PHILIP HOWARD'S NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS

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Philip Howard is the epitome of a public citizen. From his lofty perches as a senior partner of one of the country's most distinguished law firms and a civic leader in New York City, Howard has long practiced his strong dedication to the public interest, broadly defined. He is the author of several earlier best-selling books, most notably *The Death of Common Sense: How Law is Suffocating America* (1994), as well as many opinion pieces and policy briefs on a wide variety of subjects. Howard, a patrician gadfly of boundless energy, is the founder of Common Good, a public policy advocacy group committed to the general welfare. A major commitment has been to dismantle excessive bureaucratic obstacles to the implementation of important public projects and initiatives.

Ever audacious and energetic, Howard's new book, *Not Accountable*, targets his elegant wrath on public employee unions.[1] They constitute a plague on the body politic, he maintains; they are excrescences that contaminate everything they touch.[2] (If he allows for any exception to this sweeping indictment, it eluded this reader). In *Not Accountable*, Howard advocates more than the weakening of these unions. Indeed, he would bar them entirely on the ground that they are flatly *unconstitutional*. Here, however, is where his fine book comes up short. For although its subtitle purports to "rethink" the constitutional question, Howard fails even to mention a counter-argument for the unions' constitutionality, much less seriously explore what such counter-arguments might be. Howard's utter certainty on the constitutional issue is the only significant flaw in an otherwise admirable, convincing, and important book. But it is a serious flaw because – as I shall argue in conclusion – the constitutional analysis of abolition is by no means straightforward.

The stakes are certainly high. As Howard points out, 35% of public employees in America belong to unions – 25% in federal government, 30% in state government, and 40% in local government, with far higher concentrations in California and other union-friendly states.[3] Howard's bill of particulars against public employee unions is uniform; it does not differentiate among them. After all, each such union – whether representing teachers, prison guards, police

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

[2] As it happens, Howard's new book appears only a few months after another book analyzing the symbiotic, indeed familial, relationship among public employee unions, private interests, and political actors -- there, teachers' unions. MICHAEL HARTNEY, HOW POLICIES MAKE INTEREST GROUPS: GOVERNMENTS, UNIONS, AND AMERICAN EDUCATION (2022). Howard cites to Hartney's research. Howard, *supra* note 1, at 103.

[3] HOWARD, *supra* note 1, at 29.

officers, sanitations workers, or any other group of local government workers – suffers from the identical flaw: by definition, Howard insists, it is unaccountable to the public and for that reason alone constitutes a conspiracy against the public interest. This "extortive power"[4] enables public employee unions to extract (coerce, really) "abusive fiscal entitlements in public union contracts – including overstaffing, massive overtime for minor schedule changes, and pensions 'spiked' by rigged overtime in the last year of work."[5] If their demands are not met, they have the power to demand resolution by a union-approved arbitrator – a unique instrument of power. In these and other union-contrived ways, Howard laments, "modern government is organized to fail."[6]

Howard's account of when and how public employee unions first gained recognition is a bit confusing. He asserts that "until the rights revolution of the 1960s, the idea of negotiating against the public interest was unthinkable" (a dubious claim that begs the question of what constitutes "the public interest"),[7] but then immediately notes that New York's Mayor Robert Wagner "authoriz[ed] collective bargaining by executive order in 1958," with Wisconsin doing so a year later and President Kennedy issuing a permissive executive order "as payback for union support" in 1962.[8] This was several years before the civil rights movement gained national attention, and Howard does not say whether Kennedy justified it as a civil rights measure.

He denounces "[t]he general indifference to inefficiency in public bargaining [which] impacts not only the cost of government but also the delivery of public services."[9] Because the municipal unions contribute substantial money and manpower to politicians' campaigns, union interests are represented on both sides of the bargaining table. Government officials' willingness to resist union demands is compromised by the officials' divided loyalties and interests. "Public sector bargaining," Howard asserts, "thus partially preempts the responsibility of officials to make tradeoffs among competing public goods."[10] But in fact this bargaining process should make such tradeoffs even more difficult by increasing the severity of officials' constraints. In this respect, the difference between public and private goods is irrelevant.

As it happens, I am writing this review as New York City is providing a classic illustration of Howard's indictment. The city in the final stages (perhaps) of negotiations with its largest municipal employees union, District Council 37, which represents approximately a quarter of the city's public workforce.[11] Mayor Eric Adams has just capitulated to the union on a number of fronts, including his previously firm opposition to allowing remote working, and has also agreed to a wage package including increases far above what the city has budgeted for. The president of the Citizens Budget Commission, while oddly commending the package's balance, complains that "the city has identified no way to pay the billions in extra costs."[12]

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[4] *Id.* at 19.

[5] *Id.*

[6] *Id.* at 23. The book's Forward by former Indiana governor Mitch Daniels strongly confirms this assessment.

[7] *Id.* at 26.

[8] *Id.* at 27.

[9] *Id.* at 33.

[10] *Id.* at 34.

[11] Emma G. Fitzsimmons, *New York City's Deal with Largest Union Would Include Remote-Work Plan*, N.Y. TIMES (Feb. 17, 2023), https://www.nytimes.com/2023/02/17/nyregion/adams-remote-work-dc37.html.

[12] *Id.*

More generally, Howard notes that "[p]ayoffs that would be unlawful in business bargaining have become a common feature of public bargaining," citing the "massive campaign donations to the politicians with whom they will then be negotiating. . . .in effect [sitting] on both sides of the bargaining table."[13] The expansive effect of municipal unions' demands and political agendas are an important cause of city governments' inflated budgets and ambitions. After all, they have the legal authority and political power to bargain over what governments do and how they do it. They can "call upon billions of campaign funds, existing political alliances, hordes of campaign workers, and threats of shutting down government."[14] And they oppose any reforms that would increase accountability to public needs as defined by voters and elected and appointed officials. "They make government work badly," Howard concludes, "while also preventing reform."[15] In this, they violate their "duty of loyalty" to the public,[16] a duty arising (as Howard contends, channeling FDR) out of ordinary citizens' absence from the bargaining table.[17]

Much of Howard's critique turns on his characterization of this duty of unionized public employees as "fiduciary" in nature, like that of a trustee who is legally obliged to act selflessly in all respects related to the beneficiary's interests. This analogy, however, seems inapt; a city sanitation worker's duty, after all, is simply to do his job as defined by municipal regulations. This definition may incorporate the union contract in some respects, but it is up to city officials to demand the appropriate balance between the workers' self-interest and the citizens' welfare. Neither the municipal worker nor his or her union is a fiduciary -- all the more reason for the city to be especially cautious in delegating power to them.

Howard's indictment of public employee unions for pursuing their self-interest at citizens' expense is long and damning. The most daunting aspect of their power, of course, is their alliance with politicians, including the very ones who employ and direct them. This alliance is hardly surprising for entities that, as Howard shows in a case study of the New Jersey teachers union, resemble political parties more than mere interest groups.[18] Their death grip on city government assures that their demands will be defined largely by the government's power to accede to them by increasing taxes, floating costly bond issues, and squeezing out other, competing public interests and programs. How can this remorseless political juggernaut – exhibiting the "sense of entitlement that no other interest group can aspire to"[19] – be stopped? What extra-political force could possibly control it?

Howard's answer? Judges. He is the most recent in a long line of political reformers who, desperate for institutional allies unavailable in conventional politics, turn to the courts. Whether the evil be racist power structures, segregated schools, brutalized prisons, neglectful mental hospitals, the death penalty, corrupt housing agencies, or other recalcitrant lawlessness, reformers have long sought institutional remedies from judges whose injunctive powers promise relief that self-seeking politicians will not grant. Judges (the theory goes) depend less than

[13] HOWARD, *supra* note 1, at 35 ("in effect" quotation quoting labor lawyer Theodore Clark).
[14] *Id.* at 40.
[15] *Id.* at 159.
[16] *Id.* at 130.
[17] *Id.* at 124.
[18] *Id.* at 107–13.
[19] *Id.* at 113.

politicians do on the support of municipal union leaders, their rank-and-file members, and the elected officials who so often dance to the unions' tunes. Not in the unions' thrall, courts can be the leading force in Howard's war against them.[20] Armed with the U.S. Constitution, judges can curb the unions' overwhelming domination of municipal governments. (Howard does not mention state constitutions, but they tend to contain similar if not identical provisions of this kind). His invocation of the Constitution as the only weapon that can effectively crush municipal unions is an innovative, ostensibly clean solution to the vast problems that he has revealed.[21]

But is his account of constitutional law convincing as applied to the unions? There are good reasons to doubt this; even Howard concedes that these are "constitutional issues of first impression."[22] His first argument is based on what he calls the inviolability of the government's sovereign power -- the claim that the municipal contracts cede power to the unions that only the government is empowered to exercise. Along similar lines, he contends that government employees owe an exclusive duty of loyalty to the public, as represented by the government – a duty, however, that self-interested union contracts violate. Relatedly, Howard also maintains that the Supreme Court's decision upholding the Hatch Act, which bars political activity by public employees, thus invalidates their unions' support for particular candidates – a *non sequitur*.[23] Along much the same lines, he contends that the Constitution's guarantee of a "republican form of government" prohibits such unions, and that their influence over public policies violates the Constitution's vesting of executive powers exclusively in the President.

These constitutional arguments, however, are not convincing; indeed, they prove too much. Our political systems and election outcomes are shaped by many disparate influences that, taken together, limit public officials' freedom of action. Some of these influences are as lamentable as the municipal unions that Howard abhors. Examples include the often-decisive roles of gerrymandering; legislative incumbency; seniority in committee assignments; personal attractiveness; campaign contributions; large corporations; endorsements by religious leaders and media figures; family and other name recognition; and political party support. Factors such as these do not become unconstitutional merely because they are arguably arbitrary, disproportionate, and outcome-determinative. Ever-expanding government contracting delegates vast realms of public authority and discretion to private interests. Would the Framers have intended – as Howard, quoting Madison on the Guarantee Clause seems to suppose – that courts be empowered to invalidate these practices simply because they delegate public power to private actors to execute some government programs? I think not. Some of those delegations may be broader than Howard and others think wise. Imprudence, however, is not the same as unconstitutionality.

Howard does not engage such issues. Indeed, he has no good theory of what distinguishes unions from the many other self-regarding entities and practices that compete for the public's allegiance, tax dollars, and political power without violating the Constitution. This deficiency in

[20] *Id.* at Section III.

[21] Howard does not mention any legitimate role for the unions, although I presume that he would allow them to render gratuitous advice to government officials so long as they possess no powers of decision.

[22] *Id.* at 22.

[23] *Id.* at 130–34.

no way diminishes his main contribution: a thoroughgoing and largely convincing indictment of these unions' political power and abuses. But it does cast considerable doubt on his neat judicial remedy for categorically abolishing them. Alas, we are evidently stuck with them and their sometimes extortionate demands until public officials work up the political courage to subordinate them to the greater public interest.