Constitutional Aspects of PR 3

Testimony of Peter R. Teachout
Professor of Law, Vermont Law School,
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I. Introduction

My name is Peter Teachout. I am a Professor of Law at Vermont Law School with a field of specialization in state and federal constitutional law. I have published articles on federal and state constitutional issues in law journals and as book chapters. In my role as a constitutional scholar, I am occasionally asked to testify before committees of the Vermont legislature on constitutional issues. I welcome the opportunity to testify this afternoon before the House General and Housing Committee on constitutional aspects of PR 3 which proposes amending the Vermont constitution to add a new article, Article 23, protecting the collective bargaining rights of private and public sector employees.

I need to make clear at the outset two things. First, I am not a labor law scholar. Although I am generally familiar with state and federal law governing labor-management relations, I do not purport to be an expert in that field. My testimony therefore will focus primarily on constitutional aspects of the proposed amendment. Second, the memo below reflects the results of an initial pass through the available material on state constitutional amendments in other states similar in thrust to what is being proposed with PR 3. It may be that there are issues I have missed or that require further research. If that is the case, I appreciate having those issues called to my attention and am willing to take a second look.

I set out below for the committee's consideration a written memo I provided to the Senate Committee on Economic Development, Housing & General Affairs when I testified on PR 3 before that Committee on March 14th, In my oral testimony this afternoon, I am happy to summarize the basic points made in the memo or, as the Committee prefers, simply make myself available for questions.

II. PR 3: Purpose and Effect

PR 3 proposes amending the Vermont constitution by adding a new Article 23 which would provide both private and public sector employees with constitutionally protected collective bargaining rights. The language of the proposed amendment reads as follows:

> "Article 23. [Right to collectively bargain] That employees have a right to organize or join a labor organization for the purpose of collectively bargaining with their employer through an exclusive representative of their choosing for the purpose of negotiating wages, hours, and working conditions and to protect their economic welfare and safety in the workplace, and that a labor organization chosen to represent a group of employees

shall have the right to collect dues from its members. Therefore, no law shall be adopted that interferes with, negates, or diminishes the right of employees to collectively bargain with respect to wages, hours, and other terms and conditions of employment and workplace safety, or that prohibits the application or execution of an agreement between an employer and a labor organization representing the employer's employees that requires membership in the labor organization as a condition of employment."

The proposed amendment has been introduced in the context of developments nationally in which other states have adopted legislation restricting workers' rights to organize. Basically two types of restrictions have been adopted: (1) measures which limit public-sector employees' collective bargaining rights, and (2) so-called "right-to-work"(RTW) laws which prohibit unions and employers in both the private and public sector from negotiating agreements which require employees either to join unions or to pay the equivalent of union dues.[1]

There is also the context of applicable federal law. Although the National Labor Relations Act provides collective bargaining rights for most private sector employees, it does not protect all such employees (for example, agricultural workers, independent contractors, in some cases supervisors), and provides no legal protection for public sector employees. Article 23, if approved, would supply that gap.

Although I think it is unlikely that the Vermont legislature would adopt measures aimed at restricting labor rights in the near term, Article 23 would serve as a prophylactic measure ensuring protection against adoption of restrictive labor legislation by some future legislature. It also would provide constitutional protection of the collective bargaining rights of those employees not currently covered by federal law. Finally, adoption of PR 3 would serve as symbolic recognition of the important role played by labor in the state's history and economic development and reflect the state's commitment to provide workers with basic constitutional protections.

III. Experience in Other States

If Article 23 were to be approved, Vermont would not be alone in providing constitutional protection of collective bargaining rights. As of 2022, three other states - Hawaii, Missouri, and New York—provided some form of constitutional protection of the collective bargaining rights of employees, although none of these state provisions include language preventing the state from adopting right-to-work laws. Nor do the provisions in the constitutions of these states specifically list the kinds of conditions that collective bargaining agreements are allowed to address in contrast to Article 23 which lists "wages, hours, and working conditions and . . . economic welfare and safety in the workplace."

[1] See https://www.epi.org/blog/illinois-workers-rights-amendment-sets-new-bar-for-state-worker-power-policy-other-state-legislatures-should-seize-the-moment-to-advance-worker-racial-and-gender-justice-in-2023/

There is one other important recent development. In November of 2022, Illinois broke new ground by amending the state constitution to add a provision with the sort of broad coverage that would be provided by Article 23.[2] PR 3 is modeled on the Illinois approach and in its current form tracks the language of the Illinois amendment which reads as follows:

> "Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment."[3]

Since adoption of the Illinois amendment in the fall of 2022, moreover, at least two other states – Pennsylvania and California - have introduced and are considering proposed amendments with similar goals. The proposed Pennsylvania amendment tracks word-for-word the Illinois amendment.[4] The proposed California amendment, while similar in general thrust, adopts a slightly different approach:

> "(a) This section shall be known, and may be cited, as the Right to Organize and Negotiate Act.
>
> "(b) All Californians shall have the right to join a union and to negotiate with their employers, through their legally chosen representative, ~~and the right~~ to protect their economic well-being and safety at work. *The Legislature shall provide for the enforcement of these rights.*
>
> "(c) On or after January 1, 2023, no ordinance or statute shall be passed, enacted, or adopted that interferes with, negates, or diminishes the right of employees to organize

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[2] See Jennifer Sherer, "Illinois Workers' Rights Amendment sets new bar for state worker power policy," Working Economics Blog, December 7, 2022 at https://www.epi.org/blog/illinois-workers-rights-amendment-sets-new-bar-for-state-worker-power-policy-other-state-legislatures-should-seize-the-moment-to-advance-worker-racial-and-gender-justice-in-2023/#:~:text=On%20election%20day%2C%20Illinois%20voters%20approved%20a%20constitutional,income%20inequality%20and%20unequal%20power%20in%20our%20economy.

[3] https://ballotpedia.org/Illinois_Amendment_1,_Right_to_Collective_Bargaining_Measure_(2022)#:~:text=Amendment%201%20amended%20the%20Illinois,safety%20at%20work.%22%20It%20prohibits

[4] The language of the proposed Pennsylvania amendment can be found at: https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2023&sInd=0&body=H&type=B&bn=950.

and bargain collectively over their wages, hours, and other terms and conditions of employment and workplace safety."[5]

The two crucial differences in the California approach are (1) the addition of a provision requiring the state legislature to provide for the enforcement of the rights embodied in the amendment; and (2) the omission of a "union security agreement" provision allowing management and labor to agree that employee membership in the union is "a condition of employment."

IV. Significance of Recent Adoption in Illinois and Current Consideration in Other States

The fact that the Illinois amendment was only added at the end of 2022 and that similar amendments are currently in the process of being considered in Pennsylvania and California has two important consequences for consideration of PR 3.

First, it means that there has not been much experience with actual application of the provisions in the Illinois-style amendment, making it difficult to predict what sorts of constitutional challenges might be brought if PR 3 were to be approved. Since adoption of the Illinois amendment is so recent, we don't have the benefit of experience in trying to predict what sorts of problems might arise.

Second, and cutting the other way, it is likely that in the process of legislative consideration of these amendments in other states, objections by opponents – constitutional, policy-based, and economic objections – have been pretty thoroughly vetted, and, so far, whatever objections have been raised apparently have not been sufficient to prevent the amendments from adoption (as in Illinois) or from moving forward (as in Pennsylvania and California). So we at least have the comfort of knowing that if the approach adopted by PR 3 presented serious constitutional problems, those problems would likely have surfaced in the consideration of similar amendments in the other states. And they have not.

V. Relevance of the federal National Labor Relations Act: Supremacy and Preemption Issues

If Article 23, or something like it, were to be added to the state constitution, it would provide constitutional protection to all those employees, both private and public sector employees, not currently covered by the federal National Labor Relations Act [NLRA]. Most private sector employees are covered by the NLRA however, and with respect to those employees, the provisions of Article 23 would not apply in situations where there is a conflict between the federal law and the state constitutional amendment (under the doctrine of "supremacy"). Even without an actual conflict, collective bargaining agreements entered into in accordance with Article 23 could potentially be subject to challenge on grounds that the state constitutional provision has been "preempted" by the federal law.

Article 23 as written, for example, provides that "no law shall be adopted that . . . prohibits the application or execution of an agreement between an employer and a labor organization representing the employer's employees that requires membership in the labor organization as a condition of employment." It provides in essence that as a matter of Vermont constitutional law

[5] https://legiscan.com/CA/text/SCA7/id/2830834#:~:text=SEC.,being%20and%20safety%20at%20work.

collective bargaining agreements can require membership in a union, and presumably payment of union dues, "as a condition of employment." Article 23, in short, would constitutionalize what is known as a "union-security agreement." But if if there is a conflict between the NLRA and the Vermont constitutional provision in this respect, or if both the federal law and the state constitutional provision cover the same ground in different but incompatible ways, the provisions of the NLRA would prevail.

I do not want to suggest that the NLRA prohibits collective bargaining agreements that contain "union security agreements," it does not.[6] But the NLRA does impose limitations on what collective bargaining agreements can and cannot require, and if there is a conflict, the federal law prevails.

Preemption is a complicated area of constitutional law and depends always on specific applications, so I do not want to pursue that further here. It is enough to know that where both the state constitutional provision and the federal law cover essentially the same ground, collective bargaining agreements authorized by the collective bargaining provision in a state constitution may be found to have been preempted by the NLRA or other applicable federal labor law.

That is not a reason, it is important to stress, for opposing PR 3 – preemption happens – but it is something to be aware of. In short, Article 23 would not have free range. It would be bounded in its operation by duly adopted federal law.

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[6] "The NLRA allows employers and unions to enter into union-security agreements requiring all employees in a bargaining unit to become union members and begin paying union dues and fees within 30 days of being hired. Even under a security agreement, employees who object to full union membership may continue as 'core' members and pay only that share of dues used directly for representation, such as collective bargaining and contract administration. Known as objectors, they are no longer full members but are still protected by the union contract. Unions are obligated to tell all covered employees about this option, which was created by a Supreme Court ruling and is known as the Beck right" https://www.nlrb.gov/resources/faq/nlrb. And there are other limitations under the NLRA on what requirements a collective agreement can impose on employees who object to union membership or to union policy that also might present conflicts or raise preemption problems.. For example, under the NLRA, the following are prohibited:

- "Threats to employees that they will lose their jobs unless they support the union.
- "Seeking the suspension, discharge or other punishment of an employee for not being a union member even if the employee has paid or offered to pay a lawful initiation fee and periodic fees thereafter.
- "Refusing to process a grievance because an employee has criticized union officials or because an employee is not a member of the union in states where union security clauses are not permitted.
- "Fining employees who have validly resigned from the union for engaging in protected concerted activities following their resignation or for crossing an unlawful picket line."

See https://www.nlrb.gov/resources/faq/nlrb

VI. The *Janus* case: Public-Sector Employees Cannot be Required to Pay Union Dues or Equivalent Fees

In 2018, the United States Supreme Court handed down a far-reaching decision affecting the rights of public sector employees who do not want to join a union and do not want to pay union dues or equivalent fees. The case was *Janus v. American Federation of State, City, and Municipal Employees,* 138 S.Ct. 2448 (2018). The question addressed by the Court in *Janus* was whether public sector unions can require employees who benefit from union representation in collective bargaining but who do not want to belong to a labor union or who object to union policy to pay union dues. The Court held that public sector unions cannot require non-member employees to pay dues or equivalent fees (sometimes called "agency fees") for services the union provides because compelling the employees to support union activities would violate the employees' free speech and freedom of association rights under the federal constitution. The Court went further imposing the requirement that public sector employees must affirmatively opt in to union membership, rather than being automatically enrolled as members and provided an opportunity to opt out. The *Janus* decision represents a federal constitutional constraint, in short, on what a state constitutional provision can and cannot do.

Article 23 as proposed in PR 3 provides in its second sentence that no law shall be adopted prohibiting "execution of an agreement between an employer and a labor organization representing the employer's employees that requires membership in the labor organization as a condition of employment." Essentially it provides that all employees, including public sector employees, can be required to join a union and pay union dues "as a condition of [continued] employment." But the Court in the *Janus* decision ruled that such a requirement would violate the objecting public sector employee's constitutional rights to freedom of expression and association. It is important to appreciate that the Court's ruling in *Janus* only applies to public-sector employees, since as government employees their rights are protected under the constitution, which is not the case for private-sector employees. But as far as public-sector employees are concerned, the provision in proposed Article 23 providing that employees can be required to join a union and pay union dues as a condition of continued employment would be a dead letter.[7]

Here again, the fact that some provisions in collective bargaining agreements authorized by proposed Article 23 might be struck down by the Court as violating the rights of public sector

[7] "Public-sector union officials predicted that they would lose 10 to 30 percent of their members and tens of millions of dollars in revenue in the states that would be affected. The nation's two largest public sector unions lost the vast majority of agency-fee payers after the ruling. American Federation of State, County and Municipal Employees went from 112,233 nonmember agency-fee payers to 2,215 (a 98% decline) while Service Employees International Union went from 104,501 to 5,812 (94%), as per 2018 filings. However, there was little change in numbers of dues-paying members, and AFSCME retained 94% of members and agency-fee payers. " https://en.wikipedia.org/wiki/Janus_v._AFSCME. See also, Michael Artz, "The Impact of Janus on the Labor Movement, Five Years Later," Human Rights Magazine, October 31,2023.

employees is not grounds for opposing the amendment. But it is something to be aware of since it represents another limitation on expectations of what Article 23 would and would not do.

VII. What are the Objections to Adopting a Constitutional Amendment Along the Lines Proposed by PR 3?

Basically three types of objections have been raised to adoption of state collective bargaining constitutional amendments along the lines proposed by PR 3 in other states where similar measures have been or are being considered: constitutional objections; policy-based objections, and economic objections.

A. The Constitutional Objection

The constitutional objection is that terms like "conditions of employment" in the proposed amendment are too vague and open-ended to be able to know exactly what they cover and what they mean. That objection has not proved a substantial barrier to adoption since constitutional provisions often contain terms and standards of a general nature (think "equal protection" and "due process"), terms and standards that are gradually made clear through a process of judicial decision and refinement in actual application.

B. Policy-Based Objections

The second type of objection is based on policy considerations. The argument is that adoption of constitutional amendments such as that being proposed here will prevent the state legislature from adopting a whole range of measures aimed at protecting the public interest. One study produced during the time the Illinois amendment was under consideration suggested that as many as 350 state and local laws would be potentially subject to constitutional challenge if the amendment were to be adopted.[8]

What would be an example of this policy-based concern if PR 3 were to be adopted? The first half of the second sentence of PR 3 reads as follows:

> "Therefore, no law shall be adopted that interferes with, negates, or diminishes the right of employees to collectively bargain with respect to wages, hours, and other terms and conditions of employment and workplace safety . . ."

How might such a provision prevent the Vermont legislature from adopting laws aimed at serving the public interest?

Suppose that after Article 23 is approved and goes into effect, the Governor proposes that, due to significant increases in state property taxes attributable to expanding local school budgets, collective bargaining negotiations over heath care benefits for teachers be removed from the

[8] See https://www.illinoispolicy.org/reports/above-the-law-amendment-1-would-let-government-unions-void-over-350-illinois-laws/. Note that under the terms of the amendment the prohibitions on adoption of state laws are prospective only. They only apply to laws adopted after the amendment goes into effect. The study referred seems to ignore that distinction.

local to the state level. Suppose the Vermont legislature agreed with this proposal. The idea would be that the state would be in a better position than local school boards to extract concessions from union negotiators and thus in a better position to keep teacher health care benefits in check. If you represented a local teachers' union, the second sentence in Article 23 would provide you with a basis for challenging this decision. Now you could argue that moving collective bargaining negotiations over teachers' health care benefits from the local to the state level would "diminish the right" of the employees you represent to bargain collectively "with respect to wages . . . and other terms and conditions of employment." It would violate the rights of the teachers as provided by the constitutional amendment. Whether or not such a challenge would succeed, opponents argue, adoption of the provisions in Article 23 would be an open invitation to lawyers representing local teachers' unions to bring constitutional challenges along these lines.

This is a simple example, but it illustrates the larger concern raised by those who have objected to adoption of similar amendments in other states.. If the proposed amendment were to be adopted, the argument goes, the ability of the state legislature to adopt sensible legislative policy measures in a whole range of areas would be hamstrung. The laundry list of sensible policy measures that could not be adopted without triggering constitutional challenge, *as reflected in the testimony of opponents in other states* where similar amendments have been considered, reads like a virtual parade of horribles.[9] If language like that embodied in proposed Article 23 were to be adopted, we are told, state legislatures could not forbid school districts from employing known sexual offenders as teachers or coaches without giving rise to a constitutional challenge by some local teachers' union lawyer on grounds that such a policy "diminished" the right of the union he or she represents to enter into a collective bargaining agreement that served the interests of its members. It is difficult to know how much credence to give these concerns and objections, because they turn on speculations about how, if adopted, the collective bargaining constitutional amendment might be employed or abused by lawyers for unions. But we do know that in other states where similar amendments have been or are being considered, they have provided a major, although so far ineffective, ground for objection.

C. Economic Objections

The basic thrust of the economic objection is simple. It is that amendments like that proposed by PR 3 would make it easier and more attractive for employees in the public sector to organize unions and to enter into collective bargaining agreements with government employers, the agreements entered into would provide for more favorable treatment of the employees in terms of salaries and benefits, and the costs involved would end up being born by taxpayers. Whether what is involved is actual increased cost or simply reallocation of costs is an open question, since the increased cost to the taxpayer is presumably made up for, at least in part, by economic benefits to the employee. Another source of increased cost would be that associated with increased litigation resulting from disputes over application of the provisions of the amendment. It is likely that adoption of the amendment may contribute to increased government costs, but

[9] See, for example, https://www.illinoispolicy.org/reports/above-the-law-amendment-1-would-let-government-unions-void-over-350-illinois-laws/

whether the costs outweigh the benefits is another matter. If the resources were available, it might be helpful to ask the relevant office in state government to do a cost-benefit analysis of the consequences of adopting PR 3.

VIII. Tentative Conclusions and Recommendations

Based on my research so far, I would like to share four tentative conclusions and recommendations:

(1) In general thrust, I support adoption of a constitutional amendment along the lines proposed in PR 3 and think it appropriate to add the amendment as a new Article 23. It represents in some respects, it seems to me, an appropriate counterpart to the newly added Article 22 which protects reproductive rights. Both amendments reflect not so much concern that the current state legislature will adopt restrictive legislation but rather serve to provide long-term constitutional protection from restrictive measures that may be adopted by future legislatures. Both serve to signal the constitutional importance the state attaches to protecting the rights of those who in other states have been subject to restrictive limitations.

(2) Since actual experience with amendments similar to that proposed by PR 3 has been so limited, it is difficult to predict with any accuracy the sorts of constitutional challenges to which the amendment might give rise. But if there were major constitutional objections to adoption of the amendment, they surely would have been raised by opponents in the course of adoption and consideration of similar amendments in other states. And so far that has not been the case.

(3) The policy-based and economic-based objections to adoption of an amendment along the lines of PR 3 have been vigorously asserted in the consideration of similar amendments in other states. It seems to me that in some instances the concerns expressed may be valid ones, but whether those concerns are sufficient to outweigh the benefits flowing from adoption is a matter for the state legislature and the people of the state. That so far has not proved the case in other states.

(4) Finally, I understand the language of PR 3 has been amended since it was first introduced to bring it in line with the language of the Illinois amendment that was adopted in 2022 and the Pennsylvania amendment currently under consideration. I support the language of PR 3 as it currently reads. If PR 3 is adopted by the current session of the legislature and then brought back for second approval as required by the Vermont constitution, it is possible that by the time of second consideration we will have experience in Illinois and Pennsylvania with similar amendments to draw upon.

Thank you for your consideration.