BARGAINING RIGHTS GONE WRONG: HOW STATE COURTS INVENTED A CONSTITUTIONAL DUTY TO BARGAIN AND HOW IT HARMS INDIVIDUAL WORKERS[*]

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Constitutions often give you the right to do things. They give you the right to speak your mind, to petition the government, to "bear arms"—the list goes on. But do they also require other people to help you do those things? Do I have to help you exercise your constitutional rights?

Traditionally, the answer has been no. Constitutions usually bind only state actors,[1] and the state generally has no duty to help you exercise your rights.[2] It doesn't have to give you a platform for your speech.[3] It doesn't have to give you a gun to bear.[4] It doesn't even have to listen to your petitions.[5] It

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 595 (8th ed. 2010) ("Most of the protections for individual rights and liberties contained in the Constitution and its amendments apply only to the actions of government.").

[2] *See, e.g.*, Smith v. Ark. State Highway Emps., 441 U.S. 463, 465 (1979) ("The First Amendment right to associate and to advocate 'provides no guarantee that a speech will persuade or that it will be effective.'" (quoting Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp., 457 F.2d 456 (7th Cir. 1972))); Webster v. Reproductive Health Servs., 492 U.S. 490, 510 (1989) (holding that state had no obligation to aid citizens in exercise of abortion rights recognized by Roe v. Wade, 410 U.S. 113 (1973)).

[3] *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones.").

[4] *See* Nowak & Rotunda, *supra* note 1, at 419–20 (observing that the Second Amendment has been interpreted to protect an individual right to bear arms, but that the right has been treated as a "narrow one" leaving room for government to regulate possession).

[5] *See Smith*, 441 U.S. at 465 (recognizing that the First Amendment guarantees the rights of speech, association, and petition, but "does not impose any affirmative obligation on the government to listen, to respond, or in this context, to recognize the [petitioner] and bargain with it"). *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) (rejecting argument that

only has to refrain from interfering with your right to do the constitutionally protected thing.[6]

But that principle hasn't always held true for collective bargaining. In a few states, collective bargaining has been enshrined as a constitutional right.[7] Some courts have applied that right in the traditional way. They have protected it from interference, but not required others to facilitate it. They have safeguarded employees' right to form unions, join them, and demand recognition. But they have not forced employers—public or private—to bargain in return. For these courts, bargaining remains a matter of consent.[8]

Other courts, however, have gone further. Not only have they protected collective-bargaining rights from interference, but they have also ordered employers to bargain in return. That is, they have required employers to participate in and facilitate the exercise of their employees' rights.[9]

From a constitutional perspective, this was an unusual step.[10] Constitutions in the United States usually create negative rights, not positive ones.[11] But these courts justified it as a necessity. They reasoned that if they didn't require employers to bargain, bargaining rights would be meaningless. After all, bargaining takes two parties. If an employer has no enforceable duty, it can frustrate bargaining with "surface" negotiating tactics. Or worse, it can refuse to bargain in the first place. Employees are left with only the right to *demand* bargaining, which isn't much of a right at all. So, these courts reasoned, the right to bargain must include an implicit duty to bargain as well.[12]

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state had to afford citizens equal access to education so they could exercise other constitutional rights effectively) ("[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.").

[6] *Cf.* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (describing the Due Process Clause as "a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security").

[7] *See, e.g.*, N.Y. CONST. art. I § 17; N.J. CONST. art. I § 19; MO. CONST. art. I § 29.

[8] *See* Univ. of Columbia v. Herzog, 269 App. Div. 24, 30 (N.Y. App. Div. 1945).

[9] *See, e.g.*, Johnson v. Christ Hosp., 45 N.J. 108, 112 (1965); Am. Fed'n of Teachers v. Ledbetter, 387 S.W.3d 360, 364 (Mo. 2012).

[10] *See Smith*, 441 U.S. at 466 (refusing to impose duty to recognize union as a matter of federal constitutional law) ("Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.").

[11] *But see* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 4 (2013) ("American rights are often thought to be negative rights, protecting citizens only from intrusive government by prohibiting government intervention.") (arguing that state constitutions sometimes do create positive rights).

[12] *See Ledbetter*, 87 S.W.3d at 364; Comite Organizador v. Molinelli, 114 N.J. 87, 97 (1989).

That rationale makes some intuitive sense. When a constitution guarantees the right to bargain, we might reasonably assume the right involves at least two parties. But the more we think about it, the more we can see the holes in that assumption. For one, constitutional bargaining rights can do a lot more than force one party to the table. They can protect people who engage in traditional labor activities, such as forming and joining unions.[13] They can prevent states from outlawing bargaining altogether, as some other states have done.[14] They can even guard against more subtle anti-labor tactics, such as "yellow dog" contracts.[15] What's more, they can do all those things without imposing any affirmative bargaining duty. So no, imposing that duty isn't necessary to give bargaining rights meaning. Bargaining rights have meaning all on their own. If courts want to impose a duty, they have to justify their decision on some other ground.

That point becomes especially clear when we look at the duty's collateral effects. Two of those effects deserve mention here. First, there is the problem of judicial administration. When courts announce a duty to bargain, they also have to explain how bargaining will work. And that explanation requires them to resolve dozens of mundane administrative issues. For example, what are the subjects of bargaining? Whom does bargaining cover? And what happens if the parties can't agree? Courts are ill-suited to decide these questions de novo. Without guidance, they have to make up the rules as they go along. And as they make up the rules, they slowly creep outside their comfort zones into areas where, from the perspective of institutional competence, we'd probably prefer they didn't go.[16]

That leads us to the second collateral effect. Among the problems courts have to solve is the risk of multiple unions. If the employer has to bargain

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[13] *See* Quinn v. Buchannan, 298 S.W.2d 413, 415–19 (Mo. 1957) (protecting employees from retaliation for forming labor union and demanding bargaining, but not imposing duty to bargain on employer).

[14] *See* N.C. GEN. STAT. §§ 95-98 (forbidding any agreement or contract between a public entity and a union).

[15] *See* Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1422–23 (1983) (describing pre-NLRA use of yellow-dog contracts).

[16] *See* Cornelius J. Peck, *Judicial Creativity and State Labor Law*, 40 WASH. L. REV. 743, 777 (1965) (criticizing judicial invention of constitutional bargaining duty, which inevitably entangled courts in routine administration of labor relations).

with every union chosen by an employee, the employer might easily find itself bargaining with two, three, or a dozen unions in the same workplace. That kind of bargaining isn't industrial democracy; it's industrial chaos. The natural solution is to require an employer to recognize only one union. Once a union gets support from a majority of employees, it represents all the employees, even the ones who don't want its services. It's a neat solution—one well established in federal law. The only problem is that it has no basis in state constitutional text or history. So to adopt it, courts had to effectively rewrite their constitutions.[17]

This not only oversteps the judicial role; it also affects individual rights. When courts impose exclusive representation, they necessarily deny some employees their choice. Some employees get the representative they want, but others have one foisted upon them. And that means some employees lose the only right guaranteed by the text—the right to bargain collectively. Ironically, by adopting an unwritten employer duty to bargain, courts subverted the written right guaranteed to workers.

None of this had to happen. Some courts avoided the conflict by interpreting their constitutions in the traditional way: They protected bargaining rights from interference, but imposed no new duties. They stayed mostly on the sidelines, leaving questions about bargaining duties to legislatures. And by proceeding in that way, they neither trampled on individual rights nor stretched themselves beyond their sphere of competence.[18]

This article argues that the traditional approach is the right one. It supports that position by tracking developments in three states: New York, New Jersey, and Missouri. New York courts followed the traditional approach, protecting employees from interference while leaving bargaining duties to the legislature. New Jersey and Missouri courts, by contrast, sidelined legislatures and read bargaining duties into their constitutions. And as a result, these courts ran straight into the practical and theoretical problems inherent in court-ordered bargaining.

Those problems deserve our attention. State labor law is a much-neglected practice area—practically a doctrinal backwater. It gets little attention from

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[17] *Cf. Ledbetter*, 387 S,W.3d at 368 (Fischer, J., dissenting) (criticizing majority for reading bargaining duty into constitution despite the absence of any textual or historical support).

[18] *See Herzog*, 269 App. Div. at 30 (refusing to import a duty to bargain into the constitution and leaving bargaining duties to the legislature's discretion).

the academy or press.[19] It almost always takes a back seat to its federal counterpart, which admittedly has a wider reach. But for millions of workers, state law is the only source of bargaining rights. So when state courts get the law wrong, their errors affect real people. We should study their decisions just as closely—and call out their errors just as vigorously—as we do with federal courts.

I. STATES' ROLE IN REGULATING COLLECTIVE BARGAINING

When modern lawyers think of collective bargaining, they usually think of federal law. For decades, bargaining in the United States has been governed by the National Labor Relations Act (NLRA).[20] The NLRA regulates labor relations from beginning to end: from elections to decertification, and everything in between.[21] Because the NLRA is so comprehensive, it casts a wide shadow over state law.[22] Any state law regulating the same subjects as the NLRA—or even subjects Congress meant to leave unregulated—is preempted.[23]

Given this state of affairs, one could reasonably wonder what role is left for states. If the NLRA already regulates labor relations from front to back, what can states add? How much does state labor law matter?

The answer is more than you might expect. Though the NLRA is broad, it's also full of holes. Probably the biggest hole includes government workers.[24] States and their political subdivisions, such as towns and counties, are

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[19] *Cf.* ROBERT J. HUME, JUDICIAL BEHAVIOR AND POLICYMAKING loc. 335 (2018) (ebook) (noting that state courts get less attention than federal ones even though the majority of criminal and civil litigation takes place in state courts).

[20] 29 U.S.C. §§ 151–169.

[21] *See* Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 287 (1986) (describing the NLRA as a "comprehensive regulation of labor relations").

[22] *See id.* (holding that NLRA preempted state law debarring contractors who violated NLRA three times in five years because it added remedies to those prescribed by Congress, and thus deviated from Congress's regulatory scheme).

[23] *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 346 U.S. 485, 498–99 (1953); Machinists v. Wis. Emp. Relations Comm'n, 427 U.S. 132, 148–51 (1976). *See also Doe v. Google*, No. A157097, slip op. at 8 (Cal. Ct. App. Sept. 21, 2020) (noting that "Congress intended the NLRA to serve as a comprehensive law governing labor relations").

[24] *See* 29 U.S.C. § 152(2) (excluding from the definition of *employer* any "State or political subdivision thereof"); NLRB v. Natural Gas Utility Dist. Of Hawkins Cnty., 402 U.S. 600, 604 (1971)

exempted from the NLRA's coverage.[25] As of 2019, more than 5 million people worked for state governments, plus another 14 million for local ones.[26] So all told, the NLRA's government exemption carves out nearly 20 million workers.[27]

The NLRA also exempts some private-sector workers. For example, the statute excludes agricultural workers,[28] domestic workers, supervisors, and independent contractors.[29] Courts have likewise carved out managers and "confidential personnel" workers.[30] Similarly, some workers are left out because the National Labor Relations Board has declined to regulate them. While this category can shift depending on the Board's views, it has at times included student athletes, teaching assistants, and racetrack employees.[31] And still other workers have been excluded on constitutional grounds. In one notable

(explaining that Congress intended to "except from Board cognizance the labor relations of federal, state, and municipal governments").

[25] *See Hawkins Cnty.*, 402 U.S. at 604.

[26] Adam Grundy, *The 2019 Annual Survey of Public Employment and Payroll is Out*, U.S. CENSUS (Oct. 7, 2020), https://www.census.gov/library/stories/2020/10/2019-annual-survey-of-public-employment-and-payroll-is-out.html.

[27] *See id.* (reporting state and local employment figures for 2019).

[28] Some studies estimate that this group includes as many as 3 million workers. LANCE A. COMPRA, UNFAIR ADVANTAGE, WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 173 (2000) (reporting that there are 3 million agricultural workers excluded from the NLRA's coverage). And that estimate may even understate the case. The NLRB's Division of Advice has recently interpreted the exemption broadly to cover even workers in nontraditional industries like the cannabis industry. *See* Memorandum, NLRB Div. of Advice, *Agri-Kind, LLC*, Case No. 04-CA-260089 (Dec. 30, 2020) (concluding that workers in cannabis growing operation were excluded as agricultural workers).

[29] 29 U.S.C. § 152(3).

[30] *See, e.g.*, NLRB v. Hendricks Cty. Rural Elec. Membership Corp., 454 U.S. 170, 176 (1981) (recognizing exception for confidential personnel workers with "labor nexus" in job duties); NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980) (recognizing exception for managerial workers).

[31] *See, e.g.*, Prairie Meadows Racetrack & Casino, 324 N.L.R.B. 550, 550 (1997) ("Pursuant to Board precedent and Section 103.3 of the Board's Rules and Regulations, the Board has declined to assert jurisdiction over proceedings involving the horseracing industry."). The Board's position on some of these exemptions occasionally flips. *See, e.g.*, Brown Univ., 342 N.L.R.B. 483 (2004) (holding that student workers were not employees under the NLRA), *overruled by Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016) (holding that student workers were employees); *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015) (holding that "it would not effectuate the policies of the Act" to assert jurisdiction over student athletes); Jennifer Abruzzo, NLRB Office of the Gen. Counsel, Memorandum GC 21-08: Statutory Rights of Players at Academic Institutions (Student–Athletes) Under the National Labor Relations Act (Sept. 29, 2021) (taking the position that "certain [p]layers" at academic institutions are employees).

example, the Supreme Court carved out a First Amendment exception for religious schools.[32]

In each of these cases, the carved-out workers fall into a regulatory gap. Federal law does not apply to them, nor does the NLRA's broad preemptive effect.[33] And with no preemption, states are free to apply their own law.[34] For these workers, then, state law matters a great deal.

So it is meaningful when a state enshrines collective-bargaining rights in its constitution. For a large group of the state's workers, the state constitution serves as their primary, and maybe even only, source of bargaining rights.[35] Workers will look to the constitution to understand their rights and responsibilities.[36] And that means they will often look to courts.[37]

Courts, however, haven't always treated bargaining rights uniformly. Some courts have interpreted them modestly, leaving room for legislatures to design bargaining systems within constitutional boundaries. But others have taken it upon themselves to write the rules of bargaining, largely sidelining legislatures. We can see this divide play out in three states: New York, New Jersey, and Missouri. The former took the modest, traditional approach, while the latter two staked out more aggressive positions. The primary difference between them was how they treated a single issue: an employer's duty to bargain in good faith.

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[32] *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 497 (1979) (interpreting NLRA to contain an exception for religious schools); Bethany College, 369 N.L.R.B. No. 98, slip op. at 1 (June 10, 2020) (recognizing exception announced in *Catholic Bishop*).

[33] *See, e.g.*, S. Jersey Catholic School Teachers v. St. Teresa, 150 N.J. 575, 584 (N.J. 1997) (applying state law to employees at religious school, which had been carved out from NLRA by *Catholic Bishop*).

[34] *See id. But see* Alexander MacDonald, *Religious Schools, Collective Bargaining & the Constitutional Legacy of* NLRB v. Catholic Bishop, 22 FEDERALIST SOC'Y REV. 134, 134 (2021) (arguing that states erred by applying their own law to schools exempted from coverage by the First Amendment).

[35] *See id.* (applying state constitutional right to bargain to religious school employees); *Molinelli*, 114 N.J. at 96 (applying state constitutional bargaining right to agricultural workers).

[36] *See, e.g.*, *Molinelli*, 114 N.J. at 96; *St. Teresa*, 150 N.J. at 584.

[37] *See Molinelli*, 114 N.J. at 97 (observing that while state legislature had never implemented state constitutional bargaining right through legislation, courts could fashion remedies to implement the right themselves).

II. FROM EMPLOYEE RIGHTS TO EMPLOYER DUTIES: THE JUDICIAL CREATION OF MANDATORY BARGAINING

A. New York

In 1938, New York's voters approved a new constitution.[38] The new constitution included at least one provision that was the first of its kind: article I, section 17. That section guaranteed, as a matter of constitutional law, the right to bargain collectively:

> Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. . . . Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.[39]

Though new as a matter of constitutional law, these two sentences would have sounded familiar to many voters. The first echoed the Norris–LaGuardia Act.[40] Passed by Congress only six years earlier, that act mostly barred federal courts from issuing injunctions in local labor disputes.[41] The second sentence, meanwhile, echoed the NLRA's section 7.[42] Section 7 had been adopted even more recently—only three years earlier. And it had used mostly the same words to guarantee bargaining rights. [43] But it did not contain an explicit duty to bargain.[44] Mirroring section 7, New York's new constitution was likewise silent on bargaining duties.[45]

That silence would prove meaningful. In 1945, in *Trustees of Columbia University v. Herzog*,[46] the New York Appellate Division held that section 17 created no affirmative bargaining duty. The case involved a dispute between the New York Labor Board and Columbia University. The Board wanted to

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[38] *See N.Y. Rights of Labor on Public Works Projects, Amendment 6 (1938)*, BALLOTPEDIA, https://ballotpedia.org/New_York_Rights_of_Labor_on_Public_Works_Projects,_Amendment_6_(1938) (last visited Oct. 13, 2021).

[39] N.Y. CONST. art. I § 17.

[40] *See* 29 U.S.C. § 101–115. *See also* Edward H. Miller & John B. Huffaker, *The Application of Anti-Trust Legislation to Labor Unions—Past, Present, and Proposed* 2 S. CAR. L. REV. 205, 206 (1950) (discussing historical context and development of Norris–LaGuardia Act).

[41] Miller & Huffaker, *supra* note 40, at 206.

[42] *See* 29 U.S.C. § 157.

[43] *See id.*

[44] *See id.*

[45] *Compare* 29 U.S.C. § 158(a)(5), *with* N.Y. CONST. art. I § 17.

[46] 269 App. Div. at 30.

force Columbia to bargain with a union.[47] At the time, a state statute required most employers to bargain.[48] But it exempted some employers, including educational institutions.[49] Columbia argued that, as an educational institution, it was exempt under the statute and so had no bargaining duty. The Board disagreed. It claimed that even if Columbia fell within the statutory exemption, the university was still covered by section 17. And section 17 imposed a duty on all employers, whether or not covered by the statute.[50]

The Appellate Division rejected that argument.[51] It pointed out that, if the board were correct, section 17 would effectively nullify all statutory exemptions.[52] Every employer, regardless of the exemptions, would have a duty to bargain.[53] And there was no evidence that section 17's drafters meant to override existing law. To the contrary, it appeared that they had wanted only to affirm "the right of labor to organize and bargain collectively which, in 1935, had found expression in the [statute]."[54]

The New York Court of Appeals affirmed without an opinion.[55] As a result, the Appellate Division's opinion has been the definitive word on the right to bargain in New York. It has been cited to show that while section 17 protects the right to organize and select a representative, it imposes no reciprocal duty on employers.[56] In other words, section 17 is a shield against interference, not a sword to enforce bargaining.[57]

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[47] *Id.*

[48] *Id.*

[49] *Id.* (citing N.Y. Lab. L. § 715)

[50] *See id.* (analyzing parties' arguments).

[51] *Id.*

[52] *Herzog*, 269 App. Div. at 30.

[53] *Id.*

[54] *Id.*

[55] *See* Herzog v. Univ. of Columbia, 295 N.Y. 605, 605 (1945).

[56] *See, e.g.*, Quill v. Eisenhower, 5 Misc. 2d 431, 433 (N.Y. Misc. 1952) ("It is evident that the constitutional provision guaranteeing employees the right to organize and bargain collectively through representatives of their own choosing does not cast upon all employers a correlative obligation."); McGovern v. Local 456, Intern. Broth. Teamsters, 107 F. Supp. 2d 311, 318–19 (S.D.N.Y. 2000) ("Section 17 was 'not intended to invalidate existing legislation which imposed a duty to bargain collectively with employees even though that obligation by reason of certain exemptions or exceptions was not in all respects coextensive with the rights of labor.'" (quoting *Herzog*)).

[57] *See Quill*, 5 Misc. 2d at 433 ("The constitutional provision was shaped as a shield; the union seeks to use it as a sword.").

B. New Jersey

Just to the south, courts followed a different path. New Jersey rewrote its constitution in 1947, about a decade after New York.[58] Like New York, it included a new provision, section 19, guaranteeing the right to bargain collectively:

> Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.[59]

Section 19 shared much with its northern predecessor. Both sections appeared in their respective bills of rights. They each gave private employees the right to "bargain collectively." And they each closely followed NLRA section 7, which framed bargaining rights in similar terms.[60] Given those similarities, one might have expected New Jersey's courts to read section 19 with the way New York courts read their section 17.[61] They might naturally have looked for guidance in New York's caselaw, including *Herzog*.[62] This would have led them to conclude that section 19 protected bargaining rights without also foisting new obligations on employers.[63]

But instead, New Jersey courts diverged. The split emerged in *Johnson v. Christ Hospital*. There, a union sought to represent a nonprofit hospital's employees. At the time, no statute required the hospital to bargain.[64] The only

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[58] *See generally New Jersey Constitutional Proceedings – 1947*, N.J. STATE LIBRARY, https://www.njstatelib.org/research_library/new_jersey_resources/highlights/constitutional_convention/ (last visited Oct. 13, 2021) [hereinafter New Jersey Debates]. For a summary of the convention's handiwork, see John E. Bebout & Joseph Harrison, *The Working of the New Jersey Constitution of 1947*, 10 WM. & MARY L. REV. 337 (1968).

[59] N.J. CONST. art. I § 19.

[60] *Compare id., with* N.Y. CONST. art. I § 17, *and* 29 U.S.C. § 157.

[61] *See* Peck, *supra* note 16, at 768 (observing that in *Johnson*, *infra*, the lower court expressly considered and rejected *Herzog*'s interpretation of section 17).

[62] *See id.*

[63] *Cf. Herzog*, 269 App. Div. at 30 (holding that section 17 created no new bargaining obligation for employers); *Quill*, 5 Misc. 2d at 433 (explaining that New York's section 17 operates as a shield, not a sword).

[64] At the time, the NLRA exempted nonprofit hospitals. The hospitals were covered in the original Wagner Act, but pulled out in the Taft–Hartley Act. They were added back in by a 1974 amendment. *See 1974 Health Care Amendments*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1974-health-care-amendments (last visited Oct. 13, 2021).

possible source of a bargaining duty was the new constitution.[65] So when the hospital refused to recognize the union, the union sued under section 19.[66]

The Chancery Division[67] accepted the union's claim. It reasoned that although section 19 never mentioned a duty to bargain, it still implied one.[68] The constitution gave employees the right to bargain.[69] And for that right to mean anything, employers had to have a duty to bargain in return.[70] Any other interpretation would make the right to bargain "impotent."[71] So the court ordered the parties to hold an election.[72] If a majority of employees voted for the union, the union would become the employees' exclusive bargaining agent.[73] And the hospital would have a duty to bargain.[74]

The hospital appealed. Citing *Herzog*, it argued that section 19 protected the right to organize and bargain through a chosen representative.[75] But the constitution imposed no duty on an employer to recognize that representative, much less to sit down and bargain.[76]

The New Jersey Supreme Court rejected that argument. In a summary opinion, it affirmed the Chancery Division's order. It recognized that

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[65] *See Johnson II*, 45 N.J. at 112 (recognizing that no legislation governed a labor dispute between nonprofit hospital and union).

[66] *See* Johnson v. Christ Hosp. (*Johnson I*), 84 N.J. Super. 541, 544 (Ch. Div. 1964) (Chancery Division opinion) (setting out facts in more detail). *See also* Peck, *supra* note 16, at 766 (noting that because the N.J. Supreme Court issued only a memorandum opinion, we have to look at the Chancery Division opinion to understand the background).

[67] The Chancery Division is a trial court handling cases involving equitable relief (i.e., "cases where the person suing is asking for something other than money"). *About the Superior Court of New Jersey*, LSNJLAW.org, https://www.lsnjlaw.org/Courts/NJ-State-Courts/Superior-Court-of/Pages/About-Superior-Court-NJ.aspx#chancery (last visited Nov. 5, 2021).

[68] *Johnson I*, 84 N.J. Super. at 555.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 567.

[73] *Id.*

[74] *See id.* at 549, 567 (ordering election and accepting proposition that duly elected union becomes exclusive representative).

[75] *See id.* at 552 (outlining arguments made before superior court). *See also* Peck, *supra* note 16, at 766 ("Because the supreme court issued only a per curiam opinion affirming the superior court's judgment, resort must be made to the superior court's opinion for much of the reasoning supporting the decision.").

[76] *Id.*

imposing a bargaining duty was not a matter of simply applying the text.[77] Section 19 was not a comprehensive labor-relations statute; it cast bargaining rights only in "general terms."[78] The text offered no details on implementation and no mechanism for enforcement.[79] No cause of action appeared, nor did any remedies. Nowhere could the court find guidance on how to put meat on the new right's bones.[80] But even so, the court had a duty to enforce the constitution, whatever its ambiguities.[81] It would be "derelict" in that duty if it left the union without a remedy.[82] Section 19 left gaps, but someone had to fill them.[83] The Chancery Division had therefore been right to order an election and, if the union won, to order bargaining.[84]

In the same breath, however, the court recognized that judge-fashioned solutions were less than ideal in this space. Courts were not well suited to write day-to-day bargaining rules. The proper body to write those rules was the legislature. So the court called on the legislature to fill out section 19's skeletal structure:

> In the present state of the law the courts have the general power and the duty to determine justiciable labor disputes between nonprofit hospitals and their employees. At the same time we recognize that it is more expedient to have the day-to-day problems arising out of disputes concerning wages, hours and conditions of employment regulated by over-all legislation, than for the courts to set about the establishment of procedural and substantive precedents on a case-to-case basis.[85]

But the court's call went unheeded. In the years following *Johnson*, no general labor law was forthcoming. Nor did any other guidance emanate from the legislature. Section 19 remained elliptical, and key questions remained unanswered. Most important, with whom did the employer have a duty to bargain? The Chancery Division had embraced majority rule, with majority

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[77] *See Johnson II*, 45 N.J. at 111 n.1
[78] *Id.*
[79] *See id.*
[80] *See id.* (noting lack of legislative implementation and enforcement mechanism).
[81] *See id.* (reasoning that the court would be "derelict" in its duty if it failed to provide a remedy).
[82] *Id.*
[83] *See id.*
[84] *See id.*
[85] *Id.* at 112.

status determined by an election.[86] And by affirming, the supreme court seemed to endorse that approach.[87] But the question remained without a definitive answer. By getting support from a majority, did the union win the right to represent everyone? Or did dissenters keep some bargaining rights for themselves?

The New Jersey Supreme Court eventually answered that question, but again, only implicitly. In *Comite Organizador v. Molinelli*, the court considered a suit by a group of farmworkers and their union. A majority of the workers signed cards designating the union as their representative.[88] When the union presented the cards to the farm, the farm refused to bargain. Instead, it fired the whole group of workers.[89] The union sued, and the Chancery Division ordered an election.[90] The union won the election and again demanded bargaining. But the farm refused a second time, and the union sued again.[91] The Chancery Division again found that the farm had unlawfully failed to bargain and ordered it to recognize the union.[92] But again, rather than sit down with the union, the farm appealed. It argued that despite the outcome in *Johnson*, section 19 imposed no duty to bargain on employers.[93]

The supreme court disagreed. Section 19, it explained, gave all employees the right to bargain. That right would be "emasculated" if the employer had no duty to bargain in return.[94] A majority of the workers had twice chosen a representative, and the farm had twice refused to respect their choice.[95] So again, echoing *Johnson*, the court held that the Chancery Division had been right to order an election, and following the election, to order the farm to bargain.[96]

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[86] *See Johnson I*, 84 N.J. Super. at 549.
[87] *See Johnson II*, 45 N.J. at 110–11.
[88] *Molinelli*, 114 N.J. at 91.
[89] *Id.*
[90] *Id.* at 91–92.
[91] *Id.* at 92.
[92] *Id.*
[93] *See id*. at 97.
[94] *Id.*
[95] *Id.* at 91–92.
[96] *See id.* at 97–98.

Some of this reasoning may have been driven by bad facts. The farm explained its decision to fire the workers by saying that it had closed its operations.[97] But parts of those operations remained open, and the farm continued to employ other workers.[98] So its explanation carried more than a waft of mendacity. The farm had also failed to pay Social Security taxes on the workers' wages—a fact irrelevant to the issue at hand, but one that still made its way into the court's opinion.[99] And maybe worst of all, at least in the court's eyes, the farm had never asked to set aside the Chancery Division's original order.[100] It had simply ignored the order and continued to reject the union.[101] The supreme court could hardly stomach such brazen disregard for judicial authority.

Whatever role these facts played, the result was clear. Section 19 not only protected employees from interference, but also imposed an affirmative bargaining duty on employers.[102] And that duty attached to a single union, chosen by a majority vote.[103] The duty to bargain and exclusive representation had been lashed together.[104] As a unit, they had been firmly embedded in the state's constitutional law.

C. Missouri

Missouri would reach the same conclusion, if only belatedly. The state rewrote its constitution in 1945.[105] Among the new constitution's features was a right to bargain collectively.[106] The right appeared in article I, section 29, which read: "[E]mployees shall have the right to bargain collectively through representatives of their own choosing."[107]

Like New York's and New Jersey's constitutions, Missouri's new constitution mirrored section 7 of the NLRA. Like section 7, it guaranteed a right to bargain collectively through a chosen representative. Also like section 7, it said nothing about an employer's duty to bargain.

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[97] *Id.* at 92.
[98] *Id.*
[99] *See id.* at 94.
[100] *Id.* at 92.
[101] *See id.*
[102] *See id.* at 97.
[103] *See id.*
[104] *See id.*
[105] *See Missouri Constitution*, BALLOTPEDIA, https://ballotpedia.org/Missouri_Constitution (last visited Oct. 14, 2021).
[106] *See* MO. CONST. art. I § 29.
[107] *Id.*

That omission soon became important. In *Quinn v. Buchannan*, the Missouri Supreme Court held that section 29 created no new bargaining duties.[108] The case concerned a group of truckers, who had designated a local chapter of the Teamsters as their representative.[109] The Teamsters collected authorization cards from the truckers and presented the cards to the employer.[110] The employer responded by insisting that he would never have a union in his company.[111] He refused to recognize the Teamsters and, instead, fired the truckers.[112]

The truckers sued.[113] They argued that by firing them, the employer had violated their rights under section 29.[114] They sought damages, reinstatement, and an order forcing the employer to bargain.[115]

The Missouri Supreme Court agreed with them in part. It reasoned that section 29 gave the truckers a right to choose a bargaining representative.[116] That right implied the right to make an uncoerced choice.[117] And coercion was exactly what they had experienced: they had been fired for joining a union and demanding bargaining.[118] So section 29 entitled them to relief, including damages and reinstatement.[119] It did not, however, entitle them to a bargaining partner.[120] It said nothing about an employer's duty, and nothing in the records of the constitutional debates suggested that the drafters meant to create one.[121] The drafters had not written section 29 as a "labor relations

[108] 298 S.W.2d at 415.
[109] *Id.* at 416.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 416–17.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 417.
[117] *Id.* at 417
[118] *Id.*
[119] *See id.*
[120] *Id.* at 419.
[121] *Id.*

act, specifying rights, duties, practices, and obligations."[122] If those obligations and duties were to exist, they would have to come from legislation.[123]

In this way, *Quinn* followed the *Herzog* model.[124] It found gaps in the constitutional language, but refused to fill them with judge-made solutions.[125] It instead applied the words as written and left legislators to fill in the rest.[126] It recognized that legislators, not courts, should decide whether and when to require bargaining.[127]

But unlike *Herzog*, *Quinn* would not stand the test of time. In 2012, some sixty years after *Quinn*, the Missouri Supreme Court reversed course. In a pair of decisions, it repudiated *Quinn* and held that section 29 did, in fact, create a duty to bargain.

The first decision came in *Eastern Missouri Coalition of Police v. City of Chesterfield*.[128] *Chesterfield* involved a drive to unionize police officers.[129] At the time, a Missouri statute gave bargaining rights to some state and local employees, but exempted police.[130] On the strength of that exemption, the city refused to recognize the officers' union.[131] The union responded by suing.[132] A trial court held that despite the exemption, the officers had a right to bargain under section 29—and that the city had a duty to bargain in return.[133]

On appeal, the supreme court affirmed. It announced that the city had a duty to "meet and confer" with the union—despite the contrary conclusion in *Quinn*.[134] *Quinn*, it said, rested on an unstated assumption: that constitutional rights were inherently negative.[135] But that assumption was not invariably true. Nothing in doctrine or structure prevented constitutions from

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[122] *Id.* at 418.

[123] *See id.* ("Thus implementation of the right to require any affirmative duties of an employer concerning [the right to bargain] is a matter for the Legislature.").

[124] *See id.* (citing *Herzog*, 53 N.Y.S.2d at 617)).

[125] *See id. See also* Peck, *supra* note 16, at 769 (contrasting *Quinn* with *Johnson*, the latter of which was an example of judicial invention).

[126] *See Quinn*, 298 S.W.2d at 418–19.

[127] *See id.* at 419.

[128] 386 S.W.3d 755 (Mo. 2012).

[129] *Id.* at 758.

[130] MO. REV. STAT. § 105.500 (exempting public-safety labor organizations from coverage).

[131] *See Chesterfield*, 386 S.W.3d at 758–59.

[132] *Id.* at 758.

[133] *Id.* at 758–59.

[134] *Id.* at 758.

[135] *Id.* at 761.

creating positive rights.[136] In fact, many other states had found positive rights in their constitutions. For example, Connecticut courts had found a positive constitutional right to an equal educational opportunity.[137] Montana courts had found a positive right to observe government meetings and inspect certain public documents.[138] Those decisions showed that constitutions could, in some cases, create positive rights. Nothing prevented section 29 from doing the same.[139] *Quinn*'s contrary assumption was flawed, and that flaw undermined the rest of its rationale.[140]

The court continued in this vein in a second case, *American Federation of Teachers v. Ledbetter*. *Ledbetter* involved negotiations between a teachers' union and a board of education.[141] Like police officers, teachers were exempted from Missouri's public-sector labor law.[142] Even so, the board voluntarily recognized the union and bargained with it for about a year.[143] The negotiators met nearly twenty times and came to a tentative agreement.[144] But when the deal was presented to the board, the board rejected it.[145] The board was particularly unhappy about the tentative deals on tenure and pay.[146] Because negotiations had carried on so long, there was little time to go back to the table; the next school year was fast approaching.[147] So rather than make a

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[136] *See id.* at 762 (observing that there is no rule against placing affirmative rights in the constitution, as opposed to negative rights). *See also* ZACKIN, *supra* note 11, at loc. 158 (making the same point).

[137] *Chesterfield*, 386 S.W.3d at 762 (citing Sheff v. O'Neill, 678 A.2d 1267, 1284–85 (Conn. 1996)).

[138] *Id.* (citing Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 82 P.3d 876, 886 (2003)).

[139] *See id.* ("Likewise article I, section 29 of the Missouri Constitution imposes on employers an affirmative duty to bargain collectively.").

[140] *See id.* (overruling *Quinn*). This characterization of *Quinn*'s rationale was tenuous. Overtly, *Quinn* rested its conclusion not on assumptions about constitutional structure, but on the constitutional text at issue. It pointed out that the text of section 29 "required no affirmative duties." *Quinn*, 298 S.W.2d at 419. It never said that constitutions could not create positive rights; it said only that section 29 did not create one. *See id.*

[141] *Ledbetter*, 387 S.W.3d at 362.

[142] *Id.* at 363 (citing MO. REV. STAT. § 105.510).

[143] *See id.* at 362.

[144] *Id.*

[145] *Id.* at 362.

[146] *See id.*

[147] *Id.*

counterproposal, the board announced new salaries and sent individual contracts to the teachers.[148]

The union sued.[149] It argued that by making individual offers, the board had failed to bargain in good faith.[150] It conceded that the teachers were excluded by the statute. Even so, it claimed that they had a right to bargain under section 29, and that the school board had a reciprocal duty to bargain.[151]

Relying on *Quinn*, a trial court rejected that argument.[152] But the supreme court reversed.[153] Building on *Chesterfield*, the court reasoned that section 29 gave every employee, public or private, the right to bargain collectively.[154] That right would be empty if the employer had no duty to bargain in good faith.[155] Were it otherwise, the employer could stymie bargaining by using "surface" negotiation tactics.[156] Or worse, it could refuse to bargain at all.[157] Employees would have no way to force the issue; their bargaining rights would mean little more than the right to present grievances.[158] And for public employees, that would make their bargaining rights no different from the right to petition the government—i.e., their employer—making their rights would be effectively redundant.[159] The drafters surely hadn't meant to duplicate existing rights.[160] They must have meant to give employees something meaningful. So the right to bargain must imply a reciprocal duty.[161]

To bolster that conclusion, the court looked to federal law.[162] It argued that while nothing in the constitutional debate records showed that the

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[148] *Id.*

[149] *Id.* at 363.

[150] *Id.* at 361.

[151] *See id.*

[152] *Id.* at 362.

[153] *Id.* at 361.

[154] *See id.* at 363 ("When a procedural framework for bargaining is not codified, i.e., for excluded employees, the lack of a framework does not excuse the public employer from its constitutional duty to bargain collectively with public employees.").

[155] *Id.* at 364.

[156] *Id.*

[157] *Id.* at 364.

[158] *Id.*

[159] *See id.* ("In situations in which the employer is a government entity, that interpretation would make the right redundant because this goes no further than the limited right to petition the government already guaranteed by the First Amendment of the United States Constitution and article I, sections 8 and 9 of the Missouri Constitution.").

[160] *See id.* at 364.

[161] *See id.*

[162] *See id.* at 364–66 (examining federal authorities).

drafters meant to create an affirmative duty, contemporary federal authorities suggested that they may have assumed they were creating one anyway.[163] In the early 20th century, the War Labor Board,[164] the Railway Labor Board,[165] and the National Labor Board[166] had each concluded that the right to bargain collectively implied a reciprocal duty.[167] Section 29's drafters must have been aware of those decisions and would have known that "collective bargaining" had become a term of art.[168] So they likely knew they were creating a duty to bargain, even if they never acknowledged it.[169]

The court's decision was not unanimous. It drew a spirited dissent from Judge Zel M. Fischer, who accused the majority of reading new words into the constitution.[170] He pointed out that section 29 never mentioned a duty to bargain.[171] It used no words like duty, recognition, or good faith.[172] Instead, it simply gave employees a right to choose their bargaining representatives.[173] By expanding that right to include a reciprocal duty, he said, the majority was glossing the text with its own policy judgments.[174]

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[163] *See id.* at 364 n.4 ("[The debates] do not give any indication as to whether the right impose an affirmative duty, a sword that can compel employers to bargain, or whether it created only a negative duty, a shield that prohibits public and private employers from impeding the organization of labor unions.").

[164] *Id.* at 365 (citing *Amalgamated Meat Cutters & Butcher Workmen of Am. v. W. Cold Storage Co.*, Nat'l War Labor Bd. Docket No. 80 (1919)).

[165] *Id.* (citing *Int'l Ass'n of Machinists*, 2 R.L.B. 87, 89 (1921)).

[166] *Id.* (citing *Conn. Coke Co.*, 2 N.L.B. 88, 89 (1934)).

[167] For more background on these decisions and the development of the duty to bargain under federal law before 1935, see generally, Richard Miller, *The Enigma of Section 8(5) of the Wagner Act*, 18 ILR REV. 166 (1965).

[168] *See Ledbetter*, 387 S.W.3d at 365 (concluding that by "1945, when article I, section 29 was adopted . . . the words 'bargain collectively' were common usage for negotiations conducted in good faith and looking toward a collective agreement").

[169] *See id.*

[170] *See id.* at 373 (Fischer, J., dissenting) ("T]his Court still does not have the authority to read words into the Constitution and particularly to read words into the Constitution that drastically redefine the long established meaning of its actual words.").

[171] *Id.* at 368.

[172] *Id.*

[173] *Id.*

[174] *Id.* at 368.

Judge Fischer also found it odd that the majority put so much emphasis on federal law while ignoring what section 29's drafters actually said.[175] Looking to the convention debates, he found no evidence that the drafters meant to create a new bargaining duty.[176] Instead, by their own words, they were trying only to protect bargaining rights against legislative interference.[177] They said that section 29 would "preclude the possibility and the probability . . . [of] many bills being introduced seeking to destroy collective bargaining."[178] But they never said they wanted to expand bargaining beyond its current status under state law, much less adopt federal law in its entirety.[179]

He likewise disagreed that a duty was necessary to make bargaining rights meaningful. Even without a duty, section 29 would protect employees from interference.[180] For example, in *Quinn* itself, the court granted relief to employees fired for joining a union.[181] That kind of retaliation was illegal under section 29 and well within the court's power to remedy.[182] But it was not within the court's power to convert section 29 into a full-blown labor-relations act.[183] The court had no authority to impose a new duty, much less to create the rules that went along with it.[184] That kind of detailed rulemaking could be done only by the legislature.[185] By taking that task upon itself, the majority had overstepped its proper judicial role.[186]

III. THE TEXTUAL, HISTORICAL, AND STRUCTURAL FLAWS OF JUDICIALLY IMPOSED BARGAINING

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[175] *Id.* at 369.

[176] *Id.*

[177] *See id.* at 373 (Fischer, J., dissenting) ("[A]rticle I, section 29, was intended to protect from legislative or employer interference [with] the right of employees to organize and bargain through a representative of their own choosing.").

[178] *Id.* at 369 (quoting 8 DEBATES OF THE 1934–44 CONSTITUTIONAL CONVENTION OF MISSOURI 2517 (1943–44) [hereinafter Missouri Debates]).

[179] *See id.* at 373 (concluding that the affirmative duty to bargain collectively was "entirely a new creation by the principal opinion in this case").

[180] *Id.* at 372.

[181] *Id.* at 371–72 (citing *Quinn*, 298 S.W.2d at 420).

[182] *Id.*

[183] *Id.* at 372 (Fischer, J., dissenting).

[184] *See id.* (noting that section 29 did not enact a comprehensive labor-relations statute).

[185] *See id.* ("Perhaps modern industrial conditions make desirable more than that for best labor relations but that is a matter for the Legislature."(quoting *Quinn*, 298 S.W.2d at 420)).

[186] *See id.*

These decisions show how rights can develop in unexpected directions. In New York, courts read bargaining rights modestly and fit them into existing law.[187] Missouri courts did the same for nearly sixty years.[188] But later, Missouri courts abandoned that approach and imposed an unwritten bargaining duty. [189] And in New Jersey, courts took the duty-to-bargain approach from the beginning. [190]

What emerges is a lesson in unintended consequences. When planted in a governing document, even the barest of texts can sprout a tangle of judicial glosses.[191] And that kind of tangle can be hard to pull back from. Having waded into the thicket, courts struggle to extract themselves. Witness how New Jersey's and Missouri's courts took one step beyond the text—inferring an unwritten duty to bargain—and quickly found themselves straying even further. Lacking any statute or administrative system to fall back on, they reached for federal concepts—good faith, majority elections, and exclusive representation—rather than simply hewing to the plain text and the original meaning of their constitutions.[192]

A. Text

Nothing in the text of either Missouri's or New Jersey's constitution supported a duty to bargain. The relevant texts said that employees had the right to bargain collectively through representatives of their choosing.[193] But they said nothing about an employer's duty. They used no words like "duty to

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[187] *See Herzog*, 269 App. Div. at 30.

[188] *See Quinn*, 298 S.W.2d at 418.

[189] *See Ledbetter*, 387 S.W.3d at 363–65.

[190] *See Johnson*, 45 N.J. at 111–12.

[191] *See, e.g.*, *Chesterfield*, 386 S.W.3d at 761 (reversing *Quinn* after sixty years of unbroken interpretation of unchanged constitutional language). *See also* 8 Missouri Debates, *supra* note 178, at 310 (statement of Judge Robert Carey) (arguing that collective bargaining was so ill defined that the drafters wouldn't know what it meant until a court told them).

[192] *See, e.g.*, *Johnson II*, 45 N.J. at 111–12 (accepting Chancery Divisions decision to order an election to determine exclusive representative); *Johnson I*, 84 N.J. Super. at 459 (endorsing concept of exclusive representation, borrowed from federal law); *Ledbetter*, 387 S.W.3d at 363–65 (relying on federal authorities to read bargaining duty into state constitution).

[193] *See* N.J. CONST. art. I § 19; MO. CONST. art. I § 29.

bargain," "meet and confer," or "good faith." They offered no textual hook for an affirmative bargaining duty.[194]

Without such a hook, courts had to infer a duty. And to justify that inference, they had to borrow from federal law.[195] They pointed out that federal law required employers to bargain in good faith—i.e., with a genuine desire to make an agreement.[196] The state constitutional drafters were writing against the backdrop of federal law and surely would have been aware of it. So, they reasoned, the drafters must have assumed a similar requirement would apply under the state law provisions they were drafting.[197]

But that analysis glides over differences in the relevant texts. Both constitutions mirrored section 7 of the NLRA, which gave employees a right to bargain collectively.[198] Section 7 predated the two constitutions, so it was reasonable to assume that the drafters thought of it as a rough model. But that assumption doesn't lead us to a bargaining duty, because there is no bargaining duty in section 7. The federal bargaining duty comes from a different part of the NLRA—section 8(a)(5).[199] That section makes refusing to bargain an unfair labor practice.[200] Likewise, section 8(d) (added later) explains that the duty to bargain includes the duty to "meet at reasonable times and confer in good faith."[201] Both 8(a)(5) and 8(d) would be redundant if section 7 imposed a duty to bargain on its own.[202] They are necessary only because section 7's language doesn't do the job.

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[194] *See* Peck, *supra* note 16, at 729 (criticizing *Johnson* for going "beyond what is immediately suggested by a reading of the supporting texts" and engaging in "judicial creativity").

[195] *See, e.g.*, *Molinelli*, 114 N.J. at 97 (explaining that because section 19's scope was unclear, court looked to federal "experience and adjudications" to determine rights and remedies under state constitution); *Ledbetter*, 387 S.W.3d at 364–65 (looking at federal agency interpretations to determine scope of bargaining rights under state constitution). *See also* Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 422–23 (N.J. 1970) (citing federal agency interpretations to uphold exclusive-representation scheme under state public-sector labor law).

[196] *See Ledbetter*, 387 S.W.3d at 364–65. *See also Lullo*, 55 N.J. at 422–23.

[197] *Ledbetter*, 387 S.W.3d at 364–65; *Johnson I*, 84 N.J. Super. at 459.

[198] *See* 29 U.S.C. § 157.

[199] *See id.* § 158(a)(5). When Missouri and New Jersey rewrote their constitutions, section 8(a)(5) was numbered 8(5). *See* Miller, *supra* note 167, at 168–78 (discussing development of duty to bargain before and after passage of section 8(5)).

[200] 29 U.S.C. § 158(a)(5).

[201] *Id.* § 8(d).

[202] *See* Miller, *supra* note 167, at 180 (explaining that Senate added section 8(5) because duty to bargain was not clear in section 7 alone).

At least, that's how the NLRA's drafters saw it. When the NLRA was first proposed, some in Congress wanted to let section 7 stand alone.[203] Chief among them was the statute's sponsor, Senator Robert Wagner.[204] Wagner told various Senate committees that section 7 implicitly required employers to bargain in good faith.[205] But the broader Senate rejected that interpretation.[206] Several senators observed that, without a clear textual hook in section 7, employers might have no enforceable duties.[207] So they added section 8(5), and later section 8(d), to spell the duty out explicitly.[208]

No similar additions were made in Missouri or New Jersey. The drafters gave employees the right to bargain collectively, but they said nothing about an employer's duty. Had they wanted to create such a duty, they could easily have done so. They only had to look at what the U.S. Senate had done with section 8(5). But they chose not to do that. Instead, they adopted language mirroring section 7—and only section 7.

Sound constitutional interpretation should treat that choice as meaningful.[209] As Judge Fisher observed in his *Chesterfield* dissent, courts have no power to amend constitutional text.[210] They cannot add words simply because they think the text would work better with a little embellishment. They must apply the text as written. And as written, sections 19 and 29 impose no duty on employers.[211]

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[203] *See id.* (describing position of Sen. Wagner).

[204] *See id.*

[205] *Id.*

[206] *See id.* (describing committee reactions and quoting from legislative history).

[207] *See id.* at 173 (quoting NAT'L LABOR RELATIONS BD., LEGISLATION HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 38 (Washington: GPO 1949)).

[208] *See id.* at 180.

[209] *See Ledbetter*, 387 S.W.3d at 368–69 (Fischer, J., dissenting) (arguing that a court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted").

[210] *See id.* at 373 ("T]his Court still does not have the authority to read words into the Constitution and particularly to read words into the Constitution that drastically redefine the long established meaning of its actual words.").

[211] *See id.* at 368 (pointing out that section 29's plain language creates no duty to bargain).

B. History

If the mandatory-bargaining approach makes little sense as a matter of text, it makes even less sense as a matter of history. To understand why, we have to start with the common-law baseline. At common law, a party had no duty to bargain.[212] She was free to bargain or not bargain with whomever she chose.[213] The concept of "good faith" came into play in only limited circumstances. A party could not entice another person into a contract through fraud, nor could she deny a contract when she had induced the other party to rely on her representations. But outside those situations, no "good faith" obligation attached. No one had to negotiate with a genuine desire to make an agreement. If a party didn't want an agreement, she could walk away—or never bargain to begin with.[214]

These same principles applied to bargaining between employers and unions.[215] The common law recognized no duty for either party to bargain, much less bargain in good faith.[216] Instead, the law respected an employee's right to choose a bargaining representative, typically a union.[217] It then left the union with the normal tools for extracting an agreement. The union could approach the employer through persuasion, protests, or displays of

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[212] *See, e.g.*, Local 47 v. Hospital, 11 Ohio Misc. 218, 226 (Ohio Com. Pleas 1967) ("There is not a word in Ohio's common-law rule book that says an employer must, against his will, bargain collectively."); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1364 (1983) (explaining the common-law default: "Every person owns his own person and can possess, use and dispose of his labor on whatever terms he sees fit."). *Cf.* Getman & Kohler, *supra* note 15, at 1421 (observing that Congress judged the common-law method too limited to address industrial society's emerging labor issues, and so enacted a "new" bargaining paradigm with the NLRA).

[213] *See* Epstein, *supra* note 212, at 1395 (explaining that under common law, courts did not force parties to bargain; they merely enforced agreements voluntarily made).

[214] *See id.* ("Limited in this way, the principle of 'good faith' clearly has no bite in the area of labor relations, as employers can easily avoid the twin pitfalls of precontractual reliance and misrepresentation.").

[215] *See id*. at 1365–69 (explaining that early common law allowed formation of unions, but did not dictate outcome of labor disputes; it left the parties to determine their own agreements.)

[216] *See* Petri Cleaners v. Auto. Emp., Etc., Local No. 88, 53 Cal.2d 455, 470 (Cal. 1960) (Traynor, J.) (explaining that there was no duty to bargain collectively at common law; the employer's decision to bargain was left to the "free interaction of economic forces").

[217] *See* Epstein, *supra* note 212, at 1365, 1394 (noting that formation of labor unions and collective bargaining were fully consistent with common law; just as one employee was free to bargain for the terms under which she would sell her labor, so was a group of employees).

economic strength.[218] It could use skill or tact or weight of numbers.[219] But it could not sue to force the employer to the table.[220] Likewise, the employer could respond with its own economic weapons, such as hiring replacements. Or it could take a less drastic approach and bargain voluntarily.[221] But it had no legal right to dictate the union's bargaining behavior.

The NLRA, of course, changed all that.[222] It deliberately departed from the common law and imposed a duty to bargain on both parties.[223] That mandate marked a sea-change in the law of labor relations, and it still colors our views of bargaining today.[224] But in the 1940s, when their constitutions were drafted and passed, neither Missouri nor New Jersey had anything like the NLRA. They had no general statute imposing a duty to bargain.[225] So for them, the relevant baseline was still the common law.[226]

The constitutional drafters had no intent to upset that baseline. In the contemporary debates, supporters of both provisions assured their

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[218] *See Petri Cleaners*, 53 Cal.2d at 470 (finding no duty to bargain collectively absent statute departing from common law).

[219] *See id. See also Local 47*, 11 Ohio Misc. at 226 (surveying cases from multiple jurisdictions refusing to recognize a common-law duty to bargain).

[220] *See Local 47*, 11 Ohio Misc. at 224 (rejecting union's attempt to force bargaining because the union failed to show that the employer had a "clear duty" to bargain under the common law). *See also* Peters v. S. Chicago Cmty. Hosp., 235 N.E.2d 842, 846 (Ill. App. Ct. 1968) ("Courts may not formulate labor rules or policies when the legislature has failed to do so."); Tate v. Phila. Transportation Co., 410 Pa. 490, 499 (1963) (recognizing that absent legislation, a court cannot require collective bargaining).

[221] *See Petri Cleaners*, 53 Cal.2d at 470 (explaining that the common law left bargaining decisions to the free interaction of economic forces).

[222] Epstein, *supra* note 212, at 1394–95 (observing that Wagner Act marked a dramatic departure from common-law baseline). *See also* Peck, *supra* note 16, at 753–54 (observing that after the Norris-LaGuardia Act removed the threat of injunctions, labor and management were on equal footing, and each could support their positions with shows of economic strength).

[223] *See* 29 U.S.C. § 158(a)(5), (d). *See also* Labor Bd. v. Laughlin, 301 U.S. 1, 31 (1937) (observing that charge under the NLRA is "not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding").

[224] *See* Epstein, *supra* note 212, at 1394–95 (discussing how Wagner Act changed the common-law baseline).

[225] *See Johnson II*, 45 N.J. at 112 (lamenting absence of legislation to manage day-to-day labor relations); *Quinn*, 298 S.W.2d at 417 (noting absence of legislation providing for enforcement of section 29).

[226] *See* Epstein, *supra* note 212, at 1395 (arguing that the appropriate baseline on which to judge the changes wrought by the NLRA is the common law).

convention colleagues that they were creating no new rights.[227] They did not mean to give any special privileges to labor.[228] Instead, they were trying to do only two things: (1) recognize employees' preexisting right to bargain collectively through their chosen representatives; and (2) protect that right from legislative and judicial erosion.[229]

In New Jersey, this position was articulated by multiple delegates. Frank Eggers, the mayor of Jersey City, insisted that section 19 gave nothing "special" to unions.[230] It was "merely declarative" of employees' "inherent right" to bargain collectively.[231] Likewise, Spencer Miller, an NYU professor of industrial relations, said that section 19 would protect employees' rights to "unite" and "exert influence" on their employers.[232] It would allow them to "withhold[] their labor of economic value" and force the employers to "pay them what they thought it was worth."[233] Such a right would not be new—it had already existed for "nearly a hundred years."[234]

Reacting to these arguments, some delegates questioned section 19's utility. If it would create no new rights, why put it in the constitution?[235] In response, supporters pointed to hostile legislators.[236] True, the supporters said, the right to bargain already existed; it was inherent and longstanding.[237] But that hadn't stopped it from coming under constant attack.[238] Lawmakers—federal and state—had shown they could not be trusted to leave

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[227] *See* 8 Missouri Debates, *supra* note 178, at 2509 (statement of Mr. Wood) ("Of course by this simple line in our Constitution we do not establish the rights of labor. Those rights already exist."); 3 New Jersey Debates, *supra* note 58, at 239 (statement of Mr. Parsonnet) (conceding that labor already had the rights guaranteed by section 19).

[228] *See* 8 Missouri Debates, *supra* note 178, at 2513 (stating that "members of organized labor are not asking any special privileges"); 1 New Jersey Debates, *supra* note 58, at 325 (statement of Mr. Eggers) (denying that labor was seeking "something special" with its proposed amendment).

[229] *See* 8 Missouri Debates, *supra* note 178, at 2513 (arguing that the provision was necessary to combat legislation hostile to labor rights); 1 New Jersey Debates, *supra* note 58, at 325 (arguing that recent history had shown that the legislature could not be trusted to protect labor rights in the future).

[230] 1 New Jersey Debates, *supra* note 58, at 325.

[231] *Id.* at 325.

[232] *Id.* at 317.

[233] *Id.*

[234] *Id.*

[235] *See* 3 New Jersey Debates, *supra* note 58, at 128 (statement of Mr. Holderman), 239 (exchange between Judge Carey and Mr. Parsonnet).

[236] *See id.* at 317 (statement of Mr. Miller), 325 (statement of Mr. Eggers).

[237] *See id.* at 314 (statement of Mr. Park), 321 (statement of Mr. Berry).

[238] *See id.* at 129 (pointing to "restrictive legislation" recently passed in Congress).

bargaining rights untouched.[239] Section 19 would forever put bargaining rights beyond their reach. It was intended, in short, to prevent legislative backsliding.[240]

The same position was taken by supporters in Missouri. Section 29's chief advocate, R.T. Wood, explained that by enshrining bargaining rights in the constitution, labor was not gaining anything new.[241] It already had the right to bargain collectively. Section 29 would merely recognize labor's rights and elevate them to constitutional status.[242]

As in New Jersey, skeptics pounced on this line of reasoning. If employees already had the right to bargain collectively, the skeptics asked, what would section 29 do?[243] Why put it in the constitution at all? In response, Wood gave a now familiar answer:

> *Mr. Darmon:* Mr. Wood, does the labor [sic] now have the right to organize and bargain collectively in this state?
>
> *Mr. Wood (of Greene):* Oh yes. Everyone knows that. That's true.
>
> *Mr. Darmon:* What rights or powers if any, do you seek to obtain by this proposal that you do not now have?
>
> *Mr. Wood (of Greene):* Well, Mr. Darmon, if it is in our state constitution we will preclude the possibility as has happened in the past, in future sessions of the Legislature, many bills being introduced seeking to destroy collective bargaining.[244]

This exchange shows that section 29 was supposed to protect existing bargaining rights from legislative sabotage.[245] It created no new rights, but rather "recognized" that "the members of organized labor [had] the same right to organize and bargain collectively in [their] own interest as every other organization and every other group."[246]

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[239] *See id.* at 128, 325.
[240] *See id.* at 325.
[241] 8 Missouri Debates, *supra* note 178, at 2509.
[242] *See id.*
[243] *See id.* at 2517 (questioning by Mr. Darmon).
[244] *Id.* at 2518.
[245] *See id*. (response of Mr. Wood).
[246] *Id.*

On the flip side, neither Wood nor any other supporter said that section 29 would force employers to bargain.[247] And if they had meant to force employers to bargain—a dramatic departure from the common-law baseline—one would have expected them at least mention it.[248] That no one did is a strong indication that we should take them at their word: they really did mean to preserve the status quo.[249]

It may come as a surprise that the drafters saw their handiwork in such modest terms. After all, they were inscribing rights into their fundamental organizing documents. Surely, they meant those rights to be meaningful. But their accomplishments seem modest only if we view them through a modern lens. We now have nearly a century's worth of experience with the NLRA; given that experience, we take bargaining rights for granted. The duty to bargain is baked into modern labor law. It is as natural to us as the common-law standard was to our predecessors. But to convention delegates in the mid-1940s, bargaining rights seemed far less secure. The delegates had only a few years' experience with the NLRA, and they could still remember a time when bargaining rights seemed quite precarious. Indeed, it was not so long before that labor unions faced threats to their very existence.

The most acute threat had come from the aggressive use of labor injunctions.[250] The injunction was an ancient remedy with deep roots in the common law.[251] Courts originally used it to prevent irreparable injuries to land.[252] But they gradually expanded it over time to cover other kinds of property, including business interests.[253] In the late 1800s, some courts started using it to tamp down labor disputes.[254] They reasoned that labor disputes posed serious threats to business interests, and so could be enjoined when paired with an "unlawful" motive—e.g., the intent to harm another person's property.[255]

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[247] *See id.* (explanation of Mr. Wood regarding the provision's purpose, given that workers already had the right to bargain collectively).

[248] *See Ledbetter*, 387 S.W.3d at 368 (Fischer, J., dissenting) (noting that section 29's supporters described it only as a "protective measure" against future legislation).

[249] *See id.* (asserting that the constitutional provision was necessary to protect rights against future legislative erosion).

[250] For a general overview of the labor injunction and its place in the history of the labor movement, see Robert M. Debevec, *The Labor Injunction—Weapon or Tool*, 4 CLEV.-MARSHALL L. REV. 102 (1955).

[251] *See id.* at 104 (tracing origins to remedies issued by British Chancery courts).

[252] *Id.*

[253] *Id.*

[254] *Id.* at 105 (citing Johnston Harvester Co. v. Meinhardt, 60 How. Pr. 168 (N.Y. 1880)).

[255] *See id.*

With an injunction came potentially heavy penalties, including criminal contempt.[256] If labor leaders violated one, they could go to jail.[257]

Though rare at first, labor injunctions expanded over the century.[258] And more and more, they were used to shut down union activities.[259] They became particularly effective when the U.S. Supreme Court coupled them with antitrust law. In a series of decisions, the Court permitted legal attacks against unions under section 1 of the Sherman Act.[260] Under that act,[261] any group formed to restrain trade was an illegal combination.[262] Unions, of course, existed to control a particular kind of trade: the sale of labor.[263] So like other combinations in restraint of trade, they faced potential dissolution.[264] Antitrust law had thus become a dagger aimed squarely at their collective heart.[265]

Nor were labor injunctions the only threat facing unions. Another prime example was the "yellow dog" contract.[266] Yellow-dog contracts were common early in the 20th century. They required workers to agree, as a condition of employment, not to join a union.[267] They presented obvious obstacles to unionization, and they were a key union-avoidance tool for much of the early

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[256] *See id.* (noting that Eugene Debs and other labor leaders were arrested and jailed for violating a labor injunction during the Pullman strike in the late 19th century).

[257] *See* Debevec, *supra* note 250, at 105.

[258] *See* Getman & Kohler, *supra* note 15, at 1427 (observing that while there were no labor injunctions in the United States before 1880, there were 1,845 between 1880 and 1930, and an additional 921 from 1920 to 1930).

[259] *See id.*

[260] *See In re Debs*, 158 U.S. 564, 591 (1895) (affirming power of federal courts to enjoin labor disputes interfering with the free flow of interstate commerce); Loewe v. Lawlor, 208 U.S. 274, 297 (1908) (holding that labor boycotts could be enjoined under Sherman Act); Amer. Foundries v. Tri-City Council, 257 U.S. 184 (1921) (interpreting Clayton Act narrowly to allow courts to continue issue injunctions in many labor disputes).

[261] 15 U.S.C. §§ 1–38.

[262] *See* Miller & Huffaker, *supra* note 40, at 209 (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)). *See also* ERIC POSNER, HOW ANTITRUST FAILED WORKERS 30–31 (2021) (describing courts' pre-Clayton Act treatment of labor unions).

[263] *See* POSNER, *supra* note 262, at 40 ("Unions are themselves cartels of workers.").

[264] Miller & Huffaker, *supra* note 40, at 209.

[265] *See id.* (discussing existential threat *Standard Oil* posed to labor unions).

[266] *See, e.g.*, JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 288 (2016) (explaining that early efforts to put labor rights into state constitutions involved bans on yellow-dog contracts).

[267] Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 534–35 (1949) (describing yellow-dog contracts and history of efforts to outlaw them at the federal level).

labor movement.[268] The constitutional drafters knew them well and cited them as a threat to bargaining rights.[269] They clearly expected sections 19 and 29 to abolish them.[270]

Unions eventually beat back these threats with the help of Congress. In 1914, Congress passed the Clayton Act,[271] which declared that labor unions were not illegal combinations in restraint of trade.[272] In 1932, Congress passed the Norris–LaGuardia Act,[273] which both stripped federal courts of much of their power to enjoin labor disputes and outlawed yellow-dog contracts.[274] These laws effectively neutralized the threat of labor injunctions in federal court.[275] They also spurred states to pass copycat laws, which put state courts on the sidelines as well.[276]

The Norris-LaGuardia Act took effect about fifteen years before Missouri and New Jersey convened their constitutional conventions. But in both states, the drafters could still remember the bad old days. They cited this history of judicial hostility as a reason for elevating bargaining rights to constitutional status.[277] They knew what it was like to feel the full force of judicial pressure and to wonder whether unions were lawful at all.[278] So to them, protecting the right to form unions and demand recognition would not have seemed so

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[268] *See id.*

[269] *See* 1 New Jersey Debates, *supra* note 58, at 318–19 (statement of Mr. Rafferty) (listing yellow-dog contracts as an example of efforts to undermine labor rights).

[270] *See id.*

[271] Pub. L. 63-212, 49 Stat. 1526 (1915) (codified as amended 15 U.S.C. §§ 12–27).

[272] *See* 15 U.S.C. § 17 (stating that the "labor of a human being is not a commodity or article of commerce" and that labor organizations are not "illegal combinations or conspiracies in restraint of trade").

[273] Pub. L. 98-620, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115).

[274] *See* 29 U.S.C. §§ 101 (stating that no "court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute" except in accordance with the Act's provisions), 103 (declaring yellow-dog contracts "contrary to public policy" and unenforceable).

[275] *See* Miller & Huffaker, *supra* note 40, at 211–13 (tracking the development of labor's exemption from federal antitrust laws).

[276] *See, e.g.*, WASH. REV. CODE § 49.32.011 (copying Norris-LaGuardia and stripping Washington courts of power to issue injunctions in labor disputes except under certain conditions); Jack Perlman, *The Little Norris-LaGuardia Act and the New York Courts*, 25 N.Y.U. L. REV. 315, 315–17 (1950) (discussing New York's adoption of state version of Act).

[277] *See* 1 New Jersey Debates, *supra* note 58, at 317 (pointing to the Supreme Court's *Tri-City Central Trades* decision as evidence of judicial hostility to labor rights).

[278] *See id.*

modest an accomplishment. It would have seemed instead like an epochal moment in the history of labor.[279]

C. Structure

The duty-to-bargain approach necessarily imbeds judges in overseeing day-to-day bargaining, in part because the relevant texts are so sparse. Neither section 19 nor section 29 mentions a duty to bargain, much less says how to implement one. So when courts declare that a duty exists, they have no choice but to define it as well.[280] And that kind of definitional work pulls them far outside their comfort zones.[281]

It's one thing for courts to protect the right to engage in specified conduct. They have a lot of experience doing that. Every year, they handle thousands of claims under federal and state antidiscrimination laws.[282] Among other things, those laws protect employees who oppose discrimination.[283] Similarly, courts adjudicate claims under laws protecting free speech in the workplace and whistleblowing activity.[284] Courts have well-worn tools for adjudicating

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[279] *See id.* at 124–25 (statement of Mr. Holderman) (tracking history of struggle for labor rights, despite their status as "natural rights"). *See also* ZACKIN, *supra* note 11, at loc. 623 (concluding that specific state provisions adopted in the first half of the 20th century, including labor provisions, often reflected national anxieties and trends).

[280] *See* Peck, *supra* note 16, at 773–78 (discussing various practical and administrative questions a court must determine to implement a bargaining obligation without legislative guidance).

[281] *See id.* at 778 (arguing that courts lack institutional expertise to delineate rules for practical administration of bargaining).

[282] *See also* 42 U.S.C. § 2000e–5(f) (providing for private lawsuit following administrative exhaustion); *EEOC Litigation Statistics, FY 1997 through 2020*, EEOC, https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2020 (last visited Nov. 1, 2021) (showing that the EEOC alone typically files more than a hundred merits lawsuits each year); Teri Gerstein, *Forced Arbitration: A Losing Proposition for Workers*, *in* INEQUALITY AND THE LABOR MARKET 179, 182 (Sharon Block & Benjamin Harris, eds. 2021) (reporting that in 2015 and 2016, discrimination suits by private plaintiffs exceeded those of the EEOC by a factor of 48).

[283] *See, e.g.*, 42 U.S.C. § 2000e–3(a) (forbidding retaliation against employees who oppose unlawful practices or participate in certain investigations or proceedings under federal antidiscrimination law); CAL. LABOR CODE § 12940(h) (forbidding interference with the same types of activities under California law).

[284] *See generally* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. OF L. & POLITICS 295 (2012) (surveying state laws protecting speech and political activity of private employees); *Statutes*, U.S. DEP'T OF LABOR, OSHA, https://www.whistleblowers.gov/statutes (listing twenty-five separate statutes with protections for whistleblowers enforced by OSHA); *Laws that Prohibit Retaliation and Discrimination*,

these claims and safeguarding protected conduct. They can muster a range of remedies, including reinstatement, backpay, and attorneys' fees.[285] They are comfortable with these remedies and more than competent to deploy them.[286]

But courts have no similar toolkit to enforce an affirmative bargaining duty.[287] To start, they can't award any remedy until they figure out what the duty entails. What subjects does it cover?[288] Where and when does bargaining take place?[289] With whom does the employer bargain?[290] Can the employer declare an impasse at some point, or does it have to bargain in perpetuity?[291] And if the parties reach an agreement, does the agreement satisfy the duty? Or do the parties have to keep bargaining even after they sign a contract?[292]

The problems don't stop there. Once courts sketch out the duty's contours, they still have to police it.[293] And that requires them to resolve yet another set of issues. For example, can an employer demand proof that the

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CAL. DEP'T OF INDUS. RELATIONS, https://www.dir.ca.gov/dlse/howtofilelinkcodesections.htm (last visited Oct. 20, 2021) (cataloguing more than thirty laws prohibiting retaliation for various protected activities in California alone).

[285] *See* 42 U.S.C. § 2000e–5(g)(1) (allowing court to award appropriate remedies, including backpay and reinstatement). *See also* Peck, *supra* note 16, at 772 (observing that courts have successfully supplemented statutory schemes with traditional remedies); *Molinelli*, 114 N.J. at 97–98, 106–07 (recognizing that court could supplement article 19 with additional remedies and directing the employer to reinstate harmed employees and award backpay).

[286] *See Molinelli*, 114 N.J. at 107 (awarding monetary damages to both deter employers from interfering with bargaining rights and encourage employees to exercise those rights).

[287] *See* Peck, *supra* note 16, at 777 (observing trial judges' lack of experience with administrative issues like defining appropriate bargaining units or deciding whether to allow new elections while a contract is in place).

[288] *Cf.* 29 U.S.C. § 158(d) (requiring bargaining over "wages, hours, and other terms and conditions of employment").

[289] *Cf. id.* (requiring bargaining at "reasonable times").

[290] *Cf. id.* § 159(a) (requiring bargaining with a representative selected by a majority of the bargaining unit).

[291] *Cf.* Comau, Inc. v. NLRB, No. 10-1406, slip op. at 8–9 (D.C. Cir. Jan. 17, 2012) (surveying the law governing bargaining impasse and unilateral implementation, as developed by the NLRB over decades). S*ee also* 29 U.S.C. § 158(d) (setting out notice requirements as precondition to contract termination or modification).

[292] *See* Peck, *supra* note 16, at 777 (criticizing *Johnson* for failing to appreciate the administrative difficulties it was burdening courts with) ("Trial judges sitting in the courts of first instance throughout a state are unlikely to have the interest or background for making such determinations, but they will be called upon to do so in New Jersey.").

[293] *See id.* at 772–73 (observing that when courts take a creative role in elaborating collective-bargaining rights, they enter an arena with no "convenient conceptual limitations," and the result is "confusion and uncertainty").

union represents the employees? If so, what kind of proof is enough?[294] Can the union use signed authorization cards? Or does it have to ask for an election?[295] If it needs an election, who supervises the voting? Who is eligible to vote? Who counts the ballots?[296] What should the court do about misconduct during a campaign? What happens if someone intimidates voters? Is the election voidable, or is it void? And more fundamentally, where is the line between intimidation and good-old-fashioned hard campaigning?[297]

Even if a court can work all these issues out, it still has to circle back to the remedy question. And there, it will find no clear answers. How does one remedy a failure to bargain? Yes, the court could order the employer to back to the table. But that's no better than ordering the employer to follow the law. It creates no real penalties for noncompliance, and so leaves the bargaining duty with no teeth.[298] So the court could instead award damages. But how does it measure damages in this context? What loss does the union suffer from a refusal? The union possibly suffers a delay in getting an agreement; but the costs of delay are hard to measure. The court has to reconstruct a counterfactual scenario with multiple variables; its conclusion is almost inherently speculative.[299] And in any event, no one is entitled to an agreement. The duty to bargain in good faith does not include the duty to accept any particular proposal, or to reach an agreement at all.[300] So there's no basis for awarding damages in the expectation that the union would eventually get an agreement. Taken together, these problems make the remedy hard to pin down. At the

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[294] *See id.* at 768 (noting that the court in *Johnson I* resolved these questions by ordering an election within 60 days—a solution with no clear basis in the constitutional text).

[295] *See id.*

[296] *See Johnson I*, 84 N.J. Super at 567 (reasoning that the "only alternative which can lead to the accuracy desired, is a representation election under the supervision of this court").

[297] *Cf.* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT ch. 9 (7th ed. 2017) (surveying the decades of caselaw courts and the Board have developed to answer these election-related questions under federal law).

[298] *See* Ellen Dannin, *Finding the Workers' Law*, 8 GREEN BAG 2d 19, 27 (2004) ("Many have rightly criticized the NLRA's remedies as weak, especially the remedies for bad faith bargaining. The standard remedy is an order to bargain in good faith.").

[299] *See* Henderson v. Bluefield Hosp. Co., LLC, 208 F. Supp. 3d 763, 771 (S.D.W. Va. 2016) (observing that connection between bargaining delay and union's alleged loss of support among employees was "purely speculative").

[300] *See* 29 U.S.C. § 158(d) (specifying that under federal law, the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession").

federal level, the NLRB has struggled with remedies for decades.[301] State courts are unlikely to find them any easier.

On the bright side, the exact answer is somewhat irrelevant. As with all these questions, the answers are less about abstract principles than they are about arbitrary line-drawing. It's more important that the questions are settled than that they're settled right.[302] But that doesn't mean courts can just make the answers up. Courts aren't supposed to be arbitrary line drawers.[303] They're supposed to apply abstract legal principles in concrete cases.[304] And while they of course develop some rules through their decisions, those rules grow over time, case by case, through the slow accretion of precedent.[305]

That's a hardly the best way to create a bargaining system. In an ideal world, the system's rules would be announced in advance.[306] The parties would review the rules and conform their behavior accordingly.[307] But court decisions don't work like that. They announce rules only after the parties have fallen into dispute. And disputes by definition involve contestable questions. So parties often won't know they've violated a rule until a court tells them they have.[308]

There is, of course, a way to lay down rules ahead of time: legislation. Unlike courts, legislators can address issues comprehensively and in advance. Over a period of months or years, they can study problems, hold hearings, solicit public input, and craft solutions. They can carve out exceptions and assign administrators to oversee new processes. They can allocate resources to make sure the job gets done. And even better, when their solutions don't

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[301] *See* Patricia A. Renovich, *Status of the Make-Whole Remedy in Refusal-to-Bargain Cases*, 2 FLA. ST. U. L. REV. 153, 154 (1974) (noting that the Board and the courts have agreed on the need for remedies in refusal-to-bargain cases, but have disagreed over what the remedy should be).

[302] *Cf.* Burnet v. Coronado Oil Gas Co., 285 U.S. 393, 406 (1932) (observing that in some cases "it is more important that the applicable rule of law be settled than that it be settled right").

[303] *See* Peck, *supra* note 16, at 773 (observing that while courts in some sense make law through their decisions, they are not well suited to this kind of arbitrary line-drawing).

[304] *See id.*

[305] *See id.* ("In the same way, effectuation of a broad and abstract principle, such as a right to organize and bargain collectively or a right to select representatives for the purpose of negotiating terms and conditions of employment, involves an undertaking without clearly marked limits.").

[306] *See* Cass Sunstein, *The Problem with Predictability*, AMERICAN PROSPECT (July 8, 2005), https://prospect.org/article/problem-predictability/ ("In the law, predictability is usually important. People need to know the rules, and they cannot plan their lives unless they know the law in advance.").

[307] *See id.*

[308] *See* Peck, *supra* note 16, at 772–73 (noting the inherent limitations in an approach that explicates bargaining rules through judicial decision).

work, they can try different ones. Unlike courts, they owe no deference to doctrinal consistency.[309]

But when courts constitutionalize an issue, they take it out of legislators' hands.[310] They prevent the kind of advance line-drawing you need to make a bargaining system work.[311] They replace political compromise with judicial artifice—an artifice constructed on the fly, with no foundation in the democratic process.[312]

Courts in New Jersey and Missouri, lacking any legislative guidance, looked to federal law.[313] Federal law was the obvious gap-filler; over the decades, the NLRA had collected an immense body of caselaw.[314] Federal courts and the NLRB had decided most, if not all, of the issues state courts were likely to face.[315] So federal law offered state courts a ready-made repository of solutions.[316] State courts could use federal law to reduce their decisional loads and, at the same time, keep their caselaw consistent with national norms.[317]

But those benefits came with two major drawbacks. First, federal law could not answer the threshold question: whether employers had a duty to

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[309] *See id.* at 778 ("In short, courts unlike legislatures cannot act in the somewhat arbitrary manner of legislatures by limiting the application of principles on the basis of expediency or other pragmatic considerations.").

[310] *See, e.g.*, Jack Wade Nowlin, Roe v. Wade *Inverted: How the Supreme Court Might have Privileged Fetal Rights Over Reproductive Freedoms*, 63 MERCER L. REV. 639, 642 (2012) (examining criticism of *Roe v. Wade*, which some say removed abortion questions from political process and caused a public backlash); ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW 19 (eds. Sutton & Whelan 2020) (arguing that when courts elevate rules to a constitutional level, "all flexibility is gone").

[311] *See* Scalia, *supra* note 310, at 19 (arguing that constitutionalizing questions reduces legislative flexibility).

[312] *See id.*

[313] *See, e.g.*, *Molinelli*, 114 N.J. at 97 (looking to federal law to build out doctrine under state constitution); *Ledbetter*, 387 S.W.3d at 364–65 (looking at federal agency interpretations to determine scope of bargaining rights under state constitution); *Lullo*, 55 N.J. at 422–23 (citing federal agency interpretations).

[314] *See generally* DEVELOPING LABOR LAW, *supra* note 297 (collecting and explaining decades of judicial and agency interpretations of NLRA); ROBERT GORMAN ET AL., LABOR LAW: ANALYSIS AND ADVOCACY (2013) (same).

[315] *See Molinelli*, 114 N.J. at 97 (explaining that New Jersey courts rely on federal experience to explicate rights under the state constitution).

[316] *See id.*

[317] *See id.* (borrowing federal concepts to help define state bargaining law); *Lullo*, 55 N.J. at 422–23 (same).

bargain. In fact, to the extent federal law even suggested an answer, it seemed to be no.[318]

The second downside was a loss of state autonomy. By importing federal precedent, state courts sacrificed the independence of state law.[319] The genius of the American system is that we have fifty-one different sovereigns.[320] Each sovereign is free to experiment in its own sphere and develop its own solutions.[321] That flexibility spurs competition and innovation. When states try different things, they sometimes land on good policies. Those policies then get picked up and spread through the marketplace of ideas.[322] But states can't generate new ideas if they interpret their laws in lockstep with federal law.[323] If they merely parrot federal principles, they make themselves junior partners in what is supposed to be a system of co-sovereigns.[324] They abdicate their duty to develop state law as an independent source of rights and protections.[325]

In fact, federal law itself recognizes the value of state independence in this field. When Congress wrote the NLRA, it carved out large swaths of the American workforce.[326] It excluded agricultural and domestic workers because it thought federal bargaining standards were too onerous for their

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[318] *See* discussion, *supra* pp. 61-62.

[319] *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW loc. 174 (2018) (ebook) (arguing that lock-stepping state law to federal law threatens the independence of state courts).

[320] *See id.* at 77 (arguing that rights are often better developed at the state level, where courts can tailor solutions to local interests and decrease national blowback and resistance). *See also* Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring) (describing the ability of states to pursue "procedural experimentation" as "one of the valued attributes of our federalism").

[321] *See* SUTTON, *supra* note 319, at 77.

[322] *See id.* at 175 (arguing that independence gives states freedom to try bold ideas); Az. State Legislature v. Az. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (quoting Oregon v. Ice, 555 U.S. 160, 171 (2009))).

[323] *See* SUTTON, *supra* note 319, at 175.

[324] *Id.* at 187–88 (arguing that more independent state law would have higher prestige and receive more attention from advocates and courts—a result leading to healthy federalism).

[325] *See id.* at 178 (arguing that state courts should prioritize questions of state law over federal law to build overlapping bulwarks of rights). *See also* Hume, *supra* note 19, at loc. 335 (noting that state courts sometimes precede their federal counterparts in the development of constitutional rights, such as in marriage cases arising out of California and Massachusetts).

[326] *See* 29 U.S.C. § 152(2) (excluding agricultural and domestic workers, among others, from definition of *employee*).

employers, who tended to be small enterprises or even individual people.[327] Likewise, it excluded public employees because it didn't want to interfere with state law, which usually denied employees the right to strike.[328] Those carveouts would have been meaningless if Congress had wanted states to simply copy the federal framework.[329] Yet by importing federal standards, Missouri's and New Jersey's courts did just that. They effectively erased the NLRA's carveouts and nullified Congress's judgment.[330]

Admittedly, none of these downsides would matter if the Missouri and New Jersey constitutions explicitly created a duty to bargain. Had the drafters written a duty into sections 19 or 29, courts would have had no choice but to enforce that language.[331] But the drafters didn't do that. Instead, they left bargaining rights open-ended and undefined. Courts could have read the language modestly and left space for legislative solutions, as New York's courts did.[332] Or they could have read the text broadly, expanding bargaining rights to encompass unwritten duties as well.[333]

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[327] *See* Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 506 (1999) (discussing legislative history of agricultural- and domestic-worker exemptions).

[328] *See Hawkins Cty.*, 402 U.S. at 604 ("The legislative history does reveal, however, that Congress enacted the s 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.").

[329] *Cf.* SUTTON, *supra* note 319, at 174 (arguing that there is no reason to suppose in a vacuum that independent sovereigns meant the same words to apply in the same way).

[330] *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS loc. 2664 (2012) (ebook) (explaining the well-settled canon that courts should not read legal texts in a way that nullifies any words of the text).

[331] *See id.* loc. 1068 ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

[332] *See Herzog*, 269 App. Div. at 30 (reading New York's constitution not to impose a bargaining obligation). *See also Chesterfield*, 387 S.W.3d at 368 (Fischer, J., dissenting) (arguing that imposing a duty to bargain was inconsistent with the constitutional text); Peck, *supra* note 16, at 771–72 (noting that while courts inevitably "make" law when they decide cases, they have a choice about what kind of law they make, and other courts faced with the same question had declined to create a new bargaining obligation (citing *Petri Cleaners*, 53 Cal.2d at 474–75))

[333] *See Ledbetter*, 387 S.W.3d at 364 (concluding that it was necessary to infer an obligation to bargain in good faith because otherwise, employers could frustrate bargaining by engaging in surface bargaining); *Molinelli*, 114 N.J. at 97 (reasoning that it had to infer a bargaining obligation to prevent rights from being emasculated).

Missouri's and New Jersey's courts chose the second path. They thought it was the only way to protect bargaining rights.[334] But as we've already seen, that line of reasoning was too facile. Even if bargaining rights meant only the right to demand bargaining, they would still be meaningful. They would still embody a "no interference" principle, which would include protection from retaliation.[335] We can see such a principle at work in *Herzog* and *Quinn*, where courts respected employees' right to bargain collectively without also imposing a duty to bargain.[336]

But rather than adopt a no-interference principle, New Jersey and Missouri instead chose a "duty to bargain" principle.[337] Courts in those states chose the latter principle, they said, because it was the only way to protect employees' rights.[338] But ironically, that approach led them to weaken employees' rights. It made them overvalue group rights and undervalue individual ones. And it left individual employees with fewer rights than when they started. We now turn to that consequence.

IV. THE CONSEQUENCES OF COURT-MANDATED BARGAINING

Labor disputes often devolve into fights between unions and management. In the popular mind, these two sides are the yin and yang of labor relations. The history of the labor movement can be told as a Manichean tug of war between them.[339] But what gets lost in the telling are the very people whose rights are at stake: individual employees. After all, labor law doesn't exist to protect unions or management; it exists to protect workers.[340] It is the

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[334] *See Ledbetter*, 387 S.W.3d at 364 (concluding that it was necessary to infer an obligation to bargain in good faith because otherwise, employers could frustrate bargaining by engaging in surface bargaining); *Molinelli*, 114 N.J. at 97 (reasoning that it had to infer a bargaining obligation to prevent rights from being emasculated). *See also* discussion, *supra* pp. 53, 57–58.

[335] *See, e.g.*, *Molinelli*, 114 N.J. at 107 (affirming order to reinstate employees fired for demanding bargaining); *Quinn*, 298 S.W.2d at 417 (reasoning that the right to bargain collectively includes the right to demand bargaining without interference).

[336] *See Quinn*, 298 S.W.2d at 417; *Herzog*, 53 N.Y.S.2d at 617.

[337] *See Molinelli*, 114 N.J. at 97; *Ledbetter*, 387 S.W.3d at 366–67.

[338] *See* discussion, *supra* pp. 53, 57–58.

[339] *See, e.g.*, *Labor vs. Management*, USHISTORY.ORG, https://www.ushistory.org/us/37b.asp (last visited October 23, 2021); DEVELOPING LABOR LAW, *supra* note 297, at ch. 1 (describing multiple national policies toward labor relations, including one "regarding it as necessary to a regime of industrial peace based upon a balanced bargaining relationship between employers wielding the combined power of capital wealth and unions wielding the power of organized labor").

[340] *See* 29 U.S.C. § 151 (declaring a national labor policy of protecting the right of "employees" to organize and bargain through representatives of their choosing). *See also* N.J. CONST. art. I § 19

choices of workers, not management or unions, that labor law is supposed to respect.[341]

When imposing a constitutional duty to bargain, courts paid lip service to that principle. They said that bargaining rights belonged to employees; and for those rights to mean anything, the employer must have a duty to bargain in return.[342] To them, a bargaining duty was the only way to respect employees' rights.[343]

But that conclusion led them to another one—one far less solicitous of individual employees. In both Missouri and New Jersey, courts concluded that for a bargaining duty to work, the employees must have only one representative.[344] In other words, courts adopted the principle of exclusive representation. They reasoned that without exclusivity, the employer might have to bargain with multiple representatives in the same workplace.[345] And with multiple representatives, mandatory bargaining would be little better than industrial anarchy.

That conclusion made some intuitive sense. It's easy to see how multiple representation would devolve into chaos. Imagine that two unions represent employees on the same assembly line. Let's even say the employees work on the same crew. One union wants to eliminate overtime. Its members want to work less because they value leisure time or time with their families. But the other union wants to expand overtime. Its members put more value on premium rates and higher take-home pay. These competing demands put the employer in a bind. The demands are mutually exclusive: the employer cannot run the line with half a crew. So if it mandates overtime for some, it has to mandate overtime for all. It therefore has to make a choice. But if it chooses

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(giving "employees" bargaining rights); MO. CONST. art. I § 29 (same); N.Y. CONST. art. I § 17 (same). *But cf. Johnson I*, 84 N.J. Super at 546–47 (rejecting argument that union had no standing to sue because section 19 protected only employee rights; rights under state constitution were inherently collective and could be asserted by collective representative).

[341] *See* 29 U.S.C. §§ 151, 157.

[342] *See Ledbetter*, 387 S.W.3d at 366–67; *Molinelli*, 114 N.J. at 97.

[343] *See Johnson I*, 84 N.J. Super. at 555 (concluding that any interpretation without a duty to bargain would render the employees' right "impotent").

[344] *See id.* at 549 (recognizing exclusivity of representation).

[345] *See Lullo*, 55 N.J. at 424–27 (describing disadvantages of multiple representation in a single workplace).

to accept one union's demand, it still has to bargain with the other.[346] And how can it bargain in good faith with the second union when it has already committed itself to the first? Isn't bargaining with the second union futile? The employer might discuss the second union's demands, but it cannot accept them. So it has no real expectation of an agreement. And doesn't that kind of pro forma bargaining violate the duty?[347]

Exclusive representation solves this problem.[348] It gives one union the right to represent employees in the bargaining unit.[349] The union only has to gain support from more than half of the employees.[350] From there, it represents all the employees, not just the ones who support it.[351] The employer must bargain with this union, but it has no duty to bargain with other representatives; in fact, it cannot do so.[352] Bargaining with other representatives—or the employees themselves—would violate the good-faith requirement.[353]

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[346] *Cf.* 29 U.S.C. § 158(d) (requiring employer to bargain with employees' representative in good faith about wages, hours, and working conditions). *See also Lullo*, 55 N.J. at 428–29 (reasoning that multiple representation would diffuse negotiating strength and foster rivalries between competing unions; purpose of exclusivity was to create a "single compact with terms which reflect the strength, negotiating power and welfare of the group").

[347] *See, e.g.*, H.J. Heinz Co. v. NLRB, 311 U.S. 514, 526 (1941) (adopting Board's good-faith standard, which requires parties to bargain with a genuine intent to reach an agreement); Highland Park Mfg. Co. v. NLRB, 110 F.2d 632, 637 (4th Cir. 1940) (surveying early caselaw and explaining good-faith standard). *See also Ledbetter*, 387 S.W.3d at 364 (adopting a duty to bargain in good faith under state constitution in part to prevent employers from frustrating bargaining rights by engaging in surface bargaining); Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1603 (1984) (explaining that an employer violates its duty to bargain in good faith by, among other things, designating a bargaining representative with no authority to make agreement).

[348] *See Johnson I*, 84 N.J. Super. at 549 (adopting principle of exclusive bargaining under state law); *Lullo*, 55 N.J. at 426–34 (justifying exclusivity principle as necessary to give full effect to bargaining rights and avoid "multiplicity" of workplace representatives). *Cf. also* W. Cent. Mo. Region Lodge No. 50 v. City of Grandview, 460 S.W.3d 425, 446–47 (W.D. Mo. 2015) (stating that constitution leaves some role for public employers to shape election procedure, but implicitly recognizing that the procedure will result in the selection of a single representative).

[349] *See Johnson I*, 84 N.J. Super. at 549.

[350] *See City of Grandview*, 460 S.W.3d at 434–36 (holding that employer had duty to recognize union when record showed that a majority of employees in the bargaining unit supported the union).

[351] *See id.* at 343–36 (implicitly accepting principle of exclusive representation); *Johnson I*, 84 N.J. Super. at 549 (borrowing exclusivity concept from federal law).

[352] *See* DEVELOPING LABOR LAW, *supra* note 297, at 13 VIII.A (explaining that under "conventional doctrine, . . . an employer would be guilty of an unfair labor practice by extending recognition to a minority union" (citing Ladies' Garment Workers (Bernhard-Altmann Tex. Corp.) v. NLRB, 366 U.S. 731 (1961))).

[353] *See id.*

But therein lies a new problem. Sections 19 and 29 give *each* employee the right to bargain through a chosen representative.[354] Exclusive representation respects that right for some employees, but not for others.[355] If a bare majority of employees selects a union, that union bargains for everyone.[356] Any employee who wants a different representative—or no representative at all—is stuck. She has a representative foisted upon her. For her, the right to select a representative is less than meaningless; it is reversed. She cannot even bargain for herself. Her rights are subordinated to the group's preference.[357]

She is also at much greater risk of coercion. Consider the process for gaining majority status. Neither Missouri nor New Jersey has a statute covering bargaining for private-sector employees. So there is no clear procedure for establishing majority status.[358] A union might gain that status by winning an election.[359] But it might also do it by collecting authorization cards.[360] Employees sign these cards in private, but not anonymously: the union knows who signs the cards because it collects them in person.[361] And these in-person interactions come with a lot of pressure and potential confusion.[362] When

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[354] *See* N.J. CONST. art. I § 19; MO. CONST. art. I § 29.

[355] *Cf.* RICHARD EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 30 (2019) [hereinafter EMPLOYEE FREE CHOICE], *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1493&context=law_and_economics (pointing out the irony of a process that ostensibly protects employee choice while denying a voice to dissenting workers).

[356] *See City of Grandview*, 460 S.W.3d at 443 (recognizing principle of majority choice under state constitution); *Johnson I*, 84 N.J. Super at 549 (same). *See also* 29 U.S.C. § 159(a) (designating any union chosen by a majority of employees in the unit as the exclusive bargaining representative).

[357] *Cf.* Civil Serv. Forum v. N.Y.C. Trans. Auth, 4 A.D.2d 117, 127–28 (N.Y. App. Div. 1957) (rejecting constitutional challenge to agreement allegedly limiting employee's right to present her own grievances because nothing in the agreement itself contained that limitation, but suggesting that a challenge could be brought against an agreement that did contain such a limitation).

[358] *See Johnson I*, 84 N.J. Super. at 553, 569 (ordering an election under procedures fashioned by the court itself in the absence of legislative guidance); *Quinn*, 298 S.W.2d at 419 (noting the absence of a legislative bargaining scheme and declining to adopt a judicial one in its place).

[359] *See Johnson I*, 84 N.J. Super. at 553 (ordering election to determine union's majority status).

[360] *See Chesterfield*, 386 S.W.3d at 763 (holding that trial court erred by ordering election when record showed that union had collected signed authorization cards from majority of bargaining unit).

[361] *See* EMPLOYEE FREE CHOICE, *supra* note 355, at 31–32 (describing card-check campaigns and the threat they pose to worker choice).

[362] *See id.* at 30 (observing that card-check campaigns expose "workers to multiple forms of intimidation and direct coercion"), 42 ("There are countless contexts in which the threat of coercion

approached, an employee may feel social pressure to sign a card, even if she has no desire to join. She may be told that others have signed, and she will be the odd one out if she refuses. She may want to feel like a team player. Or she may sign only to get the organizer to leave her alone. Even worse, she may sign under the mistaken impression that eventually, she will get a chance to cast a secret ballot. But in fact, she may have no opportunity to vote, much less to revoke her card if she changes her mind.[363]

What's more, she may be surprised when, months later, she finds the union suddenly ensconced as her representative. The union does not have to set a deadline for presenting cards to the employer.[364] It can collect cards over weeks, months, or even years. It can then ambush the employer with cards from 51% of the workforce. Its support may have risen and fallen over the signature-collecting drive. It may never have enjoyed support from more than half the workforce at any one time. But as long as it has those cards, it's locked in.[365] And the 49% of employees who never signed cards? They never had their voices heard, much less their wishes respected.[366]

By inventing a bargaining duty, courts were forced to adopt exclusive representation. And by adopting exclusive representation, they trampled on individual rights. They took a right given to each employee and subordinated it to popular rule.[367] That rule may work for employees in the majority, who get to impose their preferences on their coworkers. And it may likewise work for employers, who don't have to deal with a cacophony of divergent demands. But it does nothing for employees in the minority. Those employees not only lose their right to choose a representative, but also the right to bargain for themselves. Their constitutional rights have been reversed.

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can be implicit, powerful, and unreported. The fear of revenge from a successful union is not something that many workers can look on with indifference.").

[363] *See id.* at 31–32 (describing pressures workers face in card-check drives) ("These workers could now prefer to capitulate to a union they oppose if the alternative is to be on record against the union when it wins anyhow."), 43 (noting that there is no "effective mechanism that allows employees to revoke or withdraw their authorization cards, once signed").

[364] *See id.* at 11, 42 (noting that the card-check process is largely "unregulated"; the union need not announce its campaign in advance).

[365] *See* EMPLOYEE FREE CHOICE, *supra* note 355, at 43 (observing that union can collect cards in secret over span of time, and under current law, the cards are considered "irrevocable").

[366] *See id.* at 11 (discussing the effect of the proposed Employee Free Choice Act, a law that would have codified card-check campaigns at the federal level) ("For some workers at least, [card-check campaigns] would leave them with no choice at all if they are not approached during the campaign.").

[367] *See Lullo*, 55 N.J. at 418, 421 (rejecting challenge to exclusivity under state public-sector bargaining law because multiple representation would be "undesirable").

V. CONCLUSION: A PATH FORWARD?

Interpreting broad constitutional language often requires a degree of judgment. Answers rarely come with mathematical precision.[368] But while the edges may blur, we can identify guideposts to help us reach better results. We can produce faithful interpretations if we focus on the things we know.[369]

And when it comes to bargaining rights, we do know three things. First, we know that courts have interpreted bargaining language two ways: the no-interference approach and the duty-to-bargain approach. Second, we know that the latter approach was based on a policy judgment about the best way to protect bargaining rights. And third, we know that this interpretation contradicted text, history, and constitutional structure.

What we don't know is whether there's any way to move from the second approach to the first. Having inserted themselves into everyday bargaining, can courts find their way out? Having read rights maximally, can they revert to a more traditional position?

The answer is probably yes, but it will be difficult. Rights are like entitlement programs: once extended, they are hard to roll back.[370] The obstacles to a rollback are likely easier to overcome in Missouri, where courts at least have a history of reading bargaining rights modestly. Their turn toward a maximal interpretation is relatively recent, and so they can frame their return to the traditional position as a reversion to historical norms. But in New Jersey, courts have taken the maximal approach since the very beginning, so they cannot revert to a previous position. Courts, of course, are creatures of precedent: they like nothing less than undisguised innovation. So any reversal of bargaining duties would likely come through the people themselves—either with a new constitution or a political sea change. Neither path seems likely,

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[368] *See* Hume, *supra* note 19, at loc. 445 ("When confronted with vague or general language in an authoritative legal text, judges need to make choices about how to apply the law.").

[369] *See id.* (conceding that many legal texts are ambiguous, but arguing that such ambiguity is precisely why we employ people as judges instead of computers).

[370] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 439–40 (2000) (Rehnquist, J.) (rejecting attempt by Congress to roll back Fifth Amendment-based right to *Miranda* warnings); Adrian Moore, *Survey Shows Path to Entitlement Reform*, REASON.COM (Oct. 12, 2011), https://reason.org/commentary/survey-shows-path-to-entitlement-re/ (observing that rolling back entitlements "is politically very difficult").

but neither do they seem impossible. For either, the first step will be to bring attention to the problem. We have to see the wrinkles in our doctrine before we can start ironing them out.

That has been the modest goal of this article. Its aim has been to shed light on a much-overlooked corner of the law—one that could use a bit of sunshine. While most lawyers think of labor law in strictly federal terms, for millions of workers, the only source of rights is state law. So when state courts get things wrong, their errors matter in the real world for real people. Real people can lose their rights, including their right to choose a bargaining representative. The effect is the same whether the loss stems from an error in federal court or one in state court. The loss matters just as much—for workers, for courts, and for the rational development of the law.

Other Views:

- EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013), *available at* https://press.princeton.edu/books/paperback/9780691155784/looking-for-rights-in-all-the-wrong-places.
- American Federation of Teachers v. Ledbetter, 387 S.W.3d 360 (Mo. 2012), *available at* https://cite.case.law/sw3d/387/360/.
- Comite Organizador v. Molinelli, 114 N.J. 87 (1989), *available at* https://law.justia.com/cases/new-jersey/supreme-court/1989/114-n-j-87-1.html.