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Save Taxpayers Tens of Billions of Dollars: End Government Sector Collective Bargaining

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EXECUTIVE SUMMARY

The advent of legalized government sector unionization and collective bargaining in state and local government triggered an explosion of legal and illegal strikes. From 1958 through 1968, illegal work stoppages or strikes at all levels of government increased 1,593 percent, resulting in a 33,790 percent increase in the loss of workdays. In 1967, New York City sanitation workers struck and buried city streets under 10,000 tons of garbage per day. In 1978, striking firefighters in Indiana refused to respond to a fire that burned through a downtown city block. "Blue flues" have repeatedly struck law enforcement officers in California since 1985, when the state's supreme court ruled that public safety employees had the right to strike. And in December 2005, New York transit workers went on strike, costing the city $400 million per day in lost business and revenue.

The strike threat entailed by unionization combined with the power to force government employers to bargain over wages and benefits has empowered the average government worker to demand and receive hourly pay and benefits that are now 44 percent higher than the average private sector worker's. Those high costs are bankrupting state and local governments—and taxpayers—across the nation.

But it does not have to be this way. More than 30 years ago, Virginia banned government sector unions from collective bargaining and entering into collectively bargained contracts. Within seven years, government employees had abandoned their unions in droves as they realized the union did little for them. Statistical analysis shows that if states prohibited all forms of collective bargaining, they could reap a total of nearly $50 billion in savings for state and local taxpayers across the country.

But more than money is at stake. Collective bargaining for public unions is particularly problematic because government sector unions help elect their employers, and their employers often return the favor by raising taxes to pay for the benefits the unions then demand. A ban on government sector collective bargaining helps disrupt this all-too-common *quid pro quo*. To solve this problem, more than a ban on collective bargaining and collectively bargained contracts is needed. Statesmen must restore and enforce the ideal that the American form of government

is a public trust. Reform should be rooted in a legal framework that underscores government officers and employees are public servants, who owe undivided loyalty to the public.

Civil servants should serve the public. Honest politicians must end policies and agreements that put their interests and those of government employees ahead of those of citizens at large. This report shows how.

Introduction

Between the 1950s and the 1990s, union density among government employees—the percentage of government employees who are union members—increased more than *207* percent, from less than 13 percent to about 40 percent, while union density among private employees decreased more than 63 percent from 33 percent to under 12 percent of employees.[1] By the late 1990s, more than 30 percent of state workers and nearly 45 percent of local government employees were members of labor organizations.[2] By 2010, 52 percent of all government workers were members of a labor union.[3] Unlike private sector unions, whose power has dissipated as their industries face the pressures of technological change and international competition, government sector unions have seen their power grow in tandem with the growth of state and local government.

Government sector unions remain ascendant in state and local government. And that ascendancy threatens the fiscal wellbeing of state and local governments. Government sector collective bargaining enables collusion between government employees and public officials who can easily feather their own nests with taxpayer dollars because government sector unions hold the political future of many public officials in their hands. This paper shows a strong correlation between government sector union density, the wages and benefits paid to government employees, and unsustainable fiscal policies.

But the times are changing. Continued economic hard times and falling revenues are forcing hard choices on state and local governments. The above-market wages and benefits enjoyed by government employees are a natural target for scrutiny and savings. The obstacle to reform consists of legal barriers protecting their special privileges. In Arizona, these barriers consist of so-called "meet and confer" ordinances, which have been enacted by numerous school districts, municipalities, and counties.

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Just like more honestly labeled "collective bargaining" laws elsewhere, Arizona's "meet and confer" ordinances compel local governments to bargain with government sector unions in good faith towards a binding contract controlling wages, benefits, terms and conditions of employment. But such bargaining is not merely a discussion; the threat of litigation over so-called bad faith negotiations and unfair labor practices hangs over the heads of public officials at all times. And

unions do not shy away from hiring creative lawyers to file lawsuits to keep public officials in line.

Moreover, history shows that government sector union strength does not merely consist of the threat of litigation and political consequences. Far from being docile, government sector unions have historically engaged in illegal work stoppages, strikes, and violence to get their way during good times and bad. Moreover, their tactics are not mindless. Government sector unions have used illegal tactics strategically to undermine essential governmental services and maximize their ability to extract maximum compensation from taxpayers. As a result, public officers, and especially elected officials, greatly fear making the tough calls needed to protect fiscal stability.

It does not have to be this way. Virginia banned both collective bargaining and collectively bargained contracts with government sector unions in 1972. North Carolina has banned collectively bargained contracts as well. Other states, like Texas, have prohibited many kinds of collectively bargained contracts. Even the birthplace of government sector collective bargaining—Wisconsin—has started to break its fiscal policies free from total domination by government employees. These court-tested reforms reflect the fundamental differences between government sector and private sector unions and are fully consistent with our constitutional traditions, which require citizens to retain control over the fiscal future of their government. Moreover, these reforms have reduced the power of government sector unions, union density, and excessive costs associated with inflated wages and benefits. But states could permanently uproot the undue influence of government sector unions by restoring the principle that public offices are a public trust.

By adopting and rooting the Virginia model in public trust doctrine, Arizona taxpayers could save nearly $560 million per year in excessive government employee compensation compared to maintaining the status quo.

There was a time when courts ruled that public offices were literally a public trust, and that public officers owed a fiduciary duty of undivided loyalty to their constituents in wielding the powers entrusted to them. Courts did not hesitate to "vitiate"—or void—contracts approved by self-dealing public officers. This tradition, if revived, would go a long way towards keeping public officers and government sector unions at arm's length during negotiations. Simply put, collusion would be far less likely if any resulting bargain were rendered voidable to the very extent government sector unions used political threats or promises to induce public officers to self-deal during negotiations. Equally important, restoring public trust doctrine would restore honor to public service. And by adopting and rooting the Virginia model in public trust doctrine, Arizona taxpayers could save nearly $560 million per year in excessive government employee compensation compared to maintaining the *status quo*.

Government Sector Unions' History of Strong-Arming

Government sector unions are often regarded as the less aggressive white collar cousins of private sector unions. Wisconsin state senator Dan Kapanke probably

would disagree with that opinion. In March 2011, he and 14 other Wisconsin lawmakers received numerous threats related to their push to reform collective bargaining laws governing government sector unions.[4] One e-mail stated, "Please put your things in order because you will be killed and your familes [sic] will also be killed due to your actions in the last 8 weeks."[5] The email continued by informing the lawmakers that "[they] and the people that support the dictator have to die."[6] But that threat was tame in comparison to another, which stated, "We will hunt you down. We will slit your throats. We will drink your blood. I will have your decapitated head on a pike in the Madison town square. This is your last warning."[7]

There is, however, some truth behind the perception that government sector unions are more docile than private sector unions. Historically, for example, many of today's government sector unions were known as employee or professional associations, and were initially more focused on enhancing work skills and employment opportunities than collectively bargaining with employers.[8] But as the law increasingly allowed government sector unions to bargain collectively, most government employee "associations" either became, merged into or affiliated with union labor organizations.[9] The Wisconsin State Employees Association, for example, became the American Federation of State, County, and Municipal Employees (AFSCME).[10] The Illinois State Employees Association later merged with the Service Employees International Union (SEIU); and the Massachusetts State Employees Association merged with AFSCME.[11] By 1997, AFSCME became the second largest union in the AFL-CIO, with 1.3 million members, just behind the Teamsters.[12] Thus, the lingering use of the term "association" among government labor organizations, particularly among police and fire labor organizations, is now a euphemism for "union."

History shows that when they deem it necessary, government sector unions use the same aggressive tactics as private sector unions to get what they want—even when that means breaking the law.

Government sector unions' position of monopoly-like control over the ability of government to deliver essential services gives government employee unions a big enough stick to carry that they can afford to talk more softly than private sector unions. History still shows, though, that when they deem it necessary, government sector unions use the same aggressive tactics as private sector unions to get what they want—even when that means breaking the law.

Both strikes and union membership were illegal for government employees in most states and localities before the late 1950s. Even so, government sector unions still organized and engaged in numerous illegal work stoppages. In 1946, for example, government employees at the municipal level engaged in 43 strikes, resulting in the loss of 88,000 days of work.[13] Subsequent events show these early strikes do not appear to have been caused by a lack of recognition or legal protection for government sector unions.

Illegal strikes involving a wide spectrum of government employees, including teachers, sanitation workers, and utility workers, dramatically increased even after state and local laws began to permit public union membership and authorize government sector collective bargaining. From 1958 through 1968, illegal work stoppages or strikes by government employee unions at all levels of government increased *1,593 percent*, from 15 to 254, resulting in a 33,790 percent increase in the loss of workdays, from 7,510 to 2,545,200.[14] Between 1967 and 1997, in areas of New York State outside of New York City alone, government employee unions engaged in a total of 330 illegal strikes, involving 377,001 employees, resulting in a *235,584 percent* increase in the loss of work days, from 1,760 to 4,148,054.[15]

This acceleration of illegal work actions by government employees since 1958 is far greater than the otherwise significant growth in state and local public employment, which increased an impressive 227 percent between 1951 and 1999; and it is grossly disproportionate to the 207 percent increase in government sector union density between the mid-1950s and early 1990s.[16] It therefore appears that dramatic contemporaneous increases in the population of government employees cannot alone account for the explosion of work stoppages in the government sector. Instead, the expansion of legal protections to government sector unions seems to have caused an exponential increase in illegal and disruptive work actions. This inference is directly supported by a study of teacher strikes in the United States between 1969 and 1976, which revealed that teacher strikes occurred three times more often in states with legal protections for government employee unions and collective bargaining than in states without such laws.[17]

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Although collective bargaining laws have been justified as a means of ensuring the orderly resolution of labor disputes, history shows that disruptive and illegal work actions are greatly encouraged when a union enjoys their protection. Civil service rules, union contracts, and legally protected collective bargaining allow for illegal strikes that do not imperil every member of the union or even deplete funds set aside by the union to compensate striking members. During the spring of 1979, for example, 1,300 of the 350,000 members of two civil service unions in Britain went on strike.[18] This handful of strikers was successful in securing concessions for the entire union for two reasons: they controlled essential computer services without which government services could not be provided *and* they could outlast the government because their strike fund was continuously replenished by the automatic payroll deductions of union members who were not participating in the strike and protected from termination.

In view of such tactics, it is no wonder that studies have shown "scant empirical evidence" of a deterrent effect from laws that prohibit government sector union strikes.[19] Indeed, hundreds of strikes have taken place in New York despite vigorously enforced laws that penalize government employees *two days pay for*

every day they are on strike.[20] As proudly declared by AFL-CIO President George Meany in 1974,

> Certainly, it's against the law to strike the civil service, but it's AFL-CIO policy to ignore those laws . . . You stop the job. You shut it down. You take the consequences, and you fight. And if the guy happens to be the mayor of a city or the governor of a state, it doesn't make a damn bit of difference.[21]

The benefits associated with a carefully targeted strike are apparently great enough for government sector unions to risk severe and certain penalties as a matter of settled policy. But more often, illegal strikes trigger no adverse consequence to any member of government sector unions. Studies have shown that "enforcement of no-strike laws generally has been 'so lax and erratic as to approach to *de facto* recognition of 'illegal' public employee strikes.'"[22] Public officials responsible for enforcing the prohibition on strikes recognize that behind every illegal strike is the ballot box threat leveled by an organization representing thousands, tens of thousands or even hundreds of thousands of voting government employees and their families. It is only natural for union bosses, like George Meany, unabashedly to wield both legal and illegal means of leverage in their negotiations.

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Of course, well beyond the fiscal impact of unsustainable union wages and benefits generated by concessions to striking government employees, illegal strikes by government sector unions can be disastrous for public health, safety, and welfare. In 1919, for example, nearly the entire Boston police force went on strike, resulting in mass riots and looting of downtown Boston by a mob of more than 5,000 people.[23] During the 1967 strike of sanitation workers in New York City, city streets were buried under 10,000 tons of garbage per day.[24] In the summer of 1978, striking firefighters in Indiana's eighth largest city not only refused to respond to a fire that burned through a downtown city block, but their picket lines delayed volunteers from responding to the fire.[25] "Blue flues" have repeatedly struck law enforcement officers in California since 1985, when the California Supreme Court famously ruled that public safety employees had the right to strike, rejecting fears about the disruptiveness of strikes as fanciful.[26] More recently, in December 2005, New York transit workers went on strike, paralyzing the city during the busy holiday shopping season and costing the city an estimated $400 million per day.[27]

Government sector union strikes could become even more commonplace. Until the mid-1960s, the universal view was that government employees had no common law or constitutional right to strike.[28] Today, while most states still prohibit government employees from striking, 14 states allow strikes by some government employees either by statute or court decision.[29] Additionally, ever since the U.S. Supreme Court upheld the imposition of minimum wage and overtime

requirements on state and local governments in *Garcia v. San Antonio MTA*, labor advocates in Congress have been threatening to extend federal labor laws, including the legal right to strike, to employees of state and local governments.[30] This threat has repeatedly manifested since 1995 in a bill called the Public Safety Employer-Employee Cooperation Act, which would mandate state and local government collective bargaining with public safety employees.[31]

In view of these continuing developments, lurking in the mind's eye of every conscientious public officer is the awareness that government sector unions are ready, able, and willing to establish a stranglehold on the provision of essential governmental services. Less conscientious officials also fully appreciate that unions wield outsized political influence that can terminate them at the ballot box. With this reality in stark focus during any bargaining session, government sector unions rarely need to use the big stick they carry as often as private sector unions. An implied threat is usually enough, backed by collective bargaining laws that compel public officers to listen to their demands and negotiate in "good faith."

Government sector unions claim they enjoy fewer legal protections than their private sector cousins. Nevertheless, public sector unions regularly conduct illegal work stoppages and strikes. Moreover, public sector unions more than make up for the lack of NLRA protection with state and local collective bargaining laws.

Government Sector Unions Are Protected by State and Local Collective Bargaining Laws

Government sector unions claim they enjoy fewer legal protections than their private sector cousins. This is true in two respects. First, government sector unions are excluded from the National Labor Relations Act of 1935, which guarantees private sector unions the ability to organize, bargain, and strike against private employers as a matter of federal law.[32] Second, government sector unions are typically prohibited by law from going on strike. Nevertheless, public sector unions regularly conduct illegal work stoppages and strikes. Moreover, public sector unions more than make up for the lack of NLRA protection with state and local collective bargaining laws.

Only North Carolina and Virginia completely prohibit state and local governments from entering into collectively bargained contracts.[33] Virginia is also the only state that also bans state and local government from collectively *bargaining* with government sector unions.[34] By contrast, the overwhelming majority of government employees in at least 34 states enjoy statutory collective bargaining powers that compel state and local governments to recognize and bargain in good faith with government sector unions over wages, benefits, terms, and conditions of employment.[35] Moreover, until 2011 reforms in Wisconsin and Ohio, state and local collective bargaining laws had only expanded in their scope and reach since 1959, when the first such statewide law was enacted in Wisconsin (following New York City's lead in 1958).[36]

Only seven states—Colorado, Arkansas, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia—completely lack statutory collective

bargaining authority.[37] Even Texas, which is often credited with expressly prohibiting state and local governments from entering collective bargaining contracts with government sector unions,[38] still authorizes state and local governments to "meet and confer" with certain government sector unions and also authorizes collective bargaining for public safety employees by way of local referendum.[39] In other reportedly "non-union" states, local "meet and confer" ordinances similarly make up the difference. Pima and Pinal Counties in Arizona, for example, as well as numerous Arizona school districts and major municipalities have adopted local laws that require collective bargaining under the rubric of "meet and confer" ordinances.[40]

Although government sector unions in right-to-work states like Arizona and Texas still assiduously refuse to equate "meet and confer" and "collective bargaining" laws, the distinction between "meet and confer" and "collective bargaining" laws no longer makes much of a difference. When such laws first appeared, "meet and confer" laws authorized government sector unions and government management to engage in entirely *optional* collective negotiations.[41] They were enacted to displace a backdrop of common and statutory laws that prohibited even voluntary negotiations between government sector unions and government employers. Labor advocates later applied the term "meet and confer" to laws that *compelled* government employers to engage in "good faith" negotiations with government sector unions, but which did not require government to agree to a union contract.[42]

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Today, both "meet and confer" and "collective bargaining" laws usually authorize state and local governments to reach binding contracts with government sector unions—contracts that can tie the hands of subsequent legislatures and city councils because of the constitutional protection afforded contractual obligations under federal and state constitutions.[43] Moreover, if unions believe the negotiations are not being conducted by their employer in "good faith," both "collective bargaining" and "meet and confer" laws empower government sector unions to seek administrative or judicial intervention to compel government employers to bargain.

In short, both labels have come to denote essentially the same thing—laws that require government employers to bargain, i.e. negotiate, with government sector unions in good faith over wages, benefits, terms, and conditions of employment.[44] And however they are labeled, such laws are heavily influenced by the National Labor Relations Act.[45] Courts enforcing them look directly to National Labor Relations Board precedent for guidance.[46] In addition to the ability to compel government employers to remain at the bargaining table until "good faith" is demonstrated, these laws deploy many other aspects of the federal doctrine of "unfair labor practices" to hang a legal threat over government employers who refuse to yield to union demands.[47] This power to keep—or threaten to keep—a

government employer indefinitely engaged in a costly rope-a-dope of court-supervised contract disputes and negotiations gives government sector unions significant legal leverage in bargaining, which is roughly equivalent to that wielded by private sector unions under the NLRA in more than two-thirds of the nation's states. As a result, "a considerable amount of bargaining does transpire" in states such as Arizona notwithstanding local reticence to describe such bargaining as "collective."[48]

The legal leverage government sector unions enjoy under collective bargaining laws is further strengthened by the fact that government sector unions have a number of inherent advantages over the typical private sector union in bargaining with their employers. These inherent advantages explain why government sector unions are still able to bargain informally and successfully from a position of considerable strength, even in North Carolina and Virginia.[49]

Government Sector Unions' Inherent Bargaining Advantage over Private Sector Unions

The distinct ability of government sector unions and government sector employers to collude in reaching fiscally extravagant agreements funded by taxpayers has long been recognized.[50] Such collusion naturally occurs for three essential reasons.

The distinct ability of government sector unions and government sector employers to collude in reaching fiscally extravagant agreements funded by taxpayers has long been recognized.

First, government has an inherently greater ability to pass the cost of any labor deal onto the taxpayer than does a private sector business have the ability to pass labor costs onto their customers.[51] Unlike a private sector business, which can only pay its labor costs by persuading customers to part with their money, government can forcefully seize money to pay labor costs through taxation. Although overtaxed residents can move away, a state or local government's tax base is far more captive than the customer base of any private sector business.[52] Additionally, government is a legal monopoly within its respective jurisdiction. Consequently, the market it serves is relatively static.[53] Unlike nearly all private sector businesses, government does not need to worry so much about sparking competition if it strikes extravagant deals with government sector unions.[54]

Second, unlike private sector unions, government sector unions typically enjoy a *de facto* monopoly over labor needed for critically important services, for which there is often no ready or *legal* private sector substitute.[55] Necessary labor for police, fire, regulatory, sanitary, and sewer services is almost exclusively offered and controlled by members of cooperating unions.[56] Competition among government sector unions has largely given way to "formal nonaggression agreements between some of the larger unions."[57] And unlike private sector businesses, government employers cannot offshore their labor needs for most services, much less relocate to another state. In fact, unlike in the private sector, "no state or local employer

has yet figured out a way to 'bust' or decertify a union short of terminating a public service or contracting it out."[58] The *de facto* labor monopoly enjoyed by government sector unions is then further entrenched by civil service rules that make it exceedingly difficult to fire underperforming or badly performing employees. As a result, when faced with the possibility of disloyal conduct by hard-to-fire employees or illegal strikes, government employers have far less freedom than private sector employers to take a hard line.

Third, the interests of public employers and unions are more often aligned than are those of private sector employers and unions. Unlike private sector unions, "public sector unions can play a role in electing their employers through the exertion of political influence in campaigns for the same public offices that are responsible for negotiating with unions."[59] Government employers thus have an interest in satisfying the demands of government sector unions that private sector employers do not possess in relation to private sector union demands.[60] Although there have been instances of taxpayer revolts against gross overreaching, government sector unions expend far more effort and resources to demand maximum compensation and benefits than do taxpayers in demanding cost savings.[61] This is because a government sector union typically has far more to gain from a particular labor contract than any particular taxpayer stands to lose.[62] As a result, government employers are typically left with the impression that it is far more advantageous and politically expedient to yield to union demands than to resist them.[63]

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Additionally, the interests of government sector unions and government employers are often aligned when it comes to increasing budgets. In Illinois, for example, union members joined with their government employers to lobby for "increases in park budgets, tax levies for schools, as well as state and federal funding."[64] Such collusion takes place because bigger budgets and more spending tend to yield political advancement for government employers. Consequently, government sector union members need not fear "exploitive bosses" as much as private sector unions.[65] Government management also feels a natural affinity for their union brethren because they often share a common enemy—"bureaucrat bashers."[66] By contrast, private sector employers are always constrained by the financial bottom line, rarely rise from union ranks, and never face an analogous incentive to incur or yield to budget increases demanded by private sector unions.

Taken together, relative to the private sector, government employers have far less of an incentive or an ability to demand efficiencies, savings, and productivity from their employees, much less to oppose labor unions. Government sector employers and unions naturally tend to close rank far more often than do private sector employers and unions. In Arizona and throughout the country, government sector unions exploit this inherent bargaining advantage over private sector unions for all it is worth.

Ending Collective Bargaining Could Save Billions

A recent Goldwater Institute investigation revealed that Phoenix, Arizona taxpayers had been picking up the tab for the full salary and benefits of some city employees who do nothing but union work while on the clock. Unions that represent city workers used their clout to negotiate contracts with the city that paid union bosses to do union business. This cost Phoenix taxpayers $3.7 million in 2010, and allowed the unions that represented city workers to rack up as many as 73,000 hours doing union business at taxpayer expense.[67] Similar contracts exist between public sector unions and the Arizona cities of Tempe, Mesa, Chandler and Glendale, as well as Pima County.[68] Among major valley cities, only Scottsdale has refused to offer unions this perk. Because money is fungible, release time probably helped government sector unions in Arizona spend $200,000 to support a successful ballot measure to increase the sales tax in 2010.[69] But the abuse of "release time" is only the tip of the fiscal iceberg set adrift by government sector unions. Government sector unions leverage their political and bargaining power to cause significant increases in government spending on wages, benefits and other outlays that outstrip those in the private sector.

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Studies of government employment in both the United States and Canada have found that government employees enjoy a wage advantage over private sector employees.[70] It is well established that state and local government employees enjoy far more generous health and pension benefits than do private sector employees.[71] A comprehensive study of the cost of Ohio state employees in 2008, for example, revealed that the average state employee cost $66,051 per year—34 percent more than the $49,210 cost of the average private employee.[72] In Wisconsin, government employees paid "almost nothing to their defined-benefit pension plans" and "only 6 percent of their health care premiums."[73] In contrast, private sector workers in Wisconsin rarely enjoy defined-benefit pension plans and paid between 18 and 29 percent of the premiums for their health care plans.[74]

A significant portion of these differences in the cost of government and private sector employees is likely attributable to the bargaining power of government sector unions. Academic research focusing on municipal budgets has found that government sector unions are associated with larger budget outlays across the board.[75] The Goldwater Institute's own independent research confirms that government sector unionization has a significant impact on the finances of state and local government.

One of the primary ways in which government sector unions put fiscal strains on state and local government is through the increased salaries and benefits they receive relative to private sector workers. This has been a clear phenomenon over the past 30 years. From 1950 to 1980, average compensation in real dollars (which includes salary and benefits) generally moved up and down together. But after

1980, the compensation of an average state or local worker began to pull away from that of the average private sector worker. By the mid 1990s, government sector workers had a substantial advantage.[76]

Comparing compensation per hour for private sector workers to that of government sector workers, the differences become obvious. Salary is only one component. As seen in Table 1, most of the compensation difference comes from public workers' high level of health and retirement benefits.

For instance, the prevalence of defined benefit retirement plans for state and local workers gives them a very large compensation advantage—more than six times greater than private workers' hourly benefits. Incidentally, defined benefit plans are being quickly phased out in the private sector due to their inordinate expense when compared to defined contribution plans. The issue is risk. When an employer bears the financial risk of former employees' retirements, future financials look good during good economic times. However, if assumptions about the future turn out to be too rosy, pension obligations can mean bankruptcy for an otherwise sound company.

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***Table 1:* Compensation: Public vs. Private (September 2011 dollars per hour worked)**

Compensation Item	Private Sector Worker	State and Local Worker	Percentage Difference
Total compensation	$28.24	$40.73	44%
Wages and salaries	$19.91	$26.57	33%
Benefits	$8.33	$14.19	70%
Paid leave	$1.90	$3.03	59%
Supplemental pay	$0.80	$0.34	-58%
Health insurance	$2.15	$4.74	120%
Other insurance	$0.13	$0.15	15%
Defined benefit retirement plan	$0.45	$3.10	589%
Defined contribution retirement	$0.56	$0.33	-41%

Source: U.S. Bureau of Labor Statistics, "Employer Costs for Employee Compensation," December 7, 2011, available at http://www.bls.gov/news.release/ecec.nr0.htm

One way to determine whether these compensation differentials are driven by unionization is to compare government workers who are in a union to those who are not. Table 2 shows that unionized state and local government workers do indeed have a substantial advantage in every dimension when compared to non-union government workers. Again, the biggest difference here is in the generosity of government pension plans.[77]

Table 2: **Government Sector Compensation: Union vs. Nonunion (June 2009 dollars per hour worked)**

Compensation Item	State and Local Nonunion	State and Local Union	Percentage Difference
Total compensation	$33.33	$47.46	42%
Wages and salaries	$22.86	$29.90	31%
Benefits	$10.47	$17.57	68%
Paid leave	$2.63	$4.06	54%
Supplemental pay	$0.26	$0.45	73%
Health insurance	$3.07	$5.91	93%
Other insurance	$0.12	$0.22	83%
Defined benefit retirement plan	$1.94	$3.98	105%
Defined contribution retirement	$0.36	$0.25	-31%

Source: Chris Edwards, "Public Sector Unions and the Rising Costs of Employee Compensation," Cato Journal *vol. 30, no. 1 (Winter 2010)*

Some of the difference between public and private employee compensation could be the result of a number of factors. Some studies have found that union membership translates into a positive wage premium for government workers, sometimes amounting to 15 percent or more. Other studies suggest that the government workforce is generally more educated than most workers in the private sector and this is what explains a large part of the compensation differential. Still others contend that any type of job within the public sector should be compared to its counterpart in the private sector instead of lumping all jobs together in the analysis.

Studies that adjust for mitigating factors still find that union workers receive better pay than comparable private sector workers or their public sector brethren who are not unionized.

Studies that adjust for these factors still find that union workers receive better pay than comparable private sector workers or their public sector brethren who are not unionized. For instance, analysis by James Sherk of the Heritage Foundation that is based on data from the Current Population Survey of the U.S. Census Bureau found that state workers had an 11 percent higher hourly wage than non-union state workers after adjusting for the age of the worker, experience level, marital status, demographic profile, education level and the type of job held in the public sector. For the local unionized workers, the difference was 12 percent. We have conducted statistical analysis using U.S. Bureau of Economic Analysis data on total compensation – which includes benefits as well as wages – and data from the U.S. Census Bureau's American Community Survey. The data is cross-sectional, using data for all 50 states from 2009. (For a full explanation of the analysis, results, and methodology, see the appendix.)

The Impact of Collective Bargaining on Arizona

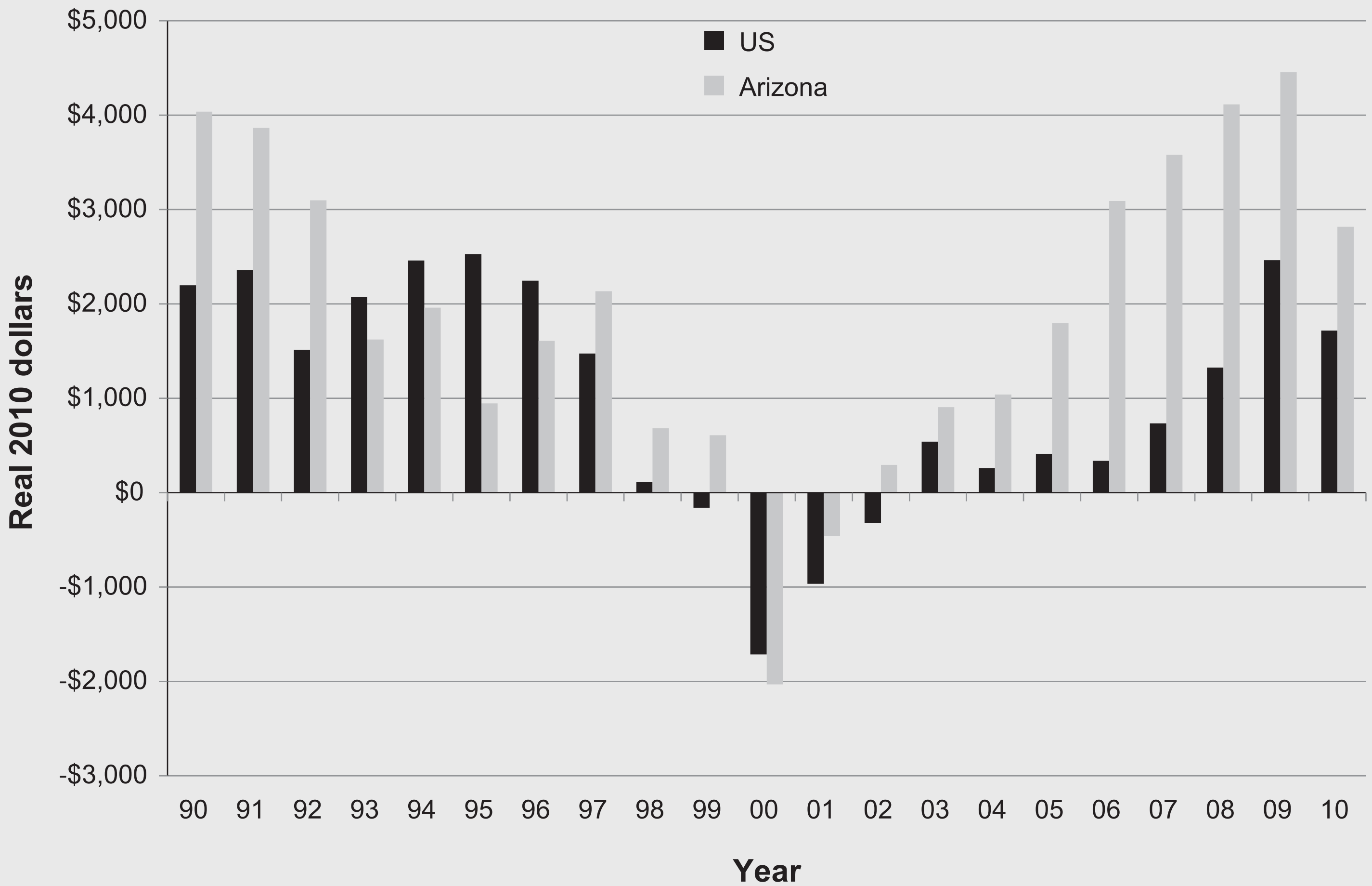
Based on our finding that each 10-point increase in government-sector unionization increases public worker compensation by $1,367, we can ascertain the cost of unionization to Arizona taxpayers. Based on the percentage of state and local workers who are unionized (23 percent in 2009), the compensation premium amounts to $3,144. Multiplying that by the number of state and local employees (362,463 in 2009) results in an estimate of the amount that unionization costs state taxpayers: over $1.1 billion.

Through decades of similar statistical analysis a broad consensus has emerged that unionization increases salaries for state and local government employees, in the aggregate, by 5 to 6 percent. Our analysis indicates that the total compensation premium, which covers a broader scope since it includes both wage and non-wage compensation, is about 6 percent for Arizona, too.

There is plenty of reason to think the national average is probably right around the mark for Arizona, or perhaps even a bit low. Chart 1 shows the inflation-adjusted difference between average total private sector compensation (which includes wages and benefits) and average state and local public sector compensation each year since 1990. Arizona's differential has been substantially higher than the U.S. average for much of this period, particularly since 2006. In 2009, the average state or local worker was compensated roughly $4,455 more in inflation-adjusted dollars than the average private employee. In 2010, the differential for Arizona dropped to $2,816, but the national average fell also. (Note that this differs from the 44% differential cited earlier in this paper. That estimate took into account the total number of hours worked. This estimate simply looks at average total compensation per employee regardless of the hours worked.)

These compensation differentials drive additional costs to taxpayers above and beyond the simple costs of salary. The most obvious cost driven higher by excessive salaries is that of government employee pensions. First, any time a government employee gets a raise, pension costs immediately rise. Taxpayers contribute a percentage of a government employee's salary to the state's (or other level of government) pension system. Even if that percentage is constant, when the salary rises, more money must be contributed to the pension system.

Second, pension system costs for taxpayers also rise with higher salaries due to the right of the recipient of a higher salary to collect a higher pension. Lifetime pension annuities are calculated based on some average of the last years of salary earned by a government employee. The higher that average, the greater the pension that individual will receive for the rest of his or her life. Currently, the Arizona State Retirement System claims to be 76.4 percent funded, but some argue the funding level is actually considerably less, meaning that Arizona taxpayers are on the hook for a considerably underfunded government employee pension system.



Source: Authors' calculations based on U.S. Bureau of Economic Analysis data.

As shown in the chart above, even after adjusting for inflation, the difference between the average compensation of private and public sector workers is usually bigger in Arizona than it is for the national as a whole since 1990, and most dramatically since 2006.

The analysis assumes that the level of government compensation is influenced by the level of private compensation, the level of government sector unionization, and the number of state and local government workers who have an M.A. or higher degree relative to the percentage of the private workers' comparable degrees. The level of government compensation is expected to be at least as competitive as private compensation as a result of the need to attract workers out of the private sector. (Private and government employee compensation would not be related at all or could be negatively correlated if there were something else that strongly attracted people to government employment.) The level of government sector compensation would also be jointly influenced by the share of state and local government workers who are members of unions. The expectation is that union membership gives the worker an advantage in compensation negotiations with their employer (government officials, who have no profit motive and spend others' money) that many private sector workers do not have—namely, more leverage in setting their own compensation levels by applying political pressure. Finally, the higher the degree earned, the higher the compensation is expected to be.

For each 10 percentage point increase in state and local government sector unionization, the average total compensation of each government worker increases by $1,367.

The results show that these three factors explain 76 percent of the variation in compensation across the states. While all factors were statistically significant, two factors in particular—private compensation and the degree of government employee unionization—were positive and most strongly statistically significant. In fact, the analysis indicates that for each 10 percentage point increase in state and local government sector unionization, the average total compensation of each government worker increases by $1,367.

The upward pressure that unions put on the cost of government can have consequences for the long-term operation of government services. This is of particular concern in periods when fiscal belt-tightening is the most important. A study published by the Kennedy School at Harvard University looks at the effect that this pressure can have on the ability of the state to issue debt or manage its current liabilities. The study's authors note that union strength in a particular level of government, defined as the presence of collective bargaining mandates and widespread public union membership, can indicate to bond markets that those governments may not be able to overcome the political pressure to implement budget-conscious measures when necessary. The study concludes that union strength strongly corresponds to a state's risk of default. In fact, the effect became more pronounced after the financial crisis hit. "In June 2008, prior to the financial crisis, the simple relationship between union membership and default risk," the authors estimate, "was only modest, but over the next six months that relationship became noticeably stronger."[78]

This concern about union concentration adversely influencing political decision-making in state and local government significantly influenced bond yields for states. Those states with a more heavily unionized government sector tended to have higher borrowing costs relative to other states with a less unionized government sector. A 10 percentage point increase in public-sector union membership increases the level of state bond spreads by about four basis points.[79] The authors further note that, in the wake of the crisis, for every 10 percentage point difference in the level of unionization, the presence of collective bargaining rights in a state was associated with a 230 basis point increase in borrowing costs, reflecting higher default risk.[80]

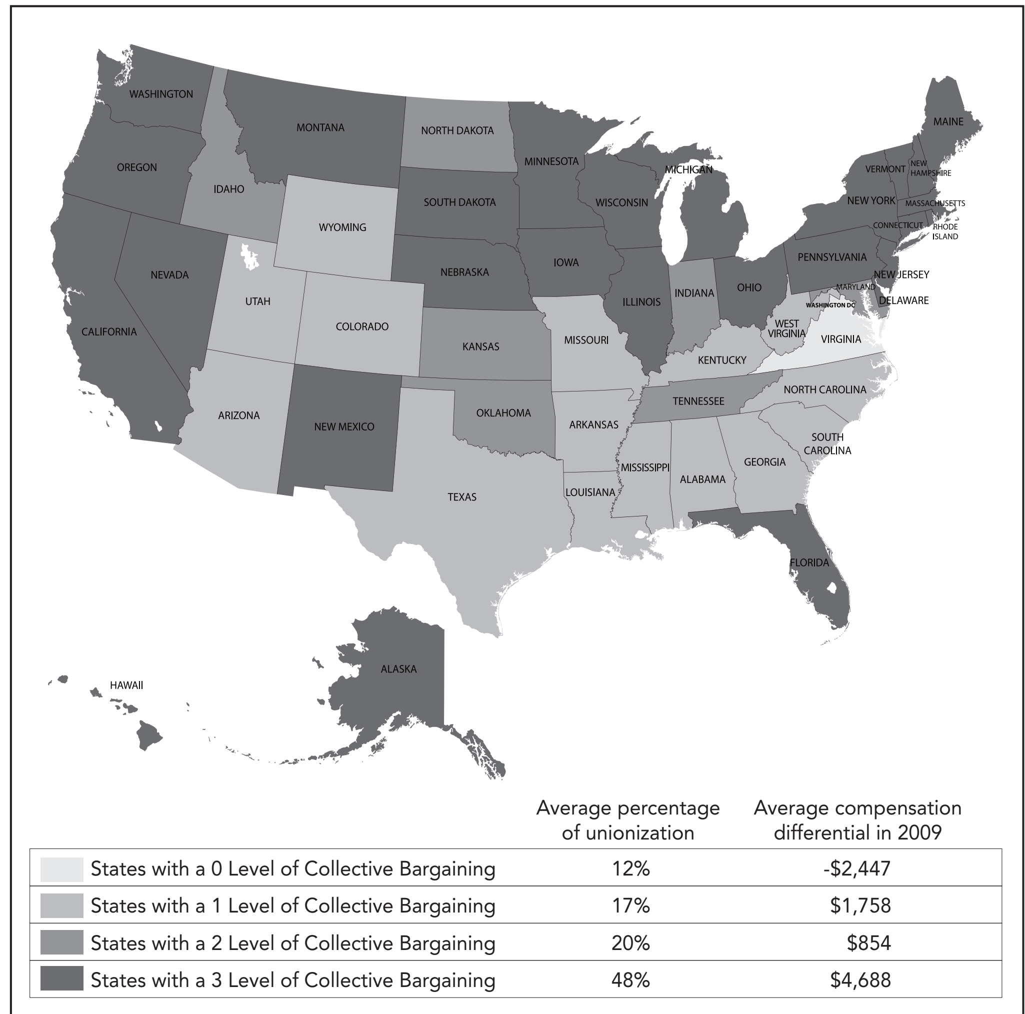
For many states, this can add up quickly. In the case of Arizona, with a government sector unionization rate of 23 percent, this would equal an extra bond premium of almost one percentage point. That translates into about $9 million dollars in increased interest costs for the state. Should bond markets construe Arizona's "meet and confer" requirements as similar to collective bargaining requirements in other states, the interest cost could rise an additional $231 million.

Finally, to test whether union density is a reliable proxy for the impact of collective bargaining laws on the compensation differential, we set out to determine whether the strength of collective bargaining laws correlated to a compensation differential that was similar to that obtained with respect to union density. We first assessed the relative strength and pervasiveness of laws authorizing government sector union collective bargaining among the 50 states. The map in Chart 2 depicts our assessment of the relative strength and pervasiveness of statewide laws authorizing government sector union collective bargaining among the 50 states.[81]

Those states with a more heavily unionized government sector tended to have higher borrowing costs relative to other states with a less unionized government sector.

Virginia, the only state that bans both collective bargaining and collectively bargained contracts, is in a category by itself, and assigned a "0." The category of "1" includes states that have no statewide comprehensive collective bargaining laws and either few statewide laws authorizing collective bargaining for any substantial portion of the overall population of state and local government employees, or mainly local laws authorizing collective bargaining. The category of "2" includes states that do not have comprehensive collective bargaining laws, and yet extend strong statutory collective bargaining rights to significant portions of the population of state and local government employees, such as teachers. Finally, the category of "3" includes states that have comprehensive bargaining laws authorizing or mandating collective bargaining for all or nearly all state and local government employees.

***Chart 2:* The Level of Collective Bargaining by State**



	Average percentage of unionization	Average compensation differential in 2009
States with a 0 Level of Collective Bargaining	12%	-$2,447
States with a 1 Level of Collective Bargaining	17%	$1,758
States with a 2 Level of Collective Bargaining	20%	$854
States with a 3 Level of Collective Bargaining	48%	$4,688

As shown in Chart 2, we immediately discovered that the average compensation differential between public and private sector workers in category 3 states was $7,135 more per employee than in Virginia (the only category 0 state), $3,834 more than in category 2 states, and $2,930 more than in category 1 states.[82] The overall trend of these findings suggests that significant savings could be achieved if category 3 states reformed their laws to replicate the Virginia model; and that even category 1 and 2 states could achieve significant savings by switching to the Virginia model.

We then ran a regression that included the numeric classification for each state's collective bargaining laws that is depicted on the map in Chart 2. The results indicated that the measure of unionization we used was strongly correlated with the pervasiveness and strength of a state's collective bargaining laws. The pervasiveness and strength of a state's collective bargaining laws also strongly and positively influenced the average level of government employee compensation. Therefore, using the share of unionization as a proxy for the power of unions to

bargain collectively is valid and yields robust estimates of the savings that can be had if a state were to eliminate collective bargaining.

In fact, within seven years after Virginia's ban on collective bargaining and contracts, union density—which, as explained above, is a strong proxy for union bargaining power—fell nearly 50 percent.[83] Compared to maintaining the *status quo*, which permits local meet and confer laws and union contracts, a similar result in Arizona could save the state nearly $560 million in excessive government employee compensation per year, not to mention millions of dollars in interest on local government bonds.[84]

Savings can be estimated for all states using the same methodology. Table 3 illustrates how much a 50 percent decline in union concentration

***Table 3:* Taxpayer Savings from a 50% Decline in the Union Share of State and Local Government Workers (in millions)**

State	Savings	State	Savings
Alabama	$716	Montana	$208
Alaska	$228	Nebraska	$312
Arizona	$558	Nevada	$310
Arkansas	$149	New Hampshire	$270
California	$8,405	New Jersey	$2,482
Colorado	$475	New Mexico	$181
Connecticut	$1,010	New York	$6,493
Delaware	$174	North Carolina	$450
Florida	$1,634	North Dakota	$68
Georgia	$520	Ohio	$2,143
Hawaii	$341	Oklahoma	$342
Idaho	$128	Oregon	$984
Illinois	$2,782	Pennsylvania	$2,428
Indiana	$757	Rhode Island	$252
Iowa	$497	South Carolina	$250
Kansas	$242	South Dakota	$75
Kentucky	$315	Tennessee	$431
Louisiana	$345	Texas	$1,677
Maine	$263	Utah	$212
Maryland	$663	Vermont	$140
Massachusetts	$1,568	Washington	$1,682
Michigan	$2,226	West Virginia	$228
Minnesota	$1,281	Wisconsin	$1,384
Mississippi	$94	Wyoming	$60
Missouri	$470	**U.S.**	**$48,902**

Note: Virginia does not appear in this chart because it has already eliminated collective bargaining.

among state and local government employees might save taxpayers in each state every year. These estimates are based on averages, so some states might generate larger savings or smaller savings. Different states may also experience a larger or smaller decline in the percentage of the state and local government workforce who are unionized.[85] Yet, holding all things constant, collective bargaining reform like that undertaken in Virginia could result in a total of nearly $49 billion in savings for state and local taxpayers across the country.

Reforming Government-sector Collective Bargaining

Given the increasingly clear and present danger government sector unions pose to public finances, and the savings suggested by the Virginia model, it is critical to consider significant administrative and legislative reforms. Until the 1960s, the answer to the abuse of power by government sector unions was simple enough: Ban membership in them as a condition of public employment.[86] As a matter of public policy, such bans were justified on the grounds that union membership dangerously divided the loyalties of government employees between serving the public or the union.[87] Advocates of the ban argued "officers of the state cannot serve two masters."[88] As explained by President Franklin D. Roosevelt, the greatest danger of such divided loyalty was the threat of government employees going on strike: "A strike of public employees manifests nothing less than an intention on their part to 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."[89] For much of this time, even many private sector union bosses supported the ban on union membership for government employees.[90]

Given the increasingly clear and present danger government sector unions pose to public finances, and the savings suggested by the Virginia model, it is critical to consider significant administrative and legislative reforms.

Bolstered by these public policy concerns, bans on union membership by government employees survived constitutional challenge for decades by reference to Justice Oliver Wendell Holmes' famous declaration that the First Amendment's guarantees do not guarantee public employment because a "servant cannot complain, as he takes the employment on the terms which are offered him."[91] Advocates of the ban argued "there is no provision of either State or Federal Constitution which gives to individuals the right to be employed in government service or the right to continue therein."[92] Accordingly, they argued, government should have the same freedom of contract to hire or fire employees as private employers—who, at that time, enjoyed the freedom to refuse to hire union members.[93] This argument, in turn, was based on the premise that the decision to hire or fire employees was not an exercise of the police power, but simply a "proprietary" business decision to which constitutional limitations governing the police power do not apply.[94]

Nevertheless, beginning in the early 1950s, courts began to rule that a blanket employment policy against union membership could impose an intolerable burden

on freedom of association guaranteed by the First and Fourteenth Amendments.[95] These cases were premised on the constitutional principle that the government cannot burden indirectly what the First Amendment prohibits the government from burdening directly. Moreover, under the equal protection guarantee of the Fourteenth Amendment, courts contended that there were no significant differences between citizens at large and government employees that warranted different treatment of government employee First Amendment rights. Based on these principles, courts first ruled that the First and Fourteenth Amendments prohibit the termination or disciplining of government employees for engaging in free speech about matters of public concern outside of work.[96] By the late-1960s, courts extended that principle to reach the conclusion that the Constitution prohibits the termination of government employees based on whom they choose to associate with outside of work, including unions and political organizations such as the Communist Party.[97] Ultimately, in a bare decision, the Supreme Court affirmed a lower court opinion holding that a blanket ban on union membership by police officers violated the First and Fourteenth Amendments absent a showing that such membership was disruptive to employment duties.[98] In essence, courts ruled that such policies impermissibly burden and deter the exercise of First Amendment freedoms by forcing citizens to choose between public employment and their right to freely associate.

Before launching into any reform, policymakers should first candidly recognize that even from a purely limited government perspective, the general thrust of this modern trend is probably correct. Early case law governing public employment policy was wrong to declare that when governments act in a "proprietary" fashion, they are equivalent to private sector businesses and should be entirely free from constitutional limitations. After all, a government is a singular entity. Ultimately *nothing* that a government does—not even its own internal administration—is unconnected to the coercive powers that distinctly define government. For example, by providing government with its financial lifeblood, the power of taxation underpins and infuses everything a government does, including its proprietary functions (even when government borrows money, its credit derives from the power of taxation).[99] Just as individuals cannot disclaim moral responsibility for what their right hand does by pocketing their left hand, government cannot disclaim constitutional responsibility for expenditures—even proprietary expenditures—that are connected to the power of taxation, to which constitutional constraints undoubtedly apply.

Before launching into any reform, policymakers should first candidly recognize that even from a purely limited government perspective, the general thrust of this modern trend is probably correct.

As recognized in modern case law, there can be no *absolute* firewall between proprietary and non-proprietary governmental functions for purposes of applying constitutional law. Internal employment decisions are not an exercise of the *police power*, but they are always and unavoidably an exercise—albeit attenuated—of the power of taxation. Therefore, the constitutional limitations implicit within

sovereignty must extend to and encompass internal employment decisions by the government *to some extent*, no matter how proprietary they may appear.[100]

In light of this analysis, an employment policy that bans membership in a government sector union *no matter how the union conducts itself* is equivalent to a policy that declares the government will tax the general citizenry in order to spend the money on citizens who refuse to associate with groups the government disfavors; i.e. that the taxing power will be used to disadvantage some associations but not others. Under the First and Fourteenth Amendments, the government cannot freely use its taxing power to burden the right to associate in this way—any more than it can freely deploy its police powers to do so. But recognizing that constitutional constraints *can reach* such proprietary employment decisions is not the same as proclaiming those decisions are constitutionally *equivalent* to external regulatory decisions—much less that government is constitutionally prohibited from regulating its own employment decisions. Proprietary and non-proprietary decisions *are* different and, as discussed later in this Report, they are properly governed by correspondingly different constitutional analyses.

No court has ruled that there is a constitutional requirement for governments to bargain collectively or contract with unions.

Indeed, although they no longer maintain a strict constitutional division between proprietary and non-proprietary decisions, modern courts continue to recognize that the differences between them can warrant restrictions on government sector union membership and activities.[101] For example, with a handful of exceptions, modern courts continue to uphold statutory and common law bans on work stoppages and strikes by government employee unions.[102] Additionally, the statutory ban on collectively bargained contracts in North Carolina has survived a federal court challenge that applied modern constitutional doctrines.[103] The court held that "there is nothing in the United States Constitution which entitles one to have a contract with another who does not want it. It is but a step further to hold that the state may lawfully forbid such contracts with its instrumentalities."[104] Other courts have ruled that, absent statutory authority, local government has neither inherent power to bargain collectively nor power to enter into collectively bargained contracts.[105] And no court has ruled that there is a constitutional requirement for governments to collectively bargain or contract with unions.[106] The Supreme Court has repeatedly ruled that the First Amendment does not require government to entertain contractual discussions or agreements with government sector unions or any other government employee.[107] Finally, federal courts continue to uphold certain carefully tailored bans on union membership for government employees.

In particular, courts have repeatedly upheld bans on union membership as a condition of public employment where union membership could reasonably be viewed as inconsistent with the independence or impartiality required by the particular job. In 1975, for example, a federal court sustained a ban on supervisors joining unions in which rank-and-file firefighters were members.[108] The court

ruled that there was a "compelling state interest" in ensuring supervisors would not have a conflict of interest in determining work conditions for rank-and-file firefighters.[109] While such cases imply that courts were applying strict scrutiny to public employment policies that restrict union membership or activities, more recent cases have adopted a balancing test analysis. For example, in 1995, a federal court sustained a judicial branch employment policy banning parole officers from joining law enforcement unions because "the interest in maintaining the appearance of impartiality of the judiciary outweighs the desire of the Plaintiffs to affiliate with law enforcement organizations."[110]

Under current case law, the key to upholding a ban on union membership as a condition of public employment is for the government to show it has a "real" and "not merely conjectural" reason for such a ban.[111] If such a showing is made, modern courts will likely rule the government's interest in the efficient performance of employment obligations outweighs the employee's interest in union membership.[112] In so doing, modern courts apply a balancing test to address the legitimate concern that imposing constitutional limitations on a government's internal administrative policies in exactly the same way as external policies could result in inefficiencies that make it impossible for government to furnish the external law and order that is necessary to secure individual liberty. They recognize that constitutional principles tailored to external governance may have no application or only a rough-hewn application to internal administration.[113] Courts also recognize that it is usually less imperative to restrict internal policies affecting only employees than external policies used directly to govern the general citizenry.[114] Modern precedent thus embraces the Holmesian doctrine that the right to engage in First Amendment activities does not entail a right to public employment free from restrictions on First Amendment activities. At the same time, modern courts depart from Holmesian doctrine to strike down patently unreasonable restrictions on constitutional liberty imposed as a condition of public employment.

Modern courts will likely rule the government's interest in the efficient performance of employment obligations outweighs the employee's interest in union membership.

In short, to keep one foot in and one foot out of the Holmesian "proprietary" approach to government employment, modern courts use the device of a balancing test. This is not a stable precedential posture. There is inherent danger that the modern test could tip in favor of prohibiting carefully crafted legislative reforms that restrict government sector union membership, collective bargaining, contracts or strikes. This is because, even when it only upholds targeted restrictions on union membership, collective bargaining, collectively bargained contracts, and government sector strikes, the test allows the government to frustrate the purpose of joining a government sector union to some extent. The test thus allows public employment policies to deter employees from joining or organizing a government sector union. The magnitude of this kind of indirect burden on First Amendment rights differs only by degree from earlier blanket bans on union membership.

Moreover, the distinction between the modern balancing test and the Holmesian approach is rendered even more tenuous by the fact that a drive for government efficiency is rarely, if ever, sufficient grounds for burdening First Amendment rights. Not surprisingly, some scholars argue that there is no principled basis under the First Amendment for maintaining a balancing test that draws *ad hoc* distinctions among employment policies based on case-by-case assessments of the weightiness of government efficiency needs and constitutional guarantees.[115] The ABA and ACLU, in particular, have long decried laws restricting collective bargaining and strikes by government sector unions.[116] As scholars and litigants continue to question whether and when government employee interests in constitutional liberty can be outweighed by the goal of efficiency in public employment, it is critical for reformers to reinforce the modern balancing test with a more coherent legal doctrine.

As discussed earlier, to some extent, modern courts still hold to the earlier judicial view that government sector union membership can pose a genuine threat of divided loyalty. When union membership genuinely threatens a government employee's requisite independence or impartiality, policies banning union membership will be upheld, notwithstanding their burden on the employee's First Amendment rights. The premise implicit in this outlook is that government employees, as public servants, owe a duty to the citizenry to perform their occupation with diligence and fidelity. This premise, in turn, likely derives from the traditional understanding that government is a public trust.

Government employees, as public servants, owe a duty to the citizenry to perform their occupation with diligence and fidelity.

As demonstrated extensively by Goldwater Institute senior fellow Robert Natelson, America was founded on the idea that public officers are obligated to wield their power with the highest degree of diligence and fidelity as trustees of the people's sovereign power, and as their agents and servants.[117] This idea was manifested in numerous explicit references in state and federal constitutions to entrusted power, the widespread constitutional usage of terms and phrases common to trust and agency instruments of the era, as well as in the arguments made in the Federalist Papers, private correspondence among the Founders, and during the convention debates.[118] Far from evidencing a passing rhetorical fad, these references mirrored key elements of the political philosophy of Locke, Vattel, and Pufendorf, each of whom argued that the legitimacy of government hinged on whether the law mirrored the fiduciary obligations owed by public officials to the people.[119]

Public Trust Doctrine is Actionable

The understanding that the American form of government is a public trust should be restored. Although Natelson suggests that fiduciary government was more metaphorical than actionable, the development of American common law proves otherwise.[120] Through the early 20th century, the idea of government as a public trust and of public officers as literal fiduciaries was underscored as

a principle of law in numerous legal treatises.[121] In *Freeman on Judgments*, for example, Abraham Freeman declared

> The position of such a governmental body towards its citizens and taxpayers is, upon principle, analogous to that of a trustee towards his *cestui que* trust, when they are numerous and the management and control of their interests are by the terms of the trust committed to his care.[122]

Such declarations were not merely theoretical. Public trust doctrine was enforced aggressively by state and federal courts for decades.

The U. S. Supreme Court, for example, relied upon public trust doctrine as the basis of the rule of law that

> all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution."[123]

This rule led the Court to void contracts that paid a contingency fee to public officers or third parties for the procurement of a government contract, an appointment to political office, or the passage of legislation.[124]

Public trust doctrine was enforced aggressively by state and federal courts for decades.

Contracts presuming to award compensation for government action were deemed "obnoxious" because they "have for their object the control of public agents by considerations conflicting with their duty and fidelity to their principals."[125] In other words, by voiding contracts to award compensation for procuring government action, the law shielded public officers responsible for such action from any temptation to violate their position of trust and base their decisions on anything other than the merits. As the Court explained,

> these offices are trusts, held solely for the public good. . . . No other considerations [than the merits of government action] can properly be regarded. . . . Whatever introduces other elements to control this power, must necessarily lower the character of the [action] . . . to the great detriment of the public. . . . The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.[126]

As late as 1954, this rule of law was regarded as "well settled."[127]

The Supreme Court did not act alone in enforcing public trust doctrine. The U. S. Court of Claims has long recognized public trust doctrine as underpinning the rule that "no transaction growing out of [government employee's] official services or position can be allowed to inure to his personal benefit."[128] Additionally,

the supreme courts of Arkansas, California, Georgia, Virginia, and West Virginia each have held that local public officials are literal trustees of a public trust, subject to corresponding fiduciary duties to the members of their community.[129]

The supreme courts of Arkansas, California, Georgia, Virginia, and West Virginia each have held that local public officials are literal trustees of a public trust, subject to corresponding fiduciary duties to the members of their community.

In the seminal 1872 case of *Andrews v. Pratt*, for example, the California Supreme Court affirmed an injunction sought by taxpayers to stop county supervisors from being paid a fee for negotiating the sale of a county railroad. The court ruled, "We think their action was indefensible and wholly void," explaining

> The Board of Supervisors . . . occupy a position of trust, and in that relation are bound to the same measures of good faith towards the county which is required of an ordinary trustee towards his cestui que trust, or an agent towards his principal. It is a prevailing rule that "the law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity." . . . The mere fact of the existence of this relationship has been held to avoid the transaction.[130]

A California court of appeals case later reiterated the *Andrews* holding, emphasizing that "the mere fact" that a public officer acts "in connection with any matter in which he is interested vitiates the transaction" because the law presumes "self-interest prevents the individual member from protecting the rights of the public against his own."[131] Correspondingly, courts across the country voided municipal transactions procured through bribery or that were otherwise tainted by the vote of a public officer who was personally enriched by the transaction. They ruled that "like a trustee, such officer must not use the funds or powers entrusted to his care for his own private gain or advancement."[132] Even innocent self-dealing warranted voiding a municipal transaction because "no man who is agent or trustee for another, whether a private or public agent or trustee, *shall have the opportunity or be led into the temptation* to make profit out of the business of others entrusted to his care, by bargaining with himself, directly or indirectly, in respect to that business."[133]

Andrews and its progeny did not represent outlier decisions. By the early 20th century, they were recognized as "black letter" municipal law. According to a leading municipal law treatise at that time,

> municipal officers and agents are held by the courts to a strict accountability in their dealings with or on behalf of the corporation. In acting for the corporation they are required to exercise the same fidelity, care and caution as would be expected of an individual purchasing for himself with his own money. It is obvious that a contrary view would be disastrous to the public service.[134]

Likewise, a Missouri court of appeals contemporaneously observed, "the trend and policy of our law in this respect is to remove from public officials, so far as possible, all temptation to use that official power, directly or indirectly, to increase

the emoluments of such office."[135] Indeed, for more than 50 years, state courts did not shy from siding with taxpayers in these direct confrontations with the political branch, recognizing that "experience" has revealed that "public opinion alone is not sufficient to prevent the tendency to abuse" of public office.[136]

Unfortunately, courts may have since lost the nerve to engage the political branches based solely on the common law. Decisions have emerged since the 1930s that reject public trust doctrine as an actionable common law theory on the grounds that a public trustee does not owe a particularized fiduciary duty to specific individuals.[137] The hesitancy of courts to question the motives of elected bodies in their legislative actions as a corollary of separation of powers doctrine may also impact their willingness to enforce public trust doctrine to void contracts or laws that are tainted by self-dealing or other breaches of fiduciary duty.[138] But public trust doctrine still has enough life at common law to sustain continued recognition of taxpayer standing to challenge improper expenditures,[139] and to provoke favorable mention in the occasional federal case.[140] Therefore, the doctrine likely remains sufficiently viable to be reliably enforced by courts to the extent that reform legislation empowers the judiciary to engage the political branches.[141]

A Framework for Lasting Reform

Government employees are servants of the public; the public is not their servant.

Public trust doctrine is a natural theoretical framework for the modern approach to the constitutionality of public employment policies and legislative reform of government sector union abuses. As discussed earlier, the doctrine regards public officers as trustees of sovereign power, with corresponding fiduciary duties to the citizenry. Fulfilling these duties, among other things, requires public officers to ensure that taxes are spent well to minimize the invasion of taxpayer property rights and also to ensure that tax revenues held in trust are not wasted. Public trust doctrine thereby reveals that the choice confronting public officers when devising a public employment policy does not really involve balancing constitutional rights against mere government efficiency (which critics of the modern balancing test approach rightly contend should never favor government efficiency). Rather, the choice involves consideration of the constitutional rights of government employees in light of government efficiency as a proxy for protecting taxpayer property rights and the related duty to prudentially manage tax revenues.

In this balance, the principles underlying public trust doctrine require assigning a presumptively greater weight to government efficiency. Most fundamentally, this is due to the fact that government employees are servants of the public. The public is not their servant. Correspondingly, public officers must recognize that taxpayers, as members of the public, do not owe any duty to subordinate their rights to the desired employment policies of government employees. With respect to the determination of employment policies, public officers must instead enforce the fiduciary duty owed by government employees, as agents of the public, to subordinate their interests to

those of taxpayers, as members of the public.[142] All other things being equal, this implies that public officers must give priority to advancing government efficiency as a proxy for protecting taxpayer property rights notwithstanding any incidental burden on the exercise of constitutional rights by government employees.

Additionally, under public trust doctrine, a public officer must also recognize that inefficient public employment policies involuntarily burden taxpayers, whereas government employees voluntarily choose to work under the employment policies that burden them. Government employees can more readily "vote with their feet" in opposing an employment policy by seeking different employment than can taxpayers "vote with their feet" by leaving the jurisdiction. This implies that market discipline will check undesirable employment policies far more readily than will the political process check inefficient employment policies. Thus, even though every voter has an equal opportunity to remove elected public officers, the rights of taxpayers are intrinsically more vulnerable to violation and abuse by public employment policies than are the rights of government employees. Because fiduciary duties are strongest when applied to protect the most vulnerable,[143] this implies that concern for taxpayer rights should ordinarily outweigh any concern about the deterrent effect that efficient employee policies may have on government employees' willingness to exercise constitutional rights.

A public officer must recognize that inefficient public employment policies involuntarily burden taxpayers.

Public trust doctrine thus fully vindicates the greater weight given to government efficiency in the modern balancing test for public employment policies. It reveals that such deference is not a pragmatic deviation from constitutional principles, but is instead a logical *requirement* of the first principles of republican governance. This recognition, in turn, should help hold the line against possible future efforts to overturn employee policies that impose targeted bans on membership in government sector unions, collective bargaining, or strikes on the basis of their deterrent effect on the exercise of First Amendment rights.[144] Moreover, the status of public officers and employees as fiduciaries and servants to the general public under public trust doctrine establishes a significant substantive basis under the Fourteenth Amendment for courts to review restrictions on their First Amendment rights differently from regulations affecting the general public. In short, under public trust doctrine, courts are right to ascribe constitutional significance to the difference between internal proprietary and external governmental actions.

Public trust doctrine is also a natural foundation for legislation aimed at reforming public employment policy. Of course, any reform should be approached cautiously because modern precedent has rightly rejected efforts to justify *blanket* bans on government sector union membership from constitutional challenge. In principle, union membership could be aimed solely at professional development or furnishing employees and employers with a convenient means of conducting aggregated arms-length negotiations over compensation—without the union attempting to leverage political influence, implicit strike threats, or *de facto*

monopoly status to gain unearned bargaining power. Under such circumstances, union membership would not foster a kind of "disloyalty" that is categorically different than from the kind of "divided loyalty" at issue whenever any government employee individually improves his skill set to become more marketable or negotiates for a raise. Because employment policies cannot reasonably be premised on government employees renouncing their pecuniary interest in compensation in order to be regarded as "loyal," a blanket ban on union membership simply does not have a real connection to the efficient performance of employment obligations when it is imposed without regard to the nature of the union or its conduct. Nevertheless, history shows that government sector unions generally do not exist for such plainly legitimate purposes.

It should be recalled that as early as 1974, AFL-CIO president George Meany proudly declared that his affiliated government sector union had a "policy" of engaging in illegal strikes to gain an advantage during collective bargaining. Government sector unions back this implied threat with *de facto* monopoly power over the labor needed for government functions. And that's not all.

Government sector unions have long pursued a strategy that is designed to "control both sides of the bargaining table"[145] through a "political instrumentality approach" aimed at "developing a favorable political climate" for their demands.[146] It is generally recognized among scholars that "public sector labor relations are deeply and inherently suffused in politics" and "the access points of labor organizations to the government employer are much more extensive than those of private sector unions."[147] Government sector unions use their extensive points of access to the government to offer a *quid pro quo* to their employers: Accede to our demands and we will support your election; refuse and we will oppose you.[148] And they are not coy about it. One scholar reports a union firefighter in Hartford, Connecticut saying, "councilmen are interested in two things, the vote and money. WE supply both."[149] Similarly, a sanitation union boss in New York City declared, "only God can guarantee 100 percent delivery. We are sure of 99 percent, based on past performance.'"[150]

Government sector unions use their extensive points of access to the government to offer a quid pro quo *to their employers: Accede to our demands and we will support your election; refuse and we will oppose you.*

Government sector unions thus routinely cajole and threaten public officers with significant economic and political consequences to accede to their demands wholly apart from their underlying merits. Moreover, their demands are not limited to discrete questions of wages, hours, and benefits. For example, collective bargaining typically seeks to lock down policies on union rights, management rights, union security, grievance procedures, work hours, work schedules, alternative work arrangements, seniority, layoffs, bumping and recall procedures, labor-management committees, inclement weather procedures, discipline and discharge, holidays and vacations, sick leave, child care, elder care, leaves of absence, position classification, health and safety, training and education, past practices, subcontracting, privatization, and the use of new technology.[151] One scholar has recounted how a teacher's union proclaimed the "ideal of Unionism"

involves "giving workers 'a larger share in management' and its rewards."[152] In other words, some government sector unions seek to dictate comprehensive employment policies during collective bargaining as if they were management.[153] Then they attempt to use employment contracts to lock down those policies and threaten litigation against future legislative revision under the Contracts Clause of the U.S. Constitution.[154]

In short, history shows that government sector unions typically use collective bargaining, union-procured employment contracts, and collective bargaining laws as devices to blind public officers to the objective merits of employment policies, to encourage them to self-deal by approving employment policies based on concerns about personal political advancement, and to induce them to surrender their independent policy making role. The fiscal consequences of such behavior have been disastrous. Accordingly, when an employee knowingly joins or maintains a membership in such an organization, that employee has openly declared his intention to be disloyal to the interests of the general citizenry by inducing public officers to ignore their fiduciary obligations.

Government employees have a fiduciary duty to resolve the conflict of interest by exiting the union or leaving their employment.

Such disloyalty cannot be tolerated under public trust doctrine. With respect to government employees who are not public officers, reform legislation should appropriately codify the public trust principle "every agency which is not a purely ministerial one involves a fiduciary relation."[155] It should recognize, in particular, that government employees who engage union representatives to induce their employers to change employment policies can no longer claim to be "purely ministerial" when their union has *de facto* monopoly power, political influence over their employer, and the ability to threaten or engage in litigation or strikes to get what they want. When an agent has great power to harm her principal, fiduciary law imposes great responsibility to act in good faith.[156]

Furthermore, to the extent that union power potentially renders mere employees the functional equivalent of public officers, the principles underlying public trust doctrine require the extension of corresponding fiduciary duties to protect the general public from the abuse of that power. Accordingly, reform legislation should codify the principle that government employees assume a fiduciary obligation to the general public to ensure their union representatives engage their employer in arm's length negotiations if they belong to a powerful union that can influence employment decisions on grounds other than the merits of their demands.[157] If their union representatives refuse to follow instructions, the law should recognize that government employees have a fiduciary duty to resolve the conflict of interest by exiting the union or leaving their employment.

Reform legislation should also reach public officers. Public officers, as fiduciaries, must protect the public from disloyal government employees. They should not hire or retain anyone who knowingly belongs to a government

sector union that has an avowed policy and practice of threatening or using *de facto* monopoly power, political influence, or threats of litigation and strikes, rather than arm's length negotiations, to secure favorable employment policies. Additionally, a public officer who is truly diligent and loyal to the general public must never put himself in a position where he might succumb to the temptation of making employment decisions based on factors other than the objective merits of the proposal. Engaging in collective bargaining with employees against a backdrop of threats of litigation, strikes, economic harm, and adverse political consequences does just that.[158] Accordingly, public officers have a fiduciary duty to refuse to engage in collective bargaining with government sector unions unless such bargaining is scrupulously conducted at arm's length, as a means of conveniently aggregating negotiations with individual employees. This implies that public officers also have a fiduciary duty to refuse to approve any contract or law that compels them to engage in collective bargaining because the threat of litigation necessarily renders bargaining no longer at arm's length.[159] Prudent public officers who are loyal to the public must not put themselves in the position Austin, Texas recently found itself, when city fathers discovered that enacting meet and confer laws gave police unions the legal muscle to approach "negotiations with the attitude of 'we meet and you listen.'"[160]

A public officer must never put himself in a position where he might succumb to the temptation of making employment decisions based on factors other than the objective merits of the proposal.

Moreover, it should be recalled that the Contracts Clause can prevent subsequent legislation from impairing a union-procured employment contract. In view of this legal doctrine, early case law prohibited such contracts based on the principle that they unconstitutionally delegated sovereign policymaking authority of a legislative body to a private organization. As held in *Perez v. Board of Police Comm'rs*,

> All public officials, whether national or state, executive, administrative or judicial, and all public employees, are public servants . . . The allegiance of all public servants is to the people; obviously there can be neither alienation nor division of this allegiance if constitutional government is to continue . . . The failure to do so in effect would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants it was their sworn duty to supervise and direct.[161]

Although this doctrine lost some ground to arguments that union contracts are no different than proprietary contracts with other private sector entities,[162] the non-delegation rule remains sufficiently persuasive in many states to void union contracts that lack legislative approval or that presume to compel a government to engage in future bargaining or arbitration.[163] In fact, no case that is critical of non-delegation doctrine explicitly rejected or even grappled with the legitimacy of union contracts in light of public trust doctrine, which was implicit in the non-delegation analysis.[164] This is not surprising because a genuine fiduciary of the general public must not contractually prejudice or delegate his employment policymaking authority, or that of future public officers, in favor of a discrete

private interest group composed of government employees, even if the contract were procured through arm's length negotiations. After all, public officers are not the true employer—the public is; and public officers can hardly claim loyalty to the public when they presume to usurp the public's authority. President Roosevelt explained: "The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives."[165] At the very least, a loyal public officer should seek the approval of the public for any such bargain by referendum.[166]

Reform legislation should expressly codify the foregoing fiduciary duties. But it must not stop there. The remedy for fiduciary fraud must be well-tailored and effective. The law should carefully define the requisites of genuinely arm's length negotiations so that any remedy is plainly targeted to preventing fiduciary fraud.[167] At minimum, following the lead of Florida and North Dakota, which require all bargaining to be held in public,[168] all public employment negotiations should be public and transparent to qualify as "arm's length." Moreover, to ensure that the First Amendment freedoms of government employees are not unduly burdened, the law should identify what specific kinds of contemporaneous political pressure will be deemed to undermine arm's length negotiations; clearly and objectively defining improper work actions, threats, and electioneering, while providing appropriate safe harbors for activities that cannot reasonably be viewed as aimed at controlling both sides of the bargaining table. At the same time, reformers should recognize that Virginia's absolute ban on government sector collective bargaining may reflect a reasonable judgment that defining "arm's length negotiations" with sufficient clarity to avoid unconstitutional vagueness is impossible; in which case, only an absolute ban on collective bargaining, alongside restrictions on collectively bargained contracts, will constitutionally enforce the fiduciary duties implied by public trust doctrine.

All public employment negotiations should be public and transparent to qualify as "arm's length."

Finally, rather than criminalizing misconduct or imposing prior restraints, reform legislation should furnish the remedy that proved judicially manageable in numerous states for more than a half century under public trust doctrine. Punitive measures have done little to stop government sector unions from engaging in illegal work actions because union officials believe the benefits outweigh the costs. In recognition of this fact, the law should simply deem illegal and "void" hiring decisions, employment, contracts and laws that violate public trust doctrine; and it should give taxpayers standing to enforce that remedy in court. This remedy is likely to be more effective than punitive measures in deterring abusive conduct by government sector unions because it would eliminate the possibility of any gain from fiduciary fraud.[169]

Taken together, the following reforms are recommended to end government sector union abuse:

- **Protect the Public Trust From Disloyal Employees**. Enact taxpayer-enforced legislation deeming illegal and void the hiring and retention of government employees who knowingly belong to a government sector union that has an avowed policy and practice of threatening or using *de facto* monopoly power, political influence, or threatening or using litigation and strikes, rather than arm's length negotiations, to secure favorable terms and conditions of employment.
- **Do Not Betray the Public Trust in Bargaining**. Enact taxpayer-enforced legislation deeming illegal and void: a) any form of collective bargaining with a government sector union (the Virginia model); or b) any form of collective bargaining with a government sector union unless it is conducted at arm's length, with transparency and public participation.
- **Do Not Surrender the Public Trust to Mandatory Bargaining**. Enact taxpayer-enforced legislation deeming illegal and void any contract or law requiring any form of collective bargaining with a government sector union.
- **Do Not Contract Away the Public Trust**. Enact taxpayer-enforced legislation deeming illegal and void: a) any collectively-bargained contract (the North Carolina and Virginia models); b) any collectively bargained contract imposing obligations extending beyond the terms of the elected officials who approve them or that impose terms and conditions of employment beyond discrete provisions dealing with wages, hours and benefits; or c) any collectively bargained contract that is not approved by a public referendum.

By adopting these reforms, we estimate Arizona taxpayers could save more than $550 million per year in excessive government employee compensation. State and local taxpayers nationwide could save nearly $50 billion.

Adopting the foregoing reforms would move a state dramatically towards the Virginia model, and beyond. There is every reason to believe that these reforms would generate considerable gains to government efficiency and protect taxpayers from needless tax increases. Our statistical analysis justifies a reasonable estimate that Arizona taxpayers could save more than $550 million per year in excessive government employee compensation. State and local taxpayers nationwide could save nearly $50 billion. In view of these potential savings, all of these reforms should withstand constitutional scrutiny even if they were deemed to burden the First Amendment rights of government employees. The benefit to taxpayers through enhanced government efficiency would be more than proportionate to any conceivable burden on government employee free association.

Conclusion

It is not unreal or conjectural to conclude that enacting laws that restrict government sector union to arm's length negotiations will staunch the fiscal bleeding caused by excessive government employee compensation. Nor is it unreal or conjectural to believe that focusing public officers and employees on their fiduciary obligations to the public will save taxpayers money. Indeed, there is every reason to believe that adopting the Virginia approach to government sector unionization would likely result in substantial fiscal savings to taxpayers across the country.

But the Virginia model only dictates an outcome: There shall be no government sector collective bargaining or contracts. Dictating this outcome is not enough for genuine and lasting reform. Even the toughest legal regimes never ended informal, backroom government sector union deal-making.[170] In Virginia, taxpayers are still sacrificed to the unsustainable fiscal demands of government employees and the political ambitions of public officers.[171] The fundamental problem is that public employers and employees alike have forgotten that government is a public trust. A bare prohibition on government sector union collective bargaining and contracts will not restore this understanding.

Adopting the Virginia approach to government sector unionization would likely result in substantial fiscal savings to taxpayers across the country.

Only if reforms replicating the Virginia model are expressly rooted in public trust doctrine will government officials be reminded that they must strive to serve the public with prudence, diligence and fidelity. By educating public officers and employees about their proper roles in government, such reforms uniquely promise to restore honor to public service. In the final analysis, nothing else can truly end government sector union abuse.

APPENDIX

This appendix explains the methodology, data, and the more detailed results of the regression analysis on which the estimate of the taxpayer cost of union membership is based. The estimates were obtained from an ordinary least squares regression model constructed to analyze the effect of government sector unionism and education level on total compensation of state and local government workers.

The model is cross-sectional in that the data used comes from all 50 states for the year 2009. The model and the variables in the analysis are defined the following way:

$$GovComp = \alpha + \beta_1 PrivComp + \beta_2 UnionShare + \beta_3 EduDiff + \varepsilon$$

GovComp: the average total compensation (wages and benefits) for state and local employees in a state.

PrivComp: the average compensation for private sector employees in a state.

UnionShare: the share of state and local government workers represented by a government employee union.

EduDiff: the percentage point difference between the percentage of state and local and local workers with an M.A. or higher degree and the percentage of private sector workers with those degrees.

The model assumes that all of these factors will apply upward pressure on the average total compensation of state and local workers. Thus, all of the signs in the model predict positive associations between these variables and the total level of government compensation. The level of government compensation is expected to be at least as competitive as private compensation as a result of the need to attract workers out of the private sector. (Private and government employee compensation would not be related at all or could be negatively correlated if there was something else that strongly attracted people to government employment.) The level of government sector compensation is also expected to be jointly influenced by the share of state and local government workers who are members of unions. The expectation here is that union membership gives the worker an advantage in compensation negotiations with their employer that many private sector workers do not have – namely, more leverage in setting their own compensation levels by applying political pressure. Finally, the higher the degree earned, the higher the compensation is expected to be, all other things being equal.

The data on compensation in both the public and private sector come from the U.S. Bureau of Economic Analysis.[172] The government sector unionization rate by state was estimated by economists Barry Hirsch of Georgia State University and

David Macpherson of Trinity University using the U.S. Bureau of Labor Statistics' *Current Population Survey*.[173] The data on graduate degrees was derived from the U.S. Census Bureau's *American Community Survey*.[174]

The regression results appear in the table below:

Compensation Item	Coefficients	T stat
Intercept*	$8,243.65	1.53
UnionShare***	$136.73	3.59
PrivComp***	$0.70	7.05
EduDiff**	$365.18	1.75

F-statistic: 49
R-squared: 0.76

* - significant above the 90 percent level of confidence
** - significant above the 95 percent level of confidence
*** - significant above the 99 percent level of confidence

The R-squared indicates that these variables explain 76 percent of the variation across the state in government sector compensation. The results as a whole are highly statistically significant and they all yield positive signs (i.e., the effects of all the factors are non-negative). Yet the influence of union membership and total average private compensation are more strongly significant than the education level of the government workforce relative to the general population. Additionally, the coefficient on the *UnionShare* variable is much higher than the *PrivComp* coefficient. The model estimates that a 10 percentage point increase in the share of public workers represented by a union leads to higher annual average government sector compensation of $1,367.30.

To test whether union density was a reliable proxy for the impact of collective bargaining laws on the differential between private and government sector employee compensation, we set out to determine whether a correlation existed between collective bargaining laws and the foregoing compensation differential that was similar to that obtained with respect to union density. We first assessed the relative strength and pervasiveness of laws authorizing government sector union collective bargaining among the 50 states. A score of zero, one, two, or three was given to states based on the following:

- A state was awarded a score of zero if it bans collective bargaining and collectively bargained contracts.
- A state was awarded a score of 1 if it has no statewide comprehensive collective bargaining laws and either few statewide laws authorizing collective bargaining for any substantial portion of the overall population

of state and local government employees, or mainly local laws authorizing collective bargaining.

- A state was awarded a score of 2 if it does not have comprehensive collective bargaining laws, and yet extend strong statutory collective bargaining rights to significant portions of the population of state and local government employees, such as teachers.
- A state was awarded a score of 3 if it has comprehensive bargaining laws authorizing or mandates collective bargaining for all or nearly all state and local government employees.

We then ran a regression that included as an independent variable the numeric classification for each state's collective bargaining laws instead of the *UnionShare* variable. (The states and their scores are illustrated on the map in Chart 2.) The results indicated that the measure of unionization we used was strongly correlated with the pervasiveness and strength of a state's collective bargaining laws. The pervasiveness and strength of a state's collective bargaining laws strongly and positively influenced the average level of government employee compensation, much as the *UnionShare* variable did and with a similar statistical significance. Furthermore, putting them in the same regression exhibited multicollinearity, further convincing us that the two variables were closely related. The two variables exhibited a correlation of 0.76. Therefore, we concluded that using the share of unionization as a proxy for the power of unions to bargain collectively is valid and yields robust estimates of the savings that can be had if a state were to eliminate the leverage those sorts of laws give to union contract negotiators.

The estimate of the average differential of compensation between public and private workers in states by the collective bargaining strength score was arrived at by first estimating the differential for each state in 2009. Then the states were grouped by their score of collective bargaining strength. The average of the differentials and the share of public unionization for each collective bargaining category were then calculated for each group of states.

ENDNOTES

1 Joseph E. Slater, *Public Workers: Government Employee Unions, the Law and the State: 1900-1962* (Cornell University Press 2004), 1 ("From the mid-1950s to the early 1990s, union density in the private sector declined from more than 33 percent to less than 12 percent; but in the public sector, from the early 1960s to the early 1990s, union density rose from less than 13 percent to nearly 40 percent. Today, about 40 percent of all union members are public employees").

2 Richard C. Kearney, *Labor Relations in the Public Sector, 3d Ed.* 28 (Marcel Dekker, Inc. 2001), 28 ("as of January 1998, according to USBLS, 30.5% percent of state government employees and 43.4% of local government employees belong to labor organizations")

3 James Sherk, *The New Face of the Union Movement: Government Employees*, Heritage Backgrounder No. 2458 (Sept. 1, 2010), 2, Table 1 (stating that the Proportion of Union Membership in Government 2009: 51.5% 2010: 51.7%; 7% of all workers in 2010 for private; 35.7% of all workers in 2010 for government).

4 Vince Coglianese, "Wisconsin GOP State Senators Receive Chilling Email Death Threats," *The Daily Caller*, 2011, http://dailycaller.com/2011/03/10/wisconsin-republican-state-senators-receive-chilling-email-death-threat/ (October 10, 2011).

5 Ibid.

6 Ibid.

7 Deroy Murdock, "Death Threats by the Dozens in Wisconsin," *National Review,* March 18, 2011, http://www.nationalreview.com/articles/262428/death-threats-dozens-deroy-murdock (November 9, 2011).

8 La Rae G. Munk, "Collective Bargaining: Bring Education to the Table," The Mackinac Center for Public Policy, 1998, 7-8, http://www.mackinac.org/791 (Oct. 21, 2011).

9 Kearney, *Labor Relations in the Public Sector*, 34-35.

10 Ibid, 14.

11 Ibid.

12 Slater, *Public Workers*, 194.

13 Ibid. at 82. Slater argues that this figure only constituted 0.034% of the total municipal employees working time for the year; however, Slater does not identify whether he is referring to total working time in the striking jurisdictions, among unionized municipal employees, or among municipal employees in the nation as a whole. This renders his percentage calculation of little or no value. Moreover, the author's supporting endnote purports to dispute evidence of strikes with the assertion that work stoppages should not be counted as strikes. This difference is not a legally-recognized distinction and it suggests subjective opinions may color Slater's interpretation of statistics.

14 William G. Haemmel, *Government Employees and the Right to Strike—The Final Necessary Step*, 39 Tenn. L. Rev. 75, 77-78 (1971).

15 Joyce M. Najita and James L Stern, *Collective Bargaining in the Public Sector: The Experience of Eight States* (M.E. Sharpe, Inc. 2001), 182-83.

16 Kearney, *Labor Relations in the Public Sector*, 17-18.

17 Morgan O. Reynolds, *Power and Privilege: Labor Unions in America* (Universe Books 1984), 195.

18 Ibid, 177.

19 William A. Fletcher, *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1676, 1705-1706 (May 1984).

20 Najita, *Collective Bargaining in the Public Sector*, 182-83.

21 Reynolds, *Power and Privilege*, 176.

22 Fletcher, *Developments in the Law*, 1705-06.

23 Slater, *Public Workers*, 13-14.

24 Ernest N. Blasingame, Jr., *Public Employees: No Right to Strike*, 38 Tenn. L. Rev. 403, 405 (1971).

25 Reynolds, *Power and Privilege*, 173.

26 Najita, *Collective Bargaining in the Public Sector*, 143; Daniel P. Ryan, *Has County Sanitation District v. Los Angeles County Employees Association Trashed the Traditional Prohibitions Upon Public Sector Strikes?* 62 Notre Dame L. Rev. 435, 439-51 (1987) (citing *County Sanitation District v. Los Angeles County Public Employees Association*, 699 P.2d 835 (Cal. 1985), *cert. denied*, 106 S. Ct. 408 (1985)).

27 James Sherk, "Time to Restore Voter Control: End the Government-Union Monopoly," *Heritage Backgrounder No. 2522*, Feb. 25, 2011, 2, http://www.heritage.org/research/reports/2011/02/time-to-restore-voter-control-end-the-government-union-monopoly (Oct. 21, 2011).

28 *Bd. Education of Community Unit School District No. 2 v. Redding*, 207 N.E.2d 427, 430 (Ill. 1965) (holding "it is, so far as we can ascertain, the universal view that there is no inherent right in municipal employees to strike against their governmental employer, whether Federal, State, or a political subdivision thereof, and that a strike of municipal employees for any purpose is illegal. The underlying basis for the policy against strikes by public employees is the sound and demanding notion that governmental functions may not be impeded or obstructed, as well as the concept that the profit motive, inherent in the principle of free enterprise, is absent in the governmental function") (numerous citations omitted from Rhode Island, Washington, Oklahoma, Texas, California, Michigan).

29 Najita, *Collective Bargaining in the Public Sector*, 13 (citing Alaska, Hawaii, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont, Wisconsin, California, Colorado, Idaho and Louisiana).

30 *Garcia v. San Antonio MTA*, 469 U.S. 528, 532 (1985); Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model*, 38 Stan. L. Rev. 1097, 1120-22 (1986) (predicting *Garcia* will lead to NLRA being applied to state and local governmental employees).

31 Catherine E. Shuck, *Bargaining Power: Understanding the Rights of Public Sector Workers in Tennessee*, 47 Tenn. B.J. 12, 17 (May 2011).

32 General Accounting Office, "Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights," September 2002, 4, www.gao.gov/new.items/d02835.pdf *(Oct. 21, 2011)* (observing that Section 2(2) of the Taft-Hartley amendment to the NLRA excludes employees of any state or political subdivision thereof).

33 N.C.G.S. § 95-98 (2011) ("Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal. -- Any agreement, or contract between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect."); Va. Code

Ann. § 40.1-57.2 (2011) ("No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service.").

34 *See* Va. Code Ann. § 40.1-57.2.

35 *See, e.g.*, 21 V.S.A. § 1726; Minn. Stat. § 179A.01; O.R.S. § 4117.11; Najita, *Collective Bargaining in the Public Sector*, 5 ("By 1999, the number of states that had enacted collective bargaining statutes covering all or some occupational groups stabilized at thirty-four, the number identified by Schneider in 1987 . . . [s]ix other states authorized other forms of representation and bargaining"); Fletcher, *Developments in the Law*, 1678 ("The vast majority of public employees in over thirty states—as well as such specific groups of employees as police officers, firefighters, and teachers in a number of other states–now enjoy statutory bargaining rights. Even in states that either lack statutes authorizing public sector bargaining or prohibit such bargaining as a violation of public policy, collective negotiation is often an accepted practice"); Sherk, *Time to Restore Voter Control*, 6 ("While 25 states have comprehensive collective-bargaining laws, the remaining 25 states limit collective bargaining for some or all classes of government employees") (citing David Denholm, "Are Labor Unions a Good Thing?" in *Sweeping the Shop Floor: A New Labor Model for America*, Evergreen Freedom Foundation, 2010, 50, http://www.effwa.org/files/pdf/SWEEPINGTHESHOPFLOOR.pdf (February 24, 2011); AFSCME, "Who has the Power? Fighting for Economic Justice," *Online Workshop*, April 7, 2008, http://www.afscme.org/docs/FINAL_Econ_Justice_self-paced_4-7-08.ppt (February 24, 2011)).

36 Compare Tim Jones, "For Governors, Public Sector Unions are the Enemy," *Bloomberg Businessweek* (March 3, 2011), http://www.businessweek.com/magazine/content/11_11/b4219029449383.htm (9/12/2011); James Sherk, "Time to Restore Voter Control: End the Government-Union Monopoly," *Heritage Backgrounder No. 2522*, Feb. 25, 2011, 7; Shuck, *Bargaining Power*, 12, 17 *with* GAO, *Collective Bargaining Rights*, 14, 17; Slater, *Public Workers*, 71-72, 180-81; Sherk, *Time to Restore Voter Control*, 6.

37 Kearney, *Labor Relations in the Public Sector*, 62-63.

38 Tex Lg. Code Ann. § 617.002.

39 Tex Lg. Code Ann. §§ 143.353, 143.354, 143.359, 617.005; Kearney, *Labor Relations in the Public Sector*, 66,

40 *See, e.g.*, Art. XVII: Employer-Employee Relations, Phx. City Code §§ 2-209, *et seq*. (1976); Art. VI: Employer, Employee Relations Meeting and Conferring, Tempe City Code §§ 2-400, *et seq*. (2000) (amended 2001); Labor Organization and Employment Assocation Election Procedure, Meet and Confer and Meet and Discuss, Tucson City Code §14 (2011); Pima Employer / Employee Relations-Meeting and Conferring, §2.77 (2000) (amended in 2001 and 2002); Prescott Valley, Meet and Confer Act, Art. 3.06, (2001); County Meet and Confer Process, Pima County Ordinances, Chapter 2.20 (2009); Pinal County Ordinances, Ordinance No. 121008-MC (2008); Pima County, Meet and Confer Memorandum of Understanding with Service Employees International Union (SEIU) for Fiscal Year 2011-2012 (approved August 15, 2011).

41 *Bd. of Ed. of Scottsdale High Sch. Dist. No. 212 v. Scottsdale Ed. Ass'n*, 498 P.2d 578, 582, 583 (Ariz. Ct. App. 1972), *vacated*, 509 P.2d 612 (1973).

42 Najita, *Collective Bargaining in the Public Sector*, 138-39; Texas Conservative Coalition, "'Meet and Confer' and Public Employee Unionization, Analysis and Talking Points," October 15, 2010, 5 ("Meet and confer" is a step toward public sector unionization."); *City of Phoenix v. Phoenix Employment Relations Bd.*, 699 P.2d 1323, 1326-29 (Ariz. Ct. App. 1985); Terry Goddard, *County Meet-and-Confer Ordinances*, 2006 Ariz. AG LEXIS 4 (October 30, 2006).

43 Najita, *Collective Bargaining in the Public Sector*, 11; see generally Fletcher, *Developments in the Law*, 1736 (observing that Contracts Clause is enforced without complete deference when a state modifies its own contractual obligations).

44 Aaron, *Unfair Labor Practices*, 1099-1100 (calling the refusal to bargain in good faith the same as refusing to meet and confer in good faith); *AFSME v. City of Phoenix*, 142 P.3d 234, 235 (Ariz. Ct. App. 2006).

45 Aaron, *Unfair Labor Practices*, 1099-1100.

46 *City of Phoenix,*, 699 P.2d at 1326-29.

47 Ibid.

48 Kearney, *Labor relations in the Public Sector*, 65-66.

49 Ibid, 62-63; Andrew Henson, "S.B. 178 Threatens Right to Work, Would Deepen NC's Fiscal Crisis," *Civitas Institute*, July 23, 2010, http://www.nccivitas.org/2010/s-b-178-threatens-right-work-would-deepen-nc-s-fiscal-crisis/ (Oct. 21, 2011); John Honeycutt, "The Influence of Organized Employees in North Carolina's Twenty-Five Largest Cities," *Popular Government*, Fall 2007, 28 ("To highlight a few, dues collection occurs in 14 of the 22 responding cities (64 percent), either voluntarily (in 11 cities) or through payroll deduction (in 3 cities). The use of payroll deduction shows consistent interaction between city management and employee organizations at least at a basic level. Also, representatives of some employee organizations meet not only with city managers but with city council members. Further, in 6 cities (27 percent), employee organizations vet or endorse candidates for city council."); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 Cornell J. L. & Pub. Pol'y 735, 753-54 (2009) (observing firefighter and education unions still operate "effectively" in Virginia and that "the average wages for both union and nonunion public sector workers in Virginia exceeded those in Illinois").

50 H.H. Wellington and R.K. Winter, Jr., *The Unions and the Cities* (Brookings Institution, 1971), 167.

51 Reynolds, *Power and Privilege*, 177-83.

52 Munk, *Collective Bargaining*, 6.

53 Shuck, *Bargaining Power*, 15.

54 James Sherk, "The New Face of the Union Movement: Government Employees," *Heritage Backgrounder No. 2458*, Sept. 1, 2010, 13.

55 Sherk, *The New Face of the Union Movement*, 3.

56 Kearney, *Labor Relations in the Public Sector*, 82.

57 Ibid, 35.

58 Ibid, 44.

59 Hodges, *Lessons from the Laboratory*, 753-54.

60 Kearney, *Labor Relations in the Public Sector*, 330.

61 Reynolds, *Power and Privilege*, 197.

62 Ibid, 183.

63 Richard C. Kearney and David G. Carnevale, *Labor Relations in the Public Sector* (3rd ed. Marcel Dekker, Inc., New York, 2001), 35.

64 Slater, *Public Workers*, 106-07; *see also* Sherk, *The New Face of the Union Movem*ent, 7 (citing Chicago Teacher on Tax Hike: 'Give up the Bucks,'" BigGoverment.com, April 22, 2010,

http://biggovernment.com/publius/2010/04/22/chicago-teacher-on-tax-hike-give-up-the-bucks/ (August 25, 2010)).

65 Sherk, *Time to Restore Voter Control*, 2.

66 Kearney, *Labor Relations in the Public Sector*, 340.

67 Mark Flatten, "Money for Nothing: Phoenix Taxpayers Foot the Bill for Union Work," *Goldwater Institute*, September 21, 2011, http://goldwaterinstitute.org/article/money-nothing-phoenix-taxpayers-foot-bill-union-work (October 10, 2011).

68 *Ibid.*; *see also* http://www.pima.gov/cob/e-agenda/06212011/AD-MOU-Meet%20and%20ConferFY2011-12.pdf (November 9, 2011).

69 See generally Sherk, *The New Face of the Union Movement*, Sept. 1, 2010, 5.

70 Reynolds, *Privilege and Power*, 194-95.

71 Sherk, *The New Face of the Union Movement*, 4.

72 Matthew Marlin, Jonathon Scott and Kaitlyn Wolf, *The Grand Bargain is Dead: The Compensation of State Government Works Far Exceeds Their Private-Sector Neighbors*, 17 (Buckeye Institute July 2010).

73 Sherk, *Time to Restore Voter Confidence*, 4:

74 Ibid.

75 Kearney, *Labor Relations in the Public Sector*, 144-45.

76 *See* Figure 1 in Chris Edwards, "Public Sector Unions and the Rising Costs of Employee Compensation," *Cato Journal*, vol. 30, no. 1, Winter 2010, 87-115.

77 The data published by the Bureau of Labor Statistics on the differences between unionized and non-unionized employees within the public sector is unpublished and available for regions and the nation, not a state-by-state basis, and available from the BLS only by request. As a result, the analysis in this paper relies on the U.S. Bureau of Economic Analysis' publicly-available state-level data on total compensation for all workers. The analysis in this paper attempts to estimate the share of the differential between average public and private sector compensation levels that can be attributed to the amount of public sector unionization in a state.

78 Daniel J. Nadler and Sounman Hong. "Political and Institutional Determinants of Tax-Exempt Bond Yields," *Harvard Kennedy School Report No. 11-04*, 2004, 8, http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG_11-04_Nadler_Hong.pdf (November 9, 2011).

79 Ibid, 10.

80 Ibid, 10.

81 In creating this map, we relied on Kearney, *Labor Relations in the Public Sector*, 31 (Table 2.3), as a baseline and proceeded to analyze the accuracy of the assessments made there. We discovered that Texas, Alabama, Kentucky, Missouri, Utah and West Virginia were identified inaccurately as having no statewide collective bargaining authority. In fact, Alabama gives school boards statutory authority to meet and confer and recognizes collective bargaining by port authority employees. Code of Ala. §§ 16-1-30, § 33-1-41. Kentucky authorizes collective bargaining by public safety employees. KRS § 67A.6902. Missouri authorizes collective bargaining by public safety employees. § 105.510 R.S.Mo. Utah recognizes collective bargaining by firefighters. Utah Code Ann. § 34-20a-5. West Virginia authorizes collective bargaining by public transit employees. W. Va. Code § 8-27-21. Additionally, we discovered that Georgia bans collective bargaining for public school teachers, but provides statutory authority for firefighters to bargain collectively. Ga. Stat. §§ 20-2.989.10, 25-5-6, 25-5-12.

82 Random error due to the small sample size of category 2 states may explain the counterintuitive finding that category 2 states enjoy a lesser compensation differential than category 1 states.

83 Hodges, *Lessons from the Laboratory*, 749.

84 See Table 3.

85 Note that we are making an assumption that each percentage point decline would contribute the same amount of savings. There could be a diminishing marginal taxpayer savings to each percentage point lowering of the union share of the public workforce. However, for the sake of making a ballpark estimate, we have made the assumption that these relationships are linear within some range.

86 Fletcher, *Developments in the Law*, 1737; Slater, *Public Workers*, 71.

87 Slater, *Public Workers*, 73.

88 *Ibid*, 22, 29, 73

89 Reynolds, *Power and Privilege*, 176.

90 Sherk, *Time to Restore Voter Control*, 2 (citing Leo Kramer, *Labor's Paradox: The American Federation of State, County and Municipal Employees, AFL–CIO* (New York: Wiley, 1962), 41)).

91 Fletcher, *Developments in the Law*, 1743-44; *see McAuliffe v. New Bedford*, 29 N.E. 517, 517-18 (Mass 1892)(holding "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here").

92 *AFSCME Local 201 v. City of Muskegon*, 120 N.W.2d 197, 202 (Mich. 1963).

93 *See, e.g.*, *Frederick v. Owens*, 1915 Ohio Misc. LEXIS 190, *23-24 (Ohio Ct. App. 1915) (Upholding supervisor's rule that no union affiliated teachers are permitted because "neither may compel the other to continue the relation of employer and employee beyond the term of service agreed upon, nor can either compel the other to enter into any new contract for service except by mutual consent of the parties."); Slater, *Public Workers*, 73.

94 *Seattle High School Chapter No. 200 v. Sharples*, 293 P. 994, 996-97 (1930); Fletcher, *Developments in the Law*, 1743-44; *see generally* Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L. Rev. 277 (1990), 309-16 ("The activity is governmental either because it is an attribute of sovereignty or because its performance is 'essential' or 'necessary' to the public weal . . . . The activity is proprietary because it is of a businesslike nature . . . The activity is deemed governmental or proprietary depending on whether it has historically or traditionally been performed by public or private entities . . . . The activity is governmental because the state mandates that it be performed by the local government as its agent . . . . The activity is proprietary because its performance primarily advances the interests of local government . . . . The activity is proprietary because it entails the provision of goods or services by a municipality to an area outside its jurisdiction").

95 Fletcher, *Developments in the Law*, 1737.

96 *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyeshian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 605-606 (1967).

97 *See, e.g.*, *Lontine v. VanCleave*, 483 F.2d 966, 967 (10th Cir. 1973); *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287, 288-89

(7th Cir. 1968); *Local 2263 v. City of Tupelo*, 439 F. Supp. 1224, 1230 (N.D. Miss. 1977); *Bd. of Ed. Scottsdale v. Scottsdale Education Assoc.*, 498 P.2d 578, 582 (Ariz. Ct. App. 1972) ("all citizens, be they public employees or not, have the right to peaceably assemble and organize for any proper purpose and to present their views to any public body, such a right being embodied within the first amendment to the United States Constitution")

98 *Vorbeck v. McNeal*, 407 F. Supp. 733, 738 (E.D. Mo. 1976), *aff'd*, 426 U.S. 943 (1976).

99 Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984), 1320 (arguing "[n]o public enterprise, however proprietary, can claim the same genealogy as a private enterprise. Somewhere along the line it rests on the sovereign taxing power, and it cannot plausibly claim to be the unsullied product of freely adopted private choices").

100 Kearney, *Labor Relations in the Public Sector*, 46.

101 Fletcher, *Developments in the Law*, 1678.

102 *Lontine v. Van Cleave*, 483 F.2d 966 (10th Cir. 1973); *United States Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.C. D.C., 1971) (three-judge court), aff'd, 404 U.S. 802 (1971); Shuck, *Bargaining Power*, 13-15; *cf.* Fletcher, *Developments in the Law*, 1702-04.

103 *Atkins v. International Assoc. of Fire Fighters*, 296 F. Supp. 1068, 1077-78 (W.D. N.C. 1969).

104 Ibid.

105 Slater, *Public Workers*, 83-85; *Commonwealth of Virginia v. County Board of Arlington County*, 232 S.E.2d 30, 40-41 (Va. 1977).

106 Rutledge C. Clement, Jr., *Freedom of Association Guarantees the Right to Unionize but not the Right to Bargain Collectively*, 44 Tul. L. Rev. 568, 569-70 (1970).

107 *Minnesota State Board for Community Colleges v. Knight*, 464 U.S. 271, 286 (1984); *Smith v. Arkansas State Highway Commission*, 441 U.S. 463 (1979).

108 *Elk Grove Firefighters Local No. 2340 v. Willis*, 400 F. Supp. 1097, 1100 (N.D. Ill. 1975).

109 Ibid.

110 *Kirchgessner v. Wilents*, 884 F. Supp. 901, 911-13 (D.C. NJ. 1995).

111 Ibid.

112 Joseph O. Oluwole, *On the Road to Garcetti: UnPickerring Pickering and its Progeny*, 36 Cap. U. L. Rev. 967 (2008), 1026 (finding "the Court's interpretation and development of the jurisprudence has devolved into greater weights being assigned to the interests of the public employer within the Pickering balancing test"); *see generally Duryea v. Guarnieri*, 2011 U.S. LEXIS 4564 * 13, *33 (2011) (observing "[t]he government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise the conduct of public Employees . . . . If a public employee petitions as an employee on a matter of purely private concern, the employee's First Amendment interest must give way, as it does in speech case"); *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995) (holding the court must "arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees"); *Connick v. Myers*, 461 U.S. 138, 145-46, 156 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment . . . . We hold only that when

a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior ").

113 *Duryea*, 2011 U.S. LEXIS at * 37 (Thomas, J., concurring) ("Recognizing 'the realities of the employment context,' we have held that 'government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'") (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 599-600 (2008).

114 This is because the abuse of government power in internal employment decisions, which is confronted voluntarily by public employees, tends to be less dangerous than the abuse of government power at large, which is involuntarily imposed on citizens at large. Ibid. Of course, this observation assumes: 1) the government is not intentionally using internal policies to circumvent constitutional limitations (i.e., as an indirect means of external governance); and 2) internal governmental policies affect significantly fewer people than external government policies. If either of these assumptions do not hold true, as in the case of a predominantly socialistic government that forces all or most of the citizenry to work in the public sector and uses its proprietary power over most of the economy to achieve external policies, the internal administrative policies of such a government could very well be just as dangerous or even more dangerous to liberty than its external policies.

115 S. Barry Paisner and Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees*, 37 N.M.L. Rev. 357, 385 (2007); Oluwole, *On the Road to Garcetti*, 1026.

116 Slater, *Public Workers*, 161.

117 *See generally* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 Kan. L. Rev. 1, 51-53 (2003); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. Rich. L. Rev. 191 (2001).

118 Natelson, *The General Welfare Clause and the Public Trust*, 50-51 (citing U.S. Const, art. VI, cl. 3., art. I, § 3, cl. 7, art. II, § 1, cl. 2; Del. Const. art. IV; Pa. Const. art. IV; The Federalist Nos. 49, 55, 57, 63).

119 Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buffalo L. Rev. 1077, 1085, 1088-89, 1117-18, 1130-31 (2004).

120 Ibid, 1086-87; Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 Penn. St. L. Rev. 415, 433 (2003).

121 Abraham Clark Freeman, *Freeman on Judgments* (5th ed. 1925), 1:1090; see also Eugene McQuillin, *A Treatise on the Law of Municipal Corporations* (Callaghan & Co. 1911), 2:§§ 422, 935-36 ("Office implies a duty and a discharge of that duty. Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not for the profit, honor, or private interest of anyone man, family or class of men. In our form of government it is fundamental that a public office is a public trust, and as well observed by the Supreme Judicial Court of Massachusetts, the person to be elected or appointed should be chosen solely with a view to the public welfare") (citing Thomas McIntyre Cooley, *The General Principles of Constitutional Law in The United States* (Boston: Little, Brown & Co. 1880), 303 (observing "A public office is a public trust truat").

122 Freeman, *Freeman on Judgments*, 1090.

123 *Tool Company v. Norris*, 69 U.S. 45, 54-55 (1865).

124 Ibid.; *Meguire v. Corwine*, 101 U.S. 108, 111-12 (1879); Trist v. Child, 88 U.S. 441, 447, 451-52 (1875) ("The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane").

125 *Oscanyan v. Arms Co.*, 103 U.S. 261, 277 (1880).

126 *Tool Company*, 69 U.S. at 54-55. Notably, this application of public trust doctrine provides a clear theoretical basis for legislation voiding collectively bargained contracts that pay union bosses "release time" for their union activities. Release time involves a promise to keep union representatives on the government payroll to work exclusively on union activities for a specified number of payroll hours. The payment is sometimes justified as a form of compensation to union representatives for their services in procuring and enforcing a new public employment contract. This justification calls release time contracts into question under public trust doctrine. Like contracts that pay a fee for procuring government action, enforcing release time contracts risks encouraging union representatives to tempt public officers to approve a government contract on grounds other than the merits of the deal. Indeed, because nothing is typically given to a government employer in return for granting release time, it is readily apparent that allowing such contracts to be enforced has, at the very least, induced public officers on the other side of the bargaining table to violate their fiduciary duty to prudently manage taxpayer money. Therefore, just as courts refuse to enforce contracts that pay a fee for procuring the passage of legislation, a government appointment or a government contract as a matter of public policy, so should the legislature enact laws that bar enforcement of collectively bargained government contracts that award release time to union representatives.

127 *In re Petrol Terminal Corp.*, 120 F. Supp. 867, 872 (D. Md. 1954).

128 *Davis v. United States*, 23 Ct. Cl. 329, 334 (1888) (holding government employees may not enforce royalty contracts for intellectual property produced in the course of their employment because "no transaction growing out of his official services or position can be allowed to inure to his personal benefit, and that from such transactions, as in the cases of guardian and ward, or trustee and cestui que trust, the law will not imply a contract").

129 *State v. Baxter*, 8 S.W. 188, 190 (Ark. 1887) (recognizing county court as literally having the duties of an "ordinary trustee towards his cestui que trust, or an agent towards his principal" with respect to property held for county); *Andrews v. Pratt*, 44 Cal. 309, 317-18 (Calf. 1872); *Twiggs v. Wingfield*, 95 S.E. 711, 712-14 (Ga. 1917) (holding "no man who is agent or trustee for another, whether a private or public agent or trustee, shall have the opportunity or be led into the temptation to make profit out of the business of others entrusted to his care, by bargaining with himself, directly or indirectly, in respect to that business"); *Johnson v. Black*, 49 S.E. 633, 636-38 (Va. 1905) (holding plaintiffs "in common with other tax payers, had the right to presume that their chosen representatives and agents would faithfully discharge their public duties within the law that regulated and prescribed those duties, and that they would not illegally divert the public funds to their private use"); *Honaker v. Board of Educ.*, 42 W. Va. 170, 176 (W. Va. 1896) ("Every public officer being a guardian of the public welfare, no transaction growing out of his official services or position can be allowed to inure to his personal benefit; and from such transactions the law will not imply a contract . . . A contract with the state, procured by bribery upon the officers having power to make it, is against public policy and void"); *cf. Frederick v. Owens*, 1915 Ohio Misc. LEXIS 190, *23-24 (Ohio Ct. App. 1915) ("The law [of freedom of contract] thus stated as applicable to individuals, partnerships, corporations and other associations of individuals handling their own money, should surely apply with equal force to public officials who are not spending their own money, but who are trustees of a public fund raised by taxation, and whose duty it is to make these expenditures according to their best judgment for the common benefit of all. Individuals may be very liberal, if they so elect, with their own money. Public servants may

not have the funds in hand with which to do as they would like in the matter of increasing the salaries of persons employed by them."); *Brown v. Russell*, 43 N.E. 1005, 1009-10 (Mass. 1896) (observing "[p]ublic offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare."); *Missouri v. Bowman*, 170 S.W. 700, 701-03 (Mo. Ct. App. 1914).

130 *Andrews*, 44 Cal. at 317-18.

131 *Woods v. Potter*, 95 P. 1125, 1127 (Calf. Ct. App. 1908).

132 *Missouri*, 170 S.W. at 701-03.

133 *Twiggs*, 95 S.E. at 712-14; *see also Hobbs, Wall & Co. v. Moran*, 293 P. 145, 146-48 (Calf. Ct. App. 1930) (invoking public trust doctrine to justify invalidation of contracts in which public officials were personally interested regardless of "actual fraud, dishonesty or loss").

134 McQuillin, *A Treatise on the Law of Municipal Corporations*, 2:§§ 513, 1101-1109.

135 *Missouri v. Bowman*, 170 S.W. 700, 701-03 (Mo. Ct. App. 1914).

136 McQuillin, *A Treatise on the Law of Municipal Corporations*, 2:§§ 513, 1101-1109.

137 *See, e.g.*, *Nussbaum v. Weeks*, 214 Cal. App. 3d 1589, 1598 (Ct. App. 1989) (holding duty as public trustee is to "all his constituents generally, and not to each constituent specifically"); *Mazzola v. City and County of San Francisco*, 112 Cal. App. 3d 141, 157 (Ct. App. 1980) (rejecting analogy to private trust because "[t]o accept respondents' theory would be tantamount to stating that union officials may serve as city officials only so long as they do not discharge their duties to their local unions").

138 It is unsettled whether courts have judicial power at common law to review and void legislative action or legislative processes that are tainted by fraud, duress or corruption. Some courts regard such judicial review as akin to an investigation into the motives of the legislature in enacting legislation, which violates the doctrine of separation of powers, other courts regard the bar of inquiring into the motives of legislation as inapplicable or as a general rule subject to exceptions for fraud and corruption. *Compare* John Forest Dillon, *Commentaries on the Law of Municipal Corporations* (4th ed. Boston: Little, Brown & Co., 1890), 311 ("We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud, at the instance of persons injured thereby"); *Cohn v. Kingsley*, 49 P. 985, 987 (Id. 1897) (ruling that judiciary properly reviews whether legislature passed law in conformity with constitutional reading requirements); *Morrison v. Cregier*, 28 N.E. 812 (1891) (observing municipal ordinances "can be impeached for fraud, at the instance of persons injured thereby"); *Lynn v. Polk*, 76 Tenn. 121, 182-83, 188-90, 202-205, 212-26 (Tenn. 1881) (Freeman, J., concurring and dissenting in part) (arguing that courts could more effectively combat legislatively approved contracts procured through bribery by voiding them based on public trust doctrine); *State Ex Rel. Newell v. Purdy*, 36 Wis. 213, 225 (1874) (sustaining cause of action allowing overturning of election if sufficient votes were purchased by winner, stating "courts have steadily held that popular elections must be kept free from any taint of corruption, and from all improper or unlawful influences whatever"); *Carrothers v. Russell*, 5 N.W. 499 (Ia. 1880) (candidate disqualified from office for bribing voters); *Sunbury & E. R. Co. v. Cooper*, 33 Pa. 278, 283 (1859) (rejecting general judicial power to review passage of legislation for fraud as "knavish" but also emphasizing that courts can refuse to allow anyone from claiming a benefit from legislation if the Act were shown to be obtained by fraud); *with United States v. Old Settlers*, 148 U.S. 427, 466 (1893) ("The Court of Claims declined to go behind the treaty of 1846 upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an act of Congress had been procured by duress or fraud, and declare it inoperative for that reason");

Fletcher v. Peck, 10 U.S. 87, 130-31 (1810) ("If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? It the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned. Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.").

139 See, *e.g.*, *Sloan v. DOT*, 379 S.C. 160, 169-70 (S.C. 2008); *Baxley v. State*, 958 P.2d 422, 429 (Ak. 1998); *Wilmington v. Lord*, 378 A.2d 635, 638 (Del. 1977).

140 In re *Valley Health System*, 429 B.R. 692, 715 n. 58 (U.S. Bank. Ct. CD. Calif. 2010) ("Arguably, the VHS directors as public officials each bear the same fiduciary relationship towards their constituents as a "trustee bears to his cestui que trust, and should therefore act with the utmost good faith.").

141 Courts have been willing to exercise such judicial review. *See, e.g.*, *In The Matter Of The Appeal From The Order Of The County Board Of Meeker County Made August 9, 1916*, 173 N.W. 850 (Minn. 1919) ("here the statute has given the court express authority to review the action of the board and determine whether it acted arbitrarily, unreasonably or fraudulently").

142 Although government employees, as members of the public, have the same right as taxpayers to require public officers to protect their constitutional rights under public trust doctrine, a public officer, as a literal trustee of the public's sovereign power, should not act in accordance with the demands of government employees when those demands amount to an attempt to violate the fiduciary duty government employees owe to taxpayers in their agency capacity. *Restatement of the Law of Trusts (Second)*, sec. 185 (1959) (stating "[i]f under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or *is a violation of a fiduciary duty to which such person is subject in the exercise of the power*") (emphasis added).

143 *Crosby v. Beam*, 548 N.E.2d 217, 218-21 (Oh. 1989).

144 Indeed, litigators should argue that the presence of politically active public sector unionism in a given jurisdiction constitutes a "plus factor" enhancing the relative weight of the government's interest in efficient employment policies. This is because the political process will afford even less of an opportunity for taxpayers to protect themselves from inefficient public employment policies when they must compete against the focused efforts of organized labor for political influence.

145 Sherk, *Time to Restore Voter Control*, 5.

146 Kearney, *Labor Relations in the Public Sector*, 65; see generally Slater, *Public Workers*, 96, 112.

147 Kearney, *Labor Relations in the Public Sector*, 83.

148 Ibid, 36, 123-26; Slater, *Public Workers*, 97-98, 105.

149 Kearney, *Labor Relations*, 123-26.

150 Ibid.

151 Ibid, 196.

152 Slater, *Public Workers*, 44.

153 Reynolds, *Power and Privilege*, 195 ("Unions try to regulate the work environment . . . police and fire fighter unions have tried to control transfers among precincts through contract provisions . . . New York City teachers' unions defeated a citizens' plan to decentralize city schools"); Kearney, *Labor Relations in the Public Sector*, 142, 184, 194, 196, 215 (observing "public employee unions can seriously limit the ability of budget makers to rationalize, control and manage the budget . . . . gradually, public employee unions have caused a shift in personnel decision making from the realm of management rights to the bargaining table . . . . notwithstanding formal management rights verbiage, unions continue to encroach on traditional management prerogatives . . . . if a variable in the environment of work can even imaginatively be labeled, 'working condition,' then the odds are that some union, somewhere, has challenged management over it").

154 *See generally* Fletcher, *Developments in the Law*, 1736 (observing that Contracts Clause is enforced without complete deference when a state modifies its own contractual obligations).

155 *Capital Gas Co. v. Young*, 41 P. 869, 870-71 (Calf. 1895).

156 *See generally* Iman Anabtawi and Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 Stan. L. Rev. 1255, 1286 (2008); Francesca Russo-Di Staulo and Jeff Cazeau, *Does a Florida Minority Shareholder in a Closely Held Corporation Owe a Fiduciary Duty to Fellow Shareholders?* 79 Fla. Bar. J. 1 (Oct. 2005); Robert S. Karmel, *Should a Duty to the Corporation be Imposed on Institutional Shareholders*, 60 Bus. Law. 1 (Nov. 2004). The foregoing authors argue for applying strong fiduciary duties to powerful minority shareholders in the context of corporate law. The arguments they use to justify this position apply with much greater force to public officers and employees. Simply put, citizens and taxpayers are far more vulnerable to the abuse of power by government officials because, unlike shareholders, they cannot contractually protect themselves against it.

157 *See generally* Shuck, *Bargaining Power*, 15.

158 *See generally* Sherk, *The New Face of the Union Movement*, 9; Blasingame, Jr., *Public Employees*, 404-05 (observing that common law rule against recognizing a right to strike for union employees articulated the idea that government employees "exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of Government and contravene the public welfare").

159 *Scottsdale Bd. Ed.*, 498 P.2d at 585 (quoting *School District No. 69 of Maricopa County v. Altherr*, 458 P.2d 537 (Ariz. Ct. App. 1969) (holding board of education has no power to limit its discretion by way of agreement with union because "A public office is considered a public agency or trust, created in the interest and for the benefit of the people, i. e., public officers, are servants of the people. A public officer may not agree to restrict his freedom of action in the exercise of his powers, and an agreement which interferes with his unbiased discharge of his duty to the public, in the exercise of his office, is against public policy and unenforceable . . . Public policy dictates that a school trustee's fiduciary duty to the public be performed unfettered by threats of litigation"). The foregoing fiduciary analysis is not undermined by the fact that *Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048 (1983), rejected the claim that a meet and confer law unconstitutionally delegated legislative authority to private parties.

160 Editorial, "Austin Police Union Abandons the Spirit of Meet and Confer," *Austin American-Statesman*, February 18, 2004.

161 78 Cal. App. 2d 638, 651 (Ct. App. 1947); *see also City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947) ("Under our form of government, public office or employment never has been and cannot become a matter of bargaining and contract. This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principle of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is voIbid. If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers"); *Mugford v. Baltimore*, 44 A.2d 745, 746-47 (Md. 1945) ("To the extent that these matters are covered by the provisions of the City Charter, creating a budgetary system and a civil service, those provisions of law are controlling. To the extent that they are left to the discretion of any City department or agency, the City authorities cannot delegate or abdicate their continuing discretion [through collective bargaining agreement] . . . Such action would not only be unlawful but would also tend to constitute a monopoly of public service by members of a labor union, which the law does not countenance."); *Railway Mail Ass'n v. Murphy*, 180 Misc. 868 (N.Y. Ct. App. 1943) ("Nothing 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 conditions under which they will carry on essential services vital to the welfare, safety, and security of the citizen. 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.")

162 Kearney, *Labor Relations in the Public Sector*, 15-16; s*ee generally Local 266, International Brotherhood of Electrical Workers v. Salt River Project Agricultural Improvement and Power District*, 275 P.2d 393 (Ariz. 1954); *City of Mesa v. Salt River Project Agricultural Improvement and Power District*, 373 P.2d 722 (Ariz. 1962); *Santa Cruz Irrigation District v. City of Tucson, Ariz.*, 494 P.2d 24 (Ariz. 1972).

163 *See, e.g.*, Slater, *Public Workers*, 77 ("cases holding that bargaining or arbitration in the public sector run afoul of the nondelegation doctrine continue through the present day in some states"); *Tucson Unified School District v. Tucson Ed. Assoc*., 155 Ariz. 441, 443 (Ct. App. 1987) ("The school board alone makes the rules and it alone enforces them. It cannot delegate the power to enforce or prescribe the rules to anyone else. The Consensus Agreement unlawfully delegates the power to enforce the rules [for school governance] to a third party"); *Police Protective Association v. Casper*, 575 P.2d 1146, 1153-54 (Wyo. 1978) (Raper, Thomas, J., concurring) ("referred to for such a holding to be that the employer-employee relationship in government is a legislative matter, which may not be delegated. Such contracts, if permitted to stand, would take away from the municipality its legislative control and exert it in an unelected and uncontrolled private organization. The whole matter of qualifications, tenure and working conditions for public service involves the exercise of legislative powers, delegated to the governing body and none of those responsibilities may be bargained away. Such bargaining would usurp those legislative powers, which cannot be contracted away. By way of example is the provision of the agreement here, requiring submission to arbitration, which would take from the city council its right to completely control its employees by permitting others to settle differences").

164 *See generally Scottsdale Bd. Ed.*, 498 P.2d at 585 (quoting *School District No. 69 of Maricopa County v. Altherr*, 458 P.2d 537 (Ariz. Ct. App. 1969) (holding board of education has no power to limit its discretion by way of agreement with union because "A public office is considered a public agency or trust, created in the interest and for the benefit of the people, i. e., public officers, are servants of the people. A public officer may not agree to restrict his freedom of action in the exercise of his powers, and an agreement which interferes with his unbiased discharge of

his duty to the public, in the exercise of his office, is against public policy and unenforceable . . . Public policy dictates that a school trustee's fiduciary duty to the public be performed unfettered by threats of litigation"); Fletcher, *Developments in the Law*, 1691 (observing "[t]he 'sovereignty' vision casts the government employer as trustee for the public interest, charged with carrying out policymaking responsibilities imposed by statute or constitution").

165 President Franklin D. Roosevelt, "Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service," August 16, 1937, http://www.presidency.ucsb.edu/ws/index.php?pid=15445 (November 8, 2011).

166 Notably, in Sacramento, California, voter approval is required for any labor arbitration that results in a propose to require a tax increase or that would "substantially interfere with management's prerogative to deploy or assign personnel." Najita, *Collective Bargaining in the Public Sector*, 17.

167 A knowing breach of fiduciary duty is widely viewed as a species of fraud. *United States v. Browne*, 505 F.3d 1229, 1265 (11th Cir. 2007) (affirming a § 1346 conviction of a labor union official who owed a fiduciary duty to union members); *United States v. Williams*, 441 F.3d 716, 723-24 (9th Cir. 2006) (concluding that a financial advisor and estate planner had a fiduciary duty to his client who had appointed him as his agent in a durable power of attorney and had entrusted him with large sums of money); *United States v. Vinyard*, 266 F.3d 320, 327-28 n.5 (4th Cir. 2001) (declining to decide whether a breach of a fiduciary duty was necessary for an honest services fraud conviction because the defendant had in fact aided and abetted his brother's breach of his fiduciary duty to his corporate employer); *United States v. deVegter*, 198 F.3d 1324, 1330-31 (11th Cir. 1999) (reversing a dismissal of the indictment as it sufficiently alleged that the defendant breached a fiduciary duty to his client, which had "relinquished de facto control of the underwriter selection decision" to the defendant); *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (affirming an honest services fraud conviction of a corporate officer who owed a fiduciary duty to disclose material information to his corporation).

168 Kearney, *Labor Relations in the Public Sector*, 106 (observing "eighteen states require some sort of bargaining in the sunshine . . . Florida and North Dakota requires all bargaining be held in public. Tennessee, Kansas requires teacher bargaining be open. California requires initial bargaining proposals to be presented at a public hearing. Texas requires police and firefighter bargaining in public. Montana, Maine and Oregon require student participation in higher ed bargaining").

169 See generally *Lynn*, 76 Tenn. at 182-83, 188-90, 202-205, 212-26.

170 Slater, *Public Workers*, 112-13, 116-17, 123-24 (recounting all of the informal agreements and arrangements utilized by the BSEIU to circumvent laws that restricted public sector union activities during the 1930s and 40s).

171 Hodges, *Lessons from the Laboratory*, 753-54 (observing firefighter and education unions still operate "effectively" in Virginia and that "the average wages for both union and nonunion public sector workers in Virginia exceeded those in Illinois").

172 Data is available at www.bea.gov/regional/index.htm.

173 Data is available at www.unionstats.com.

174 Data is available at www.census.gov/acs.

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