

ALTERNATIVE WAYS TO DEFINE PUBLIC ACCOUNTABILITY

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In *Not Accountable—Rethinking the Constitutionality of Public Employee Unions*, Phillip Howard fires another broadside at the failures of government and its employees. Under his Common Good reform coalition,¹ Howard has rallied the public behind injustices caused by bureaucratic systems that stifle creativity and create impenetrable barriers to sensible decision-making, leading to “the rule of nobody.” Using “common sense” analysis to expose government failures, he often scores direct hits against a variety of government entities.² But his latest effort goes a step further—Howard has found the culprit in public sector unions. His jaundiced view of public employment reaches new depths in this book. He calls government “a moldy culture that consigns government employees to dreary workplaces without pride or camaraderie”.³ For those of us who serve or have served in government, these words describe a world we do not recognize. There are failures to expose, of course, and maybe somewhere there is a Kafka-like agency that fits his description, but this is not who bureaucrats are or what they do. “Government” encompasses many missions, levels, and outcomes, and public employees play different roles within them. Finding the root cause of failure is not as simple as Howard would like to portray.

Not Accountable conflates three levels of government: local, state and federal, and ascribes the same conditions to each of them. That is a category failure that leads Howard to his dystopian conclusions. It also leads him to propose a solution—unconstitutionality of federal public unions—that is mismatched to the problem. At the same time, *Not Accountable* also narrows the inquiry to public union corruption and ignores equally corrupting forces from the private sector. For example, nowhere is *Citizens United*⁴ discussed, yet unlimited campaign contributions have compromised legislative government at the federal level and produced gerrymandered outcomes at the state level. One need only to consider the situation in Wisconsin, a state that Howard praises for diminishing the power of public sector unions under former governor Scott Walker. Wisconsin is the most gerrymandered state in the Union.⁵ Walker’s victory over public unions consisted of diminishing their dues collection powers, but at what cost was this “victory”

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¹ PHILLIP K. HOWARD, *NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS* (2023).

² See PHILLIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (2011) (documenting failures by EPA and OSHA to protect the public).

³ HOWARD, *supra* note 1, at 165.

⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁵ See DAN KAUFMAN, *THE FALL OF WISCONSIN: THE CONSERVATIVE CONQUEST OF A PROGRESSIVE BASTION AND THE FUTURE OF AMERICAN POLITICS* 114–21 (2018). Democrats must win the popular vote by 11% to gain a majority in the legislature, the highest “democracy deficit” in the country.

achieved? The recent state supreme court election suggests an as yet unfinished story.⁶ *Not Accountable* makes some good points on the nature of the problem but is seriously deficient on the solutions to the problem. Still, it is worth reading for both its strengths and weaknesses.

WHERE PUBLIC UNIONS ARE THE MOST PROBLEMATIC

Howard sets out significant deficiencies of teachers and police unions at the local level, and makes a case that they have often turned the public interest into their own private interest. They stand against reforms like public charter schools with proven success records (e.g., Kipp Academies) and refuse to accept independent oversight (e.g., civilian review boards). They use political power ruthlessly and are in some ways the epitome of *Not Accountable*. As Howard shows, they are often complacent if not corrupt. Let me provide an example he did not use. In *Vergara v. California*,⁷ conservative reform groups argued that under the California Constitution minority students were denied a right to education and equal protection due to teachers' unions tenure and seniority rules. Plaintiffs won in the trial court, but lost the constitutional arguments in the appellate court.⁸ The California Supreme Court denied review and the case ended.⁹ Interestingly, two of the liberal justices (Liu and Cuellar) dissented on the denial of review because they wanted to hear more about the policy impact of the teacher rules at issue. These included a two-year tenure requirement, which in effect meant that new teachers are evaluated for permanent employment after one year of teaching, making California an outlier among states with tenure requirements. In addition, the seniority system mandated a seniority process that retained even deficient senior teachers over more competent newer ones. The consequences for minority children in many schools were negative. Even though the constitutional claims were unpersuasive, the merits issues remained serious. In the aftermath of the case, the union fought legislative change (even the indefensible two-year tenure requirement) and stonewalled all reforms.¹⁰ Such "victories" are driven more by political power than care for students and reflect a troubling disregard for the public interest.

PUBLIC ACCOUNTABILITY AT THE FEDERAL LEVEL

When Howard shifts to federal public unions, however, the same attacks do not work. Federal unions cannot be made into bogeymen like local teachers' and police unions. They are neither as powerful nor as entitled. This is so for several reasons. They cannot bargain over wages and if they strike, they can be dismissed (as were the air traffic controllers under President Reagan).¹¹

⁶ See Dan Kaufman, A High-Stakes Election in the Midwest's "Democracy Desert", *NEW YORKER* (Mar. 28, 2023), <https://www.newyorker.com/news/the-political-scene/a-high-stakes-election-in-the-midwests-democracy-desert> [<https://perma.cc/SDP3-CRPM>].

⁷ 209 Cal.Rptr.3d 532 (Cal. Ct. App. 2016).

⁸ *Id.* at 538.

⁹ *Vergara v. California*, No. S234741 (Cal. Aug. 22, 2016) (order denying petition for review).

¹⁰ CALIFORNIA FEDERATION OF TEACHERS, *California Supreme Court Affirms Appeal Court Decision: "Vergara v. California" is Over* (Aug. 22, 2016), <https://www.cft.org/article/california-supreme-court-affirms-appeal-court-decision-vergara-v-california-over> [<https://perma.cc/XT2G-JCL7>].

¹¹ *Unhappy Again: The Air Controllers Reorganize*, *TIME* (Oct. 6, 1986), <https://content.time.com/time/subscriber/article/0,33009,962487,00.html> [<https://perma.cc/DA6H-NFZP>].

Moreover, they are subject to the ethical limitations of the Hatch Act,¹² which prohibits federal employees from soliciting or receiving political contributions or running for public office.¹³ So they have less power than the teachers or police unions and, as a result, lower membership and less ability to fund political campaigns. Moreover, unlike teachers unions, federal employee unions have hardly any influence over members of Congress (except for a few, like Congressman Steny Hoyer, who have federal employees in their districts). Howard says teachers' unions control state legislatures through political contributions and voter turnout. Certainly, the aftermath of the *Vergara* case suggests that is true for California.

But do federal unions nonetheless produce a "moldy culture" for the federal government as Howard forcefully argues? Here I must as forcefully disagree on the basis of both my own government experience and that of many career leaders of the civil service. In informal interviews with career HR officials (active and retired), I found no such feelings. In fact, just the opposite. One senior official told me: "I see unions as a complement to good governance." Federal unions provide a way for government employees to connect with the vast bureaucracy of which they are a part. In some respects, they encourage professionalism among their members. Top civil servants at the policy level (such as the Senior Executive Service) are not union members, of course, but there is little resentment of them that exists among state and local government managers. If federal unions are not a threat to good governance and may even be an asset, what makes them unconstitutional?

Howard says that "The American Republic no longer works because union controls disempower elected officials from managing government."¹⁴ This simply is not true at the federal level where Howard locates his constitutional remedies. These include the Guarantee Clause, the non-delegation doctrine and Article II and presidential power more generally. Howard is not a constitutional lawyer, and his references are more conclusory than analytic, so just a few rebuttal points: the Guarantee Clause has so far been declared nonjusticiable,¹⁵ the non-delegation doctrine was last successfully employed in 1935, when the Supreme Court in *Schechter Poultry*¹⁶ brought down the National Industrial Recovery Act. And even those who express the unitary Executive theory under Article II would be hard pressed to employ it in this context.¹⁷ Moreover, in *Seila Law*,¹⁸ which denied for-cause protection to the single head of the Consumer Financial Protection Bureau, the Court recognized two exceptions to its ruling: "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties

¹² 5 U.S.C. §§ 7321–7326.

¹³ See, e.g., U.S. OFFICE OF SPECIAL COUNSEL, INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION (2021), <https://osc.gov/Documents/Hatch%20Act/Reports/Investigation%20of%20Political%20Activities%20by%20Senior%20Trump%20Administration%20Officials%20During%20the%202020%20Presidential%20Election.pdf> [https://perma.cc/D2PU-WZGL]. Hatch Act violations are not always enforced, however, as the number of cases brought against the Trump White House suggests.

¹⁴ Howard, *supra* note 1, at 42.

¹⁵ *Luther v. Borden*, 48 U.S. 1 (1849).

¹⁶ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁷ For-cause removal restrictions have drawn the most attention. See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

¹⁸ *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

and no policymaking or administrative authority.”¹⁹ By citing the *Perkins* case, the Court essentially upheld the constitutionality of the Civil Service, but there will be continuing arguments about its limits to policymaking officials.²⁰

IMPACT ON STATE PUBLIC UNIONS

Even if the Supreme Court should invoke one of the theories Howard suggests, like the non-delegation doctrine, the resulting case would most likely not apply to state and localities. Yet that is where all the damage lies. The challenge is how to match the problem to the remedy. Here is one thought for Howard to consider: encourage application of the non-delegation doctrine under state constitutions, where it is “alive and well.”²¹ As Randy May shows,²² even in strong public union states, like Michigan, supreme courts have used the doctrine to strike down broad delegations to the executive branch. If a statute delegating legislative power over public unions to the Governor or even private parties (like union officials) is found, it could be attacked in this manner. While I am not recommending this course of action, it would be more consistent with Howard’s overall concerns.

Howard’s cause at the state level is also aided by a case he does not emphasize, *Janus*.²³ In *Janus*, the Court used a First Amendment (compelled speech) argument to strike down required dues payments to public unions. The plaintiff argued that he was forced to support a public union in Illinois whose goals he opposed. The decision affected over 5 million public sector jobs in the 22 states without right to work laws.²⁴ Justice Alito, in his majority opinion, even noted that Illinois had a \$160 billion unfunded pension liability²⁵, thereby picking up one of Howard’s themes. *Janus* was a bitterly fought case that has devastating long term consequences for the political power of public unions. Thus, even though Michigan recently repealed its right-to-work law,²⁶ its public unions cannot benefit from the dues checkoff requirements now permitted to its private unions. Moreover, Florida, already a right-to-work state, passed legislation that would bar teachers unions from collecting dues through paycheck deductions.²⁷ The effect of the legislation is to create a “[n]ew [l]ayer of [c]onvincing” for unions to surmount.²⁸

¹⁹ *Id.* at 2199. The Court located these two exceptions in *Humphrey’s Executor*, 295 U.S. 602 (1935), *Morrison v. Olson*, 487 U.S. 654 (1988), and *United States v. Perkins*, 116 US 483 (1886) at 485. The latter case upheld tenure protections for a naval-cadet engineer and thereby the Pendleton Act itself.

²⁰ See *infra* note 44 (Schedule F).

²¹ See Randolph J. May, *The Nondelegation Doctrine is Alive and Well in the States*, REGUL. REV. (Oct. 15, 2020), <https://www.theregreview.org/2020/10/15/may-nondelegation-doctrine-alive-well-states/> [https://perma.cc/F2DT-D6Q6].

²² *Id.*

²³ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448 (2018).

²⁴ Alana Semuels, *Is This The End of Public-Sector Unions in America?*, ATL. (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/> [https://perma.cc/4V5V-6MRY].

²⁵ *Janus*, 138 S. Ct. at 2474–75.

²⁶ S.B. 0034, 102nd Leg., Reg. Sess. (Mich. 2023).

²⁷ See 2023 Fla. Laws 2023-35. Cynically, the Bill does not apply to police and fire unions since they are Republican leaning, thus denying them the “paycheck protection” accorded teachers.

²⁸ Tom Smith, *What Happens If We Lose Dues Check-Off? Check-Off by Other Means*, LAB. NOTES, (Mar. 29, 2011), <https://labornotes.org/2011/03/what-happens-if-we-lose-dues-check-check-other-means> [https://perma.cc/P5LL-Q94H].

In light of these developments, it is hard to see how public sector unions are the ongoing threat to government accountability Howard claims. The worst examples Howard offers are in a few states—New York and California prominently—where public unions have something like monopoly control and can maximize their advantages. But this is not the rule nationally, by any means. In 2022, the Bureau of Labor Statistics tells us that 10.1% of workers were unionized, which breaks down to 33.1% in the public sector and 6.0% in the private sector.²⁹ Even with this low level of overall control, Howard is making them a scapegoat for the many problems government bureaucracy reflects.

WHO OR WHAT REALLY CAUSES GOVERNMENT UNACCOUNTABILITY?

Let me give the answer before the analysis: we all do. Interest groups, politicians, government employees (including those who are unionized), academics, pundits and surely institutions themselves. Consider just the forces on the left who rejected Senator Manchin’s permitting bill that would have limited the years devoted to NEPA reviews³⁰ and those on the right who are fighting to prevent IRS from implementing new technology essential to collecting taxes.³¹ Then we have the bureaucracy itself. Bureaucracies have been around since Bismark and they are not going away. As Richard Posner once observed, “bureaucracy is a function of complexity”³² and, as we know, complexity has a bright future. But he also concludes with the “depressing reflection” that bureaucracy “must be an efficient means of administration or it wouldn’t be so pervasive in both the public and private sectors.” So it is not going away, yet it can be improved.³³ Many of Howard’s earlier suggestions for limiting paperwork burdens and encouraging managerial leadership in government are proven methods for improving government that the National Academy for Public Administration has advocated, including the use of Agile regulations.³⁴

In addition, Mitch Daniels’ Foreword to *Not Accountable* shows how a smart leader can make a difference. While Governor Daniels is no friend of public sector unions (he ended public sector unions in Indiana by executive order when he came into office³⁵ and signed legislation turning Indiana into a right to work state when he left)³⁶ he is also an experienced manager who might have achieved comparable results without curtailing public unions. As Director of the Office of Management and Budget under President George W. Bush, Daniels learned how to evaluate

²⁹See U.S. Dep’t of Labor, Bureau of Lab. Stat., USDL-23-0071, News Release: Union Members—2022 (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/C65L-GFSZ>].

³⁰ Building American Energy Security Act of 2023, S. 1399, 118th Cong. (2023).

³¹See Alan Rappaport, *I.R.S. Unveils \$80 Billion Plan to Overhaul Tax Collection*, N.Y. TIMES (Apr. 6, 2022), <https://www.nytimes.com/2023/04/06/business/economy/irs-tax-treasury.html> [<https://perma.cc/294T-8L3Y>].

³² See Richard Posner, *Bureaucracy and Efficiency—Posner*, THE BECKER-POSNER BLOG, (Jan. 12, 2014, 7:35 PM), <https://www.becker-posner-blog.com/2014/01/bureaucracy-and-efficiencyposner.html> [<https://perma.cc/SAB4-6T4R>].

³³ See DONALD KETTL ET AL., NAT’L ACAD. OF PUB. ADMIN., NO TIME TO WAIT: BUILDING A PUBLIC SERVICE FOR THE 21ST CENTURY (2017) (documenting various methods for approving federal government hiring and performance).

³⁴ See NAT’L ACAD. OF PUB. ADMIN., AGILE REGULATION: GATEWAY TO THE FUTURE, (2022).

³⁵ HOWARD, *supra* note 1, at 4–5.

³⁶ Monica Dowey, *Indiana Governor Signs a Law Creating a ‘Right to Work’ State*, N.Y. TIMES (Feb. 1, 2012), <https://www.nytimes.com/2012/02/02/us/indiana-becomes-right-to-work-state.html> [<https://perma.cc/V8AM-PDNC>].

government and improve its performance,³⁷ lessons he later transferred to Indiana. Daniels, who subsequently served as President of Purdue, is good at improving government performance at all levels. For that reason it is particularly sad that he had to drop out of the Indiana Senate race because he isn't radically extreme enough for the Republican party in Indiana.³⁸ To turn away a realist and problem solver who served his state (and country) so well is yet another form of government unaccountability. Arrogance of power is not only a public union phenomenon. State legislators have it as well.

The fact that 25 states now have veto proof majorities³⁹ is not a good sign for government accountability. Effective government performance is usually the product of bipartisanship and compromise, since one sided decisions often overreach.

The more divided state governments become, the more divisive they are and the more quality ideas are drowned out.⁴⁰ When politicians only speak to their doppelgangers they hear their own ideas repeated back to them. This leads to a closed-minded approach that stifles innovation and reform. What better expression of this phenomena than the expulsion of two minority legislators in Tennessee who the Republican supermajority was tired of hearing from.⁴¹ And it happens on both sides of the aisle. California should rework teacher tenure laws and Tennessee and Florida should leave books on library shelves. On the subject of tenure, Florida is preparing legislation to drastically curtail tenure at the university level. A new law allows university trustees to review tenure every five years and a pending Bill allows trustees to call for tenure review "at any time."⁴² Since Governor DeSantis has replaced all university board members with those committed to his rule (New College is only one example), the purpose of these laws is clear: Remove any "woke" professors. Tenure reflects core First Amendment values at stake in Florida. And it also presages related attacks at the federal level.

³⁷ It is an interesting question whether Daniels, when at OMB, thought federal public unions had obstructed his management powers as he claimed they did later at the state level. My guess is that federal unions were very much less of an impediment to the Bush Administration's domestic agenda. See JOHN D. GRAHAM, *BUSH ON THE HOME FRONT: DOMESTIC POLICY TRIUMPHS AND SETBACKS* (2010).

³⁸ See Adam Wren, *Mitch Daniels Rips His Critics After Backing Away From Senate Bid*, POLITICO (Feb. 16, 2023, 6:56 PM), <https://www.politico.com/news/2023/02/16/mitch-daniels-rips-critics-after-senate-bid-00083365> [<https://perma.cc/33ED-RP6P>].

³⁹ In 2020, 24 states had veto proof majorities (16 Republican and 8 Democrat). Another was added in 2021. See *Election Results, 2022: State legislative veto-proof majorities*, BALLOTEDIA, https://ballotpedia.org/Election_results,_2022:_State_legislative_veto-proof_majorities [<https://perma.cc/YYP2-CTM9>] (last visited May 22, 2023).

⁴⁰ See, e.g., Timothy Williams, *With Most States Under One Party Control, America Grows More Divided*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html> [<https://perma.cc/F5X6-CURB>].

⁴¹ See Sue Halpern, *Behind the Expulsions of Two State Representatives in Tennessee*, NEW YORKER (Apr. 10, 2023), <https://www.newyorker.com/news/daily-comment/behind-the-expulsions-of-two-state-representatives-in-tennessee> [<https://perma.cc/LJ4A-LND4>]; Emily Cochrane, *Expelled Democratic Lawmaker is Sworn Back in to Tennessee House*, SEATTLE TIMES (Apr. 11, 2023), <https://www.seattletimes.com/nation-world/expelled-democratic-lawmaker-is-sworn-back-in-to-tennessee-house/> [<https://perma.cc/9RG6-HYAR>].

⁴² See Ian Hodgson, *Florida Again Targets Faculty Tenure at Universities. Here's Why That Matters.*, TAMPA BAY TIMES (Mar. 23, 2023), <https://www.tampabay.com/news/education/2023/03/23/ron-desantis-tenure-track-academic-freedom-uf-usf-fsu-professor/> [<https://perma.cc/VS7S-WVRQ>].

It is possible to view Phillip Howard's ultimate objective as not just to end public unions but to end the Civil Service system and its tenure-like restrictions on dismissal.⁴³ Federal union unconstitutionality is only one step in that direction. The Civil Service is the big prize. The chipping away at the civil service began with President Trump's Executive order creating Schedule F that freed "policy making" employees from Civil Service removal restrictions.⁴⁴ President Biden revoked that Executive order, but it waits in the wings for the next Republican administration.⁴⁵ Governor DeSantis has already picked it up at the state level.⁴⁶ Many arguments can be made in support of the Civil Service going back to the Pendleton Act and its attack on the Spoils system, but they need not be addressed now. However, one point should be made: it can be good for government when employees talk back. The Department of State has formalized that possibility by creating a Dissent Channel⁴⁷ where foreign service officers can give candid remarks about policy decisions without fear of retaliation. State recognizes that leaders need objective advice to govern well, especially in foreign relations. This is the positive side of the deep state that Francis Fukuyama has emphasized.⁴⁸ Were these mechanisms for good policymaking to be eliminated, government would suffer irreparable damage. Accountability is sometimes measured by dissent as well as assent. This is another reason why Schedule F and its goal of at will employment for policy officials is such a bad idea.

CONCLUSION

Not Accountable is a provocative and in some ways prescient work, but it would benefit greatly from a more nuanced approach to the meaning of accountability. Howard uses accountability effectively when referring to police and teachers' unions where practices like the Blue wall of silence or inflexible tenure rules limit the ability of government officials to hold these employees responsible for their actions. But when it comes to other state employee unions and certainly federal employee unions, the same accountability charge doesn't stick. These employees take seriously their oath of office when they swear to support and defend the Constitution of the United States of America.⁴⁹ Once sworn in they have different responsibilities. If they are also members of a federal union that oath and those responsibilities do not go away. There are many other and better ways to hold them accountable than to use the Constitution against them.

⁴³ See Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 AD. L. REV. 461, 471–74 (2020) (discussing Howard's prior positions on ending the civil service).

⁴⁴ Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67631 (2020).

⁴⁵ Jonathan Swan, *Trump's Revenge*, AXIOS (July 23, 2022), <https://www.axios.com/2022/07/23/donald-trump-news-schedule-f-executive-order> [https://perma.cc/S53V-WBVZ].

⁴⁶ Isaac Arnsdorf & Jeff Stein, *Trump Touts Authoritarian Vision for Second Term: "I Am Your Justice,"* WASH. POST (Apr. 21, 2023), <https://www.washingtonpost.com/elections/2023/04/21/trump-agenda-policies-2024/> [https://perma.cc/355T-XF8M].

⁴⁷ Verkuil, *supra* note 43, at 472.

⁴⁸ See Francis Fukuyama, *Valuing the Deep State, Part I*, AM. PURPOSE (Sept. 6, 2022, 2:00 PM), <https://www.americanpurpose.com/blog/fukuyama/valuing-the-deep-state-part-i/> [https://perma.cc/3FEL-TJ7Y] (discussing the proper balance between bureaucratic autonomy and democratic accountability).

⁴⁹ See PAUL R. VERKUIL, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* 94–97 (2017) (describing effect of oath on public officials).