] 441 U.S. 463, 99 S. Ct. 1826 (1979).

to the minimal safeguards established in *Smith*, or are extended just slightly beyond them (such as granting bargaining right over limited topics). In the majority of cases, the right to strike is proscribed by statute or, alternatively, is prohibited from a common law basis.

In such states, state constitutional provisions relating to organizing and bargaining would greatly expand employees' rights from the small foothold granted them in *Smith*. Labor unions could invoke these provisions to expand the scope of bargaining in their negotiations with the employer, or again, assert a right to strike in the absence of statutory authorization permitting them to do so. Even in states regarded as having comprehensive „pro-labor" PERA's, these provisions could provide a minimum standard of rights which the legislature could not roll back in subsequent terms.

A. THE BASIC RIGHT TO ORGANIZE AND BARGAIN

All public employees have the right to join or form a labor organization under the U.S. Supreme Court's decision in *Smith*. However, to make that right meaningful, these employees can look to their state constitutions in certain instances in order to obtain the correlative right to engage in collective bargaining. If there is a state constitutional provision directly providing employees with a right to engage in collective bargaining, the next step is to determine whether the provision actually applies to public employees.

It is important to note here, however, that the apparent plain meaning of the state constitutional provision guaranteeing the right to organize and bargain is not always determinative in this regard. In Missouri, the State Supreme Court initially determined that Art. I, §29 of its Constitution, which reads "That employees shall have the right to organize and to bargain collectively through representatives of their own choosing", did not afford any such organizational or bargaining rights to public employees[7]. The Court based its conclusions on two different authorities: The debates during the Constitutional Convention of 1945 pertaining to the adoption of Article I, §29, and the Separation of Powers clause of the Missouri constitution (Article II, Mo. Const.).

[7] *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947).

During the Constitutional convention of 1945, several proponents of the adoption of Article I, §2 9 appeared to readily concede that the provision would not apply to public employees. For example, the provision's main sponsor, H. R. Wood, president of the State Federation of Labor, stated in the debates for its enactment that "I don't believe there is anyone in the organization that would insist on having a collective bargaining agreement with a municipality setting forth wages, hours, and working conditions. That would be absolutely impossible [...] [since wages and hours must be] provided by law"[8].

Additionally, the Missouri court held, granting public employees the right to bargain would be in contravention of the separation of powers clause of the Missouri constitution. Under that clause, the legislature cannot delegate its legislative powers. These powers include the ability to regulate tenure, compensation, and working conditions for all public employees. Since such powers cannot be delegated, they also cannot be bargained or contracted away to any labor organization[9]. For that reason, it would be impossible that Article I, §29's protection of the right to organize and bargain would apply to public employees.

This decision was subsequently overruled by the Missouri Supreme Court sitting *en banc*[10]. The Court rejected both of the foundations upon which the *Clouse* court based its decision. First, the Court held that nothwithstanding the legislative history of Article I, §29, the plain language of that provision – giving all employees the right to collectively bargain, without any qualifications – dictated that it apply to both private and public sector employees. The Court aptly noted that the voters who approved this provision were voting on the actual language of this section, and not on the legislative history (of which they probably were not aware)[11].

Next, the Court found that the doctrine of non-delegation of powers (whereby the state could not delegate its power to determine employment conditions for public employees), also relied upon by the *Clouse* court, had been eroded since 1947 and no longer possessed any vitality. Indeed, Missouri had passed a law allowing certain public employees to meet and confer with their

[8] *Id.* at 544.

[9] *Id.* at 545.

[10] *See Independence Nat. Educ. Ass'n v. Independence School Dist.*, 223 S.W.3d 131 (Mo. 2007).

[11] *Id.* at 136-137.

employers, and even negotiate collective bargaining agreements. Public employers were not compelled to reach any agreement, and were free to reject all of the unions' proposals. Under these circumstances, there was no unlawful delegation of the authority of the legislature[12].

Still, the *Clouse* decision, and its reliance on legislative history, serves as a cautionary tale. Thus, before generally assuming the applicability of a state constitutional provision to public employees, even for organizational purposes, it is important to examine the "legislative history" of that provision's enactment in the State Constitutional Convention. For advocates attempting to add such a provision to their state's constitution, it is likewise critical to make clear in the Constitutional Convention or legislative history of the amendment that it is intended to cover public employees[13].

While the right to organize is protected with or without a specific constitutional provision on organizing or bargaining, *see Smith, supra*, this is not the case with the corresponding right to collectively bargain. A state constitutional provision guaranteeing the right of employees to bargain may provide public employees with three possibilities: no bargaining rights; the right to present grievances to one's employer, but with no obligation on the employer's part to affirmatively bargain on these issues with its employees; or the right to bargain with one's employer, with the employer having the obligation to listen and likewise engage in such bargaining.

Assuming that it has been determined that a state constitutional provision granting the right to bargain was intended by its enactors to apply to public employees, there is an argument that it actually provides no bargaining rights whatsoever. As discussed in the *Clouse* case, *supra*, it may be argued that the grant to public employees of the right to bargain is an unlawful delegation of legislative authority under the separation of powers clause of the state's constitution.

While this argument initially succeeded in Missouri in *Clouse*, it was overruled by the Court in *Independence Nat. Educ. Ass'n*, and it has been squarely rejected, at least in part, by the Florida Supreme Court. In *Dade County Teachers' Ass'n, supra*, the Court overruled the earlier decision of

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[12] *Id.* at 137-138.

[13] *See Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So.2d 903 (Fl. 1969) (In determining that constitutional provision guaranteeing the right to organize and bargain was applicable to public employees, Court looked to the legislative history of the provision which indicated that both public and private employees were intended to be covered).

Miami Waterworks Local 654 v. City of Miami[14], which had held that employment could not be a subject of bargaining or contract between a union and the state or its subdivisions. The court noted that *Miami Waterworks* had been decided before the adoption of Article I, §6, guaranteeing the right of employees to organize and bargain, in 1968. As a result, that decision did not take into account the subsequent public policy developments in favor of the right of public employees to collectively bargain, and therefore could no longer be considered good law[15]. The court then held that aside from the right to strike, Article I, §6 conferred the same rights to public employees which private employees possessed, which included the right to collectively bargain[16].

However, the Florida Court later scaled back this right on separation of powers grounds in its *Florida v. Florida Police Benevolent Ass'n*[17] decision. In that case, several police unions entered into collective bargaining agreements (CBAs) with the governor of Florida. These CBAs provided for, among other things, a certain rate of accrual of sick leave per month (17.333 hours). Subsequently, the legislature refused to fund this provision of the CBA, and instead unilaterally decreased the rate of sick leave accrual by only funding it at a rate of 13 hours per month.

The police unions argued that this unilateral change in their CBAs violated their rights under Article I, §6 of the Florida Constitution, which provided in pertinent part: "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged". Specifically, the unions contended that the legislature's unilateral change in the terms of their CBAs, by effectively reducing the rate of sick leave accrual to 13 hours per month, rather than the 17.33 hours they had bargained for, was an abridgement of their right to collectively bargain.

The Florida Court disagreed, holding that the legislature had the exclusive power over public funds under the state constitutions, and could not be compelled by a union to allocate those funds in a particular manner. Thus, "where the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of the funds will stand even if contradictory to the negotiated agreement".

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[14] 26 So.2d 194 (1940).

[15] *Dade County Teachers Ass'n*, 225 So.2d at 905-906.

[16] *Id.* at 905.

[17] 613 So.2d 415 (Fl. 1992).

The effect of the *Florida Police* decision does not impede the right of employees to effectively bargain with their employer per se, but does potentially limit the fruits of such bargaining by making every provision of the CBA requiring funding subject to the whims and vagaries of the legislature.

Even where bargaining rights concededly exist under a state constitution, the scope of such rights is arguably limited. For instance, in the New York case of *Erie County Water Authority v. Kramer*[18], a union representing certain public employees working for the Water Authority brought suit to compel the Authority to engage in collective bargaining, citing Article I, §17 of the New York Constitution. Article I, §17 states in pertinent part that "Employees shall have the right to organize and to bargain collectively through representative of their own choosing".

The New York Court refused to compel bargaining. It reasoned that Article I, §17 only gave employees as much right to bargain, beyond a certain minimum, as existed by statute at the time that provision was enacted in 1938. Since the New York State Labor Relations Act, passed in 1935, exempted public employees from its coverage, public employees could not maintain that employers had a duty to bargain with them. Minimally, public employees did have a right to organize and bargain collectively under the New York Constitution, but this "does not cast upon all employers a correlative obligation"[19].

As a result, public employees in New York are left only a skeletal right to bargain beyond their right to organize under Article I, §17. In essence, the constitutional provision only guarantees as many rights as the applicable statute will provide.

Moving to the most expansive end of the bargaining continuum, the courts of Louisiana and Florida (subject to certain separation of powers limitations, as discussed infra) have interpreted their states' constitutional provisions as granting public employees the same collective bargaining rights as private employees. That is, the employees have a right to bargain, and the employers have a correlative duty to listen and bargain good faith over most aspects of the employment relation[20].

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[18] 143 N.Y.S.2d 379 (Sup. 1955).

[19] *Id.* at 382-383.

[20] *Dade County Classroom Teachers Ass'n, supra,* 225 So.2d at 905; *Davis v. Henry*, 555 So.2d 457 (La. 1990).

The *Davis* case is of special significance, since unlike many of the decisions examined thus far, the court in this case actually read its state constitutional provision more expansively than the text would suggest, rather than reading it more restrictively.

In *Davis*, a union consisting of public school teachers had gone out on strike, and asserted that the state had no right to enjoin its activity. In the context of determining what rights the teachers possessed under state law, the Court looked to the Louisiana Constitution. Under Article 10, §10(3) "[...] No rule, regulation or practice of the [Civil Service] commission, of any agency or department, or any official of the state of any political subdivision shall favor or discriminate against any applicant or employee because of his membership or non-membership in any private organization; but this *shall not* prohibit any state agency, department or political subdivision from contracting with an employee organization with respect to wages, hours, working conditions, or other conditions of employment in a manner not inconsistent with this constitution [...]" (emphasis added).

The Court interpreted this provision to protect public employees from discrimination due to their membership in a labor organization, and noted that "with the passage of this provision, public employees became constitutionally entitled to the same right to engage in collective bargaining as held by their counterparts in the private sector"[21]. Thus, as mentioned earlier, the rights of private employees in collective bargaining also entailed a corresponding obligation on the part of the employer to listen and bargain in good faith.

This interpretation of Article 10, §10 (3), granting public employees in Louisiana such broad bargaining rights, is clearly an unusual one. The provision merely states that the state and its subdivisions are not prohibited from bargaining with public employees. It does not actually mandate such bargaining, let alone to the extent that private employees enjoy. Yet, the Louisiana court has interpreted it to require these rights.

The implications of a state supreme court broadly interpreting such a provision may be great, particularly for advocates arguing that state constitutional provisions in states such as those guaranteeing the rights of labor (Ohio, Utah and Wyoming), or prohibiting discrimination against union members (Nebraska, South Dakota, North Dakota, and Mississippi), should likewise infer a right to organize and bargain. Also, decisions like *Davis* may

[21] *Id.* at 462.

provide a basis for arguing that states with more specific constitutional provisions providing for collective bargaining rights, that have thus far been interpreted narrowly, such as New York and Missouri, should reexamine these provisions in a broader light after the *Davis* decision.

B. THE SCOPE AND PROCESS OF BARGAINING

Where it is determined that public employees do have a constitutional right to bargain, the actual scope of the bargaining may nevertheless still be constrained. The actual extent of these limitations on bargaining subjects, if any, is sometimes determined by the text of the constitutional provision itself.

In New Jersey, for example, the relevant provision states that "Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing"[22]. In interpreting this provision as it applied to public employees, the New Jersey Supreme Court in *Lullo v. International Ass'n of Firefighters*[23] "recognized that the rights secured to public employees are less than those similarly entrenched for private employees"[24]. The primary reason for this conclusion was that the provision specifically delineated the rights of public and private employees. While private employees enjoyed the right of collective bargaining in the "full sense", the provision only granted public employees the opportunity to meet and confer with their employees, and did not use the term "collectively bargain". As a result, public employees in New Jersey are often unable to expand upon the bargaining rights available to them under the statute[25].

The Florida constitution, however, provides public employees with the same rights in collective bargaining as are possessed by private employees[26]. Except for the right to strike, there is no differentiation between

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[22] N.J. Const., Art. I, para. 19.

[23] 262 A. 2d 681 (N.J. 1970).

[24] *Id.*

[25] See *Lullo, supra*, (independent firefighters union which lost representation election had no right to represent public employees which still supported it at bargaining table); *In the Matter of the State of New Jersey v. Prof. Ass'n of the N.J. Dept. of Education,* 315 A.2d 1 (N.J. 1974) (public employees unable to insist on state-wide bargaining unit of nurses).

[26] *City of Tallahassee v. PERC*, 410 So.2d 487 (FI. 1981), *citing Dade County Classroom*

public and private employees in the collective bargaining provision of the Florida Constitution. It simply provides that "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged"[27]. As a result, the Florida courts have often held that topics traditionally bargainable in the private sector, such as retirement benefits and wages (even where regulated by the civil service system), are also bargainable in the public sector by virtue of Article I, §6[28].

Nevertheless, in *City of Miami v. F.O.P., Miami Lodge 20*[29], a Florida Court of Appeals determined that while in the abstract the right to bargain was equal in both the public and private sector, certain topics were still unbargainable in the public sector. Thus, while private employees did have the right to collectively bargain over drug testing, the court held that public employees did not. A subject was only bargainable for public employees where the interests of the public (the government employer) and public employee were adverse. Since the Union in this case admitted that it had an interest in a drug-free police force, which the City desired as well, it had no right to bargain over the implementation of the drug testing plan[30].

The *F.O.P., Miami Lodge 20* case appears to be irreconcilable with the earlier court decisions holding that public and private employees possessed the same bargaining rights under Article I, §6 of the Florida Constitution. Since private employees do have the right to bargain over drug testing, such recent Florida State Supreme Court decisions seem to agree that there are differences between the two groups of employees after all. In Florida Police, discussed above, the State Supreme Court noted that "myriad distinctions, not just those of procedures, exist between public and private collective bargaining", and found that it would be impractical to require bargaining in the two settings to be identical[31].

It is important to recognize, then, with even apparently clear constitutional language granting public employees the right to collectively bargain, that this

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Teachers' Ass'n v. Ryan, 225 So.2d 903, 905 (FI. 1969).

[27] Fla. Const., Art., I, §6.

[28] *City of Tallahassee, supra*, (retirement benefits bargainable in public sector); Hillsborough Govt., Employees Ass'n, 522 So.2d 358 (wages, hours, and terms and conditions of employment bargained over and agreed upon in CBA cannot be subsequently altered by civil service rules under Article I, §6, even where there is a conflict between them).

[29] 571 So.2d 1309 (Fla. 3rd DCA 1990).

[30] *Id.* at 1328-1329.

[31] 613 So.2d at 417.

right is not necessarily equal to the collective bargaining rights enjoyed in the private sector.

C. THE RIGHT TO STRIKE

Inferring a right to strike from even specific constitutional collective bargaining provisions is even more problematic. Some state constitutions, such as Florida's, specifically prohibit public employees from striking[32]. And, of course, it would be nearly impossible to infer a right to strike from a provision that courts have held to not even provide substantial bargaining rights, such as in New York and Missouri.

Even where a state constitution does guarantee collective bargaining rights, it is by no means assured that there is a correlative right to strike. The argument that it did was put before the New Jersey Supreme Court in *Board of Education, Union Beach v. N.J. Education Ass'n*[33] and before the Louisiana Supreme Court in *Davis, supra*, with mixed results.

In Union Beach, a group of public school teachers went on strike against the local board of education. The Board then sued to enjoin the teacher's strike activity. In determining whether the teachers, as public employees, had a right to strike, the New Jersey Supreme Court looked to Article I, Paragraph 19 of the state constitution. As it pertains to public employees, Article I, Paragraph 19 states that "Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing".

Thus, the constitution neither explicitly proscribes nor permits the right to strike. However, the court noted that there was a common law presumption against public employees having the right to strike. This being the case, any right of public employees to strike, "being a sharp departure from prior law and policy, must be deliberately expressed and is not to be implied"[34]. Since, there was no deliberate expression of a right to strike contained within the constitution, the court ruled that public employees still had no right to strike.

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[32] Florida Const., Article I,§6 ("Public employees shall not have the right to strike").

[33] 247 A. 2d 867 (N.J. 1968).

[34] *Union Beach*, 247 A.2d at 877, *quoting Delaware River and Bay Authority v. Int. Organization of Masters,* 45 N.J. 138, 148 (1965).

Even if *Delaware River* was to be ignored and a right to strike could be implied, the New Jersey Court went on to hołd that no such right could be inferred from Article I, paragraph 19. In fact, the opposite was true. In the debates during the Constitutional Convention of 1947, where Paragraph 19 was added to the constitution, the provisions opponents attempted to add a provision specifically prohibiting public employees from striking. However, sponsors of the bill made a compromise to avoid this language being placed in Paragraph 19. In exchange for getting the "no strike" language dropped, the sponsors agreed to state for the record that it was their understanding that Paragraph 19 would not alter the current common law prohibition against public employees having a right to strike[35].

The Louisiana Supreme Court reached an opposite result in its *Davis* decision. The Court inferred a right of public school teachers to strike from the state constitutional provision permitting public employees to bargain, as well as from other state labor statutes. Though they took notice of the common law prohibition of public employee strikes, they also pointed out that since Louisiana was not a common law jurisdiction, such a prohibition did not weigh against the public policy in favor of certain public employee strikes[36].

If one views the result in *Davis* as a civil law aberration, it would still remain a difficult task to infer a right to strike from any state constitutional provision granting the right to organize and bargain[37]. However, one must also remember that aside from the fact that Louisiana is a civil law jurisdiction, the result in *Davis* is especially promising for future arguments of a state constitutional right to strike. That is, if a court in a "right to work" state (such as a number of states in the south, which are generally regarded as being anti-labor), can infer such a right from a constitutional bargaining provision, it is certainly possible in any other state whose constitution contains such a provision.

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[35] *Id.* at 875-876; *accord*, *Passiac Township Bd. of Ed. v. Passaic.*

[36] *Davis*, 555 So.2d at 463.

[37] *See Union Beach, supra.*

D. OTHER STATE CONSTITUTIONAL PROVISIONS PROTECTING PUBLIC EMPLOYEES' ORGANIZATIONAL AND BARGAINING RIGHTS

While the right to organize, bargain and strike may be protected to varying degrees by labor-related state constitutional provisions, it is also important to recognize that employees may also receive some protection from other more common state constitutional provisions.

In *Parkway School District v. Parkway Ass'n of Education*[38], the Missouri Supreme Court recognized that under the state constitution's freedom of expression and association clauses, Article I, §§ 8 and 9, public employees have the "right to join organizations and select representatives to confer with their employer"[39].

Perhaps more remarkably, in two earlier decisions, *Godchaux Sugars, Inc. v. Chaisson*[40], and *Douglas Public Service Corp. v. Gaspard*[41], the Louisiana Supreme Court held "that the laborer in his effort to secure better working conditions and wages is well within his right to organize, to bargain, and to take any and all needful steps to accomplish this end, including picketing", deriving these rights from state constitutional rights of Freedom of Speech and religion[42].

Thus, even in the absence of an organizational and bargaining provision in a given state's constitution, it is still possible that public employees are protected in their employment by various provisions in the state's Bill of Rights.

III. CONCLUSION

A small number of states – in particular, New Jersey and Florida – have specific language in their respective constitutions that has been interpreted by the judiciary to give wide-ranging bargaining rights to public employees.

However, in other states with provisions that have almost identical language to that of New Jersey and Florida's constitution, the courts have

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[38] 807 S.W.2d 63 (Mo. 1991).

[39] *Id.* at 66-67.

[40] 78 So.2d 673 (La. 1955).

[41] 74 So.2d 182, 187 (La. 1954).

[42] *Chiasson*, 78 So.2d at 680; *Gaspard*, 74 So.2d at 187.

either so limited them so as to take away the effect of their plain language, or simply ignored them. These are by no means insurmountable obstacles. As is the case of other state constitutional provisions, particularly those matching the federal constitution, to obtain a different or more expansive result than under federal law an advocate must carefully brief why that provision in that particular state mandates such a result[43]. This may be done by showing other state court's interpretations of a similar or identical provision, or through the legislative history of the incorporation of the provision[44].

With regards to the state constitutional provisions on collective bargaining, one could persuasively use the detailed and well reasoned New Jersey and Florida court decisions in order to convince the courts in other states with similar provisions to adopt their reasoning. The restrictive interpretations given by the Missouri and New York courts on these provisions are approximately 40 years old, and often employed a questionable analysis as to the scope and purpose of these provisions. The more recent New Jersey and Florida decisions may persuade other state courts to reexamine their prior holdings and instead adopt what appears to be the plain meaning of these provisions.

Also critical in this process is the particular constitutional history of the states that will reexamine this issue, as well as the states own special character and goals. In New Jersey, for example, "the particular industrial character of [the state] provides a basis for the argument that a right deserving of only legislative protection on a federal level is, nonetheless, a right of constitutional dimension in New Jersey's peculiar milieu"[45]. The key issue in adopting this provision in the New Jersey constitution was to provide a means for labor to judicially enforce its rights, rather than be forced to use economic violence to obtain this goal and thereby disrupt the state's economy[46]. In Florida, on the other hand, a primary issue in incorporating a similar constitutional provision was to grant public employees the right to collectively bargain[47].

Similarly, each state's own peculiar interests in favor of collective bargaining should be raised in order to convince a court to give meaning to

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[43] *See Edmunds*, 586 A.2d at 894-895.

[44] *Id.*

[45] *Farmworkers' Bargaining Rights, supra* 18 Rut. L.J. at 742.

[46] *Id.* at 741.

[47] *See Dade County Classroom Teachers Ass'n,* 225 So.2d at 905.

its own constitutional provision. Combined with more expansive interpretations of similar provisions by courts of other jurisdictions, it is quite realistic that such provisions will be given the life that they were intended to have from the beginning, with millions of NLRA-exempt public employees as the main beneficiaries.

States with more restricted constitutional amendments, either protecting a right to work, or guaranteeing the rights of labor in general, can also be argued to protect the right to organize and collectively bargain, although this will require some stretching of the literal language of these provisions. Once again, policy arguments are critical. In Louisiana, which has a right to work constitutional provision, the court reasoned that the state had made a policy decision in allowing unionization of public employees. Implicit with that decision was to grant unions effective rights to bargain, and even to strike. Since Louisiana is a civil law jurisdiction, the common law presumption against strikes carried little weight with the court[48].

With some exceptions, state courts have been eager to utilize their constitutions to protect the rights of their citizens where federal standards are either inadequate or non-existent. If special state interests can be shown, even more limited provisions protecting labor rights may be expanded to promote collective bargaining rights in general.

For states with no provisions on labor rights, arguments may be made that other state constitutional provisions, such as those guaranteeing free speech, equal protection, and the prohibition on involuntary servitude, imply a right to organize, bargain and strike. As these arguments have almost universally been unsuccessful[49], however, it is still necessary for such states to incor-

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[48] *Davis*, 555 So.2d 457; *see also City of Rocky River v. State Employment Relations Board*, 539 N.E.2d 103, 115 (Oh. 1989) (Home rule provision of constitution did not invalidate law which stated that labor disputes with firefighters had to be submitted to binding arbitration, since Art. II, §34 of constitution stated that laws may be passed fixing a minimum wage and providing for the generał welfare of all employees; "and no other provision of the constitution shall impair or limit this power". The court found that §34 did not simply apply to minimum wage laws by looking to legislative history of the incorporation of the provision in the constitutional convention.); *AFSCME v. Woodward*, 406 F.2d 137, 140 (8th Cir. 1969) (Public policy of state of Nebraska, which has right to work clause in its constitution, is that "employment should not be denied on the basis of union membership").

[49] *See, e.g., Anchorage Educ. Ass'n v. Anchorage School District,* 648 P.2d 993, 996 (Alaska 1982) (even under "substantial relationship standard" of Alaska's equal protection clause, state was justified in denying teachers the right to strike even while granting that right to other public employees).

porate a constitutional amendment granting employees the right to organize and bargain.

A threshold question, however, is the feasibility of actually incorporating such an amendment into a state constitution. There are essentially two main concerns: its procedural feasibility, and its political feasibility. However, neither of these issues operate as a real bar to these provisions' incorporation.

First, on a procedural level, it is entirely possible for a good majority of the voters in a given state, together with the ratification of their legislature, to effectuate a change or addition to their constitution. While the mechanics of amending a constitution do vary from state to state, on the whole the standards for doing so are considerably less stringent than under the federal constitution. In California, for example, the voters have routinely amended their constitution to reflect their particular concerns in the area of criminal rights[50]. If such amendments can take place in the state with the largest and arguably most diverse population, it is certainly possible for the states to incorporate a labor rights provision in their constitution.

On a political level, it is arguable that such amendments, even though procedurally feasible, cannot garner enough support from a population that has over the past 15 years been decidedly less pro-union. While this may be true in some states, perhaps in the traditionally anti-union South, the opposite should likewise be true in traditionally liberal states such as Massachusetts. And even on a broader level, the less favorable climate for unions across the country in the past decade in the private sector has not been matched in the public sector. On the state and municipal level, unionization rates have actually been on the rise. In a number of states and their subdivisions, nearly 50% of public sector employees have chosen to join unions where they have been able to do so.

Equally significant is the potential political power these groups possess, such as the various teachers unions (the NEA and the AFT) and nurses organizations (the American Nurses Association, or ANA). These groups are well-funded and could organize a successful campaign to inform and persuade the public of the necessity of incorporating a constitutional amendment on organizing and collective bargaining.

The key to such a campaign would be to stress that what public employees are asking for is not some far reaching, ultra-liberal provision that

[50] See, for example, Ca. Const., Art. I, §28, "the victims bill of rights".

would force small businesses and towns to be at the mercy of large labor organizations, but instead a provision based on fairness and equality. It is likely that the public would recognize the patent unfairness of allowing a nurse to join a union in the private sector, but not at a state or county run health facility. At a minimum, all the provision would be doing is granting certain categories of employees the basic bargaining and organizational rights afforded to most of the population under the NLRA, but specifically tailored to meet the unique requirements of the individual state.

Finally, assuming that such an amendment can be incorporated into a state's constitution, careful attention should be given to its exact wording to prevent it from becoming a dead letter, as largely occurred with the New York and Missouri (until 2007) constitutional provisions[51]. To do this, the provision should clearly state that it affords both public and private employees the right to join a labor organization and to collectively bargain with their employer. In most of the states that have already enacted such a provision, it has been attacked as not covering public employees on the grounds that the term "employees" is not necessarily expansive enough to include both categories of workers.

Secondly, the provision should make clear that it is imposing upon employers a duty to bargain in good faith with the labor organization that the employees have chosen to represent them. While Missouri's provision stated that employees had the right to bargain collectively through representatives of their own choosing, the state supreme court held that the provision only protected the right to join a union, and did not require any employers to bargain with them. Thus, perhaps even in the provision itself mention should be made of the employers correlative duty to bargain to avoid such interpretations.

Another more state specific clause in such an amendment may concern the availability of the strike weapon to public employees. Florida's state constitution expressly prohibits public employees from striking, while other state constitutions are silent on the issue. The former option may be desirable in states with a strong fear of strikes shutting down the public sector, and where the public and legislature may more readily accept the amendment containing such a proviso. From labor's perspective, perhaps the right to strike should be included, with a savings clause providing for binding arbitration

[51] *See Quinn*, 298 S.W.2d 413; *Quill*, 113 N.Y.S.2d 887.

in lieu of a strike where essential public services would otherwise be threatened. The scope of "essential public services" could be left to the courts. But if agreement seems impossible on either version, the provision could be silent on the issue with interpretation of this issue also being left to the courts.

Finally, the provision itself should contain a clause stating organization that the employees have chosen to represent them. To avoid this being construed as only a meet and confer provision, with the employer having no obligation to bargain in good faith to reach an agreement, explicit mention should be made of the employers' correlative duty to bargain to avoid such interpretations.

In sum, state constitutional provisions protecting the right to organize and collectively bargain are essential to protecting the class of employees left inadequately or completely unprotected by federal labor law. As a matter of fundamental fairness, the states should incorporate or utilize existing constitutional provisions that provide their citizens these basic rights.

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A CASE STUDY IN SUBNATIONAL CONSTITUTIONALISM: THE STATE CONSTITUTIONAL RIGHTS OF PUBLIC EMPLOYEES IN THE UNITED STATES TO COLLECTIVELY BARGAIN

S u m m a r y

While the United States Constitution has attracted considerable attention at an international level, less focus has been made upon the constitutions of the individual states that comprise the United States.

This article examines the capacity of such state constitutions to provide collective bargaining rights to public sector employees, who are not given such rights under either the federal constitution or by federal legislation. Existing state constitutional provisions that address the bargaining rights of public employees, as well as interpretive case law, are examined in detail. The aim of the article is to ultimately aid states with similar dormant constitutional provisions, or states contemplating the adopting of such clauses to their own constitutions, by providing a model to follow and drafting mistakes to avoid.

Key words: collective bargaining, strike, organizing, state constitutions, constitutional law.

STUDIUM PRZYPADKU W REGIONALNYM KONSTYTUCJONALIZMIE: STANOWE PRAWA KONSTYTUCYJNE PRACOWNIKÓW PUBLICZNYCH DO ZBIOROWYCH NEGOCJACJI W STANACH ZJEDNOCZONYCH

S t r e s z c z e n i e

Wprawdzie konstytucja Stanów Zjednoczonych znajduje się w centrum uwagi na płaszczyźnie międzynarodowej, mniej uwagi poświęca się konstytucjom indywidualnych stanów, które składają się na Stany Zjednoczone.

Niniejszy artykuł zajmuje się zbadaniem, czy takie konstytucje stanowe udzielają sektorowi pracowników publicznych praw do zbiorowych negocjacji. Pracownicy ci nie mają takich praw na mocy konstytucji federalnej czy też według ustawodawstwa federalnego. W tekście badane są szczegółowo istniejące zabezpieczenia stanowych konstytucji, jak też interpretacyjne prawo precedensowe. Celem artykułu jest ostatecznie pomóc stanom, w których takie zabezpieczenia nie funkcjonują lub stanom, które rozważają przyjęcie takich zapisów do ich własnych konstytucji, dostarczając modelu lub opisując błędy, jakich należy uniknąć.

Tłumaczenie: Elżbieta Kłos

Słowa kluczowe: zbiorowe negocjacje, strajk, organizowanie, Konstytucja, prawo konstytucyjne.