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The New Spoils System: Government By the Unions, For the Unions

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The New Spoils System: Government By the Unions, For the Unions

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Executive Summary:
Public sector unions wield outsized influence over American government. That power prevents effective managerial control and fosters cynicism toward democratic processes. Successful statutory reforms to address outsized union power are unlikely because of the political resources amassed by these unions. To combat the influence of public sector unions, who serve their own interests instead of the common good, this brief explores five possible constitutional challenges that might dislodge union controls and weaken their grip on power.

Introduction

Public sector unions have become a dominant force in American government. Through collective bargaining powers, granted by executive order and by statutes beginning in the 1960s, public employee unions have achieved preemptive legal powers over the daily operating decisions of federal government and state and municipal governments in 38 states.[1]

Statutory reforms are unlikely, except at the margins, because collective bargaining powers have enabled public sector unions to amass political resources far greater than other interest groups. Over the past fifty years unions have built a nearly impregnable statutory and state constitutional shield against managerial authority. In effect, public unions have harnessed the resources of millions of public employees in modern government to prevent any reform of how these employees are managed. Public union financial contributions to government executives—which would be illegal corruption in the private sector—is business as usual today. Indeed, public unions have exercised their political clout to secure statutes that explicitly exempt campaign payments to political executives from anti-corruption laws. In Illinois, the insulation of public unions from democratic control is nearly perfect: A recent state constitutional amendment provides that union powers override past and future legislation.

Democracy can't work effectively when elected and operating executives have no effective managerial control. In this paper, I explore possible constitutional bases for dislodging union controls and statutory changes that might weaken their grip.

A. Factual Background

The control of public employee unions over public operations is not a matter of reasonable dispute and has been demonstrated in extensive studies by political scientists Terry Moe, Daniel DiSalvo, Michael Hartney, and others.[2] Elected leaders know this better than anyone: They soon find that the union stranglehold precludes changing operations in ways that might improve poor schools and wasteful practices.

Voters elect a president, governors, and mayors who, because of collective bargaining

agreements that are not coterminous with election cycles, have little or no authority to fix broken schools, eliminate inefficiencies, or remove inept or abusive public employees. The inability of elected executives to operate government effectively has fostered broad public cynicism and alienation from democratic processes.

Democracy is a process of accountability and cannot work when the links in the chain of accountability are broken. Near-zero accountability of public employees also destroys the predicate for mutual trust within public culture. The knowledge that performance doesn't matter has, over time, bred a public culture of entitlement and resignation.

Nor have union controls made government an attractive place to work. Public culture under union controls is repellent to good candidates. The exceptions prove the rule: Energetic schools and agencies that have been able to sustain cultures of excellence and pride are generally characterized by active leadership and show what is possible.

The constitutionality of union controls over democratic operations has not been scrutinized, as I describe in *Not Accountable*, because union powers were largely authorized by legislative enactments.[3] But, as I argue there, Congress and state legislatures lack constitutional authority to delegate governing powers to private persons or groups such as public unions. Numerous Supreme Court precedents have held that Congress may not impinge on the president's "executive power" under Article II. Nor should state legislatures have authority, in "a Republican Form of Government" mandated by Article IV, to disempower elected executives such as governors and mayors and transfer their executive authority to unaccountable unions. Unions have been granted control over government operations in response to union political activity. Political activity by public unions has also escaped legal scrutiny because of an assumption that public unions are no different than any other organized interest group. But public unions are distinct in several critical ways:

Unlike other interest groups, public unions represent employees who owe an undivided duty of loyalty to serve the public.[4] This duty is fiduciary in nature for public employees with discretionary authority.[5] Organized political activity by public employee unions is aimed at achieving controls that serve no legitimate public purpose, and, indeed, are designed for unaccountability and inefficiency. By analogy to equal protection jurisprudence, these controls serve no "compelling public interest" and could not survive even a "rational basis" test. The direct harm to the public demonstrates the inherent conflict between public employees' fiduciary duty and their organized political activity.

Public union political activity is directed towards the elections of officials who have a pre-existing legal obligation, under collective bargaining laws, to enter into an agreement with unions on the terms and conditions of public employment. Unlike the inchoate benefits of political contributions by other interest groups—with benefits generally dependent on legislative and regulatory approvals after the election—unions already enjoy statutory power requiring the official to collectively bargain with them. Their political support thus resembles a quid pro quo. The elected executive taking money is in a similar moral position as an official getting personal favors from an existing public vendor. After receiving millions of dollars of union support, a governor or mayor sits not across the collective bargaining table, but on the same side; as the unions like to say, "We elect our

own bosses."[6] At a campaign rally with union members, former New Jersey governor Jon Corzine promised "We will fight for a fair contract!"[7] Whom was he going to fight?

The inherent conflict of interest of public employees financing their democratically elected managers unavoidably compromises the duties of both. Union powers are unique in scale as well as in their singular statutory rights and duties. Unlike other interest groups, public employee unions do not seek isolated subsidies or regulatory benefits—they seek controls *over the entire operating machinery of government*. Daily choices in schools and public agencies are shackled by union rights including, for matters not specifically delineated by agreement, an obligation to negotiate a resolution with the union. For example, unlike most other workers, teachers in many cities refused to return to the classroom for almost two years, irreparably harming the learning of many.[8]

The accretion of union powers and benefits is relentless. In a recent year, the New York State Legislature passed 21 laws that sweetened union pensions and[9] many union controls that had once been negotiated in collective bargaining agreements—for example, impractical processes for employee discipline or termination—have now been codified by statute. Congress and state legislatures have thereby precluded the most essential executive management.[10]

The pervasive scope of union controls over public operations reflects the outsized public union political influence. Teachers unions alone have about 4.5 million members, with annual revenues of over $3.5 billion. The majority of this money is spent on direct or indirect political activity.[11] Political scientist Terry Moe found that in 36 states teachers unions outspent all business groups combined.[12] While around 90 percent of political contributions go to Democrats,[13] public unions also wield negative power over Republicans who aggressively seek to reform union controls. When Ohio Governor John Kasich championed statutory reforms to reduce union power, the national unions consolidated resources to initiate a voter referendum that reversed the reforms within the same year.[14]

A political solution, as noted, is unrealistic. Elected executives are shackled to operating controls that have been codified not only in the requirement to collectively bargain but in layers of state statutes. Renegotiating collective bargaining agreements in some states is not possible because laws dictate that the agreements remain in force indefinitely,[15] or require that arbitrators resolve any impasse in collective bargaining.[16] A legislative change to authorizing statutes is so unrealistic that it has only been successful in one situation, and required a bruising four-year battle that few political leaders could emulate.[17]

The theoretical possibility of a legislative solution does not, in any event, remove the constitutional infirmities of delegating governing powers to a private group, of disempowering elected executives, and of breaching fiduciary duties in collusive arrangements with political candidates against the public interest.

Public employee unions disguise their preemptive power over government behind the forms of private organization activity. Trade unions bargain, so why can't they? Corporate groups organize political contributions, so why can't they? But the superficial similarities are fig leaves that cannot disguise the brute takeover of democratic operations by public employees who are supposed to operate government for the public benefit, not their own. The distinctions from trade unions and corporate interests overwhelm[18] any similarities: Neither trade unions nor

corporate interest groups seek to supplant democratic governance and control how government operates.

Public union agreements bear no resemblance to trade union agreements. A company operating under public union controls would collapse almost immediately, and union members would lose their jobs. Bargaining against government has none of the market constraints present in trade union bargaining, as I will shortly describe.

Trade union leaders who gave gifts or benefits to corporate negotiators would go to jail, as would the corporate officers accepting the benefits. For public unions, providing campaign support to elect officials who must negotiate with unions is standard operating procedure.

Unlike trade unions and corporate interests, public employees owe a duty to serve the public. Instead, public union political organizing is aimed at securing controls that harm the public.

Public union bargaining is infected with conflicts of interest by both the unions and the political leaders they support. Public union political activity is aimed at perfecting the conflict of interest. The scale of direct and indirect support is different in scale from other interest groups—often tens of millions of dollars in a gubernatorial race. Union campaign support goes to candidates who take it knowing that they have a legal obligation to negotiate with the unions. In the recent Chicago mayoral election, over 90 percent of Mayor Brandon Johnson's funds came from public unions.[19] *Res ipsa loquitur*.

Democracy can't work under these conditions. The pyramid of democratic authority has been inverted, with elected officials beholden to and controlled by public employees. Elected executives are disempowered by collective bargaining agreements that immunize public employees from accountability, and mandate rigidities that guarantee public waste, inefficiency, and, in the case of many public schools, tragic failure.

What happened has a clear analog in American history: Public unions have created a new spoils system. The operations of government are run by the unions, for the unions. Public unions have used collective bargaining powers to organize a powerful political machine—harnessing the massive size of modern government employment to preempt or overwhelm any effort by the political system to take back management control of public employees. As with the original spoils system, public jobs have become a sinecure, without any requirement of skill or effort. Unlike the original spoils system, union controls are permanent. A new executive, from a different party, has no authority to run government differently, with different people.

In 2022, the city of Baltimore announced that in 23 schools not one student was proficient in math.[20] Confronted with such abject failure, a new mayor and school board would change personnel, change anything. But under union controls, they are largely powerless.

No one in recent decades has analyzed union controls through the lens of constitutional governance. But the disempowerment of elected officials is clear. Union controls contravene first principles of democratic governance, including the nondelegation doctrine, prohibitions on conflicts of interest, and duties of loyalty. But crafting constitutional claims under federal and state law requires reframing these and other core principles in the unique context of public union controls and political activity.

B. Possible Constitutional Challenges of Union Controls

Any challenge here will almost certainly break new ground. Rulings of first impression will be needed to revive core democratic principles and restore democratic control of the operating machinery of government. But the disempowerment of democratically elected officials is irrefutable and demands a constitutional remedy.

There are at least five possible avenues for constitutional challenge, all of which require further development:

1. Infringement on Executive Power under Article II. Under numerous constitutional rulings, Congress may not infringe on the president's "executive power" under Article II, including on the president's "exclusive and illimitable power of removal"[21] of executive officers.[22] Under these rulings, several key provisions of the Civil Service Reform Act of 1978, as amended, should be unconstitutional.

2. Nondelegation. Giving public unions statutory power of collective bargaining and other restrictions on official authority violate the constitutional principle against delegating official power to any private parties. "The power of governing is a trust committed by the people to the government," the Supreme Court held in *Stone v. Mississippi*, "no part of which can be granted away."[23] By ceding control of operations and policymaking to unions, executive officers are abdicating their constitutional responsibilities and denying citizens a responsive, representative government.

3. Nondelegation by state and local governments. Each state has its own version of the nondelegation doctrine which could potentially support claims against public employee collective bargaining. Additionally, nondelegation is a main goal of the Republican Guarantee Clause of Article IV of the Constitution.[24] As Madison described, a republican form of government must necessarily "be derived from the great body of the society, not from . . . a favored class of it,"[25] and therefore the Guarantee Clause would "defend the system against aristocratic or monarchial innovations."[26] The Supreme Court has held on several occasions that the Guarantee Clause is nonjusticiable as a political question.[27] But it has never been presented with a situation where actual governing powers have been delegated to a private group. Moreover, a political solution in this context is impossible precisely because of the dominating influence of unions over the political process. Leading constitutional scholars like Erwin Chemerinsky, Akhil Amar, Hans Lindes, and others have argued that in cases involving basic rights and principles the Guarantee Clause must be judicially enforceable.[28]

4. Corruption / Duty of Loyalty. Democratic governance rests on a number of core principles, including a duty of loyalty by public employees. The duty of loyalty owed by public employees is embodied in federal and state law, as well as in the "take care" and other clauses of the Constitution. Organized political activity by public employee unions conflicts squarely with these duties: Its purpose is to supplant democratic governance with union controls and its effect is to harm the public. The main lever in union political activity is supporting the campaigns of the officials who have a legal obligation to make a deal with them. This political activity is a clear breach of public employees' duty of loyalty. It is also a form of corruption and should be unconstitutional either as a violation of citizens' rights under the Fifth and Fourteenth amendments, or as a new constitutional doctrine against

"Public union bargaining is infected with conflicts of interest by both the unions and the political leaders they support."

the inherent conflict of interest of public employee political organizing.

5. Due Process / Equal Protection. Under the due process clause, citizens should have the right to elect officials who have authority to serve the public good, including enforcing the duty of loyalty by all public employees. Under the equal protection clause, advocacy and other interest groups should have an equal opportunity to compete for public benefits and resources. Instead, collective bargaining gives public employees a priority position over other groups and over taxpayers.

Constitutional challenges to union controls would encompass not only the statutory grant of collective bargaining power but also statutes and state constitutional provisions that codify other management controls constraining executive power. For example:

Illinois Referendum. Illinois by referendum in 2022 amended the state constitution to provide a "fundamental right to organize and to bargain collectively . . . for the purpose of negotiating wages, hours, and working conditions, and to protect [employees'] economic welfare and safety at work," and to invalidate any law which "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."[29]

New Jersey Statute. In anticipation of the Supreme Court holding that states could not mandate agency fees by non-union employees, New Jersey enacted a law providing that a school district would be liable for dues if it discouraged teachers from joining the union.[30] Other controls that have been codified include seniority, elaborate disciplinary procedures, and limitations on performance appraisals by managers.[31]

C. Federal Government: Presidential Disavowal of Unconstitutional Controls

The Constitution in Article II provides that "The executive power shall be vested in a President." Executive power is toothless, as James Madison observed, if the President has no practical authority over personnel: "If any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[32] Those employees exist only as the president's surrogates because of, as George Washington noted, "the impossibility that one man should be able to perform all the great business of the state."[33]

The Supreme Court on numerous occasions has reaffirmed that "an officer . . . in the executive department . . . [is] inherently subject to the exclusive and illimitable power of removal by the Chief Executive."[34] The Court has also held that Congress may not impose onerous conditions on the removal of "inferior officers." As the Supreme Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board*:

> The Constitution that makes the Pres-

> ident accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'[35]

The executive branch must operate within goals, frameworks, and funding set by Congress. Congress can create a civil service system to regularize employment and, although not free from doubt, can also provide some mechanisms to safeguard against arbitrary or political dismissal. But the President must have authority to manage how the work gets done. As the Supreme Court said in *Free Enterprise Fund*:

> No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.[36]

Under these and other rulings by the Supreme Court,[37] key provisions of the Civil Service Reform Act are likely unconstitutional infringements on "executive power:"

- The statute mandates that the executive branch collectively bargain over "the conditions of employment" for public employees. Collective bargaining agreements vary from agency to agency, but they significantly impair managerial choices and accountability, including grievance procedures that make it practically impossible to discipline poor performers and requirements to negotiate over any new workplace feature, such as training on new software or who sits at which desk after an office move.
- Elaborate statutory disciplinary procedures that put the burden of proof on supervisors,[38] with multiple levels of appeal and review that make it unrealistic to terminate poor performers, and put ultimate power of accountability with arbitrators, the Merit Systems Protection Board, and the federal courts.[39]
- Creating an "Impasses panel" with power to resolve disagreements that occur in collective bargaining. For example, when the Veterans Administration objected to a requirement that promotions be based on seniority, the Impasses Panel overruled the VA.[40]
- Strict limitations on how agencies conduct hiring, including competitive examination requirements,[41] limitations on how many senior executives can be appointed from outside of the civil service,[42] and prohibitions on hiring outside of eligibility pools.[43]

There are several ways a president can assert executive power to reclaim managerial control of executive branch employees.

Civil service overhaul by executive order. The president by executive order could disavow the unconstitutional mandates in statutes and replace them with procedures consistent with a genuine merit system. This is not a stable framework, because it can be undone any time by another executive order. But it is a starting point for reform, will no doubt be clarified or affirmed by court challenges, and may force Congress's hand to take on reform.

Possible changes by executive order include:

i. Disavow collective bargaining agreements. Under Supreme Court decisions allowing the president to dismiss officers before the end of their term, the president might terminate the agreements effective immediately;

ii. Terminate the Impasses Panel which supplanted executive power to resolve disputes with unions;

iii. Replace statutory disciplinary procedures with a new, streamlined accountability process. For example:

- To safeguard against political retribution or arbitrary choices, provide for independent review by MSPB or other independent body, with written submissions. This independent review will confirm that there are legitimate reasons for the action, without subjecting supervisors to a trial or the requirement to "prove" by objective evidence what is a judgment call. The requirement of supervisors to show "cause" will be limited to independent or quasi-judicial officers.
- No legal process to review supervisory evaluations, other than a review as described above when there is a credible charge of political or other retribution;
- All terminations should be approved by department heads or other officials reporting to the President. Then there will be a chain of accountability ultimately back to voters. This may well be a constitutional imperative.

iv. Expeditious and flexible hiring. Sluggish hiring protocols mandated by Congress and by regulation have been broadly criticized by the Volcker Commissions and by the Partnership for Public Service, among other nonpartisan expert groups. While Congress has some role in protecting the qualifications of new hires, it cannot limit choices to a range that prevents the President and department heads from hiring qualified public employees.[44] One innovation would be to create a second hiring track which permits hires outside of the competitive service procedures, provided the hires are approved as qualified by MSPB or an independent board.

Schedule F. President Trump by executive order created a "Schedule F" in the federal civil service, under which several thousand civil servants would have become, in effect, employees at will. Schedule F employees were to be exempted from the competitive service, allowing agency heads (some of them presumably acting on the direct request of the President) to appoint employees. The purpose of Schedule F was to restore political accountability to officers whom President Trump believed were resisting his orders.

Schedule F was revoked by President Biden on the basis, among others, that it created a new "spoils system."[45]

My view is that Schedule F would not solve the problems of manageability, and only partially deals with accountability and does so in a way that raises concerns about professionalism:

- First, the main reason for administrative failure is not political resistance, but unmanageability. Making senior civil servants politically accountable does nothing to help them manage their own departments. Accountability needs to go from bottom to top; as Madison put it, an unbroken "chain of dependence ... the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President."[46]

- My second concern with Schedule F is a matter of fiduciary duty. Civil servants have an obligation to uphold the law and respond to the president's managerial orders. These loyalties can conflict, and there needs to be some independent body that prevents the president from firing a senior civil servant who is following the law. The Lloyd-LaFolette Act of 1912, for example, gave the Civil Service Commission power to act as a kind of speed bump against arbitrary decisions but it was explicit that no hearing or evidence was required.

D. Statutory Reforms

Public union powers are largely statutory and can be altered or undone by statutes. The political power of public unions makes this unlikely, but Governor Ron DeSantis in Florida has led changes, described below, that weaken union grip on power.

The one successful statutory reversal of union powers was in Wisconsin, led by Governor Scott Walker. The legislature removed all collective bargaining powers except over base wages and disallowed dues deductions while adding an annual re-certification requirement.[47] The Wisconsin reforms excluded police and fire unions, presumably because of their political clout. The battle over the reforms consumed four years, with unions organizing a demonstration of 100,000 people that occupied the state capitol, a recall election of Gov. Walker, and a criminal indictment of Gov. Walker for allegedly misusing campaign funds in the recall election.[48] The law is currently facing a constitutional challenge on state and federal equal protection grounds—that allowing uniformed services to retain collective bargaining powers while removing those powers from other public employees should be unconstitutional.[49]

The Wisconsin success is not easily replicable. As noted above, Ohio governor John Kasich succeeded in leading similar reforms, but unions then spent millions organizing a special referendum which, within the year, repealed the reforms. Indiana Governor Mitch Daniels had earlier removed collective bargaining powers except for compensation but collective bargaining in Indiana was not statutory so Governor Daniels could remove controls by executive order.

Possible statutory reforms:

- Statutes prohibiting and repealing collective bargaining. Twelve states do not statutorily authorize collective bargaining, but a handful, such as North Carolina, prohibit public employee collective bargaining entirely.[50] Indiana specifically forbids collective bargaining at the state level but leaves counties and municipalities free to do so.[51]
- Statutes limiting the topics of collective bargaining. Indiana[52] and Wisconsin[53] only permit bargaining over wages, so that agreements do not impinge on officials' authority to manage government.
- Statutes limiting bargaining to particular employees. Wisconsin, as noted, continues

"Making senior civil servants politically accountable does nothing to help them manage their own departments. Accountability needs to go from bottom to top."

to allow bargaining by some categories of uniformed services. That distinction is now under constitutional challenge under the equal protection clause. Texas similarly restricts bargaining to only police and fire unions.[54]

- Statutes requiring recertification of unions. In Florida, Governor DeSantis recently led a reform requiring some public employee unions to certify every year that at least 60 percent of the members of its bargaining unit are dues-paying union members; failure to do so triggers a recertification election.[55] Wisconsin imposed similar recertification requirements on public employee unions.[56]
- Statutes prohibiting automatic dues deduction. Florida is one of several states with an outright ban on dues deductions.[57] South Carolina prohibits any dues collected from employees from being paid to a national or multi-state association or group[58] and further allows automatic dues payments only to charitable organizations with no lobbying component,[59] effectively barring dues deductions for any union.
- Statutes preventing school principals and other managers from unionizing. Several states, including Idaho, classify school administrators, including principals, as "management," and thus render them ineligible for protection under the state's public employee collective bargaining rules.[60]
- Statutes disallowing payments for union-related work. Arizona prohibits the adoption of any collective bargaining agreement which requires or allows paid release time. State law renders void any agreement which has a release time component and gives standing to any resident of the state to enforce the bill's provisions.[61]

Conclusion

The Supreme Court in numerous decisions has expressed concern that organized political activity by public employee unions could tear the fabric of democratic governance. In the 1973 *Letter Carriers* case, affirming the constitutionality of statutory controls over public employee political activity, the Court said:

> "[T]he rapidly expanding Government workforce should not be employed to build a powerful, invincible, and perhaps corrupt political machine . . . using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns . . . the political influence of federal employees on others and on the electoral process should be limited."[62]

In Janus, the Court discussed at length how union political power can undermine the common good:

> "Th[e] ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. By 2014, that figure had ballooned to approximately $10,238 per capita. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee

> retirement packages. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that [previous Courts] did not fully appreciate."[63]

First Amendment jurisprudence is not adequate to overcome the corrosion of democratic governance by public union controls and public union political activity. This is why constitutional challenges based on nondelegation, breach of loyalty, and corruption should be put before the Supreme Court.

Endnotes

1. This brief draws from *Not Accountable: Rethinking the Constitutionality of Public Employee Unions*, a book written by Philip Howard with help from Common Good staff, and published by Rodin Books in January 2023.

2. See, e.g., Terry M. Moe, *Special Interest: Teachers Unions and America's Public Schools* (Washington, DC: Brookings Institution Press, 2011); Daniel DiSalvo, *Government Against Itself: Public Union Power and Its Consequences* (New York: Oxford University Press, 2015); Michael T. Hartney, *How Policies Make Interest Groups: Governments, Unions, and American Education* (Chicago: University of Chicago Press, 2022).

3. Philip K. Howard, *Not Accountable: Rethinking the Constitutionality of Public Employee Unions* (Garden City, NY: Rodin, 2023).

4. Public employees owe a duty to serve the public. Article IV of the Constitution requires an oath of office, and federal regulations for all federal employees require that they "place loyalty to the Constitution, laws and ethical principles above private gain." 5 C.F.R. § 2635.101(a). The Supreme Court held in *Gardner v. Broderick* that:

> "[A police officer is] entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. . . . He is trustee of the public interest, bearing the burden of great and total responsibility to his public employer." *Gardner v. Broderick*, 392 U.S. 273 at 277 (1968).

This is not to suggest that public employees have no legitimate interest in the conditions of their employment. Ethical guidance promulgated by the state of Massachusetts holds that public employees should be allowed to "represent [their] own personal interests . . . on the same terms and conditions that would apply to other similarly situated members of the public." Mass. Office of the Inspector General, "Summary of the Conflict of Interest Law for State Employees," Section IV(b). Though no commentators have strictly delineated what constitutes a legitimate "personal interest" versus a breach of public trust, it seems inarguable that political organizing in an effort to control public policy, against the public interest, goes well beyond a mere personal interest, and is instead an unconstitutional breach of public employees' duty to serve the public good. *See generally*, Howard, *Not Accountable*, 147-56.

5. Id. *See People ex. rel. Plugger v. Township Board of Overyssel*, 11 Mich. 222 (1863) (opinion of Manning, J.) (All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And, a greater necessity exists than in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less.) (internal quotations and citations omitted), cited in *Macomb County Prosecuting Att'y v. Murphy*, 627 N.W.2d 247 (Mich. Sup. Ct. 2001) ("Public officers and employees owe a duty of loyalty to the public."). See also, 63c Am. Jur. 2d § 241 ("A public officer must act primarily for the benefit of the public; by accepting a public office, one undertakes to perform all the duties of the office, and while he or she remains in such office the public has the right to demand that he or she perform such duties. A public officer owes an undivided duty to the public whom he or she serves. Public policy demands that an officeholder discharge his or her duties with undivided loyalty, and that every public officer is bound to perform the duties of his or her office faithfully. An officer's or public employee's duty of loyalty to the public and his or her superiors is similar to that of an agent of a private principal. As expressed otherwise, the powers delegated to a public officer are held in trust for the people and are to be exercised on behalf of the government or of all citizens who may need the intervention of the officer. A public official is held in

public trust. That is, a public officer occupies a fiduciary relationship to the political entity on whose behalf he or she serves, and stands in a fiduciary relationship to the citizens that he or she has been elected to serve.") (citations omitted).

6. *See*, e.g., American Federation of State, County, and Municipal Employees, "Questions & Answers About AFSCME" (2017), 27, www.afscme.org/about/AFSCME-WMAH-QA-Booklet.pdf; DiSalvo, *Government Against Itself*, 19.

7. DiSalvo, *Government Against Itself*, 57. "Such stories are not atypical," DiSalvo writes. "The powerful Speaker of the New York State Assembly, Sheldon Silver, once told the United Federation of Teachers at a rally that: 'I and my colleagues in the Assembly majority will be your best friends...in Albany.'" DiSalvo, *Government Against Itself*, 57–58.

8. *See*, e.g., Sarah Mervosh, Claire Cain Miller, and Francesca Paris, "What the Data Says About Pandemic School Closures, Four Years On," *The New York Times* (March 18, 2024).

9. Andrew S. Rein, President, Citizens Budget Commission to New York State Governor Kathy Hochul, "CBC Urges Veto of 21 Benefit Sweeteners," October 4, 2021.

10. *See* generally, Howard, *Not Accountable*, 51-70.

11. *See* discussion and corresponding endnotes in Howard, *Not Accountable*, 29, 38-39, 100-02.

12. DiSalvo, *Government Against Itself*, 60, citing Moe, *Special Interest*, 292-93.

13. *See*, e.g., Open Secrets, "Public Sector Unions: Long-Term Contribution Trends," www.opensecrets.org/industries/totals.php?ind=P04.

14. *See* generally the discussion of Governor Kasich's losing battle in Howard, *Not Accountable*, 104-05. See also, "Unions Get Revenge as Issue 2 Falls," *Columbus Dispatch* (Nov. 8, 2011).

15. *See*, e.g., New York State Civil Service Law, Article 14 § 209-a (The "Triborough Amendment,) Rhode Island Senate Bill 0512 (2019).

16. At the federal level, the Federal Services Impasses Panel handles so-called "interest arbitration" of disputes between agencies and unions. 5 U.S.C. § 7119(c). Many states and localities have similar bodies and procedural requirements. *See*, e.g., Brian J. Malloy, "Binding Interest Arbitration in the Public Sector: A "New" Proposal for California and Beyond," 55 *Hastings L.J.* 245 (2003) (noting that at the time the article was published, "about thirty states (or localities therein) have some sort of interest arbitration statute.").

17. *See* discussion and corresponding endnotes in Howard, *Not Accountable*, 105-07.

18. *See* Philip K. Howard, "Why Government Unions—Unlike Trade Unions—Corrupt Democracy," *TIME*, April 4, 2023.

19. Mailee Smith, "Unions Still Fund Johnson, Individuals Back Vallas for Chicago Mayor," Illinois Policy Institute, March 31, 2023. See also Philip K. Howard, "Public Unions Are Hurting Illinois," *Chicago Tribune*, February 7, 2023.

20. Chris Papst, "23 Baltimore Schools Have Zero Students Proficient in Math, per State Test Results," *Fox45News*, February 6, 2023.

21. *Humphrey's Executor v. United States*, 295 U.S. 602 at 627 (1935).

22. Most state constitutions also vest "executive power" in the governor and have their own separation of powers doctrines. *See*, e.g., Benjamin Silver, "Non-delegation in the States," 75 *Vanderbilt L. Rev.* 1211 (2022) (describing state-level non-delegation doctrine as in part a species of separation of powers doctrine).

23. *Stone v. Mississippi*, 101 U.S. 814 at 820 (1879).

24. U.S. Const. Art. IV Sec. 4.

25. *The Federalist* No. 39 (James Madison).

26. *The Federalist* No. 43 (James Madison).

27. *See*, e.g., *Luther v. Borden*, 48 U.S. 1 (1849), *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912), *City of Rome v. United States*, 446 U.S. 156 (1980).

28. Erwin Chemerinsky, "Cases Under the Guarantee Clause Should Be Justiciable," 65 *U. Colo. L. Rev.* 849 (1993), Akhil Reed Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem," 65 *U. Colo. L. Rev.* 749 (1993). *See also*, e.g., Deborah Jones Merritt, "The Guarantee Clause and State Autonomy: Federalism for a Third Century," 88 *Colum. L. Rev.* 1 (Jan. 1988).

29. Ill. Const. Art. I Sec. 25. Illinois law also

explicitly allows collective bargaining agreements to supercede state and local law. 5 ILCS 315/15 (a) ("In case of any conflict between the provisions of the Act and any other law . . . executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of the act **or any collective bargaining agreement negotiated thereunder** shall prevail and control.") (emphasis added).

30. *See*, e.g., Mike Lilley, "NJEA: The Taxpayer-Funded Special Interest," Sunlight Policy Center of New Jersey (May 28, 2019) (discussing in part New Jersey's "Workplace Democracy Enhancement Act.").

31. *See* generally, Howard, *Not Accountable*, supra note 10.

32. James Madison, "Speech in Congress on Presidential Removal Power," in *James Madison, Writings* (New York: Library of America, 1999), 456.

33. George Washington, letter to Count de Moustier, May 25, 1789, (available at: https://founders.archives.gov/documents/Washington/05-02-02-0278).

34. *Humphrey's Executor* at 627 (1935).

35. *Free Enterprise Fund v. Pub. Company Acct. Oversight Bd.*, 561 U.S. 477 at 514 (2010) (internal citations omitted).

36. Id.

37. *See*, e.g., *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding that the appointment of administrative law judges by SEC employees was unconstitutional, because, as "officers" of the United States, these judges must be appointed by the President or an agency head, as required by the Appointments Clause of the Constitution.).

38. *See*, e.g., "Addressing Poor Performers and The Law," Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board (Sept. 2009) (*available at*: https://www.mspb.gov/studies/studies/Addressing_Poor_Performers_and_the_Law_445841.pdf).

39. The Civil Service Reform Act (CSRA) requires that any collective bargaining agreement reached between federal employees and an agency contain grievance resolution procedures, either via a system of arbitration established within the agreement, or via the Merit Systems Protection Board (MSPB), as outlind in the CSRA itself. 5 U.S.C. §7121. The CSRA also stipulates that any decision of the MSPB can be appealed directly to a federal appellate court. 5 U.S.C. §7123.

40. *In the Matter of Dept. of Veterans Affairs and Local 200 United, SEIU*, Arbitrator's Opinion and Decision, Case No. 15 FSIP 28 (September 5, 2015).

41. 5 U.S.C. §3304 *et seq*.

42. 5 U.S.C. §3392.

43. 5 U.S.C. §3318.

44. *See*, e.g., Civil-Service Commission, 13 U.S. Op. Atty. Gen. 516 (August 31, 1871), 523..

45. See, e.g., Eric Rubin, "Back to the Spoils System?" *The Foreign Service Journal* (March 2023), James C. Capretta and Jack Rowing, "Trump's 'Schedule F' Gambit is Dangerous," *RealClearPolicy* (November 7, 2023) (arguing that implementation of Schedule F will result in "rampant patronage [in] the staffing systems of federal agencies.").

46. Annals of Congress, 1st Cong., 1st sess., 518.

47. *See*, e.g., "Act Memo: 2011 Wisconsin Act 10," Wisconsin Legislative Council (May 9, 2011) (*available at*: https://docs.legis.wisconsin.gov/2011/related/lcactmemo/act010.pdf).

48. *See*, e.g., James B. Kelleher, "Up to 100,000 Protest Wisconsin Law Curbing Unions," *Reuters*, March 12, 2011; Peter Whoriskey and Dan Balz, "Wisconsin Gov. Scott Walker's Victory Deals Blow to Unions," *Washington Post*, June 6, 2012; DiSalvo, *Government Against Itself*, 68–71; and Adam B. Lerner, "Wisconsin Supreme Court Rules Walker Didn't Violate Campaign Finance Laws," *Politico*, July 16, 2015.

49. *Abbotsford Educ. Ass'n. v. Wis. Emp. Rel. Comm.*, No. 2023-cv-3152 (Cir. Ct. Dane County, Wis, filed Nov. 30, 2023).

50. N. Car. Gen. Stat. §95-98.

51. Ind. Code Sec. 4-15-17-4.

52. Ind. Code Sec. 20-29-6-4.5.

53. Wis. Pub. L. 111.70(4)(mc).

54. Tx. Gov. Code Sub. A Sec. 617.002.

55. Fl. Stat. 447.305.56.

56. Wis. Pub. L. 111.83(3)(b).

57. Fl. Stat. 447.303.

58. S.C. Code Ann. 8-11-83.

59. S.C. Code Ann. 8-11-92.

60. Idaho Code §33-1272(1).

61. Ariz. S.B. 1166 (2022).

62. *U.S. Civil Service Commission v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 538, 565 et seq. (1973).

63. *Janus v. AFSCME*, 138 S.Ct. 2448 at 2483 (2018).