ILLINOIS
School of Labor & Employment Relations

Advancing Worker's State Constitutional Rights

Illinois as a Model

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Labor Education Program
Project for Middle Class Renewal

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About the Authors

Matthew Finkin, Professor is the author or editor, singly or in collaboration, of twelve books including For the Common Good: Principles of American Academic Freedom (2009) (with Robert Post), the treatise Privacy in Employment Law (editions from 1995 to the present), the casebook Cox, Bok, & Gorman's Labor Law (editions from 1991 to the present), and a substantial body of periodical writing. In addition to his academic work, Professor Finkin is active as a labor arbitrator. He was elected to the National Academy of Arbitrators and serves on several standing arbitral panels in the public and private sectors. In 2020, he was given the Susan C. Eaton Outstanding Scholar-Practitioner Award by the Labor and Employment Relations Association.

David Amerson, Attorney is a staff attorney with the Police Benevolent Labor Committee. David is also the Chair of the Illinois State Bar Association's Labor and Employment Law Section Council, and is an adjunct faculty member with the University of Illinois' Labor Education Program. Previously, David was the coordinator of AFSCME Retirees - Chapter 31, and Executive Vice-President of the Illinois Alliance for Retired Americans. He has also represented federal workers in the legal department of the AFGE, and as a legal advisor to the Graduate Employee Organization (IFT-AFT). Additionally, David provides legal counsel to a number of national non-profits. He is a graduate of the University Of Illinois- College of Law and is a veteran of the United States Marine Corps.

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ABOUT THE PROJECT FOR MIDDLE CLASS RENEWAL

The Project for Middle Class Renewal (PMCR), based at the University of Illinois' Labor Education Program, is dedicated to improving conditions for the working class. Our mission is to enhance public understanding of economic and worker issues through research, analysis, and education. We aim to develop policies that tackle poverty, ensure fair representation for all workers, combat discrimination based on gender, gender identity, sexuality, ability status, and race, to create stable employment opportunities, and promote middle-class wages. Each year, we release important research studies and host educational forums on labor and workplace issues.

If you value this research and want to make a tax-deductible donation, visit go.illinois.edu/DonatePMCR
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Introduction

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In 2022 Illinois became the fifth state to pass a Constitutional Amendment protecting the rights of workers.[1] Unlike other states, however, Illinois voters passed a ballot measure to create what is arguably the strongest constitutional provisions protecting collective bargaining in the country.[2] Union member voting was a strong contributing factor to the success of Illinois' Workers' Rights Amendment. Nine-in-10 union members voted in favor of the Amendment, including more than 8-in-10 in more "red" voting southern (i.e., "downstate") communities and more than 6-in-10 conservative-leaning and Republican union members.[3]

The Workers' Rights Amendment elevates Illinois as one of the most pro-union states in the nation. Referred to as Article 25, it says the following:

> *"Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment."*

The Amendment explicitly bans so-called "right-to-work" laws that limit bargaining rights. It also prohibits threats to repeal or erode public-sector workers' collective bargaining rights and benefits. The Amendment further creates unprecedented opportunities for workers typically excluded from the legal protections of the National Labor Relations Act (NLRA) and the state's public sector labor laws to unionize and pursue collective bargaining.[4]

Public approval of unions has surged to its highest level in six decades, with nearly 70 percent of Americans supporting labor unions. Popular interest in labor unions and worker rights tracks with the intense focus state elected leaders continue to give to the subject. According to the throughout 2023, "labor unions and collective bargaining reached—and maintained—fervent public and legislative interest. Some of the hottest topics in this policy arena include union dues and fees, right-to-work laws and unemployment insurance eligibility."[5] In the post-2018 Janus v. AFSCME policy landscape union activity and existence continue to be politically and partisanly contentious. The year 2024 saw 15 states introduce 29 bills about union membership. In most states anti-union bills are sponsored by Republican legislators and pro-union bills endorsed by Democrat lawmakers. When the Supreme Court ruled the collection of union fees (not dues) from nonmember public employees was unconstitutional, it accelerated a trend of state anti-union bills and legislations. While some states have enacted union protections (e.g., Illinois, Minnesota, Maryland and Oregon), others adopted restrictions (i.e., Arkansas, Florida and Kentucky). Labor's biggest state win in 2023 was the repeal of Michigan's existing right-to-work law.

Policy action on unions, like most issues, is happening at the state level. Thus, what Illinois citizens did to advance worker rights is a big deal. Maybe a model for other "blue" states. However, little organizational movement has occurred since Illinois voters passed the Amendment and therefore how the new constitutional rights may advance worker power is unclear. While Article 25 appears to provide a foundation and impetus for increasing union membership and expanding the benefits of collective bargaining, legitimate questions about the constitutional provision prevail.

For example, the Amendment states that employees have a right to bargain "to protect their economic welfare and safety at work." However, what does "economic welfare" mean? The legislature did not define the term. Arguably, it denotes items that extend beyond traditional NLRA and Illinois labor relations law terms and conditions of employment.

Moreover, do farmworkers, ride share drivers, state legislative staff, and all independent contractors to name just a few workers, now have the right to unionize and bargain? Alternatively, perhaps these groups of workers need a separate law or some change in the current labor relations laws to implement their new constitutional right. What about public and education sector supervisors and managers? For instance, are Assistant State's Attorneys, Assistant Public Defenders, Assistant Appellate Defenders and k-12 school principals managerial employees? Any prohibitions on their organizing and bargaining? Furthermore, do teachers now have a right to bargain over issues (e.g., tenure and dismissal) that currently the state school code covers? Provocatively, do employees have a right to bargain through any collective representative they choose, or must there be an exclusive representative?

Maybe.

Uncertainty invites investigation, which is why the Project for Middle Class Renewal presents two thought pieces within this publication.[6]

The first paper is titled "Advancing Worker State Constitutional Rights: Illinois As Model." What does Article 25's "fundamental right" mean? Distinguished University of Illinois Urbana-Champaign Law Professor Matt Finkin claims there are two possibilities and offers a thought piece on interpreting and enforcing the Amendment. Professor Finkin's essay includes an explanation of the need for a statute or constitutional right situating worker collective representation in the political climate that has prevailed in the country since labor-hostile Republican legislatures took control of state houses in 2010. Just a decade later, there are now 27 right-to-work states. He also discusses whether Article 25 extends bargaining rights to employees excluded from the NLRA's coverage. Finally, Professor Finkin addresses workers legally covered by the NLRA, but who do not currently enjoy bargaining rights under it, and considers the viability of "members-only" bargaining rights.

Accompanying Finkin's piece is a brief commentary by Dave Amerson, Staff Attorney for the Illinois Police Benevolent and Protective Association. Attorney Amerson is not hedging. The Worker Rights Amendment is a game changer or in his opinion, it should be. In addition, Article 25 means just what it says. "[T]he WRA's clear language elevates the right to collective bargaining from a statutory right to a constitutional one, and a fundamental right at that. This means that in Illinois, collective bargaining is a right on par with the freedom of speech, the right to vote, the right to marry, and the right to due process." Amerson's reflections on Finkin's conceptual paper is a clarion call for labor in Illinois and potentially in other states to use their constitutional rights to undo the damage of Taft-Hartley. In his words, the Worker Rights Amendment should banish the "long chain of biases and anti-worker prejudices that made up the Wagner Act's interpretation by the US Supreme Court" and that have been wrongly incorporated into Illinois' labor relations regulatory regime.

Finkin and Amerson would both like to see worker rights expanded and agree that doing so will require robust union organizing, legal and likely additional legislative initiatives. Their literary contributions raise deep thoughts about how workers in Illinois and other states realize the benefits of fundamental economic rights. Whatever they are.

[1] In addition to Illinois, four states (New York, Hawaii, Missouri, and New Jersey) have a provision to protect worker collective bargaining rights in their state constitutions. Vermont is considering added one. Contrarily, also in November 2022, Tennessee became the tenth state in the nation to include an anti-worker provision in its constitution.

[2] For background on the state's Worker Rights Constitutional Amendment process and political analysis of how the measure passed see Frank Manzo and Robert Bruno's How the Workers' Rights Amendment Passed in Illinois A Political Analysis February 28, 2023 at the Project for Middle Class Renewal, https://lep.illinois.edu/publications/how-the-workers-rights-amendment-passed-in-illinois-a-political-analysis/.

[3] For union member vote analysis, see Frank Manzo and Robert Bruno, How Illinois' Union Members Voted On The Workers' Rights Amendment, December 18, 2023 at the Project for Middle Class Renewal, https://lep.illinois.edu/publications/how-illinois-union-members-voted-on-the-workers-rights-amendment-results-from-a-summer-2023-survey/.

[4] The Illinois Public Sector Labor Relations Act and the Education Sector Labor Relations Act passed in 1983; both went into effect in 1984.

[5] Zaakary Barnes, "Some States Strengthened, Others Limited Collective Bargaining in 2023," National Conference of State Legislatures, January 31, 2024 at https://www.ncsl.org/state-legislatures-news/details/artmid/1052/articleid/3228.

[6] Both of these essays will also be published in the academic journal, *Labor Studies Journal* (LSJ). Professor Bruno is a co-editor of *LSJ*.

What Does "Fundamental Workers' Rights" Mean for Workers?: A Conceptual Recommendation on Article 25 of The Illinois Constitution

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On November 28, 2022, the electorate of the State of Illinois voted to add the following to the State Constitution:

> Article 25. WORKERS' RIGHTS
>
> (a) Employees shall have the *fundamental right* to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment. [Emphasis added.]

What does that *fundamental right* mean? There are two possibilities. One places exclusive emphasis on the second, the "no law shall" clause. Under section 14(b) of the federal Taft-Hartley Act of 1947 the states may legislate to forbid unions in the private sector from agreeing with employers that the employees the union represents who choose not to join the union should nevertheless pay a fee to the union in lieu of dues to cover the costs of representing them. These have come to be called "right to work" laws. The "no law" clause in Article. 25 prohibits such legislation in Illinois. Were a future legislature wish to enact a "right to work" law, the electorate would have to repeal Article 25. By this view, the first, the "workers' rights" clause would be a preamble to the "no law" clause that follows it and would have no independent legal effect.

The other view, drawing on textual and political considerations, reaches an opposite result. Textually, the "workers' rights" clause is not framed as a preamble, in explanatory terms. It is not set out with a "whereas," nor is it succeeded by a "wherefore" or any like signal. In other words, the "employees shall have" clause gives no indication that it is other than what it says, a declaration of there being not only a right, but a fundamental right to what it sets out.

In the public campaign over the measure involving the expenditure of substantial sums rather little mention of 14(b) was made. The measure was presented to and was understood by the public to be all about "Workers' Rights".[1] It is a principle of constitutional interpretation that, as the U.S. Supreme Court said in reading the Second Amendment, the "Constitution was written to be understood by the voters" whose understanding should prevail.[2] It would be an exercise in cynicism to maintain that how the text reads and how it was publicly presented and understood as doing something for workers in Illinois, and *something* fundamental at that, is of no effect.[3]

The *something* could be a commission to the courts of Illinois to give meaning to the rights the Constitution conferred. Though there is precedent for that approach elsewhere[4] it would be fraught with difficulty as the courts around the state would be called on to struggle without guidance with the myriad of issues the provision raises: how an "employee" to whom the right extends is to be understood? Do employees have a right to bargain through any collective representative they choose or must there be an exclusive representative? If the latter, how is the court to decide what the group to be represented is, whether the party before the court represents it, and for what specific matters?

What follows is a conceptual legislative approach to defining the meaning of Article 25 and proceeds in three parts. First is a general explanation of the need for a statute situating worker collective representation on the current socioeconomic and legal landscape. Second is a discussion of whether Article

25 extends bargaining rights to employees excluded from the NLRA's coverage. A third section addresses workers who are covered by the federal law but who are not currently represented under it and considers the viability of "members-only" bargaining rights.

Part One: The Landscape

A. The Social and Legal Context

Strong survey data of decades' duration confirm that a considerable number of American workers, at least forty percent, desire union representation.[5] On average, unionized workers are better paid and enjoy greater benefits and superior working conditions compared to their non-unionized counterparts: unionized workers enjoy workplaces significantly safer, have significantly lower rates of wage cheating and outright wage theft, have greater access to sick leave and paid time for childcare and family emergencies, suffer less from precarity of working hours and of income, and enjoy provision for better income maintenance in post-working years than their non-unionized counterparts. In stark contrast to the unrepresented, unionized workers enjoy the protection against arbitrary or mistaken management decisions afforded by the grievance-arbitration provisions of collective bargaining agreements, especially protection against wrongful dismissal.[6]

Unions may also present group claims to be heard in labor arbitration that often include claims of violation of statutory protections. This contrasts sharply with non-unionized workers who are commonly subject to company-imposed arbitration systems that preclude access to the courts and deny the possibility of group access to arbitration. These conditions can render systemic violations of labor protective law incapable of meaningful redress.

Despite all this, union density, the percentage of employees who are represented by unions measured against the private sector workforce as a whole, has been in decline for decades: from a density of over 35% in the 1950s, with more than one out of every three workers being represented, to just over 6% today, with only one out of seventeen. Private sector union density in Illinois is only a little better: 8.6%.[7] In a word, the need and demand for workplace representation is substantial and it is not being met.

A number of explanations have been offered for union decline: economic globalization and the massive export of manufacturing jobs, long a major union base; the shift to a service economy in which employees often have transient employment relationships, frequently with more than one employer simultaneously, with the consequent lack of the "workplace social capital" necessary for unionization; the widespread fissuring of work down chains of subcontracting that insulate lead companies from bargaining with their contractors' and franchisees' employees which can render collective bargaining a futility; and, critically, as all students of the subject agree, an intransigent and vehement managerial resistance to the very prospect of their employees' collective representation.[8] Here, Starbucks, Amazon, and Tesla can stand for a much larger but less publicly visible universe of employers.[9]

Into this mix the role of the federal law ostensibly devoted to the support of collective bargaining – the National Labor Relations Act (NLRA or the Labor Act) – cannot be ignored for the law can be as much an obstacle as a support for the promise of meaningful workplace voice. The Labor Act, enacted in 1935, though drafted in admirably flexible terms is nevertheless a child of its time. A Republican Congress reduced its scope and hobbled its effectiveness in 1947, over President Truman's veto. And there the law largely rests today, incapable of responding to the significant economic, social, and workplace changes

that have occurred over the course of the ensuing three quarters of a century. Political gridlock at the federal level has and for the foreseeable future will continue to block the possibility of any meaningful updating of the federal law. Even so, under the Supremacy Clause of the Constitution the Labor Act limits what the state may do.

The Labor Act declares it to be the policy of the United States that the workers it covers have the right to form, join, or assist a labor organization of their choosing and to bargain collectively with their employers. The law separately provides that all workers, notably those who are not unionized, have a right to engage in "other concerted activity for mutual aid or protection" free of employer coercion or restraint. Toward those ends the Act performs two basic functions. First, it prohibits employers from interfering, restraining, or coercing employees in the exercise of those rights. Such employer action is declared to be an unfair labor practice the exclusive recourse for which is to and by an administrative agency, the National Labor Relations Board (NLRB). Second, it provides for the manner in which employees are collectively to be represented and sanctions employers who refuse to bargain or to bargain in bad faith, an other category of statutory unfair labor practice. A word on the latter, the manner of representation.

The practice in the skilled crafts in the nineteenth and the earlier part of the twentieth century was for craft unions to decide who was eligible for membership and insist that employers hire only their members. In other words, unions sought closed shops in which union bargaining power derived from their control of the labor market. That model was unsustainable under industrial conditions.

The Labor Act took a radically different turn. It divorced union membership from job rights and adopted the principle of exclusive representation by majority rule. This requires that there be something called "an appropriate bargaining unit," a cluster of jobs in an enterprise with such common characteristics that the occupants in these jobs can be said to share a "community of interest." The statute imposed a duty on an employer to bargain only with a union that has the support of a majority of employees in a bargaining unit. With a majority the union becomes the exclusive bargaining agent for everyone in the unit whether or not they are union members, sympathizers, or opponents. Because of the "community of interest" test, a bargaining unit can consist of, say, thirty baristas working at a single Starbucks outlet. Accordingly, in order for a union to represent them under the NLRA, it must secure the support of at least sixteen, or of a majority of the baristas voting in an NLRB election. Consequently, once an employer learns of a union organizing drive it commonly commences an intense campaign against the union deploying all manner of pressure to dissipate and dissuade union support including messages in electronic, video, or hard copy form, and, most powerfully, mandatory attendance in group sessions – large and small – under the direction and control of supervisors, higher management, and labor "consultants."

What was thought in 1935 to be a process whereby a union would swiftly and effortlessly be recognized by employers as their employees' bargaining agent has evolved to become a battleground in which employer anti-union conduct all too often verges close to or crosses the line of coercion.[10] Even when unions win majorities, the effort companies expended in resisting them often transfers to the bargaining process, in employer resistance to the making of agreements for which, again, Starbucks is the poster child. In a study of organizational activity for the five-year period 1999-2004, only one in seven organizing drives that got to the point of a representation election resulted in the workers actually getting a collective bargaining agreement.[11] Proposed federal legislation that would have required arbitration to determine the terms of a first collective agreement in the event of impasse with a newly chosen union, to reset the framework for the parties relationship going forward, failed of passage. Thus stands employee representation under federal law today.

The NLRA model contrasts with the form of plural or "members only" representation that obtains in most economically developed democracies – in Europe, Australia, and Japan, for example. In that form, there is no bargaining unit, there need be no majority, no election, nor any contest over representation: simply put, the union automatically represents those who have chosen to join it. Commonly, however, the law imposes no duty to bargain on the employer: it can, in effect, choose the union it will bargain with unless it faces sufficient union power to force it to the table. The Labor Act does not forbid "members' only" bargaining. A collective agreement made by a union for only those who have joined it is lawful and enforceable; but, it is not a form of representation to which the statute attaches a duty to bargain, it is a form of representation with which the NLRA is simply unconcerned.

On reflection, it seems anomalous that a law that confers a right on the employee to be represented in bargaining by a representative of "her own choosing" makes the realization of that right contingent on the choosing of others (i.e., coworkers) in a governmentally determined bargaining unit. If ten of the thirty Starbucks' baristas in an outlet desire union representation, are willing to say so and to urge their coworkers to join them at the risk of incurring their employer's displeasure (and worse), but – after an employer's strenuous campaign – they fail to persuade six more of their number to be supportive, the ten are left without representation, without the benefits of a collective agreement, and without the protections of a union presence in the workplace.

In sum, federal law has proven incapable of satisfying the substantial demand for workplace representation when, for any of a variety of reasons – rugged individualism, job satisfaction, risk aversion, fear – bargaining union majorities cannot be mustered. Even when majorities are secured, employees who lack strategic workplace situation – the possession of skills essential for the production of goods or the performance of services, such as screenwriters, or the sheer power of overwhelming numbers, such as autoworkers – all too often find the bargaining process to be a fruitless exercise. That is the social and legal landscape on which Article 25 is situated.

Part Two: Representing Workers Legally Excluded From NLRA Coverage

There is large and diverse group of workers who are exempt from federal coverage altogether: employees of state and local government; agricultural workers; persons classified as independent contractors under the common law of agency but who could be considered employees under state law; domestic workers employed in the home and other prudentially excluded groups such as teachers in church-related schools.[12] As they are of no concern to the NLRA, the state is free to legislate for their collective representation. A second group of workers consists of employees who are within the NLRA's compass but whom the federal law precludes from enjoying any possibility of collective representation, (i.e., supervisors and managers). Under the constitution's Supremacy Clause the state is without power to accord them collective bargaining rights.[13]

How then does the meaning of a state constitutional provision granting "fundamental worker rights" extend collective bargaining coverage to uncovered workers in Illinois? Looking at the three major groups, Illinois' public employers are already afforded collective bargaining rights under two statutes. These might be modified to extend coverage more broadly better to conform to Art. 25. Unlike California and New York, Illinois has no law dealing with agricultural workers. But as these laws evidence, the situation of agricultural work has some special characteristics that require particular legislative address.[14] Art. 25

should serve as a stimulant to legislative action in the absence of which agricultural workers could well seek judicial recourse.

This leaves persons considered independent contractors under the Labor Act. In 1944, the U.S. Supreme Court read the Labor Act to extend to newspaper vendors whose arrangements with their newspapers was of independent contractorship at common law but whose economic relationship the newspapers brought them within the scope of the Labor Act, as persons sufficiently needful of redress in the imbalance in bargaining power with the newspapers as to allow them to unionize.[15] Congress swiftly repudiated that rationale and legislated to apply the common law agency test, primarily a "right to control" the work, to exclude those persons from the Act. The incongruity has not passed unnoticed: that the legal test used to decide those whose acts of negligence for which a company will be liable should determine who is authorized collectively to bargain with the company.[16] Because independent contractors are also excluded from wage and hour, unemployment compensation, and other benefits and protections accorded employees – that is, because the classification can significantly reduce a company's labor costs – the misclassification of employees as independent contractors has drawn significant legal attention.

The situation of independent contractors vexes because of there being basically two different kinds of independent contractors: on the one hand, those who are genuinely small businesses, entrepreneurs who are able to look out for themselves and whose collective organization might have such anti-competitive effect in the market for their services as to warrant the attention of anti-trust law.[17] And, on the other hand, those who though independent contractors under the law of agency are so largely dependent on the user or users their services – janitorial sub-franchisees are the classic case – as to be needful of collectivization for economic redress. Some states have attended to the latter by expanding the idea of economic dependence to clarify that workers in that situation are "employees" for the purposes of specific labor protections. There is no reason why they should not be extended the right of collective bargaining; such would be well within Article 25, which is captioned "workers' rights," and a worker, as the U.S. Supreme Court has recognized, need not be cabined by an employment relationship under the law of agency.[18] A proposal toward that end has been made.[19]

Part Three: Representing Workers Legally Covered But Denied Bargaining Rights

So what should the state do for workers who are eligible for representation under the Labor Act and who would like to be represented but are not? The answer has been provided by the International Labor Organization (ILO) as a global norm. The ILO is an international body of Member States, created in the wake of the First World War and renewed after the Second, governed by a tripartite system involving the participation of governments, managements, and unions. The United States is a member. Although the United States has not ratified the ILO's conventions on collective bargaining, in 1998 the ILO adopted a *Declaration on Fundamental Principles at Work* based on the proposition that all Member States "have an obligation, arising from the very fact of membership…to promote and realize…the principles concerning the fundamental rights" the Declaration set out that includes the right to collective bargaining.[20] It is instructive that Article 25 follows that international norm, that the right of employees collectively to bargain is a fundamental component of a democracy.

The ILO recognizes that some Member States provide for systems of exclusive collective bargaining representation by majority rule or allow employers to accord recognition to only the "most representative

union" in a plural union system, but it recognizes as well that representation may be wanting in such systems. Consequently, it has provided that

> If there is no union covering more than 50 per cent of the workers in a unit, collective bargaining rights should nevertheless be granted to the unions in this unit, at least on behalf of their own members.[21]

The challenge in the U.S. context, is how to extend bargaining rights to eligible employees who desire union representation without running a foul of federal preemption.

A. An Overview of Federal Labor Law Preemption

The U.S. Supreme Court supplied a general introduction to the current state of the preemption law in 2008:

> Although the NLRA itself contains no express pre-emption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. the first, known as *Garmon* pre-emption, see *San Diego Building Trades Council v. Garmon*, 539 U.S. 236 (1959), "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986) (*Golden State I*). To this end, *Garmon* pre-emption forbids States to "regulate activity that the NRLA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry v. Gould Inc.,* 475 U.S. 282, 286 (1986). The second, known as Machinists pre-emption, forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended "to be unregulated because left 'to be controlled by the free play of economic forces.' " *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144 (1971)). Machinists pre-emption is based on the premise that " 'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.' "[22]

Garmon was the culmination of a line of decisions concerning state administrative action under state laws that echoed the federal Labor Act, "Little Wagner Acts", that also provided for exclusive representation by majority rule for employees in a bargaining unit and for unfair labor practice remediation.[23] The conflict between those schemes and the Labor Act led to the state's action being preempted even for employees where the federal Board would decline to exercise its jurisdiction.[24]

The second body of federal preemption stems from the Supreme Court's decision in *Lodge 76, International Association of Machinists*, in which union-represented employees refused to accept mandatory overtime, conduct neither protected nor prohibited under the NLRA; as the tactic was not regulated by the Labor Act, the federal Labor Board had no power to disallow it. The employer persuaded the state labor board to secure an injunction against the tactic under the state's cognate statute, as a breach of the union's duty to bargain in good faith, a legal theory the Court has rejected on identical facts under the Labor Act. The U.S. Supreme Court held the state's action to be preempted: the Labor Act does more than regulate unfair labor practices, it creates a zone of economic combat for the resolution of labor disputes, a zone Congress meant to be unregulated – not by the NLRB and not by the state – an arena of action Congress reserved for the free play of economic force, such as the right of economic strikers to return to work.

How then would a state "members only" collective bargaining law fare vis-à-vis employees covered by the law when examined through the lens of federal labor preemption doctrine? There is no doubt that an Illinois law in pursuit of Article 25's guarantee of the right to form, join, or assist a union for the purpose of

collective bargaining and to engage in other concerted activity free of employer restraint or coercion would be *Garmon*-preempted.

However, this would not apply to the duty to bargain with a non-majority representation. The federal regulation of an employer's duty to bargain applies only when it bargains with a union "subject to" section 9(a) of the NLRA, that is, when it bargains with an exclusive representative.[25] Inasmuch as a "members only" representative is not subject to that provision, the state would seem to be free under *Garmon* to provide remedies for refusals to bargain on that basis.

Thus the serious issue here is *Machinists* preemption. The argument for preemption would run along this line: even as no specific provision of a comprehensive members only collective representation law "conflicts with" or "interferes in" the Labor Act once primary jurisdiction under *Garmon* is dealt with, the Labor Act, is nevertheless an "integrated scheme of regulation" striking a balance of protections, prohibitions, and laissez faire in respect to union organizing and collective bargaining such that it precludes the state from enacting a parallel "comprehensive integrated scheme" for the same employees.

B. A Right to Representation

There is no question of the ability of the state to provide for employees to be represented for a variety of statutory purposes: coal miners may select a check weighman to represent them in seeing that the coal they have mined and will be paid for by weight and quality is accurately graded and weighed[26]; employees who have a grievance against their employers may designate a representative to inspect their personnel records[27]; employers who wish to institute biometric systems to monitor workers must secure an informed written consent executed by the employee, the employee's union, or, importantly, some other "legally authorized representative."[28] Under these and like measures employees may designate a legal representative to deal with their employers, in effect, to negotiate with them over the many ancillary questions that would inevitably arise as that representative function is performed. More broadly, employees are free to participate in group legal actions to vindicate statutory protections in which their legal representative will necessarily deal with employers in the processes of mediation and settlement, including the resolution of changes in terms and conditions of employment going forward – wage payment, seniority, and more. In none of this is the state's affordance of representation preempted by the Labor Act.

It would seem clear that the state may afford employees a right of fair dismissal and allow the employee to be represented in a proceeding under the law by a representative of the employee's choice including a non-majority union. Neither the affordance of the substantive right nor the allowance of representation would be federally preempted.[29] Absent such a statutory provision, the worker can try to bargain for a contractual right to fair dismissal and may seek to be represented in that effort. It would be open to the state to protect the employee's right to bargain, by legislation or by judicial action as a matter of public policy or of an implied covenant of good faith and fair dealing, and to enforce any resulting agreement as a matter of contract. It would be nonsensical were federal law, indifferent when a representative makes sequential demands for the workers it represents, to become prohibitive when the demand is made to bargain for the represented workers simultaneously.[30]

As earlier explained, the Labor Act is unconcerned with individual bargaining. The Labor Board made clear early on, in explaining that it will not certify single employee bargaining units, that that conclusion "does

not mean that a single employee may not designate a representative to act for him; *he has such a right without the Act, and the Act in no way limits the right.*"[31] As the individual employee is free to bargain for herself there would seem to be no federal obstacle for the state to protect her ability to do so. Nor would there seem to be any federal obstacle, absent the presence of an exclusive bargaining representative, for the representative chosen by more than one worker to present the bargaining demands of those individual workers it represents simultaneously. State sanctions on employers who retaliate against employees who avail themselves of that right would be *Garmon* preempted if sufficient concert of action could be shown; but, as we have seen, all that means is that the state must stay its hand in cases of alleged retaliation for concerted activity while federal redress is sought. The question is whether Machinists precludes the state for requiring employers to bargain with their employees with the necessary consequence that they can do so through a representative who represents more than one worker.

The argument for *Machinists* preemption would have to run along this line: when Congress protected collective bargaining by majority unions alone, and was silent about minority unions, it "adequately indicated", even if only implicitly, that the ability of a minority union to bargain would be the result of the free play of economic force into which the state could not interfere. But nothing in the legislative record or in the structure of the Labor Act indicates that Congress intended the role of minority unions to be relegated to the play of economic force for the simple reason that Congress was not concerned with, was completely indifferent to minority unions. This situation has not changed since the *Bethlehem Steel Court* summed it up in 1947:

> In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation…It has dealt with the subject or relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state….However, the power of the state may not so deal with matters left to its control as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[32]

To disallow the state to allow for representation for the non-represented on a "members only" basis would have to rest on the ground that the Labor Act completely occupies the field of employee representation, a proposition the Court has consistently disclaimed.

Members Only Representation

The question Article 25 poses is whether a collective bargaining law can be fashioned that affords a "members only" system of representation without placing an unacceptable burden on employers who might have to bargain with several unions – simultaneously or sequentially – representing similarly situated employees.

On workability, insight can be gained by taking a closer comparative look at the Labor Act. Workers covered by the Act but who are not represented by unions nevertheless enjoy the federal right to engage in "concerted activity for mutual aid or protection" other than collective bargaining. If a group of non-unionized employees – say, ten Starbucks' baristas or a similar number of Walgreens' pharmacy workers – band together and ask the company for a higher wage and better working conditions or an increase in

staffing due to overwork, and even walk out to demand it, Starbucks or Walgreens would be under no legal duty to bargain with or even to meet and confer with them about it.[33]But federal law prohibits Starbucks, Walgreens, and other employers facing such group demands from dismissing these workers, disciplining them, or discriminating against them for their action. This scenario could play out in various of these and other companies' outlets across the state, simultaneously or over time.

However, were an employer to see the value in meeting with these groups to hear and assuage their concerns, possibly by making some concession on them, it is free to do that. In the absence of any legal duty to bargain with a faction of workers, informal bargaining with non-majority groups on a non-exclusive basis is both lawful and, in some instances, likely. Indeed a multiplicity of "affinity groups" have been formed in numerous companies, sometimes with company support, to channel the workplace concerns of discrete segments of a company's workforce to higher management: women, African Americans, the disabled, et cetera. Employer interaction with these groups can result in change in company policy responsive to their concerns which accommodations could well be of contractual status, for example, by a change in policy governing terms or conditions of employment set out in a contractually binding Employee Handbook.[34]

In a nutshell, factional bargaining commonly does go on in the workplace without there being any legal duty on an employer's part to bargain with the group.[35] The question is whether the addition of a legal duty to bargain would unduly hinder the employer's capacity to conduct its business. Whether that would be the case can be judged by considering the current situation under the statutory system of exclusive representation.

It should be recalled that an exclusive bargaining agent is one selected by the majority of workers in an appropriate bargaining unit. The unit might be all the workers in a single, company-wide unit of thousands, or a wall-to-wall unit of all the production employees in a large plant. But, today, it is more likely to be a much smaller group as there are a multitude of communities of interest even within a single workplace and unions seek majorities within a workforce guided by the likelihood of their securing it. A unit of just the front desk workers at a single hotel, part of a large chain, or the hotel's engineering department, or of its housekeeping department, of only the women's fragrance sales staff in a department store, or only the red jacketed "rental service agents" out of the 100 employed in a variety of jobs – return agents, lot agents, courtesy drivers, mechanics – at a single car rental location of a multi-location car rental chain, have all been held to be appropriate units for unions to represent.[36] In fact, the median NLRB-determined bargaining unit for the past three years has consisted of 23 employees, which means that half of all bargaining units are smaller in number.[37]

It is important to stress that the Labor Act is unconcerned with how an employer structures itself for collective bargaining: an employee is required to send an agent to the table with authority to bind the employer by contract. An employer – a department store chain, a hotel chain, a car rental chain – might have to bargain with unions representing each of a number of bargaining units containing fewer than 23 employees – various of the small operating departments of hotels and retail stores, the courtesy drivers at auto rental outlets or the mechanics in them, and the like, possibly represented by different unions. The employer owes each a duty to bargain in good faith which limits the company's capacity to make significant changes in wages, hours, or working conditions for any of these employees without first exhausting the bargaining process to impasse. Further, the duty to bargain extends to each union as it

achieves majority status over time, by being designated by as few as 12 employees on average in each bargaining unit at each location.

This is the situation employers face under the Labor Act, yet the system has not proven unmanageable for employers. Requiring the employer to bargain on a "members only" basis with unions that represent, say, ten or more of their members in one or more locations would not seem significantly different in kind or complexity from what employers currently face under the NLRA.

The real difference between the two systems is that under the NLRA the union represents those who hold specific jobs in specific locations; under "members only" bargaining the union represents those who have joined it. Under the former system a union that represents several bargaining units cannot require the employer to bargain for all of them simultaneously. The employer can insist on bargaining atomistically and, consequently, fruitlessly. Not so where the union represents people, not jobs.

Rather early on the Supreme Court held that a "members only" collective bargaining agreement was lawful.[38] Decades later it held that a strike settlement agreement made with a union on behalf of only its members, as it no longer had a majority, was enforceable.[39] As one might imagine, in the wake of the NLRA collective bargaining relationships of that nature were extremely rare; but, when a union did have a "members only" bargaining relationship and secured a wage increase for its members the United States Court of Appeals for the Third Circuit refused to sustain the NLRB's decision that the employer's failure to give the increase to co-workers who were not members of the union violated the non-discrimination prohibition of the Labor Act.[40] An employer is free to extend the wage the non-majority union bargained for its members to non-members, but federal labor law does not require it to do so. As federal law is indifferent to what the employer may do of its own volition – that is, bargain with a minority union – it is therefore indifferent to the employer's doing so under the compulsion of the state and which poses no obstacle the accomplishment of the objective and purpose of the Act.

Thus would seem to be the case that empowering employees not represented under the Labor Act to bargain individually through a common representative would not be preempted by federal law; nor would federal law prohibit the state's allowance of the representative simultaneously to represent those who have chosen it. Accordingly, a "Worker Representation Act" could provide something along this line:

> (a) Workers have a right to bargain with their employers about wages, hours, working conditions, safety, and welfare and over any grievance arising in such matters, personally or through a representative of their choosing.
>
> (i) An employer may not retaliate by discharge or otherwise or discriminate against any employee for exercising the right conferred in subsection (a).
>
> (ii) Where employer action complained of is arguably protected or prohibited by the National Labor Relations Act the court shall retain the complaint on its docket while it is referred for disposition or advice to the National Labor Relations Board.
>
> (b) Employers have a duty to bargain in good faith with employees who have exercised their right under subsection (a).

> (c) A representative designated by more than one employee of an employer under subsection (a) shall have the right to bargain simultaneously for those employees who have designated it to represent them.
>
> (d) A suit for compensatory and equitable relief may be brought by any worker or group of workers adversely affected or aggrieved by a violation of this law in the Circuit Court where the worker resides, where the violation occurred, or where the employer does business. Prevailing plaintiffs shall receive reasonable attorney fees and expenses.

CONCLUSION

In 1919, President Woodrow Wilson proclaimed the need for there to be a

> genuine democratization of industry, based upon a full recognition of the right of those who work, in whatever rank, to participate in some organic way in every decision which directly affects their welfare and the part they are to play in industry. Some positive legislation is practicable.[41]

A century later the voters of Illinois made the demand a fundamental constitutional right. Enabling legislation called for a century ago is necessary and practicable now.[42]

[1] Over $19 million was expended in the campaign on Art. 25, most spent in support of it. See Ballotpedia report (available online). Some newspaper editorials addressed the "right to work" aspect; e.g. in the Chicago Tribune and the Champaign-Urbana News Gazette. See Media Editorials (online). But by far the thrust of the campaign in favor of the measurement stressed the "workers' rights" theme. Typical is the following run by http://www.afscme31.org/news.
The Workers' Rights Amendment will:

- Drive wages higher and produce a stronger economy by guaranteeing workers can bargain collectively. The Workers Rights Amendment will put more money in the pockets of Illinois families, helping our economy grow and our families thrive.
- Keep us safe on the job by ensuring workers can speak out about dangerous conditions that put all Illinoisians at risk, and collectively bargain to make their workplaces safer.
- Protect our first responders by giving them the tools they need to keep us safe.

[2] *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

[3] In the Fall 2023 semester, the University of Illinois College of Law offered a Research Seminar on Labor *Law & Public Policy* under the instruction of Professor Matthew W. Finkin centered on Art. 25. The seminar proceeded on the basis of the latter reading of the workers' rights clause to be the more persuasive. The seminar was devoted accordingly to answering the next question, of what that *something* should be. Thanks are due to David Amerson and Marc Poulos who generously gave of their time to meet with the seminar.

[4] Four states have analogous constitutional provisions: Hawai'i, Missouri, New Jersey, and New York. Hawai'i and New York have state collective bargaining laws that carry out their constitution's mandate. In Missouri and New Jersey, where such legislation is lacking, the courts have held the constitution to supply a private right of action to impose a duty on employers to bargain with their employees' representatives. Am. Fed. of Teachers v. Ledbetter, 387 S.W.3d 360 (Mo. 2012) (public employees); COTA v. Molinelli, 114 N.J. 87 (1989) (agricultural workers).

[5] Hertel-Fernandez, Kimball, and Kochan. *What Forms of Representation Do American Workers Want? Implications for Theory, Policy, and Practice* 75 ILR Review 267 (2022). The complete large study is Hertel-Fernandez, Kimball, and Kochan, HOW U.S. WORKERS THINK ABOUT WORKPLACE DEMOCRACY: THE STRUCTURE OF INDIVIDUAL PREFERENCES FOR LABOR REPRESENTATION (2019). The massive earlier study to the same effect is Richard Freeman & Joel Rogers, WHAT WORKERS WANT (1999).

[6] The comparison of unionized workers vis-à-vis non-union is richly compiled in a multitude of works, especially in studies and reports by the Economic Policy Institute (EPI) including its State of Working America series, and other periodical treatments. *E.g.* Patrick Denice & Jake Rosenfeld, *Union and Nonunion Pay in the United States*, 1977-2015, 5 J. Sociological Science 541 (2018).

[7] See most recently Frank Manzo & Robert Bruno, *The State of the Unions* 2022 (Sept. 6, 2022).

[8] These are reviewed in Matthew Finkin & Timothy Glynn, Cox, Bok & Gorman's LABOR LAW Pt. 10 (17th ed. 2021). "Workplace social capital" is explained by Suresh Naidu, Is *There Any Future for a U.S. Labor Market?*, 36 J. Econ. Perspectives 2 (2022). On "fissurization" see David Weil, THE FISSURED WORKPLACE (2014).

[9] On Starbucks see Megan Stark, *Inside Starbuck's Dirty War Against Organized Labor*, N.Y. Times (July 21, 2023); Robert Iafolla, *Starbucks Commits Rash of Labor Law Violations, NLRB Judge Says*, Bloomberg Law News (Nov. 3, 2023) (Starbucks found to have committed unfair labor practices in 34 of 36 cases decided by Administrative Law Judges of the NLRB so far). On Amazon *see* Noam Scheiber, *Mandatory Meetings at Amazon Reveal Opponents to Resisting Unions*, N.Y. Times (March 25, 2022); Josh Edelson, *Amazon Stores Go From Dream Retail Job to Latest U.S. Labor Fight*, Bloomberg Law News (Nov. 14, 2022).

[10] On the "battle ground" see the extensive and arresting data compiled by Kate Bronfenbrenner, *In Solidarity: Removing Barriers to Organizing, H. Comm. on Educ. & Lab*., 117th Cong., 1-20 (2022) (statement of Dr. Kate Bronfenbrenner) and Celine McNicholas, *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, (EPI Rept.) (Dec. 11, 2019).

[11] The study of the result in union organizing drives is John-Paul Fergeson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 1999-2004, 62 ILR Rev. 3 (2008). Even when a contract is made it has taken significantly longer over the past two decades to arrive at a collective agreement. *How Long it Takes a Union to Get a Contract*, Bloomberg Law News (Nov. 22, 2023) at p. 3.

[12] On the exclusion of teachers in parochial schools see *Jusino Federation of Catholic Teachers*, 54 F.4th 95 (2nd Cir. 2022).

[13] *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (1974).

[14] Andrew Kreightbaum, *Legal Battle Simmers Over Plan to Give Farmworkers Union Rights*, Bloomberg Law News (Dec. 18, 2023).

[15] *NLRB v. Hearst Pub., Inc.,* 322 U.S. 111 (1944).

[16] Most recently, Timothy Glynn, *Apployment,* 61 Houst. L. Rev. 1 (2023).

[17] *See e.g.* Cynthia Estlund & Wilma Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 Comp. Lab. L. & Pol'y J. 371 (2021).

[18] *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532 (2019).

[19] This can be found at *https://law.illinois.edu/faculty-research/faculty-profiles/matthew-w-finkin/*.

[20] The framework for the 1998 ILO declaration is explained by Bernard Gernigon, Alberto Odero & Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 Int'l Lab. Rev. 33 (2000).

[21] ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO ¶ 977 (5th rev. ed. 2006).

[22] *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008).

[23] *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 775-76 (1947); *LaCrosse Tel. Corp. v. WERB*, 336 U.S. 18 (1949).

[24] *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (1957). As Congress had legislated on the "no man's land" problem by allowing agreements between the Labor Board and cognate state agencies the Court that to be the exclusive means by which that gap could be addressed.

[25] 29 U.S.C. § 158(1)(5).

[26] 225 ILCS 705/32.

[27] 920 ILCS 40/5.

[28] 740 ILCS 14/15(3).

[29] New York City's comprehensive protective scheme for fast food workers provided not only for a right of fair dismissal. but allowed "a person or organization representing persons" alleging a violation to vindicate the right in an arbitration. N.Y.C. Admin. Code § 20-1273(a). The ordinance was subject to a blunderbuss challenge on preemption grounds which, notably, did not attack the provision for representation. The challenge failed. *Restaurant Law Center v. City of New York*, 90 F.4th 101 (2d Cir. 2024).

[30] Were that not so the employees' representative would be required to sit at the bargaining table with the employer to "present Tom's request for a 12% wage increase" upon the conclusion of which the representative is to say, "I will now present Dick's request for a 12% wage increase", on the conclusion of which she is next to say, "I will now present Harriet's request for a 12% wage increase", down the roster individually of each of the workers she represents. As there should be no doubt that if the state could authorize individual bargaining by employees through a representative of the employee's choosing it cannot be that federal law would command this risible scenario.

[31] *Luckenbach Steamship Co., Inc.,* 2 NLRB 181, 193 (1936) (italics added).

[32] *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 773 (1947). The concluding caution was reiterated in Brown v. Hotel & Restaurant Employees Union, 468 U.S. 491, 501 (1984).

[33] *See e.g.* Spencer Soper, *Amazon Workers in Southern California Strike for $5 Hourly Raise*, Bloomberg Law News (Oct. 14, 2022); Michael Levenson, *What's Behind the Pharmacy Workers' Walkouts*, N.Y. Times (Nov. 2, 2023) at B4.

[34] On the contractual status of provisions of employee handbooks in Illinois see Duldulao *v. Saint Mary of Nazareth Hosp.*, 115 Ill. 2d 482, 505 N.E.2d 314 (1987) and *Doyle v. Holy Cross Hosp.,* 186 Ill. 2d 104, 708 N.E.2d 1140 (1999).

[35] As this survey suggests, factions often form to make immediate demands and then disappear. Without legal scaffolding for an ongoing organization the sustainability of fractional bargaining is a challenge. The exception that proves the rule is the Carolina Auto, Aerospace and Machine Workers Union (CAAMU), which has managed to survive as a members only union for some years and with some impact on the issues it has pressed; but then, it been supported by the UE. Moshe Marvit & Leigh Anne Schriever, *Members-only Unions: Can They Help Revitalize Workplace Democracy?*, Century Foundation Report (Oct. 1, 2015).

[36] Of the bargaining unit of hotel front desk workers, Dinah's Hotel Corp., 295 NLRB 1100 (1989), of a hotel's engineering department, Omni-Dunfey Hotels, 283 NLRB 475 (1987); of a hotel's housekeeping department, NLRB v. French Int'l Corp., 999 F.2d 1409 (9th Cir. 1993); of a department store's women's fragrance department, Macy's Inc., 361 NLRB 12 (2014); of only the rental agents out of a total complement of 109 employees, DTG Operations, Inc., 357 NLRB 2122 (2011). The roots of configuring units according to narrower communities of interest within larger workforces run deep. See e.g., F.W. Woolworth Co., 144 NLRB 307 (1963) (a unit of 20 restaurant workers within the workforce of a large retail variety store comprise an appropriate bargaining unit) (reviewing authority).

[37] *NLRB Report: Size of Bargaining Units in Elections* (Mid-Year 2022 Report); see e.g. Bellagio Las Vegas, Case 28-RC-154081 (June 30, 2015) (unit of three "surveillance technicians" is an appropriate unit in a hotel with 245 security officers).

[38] *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

[39] *Retail Clerks Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17 (1962).

[40] *NLRB v. Reliable Newspaper Delivery, Inc.,* 187 F.2d 547 (3rd Cir. 1951). Given the Labor Act's separation of job rights from union status, a collective bargaining agreement made with a non-majority bargaining agent

may not prohibit an employer to deny the wage increase to non-members; but absent such a contractual prohibition, a "members only" union owes no duty fairly to represent non-members because it does not represent them all.

[41] Presidential Message of May 20, 1919, 58 Cong. Rec. 40 (1919).

[42] As this Report was being completed challenges to the constitutionality of the Labor Act have been mounted: in a lawsuit by SpaceX (seconded by Trader Joe's); and by Starbucks and Amazon.com as part of a Board unfair labor practice proceedings mounted against them. Space Exploration Technologies Corp. v. NLRB, 2024 WL 98691 (S.D. Tex.) (Jan. 4, 2024); Amazon.com Services LLC, NLRB Cases 29-CA-296817 et. seq., Answer to Second Amended Complaint, (Feb. 15, 2024); Starbucks Corp., NLRB Case 19-CA-294708 (Feb. 16, 2024); Josh Eielson, Trader Joe's Follows SpaceX in Calling NLRB Unconstitutional, Bloomberg Law News (Feb. 2, 2024). The Labor Act's constitutionality was upheld by the U.S. Supreme Court in 1938; but there have been more recent decisions by U.S. Supreme Court on separation of powers grounds that SpaceX, Amazon, Starbucks, and Trader Joe's argue render the Labor Act unconstitutional today. The campaign, vigorously pressed by companies with deep pockets, led by leaders intensely hostile to unionization, has just been launched. The legal mill grinds slowly, but, eventually, the issue may become grist for the Supreme Court with a result incapable of confident prediction at this time. It is enough to say here that were the Court to be persuaded, the immediate consequence would be the absence of any federal law on collective bargaining. It would fall to Congress and President to fill that void, or not, as political circumstances allow. Absent legislation, however, there would be no obstacle for the state to act. Consequently, this Report might provide a useful stimulus now for serious thought on what might be done in future.

AMERSON

The Promise, and the Imperative of Illinois' Constitutional Right to Collectively Bargain

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The dire situation of organized labor is a well-trod area of comment. Following the passage of the National Labor Relations Act (NLRA, also the Wagner Act), which provided a formal legal framework through the National Labor Relations Board (NLRB) for collective bargaining, and illegalized some of Management's worst excesses in response to worker democracy, a wave of union organizing swept through the nation's workforce. Union density and power rose so steadily that by the late 1940's organized labor was able to disrupt entire economic sectors in the pursuit of working class uplift.

In response, Capital reasserted itself, and using its massive economic and political clout "disciplined" labor with the Taft-Hartley amendments to the NLRA. The amendments had the effect of destroying intra-union solidarity, blunted the strike weapon, and demarcated lines of exclusions for employees who could turn to the NLRB to enforce the law. For example, under the Taft-Hartley Act, supervisors could form and join supervisory unions, but employers did not have to legally bargain with these unions. In reality, most employers legally refused to bargain with supervisory unions and as a result, supervisory unions such as the Foremen's Association of America disappeared shortly after the passage of the Taft-Hartley Act. Taft-Hartley also created provisions for states to enact "right-to-work" laws, which not only provided management with a fault line to exploit over the following decades, but also slowed and in some cases killed burgeoning worker organizing efforts in the Southwest and Deep South.

Despite restrictions on organizing new members, unions were able to hold firm to their gains through the post-war Keynesian consensus. However, once that ended with the advent of the "neoliberal turn" in the mid-1970's, the fault lines caused by Taft-Hartley turned into chasms, resulting in a precipitous loss of union density and coverage as deindustrialization and the rise of finance Capital cemented the "end of history" for worker democracy.

As the power of private-sector unions waned, public sector unionization steadily rose. In Illinois, prior to the 1983 passage of the Illinois Public Labor Relations Act (IPLRA) and Education Labor Relations Act (IELRA), public sector collective bargaining existed for decades, but lacked a comprehensive statutory scheme. When these Acts passed they largely ported over the same precepts and infirmities that Taft-Hartley infected into the Wagner Act, most notably the bans on solidarity/secondary strikes and the exclusion of supervisory and managerial employees from organizing.

Also imported into the Illinois Acts' implementation was the long chain of biases and anti-worker prejudices that made up the Wagner Act's interpretation by the US Supreme Court. The Illinois Labor Relations Board, the administrative agency tasked with the IPLRA's enforcement, relied in large part on the US Supreme Court's jurisprudence of private sector labor relations for developing the myriad of balancing tests and paradigms prescribed by the federal judiciary. Almost without exception, these federal rulings harshly restricted the potential and guiding principles of the Wagner Act.[2]

Along with the neoliberal turn, and as Labor's political allies began to ignore and eventually betray their commitment to supporting organized labor, unions pivoted to different business models. With notable exceptions, unions largely abandoned radicalism and collective action in favor of lobbying and electoralism.[3] The consultant replaced the organizer and the lawyer replaced the strike captain. The horizons of Labor's vision receded. The tail began to wag the dog.

The pattern that played out in the private sector eventually came for the public sector. The 2008 financial collapse provided an opening that, similar to 1947, was exploited by Labor's opponents. Casting public sector unions as privileged rent-seekers, anti-labor groups engaged in a coordinated assault on statutory collective bargaining rights at the state level. This string of setbacks culminated in the 2018 Supreme Court's *Janus v. AFSCME Council 31* decision, which many commentators predicted would be the death knell for public sector unionization.

However, with the considerable turmoil in labor markets as a result of the 2020 Coronavirus pandemic, the balance of power markedly shifted in favor of workers. A wave of organizing and strike activity swept through the private sector workforce. In the public sector, this manifested in marked recruitment and retention problems in public agencies, necessitating large pay and benefit increases to compete for talent. Public approval for labor unions has reached the highest point since 1965.

Despite this surge of interest, labor organizing has largely plateaued. The gulf between worker's interest in labor organizing, and the formation of unions in response has long been explained (quite accurately) by pointing to the impotence of labor law. The hobbling of union power by the Taft-Hartley amendments, followed by the 1959 Landrum-Griffin law, as well as the consistent disapprobation of worker democracy by the judiciary all amounted to a formidable political suppression of worker voice, collective bargaining and labor institutions.

However, on the winds of this shift in popular support, Illinois voters approved in 2022 the "Worker's Rights Amendment" (WRA).[4] While often misunderstood as simply *enshrining* the current statutory scheme for collective bargaining, the WRA's clear language elevates the right to collective bargaining from a statutory right to a constitutional one, and a *fundamental* right at that. This means that in Illinois, collective bargaining is a right on par with the freedom of speech, the right to vote, the right to marry, and the right to due process.

Professor Finkin's proposal would harness the potential of the WRA for public sector employees and expand it to the private sector where, since the NLRA's passing, collective bargaining rights have been restricted. His thought piece also suggests the Amendment could act as a bulwark against a markedly hostile US Supreme Court for the protection of rights that, even under a restrictive view of the WRA, are enshrined in Illinois by constitutional fiat.

What then of the statutory restrictions on public sector collective bargaining, ported into state law from Taft-Hartley and its progeny? What of the Illinois Labor Board's reliance on the federal judiciary's implementation of these amendments, and the anti-union bias that suffuses that jurisprudence?

Ostensibly, these restraints on collective bargaining should all fall in the face of the new constitutional amendment. "Fundamental" constitutional rights enjoy the greatest deference in the law, and any legislative restraints on such rights must meet the highest form of scrutiny by the Courts. But those Courts are still staffed by judges who are historically deferential to management prerogatives, and are largely still suspicious, if not outright antagonistic, to worker democracy.

Elevating collective bargaining to the status of a constitutional right has the potential to completely shift the paradigm that Labor has operated under since 1948. Illinois can be a laboratory for the potential of unshackled worker democracy and provide a roadmap for other states to follow suit.[5] As Professor Finkin notes, this will involve analysis by the Courts that would be "fraught with difficulty," as there is little precedent[6] or guidance.[7] But the lack of guidance underscores the potential reach and breadth of the Amendment's effect, if advocates are prepared and have the courage to act.

As Capital reasserts itself with new waves of lay-offs, austere monetary policy, and monopolistic controls on the housing market, unions have the opportunity to no longer play defense. What the moment requires is imagination, boldness and an appetite for risk that labor advocates, particularly attorneys, have trained themselves to shy away from. For too long, the edicts of prudence and measurement have led union lawyers to become the bottleneck through which worker activism is tempered and squelched. With a working-class desperately clamoring for uplift and empowerment, the efforts of countless union members and activists brought us this opportunity. It would be a deep betrayal of those efforts, and of all workers, if labor advocates did not press the attack.

[1] Named after British economist John Maynard Keynes, the central tenet of "the Keynesian consensus or economics" is that government intervention and fiscal policy can stabilize the economy. See, International Monetary Fund, "What Is Keynesian Economics" at https://www.imf.org/external/pubs/ft/fandd/2014/09/basics.htm.

[2] For a concise commentary on the federal judiciary's undermining of statutory labor rights, see: Julius G. Getman, The Supreme Court on Unions: Why Labor Law is Failing American Workers, ILR Press, 2016.

[3] See *Jane McAlevey, No Shortcuts: Organizing for Power in the New Gilded Age*, Oxford University Press, 2016; Thomas Geoghegan, *Only One Thing Can Save Us: Why America Needs a New Kind of Labor Movement*, The New Press, 2014.

[4] Frank Manzo and Robert Bruno, *How the Workers' Rights Amendment Passed in Illinois: A Political Analysis*, February 28, 2023 at https://lep.illinois.edu/wp-content/uploads/2023/02/ILEPI-PMCR-How-the-WRA-Passed-in-Illinois-FINAL.pdf.

[5] A constitutional amendment modeled on Illinois has passed the Vermont state Senate. See, Bob Kinzel, "Vermont Senate Unanimously Passes Amendment Ensuring Workers' Right to Unionize" at https://www.vermontpublic.org/local-news/2024-04-02/vermont-senate-unanimously-passes-amendment-ensuring-workers-right-to-unionize#.

[6] Prior to the Amendment, the Courts *had* weighed the constitutional status of collective bargaining restrictions, but utilized only a rational basis level of scrutiny, and thereby finding "there is no constitutional right to public sector collective bargaining and the statutory right was given only to nonmanagers." *AFSCME Council 31 v. State, Dept. of Cent. Management Services*, 33 N.E.3d 757, 766–67, 393 Ill.Dec. 13, 22–23, 2015 IL App (1st) 133454, ¶¶ 31-34 (Ill.App. 1 Dist., 2015) citing (*Smith v. Local 1315*, 441 U.S. 463, 465, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979)). But, finding no constitutional issue in question, the Court provided no glimpse into what the implications of such a right may be.

[7] Contra, the Missouri Supreme Court in interpreting that state's own constitutional right to collective bargaining nonetheless imposed a collective bargaining framework for excluded public sector employees to effectuate their Constitutional prescription: "if the right did not include a duty for the public employer to negotiate in good faith, [the Amendment] would be reduced to the right to petition an employer for redress of grievances." *American Federation of Teachers v. Ledbetter*, 387 S.W.3d 360, 363–64 (Mo.,2012)