

IN DEFENSE OF PUBLIC-SECTOR UNIONS

*Anne Marie Lofaso**

“When the lion and the lamb lie down, if you look closely, when the lion gets up, the lamb is missing.”¹

“America is a government of the people, by the people, and for the people. Who are the people? . . . We’re the farmers that fed the nation. We’re the firefighters that saved the nation. We’re the police officers who protect the nation. We’re the teachers who taught the nation. We’re the nurses that healed the nation. We’re the construction workers who built the nation. We’re the truck drivers who move the nation. We’re the coal miners that energize the nation. The American labor movement—we are the people.”²

I. INTRODUCTION

A. Public-Sector Unions Attacked for the States’ Budget Shortfalls

The United States is currently in a heated debate over the extent to which public-sector workers should be permitted to band together for

* Professor of Law and Associate Dean for Faculty Research and Development, West Virginia University College of Law. Many thanks to Robert Bastress, Jim Heiko, and Michael Risch, who commented on early drafts of this Article and who have conversed with me about the contents of this Article. I would especially like to thank Samuel Estreicher for encouraging me to participate in this forum on public-sector unions and Joe Slater for influencing my thinking on public-sector unions. Thanks to the West Virginia University Law library staff, Miles Berger, Matthew Delligatti, Taylor Downs, Jenny Flanigan, Nicholas Stump, Matthew T. Yanni, and the Hofstra Labor & Employment Law Journal’s editors for their research assistance; and to the Bloom Faculty Research Grant for its support of this project. This Article is dedicated to C. Edwin Baker, who continues to inspire me. All errors are the author’s.

1. *Meet the Press* (NBC television broadcast Feb. 27, 2011), available at http://www.realclearpolitics.com/video/2011/02/27/meet_the_press_panel_on_union_bill_in_wisconsin.html (Emanuel Cleaver, Chairman of the Congressional Black Caucus, paraphrasing a well-known folktale).

2. Cecil Roberts, President, United Mine Workers of America, Keynote Address to New York Public Employees Federation Health and Safety Conference (March 24, 2011), available at <http://newworkplace.wordpress.com/2011/04/05/lets-give-a-damn-about-our-coal-miners/>.

mutual aid or protection, to form, join or assist unions, and to bargain collectively. This debate was sparked when, shortly after the 2010 midterm elections, politicians in states with large public deficits blamed public-sector unions for budget shortfalls. Ostensibly to remedy the situation in Wisconsin, Republican Governor Scott Walker, who assumed office on January 3, 2011, proposed the Budget Repair Bill, which would, among other things, raise public-sector employees' health-care and pension contributions and strip public-sector employees of most of their collective-bargaining rights.³ The situation quickly ignited when thousands of Americans, including teachers, prison guards, and students, descended on the Wisconsin Capitol in February 2011 to protest the bill they viewed as suppressing government workers' collective-bargaining rights under the guise of repairing the budget.⁴ In a concerted act of defiance, fourteen Democratic legislators blocked passage of what they perceived to be an anti-union bill by failing to show up for the vote, and leaving the state in an attempt to force Republicans to the bargaining table.⁵ On February 25, the Wisconsin Assembly passed the bill while most of the Democratic representatives were out of town. On March 11, Wisconsin Governor Scott Walker signed that bill into law.⁶ On May 26, a state circuit court issued a decision striking down the anti-union/budget repair law for violating Wisconsin's Open Meeting Law, a law that mandates that "meetings of all governmental bodies, including the Legislature itself, 'shall be preceded by public notice as provided [by state statute], and shall be held in open session.'"⁷

B. Public-Sector Unions Are Not the Cause of the States' Current Budget Shortfalls

Public unions are not, however, the cause of the states' ills. After all, public unions are not the source of wages and benefits—

3. 2011 Wisc. Act 10, available at <http://legis.wisconsin.gov/11Act010.pdf>.

4. See 2011 Union Protests, TIMELINES.COM, <http://timelines.com/topics/2011-union-protests> (last visited May 13, 2011).

5. See *id.*

6. See Scott Bauer, *Scott Walker Signs Wisconsin Union Bill into Law*, HUFFINGTON POST, (Mar. 11, 2011, 4:22PM), http://www.huffingtonpost.com/2011/03/11/scott-walker-signs-wiscon_n_834508.html.

7. *Wisconsin v. Fitzgerald*, No. 11-CV-1244, (May 26, 2011), available at http://www.wispolitics.com/1006/110526Ozanne_decision.pdf. For an excellent summary of these events, see Joseph E. Slater, *The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits*, https://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf (June 2011).

governments are. Furthermore, the evidence shows that, in general, public-sector-union pay is lower than the pay of their private sector counterparts even when benefits are taken into account; tenure is typically not collectively negotiated but grounded in civil-servant statutes; and arbitration is not a union benefit but the cost that unions pay for a no-strike promise.⁸

Given the evidence, it is instructive to ask the following two questions. First, why are public workers, especially public-union employees, the subject of such vitriolic attack? Second, are public-sector unions worth defending?

In this Article, I answer both questions. Part I has introduced the problem. Part II serves as background for understanding the economic and political reasons that public-sector unions are currently under attack. I argue that these attacks must be viewed in the context of the negative impact that the recent recession has had on public-sector pension funds and the influence that unions have had over the outcomes of political elections. In particular, I argue that public-sector unions are a convenient scapegoat for government mismanagement and that union political-spending patterns make them a more likely target of Republican administrations. Part III, which comprises the most significant part of this Article, presents a defense of unions and collective bargaining grounded in participatory workplace democracy. In that section, I begin by bringing together several strands of political theory, including congruence theory, participatory democracy theory, and transformation theory to show why unions are vital to a well-functioning democracy. After arguing that there is no principled reason for refusing to apply the workplace participatory rationale to public-sector unions, I demonstrate that most of the arguments against public-sector unions are false, misleading, or pretextual. Part IV looks to the future of public-sector unions and offers some thoughts about how we may more constructively analyze the current fiscal problems facing state and local governments.

8. See *infra* note 29 and accompanying text.

II. A Confluence of Economic and Political Events Have Made Public-Sector Unions an Easy Scapegoat for State and Local Politicians To Blame for Their States' Financial Woes

A. The Great Recession, which Resulted in Unprecedented Post-War Unemployment Rates and Market Declines that Negatively Impacted Pension Plans, Has Created an Opportunity for Politicians to Divide the Working Class

Significantly, the debate over public-employee-union rights takes place during the deepest economic recession to hit the United States and the world since the Great Depression. As Harvard University Professor of Economics Lawrence F. Katz observed, “[l]abor market conditions have deteriorated dramatically since the start of the Great Recession in late 2007 making this the severest labor market downturn since the Great Depression of the 1930s.”⁹ It is commonly understood that market declines during that recession have “significantly diminished the asset value of . . . [state and local government pension] plans.”¹⁰ Many of the public-sector pension plans (union and nonunion) are defined-benefit plans—plans that “promise[] a specified monthly benefit at retirement.”¹¹ That means that the government is ultimately liable to fund those benefits to the extent that they are guaranteed by state law or contract. Accordingly, taxpayers (including private-sector employees) already strapped by a recession with the highest unemployment rates in over sixty years,¹² are potentially liable to pay for those benefits. This situation makes public employees and their union representatives a natural scapegoat for government mismanagement by dividing public sector employees, who have been faring well during the recession, and other workers, who have not fared as well.

9. Lawrence F. Katz, *Long-Term Unemployment in the Great Recession: Testimony for the Joint Economic Committee U.S. Congress*, Hearing on “Long-Term Unemployment: Causes, Consequences and Solutions,” Apr. 29, 2010, available at http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/jec_testimony_katz_042910.pdf.

10. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-754, STATE AND LOCAL GOVERNMENT PENSION PLANS: GOVERNMENT PRACTICES AND LONG-TERM INVESTMENT STRATEGIES HAVE EVOLVED GRADUALLY AS PLANS TAKE ON INCREASED INVESTMENT RISK 1 (2010) [hereinafter GAO-10-754].

11. *Retirement Plans, Benefits & Savings: Types of Retirement Plans*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/retirement/typesofplans.htm> (last visited May 19, 2011).

12. Anne Marie Lofaso, *The Relevance of the Wagner Act for Resolving Today's Job-Security Crisis*, LABOR AND EMPLOYMENT RELATIONS ASSOCIATION PROCEEDINGS OF THE 62ND ANNUAL MEETING 2010 (forthcoming 2011).

B. Public-Sector Unions Are More Likely To Contribute to Liberal Causes and to Democratic Candidates

This debate also comes on the heels of *Citizens United v. Federal Election Commission*.¹³ There, the Supreme Court held unconstitutional a federal law prohibiting corporations and unions from using general treasury funds to make independent expenditures for publicly disseminated electioneering speech.¹⁴ Specifically, speeches that advocated for the election or defeat of a federal candidate within 30 days of a primary election were found to be constitutional.¹⁵

The practical effect of *Citizens United* was to liberalize spending on speech advocating views about political candidates. As a result, in the 2010 mid-term elections, unions spent approximately \$25.1 million on outside donations.¹⁶ This amounted to 23.9 percent of total outside spending reported. Of this total, only \$25,000 was donated to conservatives.¹⁷ Broken down further, public-sector unions, which represented the industry that disclosed the most amount of money, donated over \$10 million exclusively to liberals.¹⁸

But this snapshot does not tell us the entire story. Corporations and unions also make campaign contributions—expenditures that were not affected by the Supreme Court’s decision in *Citizens United*. In the 2010 mid-term elections, unions spent a total of \$96,574,695 on campaign contributions.¹⁹ Of this total, 68 percent of the contributions (\$65,317,751) were given to Democrats, and 5 percent (\$4,487,222) were given to Republicans.²⁰ Spending by unions in the 2010 cycle represented 5.1 percent of 2010 total contributions. By contrast, businesses spent a grand total of \$1,360,667,040 contributing to the

13. 130 S. Ct. 876, 886-88 (2010) (holding that Section 441(b) of the Bipartisan Campaign Reform Act of 2002 unlawfully suppresses political speech).

14. *Id.* In so holding, *Citizens United* overruled *McConnell v. FEC*, 540 U.S. 93, 203-09 (2003), to the extent it upheld limits on electioneering communications, and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654-66 (1990), which had upheld a state campaign finance law that prohibited corporations from using corporate treasury funds to support or oppose the election of political candidates. *See id.*

15. *Id.*

16. 2010 Outside Spending, by Donors’ Industries, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=1&type=A> (last updated April 25, 2011).

17. *Id.*

18. *Id.*

19. *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates and Parties*, OPENSECRETS.ORG, <http://www.opensecrets.org/overview/blip.php> (last updated Apr. 25, 2011).

20. *Id.*

2010 cycle, representing 72.2 percent of total contributions. Of the total amount contributed by the business sector, 49 percent of business' total contributions (\$660,255,869) went to Democrats and 46 percent (\$626,397,324) went to Republicans.²¹ Although Republicans were able to make important in-roads in such rust-belt states as Ohio, Michigan, Wisconsin, and Pennsylvania, they lost in close races in other important swing states, such as Colorado and West Virginia.²² Many attribute those losses to union campaigning.²³

C. Union Campaign Spending Patterns Give Republicans an Incentive to Silence Unions

This picture shows the incentives that various political groups have to shrink the amount available for political expenditure from the general treasuries of institutions, such as unions, which provide an opposing point of view to the voice of conservative groups. In this context, the incentive goes to the Republicans to shrink union treasuries available for political spending. Potentially, one very effective way of accomplishing that goal is to weaken unions. If public-sector unions are weakened by Republican initiatives, then there will be little to no opposition in raising campaign funds in most elections, effectively allowing more conservative groups to have a much louder voice.²⁴

This picture also shows the incentives that those in political power in states with large public debt have to blame the public union as the cause of that debt. The story is written for them. The 2008 stock market crash greatly diminished the value of defined-benefit pension plans just when many baby boomers are set to retire.²⁵ In fact, before the 2008 stock market crash, many government funded pensions were 80 percent

21. *Id.*

22. See Scott Conroy, *GOP Makes Significant Gains in Governorships*, REAL CLEAR POLITICS (Nov. 3, 2010), http://www.realclearpolitics.com/articles/2010/11/03/gop_makes_significant_gains_in_governorships_107820.html; Jill Lawrence, *GOP Wave of Change Hits House; Republicans Also Gain Governorships*, POLITICS DAILY (Nov. 2, 2010), <http://www.politicsdaily.com/2010/11/02/2010-midterm-elections-news-and-results/>.

23. Alexander Bolton, *Labor Helps Key Senate Dems (Joe Manchin, Michael Bennet), But Abandons Most House Blue Dogs*, FREE REPUBLIC (Oct. 27, 2010), <http://www.freerepublic.com/focus/news/2616315/posts>. Blue dogs are congressional Democrats who identify themselves as moderates. The term is primarily used to refer to House members.

24. See George Lakoff, *The Real Issues: A Wisconsin Update*, HUFFINGTON POST (Feb. 26, 2011, 1:19 PM), http://www.huffingtonpost.com/george-lakoff/the-real-issues-a-wiscons_b_828640.html.

25. GAO-10-754, *supra* note 10.

funded—the industry standard funding level.²⁶ By blaming public unions for the debt caused by Wall Street’s financial crisis and stock market crash, politicians divert attention to what they are really doing—coercively removing the economic and political rights of their civil servants. This is an easy story to swallow for private-sector taxpayers—many of them victims of the 2008 stock market crash. In the meantime, public unions have been weakened by false and misleading messaging as well as by curtailment of their right to engage in collective bargaining. These measures would predictably result in lower public-sector union membership, which in turn results in less money in their general treasuries available to spend on Democratic Party candidates.

III. IN DEFENSE OF UNIONS: THE PARTICIPATORY WORKPLACE DEMOCRACY RATIONALE

A. Overview: Unions Are Vital to a Well-Functioning Democracy

Unions are organizations of workers who have banded together to achieve common goals typically to improve hours, wages, and other terms or conditions of employment; and to engage in other mutual aid or protection.²⁷ These purposes can be accomplished through various means but most typically through bargaining collectively,²⁸ grieving and arbitrating disputes,²⁹ wielding economic weapons, such as pickets,³⁰

26. Elizabeth K. Kellar, *Preface* to ALICIA H. MUNELL, JEAN-PIERRE AUBRY, & LAURA QUINBY, CENTER FOR STATE AND LOCAL GOVERNMENT EXCELLENCE, ISSUE BRIEF, THE FUNDING OF STATE AND LOCAL PENSIONS: 2009-2013 (April 2010).

27. See, e.g., 29 U.S.C. § 157 (2006).

28. See, e.g., *id.* § 158(a)(5), (b)(3).

29. The Steelworkers Trilogy cements arbitration as the presumptive method of resolving labor contract disputes with only limited court review. See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568-69 (1960) (holding that an employer must arbitrate any grievance that falls within the arbitration clause of a collective-bargaining agreement regardless of the grievances merits); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960) (announcing a presumption in favor of arbitration rebuttable by “only the most forceful evidence of a purpose to exclude the claim from arbitration”); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (holding that, in cases where an employer or union refuses to comply with the arbitrator’s award, the court’s role is limited to determining whether the award “draws its essence from the collective bargaining agreement”). Arbitration, which favors industrial peace, is viewed as the quid pro quo for a no-strike clause. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 107 (1962) (Black, J., dissenting) (asserting that union implicitly waived its right to strike, for the life of the collective-bargaining agreement, by agreeing to arbitrate labor disputes arising under that agreement); *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) (stating that “the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement”).

30. See, e.g., 29 U.S.C. § 158(b)(4), (b)(7).

secondary boycotts,³¹ and strikes,³² or engaging in political action such as legislative lobbying. Among the most common reasons or values cited in support of protecting workers' rights to form unions are to equalize bargaining power between employees and their employers, to promote workplace justice, to encourage workplace peace, and to support workplace democracy.³³

This Article focuses on one such value—workplace participatory democracy. To examine that value, this Section asks and presents the following question: Why should a liberal representative democracy, such as the United States, want to encourage workplace democracy in the form of collective bargaining? The answer that emerges is that unions, including public-sector unions, are vital to a well-functioning democracy and therefore should be protected.

*B. Liberal Democracies, like the United States, Should Encourage
Workplace Participatory Democracy Because Democratic Social Units
Promote Political Stability*

The United States is a liberal democracy—its government is characterized by group or collective decision-making grounded in the equality of its citizens.³⁴ Liberal democracy, as it took hold in the United States, “offers a politics that justifies individual rights. It is concerned more to promote individual liberty than to secure public justice, to advance interests rather than to discover goods, and to keep [people] safely apart rather than to bring them fruitfully together.”³⁵ The United States is therefore particularly good at “fiercely resisting every assault on the individual—his privacy, his property, his interests, and his rights—but is far less effective in resisting assaults on [communitarian values].”³⁶ According to political theorist Benjamin R. Barber, liberal democracy’s low capacity to resist assaults on communitarian values,

31. See, e.g., *id.* § 158(b)(4).

32. See, e.g., *id.* § 163.

33. See, e.g., *id.* § 151; see generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (identifying rights of employers and employees, as well as limitations on these rights).

34. As used in this paper and as described herein, the term, liberal democracy, is a term of art used by political theorists to describe democratic governments, such as the United States, whose powers are delineated and limited by a constitution, where collective decision making is made by elected representatives, and which tends to protect various liberties. It does not connote anything about the political spectrum of that country’s government or citizenship.

35. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 4 (1984).

36. *Id.*

which would include citizenship and participation, is its “vulnerability.” In Barber’s view, this vulnerability ultimately “undermines its defense of the individual; for the individual’s freedom is not the precondition for political activity but rather the product of it.”³⁷

If Barber is correct about liberal democracy’s vulnerabilities and if we actually cherish communitarian values, instrumentally if not intrinsically, then a liberal democracy, such as the United States government, needs mechanisms for sustaining and further developing its capacity to protect these values. For political theorists such as Carole Pateman, C. B. Macpherson, and Benjamin Barber, liberal democratic societies must develop outlets for participation not only in the political sphere but in the nonpolitical social units, such as family, work and education. “Participatory democratic theory envisions the maximum participation of citizens in their self-governance, especially in sectors of society beyond those that are traditionally understood to be political (for example, the household and workplace).”³⁸

My thesis here is limited to the extent to which and the ways in which worker self-governance bolsters and stabilizes American democracy. To make this argument persuasive, the following questions should be assessed:

- (1) To what extent should the organization of social units, and work in particular, reflect the government’s organization? To what extent can social units, such as work, diverge from the government’s authority pattern but still bolster the government’s stability?
- (2) What justifies democratizing social units, such as the workplace?
- (3) What is the relationship between the particular sector of participation (in this case, the workplace) and the government in terms of decision making (mode of participation)?

In examining these questions below, I rely on political theory to draw three conclusions. First, to maintain a well-functioning democracy, American workplaces should reflect the democratic authority patterns of the United States government. Second, democratizing American

37. *Id.*

38. Jeffrey D. Hilmer, *The State of Participatory Democratic Theory*, 32 NEW POL. SCI. 43, 43 (2010).

workplaces is likely to strengthen the U.S. government by teaching workers how to be better, more public-minded citizens. Third, the relationship between the American workplace and the U.S. government is pyramidal—workers can directly participate in decisionmaking at the workplace, a much smaller social unit than the U.S. government, where they can learn the skills necessary to enter the top of the pyramid, which involves more representative forms of government and often a workplace of experts.

1. Social Units, Such as Work, Should Reflect the Government's Authority Patterns

Political scientists have focused much of their research on the study of the state and its governance. Other social units, such as family, school, community, and work, are microcosms for society and have their own systems of governance.³⁹ Those micro-governmental systems operate within sectors of participations, such as the household, the classroom, the neighborhood, and the workplace.⁴⁰

Social units, such as these, are the key to democratization, according to the late political science professor Harry Eckstein. Dr. Eckstein's political theory of congruence postulates that "[g]overnments perform well to the extent that their authority patterns are congruent with the authority patterns of other units of society."⁴¹ For Eckstein, "high performance (above a threshold) requires high congruence,"⁴² where congruence means similarity among the "authority patterns of all [the] social units."⁴³ Eckstein further postulates that "[d]emocratic governments perform well only if their authority patterns exhibit 'balanced disparities'—that is, combinations of democratic and nondemocratic traits."⁴⁴

Eckstein argued that stable democracies are associated with social units that reproduce in greater or lesser degrees the authority patterns of the greater society. Eckstein thought that, in an ideal society, congruence would entail similarity in "the authority patterns of all social

39. Harry Eckstein, *Congruence Theory Explained*, in HARRY ECKSTEIN ET AL., CAN DEMOCRACY TAKE ROOT IN POST-SOVIET RUSSIA? EXPLORATIONS IN STATE-SOCIETY RELATIONS 3, 5 (1998).

40. Hilmer, *supra* note 38, at 46.

41. Eckstein, *supra* note 39, at 4.

42. *Id.*

43. *Id.* at 12.

44. *Id.* at 4.

units.”⁴⁵ In refining his theory, he realized that, as a practical matter, congruence could still exist “if the authority patterns of a society exhibit a pattern of graduated resemblances.”⁴⁶ By this, Eckstein meant that the more significant a role that the social unit plays in the socialization into the government, the closer it should resemble the democratic structure of the government.⁴⁷

Eckstein has also suggested, however, that the workplace (along with the household and the school) is one of the most important social-unit sectors to democratize but also one of the least capable of being democratized.⁴⁸ In Eckstein’s view, the most we can hope for is a simulated workplace democracy that dovetails with or supports the democracy’s authority patterns.⁴⁹ This is where workplace democracy theorists depart to some extent with Eckstein. As shown below, workplace democracy theorists, such as Carole Pateman, believe that however difficult it may be to democratize the workplace, it can and should be done.

2. Democratizing the Workplace Strengthens Liberal Democracies by Transforming the Self

One way to justify workplace participatory democracy is to show that it will result in a more stable political democracy in the United

45. *See id.* at 12.

46. *Id.*

47. Eckstein calls this proximity of socialization “adjacency.” According to Eckstein, there are two general criteria for determining adjacency:

One is that adjacency with extent of “boundary-exchange” between social units—that is, the extent to which one unit serves as a special unit for recruitment into another, especially into its higher positions of superordination. In democracies, political parties always matter greatly in regard to this criterion. . . .

Secondly, social units are adjacent if one plays a significant role for socialization into another—for learning the norms and practices that pertain to the other unit’s roles. What these are in regard to political socialization is, in all cases, a problem for research. . . .

Harry Eckstein, *Congruence Theory Explained*, <http://www.democ.uci.edu/publications/papersseriespre2001/harry2.htm> (last visited May 28, 2011). This article focuses on workplace-government adjacency. Beyond the scope of this article is an analysis of the extent of adjacency with other social units, such as family-government adjacency or school-government adjacency.

48. HARRY ECKSTEIN, *A THEORY OF STABLE DEMOCRACY* (Ctr. of Int’l Studies, Princeton Univ., Res. Monograph No. 10, 1961), *reprinted in* DIVISION AND COHESION IN DEMOCRACY app. b at 237-38 (1966).

49. *Id.*

States. A stable democracy is characterized by “persistence in pattern, decisional effectiveness, and authenticity.”⁵⁰ The key to linking participation with stability is to show how educating people in democratic modes of decision making transforms the character of those individuals into citizens who are more likely to participate in the civic life demanded by a well-functioning liberal democracy.

The theory of participatory democracy focuses on the extent to which “individuals should receive some ‘training’ in democracy outside the national political process.”⁵¹ This theory, which is part of a more expansive version of democracy, holds that

standard liberal democracy fails to articulate goods that are inherent in democracy and exaggerates the threats posed by democracy to other goods. On this view, these limitations follow from a more general failure of standard liberal democracy to appreciate the transformative impact of democracy on the self, a failure rooted in its view of the self as prepolitically constituted. On the expansive view, were individuals more broadly empowered, especially in the institutions that have most impact on their everyday lives (workplaces, schools, local governments, etc.), their experiences would have transformative effects: they would become more public-spirited, more tolerant, more knowledgeable, more attentive to the interests of others, and more probing of their own interests. These transformations would improve the workings of higher-level representative institutions, as well as mitigate—if not remove—the threats democracy is held to pose to rights, pluralism, and governability.⁵²

The theory further posits that “the education for democracy that takes place through the participatory process in non-governmental authority structures requires, therefore, that the structures should be democratised.”⁵³ Participatory democracy theory concludes that the main modes of participation—deliberation and collective decision making—should be extended to political and non-political social sectors, and the workplace, in particular.

As Professor Jeffrey Hilmer explains, the following three arguments are often put forward for this position:

50. *Id.*

51. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 45 (1970).

52. Mark Warren, *Democratic Theory and Self-Transformation*, 86 AM. POL. SCI. REV. 8, 8 (1992).

53. PATEMAN, *supra* note 51, at 45.

- (1) “self-government increases citizens’ sense of political efficacy and empowerment;”
- (2) “frequent participation in self-government produces a more politically astute citizenry;”
- (3) “the expansion of democratic participation into traditionally non-participatory sectors of society tends to break the monopoly of state power and engender a more equitable and humane society.”⁵⁴

Although critics of participatory democracy typically point to a dearth of evidence to support the position that “citizens who actively participate in their self-governance will experience a heightened sense of political efficacy and empowerment,”⁵⁵ there is empirical evidence to support that position.⁵⁶ Most recently, Professor Hilmer surveyed case studies of participatory democracy in Porto Alegre, Brazil—studies that examined Brazil’s transition from dictatorship to constitutional democracy in part by examining participatory approaches to budgeting and public expenditure at local levels. Hilmer concluded that these studies supported the participatory democracy theorists’ claim that citizen participation in self-governance is empowering.⁵⁷

Professor Hilmer drew three conclusions from his survey. First, he concluded that the Porto Alegre case studies evidence that “participatory politics, in the form of the participatory budgeting process of the [citizen budgetary councils], does enhance citizens’ sense of political efficacy and empowerment.”⁵⁸ One 2005 study published by Stanford University Press concluded that the citizen budgetary councils “‘deeply transformed civic life in Porto Alegre’” by bringing together “‘several thousand participants [in open-ended discussion and civic involvement]. . . to demand accountability, and make real decisions.’”⁵⁹

Second, Professor Hilmer concluded that the Porto Alegre case studies evidence greater participation and political astuteness as

54. Hilmer, *supra* note 38, at 56.

55. *Id.*

56. See, e.g., PATEMAN, *supra* note 51, at 98-102 (explaining how Yugoslavia’s workers’ self-management system, although functioning in a communist state, still demonstrated how democratization of industry is not impossible); Hilmer, *supra* note 38, at 55-62 (presenting an empirical case study on the citizen budgetary councils in Porto Alegre, which have created a strong recognition of political empowerment).

57. Hilmer, *supra* note 38, at 56 n.64, 57.

58. *Id.*

59. *Id.* at 57 & nn.66-68 (quoting GIANPAOLO BAIOCCHI, *MILITANTS AND CITIZENS: THE POLITICS OF PARTICIPATORY DEMOCRACY IN PORTO ALEGRE* 138 (2005)).

measured by “access . . . to the information necessary to make effective political judgments *and* to the political, social, and economic institutions that affect [citizens’] everyday lives.”⁶⁰ In this case, his survey of the studies showed that access to decision making within several administrative bodies of the citizen budgetary councils was not exclusive; in those cases, the administrators were required to explain the decision “to a body of representative delegates,” thereby “enabl[ing] citizens to monitor and control the administrative function of the state.”⁶¹ In Hilmer’s view, this evidence strengthens the participatory democracy theory that “citizens learn by doing,” regardless of their initial intellectual starting points.⁶² It is the opportunity that transforms the citizen to learn how to be a democratic citizen.

Third, Professor Hilmer finally concluded that the Porto Alegre case studies evidence a tendency toward extending participation “into traditionally non-political sectors of society,” which eventually breaks the state’s monopolistic power: “On this point Porto Alegre offers some insight into how participatory democracy has helped citizens to directly exert political power in ways that engender a more equitable and humane society.”⁶³ In particular, Hilmer sees the Porto Alegre experiments in participatory democracy as having “transform[ed] private-minded individuals into public-minded citizens,” thereby creating a “public sphere,” such as the one described by Jürgen Habermas:

. . . all members of the community are allowed to participate regardless of income, education, or political experience. Consequently, participants increasingly see themselves as *equal* members of a community of citizens debating and deliberating about the common good. This exercise in collective or general will formation tends to transform private-minded individuals into public-minded citizens The result of this transformation is a citizenry that increasingly acts with the common good as its guiding star. Citizens begin to see their individual well-being as inexorably interconnected with the well-being of their society and make political decisions accordingly. In so doing

60. *Id.* at 58.

61. *Id.* (citing Leonardo Avritzer, *Modes of Democratic Deliberation: Participatory Budgeting in Brazil*, in DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON 397 (Boaventura de Sousa Santos ed., 2006)).

62. *Id.* at 59 (citing JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1954)).

63. *Id.* at 60.

citizens implement policies that take into account equally the interests of all citizens.⁶⁴

As a result of this transformation, the “poorer citizens [of Porto Alegre] were able to redirect funds to their sectors of the city through their participation in the [citizen budgetary councils].”⁶⁵

Critics may claim that, even if it is a good idea and even if it is possible to democratize some social units, it is nearly impossible to democratize the workplace in particular. Professor Carole Pateman’s research debunks that argument.⁶⁶ Professor Pateman surveyed studies of worker self-governance in Titoist Yugoslavia.⁶⁷ These studies, done mostly in the mid to late 1960s, showed “fairly high rates of [worker] participation” among the working class.⁶⁸ Professor Pateman concluded that “the Yugoslav experience gives us no good reason to suppose that the democratisation of industrial authority structures is impossible, difficult and complicated though it may be.”⁶⁹

3. The Pyramidal Relationship Between Workplace Democracy and a Liberal Governmental Democracy: Citizens Learn How to Become Public-minded Within the Lower, More Participatory Parts of the Societal Pyramid for Socialization into the Representative Structures Near the Top of the Pyramid

Workplace participatory democracy strengthens political democracy by training workers how to be public-minded citizens. Whereas Carole Pateman and Benjamin Barber emphasize the importance of participatory democracy, C.B. Macpherson realistically accepts that, in an American-style liberal democracy that “operate[s]

64. *Id.* at 60-61 (citing, among other things, JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., MIT Press 1991) (1962)).

65. *Id.* at 61.

66. *See* PATEMAN, *supra* note 51, at 102.

67. *Id.* at 88.

68. *See id.* at 99.

69. *Id.* at 102. The ultimate fate of Titoist Yugoslavia provides some support that participatory democratic theory is not just a pipedream. Titoist Yugoslavia was a communist dictatorship held together in large part by the charisma of Tito himself. *See* LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* 28-29 (Penguin Books 1997) (1996). Upon his death and with the fall of the Soviet Union, Yugoslavia broke apart into at least some democratic states. *See id.* at 29. It seems that participatory democratic theory would have predicted this outcome—first, a lack of stability caused in part by a lack of congruence between the government’s authority patterns and some social units; and second, the penetration of democratic social units breaking the state’s monopoly hold.

through a . . . congressional structure,”⁷⁰ “there will have to be some kind of representative system, not completely direct democracy.”⁷¹ Even still, Macpherson posits a “pyramidal system with direct democracy at the base and delegate democracy at every level above that.”⁷² For Macpherson,

[a]s soon as democracy is seen as a kind of society, not merely a mechanism of choosing and authorizing governments, the egalitarian principle inherent in democracy requires not only ‘one man, one vote’ but also ‘one man, one equal effective right to live as fully humanly as he may wish.’⁷³

Putting together Carole Pateman’s and Benjamin Barber’s theories of participatory democracy, C.B. Macpherson’s pyramidal theory, and Harry Eckstein’s congruence theory results in a working description of the relationship between the workplace and a liberal democracy. In a liberal democracy with a market economy, citizens learn about democracy by participating in democracy at home, in the community, at school, and at work. These social, non-political sectors can accommodate more participatory modes of democracy because they are smaller and more intimate than state and federal government. By participating in social-unit democracy, such as collective bargaining at the workplace, citizens are more likely to participate in other forms of both political and non-political forms of democracy. In the process, the character of these individuals is transformed.⁷⁴

This pyramidal structure meets Eckstein’s congruence theory—that congruent authority patterns between government and social units promotes governmental stability—and its corollary—that there should be a balance between democratic and nondemocratic elements. First, under a participatory workplace model, the workplace itself is organized in a democratic manner. Employees participate in decisions affecting their work lives and in the process become part authors of their work lives.⁷⁵ This participation transforms the character of these workers,

70. C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 114 (1977).

71. *Id.* at 95.

72. *Id.* at 108. Professor Hilmer makes a similar analysis of Macpherson’s work. *See* Hilmer, *supra* note 38, at 46; *see also* Anne Marie Lofaso, *British and American Legal Responses to the Problem of Collective Redundancies* (July 1996) (unpublished D.Phil. dissertation, University of Oxford) (on file with author).

73. C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 51 (1973).

74. *See* PATEMAN, *supra* note 51, at 45-66.

75. Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 39 (2007) (citing JOSEPH RAZ, *THE MORALITY OF*

thereby transforming worker autonomy into citizen autonomy. The workplace thereby resembles the U.S. government's authority pattern. Second, it also meets the democratic-nondemocratic balance corollary. Collective bargaining over wages, hours, and other terms or conditions of employment (mandatory subjects of bargaining) is accomplished in the generally hierarchical, nondemocratic organization of corporate America. Furthermore, in the private-sector and in some parts of the public-sector, labor disputes are resolved by presidentially appointed experts on the National Labor Relations Board or a public labor board rather than by elected officials.⁷⁶

Collective decision-making over mandatory subjects of bargaining gives workers some control over their work lives, which in turn transforms union workers into better citizens. Indeed, union membership positively correlates with voter turnout.⁷⁷ These data suggest that the unionized workplace is one of the most important sectors for adult citizens to learn how to be better citizens in a democracy.

C. Workplace Participatory Democracy Is Necessary To Protect Public Employees from Government Coercion

Liberal democracy theory views citizens as having conflicting interests, whereas participatory democracy theory views participation as a way of uniting citizens into a common interest.⁷⁸ Rights discourse in the United States tends to reinforce the observation that citizens have conflicting interests, insofar as rights are themselves based on interests.⁷⁹ Accordingly, American rights discourse reinforces the idea that conflict is inevitable in social units, such as the workplace. The rights-based lens

FREEDOM 369 (1986)).

76. See, e.g., 29 U.S.C. § 153 (establishing the National Labor Relations Board).

77. See, e.g., Benjamin Radcliff & Patricia Davis, *Labor Organization and Electoral Participation in Industrial Democracies*, 44 AM. J. POL. SCI. 132, 140 (2000) (“[D]eclines in labor organization mean a decline in the proportion of citizens contributing their preferences to the democratic process.”); Patrick Flavin & Benjamin Radcliff, *Labor Union Membership and Voter Turnout Across Nations* (unpublished manuscript presented at annual meeting of the Midwest Political Science Association, Chicago, IL, Apr. 2-5, 2009), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/3/6/3/2/0/pages363204/p363204-1.php.

78. See generally JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 3 (1980) (comparing “adversary” and “unitary” democratic models and explaining participatory democracy as a form of unitary democracy, “based on common interest and equal respect”).

79. See RAZ, *supra* note 75, at 181-82.

can, therefore, cloud rather than clarify the role of participation in the workplace.

More precisely, rights create correlative duties that the rights holder can claim against the one who is legally obligated.⁸⁰ Rights holders and duty holders are therefore pitted against one another based on conflicting interests. The reality of a liberal democracy devoted to defending rights then is that citizens' sundry interests remain in a constant state of conflict, often based on conflicting values.⁸¹

To be sure, conflicting rights, interests, and values are common in the workplace. Workers' and employers' rights are based on interests that often result in conflict. Workers are interested in job security, living wages, secure retirement, health and safety, and other "good" terms and conditions of employment. Workers therefore have an interest in securing rights that protect these interests. These rights are based, at least in part, on substantive autonomy (self-actualization) and human liberty.⁸² To accomplish the profit-maximization goal, employers desire a productive, orderly workforce and therefore have an interest in obtaining and maintaining managerial and property rights. These rights are themselves based on free market values such as efficiency and wealth maximization.⁸³

As Professor Barber observes, the American political tradition contains three "contradictory impulses"—the anarchist strain, the realist strain, and the minimalist strain—that co-exist as different approaches to the problem of conflict:

The American political system is a remarkable example of the co-existence—sometimes harmonious, more often uncomfortable—of . . . three dispositions. Americans . . . are anarchists in their values (privacy, liberty, individualism, property, and rights); realists in their means (power, law, coercive mediation, and sovereign adjudication); and minimalists in their political temper (tolerance, wariness of government, pluralism, and such institutionalizations of caution as the separation of powers and judicial review).

80. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 36-38 (Walter Wheeler Cook ed., 1923); RAZ, *supra* note 75, at 183-86.

81. See BARBER, *supra* note 35, at 4. For a discussion on conflicting values, see generally Lofaso, *supra* note 75.

82. Lofaso, *supra* note 75, at 38-39, 49 (citing RAZ, *supra* note 75, at 369; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 181 (1977)).

83. See *id.* at 7-9 (citations omitted).

The anarchist, realist, and minimalist dispositions can all be regarded as political responses to *conflict*, which is the fundamental condition of all liberal democratic politics. Autonomous individuals occupying private and separate spaces are the players in the game of liberal politics; conflict is their characteristic mode of interaction. Whether he perceives conflict as a function of scarce resources (as do Hobbes and Marx), of insatiable appetites (as do Russell and Freud), or of a natural lust for power and glory (as does Machiavelli), the liberal democrat places it at the center of human interaction and makes it the chief concern of politics.

While the three dispositions may share a belief in the primacy of conflict, they suggest radically different approaches to its amelioration. Put very briefly, anarchism is *conflict-denying*, realism is *conflict-repressing*, and minimalism is *conflict-tolerating*. The first approach tries to wish conflict away, the second to extirpate it, and the third to live with it. Liberal democracy, the compound and real American form, is conflict-denying in its free-market assumptions about the private sector and its supposed elasticity and egalitarianism; it is conflict-repressing and also conflict-adjusting in its prudential uses of political power to adjudicate the struggle of individuals and groups; and it is conflict-tolerating in its characteristic liberal-skeptical temper.⁸⁴

The centuries-old debate over the degree of good that unions, as participants in workplace decisionmaking, do in the private sector has historically been a struggle between the anarchist and the realist impulses within the American political tradition. Because Americans tend to be conflict-denying (anarchists) in their “free-market assumptions about the private sector,”⁸⁵ many Americans struggle to see the good that unions do within that anarchist framework. Instead, they view unions as adding conflict to the workplace, diminishing the free market values of efficiency and wealth maximization and therefore as harming the United States, especially in today’s global economy. This view coincides with public support for employer interests over worker interests. It was only during the Depression, when enough members of Congress were convinced that union repression resulted from inequality of bargaining power between labor and capital and that union repression resulted in disruption to interstate commerce, that Congress could pass

84. BARBER, *supra* note 35, at 5-6.

85. *Id.* at 6.

the National Labor Relations Act ("NLRA").⁸⁶ In other words, it was only when Congress could see that unions reduced conflict that it was willing to accept unions. The NLRA's purpose is, in part, a realistic approach to extirpating conflict, thereby promoting industrial peace through administrative adjudication of labor disputes and the grievance-arbitration machinery.⁸⁷ Strikes and other forms of industrial war are a last resort and have been further curbed by judicial amendment to the NLRA.⁸⁸

As Barber and others have repeatedly recognized, protecting rights and liberties is at the heart of the American liberal democracy. But how we think of those rights and liberties shades how we regard solutions to the problem of government and private-sector coercion. At one extreme lie market libertarians, such as Friedrich von Hayek, whose scholarship has discounted the dangers inherent in accumulated capital and who has defined liberty in the negative sense as freedom from coercion,⁸⁹ where coercion is defined as the state of choosing "to serve the ends of another" "in order to avoid a greater evil."⁹⁰ Reminiscent of the pre-Depression, *Lochner*-era of American jurisprudence, which raised freedom of contract to a constitutionally cognizable liberty interest, the purpose of Hayek's liberty theory is to show that government interference into the individual's personal and business affairs should be minimal.⁹¹ As a result, Hayek tends toward anarchism, or at least minimalism, in his approach to government's role as a market regulator. Along these lines, Hayek views unions as labor monopolies, privileged by their exemptions from various torts and antitrust laws in the United States and the United Kingdom.⁹² These privileges, holds Hayek, give unions the power to create conflict where conflict is unnecessary—to coerce employees and employers by exerting unlimited pressure on them, in particular, by interfering with their freedom of contract and freedom to bargain individually.⁹³

86. 29 U.S.C. §§ 151-169 (2006).

87. *See id.* § 151.

88. The right to strike is protected under 29 U.S.C. §§ 157, 163. For a discussion of how economic weapons have been diminished see, for example, Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 220-21 (2010); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

89. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 11-12, 19 (1960).

90. *Id.* at 20-21.

91. *See Lochner v. N.Y.*, 198 U.S. 45 (1905) (finding state statute limiting the working time of bakers to be unconstitutional interference into freedom of contract under the Fourteenth Amendment).

92. *See HAYEK, supra* note 89, at 136, 267-68.

93. *See id.* at 136, 269-70.

Workplace participatory democracy theory provides an effective response to Hayek and other market libertarians. As explained in Section III.B.2, workplace participation results in certain goods, such as educating the public in civic duties, which are ignored by market libertarians, who focus on the property and managerial rights of owners and employers. This educative effect dignifies workers by allowing each and every one of them to realize their true self, free from one of the gravest dangers to individual liberty—government interference.⁹⁴ It also protects workers from private sources of coercion—owners and their managers. In the case of the public employee, the government is also the employer. This fact makes it all the more important that public employees have a voice against this doubly dangerous source of coercion.

D. The Lack of Constitutional Protection Afforded Public Employee Speech is Yet Another Significant Rationale Demonstrating the Need for Public Employee Voice Through Public-Sector Unions

There is no principled reason why employees should be denied the opportunity to transform their character and become better citizens simply because their employer is the government. As explained in Part III.B and III.C above, participatory democracy arguments generally contemplate the value of all types of social-unit sector participation, including participation in local government to educate people in the arts and skill of citizenship.

Nor is there anything unique about the development of American common law that would give us pause in applying the participatory democracy rationale to public-sector unions. To the contrary, the common law has, in fact, *diminished* the citizenship rights of public-sector employees, making it all the more imperative that these employees have a voice check on our government.

The *Pickering-Connick-Garcetti* trilogy⁹⁵ demonstrates the extent to which the Court (the government's judicial branch) has diminished the dignity of public-sector employees through the common law in the past 40 years. Those cases present the question whether an employer may lawfully discipline a public employee for engaging in free speech. Given the considerable freedom from government interference that the

94. See *id.* at 136-37.

95. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

Court normally affords speakers, even fictional speakers such as corporations,⁹⁶ the answer here is quite surprising.

Under this trilogy, the Supreme Court has created a three-step inquiry for determining whether the First Amendment protects public employee speech. First, as a threshold matter, the court must determine whether the speech falls within the public employee's job duties.⁹⁷ The Court in *Garcetti* held that if the speech does fall within that employee's job duties, then the speech is not protected and the employer does not violate the Constitution if it terminates or otherwise engages in an adverse employment action because of that employee's speech.⁹⁸ Second, the court must determine whether the employee uttered speech involving a matter of public concern.⁹⁹ The Court in *Connick* found that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."¹⁰⁰ Courts, in the context of public employee speech, have taken a narrow view of what constitutes speech of public concern, defining it as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."¹⁰¹ Finally, even if speech is uttered on a matter of public concern, the speech must be weighed against the "interest of the State, as an employer, in promoting the efficiency of the public services it performs."¹⁰² Applying this *Pickering* balancing test, public employee speech is protected only when the interests of the public employee in discussing a matter of public concern outweigh the interests of the state as employer.¹⁰³

96. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978); see also C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 646 (1982) (predicting that the "Supreme Court decision to protect profit-oriented corporate political speech will, if followed, probably do more to undermine people's 'ability to control [their] own destiny' than any of the Court's recent refusals to protect self-expressive conduct" (quoting Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982))).

97. See *Garcetti*, 547 U.S. at 423.

98. *Id.* at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

99. See *Connick*, 461 U.S. at 147-48.

100. *Id.* at 147-48.

101. *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (per curiam).

102. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

103. See *id.* at 569-73 (holding that a public school teacher's act of writing a letter to local newspaper criticizing the board of education's allocation of school funds coming from taxes did not provide a lawful basis for teacher's dismissal, absent proof that false statements were knowingly or recklessly made).

The *Pickering-Connick-Garcetti* framework is predicated on the Court's assertion that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."¹⁰⁴ Given this assumption, the Court fairly easily stripped public employees of *all* constitutional protection from discipline to utter speech made pursuant to that employee's official duties. But, as Justice Stevens points out in his dissent in *Garcetti*, the answer to the question—whether public employee speech uttered pursuant to official duties should be constitutionally protected—must, at the very least, be "'Sometimes,' not 'Never.'"¹⁰⁵ As both Justice Stevens and Justice Souter point out, "public employees are still citizens while they are in the office."¹⁰⁶ Rather, when a public employee utters otherwise protected speech that the government does not like, it is "immaterial" whether that speech fell within that employee's official job duties.¹⁰⁷

In contrast with the majority's view that a public employee "by necessity must accept certain limitations on his or her freedom,"¹⁰⁸ Justice Souter observes that "a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him."¹⁰⁹ He further observed that constitutional protection rests on "the value to the public of receiving the opinions and information that a public employee may disclose. 'Government employees are often in the best position to know what ails the agencies for which they work.'"¹¹⁰ Given Souter's starting points, he would have protected public employee speech "addressing official wrongdoing and threats to health and safety," even when uttered in the course of that employee's official duties.¹¹¹

As the *Garcetti* dissents point out, discounting public employee speech merely because the public employee may be speaking pursuant to

104. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

105. *Id.* at 426 (Stevens, J., dissenting).

106. *Id.* at 427.

107. *Id.* at 427 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413-16 (1979) (applying constitutional protections to an English teacher who raised concerns to the principal about the school's racist employment practices without discussing whether the speech was made pursuant to the teacher's job duties)).

108. *Id.* at 418 (majority opinion).

109. *Id.* at 428-29 (Souter, J., dissenting).

110. *Id.* at 429 (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994)).

111. *Id.* at 428.

his official capacity unduly restricts the civil rights of those public employees, who may very well be speaking *also* as concerned citizens:

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation with my vocation"; these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract. There is no question that public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would.¹¹²

In other words, civil servants often include public-minded citizens who intertwine public service and private life. The *Garcetti* rule discourages precisely the type of workers that the government should be trying to attract.

Accordingly, it is antithetical to any conception of a democratic workplace or of the dignified worker to hold—as *Garcetti* does—that the government *owns* every syllable that the employee utters in performing his or her job. *Garcetti*'s vision of the public employee is insulting and degrading to the civil servant.¹¹³ By contrast, recognition of the value of participatory democracy in the workplace would have led to the conclusion that "public employees are often the members of [a] community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public."¹¹⁴ It is patently obvious that the complaints of police officers and firefighters, among others, are often both matters pertaining to employment and matters of grave public concern. By not allowing them "to speak on these matters, the community [is] deprived of informed opinions on important public issues."¹¹⁵

The *Pickering-Connick-Garcetti* trilogy demonstrates one very significant reason why public employees must have a voice outlet and why public-sector unions are still very important: their speech as citizens is under greater government coercion merely because they work for the government. As Justice Souter points out, the majority's reliance on federal and state whistleblower statutes is inadequate to protect public

112. *Id.* at 432-33 (footnotes omitted).

113. I would like to thank West Virginia University Law Professor Bob Bastress for raising this issue with me.

114. *See City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam).

115. *See id.*

employee speech or to provide an important check on government coercion.¹¹⁶ Whistleblower statutes, in their current manifestation, are hardly comprehensive and therefore would not capture much, if not most, of the speech that should be protected.¹¹⁷ A dearth of voice outlets resulting from inadequate speech protection, especially protection of dissenting speech, is very likely to result in higher skilled public employees exercising their exit option and leaving public service.¹¹⁸

E. There Is No Principled Rationale for Denying Public Employees the Right to Join Unions and Otherwise to Participate in Public Sector Bargaining, Especially Because the Arguments Against Public-Sector Unions Are Generally False, Misleading, or Pretextual

The media are filled with commentary explaining to the public why public-sector unions should be prohibited.¹¹⁹ Almost all of those arguments are either based on faulty data or are really arguments against unions in general, as opposed to public-sector unions. Below, I debunk some of the most common arguments against protecting public-sector unions.

Many commentators baldly assert that public-sector unions have wielded too much economic and political influence. As proof, these commentators assert that public unions have secured higher wages, more generous defined-benefit pension plans, and job tenure.

The argument that public-sector employees, and especially union-represented public-sector employees, are paid higher wages than their private-sector counterparts is a myth. The most recent scholarly paper (the Lewin Report) to gather research results and analyze the data concluded as follows:

The existing research, much of which is very current (completed within the past two years), shows that, if anything, public employees are underpaid relative to their private-sector counterparts. While public-sector benefits are higher than private-sector counterparts, total compensation (including health care and retirement benefits) is lower than that of comparable private-sector employees. Erosion of public-

116. *Garcetti*, 547 U.S. at 439-40 (Souter, J., dissenting).

117. *See id.* at 440.

118. *See* Richard B. Freeman, *The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations*, 94 Q. J. ECON. 643, 644 (1980).

119. *See, e.g.*, John O. McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions*, POLICY REVIEW, Aug. 1, 2010, at 1, available at <http://www.hoover.org/publications/policy-review/article/43266>.

sector pay and benefits will make it harder for public employers to attract, retain and motivate the workforce needed to provide public services.¹²⁰

Accounting for education, age, and other relevant variables, “public employees earn 11.5 percent lower base pay (i.e., wages and salaries) than their private-sector counterparts”¹²¹ The difference between public and private-sector employee compensation shrank to 3.7 percent when health, retirement, and other benefits were included in the analysis.¹²²

The Lewin Report also verifies that the data from other research are remarkably similar. In particular, the research studies report that public employee base pay is between 12.0 percent and 11.4 percent lower for public-sector employees.¹²³ And the research papers report that public employee total compensation is anywhere from 3.7 percent to 1.4 percent lower than equivalently educated private-sector counterparts.¹²⁴

This argument against public-sector unions also conflates the source of public-sector benefits, falsely attributing them to unions. Many benefits enjoyed by public-sector employees are not the result of collective bargaining but the result of some other governmental process, including the legislative process, and therefore benefit all public workers.¹²⁵ This is true, for example, of most public servants for the federal government; most federal employees, even managers, receive the same menu of benefits; most federal-sector unions may not bargain over that menu.¹²⁶ Similarly, many state government employees do not have

120. David Lewin et al., *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining*, EMP’T POLICY RESEARCH NETWORK, at 2 (Mar. 16, 2011), available at <http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/EPRN%20PS%20draft%203%2016%2011%20PM%20FINALtk-ml4%20edits.pdf>.

121. *Id.* at 4 (interpreting the findings of Rutgers University Professor Jeffrey Keefe).

122. *Id.* at 5.

123. *Id.* at 5-6 (citing studies from Bender and Haywood, in addition to the Keefe study).

124. *Id.* at 5 (citing reports from Jeffrey Thompson (University of Massachusetts) and John Schmitt (Center for Economic Policy Research) in addition to the Keefe study). *See also* Slater, *supra*, note 7, at 5-10.

125. GAO-10-754, *supra* note 10.

126. The Federal Service Labor-Management Relations Statute (FSLMRS) directs federal agencies to negotiate in good faith with the union representatives of their employees. 5 U.S.C. § 7117. In particular, “[t]he duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation . . . [and] extend to matters which are the subject of any agency rule or regulation [as defined] only if the [Federal Labor Relations Authority] has determined. . . that no compelling need exists for the rule or regulation.” 5 U.S.C. § 7117(a). “The scope of the agency’s duty to negotiate extends to all

the right to bargain over their pension plans, which are a matter of government policy, not of private ordering. This is true, with limited exception, of public servants for the state of West Virginia.¹²⁷ And even if some public unions have bargained over their benefits, unions cannot make those bargains happen without management approval. After all, the government, not the union, is the source of the benefit. This argument—that unionized public servants are overpaid—thus shifts the burden of the government’s mismanagement of its financial affairs onto the union. Recall, too, that these pension plans were relatively well-funded just a few years ago.¹²⁸ This argument therefore also shifts the blame of underfunded liabilities onto public-sector unions; yet, as discussed in Parts I and II, those responsible for the 2008 financial crisis (mostly private-sector financial institutions) are ultimately responsible for creating these underfunded liabilities.

Similarly, tenure—which simply means that an employee can only be fired for cause and with due process—is commonly granted under civil servant statutes both at the federal and state level, irrespective of

‘conditions of employment,’ *id.* § 7103(a)(14), a term that the Supreme Court has interpreted to include wages and compensation. . . . unless these matters are otherwise expressly provided for by law.” AFGE, Local 3295 v. FLRA, 46 F.3d 73, 74 (D.C. Cir. 1995) (citing *Fort Stewart Schools v. F.L.R.A.*, 495 U.S. 641, 645-50 (1990)). In general, the pay for most federal employees “is fixed administratively under the Prevailing Rate Systems Act,” and is therefore “not negotiable.” AFGE, Local 1978 v. F.L.R.A. 960 F.2d 838, 840 (1992). The Federal Labor Relations Authority, with court approval, has held under various rationales that federal agencies do not have the obligation to bargain over wages and benefits with their employees’ union representatives. *See, e.g.*, AFGE, Local 3295, 46 F.3d at 78-79 (holding that, by the Financial Institutions Reform, Recovery, and Enforcement Act, Congress intended to endow the Director of the Office of Thrift Supervision with exclusive authority to set compensation levels and therefore that the Director is not under a duty to bargain with the union over wages and benefits).

127. West Virginia public employees are not covered by either the National Labor Relations Act, 29 U.S.C. § 152(2), (3) or the West Virginia Labor-Management Relations Act, W.Va. Code § 21-1A-2(a)(2), both of which expressly exempt state employees. *See also* Woodruff v. Bd. of Trustees of Cabell Huntington Hosp., 173 W.Va. 604, 606 n.2, 319 S.E.2d 372 (1984) (explaining that West Virginia state employees are not covered by state or federal statutes that protect the right to organize and bargain collectively). Accordingly, any rights West Virginia public employees may have derive from the West Virginia Constitution as interpreted by the West Virginia Supreme Court. Although that Court has recognized that collective bargaining between the state and its employees is permissible, it has not held that collective bargaining is mandatory. For example, in *Woodruff*, the Court held that public employees possess constitutionally protected free speech rights to picket, to petition the state for redress, and to disseminate information about a labor dispute under the First Amendment of the United States Constitution and under the West Virginia State Constitution. *See id.* at 609-10. The Court also held that such a collective-bargaining agreement could not waive these rights “inherent” in the State Constitution. *See id.* at 611. The Court further held that the particular contractual language in this case was insufficient to constitute a waiver of the workers’ First Amendment rights under the United States Constitution. *See id.* at 611-12.

128. ALICIA H. MUNNELL, JEAN-PIERRE AUBRY & LAURA QUINBY, THE FUNDING OF STATE AND LOCAL PENSIONS: 2009-2013, 5-6 (2010).

union participation or representation.¹²⁹ Tenure, which is also common in the private sector in some industries and therefore is not unique to the public sector, let alone to the unionized public sector, is typically granted only after an employee has served some probationary period ranging from two years, as in the federal government, to six or more years, as in the case of professors.

Critics here may point back to the union's general treasury spent on political candidates as an even greater influence on government spending decisions. According to this argument, politicians (whose primary concern is re-election) will be unduly influenced by unionized public servants. This argument shifts the burden of the politician's lack of integrity onto public servants. There are, however, better ways to handle this problem, such as greater transparency in the cost of benefits. In any event, this argument proves too much. As the data in Part II show, corporations have much more influence over politicians than unions, and yet no one is advocating for the removal of the corporate form.¹³⁰ In this vein, this contention is really one of two arguments. At most, it is an argument against *Citizens United* and an argument in favor of curbing corporate political expenditures—not an argument against public sector unionism. Or it is an argument against applying *Citizens United* to union speech (in other words, an argument in favor of content discrimination).

Critics of public employee unions also mischaracterize the rights to strike, to bargain collectively, to seek binding arbitration,¹³¹ and to collect union dues as “privileges.”¹³² This argument conflates the legal concepts of rights proper (also known as claim-rights) with privileges (also known as liberty rights).¹³³ A claim-right is a right that the right's holder, such as an employee, can claim against a specific entity, such as

129. See, e.g., MICH. COMP. LAWS ANN. § 38.91 (West 2011) (teacher tenure); § 38.514 (firefighter and police officer tenure).

130. See, e.g., Stephen Slivinski, *The Corporate Welfare State: How the Federal Government Subsidizes U.S. Businesses*, POLICY ANALYSIS, May 14, 2007, at 1, available at <http://www.cato.org/pubs/pas/pa592.pdf> (acknowledging that the federal government spent \$92 billion on direct and indirect business subsidies in the private sector in fiscal year 2006).

131. Strangely enough, arbitration is viewed as an anti-employee dispute resolution mechanism because it is used by employers to limit liability, especially in the private sector.

132. See, e.g., McGinnis & Schanzenbach, *supra* note 119; Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT'L AFFAIRS, Fall 2010, at 13, 19, available at <http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>.

133. See HOFELD, *supra* note 80, at 36-37. The relationship between Professor van Alstyne's analysis of the right-privilege distinction and as its application to public-sector unions is beyond the scope of this Article. See generally William W. van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

a public or private employer (the government or a private firm), who in turn owes a duty to the right's holder.¹³⁴ A right is the correlative of "a duty or a legal obligation," defined as "that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated."¹³⁵ A privilege, by contrast, is the opposite of a duty and the correlative of "no-right."¹³⁶ The structure of the NLRA illustrates the relationship between employee¹³⁷ claim rights and employer¹³⁸ duties. Under NLRA section 7, private-sector employees hold "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities"¹³⁹ Employees can claim an obligation from employers that, in essence, protects the employees' section 7 rights. In particular, NLRA section 8(a) articulates those duties by making it unlawful for employers to, among other things, "interfere with, restrain, or coerce employees in the exercise of [their section 7 rights],"¹⁴⁰ "dominate or interfere with the formation or administration of any [union] or contribute financial or other support to it,"¹⁴¹ "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage [union] membership,"¹⁴² retaliate against an employee,¹⁴³ or

134. See HOHFELD, *supra* note 80, at 38.

135. See *id.*

136. See *id.* at 38-39.

137. 29 U.S.C. § 152(3) (2006) (defining employee as "any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include [strikers], but shall not include [agricultural laborers], or [domestic servants], or [close relatives], or . . . independent contractor[s], or . . . supervisor[s], or [employees or employers not covered by the NLRA]").

138. See *id.* § 152(2) (defining employer as "any person acting as an agent of an employer, directly or indirectly, but shall not include [the federal or state government acting as employer], or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization"). The labor rights of aviation and railroad employees are protected under the Railway Labor Act, 45 U.S.C. §§ 151-88 (2006), the labor rights of federal employees are protected by the Federal Labor Relations Act, 5 U.S.C. §§ 7101-35 (2006), and the labor rights of state employees are protected by state statute. The labor rights of state employees varies by state depending upon whether the state has granted such rights through a public-sector labor relations statute or whether such rights depend on the state's constitution as applied by its courts. For example, West Virginia state employees would have a constitutional right to organize a union under Article III, §§ 7, 16.

139. 29 U.S.C. § 157.

140. *Id.* § 158(a)(1).

141. *Id.* § 158(a)(2).

142. *Id.* § 158(a)(3).

“refuse to bargain collectively with the representatives of his employees”¹⁴⁴ For example, an employer who threatens to or actually fires an employee because of that employee’s union activities violates the NLRA because it violates that employer’s duty under section 8(a).¹⁴⁵

Labor rights such as these are not merely privileges but are more properly characterized as claim rights. In the case of public-sector unions, the rights’ holders are public employees who are union members (or in some cases, the unions themselves). In general, the government, when acting as an employer, owes certain duties to public employees who are union-represented.¹⁴⁶ In some states, those duties include the government’s obligation to bargain collectively with the public-sector union; in other states, those duties do not include that obligation.¹⁴⁷ The right to binding arbitration is a dispute-resolving mechanism that is viewed as a trade-off for the right to strike.¹⁴⁸ For example, federal employees who are union members do not have the right to strike, but they do have the right to bring their labor disputes to an impasse panel.¹⁴⁹ Because many public-sector employees do not enjoy the right to strike, they lack the most persuasive weapon necessary to convince the public-sector employer to give in to their demands.

In any event, opponents of public-sector unions employ the term “privilege” as a rhetorical device to conjure up the lay definition of privilege as special or undeserved favor.¹⁵⁰ This appeal to pathos is a very common type of political messaging, but has no room in logical legal discourse.

Critics of public-sector unions use the fact that government services tend toward monopoly to argue against public-sector unions. As CCNY Professor Daniel DiSalvo observed, “[t]he very nature of many public services—such as policing the streets and putting out fires—gives government a monopoly or near monopoly; striking public employees could therefore hold the public hostage.”¹⁵¹ Professor DiSalvo, quoting

143. *Id.* § 158(a)(4).

144. *Id.* § 158(a)(5).

145. *Id.* § 158(a)(1), (3).

146. *See supra* notes 134-35 and accompanying text.

147. *See supra* note 127 and accompanying text.

148. *See supra* note 29.

149. 5 C.F.R. 2470.1 (2011).

150. *See* “privilege”, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/privilege> (last visited May 19, 2011). *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 623, 626 (1996) (rejecting state’s argument that its constitutional amendment, prohibiting all government action designed to protect gays and lesbians, “does no more than deny homosexuals special rights,” and holding the amendment unconstitutional under the Equal Protection Clause).

151. DiSalvo, *supra* note 132, at 6.

New York Times labor reporter A. H. Raskin, concludes, “[t]he community cannot tolerate the notion that it is defenseless at the hands of organized workers to whom it has entrusted responsibility for essential services.”¹⁵²

There are several problems with this argument. As a threshold matter, this argument does not appear to hold true for all government-provided services. For example, government does not appear to be a monopolist provider (single seller) of educational, healthcare, or sanitation services because there are many private schools, hospitals, and waste removal companies to compete with these public services.

To be sure, in the public sector, government is a monopolist provider of national defense, police, and fire services; but in those cases, it is also a monopsonist buyer (single buyer) of the labor needed to provide these services. Monopsony is conducive to labor exploitation and unions are needed to break that monopsonistic hold on workers.¹⁵³ For example, monopsony is the likely explanation for the reserve clause, which bound every major league baseball player to his team indefinitely.¹⁵⁴ Without the help of unions, baseball players may not have been able to break the team owners’ monopsonistic exploitation of those players.¹⁵⁵

The recognition that the government as employer acts as a monopoly is in fact a good reason in favor of public-sector unions. Monopoly employers are more likely to exploit workers. Unions redistribute bargaining power thereby bolstering the bargaining power of the monopolist’s employees. These employees learn the tools of democracy that eventually break the monopolist’s hold on decision-making and resource distribution.

Finally, even if a critic of public-sector unions can point to a government-provided service in which the government is a monopoly but not a monopsony (akin to Microsoft’s position as a monopoly seller

152. *Id.* at 7.

153. Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL’Y REV. 87, 92-95 (2011) (describing the economic conditions in southwestern West Virginia that have resulted in coal mine company monopsonies).

154. William M. Boal & Michael R. Ransom, *Monopsony in the Labor Market*, 35 J. ECON. LIT. 86, 110 (1997).

155. *Id.* (“Monopsonistic exploitation arising from explicit collusion is probably rare but occasionally large. Well-documented cases include U.S. baseball before the reserve clause and perhaps other professional sports.”). See 15 U.S.C. § 26b (eliminating baseball’s exemption from antitrust laws in this context and allows baseballs to become free agents); Morgen A. Sullivan, “*A Derelict in the Stream of the Law*”: *Overruling Baseball’s Antitrust Exemption*, 48 DUKE L. J. 1265 (1999).

of Microsoft Office but not a monopsony buyer of labor because it competes with other high tech companies for competent computer programmers and engineers), at most, that situation entails an argument in favor of curtailing the right to strike among public employees in that industry, not an argument for eliminating the right to join a public-sector union or the right to bargain collectively. One such example could be found among secretaries or other clericals who work for police or fire departments. In these situations, we would have to ask ourselves whether there is a good policy reason to prevent police department or fire department secretaries from striking. Such analysis would require more nuanced inquiries regarding the particular employee's job duties.

IV. CONCLUSION

This Article is a small step toward showing why collective bargaining, in general, and collective decision-making (public employee bargaining), in particular, is integral to our democracy's vitality. As explained above, participatory democracy theory contemplates the value of all types of social-unit sector participation, including participation in workplace decision-making, to educate people in the art and skill of citizenship.¹⁵⁶ These arguments show that there is no principled reason that justifies denying employees the opportunity to transform their character and become better citizens simply because their employer is the government. In fact, there are greater justifications for public-sector unions insofar as government is potentially the most formidable source of coercion against human liberty and dignity.

If these arguments so forcefully demonstrate the need for worker voice, in general, and public-sector unions, in particular, then why have politicians (who are supposedly unduly influenced by unions) targeted and attacked public-sector unions? As explained above, the real issue is how to solve underfunded liabilities. This pressing domestic issue of our day can only be solved by examining two related questions—an economic question and a fairness question. First, who is in the best position (or what combination of players is in the best position) to pay for these liabilities? Is it the state governments, some of which are so financially strapped that they are contemplating bankruptcy? Is it the taxpayer in the form of higher taxes? Is it the future taxpayer? Is it the public employee, who is receiving the benefit? If so, which public employee is in the best position to bear these costs? Is it current workers

156. See discussion *infra* Part II A-B.

(by increasing employee contributions), or is it retired workers (by increasing retirement age)?

Second, the issue of underfunded liabilities compels us to review the equities of the situation to determine who, as a matter of justice or fairness, society should burden with these liabilities. In particular, in coming up with solutions to these difficult policy questions, we must come up with rationales that “no one could reasonably reject as a basis for informed, unforced general agreement.”¹⁵⁷ One method for coming up with such rationales would be to put ourselves into a Rawlsian original position in search of the most just ways to distribute these burdens.¹⁵⁸ For example, those behind the veil of ignorance might be given the context of today’s economic situation and then tasked with finding solutions. They might ask themselves, which is the fairer solution—asking retired workers (who will ultimately receive the benefit) to bear the cost of these benefits by raising the retirement age or asking current workers (who will not receive these benefits) to pay for these benefits. Or is it simply more just to spread the cost over society by asking taxpayers to bear the cost?

Although these questions are beyond the scope of this Article, I would like to outline a three-step method for attacking this problem. First, we must get a handle on the extent of the unfunded liability issue. Think tanks have already begun to research this.¹⁵⁹ Second, we must understand the legal environment in which these unfunded liabilities will come due. In many cases, state and local governments are constitutionally, statutorily, or in some cases, contractually obligated to pay these pensions. Therefore, if the government cannot pay, they are in danger of violating state law. For example, in West Virginia, state employees can challenge any change in vested pension rights under the West Virginia Constitution.¹⁶⁰ Third, once the facts and the state law are known, we can come up with a solution that may be unique to each state.

In going through this analysis, we must understand the conflicting interests that are creating the political tensions. State governments are interested in fiscal sustainability, and attracting good workers through pay, benefits, and other good terms and conditions of employment. State

157. THOMAS SCANLON, WHAT WE OWE TO EACH OTHER 153 (1998).

158. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 15-19 (1971) (revised ed. 1999).

159. *See, e.g.*, GAO-10-754, *supra* note 10; MUNNELL, AUBRY & QUINBY, *supra* note 128, at 4-5.

160. W.V. CONST. art. III, § 4 (prohibiting the enactment of any “law impairing the obligation of a contract”); *see Booth v. Sims*, 456 S.E.2d 167, 186-88 (W. Va. 1994) (upholding law that increased contributions but striking down provision reducing employee’s cost-of-living adjustment).

governments will prefer defined contribution plans which are less costly to the government. Public employees are interested in income security and retirement security. Many of them rightfully feel that they have made past wage-benefit trade-offs to secure retirement. These employees will typically prefer defined benefit plans. Taxpayers are interested in government accountability, government competence, and receiving more services for less money. There are also generational interests, including state promises to past generations and cost-shifting issues to future generations.

This crisis does give us food for thought. Although assessing blame will do little to help now, it would be helpful to analyze the extent to which the various parties contributed to the financial crisis. This means that politicians need to stop deflecting blame onto public servants and show the leadership that they claim to possess.

Copyright of Hofstra Labor & Employment Law Journal is the property of Hofstra University School of Law and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.