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Public-Sector Unions and the Founders' Political Science

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Abstract

Four themes in the Founders' thought are in tension with the introduction of unions and collective bargaining into American government. One is the importance of the consent of the governed, which is undermined when government outsources some portion of control over its workforce to unelected union leaders over whom the public has little control and whose priorities at times are at odds with the public good. Another is the need to control factions in an extended republic, which is made considerably more difficult when one of those factions emerges from the government itself. A third is the principle of limited government, which can be overrun when public employee unions push for ever-larger government at the local, state, and federal levels. And last, there is the importance of effective administration, which can be undercut by burdensome work rules unions negotiate in collective bargaining.

Introduction

Before 2008, few people paid attention to public employee unions. Since the Great Recession of 2008–2011, however, public-sector unions have been in the national spotlight. In 2009, for the first time, government employees became a majority of all union members—despite constituting less than 20 percent of the labor force.¹ In cities and states experiencing fiscal stress, government workers were forced to accept salary and benefit cuts.² Over union opposition, six states passed “right-to-work” laws in the past decade.³ President Barack Obama’s “Race

to the Top” education initiative put teacher unions on the back foot across the country.⁴ In four high-profile cases, the U.S. Supreme Court considered the constitutionality of various aspects of unions in government.⁵

Defenders of unionized government argue that unionization is good for public employees and encourages a professional workforce that better serves the American people.⁶ Public servants who belong to unions enjoy higher salaries, better health and pension benefits, and more robust job protections. Unions, we are told, thereby ensure that talented people are attracted to and remain in government service.⁷ Finally, public workers are organized labor’s last stronghold, and organized labor needs them to provide the seeds for renewal.⁸

Critics argue that unionization drives up the cost of government, reduces government performance, and creates inequities within the government workforce. These consequences result from the political

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power of public-sector unions. Unlike unions in the private sector, government unions can influence their employers more directly by making large expenditures on political campaigns and lobbying, as well as through collective bargaining. Therefore, critics claim they distort democratic governance.⁹

The rise and growth of unionized government shows how the Founders did not anticipate that government's own employees would become a powerful "faction" in their own right.

However, the contemporary debate has overlooked the ways in which the growth of public-sector unions since the 1960s runs counter to the American Founders' political science. To contrast the Founders' constitutional theory with public-sector unionism reveals how uncomfortably the latter sits with the former. The rise and growth of unionized government shows how the Founders did not anticipate that government's own employees would become a powerful "faction" in their own right. Such a faction

challenges the Founders' view of republican government.¹⁰ Unionization also often works at cross-purposes with the Progressives' original argument for bureaucratic expertise, which sought to overcome the limitations on government inscribed in the separation of powers. The reason for this is public employees' occupational self-interest, which can infringe on expert administration. Consequently, the public today reaps neither the benefits of limited self-government nor those of bureaucratic effectiveness.

From Party Machines to Public Unions

American government today is far different from the one designed by James Madison, Alexander Hamilton, and the other authors of the Constitution. One difference is that government employees have themselves become a faction. In *Federalist* No. 10, Madison defined a faction as "a number of citizens...who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹¹ Today, government employees have their own interests—which do not necessarily chime with the public interest. Unions that represent those workers advance those interests, which are in their jobs—especially higher pay, better benefits, and

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1. U.S. Department of Labor, Bureau of Labor Statistics, "Union Members: 2009," January 22, 2010, https://www.bls.gov/news.release/archives/union2_01222010.pdf (accessed March 26, 2018).
 2. See, for example, Detroit, Michigan; Central Falls, Rhode Island; Vallejo, California; Stockton, California; and San Bernardino, California.
 3. Kate Andrias, "The New Labor Law," *Yale Law Journal*, Vol. 126, No. 1 (October 2016), pp. 5-99, <https://www.yalelawjournal.org/article/the-new-labor-law> (accessed March 26, 2018).
 4. Patrick McGuinn, "Presidential Policymaking: Race to the Top, Executive Power, and the Obama Education Agenda," *The Forum*, Vol. 4, No. 1 (2014), pp. 61-79, https://www.academia.edu/12384571/Presidential_Policymaking_Race_to_the_Top_Executive_Power_and_the_Obama_Education_Agenda (accessed March 26, 2018).
 5. *Knox v. Service Employees International Union*, 567 U.S. 310 (2012); *Harris v. Quinn*, 573 U.S. ____ (2014); *Friedrichs v. California Teachers Association*, 578 U.S. ____ (2016); and *Janus v. American Federation of State, County, and Municipal Employees*, No. 16-3638 (7th Cir. 2017).
 6. Joseph Slater, "Attacks on Public-Sector Bargaining as Attacks on Employee Voice: A (Partial) Defense of the Wagner Act Model," *Osgoode Hall Law Journal*, Vol. 50, No. 875 (2013), <http://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss4/5/> (accessed March 26, 2018), and Joseph Slater, "Public Sector Labor in the Age of Obama," *Indiana Law Journal*, Vol. 87, No. 189 (2012), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://duckduckgo.com/&httpsredir=1&article=2990&context=ilj> (accessed March 26, 2018).
 7. Some also argue that the stability induced by unionization also acts as a countercyclical policy during economic downturns, since union protections stave off job cuts and public workers continue to spend their salaries in the private economy.
 8. Craig Becker, "What Should Unions Do Now?" *Dissent*, Vol. 62, No. 4 (Fall 2015), pp. 65-68, <https://www.dissentmagazine.org/article/future-labor-what-should-unions-do-now> (accessed March 26, 2018).
 9. Daniel DiSalvo, *Government Against Itself: Public Union Power and Its Consequences* (New York: Oxford University Press, 2015), and Terry Moe, *Special Interest: Teachers Unions and America's Public Schools* (Washington, DC: Brookings Institution Press, 2011).
 10. To address these questions, the focus here will be on unions in the federal government—while acknowledging how their power is magnified by their connections to state and local public unions.
 11. James Madison, *The Federalist* No. 10, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York: Mentor, 1961).
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greater job security. While those things are good for workers, taken too far they can compromise the public's interest in effective public services and can drive up the size and cost of government.

A faction arising from government employment to demand that the government *grow* was not a topic to which the Founders devoted much attention. In their day, the federal bureaucracy was small, and they did not expect it to expand rapidly. Furthermore, they conceived of national administration as highly constrained by law, Congress, and the President. They expected the states and their localities to carry out most administrative tasks. This was what Alexis de Tocqueville, the great French observer of American life in the 1820s, called “administrative decentralization” in America.¹²

The Constitution provides only the broad outlines for national administration. Article II, Section 2 gives the President the power to appoint officers and department heads. The President also has the responsibility to see that the laws are “faithfully executed.” According to Article I, Section 8, Congress has the power to establish a post office, build roads, regulate commerce, coin money, and regulate the value of money. The powers and responsibilities of the President and Congress anticipate a federal bureaucracy. Yet the design of the bureaucracy is not described. Its form was established in practice.

Public administration in the early republic was fairly simple. The first Congress erected a hierarchical structure under the President and gave him the power to remove subordinates (a power only implied in the Constitution). During George Washington's presidency, the departments of State, War, and Treasury were created. Along with the postal service, these departments constituted most of the federal bureaucracy. Staffing was by political appointment. In the Founders' view, this would ensure tight connections and loyalty to the national government, especially to the President. The Founders opposed

the delegation of legislative or judicial powers to administrators, and Congress held administrative discretion to a minimum by defining administrators' tasks in detailed statutes. The judiciary was also able to review contested administrative actions.¹³

The Founders believed that the limited government created by the Constitution would not require large federal bureaucracies.

The Founders believed that the limited government created by the Constitution would not require large federal bureaucracies. Those who served in government came from the upper echelons of society. With few employees doing tasks narrowly defined in law, the Founders did not expect rapid turnover of office holders. Most appointees would serve their time—as a service to the nation—and then retire to private life. Most would be loyal to the President who appointed them because they would be aware that they served at his pleasure.

However, as the national state grew, its employees became parts of the political game. Government's own employees became factions by two modes. The first was the party machine. With the rise of political parties in the 1820s, government employees became cogs in the party machines. The new parties used bureaucratic appointments as a reward for service to the party. The political parties of the 19th century sought to win elections, in part, to capture government resources—especially government jobs. Winning elections meant extracting economic rents from government, which made patronage jobs the fruits to be harvested. As New York State Senator William Marcy famously put it in 1828, “To the victor belong the spoils of the enemy.”¹⁴ The spoils system, as it

12. Alexis de Tocqueville, *Democracy in America*, Delba Winthrop and Harvey C. Mansfield, trans. (Chicago: University of Chicago Press, 2000), pp. 82-93.

13. For detailed analyses of current law regarding judicial review of administrative decisions, see Paul Larkin, Jr., “The World After *Chevron*,” Heritage Foundation *Legal Memorandum* No. 186, September 8, 2016, <https://www.heritage.org/courts/report/the-world-after-chevron>; Elizabeth Slattery, “Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and *Chevron* Deference,” Heritage Foundation *Legal Memorandum* No. 153, May 7, 2015, <https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and>; and Alden Abbott, “Why a ‘Major Questions’ Exception to *Chevron* Deference Is Inappropriate—and No Substitute for Regulatory Reform,” Heritage Foundation *Legal Memorandum* No. 216, September 29, 2017, <https://www.heritage.org/courts/report/why-major-questions-exception-chevron-deference-inappropriate-and-no-substitute>.

14. The remark came in a speech on the Senate floor defending New York Senator Martin Van Buren from an attack by Senator Henry Clay (KY).

came to be known, was one in which party machines decided who got government jobs on the basis of partisan loyalty.

The parties in turn levied assessments on government workers, all of whom were political appointees, to finance their campaign activities. In short, public employees often “donated” a portion of their salaries to the party’s campaign coffers. Political money thus came from inside the political system. State party leaders dug into the pockets of their political appointees, which enabled them to dominate the presidential selection process.¹⁵ Furthermore, when getting out the vote was highly labor intensive, government employees were extremely valuable assets. They could be enlisted to work on campaigns—sometimes while doing their nominal jobs. The party machines were massive get-out-the-vote operations whose precinct captains, district leaders, and other operatives enlisted people to vote for candidates.

The advantages parties accrued in power, especially at the state and local level, often resulted in excess government spending, corruption, and self-dealing. Parties entrenched themselves through what amounted to legalized bribery. Because parties were often stronger than the bureaucracy, they often overawed it. Consequently, the bureaucracy remained high-cost but low-capacity.¹⁶

Advocates of administrative expertise had to reduce party power to realize their goals. Therefore, Progressive reformers embarked on a campaign to defeat the party machines in the 1880s, sparking a war that lasted until the 1960s.¹⁷ Progressive reformers sought to change party structures to reduce the power of the bosses. They called for the direct election of U.S. Senators; advocated direct democracy methods, such as the initiative, referendum, and recall; and fought for primary elections, which would take the power to nominate candidates away from the parties and hand it to voters.

Yet Progressives’ signature reform was the enactment of civil-service protections, which would cut off

the lifeblood of the party machines. Their aim was to shield public workers from politics. Rather than selecting candidates for federal jobs based on personal connections and party affiliation, job seekers would now be hired and promoted on the basis of competence and merit. Only a disinterested elite, positioned above and outside the political fray and dedicated to the public good, could address the challenges of the industrial age. In a classic study of 1887, future-President Woodrow Wilson argued that “administration lies outside the proper sphere of *politics*. Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.”¹⁸

“The coming science of management in this century,” wrote future Supreme Court Justice Louis Brandeis, marked “an advance comparable only to that made by the coming of the machine in the last.”

Only by separating politics from administration, Progressives held, would government be up to the task of managing an industrial economy. In addition, only agencies staffed by experts with the most advanced educations would be up to the job. The new social sciences would allow for rational planning and management of public affairs. “The coming science of management in this century,” wrote future Supreme Court Justice Louis Brandeis, marked “an advance comparable only to that made by the coming of the machine in the last.”¹⁹ University of Wisconsin economist John R. Commons called scientific management “the most productive invention in the history of modern industry.”²⁰ It would transform not just the business firm and economy but the public administration and the state as well.

15. James W. Ceaser, *Presidential Selection: Theory and Development* (Princeton: Princeton University Press, 1979), pp. 123–169.

16. Martin Shefter, *Political Parties and the State* (Princeton: Princeton University Press, 1994), pp. 66–75, and Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982), pp. 39–85.

17. Paul P. Van Riper, *History of the United States Civil Service* (Westport, CT: Greenwood Publishers, 1976).

18. Woodrow Wilson, “The Study of Administration,” *Political Science Quarterly*, Vol. 2 (1887), p. 201. (Emphasis in original.)

19. Quoted in Robert Kanigel, *The One Best Way* (New York: Viking, 1997), p. 504.

20. Quoted in Samuel Haber, *Efficiency and Uplift: Scientific Management in the Progressive Era, 1890–1920* (Chicago: University of Chicago Press, 1964), p. 148.

In retrospect, the Progressives' optimism about the prospective gains from the science of administration is stunning. According to Herbert Croly, a leading Progressive intellectual, it would allow for the replacement of the "robberbarons" by "industrial statesmen."²¹ America's social and economic problems, he believed, were akin to technical problems that could be solved by engineers. Progressive sociologist and eugenicist Edward A. Ross claimed that "intelligent social engineering" by policy experts was not only desirable, but readily achievable.²² The old party machines were the only thing standing in the way.

The new democracy would be less about political parties, elections, and representation and more about policy outcomes crafted by experts insulated from politics by civil-service protections.

Such sanguinity came with a strong dose of elitism. As Croly put it, "efficient public administration puts the collective power of the group at the service of its ablest members."²³ Nonetheless, the Progressive movement promised a new and more robust version of democracy. The new democracy would be less about political parties, elections, and representation and more about policy outcomes crafted by experts insulated from politics by civil-service protections. In the progressive view, taking power away from the people and their political parties was in the people's long-term best interests.

The Rise of Public Unions

The character of federal administration began to change at the end of the 19th century. In 1883, the federal government passed the Civil Service Act (also known as the Pendleton Act), which created the

Civil Service Commission.²⁴ At first the law covered very few jobs—only 14,000 out of 131,000. Yet over time it moved most federal jobs into a merit system and sounded the death knell of the spoils system within the federal government. The law allowed outgoing presidents to lock in their own appointees by placing their jobs under civil service rules rather than leaving their positions open to appointment by their successors. The law also required entrance exams for new bureaucrats and banned mandatory party contributions by federal employees.

Without regular turnover based on elections and protected from dismissal by civil service provisions, public employees gained a long-term stake in their jobs. They began to form associations to express their occupational interests. The most notable example came from postal workers. In the late 19th century, postal workers besieged Congress seeking higher pay and promotions. Their excessive lobbying led Congress to enact measures to limit the ability of government workers to influence the federal government in 1901. Then-President Theodore Roosevelt backed federal workers' right to unionize but did not want unions to interfere with presidential control of government agencies.²⁵ He recognized that while civil service systems protected the bureaucracy from politicization, they could also be used to shield public employees from accountability.

Beginning in the early 20th century, associations of government workers sought to convert themselves into labor unions and win the right to collectively bargain with their employers. To do this required new legislation that would require government employers to recognize unions and oblige them to negotiate over pay, benefits, and working conditions. This movement proceeded slowly, and the bargaining practices that existed were usually ad hoc and informal rather than inscribed in law.²⁶ In 1912, under pressure from the American Federation of Labor, Congress passed the Loyd-La Follette Act, which recognized the right of public employees to organize and petition Congress.

21. Herbert Croly, *The Promise of American Life* (New York: Macmillan, 1911), p. 408.

22. Quoted in Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics and American Economics in the Progressive Era* (Princeton: Princeton University Press, 2016), p. 34.

23. Croly, *Promise of American Life*, p. 408.

24. Pendleton Civil Service Reform Act, Ch. 27, 22 Statutes at Large, § 403, January 15, 1883, pp. 403–407, <http://legisworks.org/sal/22/stats/STATUTE-22-Pg403a.pdf> (accessed March 26, 2018).

25. Skowronek, *Building a New American State*, pp. 197–200.

26. Joseph Slater, *Public Workers: Government Unions, the Law, and the State, 1900–1962* (Ithaca: ILR Press, 2004).

For the first two decades of the 20th century, few people paid public-sector unions much attention. For those who did, even pro-labor observers were equivocal about whether public workers should organize themselves into unions along the lines of private-sector workers. Most believed that public workers should not be allowed to strike, be required to join unions, or exert too much political influence.

Whatever movement there was toward unionization of public workers in the early 20th century, it came to an abrupt halt with the Boston Police Strike of 1919. Massachusetts Governor Calvin Coolidge broke the strike. The result was a broad consensus against unionization of public workers that persisted for the next three decades. As Colorado's Democratic Senator Charles Thomas remarked in 1920: "The fundamental idea of...organized labor...has been the assumption—a correct one, in the main—of an antagonism of interest and of purpose between employer and employee.... [T]hat situation cannot be applied to public employment."²⁷ President Franklin D. Roosevelt considered strikes by government workers "unthinkable and intolerable."²⁸ By the end of the 1940s, only about 10 percent of government workers in the nation belonged to a union, and many of those unions had limited legal rights.

Circumstances changed rapidly in the late 1950s. The first steps toward granting greater recognition of and legal rights to public unions came in New York City in 1958. That move was followed quickly in Wisconsin, where the state passed the first collective-bargaining statute covering *all* government employees in 1959. Over the next two decades, nearly half the states would pass collective bargaining and union security laws.²⁹

Fresh from the merger of the American Federation of Labor (AFL) and the Congress of Industrial

Organizations (CIO) in 1955, organized labor began to lobby the federal government to pass measures allowing for more collective bargaining for federal employees. Congress considered a few different measures, but none passed. President John F. Kennedy then kick-started unionism in the federal service when he issued Executive Order 10988 in 1962—in part to head off more expansive measures being considered in Congress. The Kennedy Administration was particularly keen to block unionization of employees in the defense sector. Executive Order 10988 did not provide for full collective-bargaining rights: Those words did not appear in the order. Indeed, the workplace issues of pay, benefits, and management's prerogatives to hire, fire, and transfer employees were all *excluded* from negotiations. But it provided an opening wedge that unions in the federal government would exploit—and those seeking unionization in the states interpreted as a sign of their legitimacy.³⁰

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During the Carter Administration, there were a few attempts to expand collective bargaining in the federal service. Congress considered but rejected bills that would have imported private-sector practices, such as duties to bargain over wages and benefits.³¹ Congress eventually passed the Federal Labor Relations Act of 1978 to govern public employee unions in

27. Cited in *ibid.*, p. 1.

28. Franklin D. Roosevelt, "Letter to Luther C. Steward, President, National Federation of Federal Employees," August 16, 1937, <http://www.presidency.ucsb.edu/ws/index.php?pid=15445> (accessed March 26, 2018).

29. Collective bargaining laws require employers to meet with workers' designated representatives (unions) and negotiate over certain subjects, usually including pay, benefits, and working conditions. Union security provisions are either laws or parts of collective-bargaining contracts stipulating union membership enrollment and making retention easier. This can include the power of unions to charge "fair share" or "agency" fees to those who elect not to join them. Another aspect of union security provisions is to allow employers to deduct union dues and agency fees directly from workers' paychecks and send those monies to the union.

30. At the federal level, President Richard Nixon further developed Kennedy's order reconfiguring labor-management relations. He signed Executive Order 11491 in 1969, which created a Federal Labor Relations Council and the Federal Services Impasses Panel and identified unfair labor practices for both labor and management. See Richard Nixon, "Labor-Management Relations in the Public Service," Executive Order 11491, October 29, 1969, <http://www.presidency.ucsb.edu/ws/index.php?pid=59075> (accessed March 26, 2018).

31. Gareth Davies, *See Government Grow: Education Politics from Johnson to Reagan* (Lawrence, KS: University of Kansas Press, 2007), p. 222.

the national government.³² In that statute, Congress indicated its desire to encourage collective bargaining in the federal service. The act states that collective bargaining is “in the public interest” because it “contributes to the effective conduct of public business” and “facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment.”³³ Yet the subjects of bargaining were limited to work rules. Strikes remained prohibited, and unions were forbidden to charge agency fees to non-members. In short, the new federal law was quite restrained compared to state laws governing public employees.

While the unions continued to press for more, the effort to expand bargaining rights in the federal service came to a screeching halt when President Ronald Reagan broke the Professional Air Traffic Controllers Organization (PATCO) strike in 1981. Over the course of the 1970s, PATCO’s efforts to advance its members’ interests had been frustrated. The union endorsed Reagan in the 1980 presidential election on the basis of some vague campaign promises. After the election, problems quickly emerged. The central issue was that PATCO’s demands—including wage increases and a shorter workweek—were technically “non-negotiable” under existing law. Yet the union believed that a strike threat would get the Reagan Administration to roll over. In fact, the Reagan Administration went a long way toward meeting the union’s demands, in part because it feared the strike’s economic costs. But PATCO ignored several warning signs, rejected the Administration’s offer, and called a strike anyway.³⁴

President Reagan took a hard line. He declared that all controllers who did not return to work within 48 hours would be fired and replaced. He also instructed the Federal Aviation Administration (FAA) to bring in controllers from the armed services to cover the gaps created by the strikers. The nation’s airline system muddled through the next few years as new controllers were trained and hired.

Sticking with Reagan’s ultimatum, the FAA never rehired most of the PATCO strikers who were fired.

The PATCO strike essentially forestalled any further attempts to extend collective-bargaining rights in the federal service. Instead, the federal government sought to avoid conflict with unions by holding the size of the federal workforce flat and hiring more non-unionized private contractors. This allowed the federal government to skirt the onerous work rules and red tape negotiated by the unions and made it appear as though the bureaucracy was not growing—when in fact it was.

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All told, public- and private-sector unions have followed different historical paths such that the nation has never simultaneously had a strong public- and private-sector labor movement. Private-sector unionism took off in the 1930s. But private-sector union membership has declined from over 15 million workers in 1973 to fewer than 8 million today. Public-sector unionism did not emerge until the 1960s. Government union membership has since risen from about 5 million workers in 1973 to over 8 million today.³⁵

The Contemporary Public-Sector Labor Landscape

Today, there are approximately 125 million full-time workers in the United States. More than four-fifths of the U.S. labor force is in the private sector, and less than one-fifth works in the public sector. There are roughly 3 million federal employees, 666,000 postal workers, 7 million state government workers, and 10 million local government workers.

32. John O. Shimabukuro, “Collective Bargaining in the Federal Service Labor-Management Relations Statute: Selected Legal Issues,” Congressional Research Service Report for Congress, March 21, 2017, <https://fas.org/sgp/crs/misc/R44794.pdf> (accessed March 25, 2018).

33. Federal Service Labor-Management Relations Statute, 5 U.S.C. § 71 (1978), <https://www.flra.gov/resources-training/resources/statute-and-regulations/statute> (accessed March 26, 2018).

34. Joseph McCartin, *Collision Course: Ronald Reagan, the Air Traffic Controllers, and the Strike that Changed America* (New York: Oxford University Press, 2011), pp. 250–350.

35. As a percentage, private-sector union membership has dropped from 25 percent of the workforce in 1973 to about 6.4 percent today. Public-sector union membership has risen from representing about 25 percent of government workers in 1973 to 34.4 percent of today.

The percentage of workers who are members of unions (public and private) in 2018 is 10.7 percent of the workforce, which equals 14.6 million workers.³⁶ In terms of union representation, 19 percent of federal, 64 percent of postal, 33 percent of state, and 44 percent of local government workers are unionized.³⁷

Union membership is by no means uniform and varies greatly by state, level of government, and occupation. Some segments of the federal workforce are heavily unionized, while others, particularly in the defense sector, are not. At the state and local level there is also significant variation. Public-sector unions are strongest in the populous and previously industrial states of the Northeast and the West Coast. New York, for example, has the highest public-union membership rate in the nation, with 67.4 percent of its public workers belonging to unions. Meanwhile, public union membership in much of the South and Southwest remains in the single digits in percentage terms. Public employee unions are also particularly active in the politics of many large cities, such as New York City, Chicago, Los Angeles, San Francisco, Boston, and Philadelphia.

The reason for the variation in membership rates is that each type of labor organization operates under different laws created by different levels of government.

The reason for the variation in membership rates is that each type of labor organization operates under different laws created by different levels of government. Those laws create stronger or weaker incentives for public workers to join unions. In the federal service, unions exist but lack many of the legal rights that make them such outsized players in

state and local government. The subjects of collective bargaining in the federal service are highly circumscribed. Unlike workers in the private sector or in state and local government, federal employees can only negotiate over working conditions or personnel practices. Wages, hours, benefits, and job classifications are not subjects of bargaining. Therefore, union efforts to increase members' pay and benefits take place exclusively through their lobbying efforts in Congress. Yet as the largest federal employee union notes, just because pay "is outside the scope of bargaining does not mean the union can't effectively deal with it on behalf of its members."³⁸ Unlike private-sector unions, but like most state and local government unions, federal unions do not have a right to strike.

All employees of the federal government, including the postal service, are by law guaranteed the right to refrain from union membership.³⁹ Federal unions exist in a right-to-work environment, which means they cannot charge non-members fees for their work in collective bargaining and contract administration. Therefore, federal workers cannot be required to join a union or pay it representational fees as a condition of employment. They only pay dues if they *voluntarily* join the union. The result is that union membership rates tend to be lower in the federal government than in states where laws require workers to pay union fees whether they want to belong to the union or not.

The largest federal employee union is the American Federation of Government Employees. It represents 700,000 federal workers nationwide (as well as District of Columbia workers). In addition, the National Federation of Federal Employees (NFFE) represents approximately 110,000 workers across the United States. The NFFE is also the oldest union representing federal employees. Both unions provide their members with legal representation, legislative advocacy, technical expertise, and informational services.

36. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent, and there were 17.7 million union workers.

37. U.S. Department of Labor, Bureau of Labor Statistics, "Union Members Summary," January 19, 2018, <https://www.bls.gov/news.release/union2.nr0.htm> (accessed March 25, 2018).

38. American Federation of Government Employees, "Collective Bargaining FAQ," <https://www.afge.org/leaders-activists/local-union-administration/collective-bargaining/collective-bargaining-faq/> (accessed March 26, 2018).

39. See 5 U.S.C. § 7102 (federal employees generally), and 39 U.S.C. § 1209(c) (postal employees).

Meanwhile, state laws govern public-sector unions. Some 22 states have enacted laws modeled on federal law for private-sector workers. Those laws encourage higher union membership. The other 28 states have adopted laws more closely modeled on the federal laws that govern the federal government's standard for its own employees. These states tend to have lower union membership. The essential difference in these legal arrangements is that the strong union states allow unions to charge non-union members an "agency fee" nearly equal to union dues as a condition of employment, while in the weak union states such fees are prohibited.

Consequently, labor-management relations in the federal government more closely resemble those in right-to-work states of the American South than in the public-sector union strongholds in the Northeast and the Pacific Coast. Union rights in the federal government are more restricted, and managers have far more flexibility than in states like New York or California, which have strong agency-shop provisions and mandatory collective bargaining on a wide range of topics. That is why less than 20 percent of the civilian federal workforce belongs to a union, while 60 percent or more of New York and California public workers do.⁴⁰

[P]ublic unions' federated organizational structure means that union power at the state and local level translates into power in Washington.

It is important to bear in mind that public unions' federated organizational structure means that union power at the state and local level translates into power in Washington. For instance, the American Federation of State County and Municipal Employees represents state and local employees across the country. But it is also one of the largest spenders on campaigns for federal office in the nation.⁴¹ And, as we shall see, state and local workers are essential to the administration of federal policy.

Simply looking at federal unions in isolation, as if they were the only public employee unions relevant to the national government, is a mistake. In reality, the federated structure of unions means that they can and do seek to pursue their interests at all levels of government simultaneously, directing resources from all parts of the federation to where the leadership feels they are most needed. This is especially important as state and local workers actually carry out so many federal programs today.

Public-Sector Unions and the Founders' Political Science

The Founders' political thought operated on at least two levels. At the philosophic level, they sought to provide the theoretical justifications for republican government—or what we today would call liberal democracy—as the best possible regime in the modern world. This dimension of the Founders' thought was anchored in ideas about the power of reason, human equality, natural rights, and the laws of nature. These ideas were used to justify revolution and to establish a certain type of political regime. At the practical level, they sought to show how a particular constitutional design could work to sustain that regime against threats to undermine it. The Founders trained their sights on the extent of the nation's territory, the importance of a written constitution, the distribution of power and arrangement of government offices, and the character of the people as the bulwarks of the new republican order.

Four themes in the Founders' thought are in tension with the introduction of governmental unions and collective bargaining into American government. One is the importance of consent of the governed, which is undermined when government outsources some portion of control over its workforce to unelected union leaders over whom they have little control and whose priorities at times differ from the public's. Another is the need to control factions in an extended republic, which is made considerably more difficult when one of those factions emerges from the government itself. A third is the principle of limited government, which can be overrun when public employee unions push for ever-larger government at

40. See Bureau of Labor Statistics data compiled at "Union Membership and Coverage Database from the CPS," <http://www.unionstats.com> (accessed March 26, 2018).

41. Brody Mullins and John McKinnon, "Campaign's Big Spender," *Wall Street Journal*, October 22, 2010, <https://www.wsj.com/articles/SB10001424052702303339504575566481761790288> (accessed March 26, 2018), and Steven Greenhouse, "Union Spends \$91 Million on Midterms," *The Caucus-New York Times Blog*, October 22, 2010, <https://thecaucus.blogs.nytimes.com/2010/10/26/union-spends-91-million-on-midterms/> (accessed March 26, 2018).

the local, state, and federal levels. And last, there is the importance of effective administration, which can be undercut by burdensome work rules unions negotiate in collective bargaining.

Consent. Beginning from premises about human equality and natural rights, the Founders held that government comes into being through a social compact.⁴² According to the Founders, because individuals are free and independent, they must consent to the erection of any authority over them. No one can be compelled to join a political community. Everyone has the right to emigrate if they find themselves in one of which they no longer wish to be a part. If the government consistently violates their rights, the people may rightfully withdraw their consent and alter or abolish the government. Consent can be rendered explicitly, such as when people vote or otherwise participate in the political process, or tacitly, such as when they accept the current government and forego moving to Canada.

Permitting collective bargaining in government takes some of elected representatives' decision-making authority and hands it to union officials.

From the idea of consent emerges the principle of popular sovereignty, which stipulates that all political authority rests in the hands of the people. Political authority thus derives from the people, considered as equal and independent individuals. Through the mechanism of a written constitution, the people delegate a portion of their power to a sitting government. The constitution is thus the deepest expression of the people's will. Like a contract, it allocates and limits the power the people have delegated to the government created under its auspices. Citizens must then participate in choosing the officers to serve under the constitution and can influence what those officers do. The people can thus be said to be ruling from the *top down*, insofar as the constitution remains in force, and from the *bottom up*, by

electing officers to serve under the constitution. In a nutshell, that is the Founders' notion of republican self-government.

Public-sector unions pose serious challenges to this conception of self-government. Permitting collective bargaining in government takes some of elected representatives' decision-making authority and hands it to union officials. The sovereignty of the people and the principle of consent are compromised when elected officials share with union leaders the power to determine government employees' wages, benefits, and working conditions. In addition, collectively bargained work rules mean that union leaders partially determine how public employees do their day-to-day jobs. Such power cuts into the sovereign authority of the people and their representatives to dictate how public services will be carried out. Instead, power is handed over to union officials in whom the people have invested no such authority.

Unionizing federal employees challenges the Founders' understanding of how popular sovereignty works through a written constitution. In their view, if the Constitution is being followed, the people can be said to be ruling. That is because, in Hamilton's view, the Constitution remains the "master," and the sitting government at any given time is "the servant."⁴³

The people exercise a measure of control over the government through elections. In turn, elected officials exercise political control over the bureaucracy, such that through them administrative agencies remain accountable to the will of the people. To the extent that public-employee unions remove political control of the bureaucracy from elected officials by creating extensive work rules that make changing what bureaucrats do and how they do it more difficult, they weaken the chain of delegation of power from the people to the constitution, from the constitution to the government, and from the people to their representatives. Parceling out authority to union leaders undermines popular sovereignty. By introducing a third party into the chain of command running from the people to their representatives to bureaucrats, unionization undermines government's sovereignty as an employer.

42. Thomas G. West, *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom* (New York: Cambridge University Press, 2017), pp. 19–42 and 96–111, and Michael Zuckert, *The Natural Rights Republic* (South Bend: University of Notre Dame Press, 1997).

43. Alexander Hamilton, *The Federalist* Nos. 28, 78, and 84, in Hamilton, Madison, and Jay, *The Federalist Papers*.

By creating the means by which government bureaucrats can defy their political superiors, the principles of consent and popular sovereignty are undercut. Granting power to unions flies in the face of the Founders' conception of bureaucratic accountability. Republican presidents from Richard Nixon to Ronald Reagan to Donald Trump have complained about the lack of bureaucratic responsiveness. Nixon grumbled about the "lack of discipline" in government agencies and thought that many were subverting the will of his administration.⁴⁴ Dissenting bureaucrats have often leaked sensitive information to the press, allies in Congress, or the interest group community. Critics frequently charge federal bureaucrats with "dragging their feet" on implementing policy with which they disagree. The rare instances when the bureaucracy refuses to implement the policies of elected officials are the most egregious violations of consent and popular sovereignty.⁴⁵

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Role of Factions. At the core of the Founders' constitutional theory is the relationship of self-interest and the common interest. Madison recognized that individuals form groups to pursue their self-interest—but that they sometimes do so at the expense of the common good or the rights of others and thus become what he called "factions." Since factions cannot be eliminated without restricting liberty, according to Madison, self-interest must be channeled to make it more likely to chime with the public interest. To improve the chances of that happening, Madison argued for an extended republic over a large territory, a scheme of representation designed to diffuse passion, and a constitutional structure meant to restrain government power.

Madison distinguished between majority and minority factions. He argued that the former were far more dangerous than the latter. As he put it:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views, by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.⁴⁶

This suggests that Madison did not foresee the federal government becoming actively involved in distributing economic rents. In his view, the majority would mobilize to block such rent-seeking behavior. Any faction large enough to become the majority would have shed much of its particular interests and come closer to approximating the general interest.

However, a government that is very large and intrusive on the economy and society poses a problem for Madison's theory. Such a government hands out favors of all sorts and offers preferential treatment to minority factions. While all citizens may be better off if they collectively join the majority to oppose a minority faction, any individual citizen will be even better off if he refuses to join the majority and still reaps the benefits of its advocacy on his behalf. This incentive to free-ride makes it harder for majorities to form to defeat minority factions. In short, apathy, indifference, and self-dealing can lead powerful minority factions to prevail over the public interest.⁴⁷ Consequently, a large state will have few means to resist the rent-seeking behavior of minority factions.⁴⁸

The transformation of American government after the New Deal placed the federal government squarely in the role of regulating society and redistributing resources, which created new factions and more avenues for them to pursue their interests. The result is that opposition to minority factions

44. Richard Nixon, quoted in James P. Pfiffner, *The Modern Presidency*, 6th ed. (Boston: Wadsworth, 2011), p. 123.

45. A well known example occurred at the Environmental Protection Agency during the first two years of Ronald Reagan's presidency. Career employees leaked sensitive information to the press and Democratic staffers on the Hill with the objective of making the lives of the President's political appointees impossible.

46. Madison, *The Federalist* No. 10.

47. Gregory Wiener, "After Federalist No. 10," *National Affairs*, Vol. 33 (Fall 2017), <https://nationalaffairs.com/publications/detail/after-federalist-no-10> (accessed March 26, 2018).

48. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965).

becomes difficult, if not impossible.⁴⁹ The result is that entrenched special interests introduce sclerosis, rendering government less able to experiment or act decisively.⁵⁰

Public-sector unions are a type of minority faction that has grown up inside big government. As American government expanded, its employees banded together to protect their occupational interests. Government employment itself becomes a source of faction. However, public-sector unions are a type of faction that Madison and the Founders did not anticipate. They largely saw factions as emerging from outside government, from the private economy—creditors and debtors, property owners and laborers, farmers and manufacturers, and so on. The problem is that majoritarian counter-mobilization to union demands is difficult to create and hard to sustain. Given their strategic position inside government, public unions have advantages over other factions. And their interests do not always coincide with the public interest.

Insider status makes government unions a distinct type of faction. Public-employee unions are, in a sense, the government lobbying itself. Unlike factions in the private economy that face collective action and communication problems, public-sector unions are within the government itself, which reduces the force of those challenges. In 22 states, public workers who do not want to join unions can be forced to pay fees nearly the equivalent of union dues for union representation in collective bargaining and contract administration that they do not want. This increases the number of union members and the amount of revenue they collect.⁵¹ Public employee unions can have their member dues (and non-member agency fees) directly collected by the government. The government can subsidize union activity by allowing some workers to hold on to their government jobs while working as union leaders (a practice call “official time”).⁵² Few other factions can rely on the coercive power of government to fund and help organize themselves. Government unions

also maintain close ties with the Democratic Party, and its leadership is often intimately involved in campaigns and elections. These ties reduce the costs of communicating the unions’ agenda to legislators.

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As a result, public-sector unions can easily forge alliances with other factions seeking favors from government because granting those favors creates more work for public employees. Finally, they can more easily smuggle particular interests into the public square under the banner of the general interest (e.g., “What’s good for teachers is good for kids.”).

Limited Government. The Founders’ political science is concerned with how to strike a balance between governmental power and its restraint. Madison famously remarked in *Federalist* No. 51: “You must first enable the government to control the governed; and in the next place oblige it to control itself.”⁵³ The government needs enough power to rule—that is, defend the nation, maintain domestic tranquility, and provide citizens with important services. But it must not become too powerful and thereby threaten liberty and rights. How that balance is struck depends on the arrangement of offices and the distribution of power. The aim is resist the gradual concentration of power in a few sets of hands.

To accomplish that, institutions are separated and powers shared. The solution “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” As a result, “ambition will counteract ambition,” as each of the national institutions jealously guards its prerogatives. In addition, in the “compound republic of

49. Theodore Lowi, *The End of Liberalism*, 2nd ed. (New York: W.W. Norton, 1979), pp. 67–91 and 167–238.

50. Jonathan Rauch, *Demosclerosis: The Silent Killer of American Government* (New York: Times Books, 1994).

51. The constitutionality of this practice is the subject of a Supreme Court case now pending, *Janus v. AFSCME Local 100* (supra, note 5).

52. Official time is a subject of collective bargaining in the federal government. Congress has been particularly interested in it, and legislation was introduced in the 115th Congress to limit its use and require it be reported.

53. James Madison, *The Federalist* No. 51, in Hamilton, Madison, and Jay, *The Federalist Papers*.

America,” power is divided between the federal and state governments in hopes that the “different governments will control each other.”⁵⁴ The result is that power is dispersed and allocated between two levels of government (federalism) and within each level (separation of powers).

Public-sector unions are antithetical to constitutional constraints. To advance their members’ interests, they want government to grow.

Public-sector unions are antithetical to these constraints. To advance their members’ interests, they want government to grow. For government to grow, it must overcome the limits to action. Public-sector unions encourage this by making campaign contributions to candidates and parties and lobbying office holders at all levels of government and across institutions. The unions’ federated structure makes them powerful players at both the national and state level as they seek to reduce the distance between levels of government. In fact, these levels have become far less distinct, since state and local officials now administer many federal programs such as Medicaid or the Supplemental Nutrition Assistance Program (SNAP, or food stamps).

American government has become very large. It spends almost as much as the more supposedly “statist” governments of Europe. It maintains policies touching on virtually every aspect of human life. However, its size is obscured. The federal government achieves this by keeping taxes low and borrowing to pay for its activities (debt-financing), and it administers many programs through “proxies” (state and local government, for-profit companies, and nonprofit organizations) rather than by hiring lots of federal government workers.⁵⁵

Today, the federal government employs roughly the same number of full-time bureaucrats as it did 30 years ago. Instead of employing more workers directly, tasks are outsourced to other levels of government or to the private sector. For example, the federal government administers 200 grant programs to state and local government that spend over \$600 billion a year.⁵⁶ As a result, the state and local government workforce has tripled over the past 30 years to some 14.9 million full-time employees. Current arrangements also foster government growth, since state and local governments as well as for-profit and nonprofit organizations that contract with the federal government incessantly lobby for the expansion of federal programs they administer.⁵⁷ Consequently, the federal government has created machinery that keeps it growing. Political scientist Martha Derthick aptly summarized the political logic at work:

Congress has habitually chosen the medium of grants not so much because it loves the states more but because it loves the federal bureaucracy less. Congress loves action—it thrives on policy proclamation and goal setting—but it hates bureaucracy and taxes, which are the instruments of action. Overwhelmingly, it has resolved this dilemma by turning over the bulk of administration to the state governments or any organizational instrumentality it can lay its hand on whose employees are not counted on the federal payroll.⁵⁸

The federal government’s persistent use of the states and localities as its proxies makes for a very confusing form of government. Consequently, the administration of government programs is highly complex. Such complexity, according to political scientist John DiIulio, frustrates attempts to evaluate the effectiveness of public programs and undermines democratic accountability. Neither the experts nor

54. Ibid.

55. Donald F. Kettl, *Government By Proxy (Mis?) Managing Federal Programs* (Washington, DC: CQ Press, 1987), and John J. DiIulio, *Bring Back the Bureaucrats* (West Conshohocken, PA: Templeton Press, 2014).

56. Congressional Budget Office, “Federal Grants to State and Local Governments,” March 5, 2013, <https://www.cbo.gov/publication/43967> (accessed March 26, 2018); and Government Accountability Office, “Grants to State and Local Governments: An Overview of Federal Funding Levels and Selected Challenges,” GAO-12-1016, September 2012, <https://www.gao.gov/assets/650/648792.pdf> (accessed March 26, 2018).

57. DiIulio, *Bring Back the Bureaucrats*, pp. 7–8, 24, 35, and 42.

58. Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington, DC: Brookings Institution, 2001), p. 63.

average citizens can say what government is doing and how well it is doing it. It is also expensive. Pay premiums in the federal service are well known.⁵⁹ One of the unions' primary effects is to increase the pay and benefits of their members relative to non-union public workers doing the same job.⁶⁰ Insofar as state and local government workers are unionized, they increase the costs of administering federal programs. Therefore, everything from police and fire protection to clerical and janitorial work is more expensive in unionized jurisdictions.

Everything from police and fire protection to clerical and janitorial work is more expensive in unionized jurisdictions.

Even if the size of the federal workforce remains modest and its workers' union rights remain constricted, the federal government often employs state and local workers with extensive collective-bargaining rights that drive up government costs. State and local governments must then hire more unionized workers and pay them more, a bill that they then pass on to the federal government. Not only does government grow, it grows in strange ways. Ultimately, the result of current arrangements is well-documented program duplication,

cost overruns, and inefficiency because the political clout of the federal government's proxies extends from the legislative to the procurement process.⁶¹

Effective Government. As Alexander Hamilton famously remarked, "A government ill executed, whatever it may be in theory, must be, in practice, a bad government."⁶² His argument was that the quality of government is often as important as, if not more important than, its size. The quality of government is reflected in its ability to carry out key tasks. Some fairly small governments (in terms of number of government employees) do this effectively, while some fairly large governments are unable to do these things. Of course, the quality of government hinges on many factors, including the size of the bureaucracy, the competency of its employees, its procedural flexibility, organizational culture, and more.

To provide for effective government overall, Hamilton argued that the performance of the executive branch is critical to the endeavor. In order to be effective, Hamilton believed, the executive branch needs to balance "energy" and "safety in the republican sense." Among the elements that constitute energy are unity and "competent powers." The elements that constitute safety are a "due dependence on the people" and responsibility.⁶³ Consequently, Hamilton argued that there should be only one President; that the bureaucracy should be accountable to him; and that the President should be accountable to the people through regular elections.

59. John D. Donahue, *The Warping Government Work* (Cambridge: Harvard University Press, 2008), pp. 167-178.

60. Sharon P. Smith, "Pay Differentials Between Federal Government and Private Sector Workers," *Industrial and Labor Relations Review*, Vol. 29, No. 2 (1976), pp. 179-197, <http://journals.sagepub.com/doi/abs/10.1177/001979397602900201?journalCode=ilra> (accessed March 26, 2018); Brent R. Moulton, "A Reexamination of Federal/Private Wage Differentials in the United States," *Journal of Labor Economics*, Vol. 8, No. 2 (1990), pp. 270-293, <https://www.journals.uchicago.edu/doi/abs/10.1086/298223?journalCode=jole> (accessed March 26, 2018); Justin Falk, "Comparing Benefits and Total Compensation in the Federal Government and the Private Sector," Congressional Budget Office *Working Paper* No. 2012-4, January 2012, https://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-04FedBenefitsWP_0.pdf (accessed March 26, 2018); Justin Falk, "Comparing Wages in the Federal Government and the Private Sector," Congressional Budget Office *Working Paper* No. 2012-3, January 2012, <https://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-03FedWagesWP.pdf> (accessed March 26, 2018); Jason Richwine and Andrew Biggs, "Are California Public Employees Overpaid?" Heritage Foundation *Center for Data Analysis Report* No. CDA11-01, March 17, 2011, <https://www.heritage.org/jobs-and-labor/report/are-california-public-employees-overpaid>; Jason Richwine and Andrew Biggs, "Public-Sector Compensation: Correcting the Economic Policy Institute, Again," Heritage Foundation *Backgrounder* No. 2539, March 31, 2011, <https://www.heritage.org/jobs-and-labor/report/public-sector-compensation-correcting-the-economic-policy-institute-again>; James Sherk, "Inflated Federal Pay: How Americans Are Overtaxed to Overpay the Civil Service," Heritage Foundation *Center for Data Analysis Report* No. CDA10-05, July 7, 2010, <https://www.heritage.org/jobs-and-labor/report/inflated-federal-pay-how-americans-are-overtaxed-overpay-the-civil-service>; and Jason Richwine, "Same Worker, Higher Wage: A Study of Workers Who Switch from Private to Federal Employment," Heritage Foundation *Center for Data Analysis Report* No. CDA11-02, June 15, 2011, <https://www.heritage.org/jobs-and-labor/report/same-worker-higher-wage-study-workers-who-switch-private-federal-employment>.

61. Paul C. Light, *A Government Ill Executed: The Decline of the Federal Service and How to Reverse It* (Cambridge: Harvard University Press, 2009), pp. 1-19 and 52-77, and Peter Schuck, *Why Government Fails So Often* (Princeton: Princeton University Press, 2015), pp. 125-199.

62. Alexander Hamilton, *The Federalist* No. 70, in Hamilton, Madison, and Jay, *The Federalist Papers*.

63. *Ibid.*

Insofar as public unionism increases the costs of government employment and creates work rules that slow or retard the carrying out of public policy, it pushes in the direction of bad government. The work rules that unions imagine make the federal workplace fairer also make personnel actions slow and cumbersome. They conspire to reduce efficiency and drive up costs and contribute to the creation of semi-autonomous forces within the bureaucracy that can be unresponsive to elected officials. Evidence that unionization of government threatens government performance can be seen in increased costs, subsidization of union activity (by allowing workers to hold their job titles and accrue pension benefits while serving as union leaders), and excessive job protections that distort day-to-day functioning of bureaucracy.⁶⁴

Insofar as public unionism increases the costs of government employment and creates work rules that slow or retard the carrying out of public policy, it pushes in the direction of bad government.

The unionization of federal employees runs counter to the qualities Hamilton said the executive department needed. The energy of the executive is relaxed when collectively bargained work rules shield federal employees from presidential directives. Executive power is no longer unified when it is shared with union leaders. And existing rules that define day-to-day routines undercut the flexibility that is required for energy. Furthermore, to the extent that work rules layered on top of civil service protections make hiring, firing, promotions, transfers, and disciplinary actions more difficult, government managers are constrained. The bureaucracy is untethered from executive accountability.

In the Founders' view, administrative decisions and performance are the responsibility of the President. The problem is that presidential responsibility is weakened as union rules constrain the President's ability to direct the bureaucracy. It is not simply that politics and administration are separated, as the Progressives desired, but that the bureaucracy becomes directed not by expertise but by its employees' own self-interest. The public receives neither expert administration nor can it exercise democratic accountability. Neither the Progressive view of expert governance nor the Founders' view of democratic control of the bureaucracy is realized in practice.

In contrast to the Founders' view, it is Congress, rather than the presidency, that is truly the national administrator-in-chief today. As the late, eminent political scientist James Q. Wilson argued, Congress controls the federal bureaucracy's day-to-day operations by passing far-reaching and detailed statutes.⁶⁵ It is the architect of what bureaucrats do and why they do it. The result has been extensive delegations of power: first from Congress to federal bureaucrats and from them to state and local bureaucrats and outside contractors. The President and his 4,000 political appointees come in third after Congress and the federal courts, which have taken an active role in instructing federal administrators what the law requires.

The problem of control is only compounded by civil-service rules, which often protect poorly performing workers. Today, almost all full-time, non-political federal employees are hired under the civil-service system, which gives them substantial job protections. It can be nearly impossible to fire, demote, or suspend a career civil servant. It is illegal to fire career employees for political reasons. Furthermore, civil service laws require that government employers establish a cause for the termination of any employee protected by them. The procedural hurdles can be daunting, and many managers forgo them. That is why in 2013, for example, less than 1 percent of the 2.1 million federal workers were fired for discipline or poor performance.

64. Sara Anzia and Terry Moe, "Public Sector Unions and the Costs of Government," *Journal of Politics*, Vol. 77, No. 1 (2015), draft available at https://gspp.berkeley.edu/assets/uploads/page/Anzia_Moe_Costs_11_26_13.pdf (accessed March 26, 2018).

65. James Q. Wilson, *Bureaucracy* (New York: Basic Books, 1991); and David Lewis, "The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies," *British Journal of Political Science*, Vol. 34, No. 3 (2004), pp. 377-404.

Conclusion

Unionization of government employees emerged as an effort to capitalize on the latent political power of government's own employees. The Founders did not directly confront it. Rather, it emerged in the Jacksonian era just after the Founding generation departed the stage. The result was widespread corruption induced by the party machines. The Progressives sought to address the problem, but their solution (civil service) had the unintended consequence of encouraging public servants to band together in associations or unions to press their interests. Politicians soon learned to love the political favors that public unions could provide. Consequently, the problem of how to manage the political activity of government's own employees persists, as do the tensions between unionized government and the Founders' political science.

By creating a national government empowered to extensively regulate business, tax society, and redistribute income, the problem today is how to restrain government such that liberty and self-government are protected. That means reconsidering the role of unions in government.

The place to begin to rethink the character and role of government employment is with the Founders' principles in light of the practical political difficulties they encountered as the economy industrialized and government grew. An important task today is to control public employees and prevent them from becoming the tools of either parties or unions.

There are several helpful steps to consider in embarking on that task. The first is to recognize that the factional behavior of public-sector unions is essential to grappling with the core problem. Another is to return to the Founders' understanding of consent and popular sovereignty in order to clarify the role of national administration in their constitutional scheme. A third is to consider how one could update the Founders' limiting the practice of delegating powers to bureaucracies and outside agents (such as unions) in order to constitutionalize and improve American bureaucracy. Fourth, creating clearer lines of executive authority and eliminating bloated middle management in the federal service can reconnect the President with the agencies he is charged to manage.

Ultimately, revivifying the connections between consent, popular sovereignty, and the delegation of power from the people's elected representatives to bureaucrats concentrates the mind on the democratic value of these lines of authority. Keeping them in focus will help us concentrate on how the potential factionalism of government employees can be moderated.

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