NOT SO FAST PHILIP

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Philip K. Howard has written another provocative, iconoclastic book. In *Not Accountable*, he extends his critique of our legal system that began in *The Death of Common Sense* in 1994, and continued through four books, including my personal favorites, *Life Without Lawyers* and *The Rule of Nobody*.

Howard's overarching vision is that our society has become rule-bound. According to Howard, we need to return to a bygone golden age — which he never quite identifies — in which he imagines that managers were free to make decisions based on individual judgments rather than rules and were "accountable" for outcomes, a concept that he highlights in his title for this book but does not discuss in detail. Accountability means, for example, that in Howard's ideal world, presidents would be free to fire whomever they want for whatever reason,[1] but would answer for their decisions, if at all, via the next election; and teachers would be free to teach how and whatever they like, but would suffer consequences if their students do not measure up.

In *Not Accountable*, Howard points the finger for much of what he believes ails our society at collective bargaining by public sector unions. The cure, he contends, is "not political but constitutional."[2] Extending an argument first made by Professors Wellington and Winter in the *Yale Law Journal* in 1969,[3] Howard argues that the "non-delegation doctrine" and several other constitutional provisions should be interpreted by courts to prohibit governmental officials from contracting away their management prerogatives in labor negotiations. He despairs of any solution short of a constitutional counter-revolution in the courts. In his view, public employee unions' ability to raise money and campaign against politicians who oppose them makes them too powerful for a disorganized and disinterested public to push back.[4]

Howard supports his vision with his remarkable gift for illustrative anecdote, as well as statistics and quotes. This makes for an entertaining read and a simple, clear, albeit iconoclastic, thesis. I have two main objections: first to his diagnosis, and second to his proposed solution. I am not saying he is necessarily wrong, but that there are important gaps in his argument.

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[1] *See* Philip K. Howard, *Restoring Accountability to the Executive Branch* (CSAS Working Paper 20-02), https://administrativestate.gmu.edu/wp-content/uploads/2020/02/Howard-Restoring-Accountability-to-the-Executive-Branch.pdf.

[2] PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS 13 (2023).

[3] *See* Harry H. Wellington and Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1109–10 (1969), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/1478/The_Limits_of_CBarg.pdf?sequence=2.

[4] HOWARD, *supra* note 2 at 38–40.

I. IS COLLECTIVE BARGAINING BY PUBLIC EMPLOYEE UNIONS REALLY THE PROBLEM?

Howard thinks big and paints rapidly with a broad brush. He notes that thirty-eight states have some form of collective bargaining with public employee unions, but acknowledges that "thirteen have limited bargaining to specific job categories, such as police or teachers, or limited the scope of bargaining to compensation issues."[5] The federal government, on the other hand, only "authorized bargaining over work conditions and discipline, but not compensation and benefits."[6] However, after noting these differences affecting about half the states, he fails to consider their effect but instead treats collective bargaining by public employee unions as if it were a single thing.

Howard then rests his case on a series of anecdotes about alleged pathologies in particular locations, such as "In New York City, 'eight teachers out of a total teaching force of 55,000 were dismissed for poor performance in 2006-07: a dismissal rate of one one-hundredth of 1 percent.'"[7] Howard implies that collective bargaining is somehow responsible for the low rates of teacher firings that he considers suboptimal. That is certainly intuitively plausible but he does not demonstrate that it is actually the case. He doesn't even tell us whether rates of teacher firings were higher before collective bargaining. Nor does he show us that rates of teacher firings differ substantially between states that have collective bargaining over disciplinary procedures for teachers and those that do not.

What is implied, but isn't yet proven, is that the existence of collective bargaining with public sector unions produced these results. To be sure, to some it may seem obvious that public employee unions are responsible, but that's ideology, not evidence. In fact, Howard's target — collective bargaining with public employee unions — is not one thing, but a whole range of different practices that vary from state to state.[8] As Howard himself acknowledges in the passage quoted above, about half the states restrict the subjects that are subject to bargaining or do not allow collective bargaining at all. It would be important to know whether these exclusions make any noticeable difference in outcomes. For example, five states exclude retirement benefits from negotiations.[9] Do they have retirement benefits for government employees that Howard considers more reasonable? He doesn't tell us.

If Howard is right about the source of the problem, we would also expect to see differences among those states where unions can negotiate the terms of disciplinary procedures and those where they cannot. One wonders, for example, whether the rules for firing employees are substantially different where it is a subject of bargaining and where it is not. However, one searches in vain for any demonstration of a causal relationship between the extent of union bargaining and the various ills about which he complains. What is missing is evidence of what

[5] *Id.* at 28–29.

[6] *Id.* at 29.

[7] *Id.* at 53.

[8] JON O. SHIMABUKURO, CONG. RSCH. SERV., R41732, COLLECTIVE BARGAINING AND EMPLOYEES IN THE PUBLIC SECTOR 3 (2011).

[9] *Id.*

scientists call a "dose-response relationship," whereby more of the alleged cause produces more of the alleged harm, which is an important indicator of a causal relationship.[10]

The absence of any such comparative evidence is particularly pertinent for Howard's argument because in his prior books he attributed the obsession with rules and procedures to broader cultural phenomena rather than union negotiating power. For example, in *The Rule of Nobody*, Howard attributed government paralysis not to union negotiations but to a "philosophical mandate" for a "rationalistic system of clear laws that will mechanize public choices" rather than human judgment.[11] In technical terms, Howard fails to provide either evidence supporting a causal connection or to exclude plausible confounding factors.

II. NOT EVERY PROBLEM REQUIRES A CONSTITUTIONAL SOLUTION

The absence of a more nuanced description of various forms of collective bargaining by public employee unions is also relevant to devising a solution. The subtitle of Howard's book is "Rethinking the Constitutionality of Public Employee Unions," but it is not entirely clear whether he thinks that unionization by public employees is unconstitutional *per se*, regardless of the scope and extent of collective bargaining permitted. Regardless, Howard's focus on his constitutional arguments causes him to overlook two obvious but less extreme possible remedies: (1) limiting the scope of collective bargaining to certain subjects, and (2) prohibitions on campaign contributions by unions. In fact, both of these less intrusive remedies already exist in multiple jurisdictions, but Howard does not discuss them or assess their effectiveness.

A. Limiting The Scope of Collective Bargaining

Clyde Summers, a prominent labor law expert whom Howard quotes on a different point, wrote twenty years ago:[12]

> Public employee bargaining statutes originally followed the federally-developed law on mandatory subjects of bargaining [in the private sector], but it eventually became widely recognized that the scope of bargaining in the public sector should be narrower, and a "balancing test" evolved . . . . Typical language included whether the subject was a matter of "inherent management policy," or "natural management prerogative" which "intimately and directly affects the work and welfare of the employee" or which "significantly interferes with the exercise of inherent prerogative," or "an essential element of the right to manage affairs," or whether the subject "falls closer to wages, hours and conditions of employment on the continuum or falls closer to the core of management discretion."

Similarly, Wellington and Winter in their 1969 *Yale Law Journal* article note that some courts had already held that certain subjects were impermissible subjects of bargaining under state constitutions because they infringed on the inherent prerogatives of government managers.[13]

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[10] *See* Sydney Pettygrove, "dose-response relationship", ENCYC. BRITANNICA (Sep. 23, 2016), https://www.britannica.com/science/dose-response-relationship.

[11] PHILIP K. HOWARD, THE RULE OF NOBODY: SAVING AMERICAN FROM DEAD LAWS AND BROKEN GOVERNMENT 15–16 (2014).

[12] Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5. U. PA. J. LABOR & EMPLOYMENT L. 441, 444–45 (2003), https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2015/04/Public-Sector-Bargaining_-A-Different-Animal.pdf.

[13] Wellington and Winter, *supra* note 3.

Presumably, Howard would agree with these decisions, but one searches his book in vain for any discussion of the development of these legal doctrines or why limitations on the subjects of bargaining imposed either legislatively or by courts are not sufficient to either solve, or at least ameliorate, the alleged abuses of union power about which he complains.

B. Prohibiting Campaign Contributions by Unions

Howard also inveighs against the "unprecedented political war chest amassed with the exclusive rights afforded by collective bargaining."[14] He goes on to note that "[a]nnual union revenues from dues are on the order of $5 billion"[15] and claims that "[m]uch of this is spent on direct or indirect political activity."[16]

An obvious remedy would be limits on campaign contributions by unions, whether direct or indirect. I am not a labor law expert, but other sources claim that such limitations already exist, and "[a]s a result, the vast majority of unions do not spend any due[s] money on political activities, especially if they represent public sector employees."[17] I do not know who is right. It may be that loopholes in current law that allow so-called "voluntary contributions" by union members to Political Action Committees[18] make formal prohibitions on contributions out of union dues less relevant.

However, before jumping to the conclusion that public employee unions are unconstitutional and should be banned by the courts, one might reasonably expect more discussion of less intrusive legal devices intended to keep union power within acceptable bounds. If they are inadequate, or some of them work and others do not, we might expect suggestions for how they could be improved. On the contrary, Howard flatly announces that "[d]emocratic processes cannot solve this problem"[19] and instead pins his hopes on the courts.

III. CONCLUDING REMARKS

None of this is to say that Philip Howard's vision is incorrect, but merely that it is not fully supported. He deserves our praise for re-opening a debate that raged in the 1960's when unions were first obtaining broad rights to represent public employees in collective bargaining negotiations. After more than half a century of experience with this experiment, it is time to take stock and perhaps make some mid-course corrections. However, I wish that Howard had given more consideration to the variations in existing legal regimes for regulating bargaining by public employee unions. This might have enabled us to chart a course for improving the present system rather than pinning our hopes on the pipe dream of the courts throwing out public sector unions entirely.

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[14] HOWARD, *supra* note 2 at 38.

[15] *Id.* at 38–39.

[16] *Id.* at 39.

[17] The Weinstein Law Group, *Can Union Dues Be Used for Political Purposes?*, https://www.twlglawfirm.com/new-york-construction-accident-lawyer/can-union-dues-be-used-for-political-purposes/.

[18] *See* Michigan State Employees Association, *The FACTS about Union Dues and Political Campaigns*, https://www.msea.org/facts-about-union-dues-and-political-campaigns.

[19] HOWARD, *supra* note 2 at 40.