Lessons From the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum

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I. Introduction

One of the widely touted advantages of the multiple labor law regimes in the public sector is that the jurisdictions serve as laboratories for experimentation and evaluation of various approaches to the complex issues involved in public sector labor relations. In order for the laboratory approach to work most effectively, it is necessary to analyze the law and its impact in various jurisdictions. This article attempts such an analysis with respect to two of the jurisdictions at opposite ends of the legal spectrum, Illinois and Virginia. The range of laws in the public sector includes states with constitutional bargaining rights and comprehensive statutes at the one end and those where collective bargaining is illegal on the other. Illinois has a long history of public...
sector bargaining and enacted two comprehensive statutes which took effect in 1984.\(^5\)

The statutes are patterned after the private sector National Labor Relations Act, but in a number of respects are more favorable to bargaining rights than the NLRA.\(^6\) By contrast, Virginia outlawed public sector collective bargaining by court decision in 1977, later confirmed by statute in 1993.\(^7\) A comparison of the two approaches and the resulting realities in the two states provides lessons for both other states and the private sector.\(^8\)

Section II analyzes the legal framework and history of collective bargaining in Illinois and Section III follows with a similar analysis of Virginia. Each section includes current data about public sector employees and union activity in the two states. Section IV follows with an analysis of possible explanations for the differences in the law of the two states. Section V looks at the lessons from this analysis for state and federal lawmakers and for unions and employers and their advocacy groups in the labor relations sector.

The examination of the law and reality in Illinois and Virginia, and comparisons with the federal private sector, reveal that law matters. Whether law is the cause or the effect, or more likely both, where the law is more favorable to unions and collective bargaining, unions are more prevalent and more active, and where unions are more

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5 See infra notes 9-13 and accompanying text.
6 See infra notes 14-39 and accompanying text.
7 See infra notes 58, 88 and accompanying text. Currently, there is a bill in Congress that would require states to authorize bargaining for public safety officers. See H.R. 980; S. B. 2123. If this bill is passed and upheld by the courts, Virginia would have to amend its laws to conform. H.R. 980 was passed by the House, by a vote of 314-97 on July 17, 2007 but no vote has been taken in the Senate. GovTrack.us, http://www.govtrack.us/congress/votes.xpd?year=2007 (visited July 17, 2008).
8 As Joe Slater has correctly pointed out, the public sector has often been ignored in the study of United States labor relations. JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW AND THE STATE, 1900-1962 at 1-2 (2004).
prevalent and more active, the law is more favorable to unionization and bargaining. This conclusion provides support for those advocates and lawmakers who contend that changing the law will affect rates of unionization and bargaining.

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

II. Illinois

A. The Law and History

There is a long history of collective bargaining in the public sector in Illinois although the comprehensive Illinois statutes were late in coming to fruition.9 In fact,

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9 Employees in Illinois do not have a state constitutional right to bargain.
however, the Illinois legislature passed a collective bargaining law in 1945.\textsuperscript{10} The Illinois governor vetoed the statute, leaving Wisconsin to become the first state to enact a comprehensive collective bargaining law for public employees fourteen years later.\textsuperscript{11} In 1967, labor opposed a collective bargaining bill introduced in the Illinois legislature because of its broad prohibitions on the right to strike, and it failed to pass.\textsuperscript{12} Finally in 1983, after repeated efforts, the legislature enacted two comprehensive collective bargaining statutes, one covering educational employees (the Illinois Educational Labor Relations Act or IELRA) and the other covering state and local government employees outside the educational sector (the Illinois Public Labor Relations Act or IPLRA).\textsuperscript{13}

Both statutes, like most in the public sector, were patterned after the private sector National Labor Relations Act (NLRA).\textsuperscript{14} Unlike many public sector statutes, however, they allow strikes by all employees except police officers, firefighters, paramedics and security personnel.\textsuperscript{15} Other significant features of the legislation are the grandfathering of existing bargaining units, including those that are inconsistent with the law, and a requirement that the parties to existing agreements continue to bargain about subjects included therein even if they are not mandatory subjects under the statute.\textsuperscript{16} For example, the statute allows police and fire bargaining units that include supervisors if

\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} See id. at 196-99 (describing the political process of enactment of the two statutes and noting that opposition of the Chicago mayors likely precluded earlier passage of a comprehensive collective bargaining law); Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. 315/1 et seq.; Illinois Educational Labor Relations Act, 115 ILL. COMP. STAT. 5/1 et seq.
\textsuperscript{14} Id. at 198.
\textsuperscript{15} Id. Only ten states have legislation allowing some public employees to strike while 35 outlaw some or all strikes. Kearney & Carnevale, \textit{supra} note 4, at 235.
\textsuperscript{16} Id. at 199.
they preceded the enactment of the statute. These provisions exceed the protections under the NLRA.

In many other ways, the Illinois statutes contain broader protections for employees than the NLRA. The definition of a supervisor excluded from the protection of the statutes is narrower under the Illinois statutes than under the NLRA, thereby including more employees under the protections of the laws. Included as employees under the IPLRA are interns and residents at public hospitals. The IPLRA also covers certain personal care attendants and day care home providers, deeming them employees

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17 See 5 ILL. COMP. STAT. 315/3(S)(1).
19 Compare 5 Ill. Comp. Stat. 315/3(r) (2006) (defining “supervisor,” for all personnel except police officers, under the IPLRA, as an individual who spends a preponderance of his or her employment time conducting supervisory activities), and 115 Ill. Comp. Stat. 5/2 (g) (2006) (defining “supervisor,” under the ILERA, as an individual who spends a preponderance of his or her time conducting supervisory activities), with 29 U.S.C. § 152(11) (2000) (defining “supervisor,” under the NLRA, as an individual who conducts supervisory activities, regardless of the amount of time spent on those activities, as long as they are not occasional temporary supervisory assignments). See also NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001) (stating that an employee is a statutory supervisor if (a) he or she holds the authority to engage in any 1 of the 12 listed supervisory functions, (b) the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (c) the authority is held in the interest of the employer); Ohio Power Co. v. NLRB, 176 F2d 385 (6th Cir. 1949)(finding that the test of the performance of supervisory duties under the NLRA is not the frequency of the exercise of such duties, but the existence of authority for such purpose); Edward Street Daycare Center, Inc. v. N.L.R.B., 189 F.3d 40 (1st Cir. 1999) (same); NLRB v. Edward G. Budd Mfg. Co 169 F2d 571 (6th Cir. 1949)(noting that the listed supervisory function should be read in the disjunctive so that if an employee has authority to do any of the twelve functions, the employee is a supervisor).
20 See 5 ILL. COMP. STAT. 315/3(n). In 1999 the NLRB held that interns, residents and fellows are employees under the statute, reversing a decision twenty years earlier to the contrary. See Boston Medical Center, 330 NLRB 152(1999). In 2004, the Board overturned its previous decision holding that graduate assistants were employees, a decision based in part on Boston Medical Center. See Brown University, 342 NLRB 483 (2004).
of the state for purposes of bargaining. Both Illinois statutes limit the use of public funds to influence union representation elections, while such anti-union campaigns have been credited with reducing the unionization rate in the private sector. The statutes have time limits for conducting elections to avoid the delays that have characterized representation proceedings in the private sector to the detriment of employees seeking union representation. The statutory Boards can designate a union as exclusive representative of employees based on evidence of majority status, such as dues deduction authorizations, and need not hold an election.

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

22 5 ILL.COMP. STAT. 315/10(a)(6); 5 ILL. COMP. STAT. 5/14(a)(8).

23 See Weiler, supra note 18, at 1769.

24 ILL.COMP. STAT. 315/9; 5 ILL. COMP. STAT. 5/7(c)(2).

25 See Weiler, supra note 18, at 1787-95.

26 The IELRA is enforced by the Illinois Educational Labor Relations Board (“IELRB”), while the IPLRA has two enforcement panels of the Illinois Labor Relations Board, one for Chicago and Cook County (the Local Panel) and one for the remainder of the state (the State Panel.) See Clark & O’Brien, supra note 10, at 203; 5 ILL. COMP. STAT. 315/5.1; 115 ILL. COMP. STAT. 5/5.5.

27 5 ILL. COMP. STAT. 315/9 (a-5); 115 ILL. COMP. STAT. 5/7(c)-5). The Employee Free Choice Act, which would have included a similar provision in the NLRA, passed the House but in the Senate did not have enough votes to overcome a Republican-led filibuster. See Supporters of Card Check Bill Fall Short Of Votes Needed to Limit Senate Debate, DAILY LAB. REP. No. 123 (June 27, 2007). Supporters hope to revive the bill with increased chance of passage in the event of a Democratic victory in the 2008 presidential election. Kennedy Says Employee Free Choice Act Must Wait for Passage Until After Election, Lab. Rel. Weekly, Vol. 22, No. 7; Feb. 14, 2008, at 235 (describing Senator Kennedy’s speech before the United Auto Workers stating that the success of the Employee Free Choice Act depends upon the election of a Democratic President).
The laws require inclusion of grievance and arbitration procedures in collective bargaining agreements, a common feature in the private sector, but not a requirement.\(^{28}\)

Generally the Boards and courts interpreting both statutes have read the duty to bargain expansively, requiring negotiation on some subjects that many other states have excluded from negotiations.\(^ {29}\) During the hiatus between collective bargaining agreements, dues and fair share fees must still be deducted.\(^ {30}\) The duty of fair representation doctrine is violated only by intentional union conduct.\(^ {31}\) Attorneys’ fees are available as sanctions for frivolous litigation.\(^ {32}\) Under the IPLRA, contracts can bar decertification of the union or a petition by another union for a longer period than under the NLRA, increasing the stability of union-management relationships.\(^ {33}\) The primacy of collective bargaining is

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

\(^{29}\) Clark & O’Brien, supra note 10, at 206-07.

\(^{30}\) 5 ILL. COMP. STAT. 315/9(a-5); 115 ILL. COMP. STAT. 5/7(c-5). In Hacienda Hotel, 331 NLRB 665 (2000), the NLRB held that the contractual obligation to deduct dues expired with the contract, regardless of whether it was tied to a union security provision. The Ninth Circuit vacated and remanded, finding that the Board did not adequately explain its conclusion that a dues deduction clause without a union security provision should be treated differently than other contract provisions that cannot be changed unilaterally during a contract hiatus. Local Joint Exec. Bd. of Las Vegas v. NLRB, 309 F.3d 578 (9th Cir. 2002). On remand the Board maintained its decision that the Respondents did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff after the parties' collective-bargaining agreements expired. The Board, however, did not rely on the legal precedent cited in its earlier decision but instead based its finding on the factual circumstances of the case, in which the dues-checkoff provisions in the parties' agreement contained explicit language limiting the dues-checkoff obligation to the duration of the agreements. Hacienda Hotel, 351 N.L.R.B. No. 32 (2007)

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

\(^{32}\) 5 ILL. COMP. STAT. 315/11(c); 5 ILL. COMP. STAT. 5/15. The NLRA makes no provision for attorneys’ fees, but the agency does adjudicate those cases in which it finds reasonable cause to believe a violation has occurred so a charging party does not need legal representation. See 29 U.S.C. §160. Under the Equal Access to Justice Act, the respondent can get fees from the agency if the respondent wins the case and the agency’s position was not substantially justified. See 5 U.S.C.A. § 504(a)(1).

\(^{33}\) See 5 ILL. COMP. STAT. 315/9(h) (5 years). Under the NLRA, the contract bar is limited to three years. See General Cable Corp., 139 NLRB 1123 (1962).
further emphasized by statutory provisions that make the bargaining laws controlling in the event of conflict with other laws. \(^{34}\)

Not only do the Illinois statutes favor employee bargaining rights, \(^{35}\) but a review of the administrative and judicial decisions reveals that they have interpreted the statute to further the goals of encouraging bargaining and protecting employee rights. \(^{36}\) This is in contrast to many decisions under the NLRA which restrictively interpret the statute. \(^{37}\)

Where the Illinois courts have restricted bargaining rights, the legislature has often responded with statutory amendments. For example, the Illinois Supreme Court ruled that the Board could not assert jurisdiction over certified court reporters because the Supreme Court was a co-employer of the reporters. \(^{38}\) The legislature amended the statute to provide bargaining rights to the court reporters. \(^{39}\)

Two further legal provisions in Illinois are worthy of note as they bear on labor relations and differ substantially from the law of Virginia. Illinois is a home rule state.

The Illinois Constitution provides in Art. VII, § 6:

\(^{34}\) 5 ILL. COMP. STAT. 315/15(a), (b); 115 ILL. COMP. STAT. 5/17.

\(^{35}\) The Illinois statutes are not exclusively favorable to the collective bargaining rights of employees. For example in 1995, the legislature imposed limitations on bargaining applicable only to the Chicago public schools. See P.A. 89-15, §10 amending 115 ILL. COMP. STAT. 5/4.5 and 105 ILL. COMP. STAT. 5/34-8.1a. In 2003, the legislature again altered the statute, making previously prohibited subjects of bargaining for the Chicago public schools permissive. See P.A. 93-3, §10, amending 115 ILL. COMP. STAT. 5/4. For further discussion of these amendments, see Clark & O’Brien, supra note 10, at 202.

\(^{36}\) See supra note 29 and accompanying text.

\(^{37}\) See Wilma B. Liebman, Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board, 28 BERKELEY J. EMP. & LAB. L. 569 (2007)(discussing NLRB decisions weakening statutory rights); ELLEN DANNIN, TAKING BACK THE WORKERS LAW 7-10, 80-98 (2006)(discussing judicial distortion of NLRA); Cynthia L. Estlund, The Ossification of American Labor Law, 102 COLUM. L. REV. 1527, 1559-64 (2002) (discussing U.S. Supreme Court cases that have forced the NLRB to more restrictively interpret the NLRA and arguing that NLRB decisions are accorded little deference under judicial review); James J. Brudney, Symposium: The Changing Workplace: Reflections on Group Action and the Law of the Workplace, 74 TEX. L. REV. 1563, 1572-75 (1996)(discussing dramatic decline in support for concerted activity and collective bargaining in NLRA cases decided by the Supreme Court since 1970).

\(^{38}\) See AOIC v. Teamsters Local 726, 167 Ill.2d 180, 657 N.E.2d 972 (Ill. 1995).

\(^{39}\) See 5 ILL. COMP. STAT. 315/2.5, 3(o-5)(1),(2),(3).
Any County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.\textsuperscript{40}

The IPLRA states that it supersedes home rule powers except where specifically authorized by the statute.\textsuperscript{41} And finally, Illinois has no right to work law.

B. The Reality

Although collective bargaining in the public sector was extensive in Illinois prior to enactment of the statutes, passage of the legislation increased unionization substantially.\textsuperscript{42} As of 2006, 49.5\% of public employees were union members and 52.5\% were covered by collective bargaining agreements.\textsuperscript{43} Average hourly earnings are $20.96 for unionized public sector workers and $20.75 for nonunion public sector workers.\textsuperscript{44} The Illinois Education Association, an affiliate of the National Education Association, is the largest public sector union in Illinois, while the Illinois Federation of Teachers, affiliated with the American Federation of Teachers, also has a significant presence, especially in Chicago.\textsuperscript{45} Both represent teachers and educational support personnel.\textsuperscript{46} AFSCME also

\textsuperscript{40} See ILL. CONST. art. VII, § 6.
\textsuperscript{41} See 5 ILL. COMP. STAT. 315/15(c). This limitation on home rule is protective of collective bargaining as it would prevent a locality from opting out of the statute. The IELRA has no similar provision expressly relating to home rule but does provide that if the statute conflicts with “any other law, executive order or administrative regulation”, the IELRA controls. 115 ILL. COMP. STAT. § 5/17.
\textsuperscript{43} BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK 31 (2007).
\textsuperscript{45} Clark & O’Brien, supra note 10, at 199-200. The IFT currently has approximately 90,000 members, and its Chicago presence includes the Chicago Teachers Union Quality Education Standards and Teaching (QUEST) Center. IFT, http://www.ift-aft.org/Forms/index3.aspx?TID=top6&PID=16 (last visited Aug.
represents substantial numbers of public employees in state and local government. Unionization among police and firefighters is widespread. In terms of overall unionization, Illinois ranks 3d in the nation in the number of union members and 7th in the nation in percentage of workers who are unionized.

The public sector unionization rates in Illinois are very high as compared to the national private sector rates under the NLRA with its legal provisions, especially as more recently interpreted, less favorable to unionization and bargaining. Current private sector union membership stands at 7.5%, as compared to 49.5% among Illinois public sector employees, a dramatic difference. As will be seen below, there is also a dramatic difference from Virginia, with law even more hostile to bargaining than the NLRA.

While both the IPLRA and the IELRA allow strikes, relatively few strikes have occurred under the IPLRA while more have occurred among teachers covered by the IELRA. Explanations for this difference have focused on the limited cost to teachers of striking since they will likely make up the days lost in order to maintain state funding, as well as on the difficulty of enjoining teacher strikes under the law. In addition, many of the pre-statute strikes were over recognition, which is now determined using statutory

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46 Clark & O’Brien, supra note 10, at 200. See also IEA, About; IFT, About.
49 HIRSCH & MACPHerson, supra note 43, at 69.
50 Union Membership as a Percent of Employed Wage and Salary Workers by Industry, ADDITIONAL EARNINGS AND UNION MEMBERSHIP DATA (2007).
51 Clark & O’Brien, supra note 10, at 209. Malin, supra note 42, at 4-5.
52 See Clark & O’Brien, supra note 10, at 209. Professor Malin’s research on strikes before and after the statutory legalization of strikes demonstrated that, perhaps contrary to expectations, legalization did not increase the number of strikes and probably contributed to a decrease instead. Malin, supra note 42, at 4-5
procedures. Furthermore, since collective bargaining was a familiar process from the pre-statute days, the parties were experienced at successfully resolving disputes before the statute was passed. The enactment of the statutes coincided with a general drop in the number of strikes and with a time period when the cost of living was relatively stable and predictable, which may have made resolution of disputes easier.

III. Virginia

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

A. The Law and History

As far back as 1946, the Virginia General Assembly expressed its opposition to collective bargaining for public employees in the form of a joint resolution. Nevertheless, like Illinois, Virginia has a history of collective bargaining in the public sector, at least at the local level. Legal collective bargaining came to an abrupt halt in 1977, however, with the decision of the Virginia Supreme Court in *Virginia v. Arlington County*. Arlington County had multiple collective bargaining agreements with unions representing its firefighters, teachers, nonprofessional school employees, school administrators, and all other county employees. The state filed an action against the county arguing that it had exceeded its powers by entering into the agreements. The court concluded that Virginia follows the Dillon Rule, which holds that subdivisions of

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55 See id.
56 See id. The final reason offered by these authors is that the right to strike and corresponding preparations by employers reduced posturing and fostered agreement. Id.
57 See Senate Joint Resolution No. 12, *Unionization of Officers and Employees of the Commonwealth*, February 8, 1946.
59 217 Va. at 561.
60 217 Va. at 559.
the state have only those powers that the state expressly gives them, or those which follow from express powers by necessary implication.\textsuperscript{61} Where the power is granted but without express direction as to how it should be carried out, the governmental unit may choose a reasonable method of execution.\textsuperscript{62} Clearly, there was no express grant of power from the state to engage in collective bargaining.\textsuperscript{63} The court then moved to the question of whether the power to enter into contracts, hire employees, and determine the terms and conditions of employment implied the power to bargain collectively or permitted the local governments to select that method of executing their powers.\textsuperscript{64} The court answered the question in the negative, stating that it was contrary to legislative intent and not “necessary to promote the public interest.”\textsuperscript{65} The court relied on Virginia’s failure to enact legislation authorizing collective bargaining, except in the limited arena of transportation employees, several attorney general’s opinions suggesting that local governments lacked the power to enter into binding collective bargaining agreements, and the fact that the enumerated powers to hire, contract and set working conditions preceded public sector bargaining.\textsuperscript{66}

Prior to this decision, nearly one-third of Virginia’s teachers were covered by collective bargaining agreements, along with thousands of police, firefighters and other government employees.\textsuperscript{67} Shortly after the decision on collective bargaining, the

\textsuperscript{61} 217 Va. at 573-74.
\textsuperscript{62} 217 Va. at 574-75.
\textsuperscript{63} 217 Va. at 576.
\textsuperscript{64} 217 Va. at 577-78.
\textsuperscript{65} 217 Va. at 578.
\textsuperscript{66} 217 Va. 578-81.
Virginia Supreme Court struck another blow to the state’s teachers, ruling that binding arbitration for disputes between school boards and their employees was an unconstitutional delegation of power.\footnote{School Board v. Parham, 218 Va. 950, 959 (1978). The case involved an arbitration provision of a grievance procedure adopted by the State Board of Education, not a collectively bargained procedure. 218 Va. at 951.} Preceding the bargaining decision, several Virginia study commissions considered whether to recommend legislation relating to bargaining for public employees.\footnote{Webb, \textit{supra} note 67, at 60-61. The Commission was created by the General Assembly and composed of twelve members, five appointed by the Speaker of the House, two appointed by the Committee on Privileges and Elections of the Senate and five appointed by the Governor from the state at large. \textit{Commonwealth of Virginia, Report of the Commission to Study the Rights of Public Employees, House Document No. 12, at 1 (1973) (hereinafter “1973 Commission Report”). The members appointed by the General Assembly could be members of that body but were not required to be. \textit{Id}. \textit{Id}. at 3.} 

In 1973, the appointed commission recommended adoption of grievance procedures for public employees and legislative specification regarding whether and when agreements relating to terms and conditions of employment were enforceable.\footnote{\textit{Id}. at 6. This recommendation was likely in response to pressure to authorize bargaining for some groups of public employees, as many states have done through piecemeal legislation.} The report also recommended that any legislation be uniform\footnote{\textit{Id}. at 4.} and that “the General Assembly should encourage a policy of providing methods whereby public employees, both state and local including those of constitutional offices, may effectively express their views concerning matters which affect them.”\footnote{\textit{Id}. at 8-9.} This latter recommendation was not a majority recommendation for collective bargaining legislation, however, as six commission members added an addendum stating their belief that collective bargaining was not appropriate for public employees.\footnote{\textit{Id}. at 23-35.} Nevertheless a draft “meet and confer” bill which had been discussed by the commission accompanied the report.\footnote{\textit{Id}. at 23-35.}
In response to the report, the General Assembly enacted legislation requiring grievance procedures for state employees and employees of localities with 15 or more employees. In addition, a recommendation for inclusion of public employees in the right to work law was enacted into legislation. The meet and confer bills and bills making collective bargaining agreements enforceable were all defeated. The 1973 commission recommended its continuation and in 1974, it issued another report. The 1974 report recommended legislation to legalize contracts between labor unions and employers that chose to enter into such agreements. A meet and confer bill did not command the support of a majority of commission members, however. The commission also studied the progress of implementation of grievance procedures pursuant to the legislative enactment and the implementation of opportunities for employee input on employment policies pursuant to a legislative resolution stating that public policy requires creation of such opportunities. The Commission concluded that there was significant progress in establishing grievance procedures at the state level, limited progress at the local level, and little progress in creating opportunities for employee voice. Again the commission was reappointed for the following year, but with several changes in membership.

The year 1974 was the high point for advocates of legislation enabling collective bargaining in Virginia. A majority of the 1975 commission failed to support even limited

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76 Id.
77 Id. at 1-2.
78 See id.
79 Id. at 6.
80 Id. at 5.
81 Id. at 1, 6-11.
82 Id. at 8-11.
83 See Webb, supra note 67, at 60.
legislation to permit localities and unions to enter into enforceable collective bargaining agreements.\textsuperscript{84} Although the legislative subcommittee recommended such legislation, the commission as a whole split 6-6 on the proposal.\textsuperscript{85} The 1975 Commission also analyzed the progress in implementation of the grievance procedure, finding that at the state level fifty grievances had been filed, while at the local level, 98 of the 127 local governments required to implement grievance procedures had done so.\textsuperscript{86} The 1975 Commission did not address the issue of employee voice.

Subsequent to the \textit{Arlington County} decision, there were additional efforts to legalize public employee collective bargaining, but none were successful.\textsuperscript{87} In fact, quite the opposite. In 1993, the General Assembly felt the need to codify the \textit{Arlington County} decision by enacting a statutory bargaining prohibition.\textsuperscript{88} The statute does allow the employees to form associations to promote their interests to their employer, however.\textsuperscript{89} Further, several opinions and reports of the Attorney General have recognized that employers can discuss working conditions with their employees.\textsuperscript{90}


\textsuperscript{85} Id. at 4-23.

\textsuperscript{86} Id. at 26. Notably, the Commission suggested that the fact that only .07% of state employees had filed grievances indicated that the Commonwealth was providing excellent working conditions for its employees. Of course, there are other possible explanations for the limited number of employee grievances. Indeed, a General Assembly Committee Report from 1978 identified a number of criticisms of the procedure and made special accommodations to obtain information from employees who feared reprisal for testifying regarding those criticisms. Commonwealth of Virginia, \textit{Report of the Joint Senate and House General Laws Committees Study on Grievance Procedures to the General Assembly of Virginia}, Senate Document No. 23, at 6 - 7 (1978).


\textsuperscript{88} VA. CODE, § 40.1-57.2.

\textsuperscript{89} VA. CODE § 40.1-57.3. This provision merely codifies what is already a federal constitutional right, however. See Henrico Professional Firefighters Association v. Board of Supervisors of Henrico County, 649 F.2d 237, 246-47 (4th Cir. 1981).

legislative mandate is the standards of quality for education, which require each school board to establish a “system of two-way communication between employees and the local school board and its administrative staff whereby matters of concern can be discussed in an orderly and constructive manner.” The General Assembly has also modified the legislation relating to the grievance procedures over the years in various ways, but still mandates the procedure for state employees as well as employees of local governments which have more than 15 employees.

B. The Reality

The change in legal climate had a dramatic effect on public employee union membership in Virginia. Between 1972 and 1978, union membership dropped from 38.5% to 19.5% of public sector workers. Despite the judicial and legislative decisions to ban binding collective bargaining, however, unions still play an active role in Virginia’s public sector, albeit a much smaller role than Illinois unions. The percentage of public employees who are union members is 8.4%, while 11.8% are covered by collective bargaining agreements. The average hourly earnings of unionized public sector workers are $27.37 per hour, while nonunion public sector workers average $24.77 per hour. In terms of overall union membership, Virginia ranks 25th in the number of

91 VA. CODE § 22.1-253.13/7D1.
92 See VA. CODE §§ 15.2-1506 – 1507; VA. CODE §§ 2.2-3000, 3003-3006. Local government compliance with the grievance procedure requirements has been mixed. See, e.g., Report of the Department of Employee Relations Counselors on the Statutory Compliance of Local Government Grievance Procedure to the Governor and the General Assembly of Virginia, Senate Document No. 9 (1986).
93 See Lon S. Felker, et al. Public Sector Unionization in the South: An Agenda for Research, 13 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 1, 4, 9 (1984). While the decision outlawing bargaining was issued in 1977 by the Supreme Court, the legal efforts began earlier. See Commonwealth of Virginia v. County Board of Arlington County, 217 Va. at 579-581.
94 HIRSCH & MACPHERSON, supra note 43, at 35. Presumably those employees covered by collective bargaining agreements are federal employees or employees covered by nonbinding memoranda of agreement. See infra notes 113 and 196 and accompanying text.
95 Id.
union members and 49th in the percentage of workers who are union members. Unions most active in Virginia’s public sector are predominantly the same unions active in Illinois, including affiliates of the National Education Association and the American Federation of Teachers, the International Association of Firefighters, and AFSCME.

What do unions that cannot negotiate binding collective bargaining agreements do? As noted previously, employees have a constitutional right to join labor unions and these unions represent employees in a number of forums. They promote legislation that favors employees and oppose legislation that they identify as detrimental to public employees. They speak before legislative commissions, county boards, city

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96 Id. at 70.
97 See 1973 Commission Report, supra note 69, at 6 (reporting, inter alia, contracts with AFSCME and the International Association of Firefighters); 1975 Commission Report, supra note 84, at 10 (reporting testimony by various locals of the Virginia Education Association and the International Association of Firefighters); Virginia Professional Fire Fighters, Who are the Virginia Professional Fire Fighters, http://www.vpff.org/Membership/WhoAreVPFF.htm (last visited Aug. 18, 2008) (indicating affiliation with the International Association of Fire Fighters and organization of 51 local unions representing over 6000 firefighters and paramedics); Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006 (indicating Richmond Fire Fighters have 84% membership); Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006 (indicating 99% membership among teachers in the Norfolk Public Schools); Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006 (indicating that the VEA has over 60,000 members in Virginia); Interview with Donald Baylor, President, AFSCME Council 27, June 6, 2006 (indicating that the union has almost 1000 members working in corrections, mental health, juvenile justice, social services, alcoholic beverage control, and medical facilities.)


99 See 1975 Commission Report, supra note 84, at 10; Report of the Joint Subcommittee Studying The Continuing Contract Status Law for Instructional and Administrative Personnel to the Governor and
councils, school boards and other governmental bodies to advocate for employee rights. Unions represent employees in the existing grievance procedures established by law. Such representation may obviate the need for legal representation, which can be costly for the employee. The existence of the grievance procedure, while it may have been intended to forestall unionization and substitute in part for collective bargaining, provides a vehicle for unions to prove their worth to actual and potential members.

Unions also represent employees in other legal proceedings relating to their employment. In some jurisdictions, employees have even engaged in concerted activities such as “work to the rule” or taking down from the classroom all items paid for by the teachers. In short, public sector unions in Virginia, like public sector unions in

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100 See, e.g., Henrico Professional Firefighters Ass’n v. Board of Supervisors of Henrico County, 649 F.2d 237, 239-240 (4th Cir. 1981) (describing efforts by president of association to speak to county board on behalf of the association and its members regarding county’s handling of heart-lung disability claims).

101 Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006 (describing importance of relationships with city council and successful efforts to convince former lobbyist for the organization to run for city council).


104 See, e.g., *VEA Protects Your Rights*, [http://www.veaweteach.org/resources_rights.asp](http://www.veaweteach.org/resources_rights.asp) (last visited Aug. 18, 2008) (listing various situations where VEA assisted employees in other legal proceedings, including defense against criminal charges and efforts to obtain benefits); Virginia Professional Fire Fighters, Recent Accomplishments of the VPFF/IAFF Partnership, [http://www.vpff.org/Membership/VPFFAccomplishments.htm](http://www.vpff.org/Membership/VPFFAccomplishments.htm) (last visited Aug. 18, 2008) (listing legal action on behalf of members); Virginia Troopers Alliance, Why Join the VTA, [http://www.virginiatroopersalliance.com/vta_apr_15_2007_003.htm](http://www.virginiatroopersalliance.com/vta_apr_15_2007_003.htm) (listing various legal proceedings for which the VTA provides legal assistance to members); Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006; Interview with Donald Baylor, President, AFSCME Council 27, June 6, 2006 (indicating that the union provides some limited legal assistance to membership but such assistance is limited by the small number of members and when membership was higher, additional services were provided.)

105 Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006.
Illinois and private sector unions nationally, serve as a voice for workers that they represent. In addition to representation in various legislative, judicial and administrative forums, unions provide other value-added benefit to their members such as insurance, educational workshops and support for families of employees killed or injured. They also engage in charitable endeavors to benefit their communities. These charitable endeavors can generate support for the union; when the union needs political support it may contact those who have benefited from union largesse to make calls and write letters to political leaders in support of union objectives.

The limits on Virginia unions, however, preclude their negotiation of binding collective bargaining agreements. Once a union in Illinois is certified as employee representative, the focus shifts to negotiation of successive contracts governing terms and conditions of employment and administering those agreements through representation of employees in the grievance and arbitration procedure. The statutes allow the union to negotiate fair share provisions requiring nonmembers to pay the costs of collective bargaining, contract administration and other activities affecting wages, hours and


107 Virginia Professional Fire Fighters, Recent Accomplishments of the VPFF/IAFF Partnership, http://www.vpff.org/Membership/VPFFAccomplishments.htm (last visited Aug. 18, 2008) (listing charitable work of the local unions); Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006 (describing union’s charitable activities, including building playgrounds, enhancing parks, working with school programs and raising money for fuel assistance).

108 Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006.
conditions of employment by payroll deduction.\textsuperscript{109} In Virginia, by contrast, the unions must convince employees to join the union and pay dues despite the inability to negotiate a binding agreement. They must convince members to continue to pay dues. Union leaders in Virginia describe a continual need to organize the workforce.\textsuperscript{110} The organizing campaign does not end with certification, as it often does in states with collective bargaining and fair share rights.\textsuperscript{111}

Because any agreements are nonbinding, Virginia unions also must work continually on their relationship with the employer and with any legislative body that controls terms and conditions of employment.\textsuperscript{112} Even in the absence of collective bargaining rights, however, a few unions in Virginia have negotiated nonbinding memoranda of agreement with employers.\textsuperscript{113} And, according to the unions, employers generally comply with the agreements.\textsuperscript{114} Employers and unions in some areas of Virginia have healthy, productive relationships where they work together on a regular basis.\textsuperscript{115} For example the Norfolk Federation of Teachers and the Norfolk School System worked together and succeeded in winning the Broad Prize for the top urban school

\textsuperscript{109} 5 ILL. COMP. STAT. 315/6(e); 115 ILL. COMP. STAT. 5/11.
\textsuperscript{110} Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006; Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006.
\textsuperscript{111} Wise unions, however, recognize that it is necessary to continue a form of organizing to maintain the connection of employees to the union. Moreover, in right to work states, where no union security clause can be negotiated, the same need to organize continually exists.
\textsuperscript{112} Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006.
\textsuperscript{113} Id.; Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006.
\textsuperscript{114} Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006 (indicating that the union is a part of all major decisions and that the union and the employer have an effective working relationship); Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006 (indicating that the Richmond Education Association, which has a very high percentage of members, and the Richmond School Board have a relationship that functions like a traditional bilateral union/management relationship).
\textsuperscript{115} Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006; Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006; Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006.
Given the absence of collective bargaining rights, how can unions achieve such agreements? One explanation may be that some of the union-management relationships preceded the elimination of collective bargaining. And some of the union officers have been leaders of their organizations for many years, enabling continuity and stability in both the union and the relationship with the employer. Those unions that operate most effectively in Virginia are concentrated in firefighting and education, areas with strong national organizations and a strong history of organizational activity. Further, public sector unions have an advantage that private sector unions lack. They play a role in electing their employers. Thus, they can mobilize political power to help them accomplish their goals. Notably, the average wage for

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116 See Norfolk Public Schools, Norfolk Public Schools Wins Top Urban Education Award, http://www.nps.k12.va.us/news/2005/0905nps_news.htm (last visited Aug. 18, 2008). In the two previous years, the school system was one of five finalists for the award. Id.; Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006.

117 Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006 (indicating that school districts in Norfolk, Richmond, Virginia Beach, Fairfax, Alexandria, and Arlington bargained with unions prior to 1977); 1973 Commission Report, supra note 69, at 6 (describing collective agreements with firefighters and county workers in Fairfax County; teachers in Fairfax, Arlington, Alexandria, Prince William and Newport News with negotiations in progress in Powhatan, Page, Waynesboro, Virginia Beach and Prince George; sanitation workers in Alleghany county; and county workers and school employees in Arlington County); 1974 Commission Report, supra note 75, at 6 (indicating that collective agreements covering teachers had increased 100% over the previous year and agreements also existed covering firefighters, school employees, county government workers and sanitation workers); 1975 Commission Report, supra note 84, at 15 (indicating that about 19 jurisdictions in the state had entered into collective bargaining agreements covering at least some employees to which they adhered despite several opinions from the Attorney General stating that localities had no such authority).

118 Norfolk Federation of Teachers, History, http://nft4261.org/history.htm (last visited Aug. 18, 2008)(indicating that the charter president has been continually reelected leading to continuity and effective leadership); Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006 (same); Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006 (indicating that he has been union president for 22 years).

119 KEARNEY & CARNEVALE, supra note 4, at 66. While there are other effective unions, they are smaller in number and size.

120 Interview with Michael Mohler, President Virginia Professional Fire Fighters, June 20, 2006 (noting that political arena is the bargaining table for his union and that the union has been able to obtain wages and benefits comparable to firefighters in similar jurisdictions where bargaining is lawful); Norfolk Federation of Teachers, Reasons to Join, http://nft4261.org/reasonstojoin.htm (last visited Aug. 18, 2008); Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006 (describing extensive grassroots lobbying and creation of relationships with various civic groups to develop political base). See also KEARNEY & CARNEVALE, supra note 4, at 124-26 describing electoral activities of unions).
both union and nonunion public sector workers exceeds that in Illinois, with Virginia
unionized employees showing a greater advantage over their nonunion counterparts than
those in Illinois.\textsuperscript{121}

All is not rosy for unions in Virginia, however. The unions that are thriving are
primarily in local government in large metropolitan areas.\textsuperscript{122} As noted, the unions in
firefighting and education have been particularly successful.\textsuperscript{123} This success may be
attributable to the existence of these unions as professional associations with substantial
membership prior to widespread unionization in government. It has been more difficult
for unions to organize effectively at the state level\textsuperscript{124} and in smaller localities. While
unions that have been able to build an effective politically savvy organization have
prospered, many employees remain without any union representation. Although some
employees would not choose union representation regardless of the state of the law, there
are likely other employees who would prefer union representation, yet at present have

\textsuperscript{121} See supra notes 43 and 94 and accompanying text. In 2005, however, union workers in Illinois had a
greater wage advantage over nonunion workers, $21.57 per hour for the former and $18.40 per hour for the
latter. HIRSCH &. MACPHERSON, supra note 44. In Virginia the 2005 data showed and average hourly wage
of $22.18 for unionized public sector workers and $24.45 for nonunion public sector workers. Id.
\textsuperscript{122} See supra note 97 (indicating that over 6000 firefighters and paramedics are represented by the Virginia
Professional Fire Fighters); IAFF Local 2068, Fairfax County, http://www.fairfaxfirefighters.org/ (last
visited Aug. 18, 2008) (indicating the Fairfax County local union has 1500 members, staffing 35 fire
stations in this Washington, D.C. suburb); Virginia Professional Fire Fighters, International Association of
Fire Fighters Local Unions of the Virginia Professional Firefighters,
http://www.vpff.org/Membership/MemberLocals.htm (last visited Aug. 18, 2008) (listing local unions in
Virginia); Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006
(indicating 99\% membership among teachers in the Norfolk Public Schools); Interview with Dena
Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006 (describing success of
Richmond Education Association); Interview with David Pulliam, President, Richmond Fire Fighters, June
7, 2006 (describing success of Richmond Fire Fighters in obtaining wages and retirement benefits
comparable to the best in the nation).
\textsuperscript{123} Among 96 sheriff’s offices in Virginia, for example, there is only one active local union although
several more are chartered. Interview with Kevin Pittman, Secretary of Local 5016, International Union of
Police Associations, June 16, 2006. Organizing among sheriff’s deputies has been difficult because of the
lack of collective bargaining and the lack of civil service protection for the deputies. Id. The Sheriff’s
Association is a strong political force which opposes legislative initiatives of the unions. Id.
\textsuperscript{124} Interview with Donald Baylor, President, AFSCME Council 27, June 6, 2006 (describing difficulty in
organizing state employees).
Another downside to the lack of collective bargaining is the absence of formal written documentation of agreements in most cases. When union leadership changes, institutional memory may be lost and agreements in doubt.

Specific salary data for some job categories suggest that in the less unionized environment of Virginia pay is lower. Teachers in Illinois are the 4th highest paid in the country while in Virginia, they ranked are 20th. Other data on teacher salaries, both public and private, shows a relative advantage in some categories in Virginia, while other jobs, such as police and firefighters rank lower on the pay scale in Virginia. Average

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125 See Richard B. Freeman, Through Public Sector Eyes: Employee Attitudes toward Public Sector Labor Relations in the U.S. in PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 59, 60, 71-72 (Dale Belman, et al., eds. 1996)(showing that 39% of the public sector nonunion workers in the survey, primarily from one southern state, would vote for union representation, more than their private sector counterparts despite the higher rate of unionization in the public sector); Webb, supra note 67, at 66-68.

126 Interview with Michael Mohler, President Virginia Professional Fire Fighters, June 20, 2006.

127 Id.

128 Error! Main Document Only. Comparative Average Annual Salary Data for some occupations:

<table>
<thead>
<tr>
<th></th>
<th>Illinois</th>
<th>Virginia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Correctional Officers</td>
<td>$44,252</td>
<td>range of $22,188 – 45,539</td>
</tr>
<tr>
<td>Correctional Officer Sr/Lead</td>
<td>$61,851</td>
<td>$29,167</td>
</tr>
<tr>
<td>Teacher, State Institution</td>
<td>$52,897</td>
<td>$42,014</td>
</tr>
<tr>
<td>LPN</td>
<td>$38,891</td>
<td>$34,517</td>
</tr>
<tr>
<td>RN</td>
<td>$59,795</td>
<td>$43,992</td>
</tr>
</tbody>
</table>

American Federation of Teachers, Error! Main Document Only. AFT Public Employees Compensation Survey 2006, A Survey of Professional, Scientific and Related Occupations in State Government (2006) available at http://www.aft.org/salary/2006/download/PECompSurvey06.pdf. (last visited March 19, 2008). Because these were state jobs and state level unionization is very low in Virginia, this may well reflect a significant wage premium resulting from unionization. See also note 130 infra showing lower mean wages for police and sheriff’s officers and firefighters in Virginia. The largest gap is for police and sheriff’s officers where unions have had limited success in Virginia. See supra note 123 and accompanying text.


130 Error! Main Document Only. Comparative Annual Mean Wage (not limited to public employment)

<table>
<thead>
<tr>
<th></th>
<th>Illinois</th>
<th>Virginia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secondary School Teachers</td>
<td>$59,250</td>
<td>$56,030</td>
</tr>
<tr>
<td>Middle School Teachers</td>
<td>$50,120</td>
<td>$51,070</td>
</tr>
<tr>
<td>Elementary School Teachers</td>
<td>$52,050</td>
<td>$54,950</td>
</tr>
<tr>
<td>Police and Sheriff’s patrol officers</td>
<td>$55,120</td>
<td>$45,150</td>
</tr>
<tr>
<td>Firefighters</td>
<td>$43,950</td>
<td>$41,620</td>
</tr>
</tbody>
</table>

salaries overall in the public sector are higher in Virginia, however.\textsuperscript{131} The average salary data does not control for the type of job and this difference may be explained by differences in the numbers of jobs in higher paying job categories.

It is clear that there are some significant difficulties for unions in states where bargaining is outlawed. Union membership is significantly lower than in more favorable legal environments and in many jobs salaries are lower as well. It is interesting, however, that public sector membership in Virginia is higher than national private sector membership where the law is less hostile. Clearly, the law is not the only factor. Nevertheless, some unions have survived in Virginia’s hostile climate, and some have even prospered. The next section will look at possible explanations for the different legal regimes.

\section*{III. Accounting for the Differences}

As noted by Kearney & Carnevale, the relationship between legal bargaining policy and unionization levels is a chicken and egg problem.\textsuperscript{132} Joe Slater makes this same point in his study of the history of public sector unionization.\textsuperscript{133} Levels of unionization are clearly affected by the existence of collective bargaining laws.\textsuperscript{134} Illinois and Virginia follow the pattern in this regard with much higher unionization in Illinois. Virginia’s loss of union membership between 1972 and 1978, a year after the elimination of lawful collective bargaining in the public sector also illustrates the effect

\begin{footnotesize}
\begin{enumerate}
\item[132] See \textsuperscript{supra} notes 43, 94 and accompanying text.
\item[133] \textit{KEARNEY} \& \textit{CARNEVALE},\textit{ supra} note 4, at 29.
\item[134] \textit{SLATER},\textit{ supra} note 8, at 194.
\item[135] \textit{Id.}
\end{enumerate}
\end{footnotesize}
of law on union membership. On the other hand, strong unions can exert political pressure that leads to favorable changes in the law. Public sector unions in Illinois were active long before collective bargaining legislation was enacted. The unions helped defeat unfavorable legislative efforts and enact favorable collective bargaining legislation. They have continued to promote legislative change, resulting in collective bargaining laws more union-friendly than at the federal private sector level.

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

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135 Felker, et al, supra note 93, at 9 (showing Virginia’s loss of union membership from 38.5% of the public sector workforce in 1972 to 19.5% in 1978 and attributing it to the negative legal climate.) Notably, while the Virginia Supreme Court decision was in January 1977, the efforts to eliminate collective bargaining began earlier. See Webb, supra note 67, at 60; Carlton & Johnson, supra note 87, at 268-69.


137 See supra notes 9-13 and accompanying text.

138 See supra notes 18-39 and accompanying text.

139 Interview with Guy Horsley, Senior Assistant Attorney General, Virginia Attorney General’s Office, June 20, 2006.

140 See supra notes 97, 98.
Kearney and Carnevale single out the “Sunbelt states” for particular consideration in analyzing the determinants of union strength. They note that despite the presence characteristics that in other regions have been associated with unionization, unionization has lagged in these states, a fact that they attribute to political culture and union resistance by employers. The “traditionalistic” culture of the south, which is elitist and hierarchical, favors business and is hostile to unions. Similarly, the conservative political ideology impedes union growth and strength. Kearney and Carnevale conclude: “In most of the Sunbelt, a vicious cycle seems to be present in which the traditionalistic political culture and the absence of public union strength diminish the chances of new collective bargaining legislation, while in the absence of a favorable legal environment union membership gains remain arduous.”

Carlton and Johnson, who surveyed the attitudes of teachers and school board members on issues relating to public employee bargaining, noted the historically grounded and “deep-seated antipathy felt by southerners toward labor unions and union-like organizations.”

Felker, Griffith and Durant also look at union determinants in the public sector in the south. They categorize the southern states into four categories based on their analysis of the effect of the size of public sector employment on unionism, which they identify as a key determinant. Virginia follows a relatively unique pattern, joined only

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141 KEARNEY & CARNEVALE, supra note 4, at 32.
142 Id.
143 Id.
144 Id.
145 Id. at 33.
146 Carlton & Johnson, supra note 87, at 276-77 (citing W. J. Cash’s Mind of the South which discussed the anger of many southerners expressed toward textile strikers in the 1930s).
147 Felker, et al., supra note 93. Although the analysis is dated, the authors examined a time period that was particularly important in Virginia’s history as it spanned the time period during which collective bargaining was outlawed and contracts voided. Id.
148 Id. at 6.
by Texas, in which unionization peaks and declines despite growth in public sector employment.\textsuperscript{149} The study’s authors concluded that the hostile legal climate in these two states caused them to vary from the normal pattern of strong association between the growth of employment and growth of unionization.\textsuperscript{150} Accordingly, they posit that significant public sector employment is an important but not sufficient determinant of unionization.\textsuperscript{151} The legal climate also plays an important role in constraining growth of unionization despite an incentive for growth based on the size of the public sector.\textsuperscript{152}

A more focused legal analysis based on the history of public sector unionization was conducted by Joseph Slater in his book, \textit{Public Workers}.\textsuperscript{153} Slater looked at the role of the law in public sector unionization, filling a gap in the scholarly analysis which had focused extensively on the role of law in the private sector. Slater concluded that the law historically played an important role in frustrating the efforts of public employees to unionize. He identified three significant factors. Judges were “hostile to labor”, constrained by state structures and legal doctrines, and interpreted the term union inaccurately, fearing strikes despite the assurances of unions and predominant history to the contrary.\textsuperscript{154} Each of these factors is demonstrably evident in the comparison between Virginia and Illinois, confirming that the pattern that Slater observed historically continues today.

The judicial hostility toward unions in Virginia is reflected in the Supreme Court’s decision in \textit{Arlington County}.\textsuperscript{155} The Court stated that there was no “support for

\begin{flushleft}
\textsuperscript{149} \textit{Id.} at 8.
\textsuperscript{150} \textit{Id.} at 8-9.
\textsuperscript{151} \textit{Id.} at 11.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{S}LATER, \textit{supra} note 8.
\textsuperscript{154} \textit{Id.} at 7.
\textsuperscript{155} 217 Va. 559 (1977).
\end{flushleft}
the proposition that collective bargaining by the boards is necessary to promote the public interest."\(^{156}\) By way of contrast, courts in Illinois allowed unions to play a significant role in the public sector preceding the enactment of the collective bargaining statutes.\(^{157}\)

The at-will employment doctrine is repeatedly described as a strong presumption in Virginia, not to be overcome easily, however sympathetic an employee’s case and however poorly the employer behaves.\(^{158}\) In the area of workers’ compensation, Virginia’s laws are among the most business-friendly in the nation, restricting workers’ ability to obtain benefits in several areas where most other states award them.\(^{159}\)

\(^{156}\) Id. at 578.

\(^{157}\) See, e.g., Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470 (1976) (upholding arbitration award in favor of teachers based on collective bargaining agreement in effect in 1971); Naperville Police Union, Local 2233 v. City of Naperville, 97 Ill.App.3d 153 (2 Dist., 1981)(finding constitutional decision by city to continue bargaining with union representing electrical workers while denying continued recognition of police officers union although recognition of both unions was pursuant to the same subsequently repealed city ordinance).

\(^{158}\) See, e.g., County of Giles v. Wines, 262 Va. 68, 75 (2001)(reversing the lower court’s decision that the County’s personnel policy created a binding contract to terminate only for cause). The manual in *Giles* said the “employee may be discharged for inefficiency, insubordination, misconduct, or other just cause.” Id. at 73. The Virginia Supreme Court found that such language did not rebut the presumption because it did not say that employees will only be fired for just cause or cannot be fired without just cause. Id. The court also precluded reliance on any evidence other than the manual *Id. at 79-80.* See also Cave Hill Corp. v. Hiers, 264 Va. 640 (2002)(relying on the strong at will doctrine to reverse trial court’s decision to send to the jury a case challenging the employee’s termination, finding that the contract was unambiguous although it included both a specific contract term and a 30 day notice provision for termination of the agreement); Willey v. Roanoke County 70 Va. Cir. 307 (2006 Va. Cir.) (finding at will relationship); Willey v. Roanoke County, LEXIS 14865 (W.D. Va. July 21, 2005)(relying on presumption of at will employment to defeat employee’s claim based on handbook provisions); Mizell v. Sara Lee Corporation, LEXIS 36988 (E.D. Va. June 9, 2005)(finding at will relationship despite claims of intentional employer misrepresentations that the handbook was binding).

The Fourth Circuit Court of Appeals, the federal circuit court covering Virginia, has a reputation as the most aggressively conservative appeals court in the country. Its decisions on labor matters reflect a suspicion of unions and a reluctance to rule against employers except in the clearest of cases.

Hostility is not limited to judges, of course, but rather judges reflect the expressed views of the most powerful and vocal citizens. Public officials and candidates for office in Virginia from both parties proclaim allegiance to both the right to work law and the ban on public employee collective bargaining. Recently, when a Democratic governor sought to appoint the president of the AFL-CIO to the position of Secretary of

160 See Neil A. Lewis, A Court Becomes a Model of Conservative Pursuits, N.Y. Times, May 24, 1999, at A1. (stating that by 1999 the 4th Circuit had “quietly but steadily become the boldest conservative court in the nation in the view of scholars, lawyers and many of its own members.”) See also Deborah Sontag, The Power of the Fourth, N.Y. Times Mag., Mar. 9, 2003, at 40 (stating that today the 4th Circuit is considered the “shrewdest, most aggressively conservative federal appeals court in the nation”); Carl Tobias, A Note on the Neutral Assignment of Federal Appellate Judges, 39 SAN DIEGO L. REV. 151, 152 (2002) (stating empirical research confirmed several studies which found that a majority of the court's members “invoke the rehearing en banc mechanism to reverse three-judge panel opinions which the majority considers too liberal politically”).

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

162 See Prosperity Busters, Richmond Times-Dispatch at A-14, April 14, 2008(editorial suggesting that most private employees don’t want unions, that unions will make it hard for American business to compete and that election of Democrats at the national level, who are “union pawns”, will destroy the economy and eliminate right to work laws, which will, in turn, devastate Virginia’s economy). Notably, Virginia has been ranked as the best state for business by Forbes.com for three years in a row. Tierney Plumb, Virginia named 'best state to do business' by Forbes.com, Washington Bus. J., Aug. 1, 2008, http://washington.bizjournals.com/washington/stories/2008/07/28/daily59.html (last visited Aug. 18, 2008).

the Commonwealth, public statements by members of the legislature and letters to the editor in local papers reflected anti-union views and fears of union power in a state where little exists. The appointment was derailed and he was placed in a job which did not require approval of the General Assembly. The issues of public sector bargaining reared its head again in the 2008 legislative session. In an unprecedented procedural

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165 See Michael D. Shear, GOP Delegates Stymie Kaine's Cabinet Choice, Washington Post, March 8, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/07/AR2006030700684.html, (last visited March 4, 2008) (quoting Del. Timothy Hugo stating “LeBlanc’s appointment would lead to a ‘unionization of the state workforce’”); Warren Fiske, House Panel Rejects Kaine Nominee for Cabinet Post, The Virginian-Pilot, March 8, 2006, available at http://hamptonroads.com/node/74981 (last visited March 4, 2008). Dan LeBlanc’s appointment was the only cabinet appointment ever to be rejected by the legislature since the initiation of the cabinet system. Id. Reactions in the General Assembly were described by the article. “‘Other than the governor himself, the secretary of the commonwealth has the greatest power to affect policy of any other position in the commonwealth,’ said Del. Timothy Hugo, R-Fairfax. ‘He would possess the ability to fill these positions entirely with people who share his views on right to work.’ Republicans complained that LeBlanc over the years had made derogatory comments about several of Virginia’s largest employers. Del. John Cosgrove, R-Chesapeake, noted that LeBlanc once called Newport News Shipbuilding a ‘plantation.’ Cosgrove said LeBlanc’s appointment would ‘send the wrong message’ to businesses considering locating in Virginia. Id. Notably, LeBlanc found it necessary to disavow any intent to undermine the right to work law in an effort to obtain General Assembly support for his appointment. Id. See also Michael D. Shear, Va. Delegates Question “Right-to-Work” Views, The Washington Post, February 8, 2006, Page B05. available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/07/AR2006020701889.html (last visited Aug. 18, 2008).

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

166 See Senior Advisor to the Governor for Workforce, Biography of Daniel G. LeBlanc, available at http://www.workforce.virginia.gov/OfficeInfo/LeBlancBio.cfm (last visited March 4, 2008); VA. CODE §2.2-435.6B (providing for governor to designate senior staff member from the governor’s office to handle responsibilities of chief workforce development officer.)
move, the sponsor of a bill to allow bargaining was denied the right to withdraw the bill, forcing a vote by the full House of Delegates.\textsuperscript{167} The purpose of the rare move was to force Democrats to vote on the bill, either alienating their labor supporters by voting against it or voting for a bill that might be used against them in next election.\textsuperscript{168} The Democrats refused to vote altogether,\textsuperscript{169} illustrating once again that even Democrats with labor support are reluctant to support labor issues in Virginia. As for the Republicans, the Majority Leader of the House, in speaking about the bill, echoed the earlier associations of strikes and public sector bargaining,\textsuperscript{170} asserting that the Democrats were leading Virginia toward the demise of the right to work law and the consequent end of Virginia’s status as the best state in the union in which to do business.\textsuperscript{171} Delegate Griffith’s speech asserted that a vote on the bill would show whether the delegates were for Virginia or for the unions, clearly implying that one could not support unions and public sector bargaining and still support the good of the state.\textsuperscript{172} In Illinois, by way of contrast, labor has a strong voice in the legislature, influencing favorable legislation and opposing legislation with negative consequences for labor, and certainly legislators do not fear association with union-supported legislation.\textsuperscript{173}

\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} See infra notes 184-91 and accompanying text.
\textsuperscript{171} See Majority Leader Morgan Griffith calls on Democrats to cast a vote, http://www.youtube.com/watch?v=bZD6o3uHcQY (last visited Aug. 18, 2008)
\textsuperscript{172} Id.
The laws and state structures in Virginia and Illinois also differ. Most obviously, bargaining in Virginia is outlawed, while it is not only permitted but encouraged in Illinois. As noted above, Virginia follows the Dillon rule which restricts the authority of local government to those powers expressly conferred by the state or those conferred by necessary implication. The Arlington County court relied on the Dillon Rule to find that local government entities had no authority to bargain collectively with unions despite their expressed desire to do so as reflected in the existing agreements. Illinois, again by contrast, follows Home Rule, which allows local governments to exercise those powers not clearly and expressly withheld by the state. Thus local governments that chose to bargain could do so even in the absence of a statute authorizing collective bargaining. Historically, bargaining occurred well prior to the enactment of the bargaining laws.

The nondelegability doctrine, long used to preclude public sector collective bargaining historically, persists in Virginia, despite its virtual abandonment in many states. Opponents of bargaining legislation have used the nondelegability doctrine to justify the refusal to permit negotiations, arguing that the legislature cannot delegate its responsibility through bargaining nor can it permit the executive or administrative branch

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174 217 Va. at 575-81
176 See Independence-National Education Ass’n v. Independence School Dist., 223 S.W.3d 131, 136 (S. Ct Mo. 2007)
to do so. The Virginia Supreme Court relied on the doctrine in two important cases involving school teachers. In *City of Richmond v. Parham* the Court held that school boards could not be required to submit to binding arbitration of grievances because it improperly delegated to the arbitrator authority belonging to local school boards. Subsequently, the court relied on the doctrine to find that the decisions of statutory fact-finding panels in disciplinary proceedings for school teachers are not binding on school boards. By way of contrast, the Illinois bargaining statutes require contracts to contain provisions for arbitration of grievances. And Illinois school law provides for binding decisions of hearing officers in disciplinary decisions, subject to limited appellate review. Finally, of course, Virginia remains a right to work state while Illinois is not.

Slater’s third factor, the misunderstanding of public sector unions, focuses primarily on the unwillingness to recognize and acknowledge that public sector unions largely eschewed strikes. As Slater documents, this factor played a historic role in the limited growth of public sector unions. The reports of the commissions that studied the rights of public employees preceding the Virginia Supreme Court’s decision to invalidate bargaining reflect the fear of strikes. The 1973 Commission, which recommended

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177 *1975 Commission Report*, * supra* note 84, at 6-7. Interestingly the report quotes the 1947 decision of the Missouri Supreme Court in *City of Springfield v. Clouse*, 206 S.W. 2d 539, 545 in support of its position. *Id.* at 7. The Missouri Supreme Court recently overturned *Clouse*, holding that the Missouri constitution protects the right of public employees to bargain collectively. *Independence-National Education Ass’n v. Independence School Dist.* , 223 S.W.3d 131 (S. Ct Mo. 2007).

178 218 Va. 950, 957-58 (1978). The case involved arbitration under the statutory grievance procedure not a collective bargaining agreement.


180 5 ILL. COMP. STAT. 315/8; 115 ILL. COMP. STAT. 5/10.

181 *See* 105 ILL. COMP. STAT. 5/24-12.


183 SLATER, * supra* note 8, at 82.
legislation making contracts enforceable and encouraged a policy of providing a way for public employees to express their views to their employers, also contained a recommendation to enact legislation to deter strikes.\textsuperscript{184} The 1974 commission, which recommended legislation making negotiated agreements enforceable, was accompanied by a five member dissent stating, “organization and collective bargaining is meaningless without the concurrent right of economic action and always leads to work stoppages whether lawful or not( emphasis added).”\textsuperscript{185}

The rhetoric about strikes escalated in the 1975 report, in which the commission divided equally on the need for bargaining legislation. The commissioners all agreed that strikes in the public sector should be prohibited.\textsuperscript{186} Those opposed to legislation that would authorize bargaining on a voluntary basis stated:

Thus, the question involved in the issue of public employee collective bargaining is whether it is necessary or desirable to equalize the bargaining power between public employees and public employers by encouraging the organization of employees for the purpose of collective bargaining – in the full knowledge that the process does not equalize anything unless it is supported by a right to strike with protection from reprisal. . . . States which have adopted collective bargaining or meet and confer legislation for public employees have experienced an increase in the number of strikes as a result, even though such strikes were unlawful. Thus the process of collective bargaining invites strikes and threats thereof and no legislation has been found which can prevent such strikes – action which challenges the very sovereignty of government.\textsuperscript{187}

As Slater has carefully documented, this same fear, using the specter of the Boston police strike of 1919, was used in an earlier era to frustrate the efforts of public sector unions.\textsuperscript{188}

\textsuperscript{184} 1973 Commission Report, supra note 69, at 3.
\textsuperscript{185} 1974 Commission Report, supra note 75, at p. 12.
\textsuperscript{186} 1975 Commission Report, supra note 84, at 6.
\textsuperscript{187} 1975 Commission Report, supra note 84, at 5-6. As noted previously, supra notes 51-56 and accompanying text, strikes did not increase in Illinois when bargaining legislation was passed.
\textsuperscript{188} SLATER, supra note 8, at 27-38, 46-53, 81-84.
Even those proponents of legislation, however, felt the need to address the strike issue. Of the ten legislative recommendations, five addressed enhanced and severe penalties for strikes, including authorizing employers to impose additional penalties to those required by the legislature.\textsuperscript{189} In addition, the proponents supported their call for legislation by suggesting that the refusal to meet with employees who had legitimate concerns had caused them to seek assistance from “more militant national unions.”\textsuperscript{190} Further they argued that the rightful denial of the right to strike required providing some mechanism to provide employee voice.\textsuperscript{191}

As is revealed by the above analysis, in many ways unions in Virginia are in the same place as public sector unions generally in an era when the courts and legislatures, not to mention at least some members of the public were hostile to public sector unionism.\textsuperscript{192} The factors identified by Slater to explain the delay in the development of public sector bargaining in the first 62 years of the 20\textsuperscript{th} century continue to discourage bargaining in Virginia. The hostile legal climate, traditional hierarchical culture, and conservative political ideology, which of course are interrelated factors, have combined to limit unionization in Virginia’s public sector. As is true historically, however, some unions have been successful despite these barriers. In Illinois, with a more favorable legal and political climate, collective bargaining and unionization have been widespread and successful. And the success of unionization, aided by the favorable legal climate, has enabled unions to achieve legislation that is even more protective of employee rights and

\textsuperscript{189} 1975 Commission Report, supra note 84 at 14-15, 16-17.
\textsuperscript{190} Id. at 18.
\textsuperscript{191} Id. at 22.
\textsuperscript{192} For historical documentation of public sector unionism in the era from 1900 – 1962, which reveals that unions in that era used many of the same strategies for success as current unions in Virginia, see SLATER, supra note 8.
bargaining. The next section will explore the implications of this analysis for the private sector and other states in the public sector.

V. Lessons from the Public Sector Divide

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

A. The Private Sector

There is a longstanding debate among scholars and legislators in the private sector about the role of the law in the decline of unionization. While certainly it is not the only factor in union’s loss of membership in the private sector, the comparison of Virginia and Illinois suggests that the law does make a difference in rates of unionization. In Illinois where the law is more favorable, unions have thrived in the public sector whereas in Virginia, they have struggled. Higher unionization rates also lead to more favorable laws, however. Thus, where the law is not favorable, successful efforts to spread unionization may later lead to changes in the law as the unionized employees gain political power as well. The analysis also demonstrates that while legislation authorizing

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bargaining may encourage and promote unionization, unions can succeed in representing employees without favorable legislation. Given the decline of legal protection for unionization in the private sector and the ineffectiveness of the National Labor Relations Act, can the success of some unions in Virginia’s public sector provide a blueprint for private sector unions, helping them to reverse the long decline?

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

Second, much of the success of public sector unions in Virginia has come through the political process. While private sector employees and unions can obtain important benefits through the political process as well, the process is far less direct. Employees in the private sector can rarely directly influence their employers with political activity,

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194 See Cynthia Estlund, The Story of NLRB v. Washington Aluminum: Labor Law as Employment Law in Employment Law Stories 175, 208-11 (Samuel Estreicher & Gillian Lester, eds. 2007); Liebman, supra note 37.
196 Another factor to consider is that the public sector numbers in Virginia include employees who can bargain lawfully under federal law despite Virginia’s prohibition on bargaining for state and local government employees. See Title VII of the Civil Service Reform Act, 5 U.S.C. §§ 7101-7134.
while public employees have the potential to do so because their ultimate employers are always elected. At the local level, the influence is far more direct for groups like teachers, firefighters and police officers who can participate actively in campaigns for school board members, city council representatives, county board members and mayors. Finally, it is worth noting the most successful Virginia unions did not start from scratch under a regime where collective bargaining was clearly unlawful. Instead, like many public sector unions, they evolved from professional associations\textsuperscript{197} and began to engage in collective bargaining when it was not clearly prohibited by law.\textsuperscript{198} When the legal regime changed, there was a large loss of membership, but some unions survived and eventually thrived. So the parallel with the private sector is far from exact. Nevertheless, some lessons might be drawn.

While many Virginia public employees have greater job security than most private sector employees, the security in at least some jobs does not rise to the level of public employees in other states. For example, as noted above, in tenure proceedings, the school board can reject the findings of neutral hearing officers.\textsuperscript{199} Nevertheless it far exceeds the at will status of most private employees. We might compare the strategies of successful Virginia unions to those of worker centers in the private sector, however, which represent employees with little job security.

In recent years, there have been substantial efforts to organize and empower low wage, and often immigrant workers outside the bounds of traditional labor unions. While these efforts have been supported by traditional unions in some cases, much of the work

\textsuperscript{197} See Grodin, Weisberger & Malin, supra note 195, at 16.
\textsuperscript{198} See supra notes 67, 93 and accompanying text.
\textsuperscript{199} See supra note 68 and accompanying text.
has been done by worker advocacy organizations and attorneys. One can scarcely imagine a group with less job security and political clout than low wage, immigrant, and in some cases undocumented, workers. They are easily replaced, may risk deportation, have no money to contribute to political candidates, and in some cases cannot even vote. Yet, these efforts have not been without success.

Worker centers, based on the nineteenth century model of the mutual benefit society, have been established in many areas. Worker centers are “community –based mediating institutions that provide support to low wage workers.” They focus on three prongs, service, advocacy and organizing. Worker centers have some documented successes in changing conditions for low wage workers, through law and organizing, often working in conjunction with other worker advocacy organizations. The workers on Long Island were able to change New York law, achieving enactment of the Unpaid Wages Prohibition Act, which improved enforcement of the law requiring payment of wages for time worked. A coalition of worker centers and workers’ rights advocacy organizations were able to obtain unpaid wages, legal relief for workers discharged for

201 See David Rosenfeld, Worker Centers; Emerging Labor Organizations – Until They Confront the National Labor Relations Act, 27 BERKELEY J. EMP. & LAB. L. 469, 472-73 (2006).
202 FINE, supra note 200, at 2.
203 Id.
204 For a thorough review and analysis of various worker centers, see FINE, supra note 200.
205 GORDON, supra note 200, at 8-9; Jennifer Gordon, The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law, International Migration Policy Program, Carnegie Paper No. 4, at 1, August 1999, available at http://www.carnegieendowment.org/files/imp_wp4gordon.pdf (last visited Aug. 18, 2008) (describing the act which significantly increases penalties for unpaid wages from a 25 percent civil fine to a 200 percent civil fine and from a misdemeanor with a maximum $10, 000 penalty to a felony with a maximum $20,000 penalty. In addition, the law also provides workers with more tools to collect back pay owed).
protesting poor and unlawful working conditions, and agreements to improve working conditions for garment workers in a campaign against Forever 21, based in Los Angeles.\textsuperscript{206} The campaign included boycotts, picketing, legal actions and national speaking tours by affected workers.\textsuperscript{207}

A similar coalition worked with car wash workers in Los Angeles, after discovering many legal violations and other abusive practices.\textsuperscript{208} The coalition successfully represented workers to remedy wage and hour violations, helped obtain reinstatement for workers fired for attempting to improve working conditions, and ultimately succeeded in obtaining legislation to regulate the industry to limit the most abusive practices.\textsuperscript{209} As conceived by the advocates, the legislation provided a vehicle for organizing the car wash workers, a campaign undertaken by a traditional labor union, the United Steelworkers.\textsuperscript{210}

These campaigns illustrate several different models of combining legal strategies with organizing to achieve protection of workers. Like the worker centers, public sector unions in Virginia, without the ability to negotiate binding collective bargaining agreements or to strike,\textsuperscript{211} use similar strategies of lobbying, service, including legal actions, and organizing to accomplish their goals. Traditional unions utilizing these strategies have some advantages over the worker centers. One of the major issues facing the worker centers is financing.\textsuperscript{212} Traditional unions, assuming they are able to organize

\textsuperscript{206} Narro, supra note 200, at 344.
\textsuperscript{207} Id. at 353.
\textsuperscript{208} Id. at 344.
\textsuperscript{209} Id. at 362.
\textsuperscript{210} Id. at 368.
\textsuperscript{211} While the workers affiliated with worker centers typically retain the right to strike, the centers rarely choose such a strategy. FINE, supra note 200, at 257-59.
\textsuperscript{212} Rosenfeld, supra note 201, at 479.
workers effectively or, outside the right to work states, can negotiate a union security clause, can rely on dues money for financial stability.

Worker centers and the most successful Virginia unions share an additional characteristic. In Virginia, the successful unions are primarily those in professional workplaces where the employees share not only an employer, but a profession.\footnote{Even the AFSCME local that has achieved legislative success has a membership which is composed of many corrections officers, again sharing a profession and employer. See supra note 140 and accompanying text.} Many worker centers focus on employees from particular ethnic groups.\footnote{Rosenfeld, supra note 201, at 471-72; FINE, supra, note 200, at 42-71.} Thus both groups organize employees with shared characteristics that create bonds which may aid in organizing.\footnote{Id. at 42-45.} Without either of these shared traits, nontraditional private sector organizing may be more difficult.\footnote{For a discussion of some of the challenges of multicultural organizing, see FINE, supra note 200, at 61-69.}

Finally, in the private sector, there is a concern that organizations engaged in organizing and legal actions for workers rights may run afoul of the National Labor Relations Act. David Rosenfeld has pointed out the possibility that organizations like worker centers may be found to be labor organizations under the National Labor Relations Act and thus subject to a number of legal restrictions under the statute.\footnote{Rosenfeld, supra note 201, at 499-503.} In addition, if a union is trying to organize employees under the NLRA, providing legal assistance to workers may be considered an improper inducement for union support.\footnote{See Freund Baking Co. v. NLRB, 165 F.3d 928 (D.C. Cir. 1999); Catherine Fisk, Union Lawyers and Employment Law, 23 BERKELEY J. EMP. & LAB. L. 57 (2002).} These risks do not exist where collective bargaining is banned.

Despite these differences between the public and private sectors, the Virginia experience may provide further support for alternative union strategies in the private sector.
sector. Professor Dau-Schmidt has suggested that traditional collective bargaining may continue to be effective only where international competition is not a threat.\textsuperscript{219} The success of some Virginia public sector unions suggests that unions can survive, and in some cases thrive, without traditional bargaining. It provides a model for unionization in an uncertain or even hostile legal environment. By studying the factors that contributed to success in Virginia, unions may find additional strategies for the private sector.

One factor that Virginia union leaders stressed is the need for continual organizing where there is no collective bargaining agreement and of course, no union security clause.\textsuperscript{220} They distinguished their unions from those in states which authorized bargaining in this regard, suggesting that their counterparts in other states relied on the contracts more heavily and did not feel the same need to engage in constant organizing and political activity.\textsuperscript{221} The value of this strategy should not be lost on unions that have contracts, however. While organizing for support may be essential in a hostile legal environment, it can provide valuable benefits for any union. Support from the employees is essential to establish union strength and solidarity for bargaining, grievance actions, and any other activity that the union undertakes. Indeed, many scholars and union activists are suggesting and experimenting with new forms of unionism that involve employees more directly in the work of the union.\textsuperscript{222} Under this model, the union is not

\begin{itemize}
\item \textsuperscript{220} See supra notes 110-11 and accompanying text.
\item \textsuperscript{221} Interview with Marian Flickinger, President, Norfolk Federation of Teachers, June 5, 2006; Interview with Dena Rosenkrantz, Staff Attorney, Virginia Education Association, June 6, 2006; Interview with David Pulliam, President, Richmond Fire Fighters, June 7, 2006; Interview with Michael Mohler, President, Virginia Association of Professional Firefighters, June 20, 2006.
\item \textsuperscript{222} See Michael M. Oswalt, \textit{The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations}, 57 Duke L.J. 691 (2007) (highlighting scholarly research and anecdotal evidence from union efforts supporting the value and success of “relational organizing” and “sustained internal union activism”).
\end{itemize}
a servicing organization for the members; rather the union is the members and the activism of the members leads to more successful results in disputes with management.\textsuperscript{223} The experience of some Virginia unions supports the conclusion that this model can be successful even where formal bargaining is not permitted.

\textbf{B. The Public Sector}

The comparison of Virginia and Illinois may offer a blueprint for public sector labor relations as well. The trajectory of the public sector union movement follows that of the private sector movement, although some years later. While there were certainly some differences between the two, trends in unionization show that in both the private and public sectors, it rose to similar heights in the years after legalization of collective bargaining. Private sector unionism peaked at 35\% in 1954, almost twenty years after the passage of the NLRA, and has been declining since.\textsuperscript{224} Public sector unionism followed a similar path in the first twenty years after the beginning of legalization in the late 1950s. Since that time, growth has leveled, but we have seen no precipitous decline.\textsuperscript{225} The steady decline in private sector unionism did not begin until the 1980s, however, so it is too early to tell whether the public sector may follow a similar but perhaps slightly delayed pattern.

\textsuperscript{223} See id.
\textsuperscript{225} See id. (showing membership patterns from 1993-2006 ranging between 36.2\% in 2006 to 38.7\% in 1994 with slight variations in the years in between).
While the pressures of global competition, one of many factors in the private sector union decline, are less likely to affect public sector employees, outsourcing, whether local or international, poses threats to the jobs of public workers. Traditional collective bargaining may continue to be effective only where international and private sector competition are not a threat. In those cases where traditional collective bargaining is no longer effective, the Virginia model, which uses active and continual organizing, public pressure, legislative advocacy and legal action, may provide an alternative approach to thwart the decline of unionization. Since some Virginia unions have been successful where bargaining is outlawed, their approach may work effectively where bargaining is permissible, but no longer as effective due to external pressures.

Finally, the Virginia experience suggests that at least some employers are willing to work with unions in a cooperative way in the absence of binding collective bargaining. While the evidence is purely anecdotal and quite limited, it suggests the possibility that employers may be more willing to work out agreements with unions when they are nonbinding and the law does not direct the parties to a particular type of relationship. The risk to the employer posed by agreement with the union is obviously reduced if the agreement is not enforceable. Agreements can be quietly negotiated and compliance may proceed under the radar of public scrutiny, unlike the situation where negotiations are public and contracts require legislative approval. Experimental


227 Dau-Schmidt, supra note 219, at 922.

228 See supra notes 115-16 and accompanying text.
approaches may be tried without fear on either side that an unsuccessful trial will be set in stone.

Martin Malin and Charles Kerchner make a related point in their article on charter schools and collective bargaining. Malin and Kerchner suggest that traditional collective bargaining, as cabined by the laws authorizing bargaining, results in negotiation of agreements relating to wages and working conditions. Efforts by teachers to obtain a voice in educational policy are discouraged by existing bargaining laws. Where teachers seek such a role, they must couch their interest in terms of wages and working conditions, regardless of their true motivation, because the laws typically grant them rights to bargain only about working conditions and related issues. And unions shape their agendas accordingly, focusing their efforts and their appeals to the membership on the basis of their ability to negotiate higher wages and better benefits and to protect workers against arbitrary management action. Management’s focus is resisting the union’s demands. Accordingly, both the employer and the union are discouraged, or at least diverted, from creating a different kind of workplace, where employees have more involvement and management and the union work together to achieve identified objectives and improve agency performance. Neither party has the incentive to take the risk of trying to establish a relationship where employees are

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230 *Id.* at 921-23.
231 *Id.* While Malin and Kerchner’s work is focused on teachers, the points that they make would apply in many other public sector workplaces where the employees sought a greater voice or the parties sought to create a high performance workplace, one characterized by employee involvement and flexibility. *See id.* at 892.
232 *Id.*
233 *Id.* at 923.
234 Malin and Kerchner do identify and describe instances where teacher unions have participated in alternative models to traditional labor relations. *Id.* at 903-11,
empowered to participate with management in setting and achieving goals. The focus of both is directed to traditional bread and butter issues.

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

Of course, it is true that the employer and the union cannot work together in such a situation unless both are willing. And the union’s ability to pressure the employer to do so is limited. The union may have available avenues of political pressure, however, particularly in localities with elected representatives. The employer also may need employee cooperation to achieve a particular goal, such as the Broad Prize awarded to the

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235 See The Developing Labor Law, supra note 31, at 792; Robert Gorman & Matthew Finkin, Basic Text on Labor Law 587 (2d ed. 2004); Joel Rogers, Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws", 1990 Wis. L. Rev. 1, 134 (noting that under the NLRA workers who use economic pressure to force agreement on permissive subjects of bargaining can be terminated legally); Southern S.S. Co. v. N.L.R.B., 316 U.S. 31 (1942) (finding that participation in an unlawful strike under the NLRA justifies termination); Detroit Newspaper Agency, 327 N.L.R.B. 799, 808 (NLRB 1999) (economic action in support of nonmandatory bargaining proposals is unlawful under the NLRA); Board of Trustees v. Illinois Educ. Labor Relations Bd., 244 Ill. App. 3d 945 (Ill. 4th Dist. Ct. 1993) (finding employer violated IELRA by bargaining to impasse over a nonmandatory subject); County of Cook v. Illinois Local Labor Relations Board, 214 Ill. App. 3d 979 (1991) (finding insistence on nonmandatory bargaining subject violative of the IPLRA.)

236 As noted above, it is more difficult to mount political pressure in larger units like the state as a whole.
Norfolk School District. The union provides a convenient vehicle for obtaining employee cooperation. Thus, regimes where no collective bargaining law exists may offer opportunities for the development of workplace cooperation between employers and unions that are unlikely, or at least less likely, in areas where traditional collective bargaining exists by statute.

This is not to suggest the repeal of existing collective bargaining laws, nor to promote the legal approach adopted by the Virginia legislature. A regime that encourages employers and unions to work together to find creative approaches to resolving workplace issues and to accomplish goals important to the organization and its employees could be easily achieved through amendments to collective bargaining legislation. Such an approach would avoid the unfriendly legal climate that has certainly hampered union organizing in Virginia. But where no collective bargaining law exists, the savvy union will seize the opportunity for employee involvement in decision-making that can be achieved through a combination of political pressure and emphasis on the lack of risk to the employer.

VI. Conclusion

The comparison of public sector labor relations and law of Illinois and Virginia leads inevitably to the conclusion that the law affects the ability of unions to organize. As others have persuasively argued, however, the law is probably both chicken and egg, as the level of unionization impacts the law and the law impacts the level of unionization.

See supra note 116 and accompanying text.

Malin and Kerchner suggest that for charter schools, the charter could require teacher involvement in decisionmaking, while leaving the choice of the method of involvement to the school. Malin & Kerchner, supra note 229, at 935. Minnesota requires the public employer to meet and confer with the representative of the public professional employees on matters that are not mandatory bargaining subjects. Minn. Stat. Ann. § 179A.08. The legislature's rationale for the requirement is to enable the knowledgeable professional employees to help employers develop policies for the benefit of the public. Minn. Stat. Ann. § 179A.08.
The larger and more powerful unions in Illinois have helped to persuade the legislature to enact laws favorable to unionization and bargaining. And the favorable laws have led to larger union memberships, who then support additional favorable changes in the law. In Virginia, unfavorable legal developments reduced, but did not eliminate, unionization. Resistant employers can effectively exploit the law to thwart union efforts to represent employees without legal protection. But the analysis shows that the absence of legal protection for bargaining does not make it impossible for a determined group of employees to organize effectively, utilize their available power, and bring employers to the table to create acceptable and even favorable terms and conditions of employment. Unions and employees in both the public and private sectors should consider the factors that have contributed to the success of those Virginia unions that have managed to survive in the hostile environment that exists. Adoption of similar strategies could benefit unions struggling to survive in the private sector and help public sector unions, not only to consolidate their current positions but also to grow their membership.