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The Court Does *Not* Know "What a Labor Union Is": How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law

> To tolerate or recognize any combination of . . . employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded.
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> *Railway Mail Ass'n v. Murphy* (1943); *CIO v. City of Dallas* (1946)[1]

> [T]he court, of course, knows what a labor union is . . . .
>
> *King v. Priest* (1947)[2]

Why and how American public sector labor law evolved as it did—separate from and much more restrictive than private sector law—is an important, fertile, and strangely ignored subject. Of most obvious instrumental importance, the glacier of frozen judicial rules that traditionally regulated government employment artificially obstructed the growth of public sector unions at least to the 1960s, thus affecting the entire labor movement and American society. While the National Labor Re-

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[1] CIO v. City of Dallas, 198 S.W.2d 143, 145 (Tex. Ct. Civ. App. 1946), *writ refused n.r.e.*; Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on other grounds sub nom.* Railway Mail Ass'n v. Corsi, 47 N.Y.S.2d 404 (1944), *aff'd*, 56 N.E.2d 721 (N.Y. 1944), *aff'd*, 326 U.S. 88 (1945).

[2] 206 S.W.2d 547, 554 (Mo. 1947).

lations Act of 1935 (NLRA)[3] gave basic protections to private sector unions, no federal law ever covered public sector labor relations. Up to the 1960s, under court-made law, public sector unions generally had no right to strike, bargain, or arbitrate disputes, and government workers could be fired simply for joining a union. From the 1960s to today, more than half the states have passed statutes which provide some statutory rights for public sector unions, and courts finally have concluded that firing public workers for joining unions violates constitutional rights to associate.[4] With the glacier finally beginning to melt, the rate of unionization in government employment skyrocketed from about ten percent in the 1960s to nearly forty percent in the 1990s: a stark contrast to declining rates in the private sector.[5] Public sector unions now occupy prominent places in the AFL-CIO and in American politics. The critical role that law played in facilitating these stunning developments is clear, yet this leads to the question: Why was the development of public sector labor delayed and deformed for so long? This question has remained unexplored, despite a wealth of important and fascinating studies of the history of private sector labor law.[6]

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[3] 29 U.S.C. §§ 151-168 (2000).

[4] *See* MICHAEL LEIBIG & WENDY KAHN, PUBLIC SECTOR ORGANIZING AND THE LAW (1987); KRISTA SCHNEIDER, PUBLIC EMPLOYEES BARGAIN FOR EXCELLENCE: A COMPENDIUM OF STATE PUBLIC SECTOR LABOR RELATIONS LAWS (1993) (available from the AFL-CIO).

[5] In 1953, private sector union density was 35.7% and public sector union density was 11.6%. By 1996, the rate in the private sector had dropped to 10.2% while the public sector rate had risen to 37.7%. Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 HOFSTRA LAB & EMP. L.J. 133, 160 (1998).

[6] *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES (1993); KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985) [hereinafter TOMLINS, THE STATE AND THE UNIONS]; LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS (Christopher L. Tomlins & Andrew J. King eds., 1992) [hereinafter Tomlins & King, LABOR LAW IN AMERICA]; Catherine Fisk, *Still "Learning Something of Legislation": The Judiciary in the History of Labor Law*, 19 L. & SOC. INQUIRY 151 (1994) (containing comments by William Forbath, Victoria Hattam, and Karen Orren); Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WISC. L. REV. 1; Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). For overviews, see Wythe Holt, *The New American Labor Law History*, 30 LAB.

Answering this question not only deepens our understanding of a significant body of law, but also offers an excellent case study of how law develops and sheds light on modern legal problems. As to modern issues, first, especially in the many states that still lack public sector labor statutes, key doctrines of the old legal regime still exert considerable force.[7] Second, recent constitutional litigation has revived doctrinal issues that never went away in public employment: limits on the delegation of government power and federalism. While federal courts abandoned non-delegation doctrine from the New Deal until recently, it has always been a live issue in state court public sector labor cases.[8] Federalism, too, has enjoyed renewed judicial and scholarly interest.[9] Many of these cases involve the application of employment laws to public employees.[10] But federalism has always been central to public sector law. It helps explain why the National Labor Relations Act could not have covered public employees and why public sector unions today still have only limited statutory rights in only some areas of the country. Related issues

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HIST. 275 (1989), and Joseph Slater, *The Rise of Master-Servant and the Fall of Master Narrative: A Review of Labor Law in America*, 15 BERKELEY J. EMP. & LAB. L. 141 (1994) (book review) [hereinafter Slater, *The Rise of Master-Servant*].

[7] *See, e.g.*, James Westbrook, *The Use of the Nondelegation Doctrine in Public Sector Labor Law: Lessons from Cases That Have Perpetuated an Anachronism*, 30 ST. LOUIS U. L.J. 331 (1986).

[8] As to the recent revival of non-delegation doctrine, see Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); and Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L. REV. 941 (2000). For its persistence in public sector labor law, see *infra* Part I.B.2.

[9] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (stating that under federalist principles, Congress lacked authority to enact civil remedy portion of Violence Against Women Act); Printz v. United States, 521 U.S. 898 (1997) (holding the same regarding portions of the Brady Handgun Violence Prevention Act); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (placing limits on Congressional power to abrogate states' Eleventh Amendment immunity from suit).

[10] *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (holding states immune from most private suits under the Americans with Disabilities Act); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); (holding the same for the Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706 (1999) (holding the same for the Fair Labor Standards Act); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000) (holding the same for the Family and Medical Leave Act). *See generally* Ana Maria Merico-Stephens, *Of Maine's Sovereignty, Alden's Federalism, and the Myth of Absolute Principles: The Newest Oldest Question of Constitutional Law*, 33 U.C. DAVIS L. REV. 325 (2000); Carlos Manuel Vazquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000).

of the division of power within individual states help explain why, in the absence of statutes, courts limited the rights of these unions so greatly.

Further, and central to this Article, the history of public sector labor law provides an illuminating example of why law develops as it does. Private sector labor law has long been a source of raw materials in such inquiries,[11] but the public sector raises two fundamental questions these studies do not answer. First, why did judges continue to deny to public sector unions the most basic labor rights for so long after the NLRA? Second, why did statutory protections not even begin to cover parts of the public sector in America until decades after the NLRA and after other, comparable countries had provided much greater protections for government workers?[12] Recent scholarship has developed new and sophisticated tools for answering such questions, i.e., for understanding causation in the evolution of legal doctrine. Yet the very wealth of disparate ideas, and understandable caution about oversimplification, has too often led to accounts of causation which leave the actual reasons for legal developments too vague or cluttered with factors to be satisfying.[13] As Morton Horwitz ruefully asked in his most recent volume on legal history, "[H]ow does one *explain* anything objectively in a world of complex, multiple causation?"[14]

This Article provides an example of such an explanation by critically examining the history of public sector labor law in the first half of the twentieth century. It shows that this body of law can be understood by synthesizing some of the most important insights of new and old schools of legal historiography: the legal realist stress on judicial bias against unions; the methodology of law and society scholars in looking beyond federal appellate court decisions; the concern of the legal process school that courts follow neutral rules; the critical theorist insight on the importance of competing "constructions" of terms in legal discourse; and the "new institutionalist" emphasis on the

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[11] *See generally* Slater, *The Rise of Master-Servant*, *supra* note 6; Christopher L. Tomlins, *The Heavy Burden of the State: Revisiting the History of Labor Law in the Interwar Period*, 23 SEATTLE U. L. REV. 605, 605-06 (2000).

[12] As to other countries, see *infra* Part III.B.2.

[13] *See infra* Part I. For an earlier discussion of causation in legal history, see Slater, *The Rise of Master-Servant*, *supra* note 6.

[14] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY v-viii (1992).

importance of state structures and capacity. This Article, therefore, argues for a model of causation in legal history which synthesizes insights from different and sometimes competing historiographical schools, a model which neither depends entirely on one simplistic causal factor nor involves so many considerations as to be incoherent.

Part I briefly shows that causation has been an increasingly difficult problem for legal historians. Part II parses judicial opinions in public sector labor cases, analyzing the individual factors driving these cases, contrasting private sector law, and pointing out the continuing relevance of some old doctrines of public sector law. It shows that different schools of legal historiography can, together, explain public sector law, and also that this area of law can enhance the insights of the different schools. Part II, Section A shows that, as legal realists argued, courts were often simply hostile to unions generally, and that such hostility included unions of government workers. But since courts continued to endorse broad prohibitions on public sector labor for decades after they had at least grudgingly accepted private sector unions, this section concludes that other factors were at play.

Sections B and C of Part II bring more recent theoretical tools to bear on the public sector. Section B uses a "new institutionalist" approach, investigating the role of state structure in legal developments. It argues that judges promoted a consistent conception of the powers of different arms of state governments that was particularly harmful to labor. Specifically, courts decided that they should defer to highly localized government bodies in labor matters, with the crucial caveat that such local officials did not have the power to "delegate" public authority to private bodies through bargaining or arbitration. Section C shows that, consistent with some critical discourse theory, judicial construction of the term "union" was crucial. Although contemporary unionists contested this judicial construction, renouncing strikes and bargaining in word and deed, courts "knew" that "union" could only mean groups that negotiated with and struck against capitalist bosses. Thus public workers could not be "unions" under statutes granting rights to unions, and no "union" could be permitted in the belly of the government. Part II, Section D demonstrates that all these factors worked together to yield a consistent theme: courts would not force government offi-

cials to deal with "unions" as judges understood that term; in fact, such officials lacked the authority to do so.

Part III discusses the curious absence of statutory protections in the public sector. It shows not only how federalism precluded any national public sector labor statute, but also why no state statutes protected public sector labor through the end of the 1950s. It argues that a fear of strikes, again based on judicial misconstructions, was also central. Part IV concludes with the lessons public sector labor law teaches about causation.

I

CAUSATION: "HOW DOES ONE *EXPLAIN* ANYTHING?"

Questions concerning causation—why and how law develops—are controversial and difficult, but also fundamental to legal scholarship. In broad brush, modern debates began with legal realists, who rejected the classical notion that judicial reasoning was or even could be a science. As to causation, realists often pointed to the political and other biases of judges.[15] The "law and society" approach, identified first with Willard Hurst and later with Lawrence Friedman and Kermit Hall, agreed that politics mattered, but it looked beyond the "mandarin texts" of appellate court decisions on which the realists relied. Explaining legal developments meant examining the records of administrative bodies, private litigants, and broad social trends.[16] For Hurst, the causation question centered on "the relationship of human agency and social structure."[17] Lawrence Friedman insisted that what is "crucial is the relationship of law to 'general values and process'. . . ."[18] The more doctrinally-based legal process school emerged in the 1950s, based on the works of Herbert Wechsler, Henry Hart, Jr., and Albert Sacks. It shifted the focus

[15] For a thorough study of the realists and a provocative critique of that study, see HORWITZ, *supra* note 14, at 169-246, and Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019 (1993) (reviewing HORWITZ, *supra* note 14) [hereinafter Ernst, *The Critical Tradition*].

[16] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed., 1985); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY (1989); JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1964).

[17] William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 L. & HIST. REV. 97, 104 (2000).

[18] Lawrence Friedman, *The State of American Legal History*, 17 HIST. TCHR. 103, 106 (1983).

back to traditional legal texts and internal, "neutral" rules in explaining how judges should and did operate.[19] More recently, structuralist and then post-structuralist Critical Legal Studies (CLS)[20] scholars and others have laudably engaged in serious interdisciplinary efforts to borrow or adapt new theoretical and methodological approaches used by historians, political scientists, and linguists.[21] In so doing, they encountered a theoretical storm in the humanities over issues of causation that is still very much alive.[22]

As legal historians became more facile with these diverse and complex approaches they increasingly found older causal models wanting. Christopher Tomlins and Michael Grossberg pilloried the metaphor, which law and society scholars Friedman and Hall used, that law was a "mirror" of society, arguing that this image was unhelpful in sorting out causation.[23] Critical legal scholars also deviated from traditional norms of progressive or left-lean-

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[19] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *see* Ernst, *The Critical Tradition*, *supra* note 15, at 1025. For more recent explications of this method, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995), and William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994). For a critique of this approach, see Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J. L. REFORM 561 (1988).

[20] Robert Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, *in* THE HISTORIC TURN IN THE HUMAN SCIENCES 361, 361-62 (Terrence McDonald ed., 1996); William W. Fisher, III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1073-1077 (1997).

[21] Each of the schools discussed herein can be subdivided further into factions—some opposing each other—and different taxonomies could be used. For example, Fisher, *supra* note 20, at 1065, describes four distinct schools among adherents of linguistic analysis alone: structuralism, contextualism, textualism, and new historicism. Daniel R. Ernst, *Law and American Political Development, 1877-1938*, 26 REVS. IN AM. HIST. 205, 208-09 (1998), identifies two distinct waves of new institutionalists. Robert N. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984), sets out a multi-tiered categorization of differing critical approaches. For this Article, identifying some of the central beliefs in each school is sufficient.

[22] *See, e.g.*, Arthur Rotter, *Saidism Without Said*, 105 J. OF AM. HIST. 1205, 1208 (2000) ("Postmodernists like Michael Foucault deny the linearity of the historical process; thus 'causation should be pitched out,'" but "[f]or better or worse, most historians still believe that they are engaged in a search for reasons why things happened as they did.").

[23] Michael Grossberg, *Legal History and Social Science: Friedman's History of American Law, the Second Time Around*, 13 L. & SOC. INQUIRY 359, 360, 366 (1998); Christopher L. Tomlins, *A Mirror Crack'd? The Rule of Law in American History: The Magic Mirror: Law in American History*, 32 WM. & MARY L. REV. 353 (1989) (book review).

ing scholarship by criticizing "socio-economic" models of causation.[24] Instead, two prominent but quite different trends have emerged: a stress on the linguistic construction of terms and a focus on the independent significance of state structure.[25]

While modern scholarship has provided exciting new approaches and strong critiques of simplistic and overly-deterministic models, it has been less successful at replacing them with convincing alternative theories of how law develops. Some critical scholars, true to the most extreme implications of the post-modern critique of structure and narrative, disavow the very idea of causal explanations.[26] Most legal historians prefer the formulation that law is "relatively autonomous" from broader societal forces. But not only is the degree of autonomy at issue, the variety of forces which scholars argue affects law is wider than ever. This in turn raises questions of methodology.[27] Disputes continue between internalists, who point to doctrinal, intellectual causes in explaining legal changes, and externalists, who stress political or cultural reasons.[28]

So, formulations regarding causation remain problematic. Morton Horwitz's first volume on legal history suggests that "[l]aw is autonomous to the extent that ideas are autonomous."[29] Christopher Tomlins questions any neat distinction between

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[24] For this trend in critical legal studies, see generally Gordon, *supra* note 21; John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); and Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987). For an argument from outside the CLS camp that class bias was not the main motivating factor in early twentieth century labor cases, see DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995).

[25] For overviews, see Ernst, *supra* note 21, at 205-06, and Fisher, *supra* note 20, at 1066-67.

[26] Fisher, *supra* note 20, at 1089, notes that legal historians influenced by Michael Foucault have been largely uninterested in causation. He quotes Duncan Kennedy's assertion that this approach "means ignoring the question of what brings a legal consciousness into being, what causes it to change." Ernst, *supra* note 21, at 206 (referring to scholars who critique the "implicit social theory of a historical narrative").

[27] Fisher, *supra* note 20, at 1067, observes that "disputes over method are sharper now than ever" even amongst scholars employing the methods of the "linguistic turn."

[28] *See* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2166 (1999) (describing debates over changes in constitutional doctrine during the New Deal).

[29] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at xiii (1977).

"law" and "society,"[30] but also calls for a "greater analytic appreciation of the law's autonomy."[31] Tomlins and Andrew King characterize "legal forms" as "concepts" which have "multiple avenues of realization but in practice [are] conventionally realized in official discourse in ways that most accord with, or least depart from, prevailing structures of power."[32] Daniel Ernst allows that "the historical contingency of common-sense notions of causation has been demonstrated."[33] Robert Gordon agrees that legal rules are "contingent products of time and circumstances: contested in their content, multiple in their forms, variable across time, place, and social group in the ways they are put to practical use."[34]

These observations are all true, but scholars should try to go as far as they can to identify specific structures, causes and effects, and to explain why certain contingent results actually occurred. This history of public sector labor law cries out for a melding of old and new techniques, and studying this field casts a rewarding new light on recent and older approaches.

II

Courts and Public Sector Unions: Bias, State Structure, and False Constructions

Courts settled public sector labor law for a remarkably long time. Since state statutes did not even begin to supplant judicial rules until at least the 1960s, courts controlled labor relations in government employment for nearly thirty years after the NLRA set federal statutory rules for private employment. This means, first, that a study of public sector law must interpret and explain judicial opinions. It also means that these cases provide a rich source of materials for studying judicial decision-making. In analyzing these cases, it is instructive to compare private sector law. Prior to the 1930s, judges restricted the actions of private sector unions through common law conspiracy and tort doctrines, antitrust statutes, and the constitutional "right to contract." Still,

[30] *Id.* at 358-62. *See* Gordon, *supra* note 21, at 124 (concluding that the "whole point" of the CLS critique "is that the 'economy' isn't something separate from the 'law,' which reacts on law and is in turn reacted upon by it; the idea of their separation is a hallucinatory effect of the liberal reification of 'state' and 'market'").

[31] Tomlins, *supra* note 23, at 362.

[32] Tomlins & King, Labor Law in America, *supra* note 6, at 13.

[33] Ernst, *supra* note 21, at 206.

[34] Gordon, *supra* note 20, at 359.

private sector unions had managed to carve out spheres of operation in which they could organize, bargain, and strike well before the 1930s.[35] In the public sector, however, before the 1930s and through at least the late 1950s, judges across the nation were unwilling to permit government employees any rights to bargain or to strike, and courts routinely upheld bars on their organizing. Causation in public sector labor law is thus an especially intriguing question, because the law was so remarkably consistent over time and geographic area, and because it cannot be explained simply by reference to the factors driving private sector law. In the public sector, three themes recur and blend: hostility toward unions, concerns about state structure, and judicial misconstructions of the concept of a "union."

A. Bias Against Labor: Realism and its Revisions as A Partial Explanation

1. Bias as a Factor: Union Members as Disloyal and Inefficient

The claim by legal realists that judges in the progressive era were simply biased against unions has long been an influential critique of both the development of labor law specifically and of how and why judges make decisions generally. From the many decisions invalidating wage and hour statutes and bans on "yellow dog" contracts, to the thousands of injunctions issued against unions for strikes or boycotts, it seemed impossible to understand court behavior in the late nineteenth and early twentieth centuries without assuming that judges were imposing their own political bias in favor of employers, instead of using dispassionate and objective legal analysis.[36] Labor historians have generally at least implicitly accepted this view.[37] Modern legal scholars in the realist tradition explain these decisions as representing a "lag" period in which the law failed to deal with the realities of large scale capitalism and its effects, or a period in which corporate

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[35] *See* MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA 1-106 (1994); ERNST, *supra* note 24; TOMLINS, THE STATE AND THE UNIONS, *supra* note 6.

[36] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 82-133 (1930); Louis Brandeis, *The Living Law*, 10 U. ILL. L. REV. 463 (1916); Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916); Walter Nelles, *A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 YALE L.J. 507 (1931).

[37] *See* Slater, *The Rise of Master-Servant*, *supra* note 6, at 146 (quoting the assertion by labor historian Melvyn Dubofsky that labor law has always related "to shifts in the balance of power between labor and capital").

interests temporarily captured the legal system.[38]

In public sector labor cases, judges were quick to apply anti-union doctrines and rhetoric taken from private sector decisions. The constitutional "freedom of contract" that *Coppage v. Kansas*[39] and other cases used to strike down statutes outlawing yellow dog contracts (barring employees from joining or retaining membership in labor unions) was imported into public sector cases simply as a matter of policy. The actual holdings of the private sector rulings were not precedent on point, because no statutory bans on yellow dog contracts in the public sector existed. Nevertheless, in 1915, *Frederick v. Owens*[40] cited *Coppage* and related precedent to uphold a ban on Cleveland public school teachers joining the American Federation of Teachers (AFT). "We heartily concur in these decisions," *Frederick* emphasized. Freedom of contract "should surely apply with equal force to public officials."[41] In 1920, *McNatt v. Lawther*[42] upheld a ban on Dallas firefighters joining the International Association of Fire Fighters (IAFF), quoting *Coppage*: "[I]f freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership . . . is consistent with the satisfactory performance of the duties of employment."[43] Indeed, "any restrictions upon the freedom of the employer in such matter . . . would probably be held unconstitutional."[44] Courts cited private sector yellow dog cases until the Norris-LaGuardia Act of 1932[45] invalidated them.[46] Well after the Norris-LaGuardia Act, however, courts continued

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[38] Gordon, *supra* note 20, at 348-49.

[39] 236 U.S. 1 (1915).

[40] 35 Ohio C.C. 538 (1915).

[41] *Frederick*, 35 Ohio C.C. at 549.

[42] 223 S.W. 503, 505 (Tex. Civ. App. 1920).

[43] *Id.*

[44] *Id.*

[45] 29 U.S.C. §§ 101-115 (2000).

[46] *See, e.g.*, Seattle High Sch. Teachers Chapter 200 v. Sharples, 293 P. 994 (Wash. 1930) (citing *Coppage* in rejecting a challenge to yellow dog contracts for teachers in Seattle public schools). For a summary of *Sharples* and the political battles underlying it, see Joseph Slater, *Petting the Infamous Yellow Dog: The Seattle High School Teachers Union and the State, 1928-1931*, 23 SEATTLE U. L. REV. 485 (2000) [hereinafter Slater, *Petting the Infamous Yellow Dog*]; for a more detailed study, see Joseph Slater, Down by Law: Public Sector Unions and the State in America, World War I to World War II, ch. 3 (1998) (Ph.D. dissertation, Georgetown University) (available through UMI) [hereinafter Slater, Down by Law].

to uphold yellow dog contracts in the public sector.[47]

Frequently, courts equated union membership with disloyalty and inefficiency. In 1920, *San Antonio Firefighters' Local Union No. 84 v. Bell* upheld the power of local authorities to fire members of the IAFF, noting that the union had not specifically pled that union membership would not affect firefighters' loyalty or subject them to orders that would interfere with public service.[48] In 1917, *People ex rel. Fursman v. City of Chicago* sustained a rule in which the Chicago Board of Education declared it would not hire members of the AFT, because "[m]embership by teachers in labor unions . . . is inimical to proper discipline, prejudicial to the efficiency of the teaching force and detrimental to the welfare of the public. . . ."[49] In 1923, *Hutchinson v. Magee*, approving a ban on the IAFF, quoted the assertion of the Pittsburgh Director of Public Safety that union membership was "in the very nature of things, inconsistent with . . . discipline, . . . subversive of the public service and detrimental to the general welfare."[50]

One judge even took the unusual step of noting that public sector labor cases had incorporated negative views judges held of unions. In *CIO v. City of Dallas*, the Texas Supreme Court upheld a yellow dog rule for city employees, citing cases from eight states in support of the decision.[51] On rehearing, Chief Justice Bond concurred but added that he did not join the court's "approval of the authorities from other jurisdictions, evidencing judicial prejudice against the Unions generally."[52]

Whether "freedom of contract" and related ideas that courts used in labor and employment cases reflected an explicitly conscious animosity toward labor can be debated, as can the significance of the judges' conscious understanding of their own motivations. Robert Gordon summarizes recent works that re-

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[47] *See, e.g.*, CIO v. City of Dallas, 198 S.W.2d 143 (Tex. Ct. Civ. App. 1946); City of Jackson v. McLeod, 24 So.2d 319 (Miss. 1946), *cert. denied*, 328 U.S. 863 (1946).

[48] 223 S.W. 506, 511 (Tex. Ct. Civ. App. 1920).

[49] 116 N.E. 158 (Ill. 1917).

[50] 122 A. 234, 235 (Pa. 1923).

[51] 198 S.W.2d at 146 (citing *Sharples*, 293 P. 994); Perez v. Bd. of Police Comm'r, 178 P.2d 537 (Cal. App. 1947); Fursman v. City of Chicago, 116 N.E. 158 (Ill. 1917); Fraternal Order of Firemen v. Harris, 10 N.W.2d 310 (Mich. 1943), *cert. denied*, 321 U.S. 784 (1944); City of Jackson v. McLeod, 24 So.2d 319 (Miss. 1946), *cert. denied*, 328 U.S. 863 (1946); Frederick v. Owens, 35 Ohio C.C. 538 (1915); Hutchinson v. Magee, 122 A. 234 (Pa. 1923); Carter v. Thompson, 180 S.E. 410 (Va. 1935).

[52] *CIO*, 198 S.W.2d at 149.

vise the realist interpretation, suggesting that judges in this era married Jacksonian, Free Soil, and anti-slavery ideology. In judicial minds, this combination led to the belief that some types of economic pressures (e.g. labor boycotts) were intolerable and others, such as employers' power to fire at-will, were "simply natural facts about the world."[53] Whatever the motivation, up to the mid-1930s courts frequently struck down laws that provided rights to workers in the private sector and held many actions by unions to be illegal.[54] Judges who decided public sector labor cases were part of this era and thus part of a mindset that generally did not look kindly on organized labor.[55]

2. *Not Bias Alone: Outside Government "Their Merits are Fully Conceded"*

Crucially, however, well beyond the "*Lochner* era" and even

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[53] Gordon, *supra* note 20, at 360. ERNST, *supra* note 24, argues that labor law decisions are better understood as having been part of a world view based on the social and economic values of the Victorian era, which emphasized individualism, proprietary capitalism, and a skepticism of emerging interest group pluralism. Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20 (1984), stresses the importance of concepts of "freedom," especially regarding work, in the context of the history of slavery. Slater, *The Rise of Master-Servant*, *supra* note 6, at 168-71, suggests that a theory of class-based ideology helps explain labor cases in this era. Of course, unionists and progressives often had rather different visions of freedom and liberty as applied to the workplace.

[54] Melvyn Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. OF AM. HIST. 63 (1985), claims that state court decisions on labor and employment law were not as uniformly bad as progressives portrayed them. On the other hand, for extensive lists of injunction, conspiracy, and other cases decided against unions, see WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37-58 (1991). On the Supreme Court level, workers and unions certainly did not fare well. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (finding Federal Coal Board rules, including hours cap for miners, unconstitutional); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding D.C. minimum wage laws for women were unconstitutional); Morehead v. New York *ex. rel.* Tipaldo, 298 U.S. 587 (1936) (holding New York minimum wage laws for women were unconstitutional); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (finding federal tax on child labor unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (finding Federal Child Labor Act unconstitutional); Coppage v. Kansas, 236 U.S. 1 (1915) (finding laws prohibiting yellow dog contracts unconstitutional); Lowe v. Lawlor, 208 U.S. 274 (1908) (finding individual workers engaged in a nonviolent boycott are liable for conspiracy in restraint of trade under the Sherman Act); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905) (holding state law capping hours for bakers violates liberty of contract).

[55] For negative portrayals of labor by judges in this era, see Diane Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 BUFF. L. REV. 3 (1989).

the New Deal, public sector decisions often took their tone and text from early private sector cases that portrayed unions in an unflattering light. The opinion in *CIO v. City of Dallas* was one of several to quote at length the extremely hostile view of *Railway Mail Ass'n v. Murphy*: "To tolerate or recognize any combination of Civil Service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded."[56] *Murphy* was decided in 1943 and *CIO v. City of Dallas* in 1946, by which time private sector unions had won a considerable amount of acceptance and respectability. The years immediately after World War II saw some increased concerns over union power. But not even the rhetoric from the Republican Congress that passed the Taft-Hartley Act of 1947[57] matched the consistent judicial denunciations of public sector unions. Therefore, whatever prompted judicial skepticism about private sector unions in the Progressive Era or thereafter cannot by itself explain the extent to which courts continued to be horrified by public sector unions after World War II.

Indeed, well before and well after the New Deal, courts imposed greater restrictions on unions in the public sector than those in the private. Before the 1930s, courts had tolerated bargaining and even some forms of strikes.[58] After the NLRA was passed, judges generally made their peace with private sector unions and acknowledged the legitimacy of private sector labor and employment law.[59] In the public sector, without statutory gui-

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[56] 198 S.W.2d 143, 145 (Tex. Ct. Civ. App. 1946) (quoting Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943)). Although *Murphy* was reversed on other grounds, judges in other public sector cases continued to quote it approvingly as late as 1966. *See, e.g.*, Weinstein v. New York City Transit Auth., 267 N.Y.S. 2d 111, 124 (Sup. Ct. 1966).

[57] Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-197 (2000). This Act added restrictions on union activities to the original NLRA, most notably by adding a number of union unfair labor practices ("ULPs"). The original NLRA contained only employer ULPs.

[58] *See* DUBOFSKY, *supra* note 35; TOMLINS, THE STATE AND THE UNIONS, *supra* note 6; ERNST, *supra* note 24.

[59] DUBOFSKY, *supra* note 35, at 162-67, suggests that at least from the late 1930s to the early 1940s, courts were the branch of government most helpful to labor. Strong arguments can be made that the courts did not interpret the NLRA as broadly in favor of union or worker rights as they could or should have. *See, e.g.*, Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness: 1937-41*, 62 MINN. L. REV. 265 (1978); ATLESON, *supra* note 6. But there is no comparison to the skepticism courts showed toward public sector unions.

dance, judges had the discretion to rely on common law rules, state laws on related topics, constitutional doctrines, and their own predilections. From these sources, well *after* the NLRA, judges forged public sector rules that were much less generous than private sector law had been *before* the NLRA. Explanations for this must look beyond the attitudes of the judiciary toward unions in the private sector before the New Deal.

Courts sometimes explicitly distinguished public and private sector labor. In 1946, *City of Jackson v. McLeod*[60] upheld a bar on police affiliating with a union that was part of the American Federation of Labor (AFL). The opinion averred that the case did "not involve in any way the merits or demerits of labor unions when confined to private employment. In their place, outside of governmental agencies, their merits are fully conceded."[61] *CIO v. City of Dallas* stressed that it "should be understood at the beginning that the status of governmental employees, National, State and Municipal, is radically different from that of employees in private business or industry."[62] *Murphy* concluded that "we all recognize the value and the necessity of collective bargaining in industrial and social life, nonetheless, such bargaining is impossible between the Government and its employees, by reason of the very nature of Government itself."[63] What was it about the nature of government that made public sector unions so different?

B. "The Very Nature of Government Itself": The Obstacles of State Structure

Judges made this distinction partly out of concern for the division of state powers, which they couched in terms of the doctrines of deference and delegation. While judges would enforce rules which obligated unwilling private employers to deal with unions, they repeatedly insisted that it was not the role of courts to interfere in the labor relations of other branches of government. First, courts held that legislatures had delegated power over employment matters to subordinate public bodies and officials. Judges, therefore, should defer to their decisions regarding

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[60] 24 So.2d 319 (Miss. 1946), *cert. denied*, 328 U.S. 863 (1946).

[61] *Id.* at 321.

[62] 198 S.W.2d 143, 144 (Tex. Ct. Civ. App. 1946).

[63] Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on other grounds sub nom.* Railway Mail Ass'n v. Corsi, 47 N.Y.S.2d 404 (1944), *aff'd*, 56 N.E.2d 721 (N.Y. 1944), *aff'd*, 326 U.S. 88 (1945).

unions. Second, courts held that public employers could not delegate any power to a private body such as a union. Specifically, delegating to labor the power to bargain or to arbitrators the power to bind governments would violate non-delegation doctrines and, ostensibly, threaten democracy. Judges, therefore, promoted a state structure in which they uniformly deferred to the restrictive rules of public officials, the direct employers of labor, because such power had been delegated to such officials. At the same time, judges refused to allow bargaining or arbitration, on the grounds that this would constitute an improper delegation of power from such officials.

Recognizing such concerns fits well with the recent "new institutionalist" scholarship which is "bringing the state back in" to explanations of causation.[64] State structure and capacity affect, and are not merely affected by, society and groups within it.[65] This model has been applied to the development of private sector law. Surprisingly, though, works that stress the role of the state in labor matters generally ignore the state as an employer of labor.[66] Some studies have shown that the very structure of American federalism, with its myriad layers and exceptionally strong

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[64] Theda Skocpol has been central in new institutionalism, from her essay Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, *in* BRINGING THE STATE BACK IN (Peter B. Evans et al. eds., 1985), to her theoretical approach in THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS (1992). For a critique of this method, see Paul Cammack, *Bringing the State Back In?* 19 BRIT. J. OF POL. SCI. 261 (1989).

[65] *See* Ernst, *supra* note 21, at 206, quoting political scientist Gerald Burk: "[S]tate action and politics are not only relatively autonomous from economic structure but . . . have independent effects on group formation, collective behavior, the content and definition of the interest sectors of society, and economic development."

[66] Skocpol and her critics have debated the reasons the NLRA was passed but do not discuss unions of government workers. *See* Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257 (1989); Theda Skocpol & Kenneth Finegold, *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297 (1990). DUBOFSKY, *supra* note 35, at 197-231, barely mentions public sector unions in a chapter covering the period from 1947 to 1973: this despite the fact that membership in such unions jumped from just over one million in 1960 to over three million in 1976, accounting for more than 80% of total union growth in that period. MARK MAIER, CITY UNIONS: MANAGING DISCONTENT IN NEW YORK CITY 9 (1987). Ira Katznelson, *The 'Bourgeois' Dimension: A Provocation About Institutions, Politics, and the Future of Labor History*, 46 INT'L LAB. & WORKING CLASS HIST. 7 (1994), urges labor scholars to take greater notice of the state and liberal political theory but never mentions public sector unions. David Plotke, *The Wagner Act, Again: Politics and Labor, 1935-37*, 3 STUDIES IN AM. POL. DEVEL. 105 (Karren Orren & Stephen Skowronek eds., 1989), argues that the NLRA and the ensuing political conflicts played a central role in building and

courts, fundamentally affected labor in the private sector.[67] But, although a very few scholars have at least noted that this void should be filled, none have described how state structure played out with an even greater vengeance in the public sector.[68]

1. Judicial Deference

The issue of deference to subordinate state bodies was increasingly important in the early decades of the twentieth century as the role of administrative agencies increased. Before the 1870s, such agencies were relatively unimportant in state government. From the 1880s to the early 1900s, states began forming agencies with at least investigatory powers, such as boards of public health, industrial commissions, and railroad commissions. By the early twentieth century, for example, thirty-two states had bureaus of labor statistics. Such trends continued at both the state and national level. By 1941 the federal government had fifty-one major administrative agencies. Courts had been wrestling with the proper extent of the authority of such agencies since the nineteenth century, famously refusing to enforce regulations imposed on railroads, and a burst of economic regulation by administrative agencies beginning around 1910 prompted another round of controversy on this issue. The power and independence of such agencies nonetheless continued to grow. A comprehensive law setting out the relations between courts, the public, and administrative agencies, the Administrative Procedure Act, would not be passed until 1946. In the meantime, courts had to decide such points for themselves.[69]

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expanding the state without treating the highly political public sector or its exclusion from the NLRA.

[67] FORBATH, *supra* note 54; Richard Oestreicher, *Urban Working-Class Political Behavior and Theories of American Electoral Politics, 1870-1940*, 74 J. OF AM. HIST. 1257 (1988).

[68] PAUL JOHNSTON, SUCCESS WHILE OTHERS FAIL: SOCIAL MOVEMENT UNIONISM AND THE PUBLIC WORKPLACE 24 n.33 (1994). Johnston argues that "we need a theory of the state . . . that includes the world of public work and the social movements of those who toil there." *Id.* at 216-17. One partial exception is STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982), which discusses federal sector unionism. Historians may finally be starting to address this issue. *See* Edna Johnston, Rendering a Permanent Service: Organized Labor and the Federal Civil Service, 1916-32 (forthcoming Ph.D. dissertation, University of Virginia).

[69] *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 410-36 (1950); WILLIAM BROCK, INVESTIGATION AND RESPONSIBILITY: PUBLIC RESPONSIBILITY IN THE UNITED STATES, 1865-1900 (1984); SKOWRONEK, *supra* note 68; Slater, Down by Law, *supra* note 46, at 203-68 (citing FRANK BATES

In public sector labor relations, courts always took a very deferential stand. In 1917, the *Fursman* court noted that the Chicago board of education's ban on teachers joining the AFT was an issue of first impression but opined that it "presents no great difficulties." By statute, the board had the power to employ teachers, so the court would defer to the board in all hiring decisions. It was

> immaterial whether the reason for the refusal to employ . . . is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action.[70]

In the 1920 *San Antonio Firefighters* case,[71] a Texas court denied an injunction the union sought after city commissioners threatened to fire IAFF members. The court held that the commissioners had discretion in removing employees and that it would presume that such actions were lawful absent a showing of bad faith or fraud. The court acknowledged that the mayor had made a campaign promise not to retaliate against the union, but still found no bad faith. A city had the right to determine that union membership rendered its appointees inefficient or untrustworthy. Courts had very limited power in reviewing removals, and here the commissioners had the authority to decide that the "rules of the AFL" were inimical to the interests of the city.[72]

Courts throughout the country employed this rationale for decades. In 1915, in *Frederick v. Owens*, an Ohio court held that a school board had sufficient discretion to impose a yellow dog rule and did not have to give reasons "that are satisfactory to the courts."[73] In 1935, in *Carter v. Thompson*, the Virginia Supreme Court upheld a ban that applied to the IAFF but not to a union that was not affiliated with the AFL. Although an applicable civil service statute required "cause" for discharge, the court held that the city manager could classify union membership as sufficient cause for removal. "He must, of necessity, be vested with a

& OLIVER FIELD, STATE GOVERNMENT 260-75 (1939)); KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 14 (2d ed. 1978).

70 People *ex rel.* Furman v. City of Chicago, 116 N.E. 158, 160 (Ill. 1917). Justice Farmer, concurring, stated that it would be possible that a rule could be so arbitrary, unreasonable, or contrary to public policy as to be void, but that the rule barring the AFT was valid. *Id.* at 161 (Farmer, J., concurring).

71 223 S.W. 506 (Tex. Ct. Civ. App. 1920).

72 *Id.* at 509, 511, 512.

73 Frederick v. Owens, 35 Ohio C.C. 538, 549 (1915).

large measure of discretion . . . ."[74]

Courts also deferred to civil service agencies in cases denying rights to unions. In 1946, *City of Jackson v. McLeod*[75] overturned a unanimous jury verdict that had found the Mississippi city liable for discharging policemen who had joined the American Federation of State, County, and Municipal Employees (AFSCME). The local civil service commission had upheld the removals on grounds of insubordination and "acts tending to injure the public service."[76] The state supreme court ruled that its review was limited to whether the commission's actions were taken in good faith and for cause. If so, courts would have to defer.[77] It was "not competent . . . for the Circuit Court and its jury to convert themselves into an administrative body and to become a civil service commission . . . ."[78]

The deference concern could also be cast as anxiety about the judiciary's capacity to handle these matters: judges worried about being overwhelmed by appeals from the decisions of government employers if they acted as a review board for dismissals from public service. In 1939, *Levine v. Farely*[79] upheld the discharge of a postal worker who had written newspaper articles protesting discrimination against other union members. The Postal Service fired him for bringing the Service into disrepute.[80] Despite the guarantee of the Lloyd-LaFollette Act that federal workers would not be discharged for union activities, the court refused to hear the merits: "[I]nterference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief."[81]

Crucially, such judicial abnegation of any role in restraining anti-union acts by public employers under the rubric of deference doomed union rights because it took place in the context of the divided and diffuse structure of governments within individual states. In effect, courts gave local government bodies, the actual employers of labor, complete discretion to deny unions of

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[74] Carter v. Thompson, 180 S.E. 410, 412 (Va. 1935).

[75] 24 So.2d 319 (Miss. 1946).

[76] *Id.* at 323.

[77] *Id.* at 320.

[78] *Id.* at 321.

[79] 107 F.2d 186 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 662 (1940).

[80] *Id.* at 189; *see* STERLING SPERO, GOVERNMENT AS EMPLOYER 43 (1948).

[81] *Levine*, 107 F.2d at 190 (citing Keim v. United States, 177 U.S. 290, 293 (1900)). For a discussion of the Lloyd-LaFollette Act, see discussion *infra* Part III.A.

their employees any rights. School boards issued yellow dog rules barring membership in the AFT;[82] fire chiefs, police boards, mayors, and heads of municipal departments created rules governing their own workers to which courts would then invariably defer. It is hardly surprising that these employers wrote restrictive rules.[83] It is arguably surprising that courts saw no potential conflict of interest in their authors.

2. *Non-Delegation: Government Power in Private Hands*

Judges used a second concern about state structure to limit the rights of public sector unions. Courts consistently held that collective bargaining, arbitration, and related activities by public sector unions constituted impermissible delegations of governmental power to private parties. While the famous "nondelegation" cases of the New Deal may be remembered for invalidating attempts to shift power from one government body to another, they also found improper attempts to shift government power to private parties. For example, in 1935, *A.L.A. Schechter Poultry Corp. v. United States*[84] invalidated provisions of the National Industrial Recovery Act partly because of an impermissible delegation of power from Congress to the president. But further, and more relevant here, *Schechter* also held that empowering representatives of business, labor, and the public to establish codes of fair dealing for various industries was an improper delegation of legislative functions to private parties.[85] Public sector cases typically relied on this latter branch of the nondelegation doctrine.[86]

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[82] *See, e.g.*, Seattle High Sch. Chapter No. 200 v. Sharples, 293 P. 994 (Wash. 1930).

[83] Specific studies of public sector labor law must therefore follow the methodological approach of law and society scholars in looking beyond "mandarin" legal texts. Local and often relatively minor public officials, agencies, and boards set the rules and effectively the "law" in this area; courts generally merely approved their right to do so.

[84] 295 U.S. 495 (1935).

[85] *Id.*; *see also* Carter v. Carter Coal Co., 198 U.S. 238 (1936) (finding the Bituminous Coal Conservation Act an unconstitutional delegation of government power to private parties). For a detailed treatment of delegation issues in state courts, see DAVIS, ADMINISTRATIVE LAW TREATISE 149-223 (2d ed. 1978), especially pages 193-98 for a discussion of delegation to private parties.

[86] Some secondary sources refer to the delegation problem as a "sovereignty" issue. *See, e.g.*, Kurt Hanslowe, *The Emerging Law of Labor Relations in Public Sector Employment*, *in* LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS 24 (Harry Edwards et al. eds., 4th ed. 1991) (describing bargaining as interfering with sovereign affairs); F.G. Madara, *Union Organization and Activities of Public Employees*, 31 A.L.R. 2d 1142, § 6 (1953). The doctrines are related, as

Notably, although this doctrine was largely abandoned by the U.S. Supreme Court and federal courts after *Schechter*, it recently seems to be making a comeback.[87] In state courts, especially in public sector labor cases, it never went away.[88]

Indeed, judges routinely applied this doctrine to public sector labor well after federal courts had apparently abandoned it and well after the NLRA authorized bargaining and arbitration in the private sector. In 1945, *Mugford v. Mayor and City Council of Baltimore*[89] held that a municipality could not bargain collectively or even agree to a dues check-off provision, because "[c]ity authorities cannot delegate . . . their continuing discretion" over labor relations.[90] In 1946, *Nutter v. City of Santa Monica*[91] overturned a lower court ruling that permitted collective bargaining with city workers, explaining that the authority of public officials "may not be delegated or surrendered to others, since it is public property."[92] *Dicta* in the 1949 case of *City of Cleveland v. Divi-*

Hanslowe's formulation shows: determining the conditions of government employment is a sovereign power which cannot be "given or taken away." Hanslowe, *supra* at 26. Still, the contemporary courts themselves labeled the question as one of delegation. Agreeing that the main point is delegation, not sovereignty, are Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245, 259; MURRAY NESBITT, LABOR RELATIONS IN FEDERAL GOVERNMENT SERVICE 84-85, 89 (1976); and Westbrook, *supra* note 7, at 353.

87 Bressman, *supra* note 8, at 1399, 1435-37, argues that *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999), actually relied on the doctrine prohibiting delegation of governmental powers to private parties in striking down an FCC regulation, even though the Court did not explicitly cite this doctrine. Sunstein, *supra* note 8, at 315, argues that nondelegation doctrine generally "is alive and well." *See, e.g.*, American Trucking Ass'ns v. EPA, 175 F.3d 1027, *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999) (invalidating agency regulations under non-delegation rules).

88 *See, e.g.*, Westbrook, *supra* note 7, at 362 n.183, finding that "the non-delegation doctrine is alive and well in the state courts." Westbrook shows the continuing impact of these rules in modern public sector cases in Missouri and elsewhere, in cases involving regarding arbitration and bargaining. *Id.* at 333-36. For cases in the modern era holding that arbitration constitutes unlawful delegation of public power, see Karen Speiser, *Labor Arbitration in Public Agencies: An Unconstitutional Delegation of Power or the 'Waking of a Sleeping Giant'?* 1993 J. DISP. RESOL. 333, 340-42. For an argument from the modern era that public sector bargaining is an improper delegation of authority, see Sylvester Petro, *Sovereignty and Compulsory Public Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974).

89 44 A.2d 745 (Md. 1945).

90 *Id.* at 747; *see* Westbrook, *supra* note 7, at 354. The language in *Mugford* was cited approvingly by *City of Los Angeles v. Los Angeles Bldg. & Trades Council*, 210 P.2d 305, 312 (Cal. App. 1949).

91 168 P.2d 741 (Cal. App. 1946).

92 *Id.* at 745.

sion 268[93] hinted that completely voluntary participation by a city in labor arbitration might not be an illegal delegation of authority. But the opinion stressed that employers had no legal obligation "to set up this kind of machinery. There is nothing in the law that says that employees may force . . . [a] public employer . . . to enter into any labor contract."[94]

No court ever faced the potential contradiction of whether to defer to a city that had decided to "delegate" authority by bargaining. As *Nutter* observed, it was not "an accepted practice for public bodies to enter into contracts with the employees of publicly owned operations. . . ."[95] A report in 1941 concluded that no city had ever signed a collective bargaining agreement similar to those in private industry, and that "legal opinions . . . are unanimous" that cities did not have the power to do so. A follow-up study in 1947 explained that the majority view was still that labor contracts with cities were "void as a delegation of public power to a private group," although a minority held that an agreement might be legal in certain cases.[96] In fact, a number of cities and municipal departments engaged in informal, limited forms of bargaining, or at least discussions, with their unionized employees.[97] Of course, judges were not likely to hear such cases. When cities chose to negotiate with their employees, no logical plaintiff to challenge the practice existed.[98]

Still, some courts strongly implied that they would not defer even if local governments voluntarily attempted to share power with unions. Here, judges invoked the most fundamental value of state structure: democracy itself. *City of Springfield v. Clouse*,[99] decided in 1947, refused to permit city workers engaged in street cleaning and sewage disposal to bargain. "Under our form of government, public office or employment . . . cannot

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93 90 N.E.2d 711 (Ohio Ct. of Common Pleas 1949).

94 *Id.*; *see, e.g.*, David Shenton, *Compulsory Arbitration in the Public Service*, *in* COLLECTIVE BARGAINING IN THE PUBLIC SERVICE 194 (David Kruger & Charles Schmidt eds., 1969); SPERO, *supra* note 80, at 344, 397.

95 *Nutter*, 168 P.2d at 745.

96 SPERO, *supra* note 80, at 342-43.

97 *See, e.g.*, Slater, Down by Law, *supra* note 46, at 203-68 (discussing informal bargaining done by public sector locals of the Building Service Employees Union and others in the 1930s).

98 But, see *Mugford v. Mayor & City Council of Baltimore*, 44 A.2d 745 (Md. 1945), which did allow taxpayer standing to challenge dues check off for city workers.

99 206 S.W.2d 539 (Mo. 1947). Also, see Westbrook, *supra* note 7, at 337-43, for a discussion of this case.

become a matter of bargaining and contract." This was true because wages and working conditions involved "the exercise of legislative powers."[100] Local officials could not bargain such power away.

This reasoning made the fundamental mistake of conflating bargaining over wages, which often were set by statute, with bargaining over a host of other terms of employment, which were not. For example, *Clouse* wrongly asserted that "working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract."[101] Incorrectly assuming that the text of legislation was dispositive of all or even most aspects of labor relations, the court insisted that laws "must be made by deliberation of the lawmakers and not by bargaining with anyone outside the lawmaking body."[102] Using the same flawed approach, *Murphy* asserted that collective bargaining "has no place in government service" because working conditions were guided by laws that could not be abrogated by agreement.[103] Yet as AFL general counsel Joseph Padway argued, while wages in government service could be covered by statute and therefore not be subject to negotiation, a union should still lawfully be allowed to bargain over other aspects of employment.[104]

Using this defective premise, *Murphy* made the "democracy" point most dramatically. Permitting unions in public employment would "sanction control of governmental functions not by laws but by men. Such policy if followed to its logical conclusion would inevitably lead to chaos, dictators, and annihilation of representative government."[105] *CIO v. City of Dallas* quoted this passage whole.[106] *Murphy* added that "[n]othing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and

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[100] *Clouse*, 206 S.W.2d at 545. This opinion added another layer of the nondelegation doctrine: the state legislature had not delegated to local officials the power to determine the wages and hours of employees of local government. *Id.*

[101] *Id.*

[102] *Id.*

[103] Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on other grounds sub nom.* Railway Mail Ass'n v. Corsi, 47 N.Y.S.2d 404 (1944), *aff'd*, 56 N.E.2d 721 (N.Y. 1944), *aff'd*, 326 U.S. 88 (1945).

[104] CHARLES S. RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 528-29 (1946) (quoting Padway).

[105] *Murphy*, 44 N.Y.S.2d at 609.

[106] 198 S.W.2d 143, 145 (Tex. Ct. Civ. App. 1946).

conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen."[107]

3. *Not State Structure Alone: Neutral Rules?*

a. *The Rules in Other Contexts*

In applying nondelegation and deference rules, judges were, to some extent, simply using "neutral" rules that had arisen partly outside the labor context. As with bias toward unions, however, use of neutral rules alone is not a sufficient causal explanation for public sector labor cases. Murray Nesbitt insists that public sector labor law was "singled out for special application" of the nondelegation rules and that contemporary doctrines could have allowed public employers to negotiate.[108] Courts were not necessarily demonstrably wrong in applying nondelegation rules, but the law in these areas was sufficiently unsettled that courts easily could have justified different results. Thus, courts were, in part, actively promoting specific types of power relations amongst state actors.

Judicial use of delegation and deference doctrines outside the labor context in this era were highly inconsistent, making it difficult to evaluate how "neutral" judges were in labor cases. State court opinions on the subject were so conflicting that Kenneth C. Davis, in a leading treatise on administrative law, concluded dryly that "identifiable principles do not emerge."[109] One review of the literature concluded that "neither federal nor state courts have developed consistent principles for use in deciding when delegations to private parties are valid."[110] Judges also varied widely in the amount of deference they gave to the decisions of administrative agencies. Rulings by state judges on the proper standard were "exceedingly diverse."[111] Yet courts consistently held against public sector unions.

How did labor cases fit into the underlying purposes of the doctrine prohibiting delegation to private parties? A central rationale for this doctrine was to avoid an end-run around democratic procedures by vesting legislative power "in a body

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107 *Murphy*, 44 N.Y.S.2d at 607.

108 NESBITT, *supra* note 86, at 89.

109 DAVIS, *supra* note 85, at 196.

110 Westbrook, *supra* note 7, at 366.

111 KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT 525-27 (3d ed. 1972); KENNETH C. DAVIS, ADMINISTRATIVE LAW 868-69 (1951).

dominated by self-interested groups."[112] Giving private parties legislative powers violates the basic principle that accountable public officials make the law. It also puts regulatory power in the hands of private parties who could regulate themselves or others in a manner that provides the private parties with maximum benefits, without consideration of broader effects.[113] Thus, for example, a state court struck down an attempt by the New York legislature to delegate to a private club the power to exercise licensing functions.[114] A court also found an improper delegation when the California legislature empowered a seven-member board to set minimum prices for dry-cleaning, where six of the members represented private industry.[115]

One could easily distinguish such grants of *complete* discretion to private bodies from collective bargaining in the public sector, which involves compromises between the employer and the union, or from arbitration, which involves enforcing provisions in a collective agreement to which the government employer had already agreed. Judges could have concluded, as they hold today, that arbitrators merely execute the law but do not actually make it.[116] In bargaining, as AFL counsel Padway observed, government officials retain significant discretion.[117] Lee Pressman, general counsel to the CIO, also observed at the time that bargaining involved matters "mutually determined."[118] In the first half of the century, courts rejected such arguments.

Of course, courts did allow governments to enter into contracts with *some* private entities, notably with businesses for goods and services. When the government "comes down from its position of sovereignty and enters the domain of commerce," the Supreme Court held in 1875, "it submits itself to the same laws that govern individuals there."[119] It had long been established that states and cities could form contracts on which private parties could rely.[120] Public officials had to have authorization—ulti-

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[112] FRANK COOPER, 1 STATE ADMINISTRATIVE LAW 84 (1965).

[113] Bressman, *supra* note 8, at 1428.

[114] COOPER, *supra* note 112 (citing Fink v. Cole, 97 N.E.2d 873 (N.Y. 1951)).

[115] State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 254 P.2d 29 (Cal. 1953).

[116] Speiser, *supra* note 88, at 345.

[117] RHYNE, *supra* note 104, at 530.

[118] *Id.* at 540.

[119] Cooke v. United States, 91 U.S. 389, 398 (1875).

[120] United States v. Bekins, 304 U.S. 27 (1938); Louisiana v. Pilsbury, 105 U.S. 278 (1881) (holding city contracts enforceable despite state act to nullify them).

mately from a statute—to thus bind the government. But although broadly worded laws authorizing states to enter into a variety of contracts were common by the 1920s and 1930s,[121] labor cases inconsistently found that statutes gave local officials essentially complete discretion over relations with unions but did not give them authority to contract with them. In 1942, Pressman, general counsel for the CIO, argued in vain that municipalities had the implied power to enter into labor contracts just as they did other contracts.[122] Again, such pleas went unanswered.

b. The Enduring Impotence of Holmes's Constitution

Further suggesting that more than a neutral application of institutional rules motivated courts in public sector labor cases, unions of government workers failed in their attempts to rely on two aspects of the American state that potentially could have favored them: constitutional rights and the "proprietary function" doctrine. Until the late 1960s, judges repeatedly rejected claims that constitutional rights to association, speech, due process, or equal protection trumped bans on labor affiliation in public employment. In so doing, they often cited Justice Oliver Wendell Holmes's maxim in *McAuliffe v. City of New Bedford*, holding that a police officer could be fired for making statements that were within the ambit of free speech. "The petitioner may have a constitutional right to talk politics," Holmes declared, "but he has no constitutional right to be a policeman."[123] Thus, in 1946, the union in *CIO v. City of Dallas* argued that the ban on affiliation violated the employees' First Amendment rights of assembly, speech, press, and petition. The court approvingly quoted Holmes's 1892 decision in reply, adding that "these rights . . . are purely personal and may be waived . . . by voluntarily accepting employment with the City of Dallas. . . . While they have the right to these constitutional privileges and freedoms, they have no constitutional right to remain in the service of the City."[124] Courts relied on *McAuliffe* through the early 1960s.[125]

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[121] Slater, Down by Law, *supra* note 46, at 103 (citing JOHN MCBRIDE ET AL., 1 GOVERNMENT CONTRACTS: LAW, ADMINISTRATION, PROCEDURE §§ 1.10, 1.20, 1.120, 3.50, 3.60 (1984)).

[122] RHYNE, *supra* note 104, at 536 (quoting Pressman).

[123] McAuliffe v. City of New Bedford, 29 N.E. 517 (Mass. 1892). Holmes was then the Chief Justice of the Massachusetts high court.

[124] CIO v. City of Dallas, 198 S.W.2d 143, 146 (Tex. Ct. Civ. App. 1946).

[125] *See, e.g.*, Perez v. Bd. of Police Comm'r, 178 P.2d 537, 544 (Cal. App. 1947);

Since the late 1960s, courts have found not only that public employment constitutes state action sufficient to trigger the Bill of Rights, including the right to association, but also that public employment cannot be conditioned on a full waiver of such rights.[126] This in turn meant that public employment could not be predicated on a promise not to join a union. Thus, in 1969, a court found that a North Carolina law that barred public workers from joining unions violated the First Amendment right of free association.[127] Although unionists often urged this exact argument in the first half of the century, judges invariably dismissed such ideas.[128]

c. Unworkable Public/Private Distinctions

Nor were unions very successful in urging a distinction between the "proprietary" role of government, in which it acted more as a business, and its "traditional" role, where its right to avoid dealing with unions was supreme. Some statutes did give more rights to labor in, for example, publicly owned utilities.[129] As a matter of common law, the proprietary/traditional dichotomy survived in vague forms until 1985, when the Supreme Court denounced it as "unsound in principle and unworkable in

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King v. Priest, 206 S.W.2d 547, 556-57 (Mo. 1947); AFSCME, Local No. 201 (AFL-CIO) v. City of Muskegon, 120 N.W. 2d 197 (Mich. 1963) (upholding bar on union seventy-one years after *McAuliffe*; no constitutional right to work in public service).

[126] *See* Bd. of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972) (holding that Due Process Clause can protect property right in government employment); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (affirming First Amendment rights for public workers); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (holding public employment cannot be predicated on relinquishing right of association).

[127] Atkins v. City of Charlotte, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969). Public workers would be forced to bring similar suits well into the 1970s. *See, e.g.*, Vorbeck v. McNeal, 407 F. Supp. 733, 738 (E.D. Mo. 1976), *aff'd mem.*, 426 U.S. 943 (1976) (holding unconstitutional rule barring police in St. Louis from joining a union).

[128] For example, see *Perez*, 178 P.2d at 649, which found no property right in government employment, and other cases cited herein upholding bans on union membership by public workers. For an example of a state supreme court rejecting a union's argument that a yellow dog rule violated constitutional rights, including those of speech, association, and equal protection, see Slater, *Petting the Infamous Yellow Dog*, *supra* note 46, which discusses the *Sharples* case.

[129] Around 1940, a few states passed laws granting some rights to unions of employees of public utilities. *See, e.g.*, Wash. Rev. Stat. (Rem. Supp. 1940) Title 10, § 8966-5; Mich. Pub. Act No. 176 (1939), §§ 13, 19; Local Union Int'l Bd. of Elec. Workers, Local No. 876, IBEW v. State Labor Mediation Bd., 293 N.W. 809 (Mich. 1940); SPERO, *supra* note 80, at 349-350.

practice."[130] But judges often treated this distinction skeptically, and it rarely benefitted unions. For example, in 1946, *Nutter* repudiated it as judicial legislation without legislative foundation.[131]

Courts also typically resolved the question of what constituted a "government function" against allowing rights for labor. Most famously, in *United States v. United Mine Workers*,[132] decided in 1947, the Supreme Court sustained an action against the United Mine Workers for violating an injunction against striking. The union relied on the Norris-LaGuardia Act, which banned most labor injunctions in the private sector. The Court held that since the mines had been seized by the federal government, the miners were federal employees, and therefore Norris-LaGuardia did not apply.[133] At the same time, judges would analogize private sector workers in positions involving "public safety" to government employees. For example, in 1946, *Beth-El Hospital v. Robbins*[134] enjoined hospital workers from striking, despite a state anti-injunction law. Citing public safety, the court added that the workers "are discharging public functions, at least to the extent that they are performing functions which, in the absence of these agencies, would of necessity be assumed by the state."[135] In sum, no variation of the "private/public" dichotomy involving state actions ever seemed to work in the favor of unions.

C. False Constructions of What a Union Was and Could Be

Public sector labor cases can be explained only by adding a third factor to the considerations of bias and state structure: judges falsely constructed the term "union." The "linguistic turn," originating in the writings of French theorists such as Michael Foucault and Jacques Derrida, asserts that language is central in constructing reality. This approach has been influential in recent studies of labor and labor law.[136] A moderate version

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[130] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (permitting the application of the Fair Labor Standards Act of 1938 to public employees).

[131] Nutter v. City of Santa Monica, 168 P.2d 741, 748 (Cal. App. 1946).

[132] 330 U.S. 258 (1947).

[133] *Id.*; *see* SPERO, *supra* note 80, at 27-28.

[134] 60 N.Y.S.2d 798 (Sup. Ct. 1946).

[135] *Id.* at 800.

[136] For a summary, see Joan W. Scott, *On Language, Gender, and Working-Class History*, 31 INT'L LAB. & WORKING CLASS HIST. 1 (1987). For recent works on labor and employment law using this approach, see EILEEN BORIS, HOME TO WORK:

of this approach reveals that judges in public sector labor cases misconstrued the concept of "union" to exclude organizations of workers performing waged labor for the government. Critical scholars would note that courts rejected a competing construction of these terms offered by labor in word and deed: even though public sector unions had all formally renounced strikes and most were willing to forego traditional collective bargaining, at least over wages,[137] courts insisted on seeing unions as institutions that inevitably bargained and struck. Especially in the aftermath of the infamous Boston police strike of 1919, judges could not imagine giving public workers such rights.[138] Nor could judges believe that statutes that granted rights to "labor organizations" or "unions" could possibly cover public sector unions, even in the face of legislative history that suggested they should. Judicial construction, in turn, had a dispositive effect on the outcome of cases and, therefore, ultimately on the reality of public sector labor relations. Critical scholars would also stress that modern scholars must reach beyond the cramped notions of contemporary judges.[139]

1. Judges Reject Competing Constructions (and Realities)

In forming their construction of unions, judges seemed, at best, blind to relevant events outside their courtrooms. First, public

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MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES (1994), and Victoria Hattam's response in Catherine Fisk, *Still "Learning Something of Legislation": The Judiciary in the History of Labor Law,* 19 L. & SOC. INQUIRY 151 (1994). For a criticism of this method, see BRYAN D. PALMER, DESCENT INTO DISCOURSE: THE REIFICATION OF LANGUAGE AND THE WRITING OF SOCIAL HISTORY (1990).

[137] After the Boston police strike of 1919, the AFL and all its public sector affiliates renounced the right to strike in government employment; the CIO followed suit after its formation in the 1930s. *See* Slater, Down by Law, *supra* note 46, at 70-71. For Padway's explanation of the AFL's position on strikes and bargaining, see RHYNE, *supra* note 104, at 525-32.

[138] For more on the Boston police strike, its causes and its aftermath, see Joseph Slater, *Public Workers: Labor and the Boston Police Strike of 1919*, 38 LAB. HIST. 7 (1996-97) [hereinafter Slater, *Public Workers*].

[139] Even recent scholarship often seems to set government employees apart from "real" unions and workers. A recent article analyzing labor and women appears to dismiss a steep rise in female union membership because it mostly occurred in public sector unions—as if they were not an authentic part of American labor. "Further, even though the percentage of women who are represented by unions relative to men has increased," (from 18.3% in 1960 to 37% in 1992) "the increase appears to be attributable largely to women's disproportionate entry into public sector jobs . . . ." Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L. J. 1903, 1943 (1994).

sector unions in this era, while not as large or prominent as in recent decades, did exist in significant numbers: union density in the public sector began to hold steady at around 10-13% by the late thirties. In 1934, public sector unions represented 9% of the nearly 3,300,000 government workers in the U.S., who in turn constituted 12.7% of all non-agricultural workers in the country.[140] Second, these unions took actions on behalf of their members, from representing employees in civil service proceedings, to lobbying government officials for better laws or working conditions, to electing more sympathetic employers, to providing information to their members and the public.[141] Third, these unions almost never struck. After the Boston police strike of 1919, AFL and later CIO public sector unions renounced the strike weapon, and in fact strikes by public sector unions from 1919 to 1945 were rare, small in scale, and short. But in the courtroom, unionists lacked the power to make this image of unionism real.[142]

Instead, judges clung exclusively to the private sector image of unions, ignoring the ongoing presence of active public sector unions that did not formally bargain or strike and rejecting the sworn statements and binding documents that unions proffered as evidence of their different nature. In 1947, *King v. Priest*[143] upheld a rule banning an AFSCME local that more than eight hundred police officers had joined. The union's charter barred striking and bargaining and stated that the oath that police officers took regarding their duties came before any obligation to the union. Instead of tactics used in the private sector, the charter continued, the local would, "by publicity, direct public attention to conditions that need correcting, . . . seek legislative action, . . . represent individuals in administrative procedure, and prevent discriminatory and arbitrary practices."[144]

The Missouri Supreme Court would have none of it: "[T]he court, of course, *knows what a labor union is* . . . ."[145] Defining the institution, the court took *judicial notice* of the "common knowledge" that "some of the most common methods used by labor unions . . . are strikes, threats to strike, [and] collective bar-

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[140] *See* Slater, Down by Law, *supra* note 46, at 4.
[141] *See id.* at 203-68.
[142] SPERO, *supra* note 80, at 38.
[143] 206 S.W.2d 547 (Mo. 1947).
[144] *Id.* at 553.
[145] *Id.* at 554 (emphasis added).

gaining agreements . . . ."[146] Refusing to accept an alternate model of "union," but without claiming that any AFSCME local had ever attempted to strike or bargain, the court asserted that "all of the rights and powers ordinarily inherent in a labor union would exist actually or potentially" in the local, "regardless of the form of its charter and the present admissions of appellants."[147]

Similarly, *CIO v. City of Dallas* discounted the fact that the union had renounced formal collective bargaining and that its constitution and bylaws barred strikes "or other concerted economic weapons or procedures."[148] The court ruled that the "declaration of the local to abandon the usual procedure pursued by labor unions to accomplish their purposes, is in irreconcilable conflict with the declared purposes and objects of the unions."[149] The decision cited documents from the national CIO, not the public sector local involved, that stated that the CIO was organized to help locals bargain collectively and that such activities "constitute the only effective means possessed by organized labor to accomplish economic security . . . ."[150] The court also quoted President Franklin Roosevelt's statement that collective bargaining "cannot be transplanted into the public service" because of the "very nature and purpose of government" and that strikes in public service could never be allowed.[151]

Even when labor specifically proposed a different, limited, and entirely plausible meaning for "bargaining" in the public sector, judges rejected it, maintaining that the private sector practice defined the term. *Clouse* rebuffed a union's argument that it could engage in some bargaining with a city. The union relied on section 29 of the Missouri Constitution, which provided that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing."[152]

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146 *Id.*

147 *Id.*

148 CIO v. City of Dallas, 198 S.W.2d 143, 148 (Tex. Ct. Civ. App. 1946).

149 *Id.*

150 *Id.* at 148-49.

151 *Id.* at 144-45 (quoting an August 16, 1937 letter from Roosevelt to the President of the National Federation of Federal Employees, Luther Steward). Roosevelt's position on this issue was not clear-cut. He supported laws which allowed limited bargaining in certain New Deal agencies, notably the Tennessee Valley Authority. SPERO, *supra* note 80, at 346, 438-40; NESBITT, *supra* note 86, at 99.

152 MO. CONST. of 1945, art. I, § 29; City of Springfield v. Clouse, 206 S.W.2d 539, 541 (Mo. 1947).

R. T. Wood, the president of the Missouri Federation of Labor and the man who had originally proposed section 29, presented the court with a model of bargaining in the public sector that seemingly avoided the problems that judges had expressed. Wood stipulated that government workers could not bargain over wages and hours, because such matters were controlled by city officials and by statute.[153] Nonetheless, he contended that collective bargaining was applicable to other matters: "classifications, working conditions of all kinds, night work, day work, and a multiplicity of items aside from wages and hours . . . ."[154] Wood urged that "collective bargaining means a good many things"; there were "many types of collective bargaining."[155] When a "representative of the employees of the city sits down at a table and discusses . . . relations between an employee and the city, that is collective bargaining."[156]

The court, however, refused to consider any alternative to the private sector model. "This is confusing collective bargaining with the rights of petition, peaceable assembly and free speech." Section 29 was "intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry."[157] Thus, the court pronounced a tautology that would continue to haunt public sector workers: since only workers in private industry had established collective bargaining rights, laws establishing collective bargaining rights could only apply to the private sector.[158] James Westbrook correctly labels the reasoning of the *Clouse* court the "All-or-Nothing Misunderstanding," and concludes that "Mr. Wood had a better grasp of the issues than did the Missouri Supreme Court."[159]

One lone dissent credited the claims of public sector unions that they would behave differently than private sector unions. In *City of Jackson v. McLeod*,[160] Justice McGehee of the Mississippi Supreme Court would have held that membership in AFSCME was not sufficient cause to discharge police officers under a civil service law. Among other things, the "jury was entitled to find

153 *Clouse*, 206 S.W.2d at 542.
154 *Id.* at 543.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*
159 Westbrook, *supra* note 7, at 338, 342.
160 24 So.2d 319 (Miss. 1946) (McGehee, J., dissenting).

. . . that there is a fundamental difference between [AFSCME] and the labor unions in general." McGehee noted that the union's charter denied policemen the right to strike and that no AFSCME local had ever struck a police department. Further, the union did not advocate negotiating contracts by collective bargaining or the closed shop.[161] McGehee even quoted a statement from former AFL president Samuel Gompers, issued in 1919 in response to the Boston turmoil, that it was the position of the AFL that police would neither strike nor assume any obligation that conflicted with their duty.[162] Yet beyond this single voice, which itself did not come until 1946, judges uniformly refused to accept that an organization of workers could be a "union" without striking or bargaining. In taking this stance, judges not only rejected what unions *said* they would do, but critically they ignored what public sector unions were actually doing.

2. *Statutes Apply Only to* Real *Unions and Workers*

Judicial reliance on the private sector model hurt public sector unions in two distinct ways. First, as shown above, courts refused to believe that organizations of public workers would behave differently than private sector workers. Second, courts held that public employees were not covered by state labor relations acts, even if the law did not explicitly exclude them, because those acts mentioned "bargaining," "striking," or even "business" somewhere in its text. Courts reasoned that such acts were therefore meant only to cover "real" unions that undertook those activities, and therefore no part of the act could apply to public workers. The specific holding of *Murphy* was that the National Association of Railway Postal Clerks (NARPC), at that time a racially exclusive organization, was not a "labor organization" under a New York civil rights statute. The NARPC was not a "labor organization" because part of this civil rights law listed "collective bargaining" as a task of "labor organizations." So, despite having held an AFL charter since 1917, despite being composed of members who were engaged in a common occupation for a common employer, and despite the fact that it did represent its members in employment-related matters, the NARPC was not a "labor organization."[163]

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[161] *Id.* at 327.

[162] *Id.* at 328.

[163] Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on*

Similar logic abounded in decisions that held that laws applying to "unions" or "labor organizations" or even to "employees" did not cover public sector unions. Frequently, these state laws did not, as the NLRA did, explicitly exclude the public sector in coverage provisions or elsewhere. In 1946, *Miami Water Works Local 654 v. City of Miami*[164] held that a statute granting rights for "employees" to organize could only apply to the private sector. The statute in other places discussed strikes and picketing, and such references "are strange and incongruous terms when attempted to be squared with the governmental process as we know it."[165] *CIO v. City of Dallas* refused to find that an ordinance forbidding city workers from joining a union violated a state law generally protecting the right to join unions.[166] The legislature could not have had public employees in mind, the court reasoned, because the preamble to the statute referred to "unions affecting . . . practically every business and industrial enterprise."[167]

Even when legislative history appeared to support the union's position, judges reached the same result. *King v. Priest* held that a state constitutional provision guaranteeing "that employees shall have the right to organize" did not apply to the public sector, even though language limiting the clause to private employment was debated and dropped in drafting the provision.[168] The court reached this conclusion, in part, because the constitution also included a right to bargain, which, the court held, could not apply to public workers.[169]

Courts also constructed "union" to mean an institution that provided countervailing pressure to business. In the public sector, without capitalism and its potential abuses, unions apparently were unnecessary. *Nutter*, holding that a state labor statute was not meant to cover government workers, made this point most explicitly. The "[l]egislature recognized that there has been, and is, oppression of labor in the field of private industry,

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other grounds sub nom. Railway Mail Ass'n v. Corsi, 47 N.Y.S.2d 404 (1944), *aff'd*, 56 N.E.2d 721 (N.Y. 1944), *aff'd*, 326 U.S. 88 (1945).

[164] 26 So.2d 194 (Fla. 1946).

[165] *Id.* at 197.

[166] 198 S.W.2d 143, 144 (Tex. Ct. Civ. App. 1946).

[167] *CIO*, 198 S.W.2d at 147 (emphasis omitted).

[168] 206 S.W.2d 547, 555 (Mo. 1947).

[169] *Id.* at 555-56.

where there has not been freedom of contract."[170] The incentive of personal gain could drive private employers to seek profits at the expense of their employees. So, private sector workers should be allowed to organize to protect themselves. But no evidence existed that this "incentive and its attendant evils are found in public employment."[171] The legislature had "not discerned in public employment the existence of the conflicts between labor and capital that exist in private industry . . . 'altogether different conditions prevail.'"[172] Government officials did "not have the same incentive to oppress the worker . . . ."[173] Public employers echoed this type of objection in their legal arguments. In *Miami Waterworks Local 654*, the city's brief insisted that its officials were not "motivated only by the profit motive . . . the same compelling necessity for private employees to organize does not exist as to public employees."[174]

Such quasi-Marxist analysis might seem surprising from a state appellate court and municipal attorneys. More broadly, public sector unions did not seem to have a place in the contemporary paradigm that justified the NLRA, "industrial pluralism." Industrial pluralism, among other things, granted that private sector workers and their employers had some opposing interests regarding wages, hours, and working conditions. Pluralists proposed that these interests be resolved as much as possible through private acts of self-governance: equalizing bargaining power through unionization, then collective bargaining and private contractual enforcement.[175] It is certainly understandable that the Great Depression and its attendant labor strife would put the practical and theoretical focus on the effects of unrestrained capitalism on labor in the private sector. Still, this approach ignored the fact that large numbers of government workers themselves had long felt sufficiently oppressed to form unions–not just to contest wages, but also over working conditions, dignity, and

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[170] Nutter v. City of Santa Monica, 168 P.2d 741, 745 (Cal. App. 1946) (quoting Mugford v. Mayor and City Council of Baltimore, 44 A.2d 745 (Md. 1946)).

[171] *Id.* at 741.

[172] *Id.*

[173] *Id.*

[174] RHYNE, *supra* note 104, at 318-19.

[175] *See* Ronald W. Schatz, *From Commons to Dunlop: Rethinking the Field and Theory of Industrial Relations*, *in* INDUSTRIAL DEMOCRACY IN AMERICA 87 (Nelson Lichtenstein & Howell Harris eds., 1993); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 622-44 (1992).

some measure of control over the workplace.[176] These unions also had a long tradition of attempting to represent their members and going to court as a result of such attempts. Judges again were unwilling to look at the realities outside their courtrooms.

3. *The Misleading Memory of the Boston Police Strike*

Even had judges thought that public employees needed unions to address workplace problems, the judicial construction of "union" solely along private sector lines meant that judges assumed that public sector unions would act to address these problems in exactly the same ways as private sector unions. This was especially frightening given the legacy of the Boston police strike of 1919. Thus, the consequences of this construction were harsh. In 1920, the court in *McNatt v. Lawther*,[177] upholding a ban on firefighters in Dallas joining the IAFF, referred to the "dire consequences" of the Boston strike. The court suggested that the ban may have been designed "to minimize . . . the probability of some such calamity in the city of Dallas."[178] Such fears were rekindled after less dramatic public sector strikes in 1946. Again, however, these beliefs existed despite the fact that between 1919 and 1946, there were very few public sector strikes and none of any significance.[179]

Still, judges expressed their concerns rather theatrically. The *Murphy* decision, in a case that did not in any way present a factual or legal issue involving strikes, proclaimed that to "admit as true that Government employees have power to halt or check the functions of Government unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous."[180] Strikes against the government were always unjustified and represented "rebellion

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[176] *See* Slater, Down by Law, *supra* note 46.

[177] 223 S.W. 503 (Tex. Civ. App. 1920).

[178] *Id.* at 506.

[179] SPERO, *supra* note 80, at 38. DAVID ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES (1940) has a misleading title. The vast majority of the incidents he catalogs are brief stoppages by workers in the WPA and similar agencies during the New Deal. A leading study concludes that as a result of the Boston strike, after 1919, "[n]o further important work stoppages took place in municipal governments until after World War II." STERLING D. SPERO & JOHN M. CAPOZOLLA, THE URBAN COMMUNITY AND ITS UNIONIZED BUREAUCRACIES: PRESSURE POLITICS IN LOCAL GOVERNMENT LABOR RELATIONS 246-47 (1973).

[180] Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943), *rev'd on other grounds sub nom.* Railway Mail Ass'n v. Corsi, 47 N.Y.S.2d 404 (1944), *aff'd*, 56 N.E.2d 721 (N.Y. 1944), *aff'd*, 326 U.S. 88 (1945).

against constituted authority."[181] The court quoted Roosevelt: "[A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it, is unthinkable and intolerable."[182] *City of Los Angeles v. Los Angeles Building and Trades Council*, decided in 1949, also insisted that strikes by government workers would be "rebellion against constituted authority."[183] *City of Cleveland v. Division 268* similarly labeled such actions "rebellion against government."[184] The judge in that case continued: "The right to strike, if accorded to public employees, I say, is one means of destroying government. And if they destroy government, we have anarchy, we have chaos."[185] He added that a ban on such strikes was "merely expressive of the common law."[186] This was true: a study in 1953 concluded that "in every case that has been reported, the right of public employees to strike is emphatically denied."[187] But such reasoning by courts fundamentally misunderstood the actual nature of public sector unions; such unions, in fact, did not engage in any significant strikes between 1919 and 1946.

Nonetheless, the false constructions of terms such as "union" created a very different reality in the courtroom, which in turn affected the world of public sector unions outside the courts. Public sector workers continued to contest this construction, acting on their beliefs that they were real unionists. They created labor organizations and represented their members, even in a vacuum of legal rights. In modern times, some of their alternate understandings of what their rights were or should be have prevailed in the courts and legislatures. Still, the power of judicial construction was often crippling.

D. Synthesizing the Strands into a Coherent Theme

The factors listed above—bias against labor, concerns for state structure, and false constructions of "union"—did not exist in

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[181] *Id.* at 607-08.
[182] *Id.* at 608.
[183] 210 P.2d 305, 312 (Cal. App. 1949) (quoting *Murphy*, 44 N.Y.S.2d at 608).
[184] 90 N.E.2d 711 (Ohio Ct. of Common Pleas 1949).
[185] *Id.*
[186] *Id.*
[187] SPERO & CAPOZOLLA, *supra* note 179, at 256-57.

isolation from each other. Decisions made twenty-seven years apart by courts in Texas and California show how judges easily combined these three strands of reasoning into a consistent rule. In sum, given the type of organization they perceived unions to be, courts would at minimum not interfere with the decisions of government officials to avoid dealing with them. Two cases, *McNatt v. Lawther* and *Perez v. Board of Police Commissioners* demonstrate how judges synthesized the three factors into a remarkably constant body of law.

1. McNatt v. Lawther

In 1920 the Texas court of appeals in *McNatt* upheld a bar on union affiliation by firefighters. Showing concern for the capacity of state bodies, the court deferred to the local board of commissioners in labor matters. The board could decide what constituted "cause for removal" and court review of board decisions was limited or nonexistent.[188] Demonstrating palpable skepticism toward labor, the court quoted a private sector case for the proposition that "an employer cannot have undivided fidelity, loyalty, and devotion to his interests from an employee who has given to an association right to control his conduct."[189] A "man who is by agreement . . . shackled in his faculties—even his freedom of will—may well be considered less useful or less desirable by some employers than if free and untrammeled."[190] Citing *Coppage*, the court stressed that *all* employers should be able to decide if union membership "is consistent with the satisfactory performance of the duties of employment."[191] Further, the court's construction of "union", specifically the assumption that public sector unions would use all the tactics of private sector unions, bolstered the conclusion. Despite the IAFF's disavowal of strikes, the court explained that the board "may have taken into consideration the effect of the increased probability of strikes by the policemen or firemen" if they were affiliated.[192]

2. Perez v. Board of Police Commissioners

Even after World War II, little had changed. In 1947, *Perez*

[188] McNatt v. Lawther, 223 S.W. 503, 504 (Tex. Ct. Civ. App. 1920).
[189] *Id.* at 505 (quoting State v. Kreutzberg, 90 N.W. 1098 (Wis. 1902)).
[190] *Id.* at 506.
[191] *Id.* at 505 (quoting Coppage v. Kansas, 236 U.S. 1 (1914)).
[192] *Id.* at 506.

upheld a ban on AFSCME membership by the Los Angeles police department.[193] The union claimed that the ban was unreasonable and arbitrary, and thus it exceeded the power of the board of police commissioners to make "necessary and desirable rules and regulations." Moreover, the ban violated the federal and state constitutions: it denied equal protection, free speech, assembly, and petition rights; it was impermissible "class legislation" and a deprivation of property without due process.[194]

Perez rejected these claims, refusing to compel government officials to deal with a union, as the court understood the term. Echoing the biased "disloyalty" charge from an older era of private sector cases, *Perez* approvingly quoted the city's argument that union membership could impair police "independence . . . where controversies exist between employers and employees . . . a divided responsibility would occur."[195] Second, the court rejected any construction of union not based on the private sector model. It slighted the no-strike clause in AFSCME's constitution, insisting that such rules could be amended,[196] even though it cited no example of an AFSCME police union striking or threatening to strike. Third, due to its misperceptions of labor and workplace realities, the court could not comprehend why government workers wanted or needed unions. "Nothing can be gained by comparing public employment with private employment; there can be no analogy in such a comparison."[197] This analysis made deference to another state body an easy solution. Whether union membership related to competency was for the board of police commissioners to decide. It was "not a judicial question." Reasonable rules must be held valid.[198] Given the court's views on unions, it would be unreasonable to force public officials to deal with them.

Finally, the reply of *Perez* to the union's constitutional claims confirmed how little progress public sector labor had made with judges in the first half of the century. In sweeping and dramatic

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193 Perez v. Bd. of Police Comm'r, 178 P.2d 537 (Cal. App. 1947). AFSCME organized several police locals in California in the early 1940s. Opposition caused most to disband. The Los Angeles local was formed in 1943 and banned in 1946. *Id.* at 640; WINSTON CROUCH, ORGANIZED CIVIL SERVANTS 162 (1978).

194 *Perez*, 178 P.2d at 540.

195 *Id.* at 539.

196 *Id.* at 542-43.

197 *Id.* at 543.

198 *Id.* at 541-42.

language, the court indicated that concerns of delegation and democracy could bar *any* involvement by labor in government employment. While the union's argument "sings the praises of the Constitution on the one hand . . . it presages its destruction on the other." Allowing the union to bargain would violate "the power of the people to establish and conduct the government, for it seeks to control governmental processes by indirection . . . . [T]he people have sought no assistance from the labor union . . . ."[199] Allowing affiliation "would be a direct violation of the Constitution": public workers served the people, and there could be "neither alienation nor division of this allegiance if constitutional government is to continue."[200] Indeed, failure to prohibit affiliation "would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants . . . ."[201]

3. *The Remarkable Consistency and Longevity of the Synthesis*

The logic of cases such as *McNatt* and *Perez* determined the outcome of all public sector labor decisions in this era. Some opinions seemed to rely on the special nature of police and fire departments, stating that they were in "a class apart."[202] For example, nearly thirty years after the Boston strike, *King v. Priest* repeated the concern often voiced then that AFL police unions would aid private sector strikers. The court took "judicial notice . . . of the fact that members of one union ordinarily refuse to cross the picket line of another union."[203]

But cases involving public workers who were not involved in "public safety" yielded identical results. The three factors blended together and did not distinguish between types of employees. The AFT was a popular target of yellow dog rules, which judges upheld,[204] and indeed all types of government em-

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199 *Id.* at 545.

200 *Id.*

201 *Id.*

202 *See, e.g.*, Fraternal Order of Police v. Lansing Bd. of Police & Fire Comm'rs, 10 N.W.2d 310, 312 (Mich. 1943) (banning firefighter affiliation); City of Jackson v. McLeod, 24 So.2d 319 (Miss. 1946) (banning police affiliation); Carter v. Thompson, 180 S.E. 410, 412 (Va. 1935) (banning firefighters).

203 King v. Priest, 206 S.W.2d 547, 554 (Mo. 1947). For evidence that this was a major issue surrounding the Boston police strike, see Slater, *Public Workers*, *supra* note 138, at 18-20.

204 *See, e.g.*, Seattle High Sch. Teachers Chapter No. 200 v. Sharples, 293 P. 994 (Wash. 1930); Frederick v. Owens, 35 Ohio C.C. 538, 549 (1916).

ployees were, in various times and places, barred from union membership and otherwise restricted by regulations and courts.[205] Fundamentally, no court in this period struck down a yellow dog rule aimed at public workers or allowed them to strike or bargain. Well past World War II, courts uniformly upheld whatever bans on public sector unions local authorities thought to pass. They enforced yellow dog rules through the mid-1950s. Only in the late 1960s did courts generally begin to find constitutional infirmities in such rules.[206]

III

THE DOG THAT DIDN'T BARK IN THE NIGHT: FEDERALISM, FEAR, AND THE LACK OF STATUTORY PROTECTIONS

The next logical question is, why was this area left to judges for so long? Why did public sector unions not even begin to win some statutory protections in some states until decades after the NLRA had given rights to private sector unions and other western democracies had given much greater rights to public sector unions?[207] The absence of beneficial laws was clearly important.[208] Yet while statutory law set wages and hours for govern-

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[205] *See, e.g.*, Nutter v. City of Santa Monica, 168 P.2d 741 (Cal. App. 1946) (banning public bus drivers from joining unions); Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194 (Fla. 1946) (holding the same for public utility workers); Mugford v. Mayor and City Council of Baltimore, 44 A.2d 745 (Md. 1946) (banning street cleaners afiliations); City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. 1947) (banning city workers from joining unions); City of Cleveland v. Div. 268, 90 N.E.2d 711 (Ohio Ct. of Common Pleas 1949) (banning public transportation workers from joining unions); CIO v. City of Dallas, 198 S.W.2d 143 (Tex. Ct. Civ. App. 1946) (banning city workers afiliations); Slater, Down by Law, *supra* note 46, at ch. 4 (banning janitors in public buildings from joining unions).

[206] *Compare* Gov't & Civic Employees Organizing Comm., CIO v. Windsor, 78 So.2d 646 (Ala. 1955) (upholding law prohibiting state employees from joining unions) *with* McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1967) (declaring ban on AFT in Cook County schools unconstitutional). *See infra* Part II.B.3.b; Paul G. Reiter, *Right of Public Employees to Form or Join a Labor Organization Affiliated with a Federation of Trade Unions or Which Includes Private Employees*, 40 A.L.R. 3D 728, §3 (1995). Ironically, one of the first cases to invalidate a rule barring public sector unions did so on the grounds that it violated the state's "right to work" law. Potts v. Hay, 318 S.W.2d 826 (Ark. 1958). Such laws prohibited discrimination based on union membership or lack thereof, aiming to protect non-union workers.

[207] For the latter point, see *infra* Part III.B.2.

[208] The instrumental effect of the absence of statutory protections was extremely important. By enforcing bans on union membership, and by greatly limiting the activities of public sector unions, courts kept the size of these unions artificially low; this, in turn, ensured that they had relatively little political power. This, in turn,

ment employees, and civil service rules sometimes provided rights to individual workers, neither federal nor state law gave public sector unions institutional rights. Not only were such unions excluded from the coverage of the NLRA, but state statutes, passed soon after World War II, did little beyond formally barring public sector unions from striking.

Just as one theoretical tool is insufficient to understand judicial holdings decisions, the absence of statutes also can be explained only by understanding how bias, state structure, and false constructions combined. The long and difficult battles required to pass the NLRA show the power of anti-union groups and ideology generally.[209] But why were public workers not included in the NLRA or in state labor relations laws? First, federalism and the constitutional limits of Congressional power over the states greatly limited the opportunities for a national labor statute covering employees of states and local governments. Second, memories of the traumatic Boston police strike of 1919, unique though it was, reinforced the idea that public sector unions would inevitably act like private sector labor; this image helped prevent passage of beneficial state and local statutes. Thus bias, false constructions, and state structure ensured their unions would receive no institutional protections.[210]

A. Laws, but Not Labor Relations Laws

Unions of government workers did help pass laws in the nineteenth and early twentieth centuries, but these generally were limited to wages and hours.[211] The lone statute that granted any institutional rights to public sector unions was the Lloyd-LaFollette Act of 1912, and this was limited to employees of the fed-

affected the size, power, and arguably the nature of the American labor movement. For more on this argument, see Slater, Down by Law, *supra* note 46.

[209] *See, e.g.*, DUBOFSKY, *supra* note 35, at chs. 1, 2, 4, and 5.

[210] Since this section implicitly suggests that NLRA-style statutory protections would have been good for public sector unions, it should briefly acknowledge the large body of literature that argues that the NLRA, or at least interpretations of it, has been in some significant ways bad for private sector labor. *See, e.g.*, ATLESON, *supra* note 6; TOMLINS, THE STATE AND THE UNIONS, *supra* note 6; Klare, *supra* note 59; Stone, *supra* note 6. Regrettably none of these works address public sector unions or law. It seems highly unlikely, however, that any of these authors would claim that a legal regime as restrictive as that in government employment would have been desirable or preferable to a regime that granted at least some basic NLRA-style rights.

[211] The federal service alone featured many laws setting pay. *See* SPERO, *supra* note 80, at 71, 81-91, 383, 430-31; NESBITT, *supra* note 86, at 23, 91-94.

eral government: because of the federalist structure of the American state, a labor law covering the federal government did not extend to state and local governments.[212] Practically speaking, Lloyd-LaFollette gave federal sector unions the right to exist, petition Congress, and little else.[213] Unions in state and local government lacked even this minimal form of statutory protection.

Civil service laws sometimes offered some rights to individual workers, but state structure and bias assured that these laws would not protect unions. Civil service rules were designed to protect merit principles: public workers should be hired, fired, promoted, or demoted because of their abilities, not as favors or punishments by political machine bosses. By 1944 nineteen states had adopted civil service systems, as had hundreds of cities.[214] Unions fought for these laws, and used civil service procedures and hearings to defend their members.[215] Still, civil service rules did not provide institutional rights for unions. Even though proponents and opponents of these rules were fighting about how the state would be structured through its employment prac-

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[212] In the first half of the century, the only federal law that affected the rights of state and local workers as workers was the Hatch Act of 1939, 18 U.S.C. § 61(h), which restricted the political activities of public employees. This Act, as amended in 1940, applied not only to most federal executive branch employees (and their families) but also to thousands of workers in state and local government offices that received federal funds. It barred such workers from using "official authority or influence" in elections and from taking "any active part in political campaigns." Discharge was mandatory for violations. SPERO, *supra* note 80, at 45, 47, 49, 58. A CIO union challenged the constitutionality of the Hatch Act, but the Supreme Court upheld it in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947).

[213] Lloyd-LaFollette Act, 37 Stat. 555 (1912). This Act reversed Theodore Roosevelt's "gag order" of 1902, which had barred federal employees from influencing legislation on their own behalf "through associations." The Act stated that federal workers could be discharged only for cause and that union membership was not cause if the union imposed no duty to strike. While this rule was better than nothing, courts often eviscerated it. SPERO, *supra* note 80, at 3, 17, 41-43; *see* Levine v. Farely, 107 F.2d 186 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 662 (1940) (allowing discharge for union activities).

[214] Slater, Down by Law, *supra* note 46, at 123-24 & n.249.

[215] DANIEL GRANT & H.C. NIXON, STATE AND LOCAL GOVERNMENT IN AMERICA 349 (1969); LARRY KRAMER, LABOR'S PARADOX: THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO 27 (1962); Philip Kienast, Police and Firefighter Employee Organizations (41-42) (1972) (Ph.D. dissertation, Michigan State University) (available through UMI); Slater, Down by Law, *supra* note 46, at 124-25. AFSCME was founded in part to fight the gutting of civil service. Steven H. Kropp, *Reflections on Law, Economics, and Policy in Public Sector Labor Relations in Canada, the United States, and the United Kingdom*, 27 L. & POL'Y INT'L BUS. 825, 844 (1996).

tices, neither side had a brief for labor. Unions could pass civil service laws only with the aid of government reformers, but reformers typically held the biased view that unions were simply another improper power base that should be kept out of government.[216] Further, with the judicial attitudes described above in full force, civil service provided even less protection than unions had hoped. Even when civil service rules provided that public employers could discharge workers only for "cause," courts allowed local officials to determine that union membership was adequate cause.[217] These laws were no substitute for labor relations statutes.

Also, federalism strengthened the hand of the machine bosses that opposed civil service. The federal government created a civil service system for its employees with the Pendleton Act of 1883. But, given the diffuse structure of American government, individual states and cities set their own civil service standards. This often allowed local political machines to write or administer rules such that they in fact retained significant power. Many states accepted the merit principle in name only.[218] Further, well beyond the civil service context, federalism would turn out to be an enormous obstacle for public sector unions seeking statutory rights.

B. State Structure Redux: The Continuing Constitutional Impediment of Federalism and the Absence of a National Law

1. The Tenth and Eleventh Amendments, Then and Now

Why did public sector unions not win any federal protections in the burst of national labor and employment laws passed during the New Deal? The NLRA explicitly excluded public employees from their coverage,[219] but the legislative history of the NLRA

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216 Slater, Down by Law, *supra* note 46, at 122-23.

217 *See, e.g.*, Carter v. Thompson, 180 S.E. 410 (Va. 1935); SPERO, *supra* note 80, at 41-43.

218 Even for individual workers, these laws often held out greater promise than they fulfilled. Civil service rules often covered surprisingly few employees of a given state or city, and protections were often quite minimal. SOLOMON FABRICANT & ROBERT LIPSEY, THE TREND OF GOVERNMENT ACTIVITY IN THE UNITED STATES SINCE 1900 91 nn.17, 18 (1952); GRANT & NIXON, *supra* note 215, at 349 ("in name only"); KRAMER, *supra* note 215, at 11, 27-30. For a more detailed discussion of this topic, see Slater, Down by Law, *supra* note 46, at 124-25.

219 The NLRA, § 2(2)-(3), 29 U.S.C. § 152(2)-(3) still excludes from coverage employees of "the United States . . . or any State or political division thereof."

does not explain this exclusion.[220] Nor do histories of labor law or New Deal legislation, including those written after the startling growth of modern public sector organizing, examine why New Deal initiatives did not protect government workers.[221] Unionists in the 1930s periodically called for a federal statute covering public sector labor relations.[222] In later years too, labor leaders decried the omission. "Congress . . . has made its share of blunders over the years," AFL-CIO President George Meany wrote. "In the field of labor-management relations, one of the most grievous was the singling out of farm workers and government workers for exclusion from the protection of the [NLRA]. By that action the Congress trampled on the principle of equal justice under law."[223]

A large part of the answer, at least as to national legislation, is the constitutional scope of the federalist state structure. Under the constitutional doctrines regarding the division of power between the federal and state governments that existed in the first half of the century, Congress simply lacked the authority to regulate the labor relations of states and localities. Joseph Padway of the AFL in 1942 admitted that "Congress clearly is without constitutional authority to regulate labor relations between state governments and their subordinate bodies and all of their em-

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[220] The only comment in the extensive legislative history of the NLRA on this exclusion is Francis Biddle's remark that "I suppose Mr. Connery in drawing the bill thought it wise to exclude Government employees as that is suggesting a debatable question and he did not want to overload the bill." NATIONAL LABOR RELATIONS BOARD, 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2653 (1949).

[221] *See, e.g.*, IRVING BERNSTEIN, A CARING SOCIETY: THE NEW DEAL, THE WORKER, AND THE GREAT DEPRESSION (1985); DUBOFSKY, *supra* note 35; TOMLINS, THE STATE AND THE UNIONS, *supra* note 6; STANLEY VITTOZ, NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY (1987); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993); Skocpol & Finegold, *supra* note 66.

[222] In 1933, the AFL asserted that the National Industrial Recovery Act should apply to "all city, county, and state employees." Slater, Down by Law, *supra* note 46, at 82 (quoting CHICAGO FEDERATION NEWS, Dec. 23, 1933, at 9). In 1936, the AFT declared that the NLRA should be extended to cover government workers. MARJORIE MURPHY, BLACKBOARD UNIONS: THE AFT AND THE NEA, 1900-1980, at 162 (1990). Also in 1936, the AFSCME convention similarly resolved that *all* employees should be given the right to organize and bargain. KRAMER, *supra* note 215, at 9-10, 33.

[223] George Meany, *Union Leaders and Public Sector Unions—AFL-CIO*, *in* PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 165 (A. Lawrence Chickering ed., 1976).

ployees."[224] So, for example, in 1942 the National War Labor Board cited the "sovereign rights of state and local governments" in holding that it did not have jurisdiction over a labor dispute between New York City and the Transit Workers Union which represented public subway workers.[225] Indeed, in the 1930s, even the constitutionality of a federal statute governing *private* sector labor relations was questioned. Employers insisted that the NLRA was beyond Congress's Commerce Clause powers and violated the rights of states under the Tenth Amendment. The Supreme Court rejected these claims in 1937, two years after the NLRA was enacted.[226] Since the New Deal, courts have regularly upheld Congressional power to regulate private sector labor and employment matters against such constitutional objections.[227]

In the public sector, in contrast, federalism has been a crucial and continuing obstacle. Through to the present day, courts have resisted Congressional attempts to apply federal employment laws to state and local governments. The Supreme Court only grudgingly acknowledged the power of Congress to regulate public employment as it has private employment in two brief and recent gaps. First, between *Maryland v. Wirtz*[228] in 1968 (holding that the Fair Labor Standards Act of 1938 (FLSA)[229] applied to public workers) and *National League of Cities v. Usery*[230] in 1976 (reversing *Wirtz* and holding that the Tenth Amendment[231] barred Congress from applying the FLSA to public workers); and then between *Garcia v. San Antonio Metropolitan Transit Authority*[232] in 1985 (reversing *National League of Cities*) and *Al-*

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224 RHYNE, *supra* note 104, at 528.

225 SPERO, *supra* note 80, at 407 (quoting *In re* Municipal Government, City of Newark, N.J., 5 WAR LAB. REP. 286 (1943)).

226 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutionality of the NLRA).

227 In addition to *Jones & Laughlin*, see, for example, *United States v. Darby*, 312 U.S. 100 (1941), which upheld the Fair Labor Standards Act of 1938 against a Commerce Clause challenge.

228 392 U.S. 183 (1968).

229 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-19. The FLSA, *inter alia*, sets rules regarding the minimum wage and overtime compensation.

230 426 U.S. 833 (1976).

231 The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

232 469 U.S. 528 (1985). *Garcia* was a 5-4 decision with dissenting Justice O'Connor vowing that the Court would "in time" return to the federalism of *National League of Cities*. *Id.* at 589.

den v. Maine in 1999 (limiting the ability of state employees to sue under federal employment laws, relying on the Tenth and Eleventh Amendments).[233] This underscores the validity of the belief in the first half of the century that a national public sector labor statute would have been held unconstitutional. It also shows that issues of federalism have haunted government employees constantly throughout this century. Thus, the new institutionalist emphasis on state structure not only helps answer the relatively easy question of why federal law did not assist public workers in the 1930s, but also helps answer the harder question of why no such law exists today.[234]

2. *State Structure and America's Exceptional Public Sector Law*

The significance of the federalist structure of the American state is especially evident in light of the legal regulation of government employment in other western democracies. The development of American public sector labor law on such an entirely different track than private sector law is not at all "natural"; it is in fact exceptional. Here, federalism hurt public employees in part because they had no exclusive central government to lobby for rights. Again, while labor was successful in 1912 in passing the Lloyd-LaFollette Act, which at least on its face allowed federal workers to join unions, this Act only applied to employees of the federal government, and not to any other public employees.

In contrast, while governments in Britain and France hardly welcomed their public sector unions, those unions won more rights and won them much earlier than did their counterparts in the United States. In 1927, Britain barred unions of civil service

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233 Alden v. Maine, 527 U.S. 706, 738-39 (1999) (addressing the Tenth Amendment); *id.* at 712, 720 (addressing the Eleventh Amendment). The Eleventh Amendment provides that "[T]he Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI. *Alden* and its progeny (*see supra* note 10) do not hold that Congress cannot apply federal employment laws to state employees, but rather that state employees cannot sue under these laws for money damages. Obligations of states under these laws can be enforced fully by the Department of Labor and prospectively by individuals. Vazquez, *supra* note 10, at 1934-36. How effective those remedies will be remains to be seen. Merico-Stephens, *supra* note 10, at 333 n.27, terms enforcement problems "a crisis."

234 With federalism becoming increasingly influential in recent jurisprudence, the continuing and crucial impact federalism has always had on the regulation of government employment may warrant attention in other contexts.

employees from affiliating with labor organizations that had members in the private sector, but Britain repealed this bar in 1946. Moreover, beginning in the mid-1920s, British law provided for mandatory arbitration of public sector labor disputes; such practices would not even begin to be used in parts of the United States until nearly half a century later.[235] Overall, British laws and practices have not made the sharp distinction between "public sector" and "private sector" labor law that has always existed in America.[236] The French government in 1920 opposed state workers affiliating with the national labor federation; but in 1924, pressure from civil servants forced a reversal of this policy.[237] The French Constitution of 1946 specifically affirmed the right of public workers to join trade unions.[238] Again, French law traditionally made no great distinction between public and private sector workers, except for minor differences such as a requirement of giving notice before a strike.[239] Crucially, decisions in Britain and France were made and enacted on a national level. The state structure of federalism thus ensured that statutory law would come from state and local governments. At those levels, bias and false constructions would play an enormous role.

C. *Bias and False Constructions Redux: The Strike Nightmare and the Absence of State and Local Laws*

Even assuming that public sector unions could not pass a national statute, why did it take so long to begin passing favorable state and local laws? Federalism did not prevent state labor relations acts from covering government employees. State structure still played a role, however. The diffusion of governmental power within individual states combined with judicial deference to give local government bodies dispositive power over labor re-

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235 Mandatory arbitration in public employment in the United States was generally illegal until the 1960s and is still prohibited in some jurisdictions today. *See infra* Part II.B.2; *see, e.g.*, Speiser, *supra* note 88; Westbrook, *supra* note 7.

236 *See* INTERNATIONAL LABOR AND EMPLOYMENT LAWS, §§ 7-1 to 7-41 (William C. Keller ed., 1997).

237 SPERO, *supra* note 80, at 4, 13, 419-20, 479-84.

238 Keller, *supra* note 236, at 3-16.

239 *See* Keller, *supra* note 236, at 3-1 to 3-30. Article L 521-2 of the French Labor Code sets out a few additional requirements in the case of public sector strikes. For example, that such a strike can be called only by a "representative" union and that prior notice must be given. *Id.* at 3-24. Such procedural points are in no way analogous to the absolute ban on strikes by federal employees and employees of most state and local governments in America.

lations. This, in turn, gave bias against unions a very specific context. Not surprisingly, local officials were biased against the notion that *their own workers* needed unions, or should have the right to strike or bargain.[240]

But neither state structure nor the bias of local officials is a sufficient explanation, especially for the absence of laws on the state level. Again, the third factor was present: misunderstanding the nature of public sector unions and exclusive use of the private sector model of what a union could be. Crucial in this regard was the tumultuous but singular Boston police strike. The images it spawned of unionized government workers wreaking havoc created a tide of highly restrictive state and local laws that lasted nearly half a century. Public sector unions did not have the political strength to reverse this tide; nor did their words and deeds dispel these false constructions of their nature.

In direct response to the 1919 Boston strike, Congress barred police and firefighters in the District of Columbia from striking or affiliating with unions. Many cities, including Macon, Georgia; Omaha, Nebraska; San Antonio, Texas; and Roanoke, Virginia, soon followed suit, prohibiting various public workers from joining unions. Massachusetts began enforcing an 1855 law which barred firefighters from joining any organization not approved by government officials. Similar regulations continued to be passed for decades. In 1932, Philadelphia enacted an ordinance forbidding police to form any group other than a benefit society; in 1942, Dallas passed a rule preventing city employees from forming a labor organization. After AFSCME began organizing police in the early 1940s, many additional cities blocked this by law or department order, including Chicago; Detroit; Los Angeles; St. Louis and Kansas City, Missouri; Wichita, Kansas; Louisville, Kentucky; and Jackson, Mississippi.[241]

In this climate, while many states passed labor relations statutes ("Little Wagner Acts") specifically for the purpose of covering groups of employees that the NLRA did not reach, these laws either explicitly excluded or were interpreted to exclude public workers. For example, the New York State Labor Relations Act

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[240] For example, Mayor Fiorello LaGuardia of New York, sponsor of the Norris-LaGuardia Act and generally a friend of labor, took a dim view of city workers in New York organizing. *See* Slater, Down by Law, *supra* note 46, at 289-90.

[241] SPERO, *supra* note 80, at 29-32, 289-90. For more on the Boston strike and its impact on police unions and public sector labor generally, see Slater, *Public Workers*, *supra* note 138.

stated that it "shall not apply to the employees . . . of the State or of any political or civil subdivision or other agency thereof."[242] Thus, the New York Labor Relations Board held the Act did not cover workers on the municipally owned Independent Subway System in New York City.[243] Other "Little Wagner Acts" contained similar language.[244] Moreover, as shown above, even when the text of a statute did not actually exclude public workers, courts held that it should.

States finally began to pass laws which explicitly covered public sector unions after World War II, but these statutes were mainly designed to provide draconian penalties for government workers who struck. Such laws were partly inspired by the explosion of labor militancy in 1946, which included some strikes by public workers, and were passed in the same era as the Taft-Hartley Act, which restricted the activities of private sector unions. But again, the law restricted the acts and rights of public sector unions much more significantly than it did private sector unions; and again, the image of public sector unions in the courts and legislatures was generally at odds with the traditional practices of public sector unions. Nonetheless, understanding "union" to mean only organizations that struck, cities and states centered their attention almost exclusively on the strike threat. Cities banning public sector strikes by ordinance included Bridgeport, Connecticut; Omaha, Nebraska; and Portland, Maine.[245] States also enacted highly restrictive laws. In 1946, the Virginia legislature adopted a joint resolution declaring it to be contrary to public policy for any government official to recognize or negotiate with a public sector union. Virginia then enacted a statute mandating discharge for any government worker who struck. New York's Condon-Wadlin Act of 1947, passed after a successful strike by Buffalo public school teachers, not only banned public sector strikes but also any employee participation in setting working conditions. That same year, antistrike laws were passed in Washington, Nebraska, Missouri, Pennsylvania, Michigan, Texas, and Ohio. The Texas law also explicitly prohibited public employers

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[242] 1937 N.Y. Laws 443 § 715.

[243] *Id.*; Slater, Down by Law, *supra* note 46, at 85 (quoting NEW YORK LABOR RELATIONS BOARD REPORT, 1937-42, at 169 (1942).

[244] SPERO, *supra* note 80, at 16.

[245] *Id.* at 31-32 (citing Omaha Municipal Code, Ordinance 14924 (1946) and City of Bridgeport, Ordinances (1946)).

from bargaining with or recognizing unions.[246]

While a few of these laws provided minimal rights to exist or to make appeals,[247] public sector unions generally would have to wait until the 1960s and beyond for rights even approaching what private sector unions had won *before* the NLRA. Even in the 1990s, barely over half the states permitted collective bargaining, as it exists in the private sector, by government workers. Some jurisdictions, such as Virginia, still prohibit any form of "recognition" of public sector unions. Only thirteen states permit any public sector unions at all to strike.[248] This remarkably restrictive modern law can only be explained by understanding the continuing power of the theme forged from the three central factors of bias, state structure, and misconstruction of the concept of "union." Given the type of organization legislators believe public sector unions must be, these lawmakers have also been loathe to force government officials to deal with them.

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[246] 1947 Mich. Legis. Serv. 336 (West); Mo. Ann. Stat., § 10178.207 (West 1947); 1947 Neb. Laws 178; 1947 N.Y. Laws 391; OHIO REV. CODE ANN. § 17-7 (West 1947); 1947 Pa. Legis. Serv., 1286 (West); 1947 Tex. Laws 135; Va. Senate Jt. Res. No. 12, Feb. 8, 1946; 1947 Wash. Laws 287; SPERO, *supra* note 80, at 32-37 (citing 1946 Va. Acts ch. 333); Theodore Kheel, *Introduction: Background and History*, *in* PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 1 (Chickering ed., 1976); KRAMER, *supra* note 215, at 159.

[247] The Texas statute in 1947 permitted government workers to join unions but did not allow public employers to "recognize" unions in any way. The city of Dallas nonetheless continued to bar organizing by ordinance until 1956, when a court finally held that the practice violated the state law. Beverly v. City of Dallas, 292 S.W.2d 172 (Tex. Ct. Civ. App. 1956) (citing TEX. REV. CIV. STAT. ANN. art. 514c §§ 1-4 (West 1947)). Bridgeport's ordinance permitted affiliation. Michigan in 1947 made its state Mediation Board available for certain public employee disputes. The New Jersey Constitution of 1947, art. I, § 19, gave government workers the right to organize and present grievances. N.J. CONST. art I, § 19 (1947). Pennsylvania allowed public employees to attend work-related meetings and called for panels to hold hearings on disputes. 1947 Pa. Legis. Serv. 1286 (West). The Nebraska statute, while providing for the imprisonment of strikers, created a system of arbitration by a Court of Industrial Relations. 1947 Neb. Laws 178. North Dakota in 1951 gave public workers the right to affiliate with unions. In 1952, Woonsocket, Rhode Island amended its charter to grant municipal employees that right. *See* SPERO, *supra* note 80, at 16, 35-36, 349-50; KRAMER, *supra* note 215, at 43, 156-58.

[248] Additional states permit public sector unions to "meet and confer" with public employers over employment matters, a process allowing significantly less than collective bargaining. *See* LEIBIG & KAHN, *supra* note 4; SCHNEIDER, *supra* note 4.

IV

CONCLUSION: PUBLIC SECTOR LABOR LAW AND ECLECTIC LEGAL HISTORIOGRAPHY

The history of public sector labor law is important on its own terms. It is important for the impact it has had, both affirmatively and negatively. It artificially repressed the size of public sector unions, and thus the size of the American labor movement. It is worth speculating how American labor and politics might have been different but for the odd set of factors in the American state and society that made public sector labor law so distinct from private sector law.[249]

This field can also make a valuable contribution to legal history and historiography. It shows that combining the valuable tools and methods of different theoretical schools can yield at least an example of a somewhat more precise explanation of causation. This body of law cannot be explained by one single and exclusive theme: judges disliking unions or judges simply following established rules. But judicial concerns were identifiable and of limited number, and scholars need not throw up their hands in despair of a coherent explanation. Also, scholars should not be afraid to incorporate theories too often seen as necessarily distinct or competing. On the one hand, law is almost certainly rarely, if ever, driven by one consideration, structure, or doctrine, internal or external. On the other, "multi-causal" models need not be so inclusive as to be jumbled and ultimately unhelpful. Some things can, and should, be explained, even in a world of complex, multiple causation.

[249] For more on this argument, see Slater, Down by Law, *supra* note 46.