

## Missouri Law Review

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Volume 78  
Issue 4 Fall 2013

Article 11

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Fall 2013

### Bargaining with Bite: Missouri High Court's Constitutional Holdings Alter Public Sector Labor Law

Peter W. Bay

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#### Recommended Citation

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Available at: <https://scholarship.law.missouri.edu/mlr/vol78/iss4/11>

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## NOTE

# Bargaining with Bite: Missouri High Court's Constitutional Holdings Alter Public Sector Labor Law

*Eastern Missouri Coalition of Police v. City of Chesterfield*,  
386 S.W.3d 755 (Mo. 2012);  
*American Federation of Teachers v. Ledbetter*, 387 S.W.3d 360 (Mo. 2012)

PETER W. BAY\*

### I. INTRODUCTION

Collective bargaining – negotiations over working conditions between an employer and representatives of their employees<sup>1</sup> – appeared as early as 1891 as labor unions arose in response to the Industrial Revolution.<sup>2</sup> Collective bargaining in private industry was recognized in 1935 by the National Labor Relations Act<sup>3</sup> but was considered prohibited in the public sector.<sup>4</sup> In 1945, the state of Missouri ratified its constitution, which included article 1,

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\* B.S., Texas Christian University 2008; J.D. Candidate, University of Missouri School of Law 2014; Associate Editor in Chief, *Missouri Law Review*, 2013-14. Thanks to Professor Josh Hawley, Dean Rafael Gely, and members of the *Missouri Law Review* for critical feedback.

1. BLACK'S LAW DICTIONARY 299 (9th ed. 2009).

2. *A Timeline of Events in Modern American Labor Relations*, FEDERAL MEDIATION & CONCILIATION SERV., <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=21&itemID=15810> (last visited Sept. 26, 2013).

3. See discussion *infra* Part III.

4. In 1937, President Franklin Roosevelt commented on the issue of public sector collective bargaining in a letter to the president of the National Federation of Federal Employees:

All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

Letter from Franklin D. Roosevelt to Luther C. Steward (Aug. 16, 1937), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15445#axzz1UdkHgsqd>.

section 29, a provision protecting employee collective bargaining rights.<sup>5</sup> That provision, however, was quickly interpreted by courts as applying only to private employees,<sup>6</sup> and thus, public employees had little power to negotiate employment terms. In the 1960s the Missouri legislature passed a number of public sector labor laws that established a very limited collective bargaining framework applicable to most government employees.<sup>7</sup> This area of Missouri law remained relatively untouched until 2007 when, in *Independence-National Education Ass'n v. Independence School District*, the Supreme Court of Missouri reinterpreted article 1, section 29 as applying to *all* Missouri employees.<sup>8</sup> The holding was a decisive victory for teachers and law enforcement (who are statutorily excluded from the public sector labor laws)<sup>9</sup> but left many questions as to what the holding would mean. Then in 2012, the Court again interpreted article 1, section 29 in a pair of cases handed down on the same day: *Eastern Missouri Coalition of Police v. City of Chesterfield*<sup>10</sup> and *American Federation of Teachers v. Ledbetter*.<sup>11</sup> The decisions considered the scope of article 1, section 29, specifically whether the constitutional right of public employees to collectively bargain imposed a corresponding affirmative duty on public employers to collectively bargain with their employees.<sup>12</sup> The Court held that such a duty is inherent in article 1, section 29 – public employers must bargain with employee unions<sup>13</sup> and must do so in good faith with an eye toward reaching an agreement.<sup>14</sup> This Note examines the evolution of collective bargaining rights in Missouri and discusses the import of these 2012 holdings.

## II. FACTS AND HOLDING

### A. *Eastern Missouri Coalition of Police*

In the first case, plaintiff Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 (FOP) sued separately the Missouri cities of Chesterfield and University City (the cities).<sup>15</sup> In 2007 and 2008, the majority of the cities' police officers agreed to certify FOP as their exclusive

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5. MO. CONST. art. 1, § 29.

6. See discussion *infra* Part III.B.

7. See discussion *infra* Part III.A.

8. 223 S.W.3d 131, 139 (Mo. 2007).

9. See State *ex rel.* Missey v. City of Cabool, 441 S.W.2d 35, 43 (Mo. 1969).

10. 386 S.W.3d 755 (Mo. 2012).

11. 387 S.W.3d 360 (Mo. 2012).

12. *E. Mo. Coal. of Police*, 386 S.W.3d at 760-61; *Am. Fed'n of Teachers*, 387 S.W.3d at 363.

13. *E. Mo. Coal. of Police*, 386 S.W.3d at 762.

14. *Am. Fed'n of Teachers*, 387 S.W.3d at 367.

15. *E. Mo. Coal. of Police*, 386 S.W.3d at 758.

representative for collective bargaining with the cities.<sup>16</sup> FOP asked the cities to recognize their representative status and to establish the procedures necessary for collective bargaining because none existed statutorily.<sup>17</sup> The cities denied the request.<sup>18</sup>

FOP then brought separate suits in the Circuit Court of St. Louis County against each city seeking a declaratory judgment that article 1, section 29 of the Missouri Constitution imposed an affirmative duty on the cities to implement a framework that would allow collective bargaining to take place.<sup>19</sup> The cities answered that no such duty existed and that the court lacked authority to order a public employer to adopt collective bargaining procedures.<sup>20</sup> FOP won both cases, and the trial courts ordered the cities to set up a collective bargaining framework covering the scope of the appropriate bargaining unit,<sup>21</sup> election procedures to certify FOP as employee representative, and procedures for the “meet and confer” process.<sup>22</sup> The cities separately appealed to the Missouri Court of Appeals, which issued opinions before ultimately transferring the cases to the Supreme Court of Missouri.<sup>23</sup>

The cities’ position on appeal was that: (1) a public employer has no affirmative duty to institute a collective bargaining framework for statutorily exempted public employees and likewise no duty to recognize and engage in actual collective bargaining with unions, and (2) the Missouri Constitution’s separation of powers doctrine prohibits a court from ordering a city to legislate such a framework.<sup>24</sup>

Judge Patricia Breckenridge for the majority (with Judge Zel Fischer dissenting), reversed the trial court orders that the cities establish a specific bargaining framework<sup>25</sup> but held that article 1, section 29 did impose an affirmative duty on employers to bargain collectively with a goal of reaching an agreement.<sup>26</sup>

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* “Appropriate unit” under Missouri law is a “unit of employees . . . of a public body . . . [with] a clear and identifiable community of interest . . . .” MO. REV. STAT. § 105.500 (2000). Determining the scope of the appropriate unit means establishing the proper employee group to be represented in collective bargaining.

22. *E. Mo. Coal. of Police*, 386 S.W.3d at 758.

23. *E. Mo. Coal. of Police v. City of Chesterfield*, No. ED 95366, 2011 WL 1712262, at \*5 (Mo. App. E.D. May 3, 2011).

24. *E. Mo. Coal. of Police*, 386 S.W.3d at 758-59.

25. *Id.* at 758. Rather than deciding whether a court ordering a city to establish collective bargaining procedures violates the separation of powers doctrine, the Court instead reversed that part of the trial court orders on the grounds that it was overbroad and unnecessary to satisfy constitutional requirements. *Id.* at 764.

26. *Id.* at 757-58.

### B. American Federation of Teachers

The second case, *American Federation of Teachers v. Ledbetter*, involved a teacher's union.<sup>27</sup> The American Federation of Teachers (AFT) sued the board of education of the Construction Career Center Charter School District (the board).<sup>28</sup> In 2008 and 2009, AFT met with the board several times. In January 2009, they reached a tentative and informal collective bargaining agreement on all issues except salaries.<sup>29</sup> In January and February 2009, the board held several closed-door meetings before deciding to reject the tentative agreement and submit a revised proposal to the AFT.<sup>30</sup> At a March 2009 meeting, the board unilaterally adopted teacher salaries for the 2009-2010 academic year.<sup>31</sup> The next day, the board met with the AFT but did not mention its salary decision.<sup>32</sup> Then in April 2009, the board again met with the AFT and proposed salaries for the 2009-2010 academic year, giving the union six days to respond.<sup>33</sup> Four days later, the AFT made a counterproposal on the issue of salaries, which the board rejected.<sup>34</sup> Thereafter, the AFT petitioned the Circuit Court of the City of St. Louis for a declaratory judgment that the board had failed its duty to bargain collectively under article 1, section 29, which it claimed included an implied duty to bargain in good faith.<sup>35</sup>

The trial court found in favor of the board, holding that Missouri's constitution does not impose an affirmative duty on a public employer to collectively bargain or to do so in good faith.<sup>36</sup> The court, however, stated that *if* such a duty of good faith bargaining did exist, the board failed to satisfy it as that term is defined under federal labor law.<sup>37</sup>

The AFT appealed to the Missouri Court of Appeals, which transferred the case to the Supreme Court of Missouri.<sup>38</sup> On appeal, the AFT argued that because the constitution gives employees a right to collectively bargain, employers have a corresponding duty to collectively bargain in good faith.<sup>39</sup> The board conceded that it does have the duty to "meet and confer"

27. 387 S.W.3d 360, 361 (Mo. 2012).

28. *Id.*

29. *Id.* at 362.

30. *Id.* The board posted agendas for these closed-door meetings just twenty-four hours in advance. *Id.*

31. *Id.* In this meeting the board did not record votes or minutes. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Am. Fed'n of Teachers v. Ledbetter*, No. ED 95131, 2011 WL 1855665, at \*3 (Mo. App. E.D. May 7, 2011).

39. *Am. Fed'n of Teachers*, 387 S.W.3d at 363.

with the union<sup>40</sup> but argued that this duty did not carry with it a duty of good faith bargaining.<sup>41</sup>

Judge Breckenridge for the majority (with Judge Fischer dissenting), reversed the trial court, finding (1) that the right of public employees to collectively bargain imposes an affirmative duty for public employers to “meet and confer” with them, (2) that this duty inherently includes a good faith obligation on the part of the employer, and (3) that the trial court erred in finding that the board failed its good faith obligation because it defined that term under federal, rather than Missouri law.<sup>42</sup>

### III. LEGAL BACKGROUND

The right to assemble for the purpose of joining labor unions is protected both by the First Amendment to the U.S. Constitution<sup>43</sup> as well as article 1, section 8 of the Missouri Constitution.<sup>44</sup> Federal policy and legislation favoring collective bargaining began after World War I and continued through the 1920s and 1930s,<sup>45</sup> but the first true broad strokes came with the procedures laid out in the National Labor Relations Act of 1935 (NLRA).<sup>46</sup> Congress found that employer denial of employee rights to organize and collectively bargain caused strikes and “industrial strife or unrest.”<sup>47</sup> On signing the act, President Franklin Roosevelt stated that the act’s purpose was a “better relationship between labor and management,” premised on an “equitable basis” and “orderly procedure[s].”<sup>48</sup> For nearly all private employees, the NLRA thus specifically guaranteed and protected the right of collective bargaining through representatives chosen by the employees and attempted to establish procedures that would facilitate bargaining.<sup>49</sup> The NLRA as enacted in 1935 did not define the term “collective bargaining,” and the major spokesmen for the bill seemed to have very different views of what the process would look like.<sup>50</sup> The 1947 Taft-Hartley amendments to the NLRA gave more guid-

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40. *Id.* Note that this concession by the board runs contrary to the trial court’s holding that no such duty existed. *Id.*

41. *Id.*

42. *Id.* at 367-68.

43. *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968).

44. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969).

45. *Am. Fed’n of Teachers*, 387 S.W.3d at 364-66.

46. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006 & Supp. V 2012).

47. § 151.

48. Franklin D. Roosevelt, Statement on Signing the National Labor Relations Act, (July 5, 1935), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=14893>.

49. §§ 151, 157.

50. Robert P. Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 252-53 (1964).

ance,<sup>51</sup> and it was here that the good faith bargaining standard generally became part of the bargaining process.<sup>52</sup> The NLRA addresses, among other things, the details for collective bargaining, the election of representatives, union dues, unfair labor practices, and the establishment of the National Labor Relations Board (NLRB) to handle and prevent disputes.<sup>53</sup> However, the NLRA does not cover public employees.<sup>54</sup>

The push for collective bargaining rights federally was soon mirrored at the state level. Section A of this Part discusses Missouri's constitutional and statutory efforts to protect employee bargaining rights, while Section B examines initial judicial interpretations of those efforts.

### A. Sources of Collective Bargaining Rights in Missouri

Missouri included in its 1945 state constitution article 1, section 29, which provides “[t]hat employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”<sup>55</sup> During the debates of the 1943-1944 Constitutional Convention of Missouri, R.T. Wood (the sponsor of article 1, section 29) stated that although the right of employees to bargain collectively already existed (by virtue of federal labor law), inclusion of a collective bargaining provision in the Missouri Constitution was necessary to “preclude the possibility . . . [of] many bills being introduced seeking to destroy collective bargaining” and to provide a “measure of protection” for organized labor in Missouri.<sup>56</sup> Although written for (and long constrained to) the private sector, article 1, section 29 applies today to all employees.<sup>57</sup> This places Missouri alongside Florida and Hawaii as the only states with constitutional provisions protecting public sector collective bargaining rights.<sup>58</sup>

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51. The House passed a very detailed definition of collective bargaining which sought to bring a standard of objectivity. *Id.* at 254-55. The Senate, however, rolled this back significantly, resulting in the language which was ultimately passed by Congress over the veto of President Truman. *Id.* at 255.

52. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 366 (Mo. 2012).

53. *See generally* §§ 151-169.

54. § 152.

55. MO. CONST. art. 1, § 29.

56. Debates of the 1943-1944 Constitutional Convention of Missouri (Apr. 27, 1944), in UNIV. OF MO. DIGITAL LIBRARY, <http://digital.library.umsystem.edu/cgi/t/text/pagevieweridx?sid=03a4e06c6fe107bc296a3a286a262fe5&idno=mcd194508&c=mcd&cc=mcd&seq=288&view=image>.

57. *See discussion infra* Part III.B.

58. *See* Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 735 n.2 (2009). By way of comparison, many other states have comprehensive bargaining statutes in lieu of a constitutional provision. *Id.* at 735 n.3. Public sector collective

In 1965, the Missouri Legislature enacted public sector labor laws that codified official rights and procedures by which most public employees could join labor unions, nominate exclusive bargaining representatives, and conduct something akin to collective bargaining.<sup>59</sup> In addition to allowing nominated union representatives to make employment proposals to “any public body,” the statutes also protect employees from discharge or other acts of discrimination or coercion by their employers on the basis of exercising union rights.<sup>60</sup> Section 105.520, RSMo, the “Meet and Confer” provision, describes the framework under which collective bargaining may take place but does not nearly approximate the extensive coverage of the NLRA.<sup>61</sup> Employers are required to “meet, confer and discuss” any proposals made by bargaining representatives, record the results of the discussions, and present them to the appropriate legislative or governing body to accept, modify, or reject.<sup>62</sup> The provisions further note that all Missouri public employees are denied the right to strike.<sup>63</sup> The no-strike provision is a significant example of the distinction the law makes between public and private employees. The Supreme Court of Missouri has offered various rationales for the no-strike law, including: (1) the essentiality of many public employees to public safety, health, and order, and (2) the lack of “economic forces of the marketplace” which constrain private sector negotiations.<sup>64</sup>

Of particular relevance here is that these provisions explicitly exclude all “police, deputy sheriffs, Missouri state highway patrolmen, Missouri National Guard, [and] all teachers of all Missouri schools, colleges and universities” from coverage.<sup>65</sup> The weighty societal importance of law enforcement and public educators is at least one meaningful explanation for this exclusion. However, regardless of the purpose, police officers and teachers cannot look to Missouri statutes to find collective bargaining rights or procedures. For years, teachers and law enforcement have been forced to rely on their employers bargaining voluntarily on the basis of Federal and State associational rights. Recently, numerous bills have been proposed in the Missouri General Assembly that seek to amend the public sector labor laws to remove the statutory exclusion, but none have been passed.<sup>66</sup>

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bargaining is illegal in two states (Virginia and North Carolina) and not formally recognized in six others. *Id.* at 735 n.4.

59. MO. REV. STAT. §§ 105.500-530 (1965); *Independence-Nat’l Educ. Ass’n v. Independence Sch. Dist.*, 223 S.W.3d 131, 136 (Mo. 2007).

60. MO. REV. STAT. § 105.510 (2000).

61. *Developments in the Law – Public Employment: Collective Bargaining in the Public Sector*, 97 HARV. L. REV. 1676, 1680 (1984).

62. § 105.520.

63. § 105.530.

64. *Independence*, 223 S.W.3d at 133.

65. § 105.510.

66. *See* discussion *infra* Part V.



Shortly after their passage, the public sector labor laws were challenged and upheld in *State ex rel. Missey v. City of Cabool*.<sup>67</sup> The Supreme Court explained that the statutes give employees the right to join unions and present proposals to employers free from discrimination.<sup>68</sup> Employers are not required to agree to anything but only must meet, confer and discuss.<sup>69</sup>

[The statutes] do not purport to give to public employees the right of collective bargaining guaranteed by [article 1, section 29] to employees in private industry and in the sense that term is usually known with its attendant connotation of unfair labor practice for refusal by the employer to execute and adopt the agreement produced by bargaining, and the use of strike as a bargaining device constitutionally protected to private employees . . . . The act provides only a procedure for communication between the organization selected by public employees and their employer without requiring adoption of any agreement reached.<sup>70</sup>

The Court also upheld the exclusion of law enforcement and teachers as a not-arbitrary classification.<sup>71</sup>

#### *B. Employees Covered by Article 1, Section 29: Clouse Through Independence*

Article 1, section 29 is succinct and does not include any limiting language. It stands in contrast to the NLRA, which is limited to most private employees and specifically excludes government workers. Not surprisingly, it was precisely the issue of which employees were covered by article 1, section 29 that was litigated just two years after the adoption of the Missouri Constitution in 1947.<sup>72</sup> In *City of Springfield v. Clouse*, the Supreme Court of Missouri determined that article 1, section 29 did not apply to public employees.<sup>73</sup> *Clouse* was an action by a municipal corporation against certain officers and union representatives.<sup>74</sup> The city sought a declaratory judgment as to the legal power of the city to enter into collective bargaining agreements with

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67. 441 S.W.2d 35, 45 (Mo. 1969).

68. *Id.* at 40-41.

69. *Id.* at 41.

70. *Id.* (citation omitted).

71. *Id.* at 43.

72. See *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947), *overruled by* *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. 2007).

73. *Id.* at 542.

74. *Id.* at 541.

unions on the issues of wages, hours, and working conditions.<sup>75</sup> The issue was whether article 1, section 29 applied to a municipality.<sup>76</sup> According to the Court, nothing prevented public employees from organizing into labor unions; however, collective bargaining was “an entirely different matter.”<sup>77</sup> The Court cited statements of President Franklin Roosevelt and article 1, section 29 sponsor R.T. Wood discussing the impossibility of transferring the process of collective bargaining into the public sector.<sup>78</sup> They then noted that article 1, section 29’s substantial similarity to the collective bargaining provision of the NLRA evidenced a purpose to safeguard collective bargaining rights as they were understood in the private sector.<sup>79</sup> However, the Court’s primary thrust rested on separation of powers and the non-delegation doctrine.<sup>80</sup> Wages, hours, and working conditions of public employees are set by municipal ordinance.<sup>81</sup> If the non-delegation doctrine prevents the legislature from delegating its law-making power to executive officials, then “surely [such power] cannot be bargained or contracted away.”<sup>82</sup> In other words, collective bargaining between a labor union and a public employer would amount to an unconstitutional negotiation for legislation, and thus, article 1, section 29 could not be read to apply to public employees. *Clouse* remained good law for sixty years.

This all changed in 2007 with the significant *Independence-National Educational Ass’n v. Independence School District*.<sup>83</sup> *Independence* overturned or abrogated three longstanding cases – a combined 134 years of precedent.<sup>84</sup> The decision is most notable for its overruling of *Clouse* and new reading of article 1, section 29. The Independence School District was sued by labor unions representing three of the district’s groups of public employees: transportation, custodial, and teachers.<sup>85</sup> To comply with public sector labor laws that covered the transportation and custodial workers, the district had a practice in place of meeting and conferring separately with the unions and reducing the results to writing.<sup>86</sup> Although teachers are excluded from public sector labor laws, the district had always held discussion with the

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75. *Id.*

76. *Id.*

77. *Id.* at 542.

78. *Id.* at 542-43.

79. *Id.* at 543.

80. *Id.* at 544-46.

81. *Id.* at 545.

82. *Id.*

83. 223 S.W.3d 131 (Mo. 2007).

84. The Court overruled *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. 1982), *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947), and abrogated *Glidewell v. Hughey*, 314 S.W.2d 749 (Mo. 1958). *Independence*, 223 S.W.3d at 137, 140, 140 n.7. *Sumpter* and *Glidewell* will not be discussed in this Note.

85. *Independence*, 223 S.W.3d at 134.

86. *Id.*

teacher's union as well.<sup>87</sup> In 2002, the district had agreements in place with each union but rescinded each agreement and imposed its own new policy without notice.<sup>88</sup> This unilateral rescission and imposition of new employment terms constituted a refusal to collectively bargain with the unions, but the district claimed such actions were lawful.<sup>89</sup>

The Supreme Court of Missouri held that the district violated its employees' right to collectively bargain.<sup>90</sup> It began by undercutting *Clouse*.<sup>91</sup> *Clouse*'s holding that article 1, section 29 applied only to private employees was based on the non-delegation doctrine, which had, sixty years later, become an "anachronism" – it was now largely hollowed out federally and all but abandoned in Missouri.<sup>92</sup> The Court also noted that, despite *Clouse*, most public employees had already gained the right to collectively bargain when the 1965 public sector labor laws were passed.<sup>93</sup> This was significant because if *Clouse*'s broad proscription of collective bargaining in the public sector was to be followed, then the public sector labor laws, which had been held constitutional in 1969,<sup>94</sup> were actually invalid.<sup>95</sup>

The Court then looked to the plain meaning of article 1, section 29.<sup>96</sup> Although the 1943-1944 debates of the Missouri Constitution seemed to evidence that the drafters intended article 1, section 29 to apply only to private employees, the people of Missouri ultimately voted on the words of the constitution, not anything stated in deliberations.<sup>97</sup> According to the Court, "[e]mployees plainly means employees," and article 1, section 29 as passed contains no words limiting that provision to private employees.<sup>98</sup> The Court would not read words into the constitution that were not there.<sup>99</sup> *Clouse* was thus overruled, and the Court for the first time read article 1, section 29 as giving collective bargaining rights to *all* employees, public and private.<sup>100</sup>

Finally, the Court briefly discussed how to define collective bargaining itself.<sup>101</sup> *State ex rel. Missey*<sup>102</sup> had upheld the public sector labor laws but

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 141.

91. *Id.* at 135.

92. *Id.*

93. *Id.* at 136.

94. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 43 (Mo. 1969).

95. *Independence*, 223 S.W.3d at 138.

96. *Id.* at 137.

97. *Id.*

98. *Id.* (internal quotation marks omitted).

99. *Id.*

100. *Id.*

101. *Id.* at 138-39.

102. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969).

failed to define what was meant by collective bargaining.<sup>103</sup> The *Independence* Court was aware of this lack of definition (it consulted dictionary definitions in a footnote)<sup>104</sup> but described the actions *Missey* found permissible under the statutes, essentially the “meet, confer and discuss” requirement.<sup>105</sup> The *Independence* Court added that “[t]he point of bargaining, of course, is to reach agreement.”<sup>106</sup>

The Court next had to square this new interpretation with the public sector labor laws.<sup>107</sup> Rather than invalidate these statutes to the extent they excluded teachers (because teachers, like all employees, had constitutional collective bargaining rights), the Court read the public sector labor laws as providing collective bargaining rights for the occupations included in the statutes, but not as precluding the omitted occupations (teachers) from exercising their article 1, section 29 right.<sup>108</sup> Instead, the Court recognized that because there was no statutory framework in place for teachers, the legislative body (in this case, the district) would play a role in setting the bargaining framework.<sup>109</sup> In reaching this conclusion, the Court found it significant that this particular school district had a history of voluntarily recognizing its teachers’ collective bargaining rights.<sup>110</sup> This seemingly innocuous passage turned out to be quite important in the reasoning of both the majority and dissenting opinions when the issue was ultimately litigated again in 2012.<sup>111</sup> Judge Price, dissenting in *Independence* and foreshadowing the instant decisions, seemed keenly aware that the book was not closed on public sector bargaining:

It seems less harm would result from leaving this longstanding procedure in place than from giving public employees a new constitutional right to “collective bargaining” that the majority does not define, describes in terms similar to “meet and confer,” and the application of which no one can predict.<sup>112</sup>

### *C. Early Scope of Article 1, Section 29: Quinn v. Buchanan*

Another early case helped define the scope of the collective bargaining right protected in article 1, section 29. Coming twelve years after the *Mis-*

103. *Independence*, 223 S.W.3d at 138 (discussing *Missey*, 441 S.W.2d at 41). See discussion *supra* Part III.A.

104. *Independence*, 223 S.W.3d at 138 n.6.

105. *Id.* at 138 (citations omitted); see discussion *supra* Part III.A.

106. *Independence*, 223 S.W.3d at 138.

107. *Id.* at 136.

108. *Id.*

109. *Id.*

110. *Id.*

111. See discussion *infra* Parts IV.A-C, V.

112. *Independence*, 223 S.W.3d at 148 (Price, J., dissenting).

souri Constitution in 1957, *Quinn v. Buchanan* held that article 1, section 29 was only a guarantee that employee rights to organize and collectively bargain would be protected from government interference.<sup>113</sup> Buchanan, the defendant, operated a meat packaging business in Columbia, Missouri and employed several driver-salesmen.<sup>114</sup> The employees organized and selected a local union to represent them in collective bargaining with Buchanan for wages, hours, and other employment terms.<sup>115</sup> Buchanan's sales manager told the employees that they would be discharged for unionizing as there was "no union allowed in [Buchanan's] place of business."<sup>116</sup> Buchanan attempted to coerce the employees to rescind their affiliation with the union for purposes of bargaining, and ultimately they were discharged.<sup>117</sup> The employees claimed Buchanan's actions violated their article 1, section 29 rights and sought reinstatement with back pay, punitive damages, and preventive relief enjoining Buchanan from (1) coercing employees to refrain from joining unions and (2) refusing to collectively bargain with selected union representatives.<sup>118</sup>

The Court stated that bill of rights provisions like article 1, section 29 were "primarily limitations on government, declaring rights that exist without any governmental grant."<sup>119</sup> Relying on constitutional treatises of the time, the Court found that typical bill of rights provisions merely declare rights that exist and are thus "self-executing," meaning that government action in contravention of such rights is void.<sup>120</sup> Self-executing provisions, said the Court, "do not . . . usually provide methods or remedies for their enforcement."<sup>121</sup> Rather, it is up to the legislature to pass laws to enforce declared rights and in the absence of specific legislation, individuals may avail themselves of any common law or code remedy to prevent or redress violations.<sup>122</sup> The Court found that Buchanan's union-busting acts constituted a violation of his employees' article 1, section 29 rights and granted preventive relief.<sup>123</sup>

The Court went on to say that article 1, section 29 is "not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations."<sup>124</sup> The provision was intended to protect employees from government interference with their declared rights to organize and bar-

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113. 298 S.W.2d 413, 417 (Mo. 1957), *overruled by* E. Mo. Coal. of Police v. City of Chesterfield, 386 S.W.3d 755 (Mo. 2012).

114. *Id.* at 416.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 416-17.

119. *Id.* at 417.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 419.

124. *Id.* at 418.

gain collectively,<sup>125</sup> however it does not create a correlating duty on the part of employers: “[t]he constitutional provision was shaped as a shield; the union seeks to use it as a sword.”<sup>126</sup> In other words, the legislature was entitled to impose a corresponding affirmative duty requiring employers like Buchanan to collectively bargain with employees, but article 1, section 29 itself did not contain such a duty – it protected but did not *require* collective bargaining.<sup>127</sup> Therefore, the plaintiffs were not entitled to preventive relief requiring Buchanan to collectively bargain and his refusal to do so was lawful.<sup>128</sup> *Quinn* remained good law and authoritative on the scope of article 1, section 29 for the next fifty-five years.<sup>129</sup>

#### IV. INSTANT DECISIONS

##### A. Fraternal Order of Police

The threshold issue of the case was whether the policemen’s union, FOP, had associational standing to sue the cities to enforce its members’ right to collectively bargain guaranteed by article 1, section 29 of the Missouri Constitution.<sup>130</sup> The Court found that it did.<sup>131</sup>

Next was the all-important issue of the duty to bargain collectively.<sup>132</sup> The Court began with the constitutional right of all employees to organize and collectively bargain<sup>133</sup> and then noted the Missouri public labor statutes that codify that right for public employees.<sup>134</sup> These statutes require the employer to “meet, confer and discuss” with employee representatives to come up with a written proposal, which the employer can accept, modify, or reject.<sup>135</sup> The Court recognized that although policemen and teachers are excluded from these statutes (and therefore have no statutory procedures for

125. *Id.* at 419.

126. *Id.* (quoting *Quill v. Eisenhower*, 113 N.Y.S.2d 887, 889 (N.Y. Sup. Ct. 1952)).

127. *Id.* at 420.

128. *Id.* at 419.

129. *Quinn* was overruled by *Eastern Missouri Coalition of Police v. City of Chesterfield*, 386 S.W.3d 755 (Mo. 2012). See discussion *infra* Part IV.A.

130. *E. Mo. Coal. of Police*, 386 S.W.3d at 759.

131. *Id.* The Court found that FOP satisfied Missouri’s three requirements for associational standing: (1) the association’s members “have standing to sue in their own right;” (2) the interests sought to be protected are “germane” to the association’s purpose; and (3) the claim asserted and relief requested do not require individual participation by the members. *Id.*

132. *Id.* at 760.

133. MO. CONST. art. 1, § 29; see discussion *supra* Part III.A.

134. MO. REV. STAT. §§ 105.510-520 (2000); see discussion *supra* Part III.A.

135. See discussion *supra* Part III.A.

collective bargaining),<sup>136</sup> the very notion of collective bargaining still inherently included negotiations between an employer and the employee's representative.<sup>137</sup> The majority acknowledged that such a conclusion was based on language in *Independence*, which identified "the role of public employers in collective bargaining."<sup>138</sup> Thus, notwithstanding the statutory exclusion, even employers of policemen have a duty to bargain collectively, adopting procedures as necessary.<sup>139</sup> If this duty was not imposed on employers, said the Court, the employees' article 1, section 29 right would be "render[ed] meaningless."<sup>140</sup>

The Court then addressed *Quinn v. Buchanan*,<sup>141</sup> on which the cities had relied heavily and which remained the biggest obstacle to finding that article 1, section 29 forced public employers to collectively bargain with their employees.<sup>142</sup> *Quinn* was long-standing precedent and held that article 1, section 29 did not require employers to collectively bargain with unions but that it only protected employee rights to organize and bargain from government interference.<sup>143</sup> In other words, using *Quinn*, the cities argued that while the Missouri Constitution gave the policemen the right to collectively bargain (a right which the cities could not interfere with), that right did not force the cities to actually bargain.<sup>144</sup>

The Court overruled *Quinn*, charging it with two erroneous inferences.<sup>145</sup> First was that the constitution's bill of rights does not grant new rights but rather declares the rights which the people of Missouri already possess.<sup>146</sup> The second was that the provisions of a bill of rights may only be self-executing limitations on government.<sup>147</sup> These inferences led the *Quinn* Court to hold that any provision in a bill of rights (and thus, article 1, section 29) can only be used as a "shield against governmental action and not as a sword allowing individuals to require its enforcement."<sup>148</sup> However, the Court found that *Quinn* had treated those inferences as absolute requirements, a reading which, in its view, did not comport with modern constitutional law.<sup>149</sup> Specifically, the Court found that the people of Missouri can put any-

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136. See discussion *supra* Part III.A.

137. *E. Mo. Coal. of Police*, 386 S.W.3d at 760 (quoting *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 138 (Mo. 2007)).

138. *Id.*

139. *Id.*

140. *Id.*

141. 298 S.W.2d 413 (Mo. 1957); see discussion *supra* Part III.C.

142. *E. Mo. Coal. of Police*, 386 S.W.3d at 760-61.

143. *Id.* at 761; see discussion *supra* Part III.C.

144. *E. Mo. Coal. of Police*, 386 S.W.3d at 760.

145. *Id.* at 761-62.

146. *Id.* at 761.

147. *Id.*

148. *Id.*

149. *Id.*

thing they wish in their constitution<sup>150</sup> (including provisions that grant affirmative rights)<sup>151</sup> and have, in fact, added subsequent non-self-executing provisions.<sup>152</sup> Because the Court found that *Quinn* had incorrectly read the limits of article 1, section 29, it overruled the decision.<sup>153</sup>

Finally, the Court addressed the cities' argument that the trial court's order that they establish a specific framework for bargaining<sup>154</sup> violated the separation of powers doctrine.<sup>155</sup> The cities claimed that to follow the trial court's order would require the passing of ordinances; thus, it would amount to the judiciary ordering the legislature to legislate.<sup>156</sup> The Court did not answer whether the trial court's order violated separation of powers; instead, it merely found the order to be overbroad and unnecessary.<sup>157</sup> It determined that it is proper for a court to order legislative bodies to meet constitutional requirements while leaving the specifics to those bodies.<sup>158</sup> Essentially, because Missouri public labor statutes themselves are not procedurally detailed,<sup>159</sup> the Court found that the trial court should only have mandated that the cities meet and confer, leaving them to work out the details including the adoption of any necessary procedures.<sup>160</sup>

In sum, the majority found that policemen's exclusion from Missouri public labor law did not excuse the policemen's employers from their legally enforceable duty to bargain collectively with the policemen's union.<sup>161</sup>

### B. American Federation of Teachers

Beginning with the scope of the article 1, section 29 right (newly expanded by *Independence*) and the public sector labor laws from which teachers are excluded,<sup>162</sup> the Court made explicit what had only been implicit in *Independence*: that despite the statutory exclusion, public employers had a constitutional duty to collectively bargain with their employees, a duty which

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150. *Id.* at 762 (citing *St. Louis Fire Fighters Ass'n Local No. 73 v. Stemmler*, 479 S.W.2d 456, 458 (Mo. 1972)). They are limited only by the federal constitution. *Id.*

151. *Id.* Here the Court referenced other jurisdictions that had interpreted provisions of their bills of rights, which imposed affirmative duties. *Id.*

152. *Id.* The Court cited article 1, section 32 as an example of a provision that did contemplate legislation (i.e., was non-self-executing). *Id.*

153. *Id.*

154. *See supra* Part II.A.

155. *E. Mo. Coal. of Police*, 386 S.W.3d at 762-63.

156. *Id.* at 763.

157. *Id.*

158. *Id.*

159. *Id.* at 763 n.6.

160. *Id.* at 763-64.

161. *Id.* at 764.

162. *See discussion supra* Part III.B.



required “negotiations between an employer and the representatives of organized employees to determine the conditions of employment.”<sup>163</sup>

Having found that article 1, section 29 imposed an affirmative duty on employers, the Court went on to discuss whether that duty contains a good faith standard.<sup>164</sup> Because Missouri does not have a statutorily-based good faith bargaining standard, the question for the Court was whether that standard could be located in article 1, section 29 itself.<sup>165</sup> Stating that the purpose of bargaining is to reach an agreement, the Court concluded that without a good faith standard the article 1, section 29 right would be redundant<sup>166</sup> or nullified because employers could “act with the intent to thwart collective bargaining so as never to reach an agreement – frustrating the very purpose of bargaining and invalidating the right.”<sup>167</sup>

The Court then established that “collective bargaining” was a technical term that had always been understood to include a duty to negotiate in good faith.<sup>168</sup> This interpretation was supported by marshaling an extensive history of collective bargaining in America.<sup>169</sup> The post-World War I War Labor Board (organized to handle labor disputes) did not recognize the duty of employers to bargain with employees, but recommended that they do so “in an earnest endeavor to reach an agreement.”<sup>170</sup> Similarly, various policies associated with the Transportation Act of 1920 did not order good faith bargaining but emphasized that collective bargaining between carriers and railroad employees required “more than a mere perfunctory per-

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163. *Am. Fed’n of Teachers v. Ledbetter*, 387 S.W.3d 360, 363 (Mo. 2012). *Independence* had not gone as far as expressly holding that the article 1, section 29 right imposed a duty on employers to collectively bargain; rather, in its discussion of the public sector labor statutes, it noted that in the absence of a statutory framework for bargaining (as in the case of teachers and policemen), the employer had a “role” to play in the process. *Independence-Nat’l Ass’n v. Independence Sch. Dist.*, 223 S.W.3d 131, 136 (Mo. 2007); see discussion *supra* Part III.B. Justice Fischer, dissenting in *Eastern Missouri Coalition of Police*, did not see the above language of *Independence* as clearly imposing such a duty. 386 S.W.3d at 768 (Fischer, J., dissenting); see discussion *infra* Part IV.C.

164. *Am. Fed’n of Teachers*, 387 S.W.3d at 363.

165. *Id.*

166. *Id.* at 364. The right would be redundant, said the Court, because in situations where the public employer was a government entity, article 1, section 29 would guarantee employees no more than the right to petition the government for redress of grievances, a right already assured by the First Amendment of the federal constitution. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 365 (emphasis omitted) (quoting *Amalgamated Meat Cutters & Butcher Workmen of Am. V. W. Cold Storage Co.*, Nat’l War Labor Bd. Docket No. 80 (1919)).

formance of the statute” and an “honest effort by the parties.”<sup>171</sup> Then in the 1930s, the National Labor Board<sup>172</sup> found that collective bargaining required more than just meeting and conferring and that “[w]hile the law does not compel the parties to reach agreement, it [contemplates] that both parties will approach the negotiations with an open mind and will make a reasonable effort to reach a common ground of agreement.”<sup>173</sup> In 1935, the NLRA was enacted and while it – like its statutory predecessors – did not include a good faith standard, the NLRB (responsible for administering the NLRA) found that a good faith standard was implicit in collective bargaining: “If the obligation of the Act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation.”<sup>174</sup> The Taft-Hartley Amendments to the NLRA finally made explicit the good faith standard.<sup>175</sup> Therefore, according to the Court, by the time of the 1945 Missouri Constitution, the term collective bargaining would have been understood to mean good faith bargaining.<sup>176</sup> Additionally, courts since 1945 have continued to find good faith negotiations implicit in collective bargaining, including strong words from the New Jersey Superior Court in 1985: “To say that the right to bargain collectively does not confer upon the employer a corresponding duty to likewise bargain is preposterous. Surely, employees do not organize in order to conduct a sewing circle.”<sup>177</sup>

Based on this history, the Court found that article 1, section 29’s imposition of the affirmative duty on public employers to bargain with their employers similarly included a good faith standard.<sup>178</sup> Although the parties stipulated that the actions of the school board did not constitute good faith bargaining under federal law, the Court did not make such a determination, instead remanding for an adjudication on the issue under Missouri law.<sup>179</sup> The Court did not articulate what, if any, standard existed in Missouri Law for good faith bargaining, but did state that federal law would provide guidance to the extent it was not inconsistent with Missouri law.<sup>180</sup>

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171. *Id.* (citations omitted) (quoting Int’l Ass’n of Machinists, 2 R.L.B. 87, 89 (1921)) (internal quotation marks omitted).

172. This was an early agency responsible for administering the National Industrial Labor Act of 1933. *Id.*

173. *Id.* (emphasis omitted) (quoting Connecticut Coke Co., 2 N.L.B. 88, 89 (1934)).

174. *Id.* at 366 (quoting Atlas Mills, 3 N.L.R.B. 10, 21 (1937)) (internal quotation marks and alterations omitted).

175. *Id.*; see discussion *supra* Part III.

176. *Am. Fed’n of Teachers*, 387 S.W.3d at 366.

177. *Id.* at 366-67 (quoting *Comite Organizador De Trabajadores Agricolas v. Levin*, 515 A.2d 252, 255 (N.J. Super. Ct. Ch. Div. 1985)) (internal alterations omitted).

178. *Id.* at 367.

179. *Id.* at 367-68.

180. *Id.* at 367 n.5.

### C. *The Dissent in Both Cases*

Because of the interrelatedness of both principal cases and the similarity of the issues covered by both dissents, this Section will synthesize the dissent's views on the Court's decisions in *Eastern Missouri Coalition of Police* and *American Federation of Teachers*. Judge Fischer found that the principal cases' combined interpretation of article 1, section 29 amounted to the Court doing exactly what it said it would not in *Independence* – reading into the Missouri Constitution “words that are not there.”<sup>181</sup>

Central to his argument is that *Quinn v. Buchanan* should not have been overruled.<sup>182</sup> He claimed the majority had misunderstood *Quinn*'s holding and logic.<sup>183</sup> When *Quinn* stated that the Missouri Constitution's bill of rights (1) did not create “new rights” and (2) that its provisions were self-executing, it actually *did not* treat those inferences as absolutes.<sup>184</sup> *Quinn* merely stated that *normally* bill of rights provisions are self-executing and that, in the absence of legislative remedies for the violations of such rights, individuals may protect their rights “by any appropriate common law or code remedy.”<sup>185</sup> Thus, article 1, section 29's location in a bill of rights casts light on its purpose – to recognize the right to collective bargaining that may be protected by the judiciary when violated.<sup>186</sup> According to the dissent, this is perfectly illustrated by the *Quinn* Court's enjoining of Buchanan's union-busting activities, which violated article 1, section 29.<sup>187</sup> He then argued that *Quinn* had not held that bill of rights provisions could *never* impose affirmative duties, just that article 1, section 29 clearly did not do so.<sup>188</sup> He based this conclusion on the plain meaning of the provision and was not persuaded by the majority's citation of foreign jurisdictions which found affirmative duties in constitutional provisions that were “entirely unrelated” to article 1, section 29.<sup>189</sup>

The dissent argued that both *Quinn* and the drafters of the Missouri Constitution thought the purpose of article 1, section 29 was to protect the right of public bargaining and not to establish procedures to facilitate that process.<sup>190</sup> This is an independently significant purpose that is not, as the majority claimed, rendered meaningless without an affirmative duty on the

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181. *E. Mo. Coal. of Police v. City of Chesterfield*, 386 S.W.3d 755, 770 (Mo. 2012) (Fischer, J., dissenting).

182. *Id.* at 766.

183. *Id.*

184. *Id.* at 766-67.

185. *Id.* at 767 (quoting *Quinn v. Buchanan*, 298 S.W. 2d 413, 417 (Mo. 1957)).

186. *Id.*

187. *Id.* at 766.

188. *Id.* at 767.

189. *Id.*

190. *Id.* at 768.

part of employers.<sup>191</sup> Fischer noted that prior to legislative or constitutional authorization, organization for the purpose of collective bargaining had been illegal and, further, that in the earlier part of the twentieth century, union-busting activities (like that in *Quinn*) were far more common than they are today.<sup>192</sup> Thus, the right established by article 1, section 29 would not have been viewed as meaningless without affirmative duties at the time of its adoption.<sup>193</sup> It protected (and continues to protect) employees from coercion by their employers.<sup>194</sup> The fact that such coercion may be less commonplace today does not hollow out article 1, section 29 or “justify this Court ascribing a meaning to the provision it does not have.”<sup>195</sup>

The dissent would hold that “when a public employer refuses to negotiate with its employees or fails to set up a framework to facilitate bargaining, no violation of article I, section 29, occurs.”<sup>196</sup> He contends that the majority’s holding expands article 1, section 29 into a “labor relations act” by requiring employers to collectively bargain, adopting procedural frameworks “when necessary.”<sup>197</sup> As noted above, this holding flowed from the Court’s language in *Independence* which recognized the “role of the general assembly . . . – in the absence of a statute covering teachers – to set the framework for these public employees to bargain collectively through representatives of their own choosing.”<sup>198</sup> The dissent maintains that this language was dicta and was misread by the majority.<sup>199</sup> He argued that in *Independence*, the district had a “role” to play in setting a bargaining framework only because that district had already chosen to bargain with the teachers.<sup>200</sup> But in any event, this language did not mean that: (1) public employers in all circumstances will have a role to play, and (2) having a role in the process does not amount to a legally enforceable duty to negotiate or set bargaining frameworks.<sup>201</sup> According to the dissent, this is precisely what the majority opinion was requiring regardless of its “when necessary” qualifying language or the fact that it would not go so far as to allow a court to specify the framework to be adopted.<sup>202</sup> “[T]he mere fact that the legislature has created a framework

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191. *Am. Fed’n of Teachers v. Ledbetter*, 387 S.W.3d 360, 374 (Mo. 2012) (Fischer, J., dissenting).

192. *Id.*

193. *Id.*

194. *See id.*

195. *Id.*

196. *E. Mo. Coal. of Police v. City of Chesterfield*, 386 S.W.3d 755, 768 (Mo. 2012) (Fischer, J., dissenting).

197. *Id.* at 765.

198. *Independence-Nat’l Educ. Ass’n v. Independence Sch. Dist.*, 223 S.W.3d 131, 136 (Mo. 2007); *see discussion supra* Part III.B.

199. *E. Mo. Coal. Of Police*, 386 S.W.3d at 769 (Fischer, J., dissenting).

200. *Id.* at 768.

201. *Id.*

202. *Id.* at 769.

for certain employees of the state does not obligate it, under article 1, section 29, to create a framework for other employees.”<sup>203</sup>

The dissent also noted that article 1, section 29 does not include the words “meet and confer,” “duty to negotiate,” “good faith,” or “any other phrase imposing an affirmative duty on employers.”<sup>204</sup> He also stated that when the *Independence* Court discussed meeting and conferring as a part of bargaining, it was attempting to define collective bargaining using Missouri’s public sector labor law – the only place such language could be found.<sup>205</sup> Instead, *Independence*’s only article 1, section 29 holding was that the provision applied to all employees.<sup>206</sup> It stopped short of holding that the provision required employers to bargain (defined as “meet, confer and discuss”) with their employees.<sup>207</sup> He also argued that the majority’s citation of the duty to bargain in good faith’s history in federal law did not support imputation of a good faith standard into article 1, section 29.<sup>208</sup> Those federal laws and agency interpretations were put in place to “facilitate the process” of collective bargaining which was not the purpose of article 1, section 29.<sup>209</sup> Locating an affirmative duty with a good faith standard in the state constitution, then, was not based on the text, but rather was “entirely a new creation” by the majority.<sup>210</sup>

The dissent also found the majority’s holdings to seriously implicate separation of powers issues:

The courts should perform their judicial function and determine whether the right has been violated rather than the legislative function of imposing obligations not found in the text of article I, section 29, this Court’s prior opinions interpreting article I, section 29, or the constitutional history of article I, section 29.<sup>211</sup>

## V. COMMENT

Together with *Independence* in 2007, *American Federation of Teachers* and *Fraternal Order of Police* highlight an interesting and developing area of Missouri labor law. With its dual 2012 decisions, the Supreme Court of Missouri held that an employee’s constitutional right to collective bargaining

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203. *Id.*

204. *Am. Fed’n of Teachers v. Ledbetter*, 387 S.W.3d 360, 370 (Mo. 2012) (Fischer, J., dissenting).

205. *Id.* at 374.

206. *Id.* at 373.

207. *Id.* at 374.

208. *Id.*

209. *Id.* at 370.

210. *Id.*

211. *E. Mo. Coal of Police v. City of Chesterfield*, 386 S.W.3d 755, 771 (Mo. 2012) (Fischer, J., dissenting).

necessarily confers an affirmative duty on public employers to collectively bargain in good faith with the goal of reaching an agreement.<sup>212</sup> This means that article 1, section 29 of the Missouri Constitution not only protects a public employee's right to bargain through a union, but also requires employers actually to recognize, meet, confer, and bargain with those unions.<sup>213</sup> Employers must do so in good faith and sincerely attempt to reach agreement, but they may reject any and all proposals.<sup>214</sup> These rights and duties are legally enforceable.<sup>215</sup>

But is the constitutional holding of an affirmative duty to negotiate in good faith truly a significant step forward or just recognition of the status quo? That depends on how one reads the key passage of *Independence*, discussed above, regarding the "role" public employers play in collective bargaining.<sup>216</sup> The language in question came at a point where the Court was discussing the relationship between the constitutional right to collective bargaining and the public sector labor law.<sup>217</sup> The *Independence* Court found that article 1, section 29 applied to all employees, public or private.<sup>218</sup> At that point it could either: (1) find the statutory exclusion of teachers (and police) unconstitutional, or (2) find that employers of excluded public employees would take part in the collective bargaining process apart from, but in a similar manner to, the statutory framework.<sup>219</sup> As noted above, that Court chose the second option.<sup>220</sup> The majority in *Fraternal Order of Police and American Federation of Teachers* seemed to read that piece of the *Independence* decision as a predicate for requiring all public employers of statutorily excluded employees to collectively bargain with their employees.<sup>221</sup> It saw that the right *Independence* established inherently included an affirmative duty.<sup>222</sup>

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212. *Am. Fed'n of Teachers*, 387 S.W.3d at 367.

213. *Id.*

214. *Id.*

215. *Id.*

216. See discussion *supra* Part III.B.

217. *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 136 (Mo. 2007).

218. *Id.* at 141.

219. *Id.* at 136.

220. *Id.*

221. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 363 (Mo. 2012); *E. Mo. Coal. of Police v. City of Chesterfield*, 386 S.W.3d 755, 760 (Mo. 2012).

222. It should be noted that after the decision was handed down, at least some who followed the case thought *Independence* definitively established that public employers *must* bargain with employee unions. Paul Hampel, *Government Workers Win Right to Bargain*, ST. LOUIS POST-DISPATCH, May 30, 2007, at A1, available at 2007 WLNR 10100159. In a May 30, 2007 article in the St. Louis Post-Dispatch, a spokeswoman for the Missouri National Education Association was quoted: "It's a pretty exciting day for us . . . . For 60 years, we fought to win back that right. From here on out, this means that districts no longer only have to voluntarily negotiate with us. This gives teachers an absolute right to sit at the bargaining table." *Id.*

Read that way, the instant decisions seem quite routine. All the majority has done is make concrete the affirmative duty that *Independence* flirted with but failed to make explicitly clear. Moreover, after its strong inventory of the history of good faith bargaining at the federal level, it certainly seems not only natural but also prudent to mandate a good faith duty for Missouri employers. After all, collective bargaining without someone to genuinely bargain with is counterintuitive.

However, the dissent read the same passage of *Independence* more narrowly and stated that it was only dicta.<sup>223</sup> It found that *Independence*'s only constitutional holding was that article 1, section 29 applied to all Missouri employees<sup>224</sup> and that the Court's statement that the Independence School District was to play a role in the bargaining process was specific to the facts of that case, namely that the Independence School District had already agreed to collectively bargain.<sup>225</sup> The context of the *Independence* language in question was the Court's discussion of the constitutionality of the public sector labor laws, not an interpretation of article 1, section 29.<sup>226</sup> Read this way, the Court's work in the instant decisions is a much more significant step and, as the dissent put it, a "surprising new interpretation of article 1, section 29."<sup>227</sup>

There is at least some reason to believe the dissent has a strong basis for this view. The *Independence* Court held that just because the public sector labor statutes excluded certain occupations from their bargaining framework, they did not *preclude* those occupations from exercising their article 1, section 29 right in some other way, such as a situation where an employer has agreed to bargain (as was the case in *Independence*).<sup>228</sup> The Court did not interpret article 1, section 29 in any other way and did not discuss affirmative duties at all. *Independence* was silent (or arguably unclear) about whether public employers moving forward were affirmatively required to recognize and bargain with unions. Furthermore, at the time of the decision, *Quinn v.*

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On July 1, 2007, Michael Delaney, of the Kansas City law firm Spencer Fane Britt & Browne, issued a memo detailing the holdings and impact on labor law of *Independence*. "Missouri public employers must bargain collectively with the representatives of their employees . . . . So long as a public employer satisfies its obligation to entertain proposals from the employees' representative, the employer remains empowered to implement its own terms and conditions over the objection of the employees' representative." Michael F. Delaney, *Missouri Supreme Court Recognizes Public Employees' Collective Bargaining Rights*, JDSUPRA LAW NEWS, Jul. 1, 2007, available at <http://www.jdsupra.com/legalnews/missouri-supreme-court-recognizes-public-87188/>.

223. *E. Mo. Coal. of Police*, 386 S.W.3d at 769 (Fischer, J., dissenting); see discussion *supra* Part IV.C.

224. *Id.* at 770.

225. *Id.* at 768.

226. *Id.* at 769.

227. *Id.*

228. *Id.* at 760.

*Buchanan* was still good law and directly opposed to the proposition that public employers, by virtue of article 1, section 29, were required to collectively bargain. The fact that neither the Court nor the parties in *Independence* cited *Quinn* lends some support to the contention that the decision did not actually address or consider employer obligations as part of article 1, section 29 at all.

In sum, the dissent mounts persuasive arguments supporting its view that the majority's holdings are not supported by text or stare decisis. Neither the text nor the debates of the Missouri Constitution, the many years of precedent relying on *Quinn*, nor the *Independence* decision support the new interpretation of article 1, section 29. However, the majority has wisdom on its side, and the outcomes it reaches are good ones. Despite the notion that some public employers may genuinely wish to deal directly with their employees without union obligations,<sup>229</sup> imposing a good faith duty to bargain reflects the realities of the modern workplace and will likely promote stability.

The Court's holdings in *Fraternal Order of Police* and *American Federation of Teachers* will have a significant impact in the broader area of public sector labor law. It has only been five years since *Independence*. That decision left many questions open, some of which have now been addressed in the instant decisions. However, while this burgeoning area of Missouri law is now somewhat clearer, questions still remain.

In his *Independence* dissent, Judge Price stated that the expansion of the article 1, section 29 right would yield an application that "no one can predict."<sup>230</sup> This right has now been clearly defined by the majority in *Fraternal Order of Police* and *American Federation of Teachers*, but the question of its application is no more predictable than it was in 2007. Judge Breckenridge for the *American Federation of Teachers* majority was keenly aware of this, recognizing the "inherent tension between the duty to bargain with a serious attempt to resolve differences and the employer's freedom to reject any proposal."<sup>231</sup> The Court seemed to indicate that this "inherent tension" resulted from the fact that employers must bargain in good faith with the intent to reach an agreement but are not actually required to reach agree-

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229. In a 2008 *St. Louis Post-Dispatch* interview discussing the impact of *Independence*, St. Louis labor attorney Michael Lowenbaum was asked whether unions have a place in modern society.

They do, but employers have really gotten smarter about the benefit for the employer to work directly with their employees . . . . I'm talking about an enlightened employer who really works with people and puts that into action . . . . In some ways, yes, companies would like to work without the unions. But they've found there's a lot of benefit to it.

Repps Hudson, *This Law Firm Has to Take a Side*, ST. LOUIS POST-DISPATCH, Jan. 25, 2008, at B5, available at 2008 WLNR 1495478.

230. *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 148 (Mo. 2007) (Price, J., concurring in part and dissenting in part).

231. 387 S.W.3d 360, 367 (Mo. 2012).



ment.<sup>232</sup> However, this tension is certainly nothing new and is precisely the situation that private employees have been presented with under federal labor law for years.<sup>233</sup>

Good faith bargaining is inherently difficult because ultimately it is a subjective state of mind manifesting itself in a genuine desire to reach agreement. Judge Breckenridge noted that good faith “is a concrete quality, descriptive of the motivating purpose of one’s act or conduct when challenged or called in question.”<sup>234</sup> In 1914, the Supreme Court of Missouri said that parties act in good faith when they act “without simulation or pretense, innocently and in an attitude of trust and confidence . . . honestly, openly, sincerely, without deceit, covin, or any form of fraud.”<sup>235</sup> Because it cannot be practically defined, it can only be exemplified by conduct that *violates* it. State and federal law are full of cases that offer examples of violations of good faith bargaining.<sup>236</sup>

232. *Id.*

233. 29 U.S.C. § 158(d) (2006) states:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

234. *Am. Fed’n of Teachers*, 387 S.W.3d at 367 (quoting *Mun. Bond & Mortg. Corp. v. Bishop’s Harbor Drainage Dist.*, 17 So.2d 226, 227 (Fla. 1994)).

235. *State ex rel. West v. Diemer*, 164 S.W. 517, 521 (Mo. 1914) (Lamm, J., concurring).

236. An examination of the extensive body of federal and state case law on the issues of unfair labor practices and good faith in the collective bargaining context is beyond the scope of this Note. However, the NLRB offers a helpful primer on its website:

In determining whether a party is bargaining in good faith, the Board will look at the totality of the circumstances. The duty to bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. This implies both an open mind and a sincere desire to reach an agreement as well as a sincere effort to reach a common ground. The additional requirement to bargain in “good faith” was incorporated to ensure that a party did not come to the bargaining table and simply go through the motions. There are objective criteria that the NLRB will review to determine if the parties are honoring their obligation to bargain in good faith, such as whether the party is willing to meet at reasonable times and intervals and whether the party is represented by someone who has the authority to make decisions at the table. Conduct away from the bargaining table may also be relevant. For instance if an Employer were to make a unilateral change in the terms and conditions of employees employment without bargaining, that would be an indication of bad faith.

Indeed, in *American Federation of Teachers*, the union argued for the well-settled federal standard of good faith in collective bargaining.<sup>237</sup> It claimed that because article 1, section 29 mirrors section 7 of the NLRA and was enacted after it, the Missouri Constitution drafters intended to incorporate relevant federal law.<sup>238</sup> Further, the trial court had conditionally held that the actions of the board in *American Federation of Teachers* constituted a failure to bargain in good faith under federal law.<sup>239</sup> Interestingly, the Supreme Court of Missouri remanded the case for a determination of the definition of good faith under Missouri law.<sup>240</sup> It said that federal law would be a guide as to the meaning of good faith but was not binding on Missouri courts.<sup>241</sup>

The Court may simply have viewed full incorporation of the federal good faith bargaining standard as an unnecessarily broad stroke. Yet it could also be evidence that the Court intended the Missouri standard of good faith to differ from the federal standard in some meaningful way. Regardless, the issue is an open one, and, given the sparseness of Missouri case law on good faith in the collective bargaining context, it is not clear how the good faith standard in Missouri will evolve and the extent to which it will reflect federal law.

Thus, the questions moving forward are many, not least of which is what good faith bargaining means in Missouri. How will the standard be defined and enforced in the public sector? The Missouri General Assembly can act to define it statutorily, or it can be resolved judicially on a case-by-case basis. However, if case-by-case, the question then is what body of law Missouri courts are to look to for help. However, judges are not the only ones in need of guidance. How must public employers now conduct themselves at the bargaining table to satisfy their good faith duty? And from a labor standpoint, will public employee unions see these decisions as a license to sue for a good faith violation each time an agreement is not struck?

The Missouri standard will continue to evolve as litigation on the issue is instigated. It is unlikely that unions will have a cause of action each time an agreement is not reached. Under federal law, failure to reach an agreement is not *per se* evidence of an unfair labor practice constituting failure to bargain in good faith.<sup>242</sup> In the hypothetical case of a public body going through the motions of collective bargaining without intending ever to reach agreement, a violation of good faith could not be established unless the union could point to specific evidence occurring at (or away) from the bargaining

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*Employer/Union Rights and Obligations*, NLRB, <http://www.nlr.gov/rights-protect/employerunion-rights-obligations> (last visited Aug. 28, 2013).

237. 387 S.W.3d at 367 n.5.

238. *Id.*

239. *Id.* at 367-68.

240. *Id.* at 368.

241. *Id.* at 367-68.

242. 29 U.S.C. § 158(d) (2006).

table, such as the employer making extreme demands, refusal to engage in honest “give and take,” or refusal to release information substantiating its proposals.<sup>243</sup> It cannot simply claim that failure to reach agreement means the employer was not bargaining in good faith, and the instant decisions should do nothing to change that.

On the other hand, unlike the NLRA and private industry, Missouri public employees cannot strike.<sup>244</sup> So perhaps a softer standard of good faith should emerge in this area because public unions are unable to threaten strike as a bargaining chip. It remains to be seen just how active a role an employer must play in negotiations to satisfy the good faith duty. In an article following the decisions, George Suggs, attorney for AFT, said, “If you’re going to say people can collectively bargain, you can’t say they get to go to the table and throw out the proposals, and the employer can say ‘Thank you very much, we’ll get back to you,’ then walk out of the room and do whatever they want.”<sup>245</sup> Indeed, the article 1, section 29 duty is legally enforceable, and in the absence of strike, unions unhappy with employer behavior at the bargaining table have no recourse but to attempt to legally enforce it. Public unions have a new cause of action, and it may be reasonable to expect that Missouri courts will now be faced with a number of such good faith lawsuits. Whether courts will allow the good faith standard to parallel federal law remains to be seen. Perhaps they will instead rely more heavily on the case law of other states that have similar or more expansive public sector labor provisions.

Additionally, action by the Missouri General Assembly may now be imminent. As noted above, numerous bills have been proposed since 2007 to amend Missouri’s public sector labor laws. The bills have variously sought to remove the exclusion of teachers and law enforcement from the public sector law, add a good faith standard, and even change the provisions into a more full-blown true collective bargaining regime complete with procedures for recognizing representatives, bargaining units, and resolving impasses.<sup>246</sup> None of those bills have been passed. As the law now stands, the impacts of the instant decisions are probably already being felt. Law enforcement and teachers are guaranteed good faith bargaining with their employers, but no statutory framework exists that applies to them. So in the

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243. In 1956, the Supreme Court of the United States upheld the findings of the NLRB that an employer’s refusal to release financial records that would substantiate its claim that it could not agree to a wage increase constituted an unfair labor practice. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).

244. MO. REV. STAT. § 105.530 (1997).

245. Scott Lauck, *High Court Expands Public-Sector Union Ruling*, MO. LAW MEDIA, Nov. 21, 2012, available at 2012 WLNR 25253386.

246. See, e.g., H.B. 1829, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); S.B. 761, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); H.B. 1159, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S.B. 473, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); H.B. 2030, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S.B. 1115, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008).

wake of these holdings, Missouri cities and school districts surely are scrambling to put procedures in place that will allow them to meet their constitutional bargaining duties. These procedures are now necessary, but may be arduous for cities and school districts that have historically enjoyed amicable voluntary negotiations.

The state legislature is in an interesting position to resolve this difficulty. Past efforts to bring teachers and law enforcement into the public sector labor laws and establish a statutory good faith standard have failed. With the Court's holding that a good faith duty is located in the state constitution, however, it seems that the dissent was correct when it warned in *American Federation of Teachers* that more is now required in collective bargaining with teachers and law enforcement than with other public employees who are covered by the public sector labor laws.<sup>247</sup> This is because the "Meet and Confer" provision contains no good faith standard.<sup>248</sup> If the constitutional good faith bargaining duty evolves in a manner resembling collective bargaining under federal law, public employers covered by the public sector labor laws will likely hope that this provision remains unchanged so that they are subject to less onerous requirements. However, it is quite possible that because the Court's holding was a constitutional one, the "Meet and Confer" provision is now vulnerable to constitutional attack as inconsistent with article 1, section 29 for lack of a good faith standard.

The legislature should act quickly to resolve this issue. It can, as past bills have proposed, act to define collective bargaining with a good faith standard. The simplest approach would be to amend the "Meet and Confer" provision as follows:

Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss *in good faith* such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate.<sup>249</sup>

This would directly mirror the NLRA's definition of collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer in good faith* with respect to wages, hours, and other terms and conditions of employment."<sup>250</sup>

However, the problem still remains that teachers and law enforcement are excluded from the public sector labor laws, leaving many more questions

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247. 387 S.W.3d 360, 375 (Mo. 2012) (Fischer, J., dissenting).

248. *Id.* at 374.

249. MO. REV. STAT. § 105.520 (1997) (proposed language emphasized).

250. 29 U.S.C. § 158(d) (2006) (emphasis added).

regarding collective bargaining under article 1, section 29.<sup>251</sup> Missouri’s public sector labor laws are concise and not overly regulatory, but they do define appropriate bargaining units, “exclusive bargaining representative,” and establish minimal procedures for conducting and concluding bargaining.<sup>252</sup> But if the statutory exclusion remains in force, how will these collateral issues be determined for teachers and law enforcement under article 1, section 29 collective bargaining? The legislature can resolve inconsistency by amending the public sector labor laws to not only add a good faith standard to the “Meet and Confer” provision but also to remove the statutory exclusion and bring teachers and law enforcement into the fold. Indeed, to date there is a bill currently under consideration in the Missouri House of Representatives seeking to remove this exclusion.<sup>253</sup>

It is also possible that, given the limited coverage of the public sector labor laws and the Court’s interpretation of article 1, section 29, public labor unions could press the legislature for a more expansive approach – completely repealing the public sector labor laws and enacting a new and more comprehensive statutory framework. This kind of “mini NLRA” regime has been proposed in past Missouri bills<sup>254</sup> and enacted in several other states.<sup>255</sup> Because of the highly politicized nature of labor relations both at the federal and state levels, a “mini NLRA” for public employees would face a tough path

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251. MO. REV. STAT. § 105.510 (1997).

252. §§ 105.500, 105.520.

253. See H.B. 357, 97th Gen. Assem., 1st Reg. Sess. (Mo. 2013).

254. Proposed in 2008, Senate Bill 1115 sought to repeal the public sector labor provisions, replacing them with ten new sections collectively titled the “Public Employment Relations Act.” S.B. 1115, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008). The bill maintained the no-strike position and contained a right to work provision. *Id.* It excluded only elected officials, representatives of a public body, certain temporary and confidential workers, Missouri judges, and inmates/patients of state institutions. *Id.* It included detailed provisions for the determination of bargaining units, election and certification of bargaining representatives, conducting and concluding negotiations, and a list of unfair labor practices. *Id.* The bill defined collective bargaining as:

negotiate[ing] in good faith at reasonable times and places with respect to wages, hours, and other terms and conditions of employment . . . with the intention of reaching an agreement . . . . The obligation to bargain collectively shall not mean that either party is compelled to agree to a proposal nor shall it require the making of a concession.

*Id.*

255. See, e.g., ALASKA STAT. ANN. §§ 23.40.070-23.40.260 (2013); DEL. CODE ANN. tit. 19, §§ 1301-1318 (2013); FLA. STAT. ANN. §§ 447.201-447.609 (2013); HAW. REV. STAT. §§ 89-1 – 89-23 (2013); 5 ILL. COMP. STAT. ANN. 5 §§ 315/1-315/23 (2013); IOWA CODE ANN. §§ 20.1-20.31 (2013); MICH. COMP. LAWS ANN. §§ 423.201-423.217 (2013); MINN. STAT. ANN. §§ 179A.01-179A.40 (2013); NEB. REV. STAT. ANN. §§ 81-1369 – 81-1390 (2013); NEV. REV. STAT. ANN. §§ 288.010-288.280 (2013); N.J. REV. STAT. §§ 34:13a-1 – 34:13a-43 (2013); N.M. STAT. ANN. §§ 10-7e-1 – 10-7e-26 (2013); OHIO REV. CODE ANN. §§ 4117.01-4117.27 (2013).

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through any state legislature, and Missouri may be wary of such a drastic change in law. Legislative inaction over the last several years on this issue may or may not be indicative of intent of the General Assembly *not* to heavily regulate public sector unions and bargaining. Regardless, action by the Missouri legislature soon would provide guidance to the courts, employers, unions, and employees that will soon face these issues.

## VI. CONCLUSION

Whether *American Federation of Teachers* and *Eastern Coalition of Police* are surprising new interpretations of the Missouri Constitution or just natural next steps, article 1, section 29 collective bargaining has taken a more definite shape. The right established by *Independence* has now been given teeth in the form of a cause of action for public unions. Critics may call the decisions too pro-union; supporters may say they are pro-employee, fair, and just. In any event, public sector collective bargaining is changing, and not just for teachers and law enforcement. Article 1, section 29 impacts all employees, and they will all surely be watching its evolution over time. It is not clear yet what good faith will come to mean under Missouri law. Equally unclear is what other obligations will be imposed on employers now forced to establish procedures necessary to make collective bargaining happen. There is no statute to guide them, and if the General Assembly would like to avoid an ad-hoc fix, it should act quickly to amend the public sector labor statutes and provide direction.