

# CITIZENSHIP AT WORK: HOW THE SUPREME COURT POLITICALLY MARGINALIZED PUBLIC EMPLOYEES

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Collective bargaining by public sector employees has been the subject of recent heated debates in the state legislatures of Wisconsin, Michigan, Ohio, and Indiana. The right of public sector employees to freedom of association, collective bargaining, and the right to participate in politics are among the “citizenship rights” of public employees. In many states, however, the citizenship rights of public employees are under threat both in state legislatures and in the courts. Paradoxically, the ability of public sector employees to change legislation has been hampered over the years by Supreme Court decisions, making it more difficult to organize politically by limiting the Petition Clause of the First Amendment. At the same time, public employees increasingly are politically marginalized, making the role of the courts, as a backstop for public employee constitutional rights, even more important.

This Article first describes the animus against public sector employees and union legislative efforts to roll back collective bargaining taking place in an environment of increasing vitriol against public sector employees and efforts to contract out and privatize government services. Second, I discuss how the United States Supreme Court, in three recent rulings on the ability of public sector unions to collect dues, has made it more difficult for unions to participate in the political process. Third, I describe how these cases make reversal of the elimination of collective bargaining more difficult. Finally, I examine *Borough of Duryea v. Guarnieri*, a 2011 Supreme Court decision where the Court imported the “public concern” requirement from free speech analysis into the Petition Clause in the First Amendment.<sup>1</sup> This decision also makes it more difficult than ever to overturn earlier decisions holding that the right to collective bargaining is not protected by the First Amendment, and thus to ever change the legislative rollbacks of public employee collective bargaining rights through the courts. In the end, all of these developments further exacerbate the divide between work and citizenship for public sector employees.

Nevertheless, the limited success of Wisconsin unions in federal courts overturning aspects of the elimination of collective bargaining suggests that some of the recent attacks on unions may be vulnerable to constitutional challenge. Since these actions have so far not been successful, political action becomes more important. Changing the negative attitudes toward public

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<sup>1</sup> *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2491–92 (2011).

employees in American society is essential to returning full citizenship rights to public employees.

### INTRODUCTION

Democracy, both inside and outside of the workplace, has been under stress in recent years. Upheavals in Ohio, Wisconsin, and Michigan, among other states, concerning government employee collective bargaining highlight a cleavage between work and citizenship.<sup>2</sup> In a stunning blow to the labor movement in late 2012, Michigan became a “right to work” state, which means that people who are represented by a union no longer are required to pay the cost of grievance administration and collective bargaining. In response to these actions, public sector employees argue that some legislatures have denied freedom of association and other human rights to public sector workers.<sup>3</sup> Citizenship rights also include the right to participate in the political process, individually and through organizations. While these recent events were playing out, however, the Supreme Court in several decisions made it more difficult for unions to participate in the political process to influence their conditions of work. As a result, it will be more difficult for public employees to challenge their employers’ denial of freedom of association both in the legislature and the courts.

Several recent Supreme Court decisions have also exacerbated the gap between the work of public employees and their citizenship rights. The decisions include *Garcetti v. Ceballos*<sup>4</sup> and *City of Ontario v. Quon*,<sup>5</sup> where in two different cases the Court rebuffed the constitutional claims of a prosecutor and a deputy sheriff, respectively.<sup>6</sup> The failure to obtain rights through the courts will mean that comparable protections must be obtained through the legislative process, if not through constitutional litigation. The ability of public employees and their unions to change legislation through the political process, however, has been made more difficult by three recent Supreme Court decisions: *Davenport v. Washington Education Association*,<sup>7</sup> *Ysursa v. Pocatello Education Association*,<sup>8</sup> and *Knox v. Service Employees International Union*.<sup>9</sup> In these cases, the Supreme Court endeavored to protect the constitutional rights of non-members. In this Article, I discuss how public sector employees have been the focus of recent criticism that has made it more difficult for employees to organ-

<sup>2</sup> See, e.g., Steven Greenhouse, *Delivering Moral Support in a Steady Stream of Pizzas*, N.Y. TIMES, Feb. 26, 2011, at A13; Sabrina Tavernise, *Ohio Senate Passes Bill to Weaken Collective Bargaining Clout of Public Workers*, N.Y. TIMES, Mar. 3, 2011, at A18; see also Steven Greenhouse, *Group Seeks Labor E-Mails by Professors in Michigan*, N.Y. TIMES, Mar. 30, 2011, at A13.

<sup>3</sup> Many of the signs that were present at the protests around the Wisconsin State Capital in the winter of 2011 carried the message: “Worker Rights are Human Rights.” *Wisconsin Protests, 2011*, AM. ETHNOLOGIST, <http://www.americanethnologist.org/wisconsin-protests-by-collins/> (last visited Feb. 6, 2013).

<sup>4</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>5</sup> *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

<sup>6</sup> *Garcetti*, 547 U.S. at 413; *Quon*, 130 S. Ct. at 2624.

<sup>7</sup> *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177 (2007).

<sup>8</sup> *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353 (2009).

<sup>9</sup> *Knox v. Serv. Emps. Int’l Union*, 132 S. Ct. 2277 (2012).

ize politically. In the next section, I describe how cases such as *Ysursa* and *Davenport* make it more difficult for unions to change legislation, and how the 2011 decision of *Borough of Dureya v. Guarnieri* makes it more difficult to argue that collective bargaining is a right of freedom of association under the United States Constitution. The argument I advance here is that public employees must rely on the Constitution more than the statutory protections in workplace law because, in their case, the employer controls power both at the workplace and the legislative level. With state legislatures becoming increasingly inhospitable to workers' interests, workers' rights will need to be litigated in the courts. The political participation cases discussed here show that it will be difficult to reverse the privatization of working conditions being accomplished through the legislatures.

### I. THE POLITICAL MARGINALIZATION OF PUBLIC EMPLOYEES

Although they are thought to exert inordinate influence in the political process, there are various ways in which public sector workers are disadvantaged by their status. In the United States, rights generally depend on the state in which you live.<sup>10</sup> This means that a number of workplace rights of public employees have been highly contingent and politically fragile. Since 1959, the State of North Carolina has prohibited collective bargaining by public employees and their employers.<sup>11</sup> Even though the ban was challenged in the International Labor Organization as a violation of the human right to freedom of association and collective bargaining, the State apparently seems to have no plans to change its laws. In Wisconsin, the denial of collective bargaining in 2010 meant that, even in the state where public sector bargaining began in 1959, public employees are without the right to bargain.

At the same time that legislatures are retracting rights, politicians and pundits demonize public sector employees, whether they are in unions or not. These attacks accelerated in 2010 when it was reported that, for the first time, the number of public sector union members exceeded union members in the private sector.<sup>12</sup> After that news was reported, the critiques came fast and furious. In the spring of 2010, editorials carried titles such as "Government workers feel no pain," in the *Washington Times*.<sup>13</sup> The *Wall Street Journal's* editorial page asserted: "America's most privileged class are public union

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<sup>10</sup> N.C. GEN. STAT. § 95-98 (2013). The ban was challenged, unsuccessfully, as violation of the First Amendment in *Winston-Salem/Forsyth Cnty. Unit N.C. Ass'n of Educators v. Phillips*, 381 F. Supp. 644, 645, 648 (D.N.C. 1974). While the political climate in North Carolina does not favor a change in the legislation, there have been movements to try to change the law. See Craig Jarvis, *N.C. Protesters Want Collective Bargaining Restored*, McCLATCHYDC (Feb. 22, 2011), <http://www.mcclatchydc.com/2011/02/22/109177/nc-protesters-want-collective.html>.

<sup>11</sup> Jarvis, *supra* note 10.

<sup>12</sup> Larry Swisher, *Union-Represented Workforce Stable in 2011, Ending Two-Year Slide*, *BLS Says*, 18 Daily Lab. Rep. (BNA) No. 18, at D-1, Jan. 27, 2012.

<sup>13</sup> David M. Dickson, *Government Workers Feel No Pain: Security, Wages, Benefits Beat Private Sector's*, *WASH. TIMES*, Mar. 11, 2010, at A01.

workers.”<sup>14</sup> Another headline read: “The New Fat Cats: The indefensible pensions of public-sector employees.”<sup>15</sup> Besides these hyperbolic statements, the large pension deficit faced in many states and cities has resulted in greater pressure on public sector employees. In San Diego, for example, the constant refrain has been that public employees are over-compensated. And yet, most studies have shown that many public employees are *under-compensated* by comparison to private sector employees of similar education and training.<sup>16</sup>

As shown by the recent public employee battles, there is a democratic deficit faced by public employees. The fact that public employers have both legislative and employer control over the employees’ workplaces leads to a variety of political problems. Of course, this lack of political power is variable depending on whether the public employee is a state or federal employee. Even at the federal level, however, the ten-year post-9/11 struggle for federal employees of the Transportation Security Administration to unionize shows that when the employer is the government, freedom of association is dependent on the political orientation of those in charge.<sup>17</sup>

Because of the political posture that they have with their employers, public employees have to be politically active. In the 2008 election cycle, unions such as the American Federation of Teachers (AFT) and the American Federation of State, County, and Municipal Employees (AFSCME) were more active than ever in political contributions and mobilization.<sup>18</sup> That mobilization only increased in the 2012 election, which aided in the reelection of President Obama and several Senate and House Democrats. Nevertheless, in some states, these national gains were not enough to offset state and local losses. Nowhere was this more clear than in Michigan, where the legislature in late 2012 passed

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<sup>14</sup> *The Government Pay Boom: America’s Most Privileged Class are Public Union Workers*, WALL ST. J. (Mar. 26, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748704281204575003101210295246.html>.

<sup>15</sup> Fred Barnes, *The New Fat Cats: The Indefensible Pensions of Public-Sector Employees*, 15 WKLY. STANDARD, no. 31, May 3, 2010, available at <http://www.weeklystandard.com/articles/new-fat-cats>.

<sup>16</sup> See Steven Verburg, *Report: Public Employees Make Less, Including Benefits, Than Private Workers*, WIS. ST. J. (Feb. 20, 2011, 4:00 AM), [http://host.madison.com/news/local/govt-and-politics/report-public-employees-make-less-including-benefits-than-private-workers/article\\_d4093848-3c92-11e0-ac18-001cc4c03286.htm](http://host.madison.com/news/local/govt-and-politics/report-public-employees-make-less-including-benefits-than-private-workers/article_d4093848-3c92-11e0-ac18-001cc4c03286.htm); see also Jeffrey Keefe, *Are Public Employees Overpaid?*, 37 LAB. STUD. J. 104, 117 (2012); Joseph Slater & Elijah Welenc, *Are Public-Sector Employees “Overpaid” Relative to Private-Sector Employees? An Overview of the Studies*, 52 WASHBURN L.J. 533, 536 (2013).

<sup>17</sup> See Ruben J. Garcia, *Labor’s Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 317 (2006).

<sup>18</sup> Labor Organizations were the fourth highest contributors to state political parties, donating \$32,973,081 of the \$369,641,776 total contributions. Public Sector Unions were at the top of the list of the “Top-Contributing Industries To State Party Committees,” donating \$19,528,465 of the total \$83,436,305. *An Overview of State Campaigns, 2007-2008: Financing State Political Parties*, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org/press/ReportView.phtml?r=420&ext=6#Who%20Gives%20to%20the%20Political%20Parties> (last visited Feb. 6, 2014). AFSCME ranks as the #2 “Heavy Hitter” donating a total of \$60,989,604 between 1989 and 2012 and donating \$2,899,099 respectively to 2008 elections. AFT ranked as the #13 “Heavy Hitter” donating a total of \$37,399,425 between 1989 and 2012 and donating \$3,029,325 to 2008 elections. *Top All-Time Donors, 1989-2012*, OPENSECRETS.ORG, <http://www.opensecrets.org/orgs/list.php> (last visited Feb. 6, 2014).

a “right to work” law in both the public and private sectors, making it illegal for unions to charge any dues to employees who do not join the union, even though the union represents the employees in the workplace.<sup>19</sup>

The fact that many of these initiatives have taken place in the historic cradle of the labor movement (Michigan, Wisconsin, Ohio) only highlights the extra burden that public employees face: the need to influence their conditions of work directly through political contributions to their employers. Ironically, recent Supreme Court decisions on state campaign finance law have made it more difficult for public employee organizations to be politically active as well.<sup>20</sup>

For public employees, the problem is that the same institutions that regulate their working conditions are also their employers. While public employees have made strides in various ways, they are always subject to the willingness of public entities to grant or expand rights. As it is, many public employees do not have the right to strike, and in many states they do not have the right to unionize.<sup>21</sup> Although they can often negotiate wages and benefits that are more favorable to private sector employees, their bargaining power is also reduced by limits on the right to strike.<sup>22</sup> Data also indicates that they often trade salary increases for more generous health and pension packages.<sup>23</sup> In the end, we must recall that the same entity that signs their paychecks also has the ability to legislate their working conditions. Thus, they are bargaining on two fronts—one at the bargaining table and another in the legislature. This dissipates their resources and leads them to trade away rights for higher wages and more generous retirements.

Some public employees do not even have the opportunity to bargain. There have been efforts to make the lack of collective bargaining an international issue, such as the complaints filed by the American Federation of Government Employees (AFGE) about the lack of collective representation at the Transportation Security Administration.<sup>24</sup> In the post-9/11 world, labor rights have taken a backseat to security.<sup>25</sup> After the election of President Obama, TSA employees were allowed to vote on union representation. Nevertheless, there is

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<sup>19</sup> Slater & Welenc, *supra* note 16, at 535–36.

<sup>20</sup> *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 191 (2007); *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 355 (2009); *Knox v. Serv. Emps. Int’l Union*, 132 S. Ct. 2277, 2295–96 (2012).

<sup>21</sup> *See, e.g.*, GA. CODE ANN. § 34-6-24 (2013); N.C. GEN. STAT. § 95-98 (2013); S.C. CODE ANN. § 8-11-83 (2013); TEX. GOV’T CODE ANN. §§ 617.002, 617.003 (West 2013).

<sup>22</sup> JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962*, at 87, 171 (2004).

<sup>23</sup> Verburg, *supra* note 16.

<sup>24</sup> “In 2003, then-TSA Administrator James Loy issued a directive that TSA screeners are prohibited from having collective bargaining rights under the 2001 Aviation and Transportation Security Act.” Karen Rutzick, *UN Office: TSA Screeners Have Collective Bargaining Rights*, GOV’T EXECUTIVE (Nov. 16, 2006), <http://www.govexec.com/management/2006/11/un-office-tsa-screeners-have-collective-bargaining-rights/23159/>.

<sup>25</sup> According to James Loy, “collective bargaining would hinder the national security role that screeners play.” *Id.* “AFGE turned to the UN after several domestic courts ruled against it. In 2004, the Federal Labor Relations Authority refused the union’s petitions, and the U.S. Court of Appeals for the District of Columbia ruled that it did not have jurisdiction to decide the case.” *Id.*

a segment of the population that continues to see unionization as inimical to the proper functioning of government, and, in the case of security workers, a threat to safety. While these concerns should not affect the ability of public employees to participate in politics, they permeate the surface in several Supreme Court cases cutting back on the constitutional rights of public employees.

A prime example of the differential treatment that public sector workers face is the wholesale exclusion of government workers from the coverage of the National Labor Relations Act (NLRA). The NLRA applies only to private sector workplaces and explicitly exempts states and local governments from their coverage.<sup>26</sup> This has forced public employees in various states to get their own bargaining statutes, in some respects better than the NLRA, but more often than not, patterned explicitly on the federal law. In some states, there is no law at all.<sup>27</sup> Thus, the answer of letting a thousand flowers bloom in the states has led to differential protection depending on the state's view of public employee rights.

Public employees generally are better organized politically than many other workers. There have been a number of instances in which they have been able to win relatively generous wage and benefit packages. In California cities such as San Bernardino and Vallejo, public employees were able to negotiate wage and benefit packages that some argued contributed to the financial distress of those cities.<sup>28</sup> State workers in California are also routinely derided for

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<sup>26</sup> 29 U.S.C. § 152(2) (2012) (definition of “employer”).

<sup>27</sup> We estimate that about 32 million workers currently do not have any collective bargaining rights. These workers include over 25 million private sector workers—8.5 million independent contractors, 5.5 million employees of certain small businesses, 10.2 million managers and supervisors (including 8.6 million first-line supervisors), 532,000 domestic workers, and 357,000 agricultural workers. Those groups without rights also include over 6.9 million federal, state, and local government employees. In general, these workers do not have bargaining rights under any federal or state statute.

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It is likely that some of these workers, particularly the employees of certain small businesses, have bargaining rights under state labor relations statutes. Eighteen states have state labor relations acts or “little Wagner Acts,” modeled after the federal NLRA, and although many exclude the same groups as under the NLRA, some do not expressly exclude agricultural workers, supervisors, or independent contractors and only one excludes employees of small businesses. . . . Except for agricultural workers, we did not have sufficient information to determine the number of workers affected by these statutes.

U.S. GEN. ACCOUNTING OFFICE, GAO-02-835, *COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS* 10 (2002), available at <http://www.gao.gov/new.items/d02835.pdf> (footnote omitted).

<sup>28</sup> The city of Vallejo, California, declared bankruptcy in 2008, largely because the payroll for police, firefighters, and their pensions and overtime consumed three-fourths of the budget. City employees could retire at 55 with 81 percent of their last year's salary guaranteed as pensions. In bankruptcy negotiations, however, Vallejo officials declined to reduce current pensions.

Barnes, *supra* note 15. In July 2012, the City of San Bernardino filed for bankruptcy. Tim Reid, *Bankrupt San Bernardino in Showdown with California Pension Fund Over Arrears*, REUTERS (Oct. 29, 2013, 8:40 PM), <http://www.reuters.com/article/2013/10/30/us-usa-municipality-sanber-idUSBRE99T01020131030>. In 2012, the City of North Las Vegas declared a fiscal emergency to avoid collective bargaining obligations. See Kelly Nolan, *Emergency Invoked to Cut Labor Cost*, WALL ST. J., June 29, 2012, at A2.

their disproportionate political power.<sup>29</sup>

The term “political power” is relative, just as the term “generous wages” is relative. With much of the private sector laboring under diminished wages and benefits, public sector benefits look good to many workers. Yet, the wages and benefits of public sector workers on the whole are still lower than many comparable industries,<sup>30</sup> and pensions are constantly under threat with the difficulty of raising taxes in many cities and states.

This leads to the political marginality of public sector employees. Although public employees are not subject to the cycles of the marketplace, they are instead subject to the political will for raising revenue. In many states, it has been very difficult to pass any revenue increases either at the state or local level. As a result of this cash shortage, many teachers and other public school employees face regular layoff notices.<sup>31</sup> They generally use their political capital to save their jobs. Many public workers understandably do not prioritize basic legal protections over wage and benefit increases.

While it is true that public employees are politically strong in some states, notably in California and New York, in most states public employees are diffuse and do not have the same political power.<sup>32</sup> While in most states prison guards and other correctional officers are well-organized, other public employees do not have the same political muscle.<sup>33</sup> Although approximately 35 per-

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<sup>29</sup> Editorial, *Level the Playing Field; Hollingsworth's Benefits Reform Plan Not Nearly Sweeping Enough*, SAN DIEGO UNION-TRIB., Apr. 30, 2010, at B6 (“Many Californians have figured out that public employee compensation is essentially a function of political power – and they don’t like it at all.”).

<sup>30</sup> “Data from the U.S. Census Bureau similarly show that in 2007 the average annual salary of a California state government employee was \$53,958, nearly 32 percent greater than the average private sector worker (\$40,991).” Adam Summers, *Comparing Private Sector and Government Worker Salaries*, REASON FOUND. (May 10, 2010), <http://reason.org/studies/show/public-sector-private-sector-salary>. “But according to a new study published by the Center for State & Local Government Excellence and the National Institute on Retirement Security, these aggregate compensation comparisons are misleading.” *Id.* “[A]fter attempting to control for such variables, [the study found] that state and local government workers actually earn less than their private sector counterparts.” *Id.* University of Wisconsin-Milwaukee economics professors Keith A. Bender and John S. Heywood point out that:

[S]tate government workers earn an average of 11.4 percent less than private-sector workers of similar education and work experience and local government workers earn 12.0 percent less. Due to the greater benefits received by public sector workers, the gap narrows when these benefits are factored in, to 6.8 percent and 7.4 percent, respectively.

*Id.*

<sup>31</sup> California has “cut education funding by \$17 billion over the past two years, resulting in the layoff of 16,000 teachers last year. Another 26,000 teachers have received layoff notices this year.” Christina Hoag, *Gov. Backs Law to Halt Layoffs of Junior Teachers*, U-T SAN DIEGO (Apr. 20, 2010, 2:15 PM), <http://www.utsandiego.com/news/2010/apr/20/gov-backs-law-to-halt-layoffs-of-junior-teachers/>.

<sup>32</sup> In North Carolina, for example, public employees do not have the right to organize and bargain collectively. N.C. GEN. STAT. § 95-98 (2013).

<sup>33</sup> In California, the state’s prison guards provide a good example of the dissatisfaction with public-sector compensation. According to a February 2008 Legislative Analyst’s Office report, correctional peace officer costs make up the largest share of General Fund personnel expenses. The approximately 30,000 state correctional peace officers make up nearly 10 percent of all state employees.

cent of public employees nationwide are in unions, that still leaves almost two-thirds remaining without bargaining representation.<sup>34</sup>

While there is still less animus in the public sector against union organizing, retaliation against public employees for trying to organize a union does exist, particularly in areas that are more rural or more politically conservative. There have been several reported cases of antiunion discrimination in the public sector. The Supreme Court long ago held that retaliating against someone for forming a union is a violation of the freedom of assembly in the First Amendment.<sup>35</sup> Most claims of antiunion bias will be dealt with through state administrative agencies, if such agencies exist.<sup>36</sup>

While most employers in the public sector do not oppose unionization of employees, there are exceptions. In one case I worked on as a lawyer in a small city in California's Inland Region, I represented an employee who had been demoted when he participated in the formation of the union. We filed First Amendment and Due Process claims on his behalf, alleging that his demotion was in retaliation for his union activities. Although the case eventually settled, we reasserted the constitutional dimensions of the right to associate, which unquestionably apply to public sector employees. In many small cities and rural areas, then, local governments can be hostile to unionization. They may also be reticent to provide statutory protections.

Thus, there is a need for constitutional protections for many public sector employees. The political power of marginal workers has been clipped by various court decisions, largely on the theory that the rights of workers as individuals trump their rights as part of a collective entity.<sup>37</sup> This separation of the "union's rights" and the "individual's rights" is one of the main techniques that

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Summers, *supra* note 30. The report "noted that the California Department of Corrections and Rehabilitation (CDCR) boasts that the job has been called the greatest entry level job in California—and for good reason, and that [a]long with the great salary, our peace officers earn a retirement package you just can't find in private industry." *Id.* (internal quotations marks omitted). "Perhaps this, along with the CDCR's inability to control sick leave and overtime benefits, is why the state receives roughly 130,000 applications to become a prison guard each year." *Id.*

<sup>34</sup> In 2009, 16.9 million wage and salary workers were represented by a union. This group includes both union members (15.3 million) and workers who report no union affiliation but whose jobs are covered by a union contract (1.6 million). . . . Government employees (781,000) comprised nearly half of the 1.6 million workers who were covered by a union contract, but not members of a union.

News Release, Bureau of Labor Statistics, U.S. Dep't of Labor Statistics, Union Members – 2009, (Jan. 22, 2010), *available at* [http://www.bls.gov/news.release/archives/union2\\_01222010.pdf](http://www.bls.gov/news.release/archives/union2_01222010.pdf). In addition,

Nearly an estimated 90 million private sector workers had collective bargaining rights, about 78 percent of all persons who worked for private employers. . . . The percentage of covered private sector workers varied by industry, with certain industries having coverage below 70 percent—agriculture/forestry, construction, and finance/real estate. Coverage also varied between the private and public sectors, with overall coverage among government workers (about 66 percent of 20 million workers) markedly lower than that among all private sector workers.

U.S. GEN. ACCOUNTING OFFICE, *supra* note 27, at 6.

<sup>35</sup> *Thomas v. Collins*, 323 U.S. 516, 518 (1945); *see also* *McLaughlin v. Tilendis*, 398 F.2d 287, 288–89, 291 (7th Cir. 1968).

<sup>36</sup> These include the Public Employee Relations Boards in many states.

<sup>37</sup> Statutes also clip political power.



employers use to dissuade employees from joining unions. The idea of the union merely as an autonomous organization made up of its members gets lost in this rhetoric. In several recent cases, the ability of the union to further its political goals and keep the integrity of its association has been compromised by recent court decisions, such as those which seem to interfere with the ability of unions to communicate with their members and the process by which democratic participation can take place.<sup>38</sup>

It is further important to remember that, for many years, public employees had no collective bargaining rights in the United States. Even after winning many rights by statute, public employees have had to deal with changes brought about by 9/11 and the Tea Party backlash after the first election of President Obama. While there are certain democratic disadvantages faced by public employees, obviously, they have worked through the political system in various ways to overcome that disadvantage. In the end, better workplace protection for public employees will come not only through the legislative process, but also through a new attitude toward workplace protections that are grounded in a human rights dialogue of fundamental labor freedom. Part of the problem is that international human rights law is seen to have little relevance to public employees. This must change if public sector employees are to be better protected. As seen in *Garcetti* and *City of Ontario v. Quon*, the Supreme Court has also curtailed the constitutional speech and privacy rights of nonunion public employees as well.

Despite cases like *Quon*, public sector workers are often viewed as the most protected in society. New data shows that most United States union members today are working for the government.<sup>39</sup> This high level of unionization means that workers in the public sector are generally more likely to have defined benefit pensions and job protections.<sup>40</sup> While the rate of public sector unionization is indeed higher than most industries, we must remember that not

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[T]he Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) imposed broad restrictions on the financial affairs of trade unions and exalted individual rights over collective union rights by requiring secret ballot employee votes before industrial action could be undertaken. They are surprised that New Labour has done little to change these Conservative Party restrictions on union autonomy. The authors assert that these restrictions may contravene the European Social Charter and ILO conventions on worker rights.

Charles B. Craver, *Labor and Employment Law*, 55 INDUS. & LAB. REL. REV. 548, 548 (2002) (reviewing TONIA NOVITZ & PAUL SKIDMORE, FAIRNES AT WORK: A CRITICAL ANALYSIS OF THE EMPLOYMENT RELATIONS ACT OF 1999 AND ITS TREATMENT OF COLLECTIVE RIGHTS (2001)).

<sup>38</sup> *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009).

<sup>39</sup> See Steven Greenhouse, *Most U.S. Union Members Are Working for the Government, New Data Shows*, N.Y. TIMES, Jan. 23, 2010, at B1. Data from 2009 shows that “[m]ore public sector employees (7.9 million) belonged to a union than did private sector employees (7.4 million), despite there being [five] times more wage and salary workers in the private sector.” BUREAU OF LABOR STATISTICS, *supra* note 34, at 1; *Unions Suffer Steep Decline in Membership*, FOX NEWS (Jan. 23, 2013), <http://www.foxnews.com/politics/2013/01/23/unions-suffer-steep-decline-in-membership/> (stating that for the first time in history, 51 percent of all union members work for the government on some level – county, state or federal).

<sup>40</sup> Barnes, *supra* note 15 (“According to the U.S. Bureau of Labor Statistics, state and local government salaries are 34 percent higher than those for private-sector jobs. . . . Benefits, 70

all public sector workers are unionized.<sup>41</sup> Moreover, while the Constitution applies to government employees, as the *Quon* case shows, those rights often apply unevenly.<sup>42</sup>

The lack of free speech rights for public employees, if it fits into their official duties, is yet another way that public employment is looking more like private sector employment. While the lower courts are still sorting out the official duties exception, the record of public employee success is decidedly mixed.<sup>43</sup>

In Wisconsin, government employees lost the right to bargain collectively in the winter of 2011, even though Wisconsin was the first state to *have* a collective bargaining law in 1959.<sup>44</sup> Governor Scott Walker came into office in January 2011 and promptly set about to repeal public sector collective bargaining that he argued was “bankrupting the state.”<sup>45</sup> Regardless of the truth of that claim, Governor Walker’s election effort was heavily funded by Charles and David Koch, whose foundation was a major supporter of Scott Walker’s election. The successful effort to keep Walker in office was in the face of a June 2012 recall, which was heavily funded by organized labor. In the end, the forces supporting the recall were outspent seven to one.<sup>46</sup>

percent higher for these workers, are the real rub. And benefits for government retirees are the most flagrant.”). Barnes notes that:

[S]tate workers in New York can retire at 55 with guaranteed benefits to which they contribute only in their first 10 years of work. They pay no state income tax on their pensions, and overtime is counted in computing the size of pensions. “Compared with the average New York worker, state and local government employees receive the gold standard of pensions,” the *Syracuse Post-Standard* said last year.

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In California, 9,111 retired government workers have pensions of more than \$100,000. One retiree draws an annual pension of \$509,664. Among retired teachers, 3,065 receive more than \$100,000. One gets \$285,460. Pensions for retired state workers and teachers will rise 2 percent this year, though Social Security recipients aren’t getting any cost-of-living increase.

*Id.* For some, these numbers are alarming. “Senate Minority Leader Dennis Hollingsworth, the Murrieta Republican whose district includes all of northeast and much of east San Diego County, deserves credit for directing tackling retirement benefits reform.” *Level the Playing Field*, *supra* note 29.

<sup>41</sup> “In 2009, 16.9 million wage and salary workers were represented by a union. This group includes both union members (15.3 million) and workers who report no union affiliation but whose jobs are covered by a union contract (1.6 million).” BUREAU OF LABOR STATISTICS, *supra* note 34, at 2.

<sup>42</sup> *City of Ontario v. Quon*, 130 S. Ct. 2619, 2624, 2630, 2633 (2010).

<sup>43</sup> *Compare* *Foley v. Town of Randolph*, 598 F.3d 1, 7, 9 (1st Cir. 2010) (holding that the fire chief’s speech was part of official duties and not protected by the First Amendment after *Garcetti*), *with* *Andrew v. Clark*, 561 F.3d 261, 263 (4th Cir. 2009) (holding that the district court erred in dismissing a city police commander’s First Amendment claim).

<sup>44</sup> Christian Schneider, *It’s Working in Walker’s Wisconsin*, 22 CITY J., no. 1, 2012, *available* at [http://city-journal.org/2012/22\\_1\\_scott-walker.html](http://city-journal.org/2012/22_1_scott-walker.html).

<sup>45</sup> Jonathan S. Tobin, *Scott Walker and the Fight for the Center*, COMMENT. MAG. (Nov. 25, 2013, 6:30 PM), <http://www.commentarymagazine.com/2013/11/25/scott-walker-and-the-fight-for-the-center-chris-christie-2016/>; *see also* Connor Donegan, *Disciplining Labor, Dismantling Democracy: Rebellion and Control in Wisconsin*, in WISCONSIN UPRISING: LABOR FIGHTS BACK 29, 31 (Michael D. Yates ed., 2012).

<sup>46</sup> Rachel Weiner & Felicia Sonmez, *In Wisconsin Recall Vote, It’s TV Ad Spending vs. Boots on the Ground*, WASH. POST (June 4, 2012), <http://www.washingtonpost.com/politics>

## II. THE SUPREME COURT'S POLITICAL PARTICIPATION CASES

Aside from cases involving constitutional rights in the workplace, there have been several Supreme Court decisions that make it more difficult for unionized public employees to participate in the political process. In order to change the conditions of their employment, public employees need to organize politically. But the ability to organize politically is limited by several constraints. In the federal sector, for example, the Hatch Act prohibits electioneering on the job by public employees.<sup>47</sup> State and local jurisdictions have similar laws for legitimate reasons. The problem lies in the extent to which the laws might be over-enforced and chill citizenship rights at work.

Public employee unions must give dissenters the right to opt out of any political activities that are not related to grievance administration and collective bargaining.<sup>48</sup> This prevents the compulsory subsidy of union activities that the employee may not agree with, but also prevents the “free rider” problem of employees receiving the benefits of collective bargaining while not paying for them. Obviously, the procedure by which dissenters are afforded their rights matters a great deal to the constitutionality of any particular agency fee arrangement.

The starting point of these cases is *Chicago Teachers Union v. Hudson*,<sup>49</sup> a 1986 United States Supreme Court case that first applied the principles of *Machinists v. Street*<sup>50</sup> to public employment. The Court in *Street* held that a private sector union covered by the Railway Labor Act must give employees in the union's bargaining unit the right to opt out of union dues not germane to collective bargaining and grievance administration.<sup>51</sup> The Court held that objecting members could get a portion of their dues back after paying the equivalent of full dues. This principle was transferred to the NLRA in *Communications Workers v. Beck*.<sup>52</sup> Although the courts in *Beck* and *Street* considered the constitutional implications of agency fee arrangements, the courts were able to avoid a ruling on constitutional law by finding that the use of dues for political purposes with which the employees disagreed would violate the union's inherent duty of fair representation. Thus, in the private sector, the dissenters would have a claim against the union either in federal court or as a charge with the National Labor Relations Board.

In the public sector, the constitutional implications of the agency shop were explicated in *Hudson*.<sup>53</sup> In that case, the Supreme Court found that it was not compelled speech and association for the Chicago Teachers Union to charge nonmembers an equivalent amount of dues as members and then pro-

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/in-wisconsin-recall-vote-its-tv-ad-spending-vs-boots-on-the-ground/2012/06/04/gJQAicjXEV\_story.html.

<sup>47</sup> 5 U.S.C. §§ 1502, 7323 (2012). The constitutionality of the Hatch Act was upheld in *United Public Workers v. Mitchell*. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 102–03 (1947).

<sup>48</sup> *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304–05 (1986).

<sup>49</sup> *Id.* at 301, 306.

<sup>50</sup> *International Ass'n of Machinists v. St.*, 367 U.S. 740 (1961).

<sup>51</sup> *Id.* at 744, 770, 774–75.

<sup>52</sup> *Communications Workers of America v. Beck*, 487 U.S. 735, 760, 762–63 (1988).

<sup>53</sup> *Hudson*, 475 U.S. at 302–03.

vide a refund to individuals who did not want to support the union's political efforts. The Court made clear that public employee unions were not constitutionally required to have an opt-in system. "[D]issent is not to be presumed—it must affirmatively be made known to the union . . . ."<sup>54</sup> Although section 14(b) of the Taft Hartley Act allowed states to go to so-called "right to work" regimes, federal law does not dictate what laws will govern state employees. Nevertheless, many of the states' public sector laws track their private sector law. Nevada, for example, is a right to work state in the private and public sectors.<sup>55</sup>

In *Lehnert v. Ferris Faculty Association*, the Supreme Court reiterated the general presumption of the *Hudson* case.<sup>56</sup> In *Lehnert*, the Court further refined what was chargeable and what was not. The Court recognized that the process of determining what is "germane" would be a case-by-case determination in order to ensure that those who were in the union's bargaining unit paid their fair share of the cost of grievance administration and collective bargaining.<sup>57</sup> Meanwhile, in the private sector, the Supreme Court in *Beck* applied the free-rider principles to the private sector and held that, under the union shop provision of the NLRA, bargaining unit employees have the right to a rebate of dues that are not germane to collective bargaining.<sup>58</sup>

The underlying rationale for the constitutionality of the opt-out systems in *Street*, *Beck*, and *Lehnert* is the classic free-rider problem. If unions are required by the principle of exclusive representation to represent all employees in the bargaining unit, and workers are free to decide not to become members of the union, then nonmembers can "free-ride" any benefits the union obtains from the employer if they do not pay full member dues. Thus, the union charges all employees in the bargaining units full member dues, and nonmembers can apply for a rebate of any portion of dues that is not attributable to collective bargaining and grievance administration, based on an annual analysis. The opt-in system balances the need to fund union activities with the employee's right to receive funds that are not related to collective bargaining. If the union is required to seek reimbursement for collective bargaining expenses after the fact, they will be hobbled from effectively representing the employees in the bargaining unit, and it will be more likely that their bargaining power will be lessened. Much of the recent research in behavioral economics shows that it is much easier to automatically enroll employees in health or savings plans for their own benefit than to expect them to do so on their own.<sup>59</sup>

The free-rider problem is well known in economics. If unions do not have the financial resources to bargain better contracts (by using professionals and experts like accountants, attorneys, and full-time union staff), they will be una-

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<sup>54</sup> *Id.* at 306 n.16 (internal quotations omitted).

<sup>55</sup> NEV. REV. STAT. §§ 613.230–300 (2013).

<sup>56</sup> *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991).

<sup>57</sup> *Id.* at 519.

<sup>58</sup> *Beck*, 487 U.S. at 762–63.

<sup>59</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 111 (rev. & expanded ed. 2009); see also Jeff Schwartz, *Reconceptualizing Investment Management Regulation*, 16 GEO. MASON L. REV. 521, 523 (2009) (describing a libertarian-paternalist approach to investment regulation).

ble to bargain decent contracts. If wages and benefits do not improve, then people will lose faith in the union's ability to win them better wages, benefits, and protections.

Even political expenditures, which are decidedly not chargeable to nonmembers either by private or public sector unions, can have an impact at the bargaining table. The paradigmatic example is union lobbying or political action for obtaining a minimum wage increase, which might allow the unions to focus on other priorities at the bargaining table other than wages. Even though there is a connection between these two spheres, particularly for public sector workers whose employer *is* the government, unions must have segregated voluntary political action funds to make political contributions. In other words, for direct contributions to politicians, an "opt-in" system is required.

As stated above, the system that allowed public sector unions to constitutionally require an opt-in dues system was upheld in decisions going back to the early 1960s. In several cases discussed below, which were decided since the dawn of Chief Justice John Roberts's tenure (October 2005), the Supreme Court has moved closer and closer to declaring the opt-out system unconstitutional. In all of these cases, the Court ignores or discounts the behavioral implications of choosing an opt-in or opt-out system. As economists and social psychologists have shown, it is hard to get people to do things even if they agree with them or know what's good for them. The Court also misconstrues the union dues of nonmembers as an "interest free loan" to the union, when in fact the opposite is true: political action by the union is a long-term investment in improved wages and benefits for all employees that is never fully recouped from nonmembers.

Even before the high-profile legislative actions in 2010 and 2011, several states moved to change the typical opt-out relationship that was held to be constitutional in *Hudson*. In 1992, a voter approved initiative in the State of Washington required unions to get the permission of union members before money was spent on political causes. In 2001, the State of Washington sought to enforce the law and imposed penalties against the Washington Education Association, the statewide teacher's association. The union appealed the fines to the Washington Supreme Court, which found the following passage in *Hudson* supported the conclusion that the law was unconstitutional: "[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."<sup>60</sup> The Supreme Court reversed, holding that the Washington Supreme Court interpreted that provision beyond its proper scope. Even though the Court found the opt-out scheme in *Hudson* constitutional, it did not follow that the opt-in statute in Washington was unconstitutional.<sup>61</sup>

In the 2009 decision *Ysursa v. Pocatello Education Association*, the United States Supreme Court faced an Idaho state law that prohibited payroll deductions from state employee checks for political purposes.<sup>62</sup> Although the statute seemed to be an even-handed way to prevent the state processes from deducting wages for political purposes, the unions argued that the law would

<sup>60</sup> *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007) (alteration in original) (quoting *Hudson*, 475 U.S. at 306 n.16).

<sup>61</sup> *Id.* at 191.

<sup>62</sup> *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009).

primarily burden the exercise of the speech of employees and their unions. The Supreme Court did not agree. In the opinion, authored by Chief Justice Roberts, the Court held that there was no First Amendment interest in having government processes used for the withholding of partisan political funds. *Ysursa* also overlooks the special role that government has vis-a-vis the collective bargaining representative. In *Perry Education Association v. Perry Local Educators Association*, the Supreme Court held that the duly elected collective bargaining representative of the teachers in a school district had a unique right to the mailboxes as the exclusive bargaining representative.<sup>63</sup>

As discussed above, although government employees are exempt from the provisions of the NLRA that would apply in the private sector, the NLRA sought to balance the need to deal with free riders against the ability of the union to engage in representational activities. Although the language of the statute requires “membership” in a labor organization if a valid union shop agreement exists, the Supreme Court has held that membership need not entail full membership but the financial core of membership—the cost of grievance administration and collective bargaining.<sup>64</sup>

Although statutes governing the rights of dissenters differ from state to state, efforts to require an affirmative opt-in are constitutionally suspect, even after the results in *Davenport* and *Ysursa*. First, there is an argument that was rejected in the *Ysursa* case, but might be present in other cases, that the government is essentially singling out one type of speech for content regulation. Indeed, in *Ysursa*, Justices Stevens and Souter believe there was enough of such risk that each wrote a dissenting opinion. Justice Stevens wrote, “it is clear to me that the [payroll] restriction was intended to make it more difficult for unions to finance political speech . . . .”<sup>65</sup> Second, the legislation at issue in *Davenport* and *Ysursa* interferes with the internal workings of unions in a way that may inhibit their freedom of association rights. As discussed below, however, other cases of the Court have made that part of the First Amendment, the right of assembly and association, of little use to public sector workers.

The overall results of these cases make it more difficult for public employee unions to organize politically to change legislation governing their working conditions. The fact that the rights of government employees to blow the whistle and to freedom of association have been limited in other cases make the diminished political power of unions all the more damaging to citizenship rights at work.

In June 2012, the Court decided *Knox v. Service Employees International Union*, where in dicta, the majority stated that an opt-out system of dues for public employee nonmembers might raise serious constitutional questions.<sup>66</sup> The narrow question before the Court was whether the union should have to send out a new “Hudson” notice giving nonmembers the opportunity to ques-

<sup>63</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55 (1983).

<sup>64</sup> 29 U.S.C. § 158(b) (2012) (allowing private sector unions to have agency shop agreements that employees in the bargaining unit can then opt-out of if they do not wish to finance activities that are unrelated to the union’s core responsibilities of grievance administration and collective bargaining).

<sup>65</sup> *Ysursa*, 555 U.S. at 370 (Stevens, J., dissenting).

<sup>66</sup> *Knox v. Serv. Emps. Int’l Union*, 132 S. Ct. 2277, 2290 (2012).

tion the amount of a new dues increase, indisputably for political activity, as it was named a “Political Fight-Back Fund.” Despite the fact that the union issued a new notice and tried to argue that the case was therefore moot, the Court decided 5-4 that the union had already violated the Constitution by failing to issue the notice and give nonmembers the right to opt-in to the “Fight-Back Fund.”<sup>67</sup>

Numerous decisions of the Supreme Court have already provided the framework by which dissenters can opt-out of their union’s political goals. As in *Davenport* and *Ysursa*, the *Knox* case centers upon where burdens should be placed and whether or not the Court or legislatures or voters should decide how unions should charge dues. A decision that opt-in systems are unconstitutional would also be at odds with the will of state voters in some instances. Voters in California on two different occasions rejected an “opt-in” system for state employee union dues.

There is also a significant advantage with the use of money. Most analysts agree that the *Citizens United v. Federal Election Commission*<sup>68</sup> ruling has contributed to a torrent of money into the political system as never before.<sup>69</sup> We also see an imbalance in the political system. Since the Supreme Court decided *Citizens United* in 2010, the political system has been dominated by “super-PACs,” which spend large amounts independently of candidates. Although most of the money used to support Democrats is from unions, they are still outspent fifteen to one.<sup>70</sup>

Those wishing to limit the rights of employees to bargain are well-funded. There are organizations such as the American Legislative Exchange Council (ALEC) that were instrumental in crafting the proposals to gut collective bargaining. These efforts, well-funded by the Koch foundation, take place on an uneven playing field where corporate interests dominate.<sup>71</sup> Although the Koch brothers’ interests are largely private, they are ideologically opposed to a vibrant public sector. Thus, they funded the drive to end collective bargaining in Wisconsin.<sup>72</sup>

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<sup>67</sup> *Id.* at 2285, 2296.

<sup>68</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>69</sup> See Richard L. Hasen, *The Numbers Don’t Lie: If You Aren’t Sure Citizens United Gave Rise to the Super PACs, Just Follow the Money*, SLATE, [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_campaign\\_spending\\_.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html) (last updated Mar. 12, 2012); Editorial, *The Big Money Behind State Laws*, N.Y. TIMES, Feb. 13, 2012, at A22.

<sup>70</sup> *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, OPENSECRETS.ORG <http://www.opensecrets.org/overview/blbio.php> (last visited Feb. 11, 2014).

<sup>71</sup> See Jane Mayer, *Covert Operations*, NEW YORKER (Aug. 30, 2010), [http://www.newyorker.com/reporting/2010/08/30/100830fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2010/08/30/100830fa_fact_mayer).

<sup>72</sup> Andy Kroll, *Wisconsin Gov. Scott Walker: Funded by the Koch Bros.*, MOTHER JONES (Feb. 18, 2011, 9:12 AM), <http://www.motherjones.com/mojo/2011/02/wisconsin-scott-walker-koch-brothers>.

### III. FREEDOM OF ASSOCIATION CLAIMS AFTER *BOROUGH OF DURYEA V. GUARNIERI*

Thus far, I have discussed the Speech Clause of the First Amendment. But the First Amendment also contains a protection for “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>73</sup> In the 2011 decision *Borough of Duryea v. Guarnieri*, the Supreme Court addressed the issue of whether the Petition Clause of the First Amendment requires the petition to be on a matter of public concern, as is required in the first step of the balancing test of *Pickering v. Board of Education*.<sup>74</sup>

In *Guarnieri*, the plaintiff, Chief Guarnieri, was the police chief who was dismissed from his job. He filed a grievance against his employer under the union contract and obtained reinstatement to his job after prevailing in his arbitration. After the arbitrator reinstated him, Chief Guarnieri allegedly suffered retaliation and brought a civil rights action claiming that his grievance was protected under the Petition Clause of the First Amendment, and that the Borough had retaliated against him for his exercise of protected activity. The Third Circuit relied upon its own precedent to find that Chief Guarnieri could state a claim under the First Amendment for retaliation, and the Borough appealed that decision to the Supreme Court. The question before the court was whether or not Chief Guarnieri’s petition was a “matter of public concern” under *Pickering* to allow for a First Amendment retaliation claim.

The Supreme Court reversed the Third Circuit, holding unanimously that the Petition Clause requires a petition of “public concern” and that Chief Guarnieri’s successful grievance did not meet that threshold.<sup>75</sup> Justice Thomas would have further privatized public employee’s speech rights by holding that even when the employee’s petition involves a matter of public concern, the government should not have to entertain it if it would interfere with “the effective and efficient management of [the government’s] internal affairs.”<sup>76</sup> In support of this proposition, Justice Thomas cited to *Garcetti*, discussed supra, and a passage of *Engquist v. Oregon Department of Agriculture*,<sup>77</sup> where the Court stated that “ ‘government has significantly greater lee-way in its dealings with citizen employees than it does when it brings its sovereign power to bear on the citizens at large.’ ”<sup>78</sup> In the end, the Court remanded the case to the lower court to apply the public concern test to Chief Guarnieri’s petition.

Clearly, the *Guarnieri* case will narrow rights under the Petition Clause. But the decision has implications for other rights under the First Amendment. The Supreme Court has held that there is no constitutional right to bargain collectively. To the extent that the right to bargain collectively is seen either as a petition for the redress of grievances or an aspect of freedom of association, it

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<sup>73</sup> U.S. CONST. amend. I.

<sup>74</sup> *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011); see also *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>75</sup> *Guarnieri*, 131 S. Ct. at 2492–93, 2500–01.

<sup>76</sup> *Id.* at 2502 (Thomas, J., concurring).

<sup>77</sup> *Engquist v. Or. Dept. of Agric.*, 553 U.S. 591 (2008).

<sup>78</sup> *Guarnieri*, 131 S. Ct. at 2502 (Thomas, J., concurring) (quoting *Engquist*, 553 U.S. at 600).



will now be subject to the public concern requirement. This will make it more difficult to ever challenge legislation denying the right to collective bargaining. This is because the courts will generally see union claims to bargain collectively as matters of private concern, rather than matters of public concern. The implications of *Duryea* are significant for unions that want to try to engage in constitutional litigation to change the many negative aspects of the decisions to end collective bargaining in the states. There has been a long-standing rule that the right to bargain is not a right protected by the First Amendment. And yet, there has been some limited success in the courts challenging these laws on constitutional grounds.<sup>79</sup>

#### IV. CONCLUSION: RETURNING FULL CITIZENSHIP RIGHTS TO PUBLIC EMPLOYEES

On November 8, 2011, Ohio voters repealed the public sector collective bargaining law championed by Governor John Kasich and fellow Republicans in 2010. Ohio Senate Bill 5 (SB5), passed in 2010, was a radical revamping of the collective bargaining law for Ohio public employees that had been in place for nearly three decades. Public sector unions and their allies utilized Ohio's initiative process to place Issue 2 on the November 2011 ballot, asking the voters: "Should SB5 continue to be law in the State of Ohio?" By a margin of over twenty points, Ohioans said "No" to the overhaul of the state's bargaining law that would have ended collective bargaining for all public employees including police and firefighters, as well as many other significant changes. Many observers viewed the result as a reinvigoration of organized labor in Ohio and perhaps nationally, but that remains to be seen.<sup>80</sup>

The result in Ohio might be a template for greater use of the initiative process by workers to reverse attacks on collective bargaining, but there are several limits on whether it can be an effective strategy. First, the Ohio campaign relied heavily on public safety employees like police and firefighters to appeal to voters' sense of the unfairness of SB5. In other states, such as in Wisconsin, the anti-collective bargaining law was crafted to exempt police and firefighters, which could make it harder for voters to relate to the need for public sector labor law. Secondly, not all states have the initiative process, nor do they all have the recall process. Wisconsin has the recall process, but not the initiative, and in the summer of 2011 two legislators who voted for the repeal of public sector collective bargaining, and one who opposed it, were recalled from office. Although the main proponent of the end of public sector bargaining in Wisconsin was Republican Governor Scott Walker, the unsuccessful recall effort in Spring 2012 makes it clear that the results of any recall will not automatically result in legislation restoring collective bargaining. In the end, that will be part of the legislative process.

Despite the limitations inherent in pursuing litigation, the courts must remain a viable alternative to the initiative, recall, and legislative processes.

<sup>79</sup> See *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 876 (W.D. Wis. 2012), *rev'd in part*, 705 F.3d 640 (7th Cir. 2013).

<sup>80</sup> Andy Kroll, *Bye Bye, SB 5: Anti-Union Law Repealed in Ohio*, MOTHER JONES (Nov. 8, 2011, 7:08 PM), <http://www.motherjones.com/mojo/2011/11/issue-2-sb-5-ohio-repeal>.

The cases discussed above are only the most recent examples in the courts of the devaluation of the citizenship rights of public employees in the workplace. As mentioned earlier, there are continuing efforts to engage in legislative rollback of the freedom of association and the rights to bargain collectively. As I have argued regarding employees in the private sector, there are many workers who do not have the ability to effectively change workplace law to achieve better protection because of their disadvantaged political status.<sup>81</sup> This, I have argued, requires a greater attention to international human rights strategies for immigrant workers and workers of color. Although public employees clearly have the basic right to vote, as well as other rights that noncitizens do not have, the Supreme Court, in several decisions discussed here, makes the exercise of other citizenship rights at work more difficult.

A recent case in the Supreme Court might make it even more difficult for public sector unions throughout the country to exercise workplace citizenship. On January 21, 2014, the Court heard arguments in *Harris v. Quinn*, a case that has the potential to make “right to work” the law of the land for public employees.<sup>82</sup> Homecare workers in Illinois challenged the state’s “Fair Share” statute requiring the homecare workers to pay for the cost of collective bargaining to the union that represents them in negotiations with the state. The Seventh Circuit Court of Court of Appeals held the Illinois statute did not violate the speech and associational rights of the dissenting employees.<sup>83</sup> If the Court agrees with the dissenting employees, it will need to reverse decades of its own precedent (including *Hudson*, *Abood*, and *Lehnher* discussed above) to make “right to work”—being represented by a union without having to pay anything for that representation—constitutionally compelled in the public sector nationwide. This will have quite an impact on the ability of public sector unions to participate politically.

In the end, the denial of citizenship rights is not about the pay or benefits that public employees get, although that is often exaggerated in the media. Instead, this Article has focused on a central paradox of public sector employment: while public sector workers can democratically influence their workplace conditions, the government employers generally determine the level of regulation in the workplace. This stands in contrast to private sector employment, which is largely unregulated by collective bargaining, but heavily regulated by state and federal law mandates.

These dynamics have resulted in a democratic deficit for public employees. Workplace law shows that there are flaws in the system of protection that are not cured by the political process. Cases such as those discussed above show that constitutional rights cannot always be relied upon to cure these flaws. If constitutional or international human rights are to be useful in filling the

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<sup>81</sup> See generally RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION (2012).

<sup>82</sup> *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), cert. granted. (U.S. Oct. 1, 2013) (No. 11-681).

<sup>83</sup> *Id.* at 694.

margins between statutory and constitutional rights, a new attitude toward public employment, and public employees, must take hold among courts, legislators, and the public.