THE ETIOLOGY OF A MALFUNCTION IN DEMOCRATIC PROCESSES

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ABSTRACT

Public unions have enjoyed a strong presence for half a century. Despite political disagreement about the value of public unionism, the organizations have persisted and rather steadily maintained, even as private unions dropped off dramatically. But now, in the second decade of the twenty-first century, and somewhat suddenly, the very existence of public unions is threatened by attempts at wholesale elimination. What changes prompted such finality?

The more acute change is macroeconomic in nature. Public fiscs are struggling to remain balanced during a decline in economic conditions. Given that union salaries and benefits consume a large portion of government budgets—particularly at the municipal level—they have been a natural target of reform.

But there is a more chronic change as well. The strategies public unions use to maintain parameters of success, such as enrollment and compensation, have eroded over time the confidence some have in their positions and very nature. The erosion is at minimum an impediment to the goodwill necessary to productive negotiation and at most an impediment to existence.

The literature thus far focuses on mere analyses of the effects of bargaining laws. It shows what one would expect, namely that laws designed to benefit unions do in fact benefit unions. But nonspecific analyses of raw statutes tell very little of the story behind the erosion of confidence expressed by political groups.

More important are the outcomes sought through judicial interpretation of these laws and the processes by which outcomes are sought. This paper explains such an outcome and process sought by public unions, namely to have judges rule that salaries and benefits can only go up where the right to strike is proscribed. This position has contributed to confidence erosion because it sounds at the margins of democratic means and substance. There are two reasons for this.

First, it utilizes the judiciary and quasi-judicial fora to read additional broadly applicable restrictions into procedural legislation that is on its face complete. Second, it ties the hands of elected officials on a matter according to which they are evaluated primarily. The position is not without justification, but there are more democratic means available to public unions to effect the desired result.

For example, in the case of teachers, unions exert great influence over school committee elections via financial prowess and a deep membership

electorate. They are thus able to express their will on contract negotiations through the electoral process. They need not resort to the judiciary for contractual outcomes.

A case study of this litigation–election dynamic is presented. It is set in Rhode Island. There, a teachers' union took the litigation position and lost, but then saw the replacement of all but one member of the school committee with whom it disagreed about a reduction in salaries and benefits at the time of its contract renewal in 2008 in the depths of recession.

Malfunctions in democratic processes are at times subtle. But subtlety does not limit the scope of consequence. This paper traces the potential origin of one such malfunction and points to a solution.

It doesn't do you much good being a strong man on a sinking ship.

Albert Shanker

I. INTRODUCTION

Given the economic conditions that prevail today, public managers are faced with difficult budgeting decisions. Perhaps none is more difficult to navigate than negotiations over the renewal of public employee union contracts that expire in the midst of economic recession. Public unions have won vested retirement benefits in eras of prosperity that now hamstring governments facing decreasing revenue and budget cuts.

Unfunded post-employment benefit liabilities not only erode present programming options; they also threaten solvency. The fiscal mismanagement and unwillingness to sustain revenue streams that led governmental units to this point are related problems not directly attributable to public unions. But unions, not only unwilling to make concessions but actively pursuing more, apply strategies that push governmental budgets to the brink. Perhaps then an indirect cause of, for example, the unwillingness to sustain revenue streams is in fact partly attributable to the air of illegitimacy now surrounding public unions as a result of such brinksmanship. The small city of Central Falls, Rhode Island has gone bankrupt as a result of some of these problems, and its condition is not unique.[1] Rhode Island and its communities are enduring a particularly acute problem.[2]

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1. *See* Mary Williams Walsh & Katie Zezima, *Small City, Big Debt Problems*, N.Y. TIMES, Aug. 2, 2011, at B1 ("Central Falls got into trouble, above all, by promising its police and firefighters generous retirement benefits *without setting aside enough money to pay for them*. The benefits were often determined by outside arbitrators, who were intent on resolving disputes rather than assessing whether towns could afford their promises.") (emphasis added).

2. While this article was in the publication pipeline, Rhode Island enacted controversial pension reform legislation to alleviate stresses on the system. *See* Rhode Island Retirement Security Act of 2011, 2011 R.I. Pub. Laws ch. 408, (codifed in scattered sections of R.I. GEN. LAWS tit. 8, 16, 23, 28, 36, 45); David Klepper, *Pensions the Latest Political Risk for RI Governor*, HUFFINGTON POST (Oct. 30, 2011), http://www.huffingtonpost.com/huff-wires/20111030/us-gambling-governor/ ("This year's budget was one of the worst . . . . We're facing a very difficult economy. My belief is the status quo is unacceptable here in Rhode Island. Changes have to be made."). Research conducted in 2008 showed that, across the state, locally administered municipal pension benefits were only 45% funded, and that the unfunded portion reached $1.6 billion—this before the market sharply turned. By 2011, those liabilities had reached $2.1 billion, and in 2010 the funding ratio was down below 43%. The unfunded liabilities on other post-employment benefits (OPEBs)—healthcare the most substantial among them—are even higher, now reportedly topping $3 billion across the state. (Statistical data on file with author). The problem is threefold. *First*, the number of retirees drawing benefits is

increasing relative to the number of workers paying for them. *See* Mary Williams Walsh, *The Little State With a Big Mess*, N.Y. TIMES, Oct. 23, 2011, at BU1 ("Efforts to balance the state budget by shrinking the public work force have left Rhode Island with a problem like the one that plagues General Motors: the state has more public-sector retirees than public-sector workers."). Also note that while the fertility rate is above replacement globally, the trend is downward, carrying an array of consequences. The United States is, on average, expected to maintain a fertility rate of replacement (2.1) over the next several years. *See* UNITED NATIONS POPULATION FUND, STATE OF WORLD POPULATION 2011, at 4, 43, 55 (2011), *available at* http://www.unfpa.org/webdav/site/global/shared/documents/publications/2011/EN-SWOP2011-FINAL.pdf (Over the second half of the twentieth century, fertility "dropped by more than half, from about 6.0 to 2.5, partly because of countries' economic growth and development but also because of a complex mix of social and cultural forces and greater access by women to education, income-earning opportunities and sexual and reproductive health services, including modern methods of contraception . . . . In the more developed countries, the average fertility rate is about 1.7 births—below the replacement level of 2.1 births . . . . Worldwide . . . fertility rates have been gradually dropping since the middle of the last century . . . . In Europe, from north to south and east to west, low fertility rates . . . have caused alarm, and some countries have adopted incentive programmes to encourage births of more children. Such policies . . . often come with appeals to families to have more children for the sake of sustaining national economic growth."). The population of Rhode Island is in decline, falling from its peak of 1,071,504 in July 2004 to 1,053,209 in July 2009. It grew only 0.5% between 2000 and 2009, whereas the national average was 9.1% growth. Rhode Island was one of only three states to lose people between 2008 and 2009 (Maine and Michigan being the other two). David Klepper, *Rhode Island has Fastest Population Decline in U.S.*, BOS. GLOBE (Dec. 21, 2011), http://www.boston.com/news/local/rhode_island/articles/2011/12/21/rhode_islands_population_declines_fastest_in_us/. More directly, between 2009 and 2010, active members participating in the state's teachers' retirement program increased less than 1/10 of one percent, whereas retirees and beneficiaries increased by about 2.5%. Certified public school teachers practicing in Rhode Island participate in the state administered Employees' Retirement System of Rhode Island (ERSRI), to which each the state, municipalities and teachers contribute. Municipalities have no responsibility for administering that consolidated plan, but they are required to make their annual contributions. The ERSRI is also seriously underfunded for teachers, dropping 10% year-over-year, due to adjustments in assumptions, to only about 50% as of May 2011. *Second*, healthcare costs far outpacing general inflation were underestimated, and returns on investments were simultaneously overestimated. For example, year-over-year healthcare cost assumptions provided to North Smithfield for the period 2008 to 2015 declined from 11% to 5% while actual year-over-year employer premium costs increased from 5.3% to 9.2% for the period 1999 to 2005, peaking at 13.9% in 2003. On returns, the spread between expected and actual averaged nearly 6% over the last five years for locally administered plans. And *third*, what little revenue *is* left in the public fisc is simply not being used to fund future liabilities. Politicians, eager to please and more eager to remain incumbent, mortgaged the future but failed to pay the bills while revenues declined. It has now become difficult to keep up. A consolidated state municipal pension system—the Municipal Employees' Retirement System, or MERS—requires contributions, but locally administered plans are left to managerial discretion. So, for example, West Warwick saw its pension funding ratio drop from 77% to 44% in just the five years spanning 2001 to 2006. Back to Central Falls, in 2006 it funded only 8% of the annual contribution required to keep up with perpetually accruing pension liabilities. Central Falls' funds are now insolvent. (Statistical data on file with author). Disclosure requirements for post-employment benefits did not include healthcare costs until only recently. *See* GOVERNMENTAL ACCOUNTING STANDARDS BD., STATEMENT NO. 45, ACCOUNTING AND FINANCIAL REPORTING BY EMPLOYERS FOR POSTEMPLOYMENT BENEFITS OTHER THAN PENSIONS (2004) (requiring

The reality of the liabilities now accumulated has brought about an austerity that protects private bondholders.[3] Whether the causes of these liabilities, and the protection of private interests at the expense of the public, are symptomatic of a systemic failure is debatable. That end of the discussion is not taken up here. Rather, what is addressed here is the challenge presented to democratic processes by a legal strategy employed by public unions desperate to hold on to the gains won over decades past.

This article reveals resort to the judicial branch by public unions in Rhode Island to circumvent the vicissitudes of democratically induced salary outcomes. It presents a 2008 case study of a teachers' union which, like other unions before it in other contexts, sought to tie the hands of an elected school board so that salaries and benefits could not be involuntarily reduced. A judicial pronouncement to this effect would read sweeping substantive restrictions into the statutory bargaining relationship. But outcomes like this are the province of the legislature by design.

If the union position were to be fully adopted, it would also interpose an unnecessary impediment to civic accountability because it partially dictates a primary measure by which school boards and teachers are evaluated. School expenditures dominate municipal finance, and payroll for unionized

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OPEBs to be disclosed on an accrual basis, phasing in from 2006 to 2008 depending on tier of fiscal revenue). Thus, unlike the partially funded pension liabilities, that component of debt went largely, if not totally unfunded until then. In 2010, locally administered OPEBs were only 1% funded. When reviewed in 2008, Providence had over $500 million in OPEBs on the books, all of which was completely unfunded at the time. Cranston's OPEB liabilities to public safety officers increased 20% between 2005 and 2006 alone. Statewide, one of the most recent tabulations shows over $9 billion in aggregate state and municipal unfunded pension and OPEB liabilities. This is not only a problem in Rhode Island. The nation over is experiencing an era of underfunding. In 2000, approximately 90% of state pensions were funded at or above 80%. In 2006, that proportion had dropped below 60%. Aggregate funding for state pensions peaked in 2000 at approximately 97%, but had dropped to about 82% by 2006. Like it does in Rhode Island, the national problem reaches municipalities and other post-employment liabilities. As of 2008, the unfunded portion of municipal liabilities on OPEBs well exceed $1 trillion nationwide. In 2008, Detroit, Michigan and Newton, Massachusetts faced OPEB liabilities on the order of $7,000 per capita. (Statistical data on file with the author). Not to be outdone, according to one study Rhode Island may have the highest per capita unfunded pension costs in the nation, placing at somewhere between $10,000 and $20,000 as of late 2009. *See* Robert Novy-Marx & Joshua D. Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1211 (2011).

3. *See* Walsh, *supra* note 2 ("For all the pain [in Rhode Island], one important constituency—Wall Street—seems satisfied enough. To reassure its bond investors, Rhode Island passed a special law this year giving them first dibs on tax revenue. In other words, bondholders will be paid, whatever happens. [The General Treasurer] has at times been accused of selling out ordinary Rhode Islanders to Wall Street interests, but she says hard choices must be made.").

teachers makes up the bulk of those expenditures.[4] The level of pension debt facing certain municipalities elevates the importance of accountability for all financial practices and transactions, including collective bargaining with teachers' unions.

Furthermore, seeking to end-run the legislative processes of a democratic system that has historically functioned well for unions risks delegitimization. It is odd that public unions are the subject of present tense discontented political action when the conditions paving the way to unionism in the early twentieth century—e.g., widening income inequality, maldistribution of productivity gains, and dramatic economic contraction—also hold early in the twenty-first century. Could the present impression that unions have used illegitimate or antidemocratic means, akin to the litigation position explicated here, to sustain a rent-seeking nature be the difference? I suggest that unions maintain resort to democratic processes rather than litigation in the case studied here, and I offer modest constructive criticism at a time when unions face disproportionate backlash.[5] Wholesale proscription of public unionism is unnecessary where tailored reforms can mitigate the kind of polarization that litigation engenders.[6]

The literature on public unionism includes a significant line on the extent to which favorable laws benefit public unions.[7] However, while these works

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4. For example, the total actual 2009–2010 budget for the City of East Providence, Rhode Island was $139,067,966, and school expenditures accounted for $73,192,043 of that, or fully 52%. CITY OF EAST PROVIDENCE, RI, 2011–2012 FINAL BUDGET 2 (2011), *available at* http://www.eastprovidence.com/filestorage/662/684/696/6082/Approved_FY2011-2012_Budget.pdf. The approved East Providence schools budget for FY 2012 allocates approximately 73% of expenditures to salaries and benefits. EAST PROVIDENCE SCH. DEP'T, 2011–2012 BUDGET 5 (2011) *available at* http://www.epschoolsri.com/AboutUs/docs/FY12_ Budget.pdf.

5. *See* Mary Wisniewski, *Factbox: Several States Beyond Wisconsin Mull Union Limits*, REUTERS, Mar. 10, 2011, *available at* http://www.reuters.com/article/2011/03/11/us-usa-unions-states-idUSTRE7295QI20110311.

6. *See* Julie Carr Smyth, *Spotlight on Ohio Vote on Union-Limiting Law*, NBCNEWS.COM (Nov. 5, 2011, 5:54 PM), http://www.msnbc.msn.com/id/45176350/ns/politics-more_politics/t/spotlight-ohio-vote-union-limiting-law/#.UKr6e-Oe-Yk.

7. In his 2011 book, SPECIAL INTEREST, Terry Moe, citing the work of Gregory Saltzman and data collected from the National Right to Work Foundation and the National Center for Education Statistics, argues that the membership of public teacher unions was significantly aided by permissive collective bargaining and agency fee laws. The cited data show that, for example, California adopted a collective bargaining law in 1975, and the proportion of teachers covered by it increased from 8% to 85% between 1975 and 1977. There is a pattern across several jurisdictions with similar effects, like Michigan, where a collective bargaining law was passed in 1965 and teacher coverage increased from 18% in 1964 to 85% in 1966, and Minnesota, where a collective bargaining law was passed in 1971 and teacher coverage increased from 3% in 1970 to 94% in 1975. There is also a pattern of influence showing that collective bargaining laws coupled with the allowance of agency fees increases the proportion of unionization. For example, "[w]ith the exception of New Mexico, such coverage is extremely

present interesting issues, they do not tell the whole story. It is an unacceptable economic and employment milieu that triggers unionism, and the trail of necessary alliances and favorable laws are merely ripples, the period and phase of which are determined by the energy stored in the initial trigger. Public unionism in the United States has been no exception.[8] The next important question is whether the methods by which unionism has gained a foothold, or perhaps more appropriately the methods by which the foothold gained is sustained, are antidemocratic and thus illegitimate. The short answer is that most of them are not. But, given what is explained here (i.e., (1) resort to the judiciary to (2) tie the hands of elected officials by (3) reading sweeping substantive restrictions into an otherwise statutorily defined bargaining relationship despite (4) a democratic process that functions well for unions), there are indications that at least one method may have antidemocratic features.

The specter of illegitimacy threatens unionism. Litigation tactics in other settings, as well as outright manipulations,[9] have cost public unions dearly, sometimes at the hands of teachers' unions in particular.[10] For example, a

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high—between 90 and 100 percent—for all states that have collective bargaining laws *and* allow agency fees. New Mexico is an outlier, at just 59 percent, because it only recently joined this group, having adopted a new collective bargaining law with an agency fee provision in 2003. . . . If we look at the nine states that allow collective bargaining but have no legal framework to promote and sustain it, this conclusion is reinforced: coverage is usually quite low . . . [six states] range from 0 to just 21 percent . . . ." TERRY MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 57 (2011). In her classic paper *How Teachers' Unions Affect Education Production*, Caroline Hoxby similarly argues that school personnel cost increases can be traced to the enactment of such laws. Caroline Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q. J. ECON. 671, 694 (1996) ("The fastest growth in per-pupil spending is in states that are currently passing laws facilitating unionization."). *But see* Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 28 (Princeton Univ., Indus. Relations Section, Working Paper No. 503, 2005), *available at* http://harris.princeton.edu/pubs/pdfs/503.pdf (demonstrating that collective bargaining is associated with a reduction in wages); Michael F. Lovenheim, *The Effect of Teachers' Unions on Education Production: Evidence from Union Election Certifications in Three Midwestern States*, 27 J. LAB. ECON. 525 (2009) (producing findings that contradict Caroline Hoxby's classic work, namely no increase in teacher pay or per-student expenditures or high school drop out rates as a result of unionization in three Midwestern states).

8. *See* Martin R. West, *Bargaining With Authority: The Political Origins of Public-Sector Collective Bargaining* (unpublished paper) (on file with author) (citing lack of respect, working conditions, wages, economic depression, and lack of voice in a growing bureaucracy as some triggers for the onset of public unionism in the United States in the early to mid twentieth century).

9. *See* William K. Rashbaum & Mosi Secret, *Charges for 11 in Disability Fraud Plot at L.I.R.R.*, N.Y. TIMES, Oct. 28, 2011, at A1.

10. Unions have lost a degree of legitimacy with management and labor alike. *See* Stephen Lerner, *On the Contrary: A New Insurgency Can Only Arise Outside the Progressive and Labor Establishment*, NEW LABOR FORUM (Sept. 8, 2011, 11:55 AM), http://newlaborforum.word

great deal of political and actual capital has been spent protecting union teachers from dismissal. The unions famously insist on process to avoid substance, which firstly makes the merits of dismissal matters irrelevant and secondly increases the cost of dismissal to a prohibitive level. In the end, tenure is often not much more than the combination of periodic automatic endorsements and a costly litigation strategy for those whose performance is called into question.[11] The image of public unions has thusly suffered as a result of this method of sustainment.

Sustainment is itself a point of contention. The sustainment of public unions can be measured according to a portfolio of parameters. But membership and wages/benefits are likely to be the two most prominent. There is at least anecdotal evidence showing that public unions have maintained or extended employment numbers despite declines in the populations they serve.[12] And commentary on wages/benefits is the same.[13]

Of course, private sector unionism has declined and public sector unionism has not. In 1979 private sector membership was at about 21%.[14] It

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press.com/2011/09/08/on-the-contrary-a-new-insurgency-can-only-arise-outside-the-progressive-and-labor-establishment (arguing that influential activity to counter current trends in economic policy cannot originate with or be at the direction of unions because they have lost legitimacy with and are distrusted by an erstwhile core constituency).

11. *See* MOE, *supra* note 7, at 186–87 (citing DANIEL WEISBERG ET AL., THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS (2d ed. 2009) and Scott Reeder, *Cost to Fire a Tenured Teacher? More Than $219,000*, SMALL NEWSPAPER GROUP, http://thehiddencostsoftenure.com/stories/?prcss=display&id=295712 (last visited Nov. 28, 2012)).

12. *See* Daniel Disalvo, *The Trouble with Public Sector Unions*, NATIONAL AFFAIRS, Fall 2010, at 11 ("This power of government-workers' unions to increase (and then sustain) levels of employment through the political process helps explain why, for instance, the city of Buffalo, New York, had the same number of public workers in 2006 as it did in 1950—despite having lost half of its population (and thus a significant amount of the demand for public services).").

13. Daniel Disalvo & Fred Siegel, *The New Tammany Hall*, THE WEEKLY STANDARD (Magazine), Oct. 12, 2009, at 20, 23 ("During the Reagan years, the growth in local and state jobs was double the rate of population growth. In the downturn of the early 1990s, the *New York Times* warned that the states faced a 'fiscal calamity.' In 2002, during the next serious downturn, the National Governors Association insisted that the 'states face the most dire fiscal situation since World War II.' But in each case the growth of government and public sector pay packages merely stalled. It resumed as soon as the economy recovered."). Of course, this commentary says nothing of the optimal size of or pay to government, or whether the increases or sustainment were or are necessary to achieve that optimization. It merely notes resistance to declines in pay for public unions during economic downturn, the merit of which is, again, the subject of much debate.

14. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among Private Sector Workers 1973–2011*, UNION MEMBERSHIP AND COVERAGE DATABASE, http://unionstats.gsu.edu/Private%20Sector%20workers.htm (last updated Feb. 4, 2012).

was at about 7% in 2010.[15] Public sector membership in 1979 was at about 37%.[16] It was at about 36% in 2010.[17] Many theories about the institutional and market forces and incentives at work in these numbers are available for consideration, the most prevalent of which decry monopoly.[18]

This article does not aggregate empirical data on wages and benefits in an effort to suggest sustainment of those parameters. In fact, collective bargaining has been shown to negatively impact union wages.[19] Even when the substantive merit of the union position is considered, it is not viewed through a fairness or worth lens, but rather in terms of democratic legitimacy.

The literature on teachers' unions does not speak closely to the technical events transpiring in judicial and quasi-judicial fora, but instead focuses on raw statutes and regulations without application despite an uptick in litigation activity on the issues in which, for example, teachers' unions are heavily invested.[20] The parties to union disputes, and thus the system in which they are essential operators, are not benefiting from nonspecific analysis. Thus, specificity of activity within tribunal authorities is necessary to comprehensively cover these subjects. Here, that kind of analysis is made, taking the form of a case study set in Rhode Island.

The utility of this article is thus to show: (1) the non-necessity of union resort to the judiciary on a point of its interest; (2) the impropriety of union resort to the judiciary on that point; and (3) the true complexity of labor relations and the impact that something as subtle as a litigation position may have on union image, public policy, and democratic processes. The etiology of a malfunction in democratic processes can sometimes be traced fairly. This article attempts to do just that in one such case.

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15. *Id.*
16. *Id.*
17. *Id.*
18. *See* Farber, *supra* note 7.
19. *Id.* at 27 ("[W]ithin states and within type of worker across states, union workers whose employers have a duty to bargain tend to earn 4 to 8 percent less than otherwise similar workers where there is no legal requirement."). This is a finding the author calls "surprising" and "puzzling" without explanation.
20. *See* Sean Cavanagh, *Courthouses Rife With Education Policy Fights*, EDUC. WEEK, Sept. 28, 2011, at 1.

II. THE LAW OF IMPASSE AND IMPLEMENTATION

A. Competing Interests

We begin with the elemental legal environment and the competing positions on it. After a teachers' union contract has expired, the union and the school committee must formally bargain and take any residual disagreements to an arbitration process that operates according to statutory rules.[21] What makes room for the issue addressed in this article is the nonbinding effect of an aspect of that arbitral outcome. The arbitrator cannot fix matters pertaining to the expenditure of money, such as wages and benefits.[22] At impasse, then, the most pressing subjects of negotiation are also likely to be unresolved.

Rhode Island public unions proscribed from striking have argued that at impasse they have earned a right to the continuation of status quo ante—the expired contract—until a new agreement is reached.[23] They take this position because they believe the forfeiture of what would otherwise be their most valuable option—a strike—entitles them to a substitute bargaining chip, namely the leverage of a floor on terms and conditions. Management has argued that it has no obligation to unions beyond the mandatory bargaining and arbitration schemes, and that it may unilaterally implement reduced terms of employment after a contract has expired and it has faithfully bargained and participated in all statutory processes.[24] The union position is essentially that wages and benefits can never be reduced and that they must either hold steady or go up. The teachers' unions in Rhode Island take this position.

Of course, in practice and of late, concessions have been won from a variety of unions because the threat of layoffs has offset the drive for at least status quo ante.[25] Central Falls made headlines when it terminated all

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21. *See* R.I. GEN. LAWS §§ 28-9.3-1–28-9.3-16 (2012).

22. Whether this limitation impedes the efficacy of negotiations is debatable, but it is perhaps necessary because a binding outcome on matters pertaining to the expenditure of money would likely further the institutionalization of public unions by offering up a final touchpoint that is subject to cooptation through political means. Restrictions on management through political means are the harbingers of institutionalization.

23. *See, e.g.*, E. Providence Sch. Comm. v. E. Providence Educ. Ass'n, No. 09-1421, 2010 R.I. Super. LEXIS 52 at *6–7 (R.I. Super. Mar. 15, 2010).

24. *Id.*

25. *See* Fernanda Santos, *672 School Jobs Are Lost in Largest Single-Agency Layoff Under Bloomberg*, N.Y. TIMES, Oct. 8, 2011, at A15 ("While [New York City] managed to avert the layoffs of thousands of teachers in June by brokering an agreement with their union, it could not find a way to spare the school aides, parent coordinators, family workers and others who work in support jobs at roughly 350 schools. In a statement, the schools chancellor, Dennis

teachers for poor performance and then entered into a plan to rehire them on more advantageous terms that superseded the existent collective bargaining agreement.[26] But, when bargaining with teachers at impasse and facing status quo ante, the reallocation of revenue through layoffs is only an option if expired contracts do not mandate student-teacher ratios.[27]

Before we can fully understand the legal and policy implications of the union position on this backdrop, we must parse Rhode Island law.

B. Getting to Impasse

The nature of the processes that govern a dispute between a public employer and union is dependent on the nature of the dispute. If it is one that arises during the term of a contract, the process is one of grievance in accordance with the agreement and specific procedures provided by R.I. Gen. Laws §§ 28-9-1–28-9-27, or by R.I. Gen. Laws §§ 28-7-1–28-7-49 if an unfair labor practice charge is filed with the State Labor Relations Board.[28] These kinds of disputes do not concern us here.

When a contract has expired, is no longer in effect, and negotiations concern the renewal of terms, a different arrangement for relations is contemplated. First, the parties have a duty to bargain in good faith.[29] In

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M. Walcott, said the union representing the workers, District Council 37, had squandered its chances to make a deal of its own last spring by rejecting a plan to give the city access to its health care fund to balance its books.").

26. *See* Jennifer Jordan, *Plan to Rehire Central Falls Teachers is Put in Place*, PROVIDENCE JOURNAL, May 26, 2010. The agreement dismissed labor charges and read that "[i]t is explicitly understood and agreed that all agreements contained herein shall supersede any and all contrary existent language set forth in the collective bargaining agreement between the Central Falls School District (CFSD) and the Central Falls Teachers' Union (CFTU)." Settlement Agreement between Central Falls School District and Central Falls Teachers' Union (May 15, 2010), *available at* http://box745.bluehost.com/~cfschool/wp-content/uploads/2011/05/Settlement-Agreement.pdf.

27. Class size restrictions are in place in 72% of the nation's largest districts. *See* MOE, *supra* note 7, at 200. The collective bargaining agreement at issue in *East Providence School Committee v. East Providence Education Association* did restrict class size. Tentative agreements in that case included an increase in the maximum class size from twenty-five to twenty-eight, except in elementary schools, and an expansion of the considerations that could guide the school committee's analysis of an appropriate class size below that maximum, from only the limits of the physical plant to also budgetary requirements and education policy.

28. *See E. Providence Sch. Comm.*, No. 09-1421, 2010 R.I. Super. LEXIS 52, at *7.

29. *See, e.g.*, R.I. GEN. LAWS § 28-7-13.1 (2012) (speaking to the teachers' obligation to bargain); R.I. GEN. LAWS § 28-7-13.1(3) (2012) ("It shall be an unfair labor practice for public sector employee organizations, their agents, or representatives to . . . [a]void or refuse to comply with any statutory impasse procedures as may be provided in chapter[ ] . . . 9.3 . . . ."); R.I. GEN. LAWS § 28-9.3-4 (2012) (speaking to the obligation of a school committee); R.I. GEN. LAWS §

tradeoff fashion, the employer may not simply implement terms and conditions of employment without at least first undertaking the statutory bargaining process, and, for example in the case of teachers, the union may not strike. Second, assuming no agreement is reached through the bargaining process, a specific binding statutory bargaining scheme takes hold, namely interest arbitration under R.I. Gen. Laws §§ 28-9.3-1–28-9.3-16 in the case of public school teachers. This type of prescription is unique to the public sector and ends in arbitration that fixes the terms between the parties with a categorical exception that virtually swallows the rule—again, the arbitrator cannot bind the parties to terms involving the expenditure of money.[30]

If at the end of the statutory bargaining process the parties have not voluntarily agreed on issues involving the expenditure of money, e.g., and most notably, teachers' salaries and benefits, the parties are said to have reached an impasse.[31] In the collective bargaining setting, "[i]mpasse [generally] occurs when, after good faith bargaining, the parties are deadlocked so that any further bargaining would be futile."[32] Defining the precise moment of impasse is a more straightforward task when mandated statutory bargaining procedures are applicable than when they are not, i.e., in the public versus the private sectors. For our purposes, we will call the completion of statutory processes "exhaustion," as in exhaustion of those processes, after which impasse follows if no voluntary agreement is made.

Whereas up to exhaustion in contract renewal negotiations the course available to these parties is highly specified, from exhaustion forward the options are not codified or even clearly discernable by another measure in Rhode Island law. It is at that point of departure that a difference between the private and public models becomes determinative.[33] Under *private*

28-9.3-1(b) ("[N]othing contained in [the teacher labor provisions] shall be construed to accord to certified public school teachers the right to strike.").

30. R.I. GEN. LAWS § 28-9.3-12 (2012). *See* Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 393 (R.I. 1997) (citing Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 206 (1991)).

31. *See E. Providence Sch. Comm.*, No. 09-1421, 2010 R.I. Super. LEXIS 52, at *21 ("Taking into account that negotiations between the parties occurred over a period of several months without agreement and that the parties failed to reach an agreement over the Arbitration Award, the [c]ourt finds that the parties have certainly reached the point of impasse.").

32. Bolton-Emerson, Inc. v. NLRB, 899 F.2d 104, 108 (1st Cir. 1990). This is a federal case, but the concept of impasse is one of those stemming from the derivation principle.

33. ANTHONY M. CRESSWELL, MICHAEL J. MURPHY & CHARLES T. KERCHNER, TEACHERS, UNIONS, AND COLLECTIVE BARGAINING IN PUBLIC EDUCATION 342 (1980) ("[There are] issues that seem paramount in any consideration of policy and procedures related to impasse and impasse resolution in the public sector and, more particularly, in educational bargaining. In the matter of impasses, labor relations as practiced in the public sector departs substantially from that practiced in the private sector.").

sector labor doctrine, management can unilaterally implement new terms and conditions of employment at that point, and the union can strike.[34] This is presently not fully the case under Rhode Island *public* sector labor doctrine, which is still being developed.

Without firm guidance on point, public employers and unions take polarizing views of their respective options. As shown below, public employers believe they—like private employers—have the right to unilaterally implement terms that will govern in the absence of an agreement, since they have up to that point done all else required to fulfill both the traditional and statutorily enhanced duty to bargain. We will call this position "implementation." It is the open end of R.I. Gen. Laws § 28-9.3-12 that creates the space for residual implementation. And again, public unions believe the status quo ante, as defined by the expired contract, governs until a new deal is executed because at impasse, they argue, they lack residual bargaining leverage to compete fairly with implementation, given the completion of statutory processes and an absence of the right to strike. We will call this position "continuation." Which position holds? And which position *should* hold?

C. Implementation in Rhode Island and Beyond

The labor laws governing public employee collective bargaining have been and continue to be derived from those governing collective bargaining in the private sector. Federal private sector labor law informs public sector labor law even at the municipal level. The Rhode Island Supreme Court has time and again stated that it looks to federal labor precedent.[35] Despite the derivation, the public model differs markedly, particularly at the bounds, like the right to strike and the effects flowing from its proscription, such as binding arbitration schemes.

The availability of implementation is in some jurisdictions another point of departure. Federal private sector labor law permits implementation at impasse, recognizing the sufficiency of protections up to that point, e.g., the duty to bargain in good faith.[36] The definitive federal law on

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34. *See* NLRB v. Katz, 369 U.S. 736, 747 (1962) (stating that unilateral implementation prior to impasse obstructs bargaining).

35. *See, e.g.*, Town of Burrillville v. Rhode Island State Labor Relations Bd., 921 A.2d 113, 120 (R.I. 2007).

36. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 206–07 (1991) ("Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract.").

implementation was first established by the United States Supreme Court in *NLRB v. Katz*.[37] Other courts have refined the doctrine, as has, for example, the United States Court of Appeals for the First Circuit: "This court has long said that an employer must bargain to impasse before making a unilateral change . . . . The Supreme Court has applied the *Katz* rule to situations, as here, where an existing agreement has expired but negotiations on a new one had not been completed."[38]

The implementation doctrine proper thus permits the imposition of terms and conditions of employment at bargaining impasse, so long as the terms are reasonably related to those that have been offered to and rejected by the union during the course of negotiations such that the parties can be said to have faithfully bargained over them.[39]

One would think that, because the Rhode Island Supreme Court redirects to federal law on labor issues for which there is no state precedent, resolution here would follow the federal model.[40] But the private model has not entirely carried over in Rhode Island, despite advocacy in the literature.[41] Until the most recent case on point, *East Providence School*

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37. 369 U.S. 736 (1962).

38. Visiting Nurse Servs. of W. Mass., Inc. v. NLRB, 177 F.3d 52, 57–58 (1st Cir. 1999) (internal parenthetical and citations omitted).

39. *See, e.g.*, Minn. Teamsters Pub. & Law Enforcement Emp. Union Local 320 v. Anoka Cnty., 365 N.W.2d 372, 375 (Minn. Ct. App. 1985) ("Public employers are obligated to meet and negotiate in good faith with their employees' exclusive representative on the terms and conditions of their employment . . . . If there has been a unilateral change, the employer may successfully defend the action by demonstrating that there was not a bad faith refusal to bargain . . . . Hence, if the record demonstrates either that the union was in fact given an opportunity to bargain on the subject or that the collective bargaining agreement authorized the change or that the union waived its right to bargain, courts will not find bad faith.") (citations omitted). *See also* NLRB v. Plainville Ready Mix Concrete Co., 44 F.3d 1320, 1325–26 (6th Cir. 1995).

40. Regarding California, see, e.g., Moreno Valley Unified Sch. Dist. v. Pub. Emp't Relations Bd., 142 Cal. App. 3d 191, 194 (1983) ("However, this argument assumes a correspondence between federal law and the [Educational Employee Relations Act] which does not exist. Unlike the EERA, the NLRA has no statutory impasse procedure, failure to participate in which is explicitly made an unlawful labor practice.").

41. *See* Stuart S. Mukamal, *Unilateral Employer Action Under Public-Sector Binding Interest Arbitration*, 6 J.L. & COM. 107, 152 (1986) (concluding that statutory bargaining schemes for public employees and remedies for unfair practices themselves sufficiently check and balance unilateral implementation) ("The overwhelming majority of administrative agencies and courts, both federal and state, have endorsed the idea that an employer may lawfully and unilaterally implement all or part of its 'last best offer' to the union if and when an impasse is reached in collective bargaining. These tribunals have recognized that unilateral action, when carefully limited in terms of scope, extent and timing, does not undermine either the collective bargaining process or the integrity of a labor union as the employees' collective bargaining representative. Indeed, the threat of unilateral action can induce more serious efforts to assure a successful conclusion to collective bargaining, and its actual effectuation can assist in breaking an impasse and in resuming the search for voluntary resolution of an underlying dispute. There

Committee v. East Providence Education Ass'n,[42] which is treated fully below, unions in *pre-exhaustion* cases[43] had successfully argued that the absence of a right to strike disadvantages them in a way that requires an allowance from the employer side, namely elimination of the employer's ability to implement at impasse without liability.[44] However, because those

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is no reason whatsoever for concluding that these basic observations do not apply equally to the public and private sectors or to all bargaining settings regardless of the particular impasse resolution mechanism that may be ultimately available. Statutory schemes culminating in binding interest arbitration are no different in this respect."); Robert M. Dohrmann, *The Public Employer's Right to Unilateral Action: The Union Perspective*, 8 J.L. & EDUC. 531, 538 (1979) ("Accordingly it should be deemed an unfair practice under applicable state and local laws for an employer to make a unilateral change in the terms and conditions of employment prior to the exhaustion of post-impasse procedures *whether or not the change is consistent with employer bargaining proposals*. Even as federal law condemns such changes made either prior to impasse or inconsistently with bargaining proposals as *per se* violations of the NLRA (*NLRB v. Katz*, 369 U.S. 736 (1962)), so also should unilateral changes following impasse but *prior to exhaustion* of suggested or mandated mediation or fact finding be themselves considered *per se* violations of applicable public sector employee relations law.") (emphasis added).

42. E. Providence Sch. Comm. v. E. Providence Educ. Ass'n, No. 09-1421, 2010 R.I. Super. LEXIS 52 (R.I. Super. Ct. Mar. 15, 2010).

43. *See* W. Warwick Sch. Comm. v. W. Warwick Teachers Alliance, 1996 WL 936936, at *9–10 (R.I. Super. Ct. June 5, 1996) (unpublished). In sum, the court held that: (1) any salary increase after the expiration of the agreement must be arbitrated pursuant to R.I. GEN. LAWS § 28-9.3-1; (2) non-binding arbitration under said statute is the mandated route to resolve matters involving the expenditure of money, including salaries for certified public school teachers after the expiration of the agreement; (3) based on the expired agreement, a post-expiration legally enforceable contractual right to demand binding wage arbitration under R.I. GEN. LAWS § 28-9-1 is nonexistent; and (4) as to a salary step-rank raise, neither the employer nor the union could unilaterally alter the salary levels existing on the date that the agreement expired. Because the court did not have before it a post-exhaustion situation, its ruling on forced arbitration and the status quo ante should be rightly limited to pre-exhaustion scenarios. Warwick Sch. Comm. v. Warwick Teachers' Union, Local 915, 613 A.2d 1273 (R.I. 1992) (In support of its motion for a stay, the employer asserted that implementation of the expired contract and its retroactive application would require the employer to hire 23 additional teachers, give step increases to 330 teachers, award additional compensation to all teachers who had more than 28 students in a class during the prior school year, and award alternative health care benefits. Those terms would require the employer to outlay an additional five million dollars. The employer contended that the budget approved for the new school year did not contain such additional funds. The case went back down to the State Labor Relations Board on jurisdictional grounds, which ruled for the union. It was held that the employer illegally refused to recognize the terms and conditions of the expired agreement, in derogation of R.I. GEN. LAWS §§ 28-7-13(5), (6) and (10).); *In re* Rhode Island State Labor Relations Bd. & Warwick Sch. Comm., No. ULP-4647 (RISLRB Nov. 10, 1992); *In re* Warwick Teachers' Union, No. 92-1199 (R.I. Super. Ct. 1993).

44. *See* ANTHONY M. CRESSWELL & MICHAEL J. MURPHY, EDUCATION AND COLLECTIVE BARGAINING: READINGS IN POLICY AND RESEARCH 298 (1976) (This passage dismisses implementation out of hand: "What is the best avenue to take when parties in the public sector cannot agree on contract terms? Three options present themselves: allow the parties to escalate their conflict via the strike or lockout, seek resolution through third-party intervention, and empower the employer to make a unilateral determination of terms. Because the latter method

cases arose in a pre-exhaustion context, such cases should be read as, more than anything else, obvious directives to comply with and complete the statutory bargaining process.[45]

The *East Providence* case directly addressed *post-exhaustion* implementation by a public employer.[46] But even *it* took a middle position, keeping continuation intact under all but a rare circumstance and failing to squarely unknot the balance of bargaining leverage as it is presented here and in the labor lineage. Before taking a closer look at that case, let us look further into policy concepts so that we may better understand why the middle position taken there is insufficient to protect the sound operation of interdependent public policies.

Permitting implementation at impasse in the case of public unions subject to mandatory binding arbitration requires formally redefining the point of impasse from its meaning in the private sector such that the arbitral schemes and protections mandated by, for example, R.I. Gen. Laws § 28-9.3-1 *et seq.*, maintain their guarantee. It is possible to define impasse as post-exhaustion and expressly provide for implementation by statute. It is also possible that, in the absence of a statutory answer, a court might read a balanced solution into a scheme. Rhode Island had hinted at the possibility of this latter approach at the state level,[47] but such has not yet fully come to pass. Several jurisdictions provide examples of the various options.

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undermines bargaining, two directions for analysis remain . . . ."). Note that while there is little agreement on what a proper tradeoff would be, there is some agreement that a strike is not the union equivalent of employer unilateral implementation. *See, e.g.*, *Moreno Valley Unified Sch. Dist.*, 142 Cal. App. 3d at 193 ("[The hearing officer] found that because employee organizations could not use 'self-help' during impasse, neither should employers be allowed to do so . . . . [T]he hearing officer's rationale [is] premised on a flawed equation of employee strikes with unilateral changes in employment conditions made by employers. *It is manifest* that a unilateral change in employment conditions is not the same thing as a strike, at any stage of employment dispute. The management equivalent of a strike is a lockout.") (citing Wasco Cnty. v. Am. Fed. of State, Cnty. & Mun. Emp., 569 P.2d 15, 19 (Or. Ct. App. 1977)) (emphasis added).

45. Note that Massachusetts has permitted pre-exhaustion implementation by a public employer. *See* Mass. Org. of State Eng'rs & Scientists v. Labor Relations Comm'n, 452 N.E.2d 1117 (Mass. 1983).

46. *E. Providence Sch. Comm.*, No. 09-1421, 2010 R.I. Super. LEXIS 52. *See also* Alisha A. Pina, *Much at Stake in Lawsuit Over East Providence Teachers' Contract*, THE PROVIDENCE JOURNAL, Nov. 29, 2009, *available at* 2009 WLNR 24121419 ("'These questions—which concern whether a party required by state law to collectively bargain is permitted to abandon that process at will—are arguably some of the most critical labor law issues ever presented since the enactment of the [labor relations and teacher arbitration acts] and cut to the very heart of collective bargaining in this state,' according to the legal briefs from union lawyers John E. DeCubellis Jr. and Vincent P. Santaniello.").

47. *See* Rhode Island Council 94 v. Carcieri, C.A. No. P.C. 08-5073, 2008 R.I. Super. LEXIS 99, at *16 (R.I. Super. Ct. Aug. 21, 2008) (supplemented by 2008 R.I. Super. LEXIS

Michigan Compiled Laws Annotated § 423.207a(4) states that:

> If 1 or both of the parties fail to ratify a recommended settlement described in subsection (3) within the 30-day time limit specified in subsection (3), the public school employer may implement unilaterally its last offer of settlement made before the impasse occurred. This section does not limit or otherwise affect a public school employer's ability to unilaterally implement all or part of its bargaining position as otherwise provided by law.

North Dakota employs a reasoned set of rules in these circumstances. In *Kenmare Education Ass'n v. Kenmare Public School District No. 28*,[48] the court, summarizing the issue clearly and concisely, rested on the post-exhaustion distinction to permit public employer implementation:

> Unlike a private sector employee, a teacher does not have the option of engaging in a strike. As such, teachers are often without the ultimate bargaining weapon that could pressure their employers into agreement. In order to compensate for the lack of a right to strike, the legislature has enacted an impasse provision that allows for mediation and a fact-finding process through the Commission. The Commission does not have binding authority on the parties, but does have the authority to make its findings public. Our statute does not provide for additional procedures after a Commission has made its findings public and negotiations are still at an impasse.
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> In *Dickinson Education Ass'n v. Dickinson Public School District No. 1*, 252 N.W.2d 205 (N.D. 1977) (*Dickinson I*) . . . this Court [held]:
>
> > We find that the statutory scheme . . . recognizes that there comes a point—after the conclusion of a good faith negotiation process—when a school board must be allowed to make contractual offers to the teachers of a school system, which contracts the teachers must choose either to accept or to reject.

The North Dakota court limited implementation to current periods under negotiation, i.e., not future years, because it believed that, given the lack of

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117 (Sept. 11, 2008)) ("This order shall remain in effect until such time as the proceedings before the Rhode Island State Labor Relations Board have been finalized and, thereafter, the Governor may implement Executive Order No. 08-06 only to the extent permitted by law."). Under R.I. GEN. LAWS § 36-11-9, speaking to state employees, an arbitral opinion on issues involving wages is only advisory in nature. This fits a bill similar to that controlling the issues raised in the instant analysis.

48. 717 N.W.2d 603, 608–09 (N.D. 2006) (internal citations omitted).

a right to strike, permissible implementation creates a "tremendous disparity in bargaining power" between the union and school board.[49] This is a sensible outcome. Presumably, the public nature of the commission's findings assists citizens with their democratic choices. This scheme preserves the necessity of flexibility and does not read more into the law than there is while also requiring the parties to periodically re-engage the statutory processes, which may facilitate resolution through positive contributions to the substance of negotiation or simply a desire to avoid costs. The court offered this final note on common sense and the balance of power:

> We are mindful that a school district's authority to end contract negotiations creates unequal bargaining power. But pragmatically speaking, were negotiations to proceed unrestricted for an unlimited amount of bargaining, the [parties] might never form a contract. This Sisyphean act could not be what the legislature had in mind when it enacted the impasse provisions. The judicial remedy for this unequal bargaining power continues to be a probing review of the negotiation process for bad faith practices.[50]

A legislative answer to a legislative question is preferable. And a legislative outcome need not contradict the union position. In a mash of possibilities, New York has codified continuation in what is known as the Triborough Amendment to the Taylor Law, which simultaneously permits unilateral implementation by legislative action—note, not enactment—at impasse.[51] The apparent conflict between these provisions was addressed in *County of Niagara v. Newman*.[52]

There, the 1980–1981 collective bargaining agreement between the Civil Service Employees Association and the County of Niagara, set to expire on December 31, 1981, underwent unsuccessful negotiations for extension.[53] The parties exhausted the statutory resolution procedures, and impasse was declared.[54] The Niagara County Legislature then passed a resolution that granted a pay increase but cut other benefits and rights in place under the

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49. Kenmare Educ. Ass'n v. Kenmare Pub. Sch. Dist. No. 28, 717 N.W.2d 603, 609 (N.D. 2006) (*Dickinson I*) (quoting Dickinson Educ. Ass'n v. Dickinson Pub. Sch. Dist. (*Dickinson II*), 499 N.W.2d 120, 126 (N.D. 1993)).

50. *Kenmare Educ. Ass'n*, 717 N.W.2d 603, 609–10.

51. N.Y. CIV. SERV. LAW § 209-a(1)(e).

52. 481 N.Y.S.2d 563 (App. Div. 1984).

53. Cnty. of Niagara v. Newman, 481 N.Y.S.2d 563, 564 (App. Div. 1984).

54. *Id.*

prior agreement.[55] Given the mandate of New York Civil Service Law § 209-a(1)(e) (the Triborough Amendment to the Taylor Law),[56] that

> [i]t shall be an improper practice for a public employer or its agents deliberately . . . to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in [a strike],[57]

the union sued, seeking restoration and at least continued maintenance of status quo ante.[58] The court ruled for the union by limiting the discretion of the legislature at impasse.

> Section 209 of the Civil Service Law provides for detailed procedural steps to be followed in the resolution of disputes between public employers and their employees in the course of collective negotiations. Critical in the resolution of this case is the interplay between [S]ection 209 of the Civil Service Law, which grants the legislative body unilateral power to resolve the impasse, and [S]ection 209-a of the Civil Service Law, which requires the employer to keep in effect the terms of an expired agreement until a new agreement is negotiated.
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> * * *
>
> We conclude . . . that in resolving an impasse pursuant to [S]ection 209 of the Civil Service Law, the legislative body is precluded by the Triborough Amendment from imposing a settlement which diminishes employee rights under an expired collective bargaining agreement.
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> To hold otherwise would ignore the public policy and purpose of the Taylor Law . . . . The power of the Legislature to resolve

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55. *Id.*

56. "[T]he Triborough Amendment, mandates that in the event of a lack of a contract, the terms of the previous contract continue indefinitely, leaving governments (and, by extension, taxpayers) with virtually no leverage to force concessions if an overly generous contract becomes unsustainable. While raw salary increases are generally negotiated on a year by year basis (and are thus frozen at the expiration of a contract), 'step increases' (which are based on an individual worker's longevity and are additional raises above and beyond general salary raises) are still required in most state contracts, and must be given even when a contract expires if the previous contract stipulated such. Thus, raises can theoretically continue in perpetuity." *Taylor Law*, WIKIPEDIA, http://en.wikipedia.org/wiki/Taylor_Law (last visited Nov. 27, 2012).

57. New York Civil Service Law § 210(1) provides that "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike."

58. *Newman*, 481 N.Y.S.2d at 564.

> negotiations unilaterally gives the public employer a decided edge in negotiations. Nevertheless, this power is deemed necessary in the interests of concluding negotiations, particularly since public employees do not enjoy the right to strike as do employees in the private sector. Some means of resolving an impasse is, therefore, necessary. As a limitation on the legislative body, however, [S]ection 209-a grants some measure of protection to employees, who will at least be assured of maintenance of the status quo until a new agreement is negotiated.[59]

New York, then, has provided a legislative answer that impedes the accountability of public managers. While imperfect, it was not a contrived solution read into an otherwise silent statute by the judiciary. North Dakota, on the other hand, has provided a judicial answer, but it is a reasoned approach at preserving managerial discretion and relative bargaining parity while facilitating resolution. Michigan has simply codified absolute discretion at impasse.

Public labor relations interest arbitration schemes are positive restrictions on employers that would not exist but for a moment of political will sustained. For a tribunal to read additional restrictions into these enactments is for it to assume a legislative function. Additional restrictions cannot be masked as an interpretation or a completion of a legislative scheme.

The Rhode Island scheme stops its mandates at impasse after arbitration. Anything further required of public employers would be a creation, not an implication or inducement. Again, public unions have asked judicial and quasi-judicial bodies in Rhode Island to read a further limitation into the public employment labor relations scheme, namely making implementation at impasse a civil liability. This is an unnecessary position that incidentally intensifies the impediment to goodwill because, first in law, pre-existing proscriptions and prescriptions are inconsistent with it, and second in policy, more democratic methods of action remain viable for public unions.

III. LEGAL ARGUMENTS FOR IMPLEMENTATION IN RHODE ISLAND: STATUTORY DIRECTIVES ON FINANCE AND NONDELEGABLE EDUCATION POLICY

A. Context

The previous section discussed implementation as an isolated labor concept abstracted from other contexts. Putting it more fully into context

59. *Id.* at 564–65.

will help illuminate the complications. Consider now a more detailed circumstance, one in which implementation at bargaining impasse of terms and conditions applicable to unionized teachers by a school committee is necessary for compliance with other legal mandates. Implementation of *law* cannot be impeded in any way or at any time, both before expiration of an agreement and after, and both pre- and post-exhaustion, even if it affects terms and conditions of public employment.[60] Rhode Island recognizes this principle,[61] and at least one teachers' union has too.[62] It is beyond axiomatic that an act required by law cannot subject one to legal liability, and it is doctrinal that the law will not permit one to do indirectly that which cannot be done directly.[63]

Two such mandates will be addressed below, one general and the other specific. First, implementation of education policy is a general nondelegable statutory grant of power that cannot be denied a public school committee. Second, education financing, budgeting, appropriation, and expenditure are each and together subject to an express and specific arrangement of directives stemming from the Rhode Island Constitution and running through statutes and local charters. Thus, implementation of any term that falls within the nondelegable policy power, or any term required by school financing directives, is permitted to be implemented, if not mandatorily so. The union position would, through a single judicial pronouncement, at least neutralize, and at most expropriate, these mandates—which were, of course, arranged by a democratically elected representative government—where

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60. The "illegal subjects of bargaining" doctrine of federal labor law is therefore inversely analogous in some respects. *See* United Steelworkers, Local 4102, 199 N.L.R.B. 153, 154 (1972) (considering illegality of provisions under state law).

61. N. Providence Sch. Comm. v. N. Providence Fed'n of Teachers, Local 920, 945 A.2d 339, 346 n.12 (R.I. 2008) ("It goes without saying that statutory duties that are specifically imposed upon school committees by law (and activities closely associated therewith) may not be made the subject of the arbitral process . . . . Even in the absence of such specific statutory mandates, however, school committees are vested with a plethora of powers and responsibilities that relate to the essence of the educational mission that may not be bargained away.") (citations omitted).

62. *See* Narragansett Sch. Comm. v. NEA/Narragansett, No. W.C.2004-0615, 2005 WL 1274286, at *2 (R.I. Super. Ct. May 27, 2005) ("In order to invalidate a contractual provision in a public sector employment agreement, the union suggests that the contested term must *either directly violate a statute or* in some measurable way *prevent or hinder the employer from carrying out its lawful duties or responsibilities*.") (emphasis added).

63. *See* State v. Rhode Island Alliance of Soc. Servs. Emps., Local 580, 747 A.2d 465, 468–69 (R.I. 2000) ("[A]n arbitrator cannot resolve a labor dispute by issuing a ruling that would conflict with . . . the . . . legal obligations of a department of state government" and statutory obligations "cannot be negated by an arbitrator who purports to do so through . . . 'contract interpretation.'"); Rhode Island Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139, 147 (R.I. 1935) ("None must be permitted to evade these requirements by doing indirectly what they cannot do directly.").

democratic processes already appear functional and responsive to union interests.

B. Nondelegable Education Policy: The Hydraulics of Allocation

The Rhode Island General Assembly has established a complex of authority that interlocks from constitution to ordinance.[64] Article XII, Section 1, Rhode Island Constitution, titled "Of Education," requires the General Assembly to promote public schools. The General Assembly has delegated its education mandate to school committees (the public employer here) under R.I. Gen. Laws § 16-2-1 *et seq.*[65] "It is . . . a basic rule of law that school committees are not at liberty to bargain away their powers and responsibilities with respect to the essence of the educational mission."[66] "[T]he well-settled rule in [Rhode Island is] that school committees in carrying out the functions assigned to them by the legislature are exercising a portion of the state's sovereignty."[67] This is a parallel of the same centuries-old nondelegation doctrine that for decades stayed the very onset of public unionism in the early twentieth century.[68] Although public unionism writ large overcame this theoretical obstacle, certain policy matters—like education in Rhode Island—remain nondelegable.

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64. *See* Exeter–West Greenwich Reg'l Sch. Dist. v. Exeter–West Greenwich Teachers' Ass'n, 489 A.2d 1010, 1017–18, 1020 (R.I. 1985) ("The Constitution and the Legislature in its several enactments over the years have erected a structure of laws that we are under a duty to read together and interpret.").

65. *See* Cummings v. Godin, 377 A.2d 1071, 1073 (R.I. 1977) ("[S]chool committees are not state agencies; they are municipal bodies acting as agents for the state in that they exercise state power that has been delegated to them by the state.").

66. N. Providence Sch. Comm. v. N. Providence Fed'n of Teachers, Local 920, 945 A.2d 339, 347 (R.I. 2008).

67. Mellor v. Clancy, 520 A.2d 1278, 1279 (R.I. 1987) (citing Dawson v. Clark, 176 A.2d 732, 734 (R.I. 1962)) (interal quotations omitted).

68. *See* JOHN LOCKE, ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL-GOVERNMENT (SECOND TREATISE), Ch. XI, Sec. 141 (1690) ("The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands."); West, *supra* note 8.

The specific powers and duties of individual school committees enumerated by R.I. Gen. Laws § 16-2-9(a) include (emphasis added):

> (2) *To develop education policies* to meet the needs of the community.
>
> (3) To provide for and assure the implementation of federal and state laws, the regulations of the board of regents for elementary and secondary education, and of local school policies, programs, and directives.
>
> (5) To have responsibility for the care and control of local schools.
>
> (6) *To have overall policy responsibility* for the employment and discipline of school department personnel.
>
> (9) To adopt a school budget to submit to the local appropriating authority.
>
> (10) To adopt any changes in the school budget during the course of the school year.
>
> (11) To approve expenditures in the absence of a budget, consistent with state law.
>
> (18) To enter into contracts.
>
> (20) *To establish policies* governing curriculum, courses of instruction, and text books.

Under R.I. Gen. Laws § 16-2-9(a)(2), school committees are empowered to "develop education policies to meet the needs of the community." The vagueness of the enumeration has made it the subject of litigation. In *North Providence School Committee v. North Providence Federation of Teachers, Local 920, American Federation of Teachers*,[69] the central issue was whether the school committee could, for budgetary reasons, eliminate a free period for English teachers without contravening an active union contract.[70] As a cost-saving measure, the superintendent recommended that the employer not refill two vacant positions but instead cut free periods and then redistribute the existing classes among the other teachers.[71] When considering whether the action was one that could lead to liability via grievance arbitration the court wrote:

> [A] very strong argument can be made that a decision about having or not having a composition period for teachers of English

69. 945 A.2d 339 (R.I. 2008).
70. *Id.* at 341.
71. *Id.*

> is directly related to the essence of the educational mission and is therefore non-arbitrable.
>
> It is because the school committee in this case opted to ground the abolition of the composition period primarily on a fiscal rationale that we have come to conclude that the arbitral decision need not be vacated. If the school committee had justified the elimination of the composition period on the primary basis that said elimination was undertaken for the purpose of improving the education of North Providence High School students in English and if the school committee had explained its thinking in that regard in a cogent manner, it is entirely possible that we would have considered that administrative decision to be non-arbitrable.[72]

The court's *sub silentio* articulation of the fungible nature of money is important. Where the parties are negotiating a new agreement, the decision to implement terms and conditions of employment involving money is not a cost-saving measure, nor need it be described that way. Rather, it is an allocation measure. The hydraulic nature of allocation means a decision to deny teachers pay or benefits is one to use monies in another educational capacity.[73] Policy content is particularly rich where the allocation of budgeted funds is at issue since such decisions determine the resources students get from their schools. The issue is amplified where additional inputs are directed at teachers because research that is popular in the field questions the added value of such input increases.[74]

The allocation distinction has been raised previously in this context. In *Warwick School Committee v. Gibbons*,[75] the Rhode Island Supreme Court cited the allocation authority of school committees in relation to city government under municipal charter: "[T]he city council determines the total amount of the appropriation. Within that total amount, the allocation of

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72. *Id.* at 347.

73. *See generally* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("Our account, then, is 'hydraulic' in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.").

74. *See* Hoxby, supra note 7, at 707 ("The estimates for unionized schools, taking into account . . . the interactions between unionization and the inputs, show no statistically significant input efficacy. In fact, unionized schools appear to suffer from the 'typical' problem that inputs do not matter."). *See also* Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 ECON. J. F64 (2003).

75. 410 A.2d 1354 (R.I. 1980).

monies is determined by the committee without supervision by the council or any other officer of city government."[76]

The court's pronouncement in *Providence Teachers Union, Local 958 v. School Committee of Providence*,[77] reads similarly: "It is clear from a reading of this section that once the council furnishes the committee with its appropriation, the committee is then free to allocate the sums appropriated to it as it deems fit."[78]

Therefore, given the nondelegable nature of education policy and the fungible and hydraulic nature of funding, the determination of how scarce monetary resources are to be allocated must rest exclusively with a school committee, *absent a current and controlling contract*. Establishing liability for a decision made one way or another, e.g., reducing wages at impasse, would suggest that some portion of the budget allocation process should be determined by a union position. Such a result is improper, but not inconsistent with data showing that over 50% of union and nonunion teachers alike believe that collective bargaining has no effect on both teaching and academic performance,[79] or in other words, education policy.

A judicially invented, union-sponsored intercession that disrupts the chain of constitutional and statutory logic on education policy presents, at minimum, the appearance of illegitimacy. As we will see below, the court in the East Providence case commented on this point of analysis, if only quite discreetly and in passing.

C. Finance Directives: Balancing a Budget During a Fiscal Crisis

The broader economic problem with the union position of continuation is the inflexibility it imposes on government in times of fiscal strain.[80] Where an increase in revenue is politically or economically infeasible, the public employer must have authority to adjust personnel costs downward. It could be argued that holding a floor below salaries, for example, is a practical check on the political will to denude government of an incentive needed to

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76. Warwick Sch. Comm. v. Gibbons, 410 A.2d 1354, 1357 (R.I. 1980).

77. 276 A.2d 762 (R.I. 1971).

78. Providence Teachers Union, Local 958 v. Sch. Comm. of Providence, 276 A.2d 762, 767 (R.I. 1971).

79. *See* MOE, *supra* note 7 (tabling 2003 survey data).

80. *See generally* Dianna M. Náñez, *Tempe Declares 'Fiscal Crisis' to Open Firefighters Union Contract*, ARIZ. REPUBLIC, May 2, 2009, http://www.azcentral.com/news/articles/2009/05/01/20090501tr-firefighters0501.html; Editorial, *Public Employees Must Share Fiscal Pain*, EAGLE TRIBUNE, Oct. 20, 2009, http://www.eagletribune.com/opinion/x546146257/Editorial-Public-employees-must-share-fiscal-pain.

attract personnel and function at an appropriate level.[81] In that sense, it could be argued that government should not be permitted to dismantle government beyond a minimum previously reached. But the finance directives relevant here and applicable to school committees in Rhode Island do not require such an analysis because they speak only to deficit spending.[82]

A decrease in revenue combined with the union position would present a particular fiscal challenge because unions could refuse to agree to renewed contract terms that are less favorable than those of an expired contract and thus simply hold out at the last set of terms indefinitely—the Sisyphean problem identified by the North Dakota Supreme Court.[83] This approach engenders an economic incongruity that removes retrenchment from the band of options, further stresses governments in times of need, and does long-term damage to the union image.[84]

Hand-in-hand with policy, the Rhode Island General Assembly has delegated to school committees corollary financing, budgeting, appropriation, and expenditure duties, with confines. For example, R.I. Gen. Laws §§ 16-2-9(d) and (e) mandate balanced budgets notwithstanding *any* law to the contrary:

> (d) Notwithstanding any provisions of the general laws to the contrary, the requirement defined in subsections (d) through (f) of this section shall apply. The school committee of each school

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81. *See* Monique Garcia & Ray Long, *Madigan Wants to Set Limits on Union Wages, Benefits*, CHI. TRIB., Oct. 25, 2011, *available at* http://articles.chicagotribune.com/2011-10-25/news/chi-madigan-wants-to-set-limits-on-union-wages-benefits-20111025_1_afscme-wages-house-speaker-michael-madigan (discussing proposed legislation that would limit spending on unionized personnel, and citing comment by AFSCME about tax structure).

82. Although, note that a collusive government could induce deficit to the same effect.

83. Kenmare Educ. Ass'n v. Kenmare Pub. Sch. Dist. No. 28, 717 N.W.2d 603, 609–10 (N.D. 2006).

84. *See* E.J. McMahon & Fred Siegel, *Gotham's Fiscal Crisis: Lessons Unlearned*, THE PUB. INT., no. 158 96–110 (Winter 2005) (arguing presciently in 2005 that government fiscal crises were looming and lessons from union relations in New York City during the fiscal crisis of the 1970s would be instructive). *But see* Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1268 (1985) ("Virtually all jurisdictions carry over to the public sector the private sector rule extending the unilateral change proscription to the postcontract setting, prohibiting an employer from unilaterally altering the status quo concerning mandatory bargaining topics, whether established by an expired contract or past practice, without first bargaining to impasse."). The author goes on to argue, using New York City in the 1970s as an example, that union accommodation is part of the solution to government fiscal crisis, and that confrontation is counterproductive. *Id.* at 1268–75. *See also* PETER BRIMELOW, THE WORM IN THE APPLE: HOW THE TEACHERS UNIONS ARE DESTROYING AMERICAN EDUCATION 76 (2003) (discussing generally the economic incongruities of the educational public union and taxpayer arrangement).

> district shall be responsible for maintaining a school budget which does not result in a debt.
>
> (e) The school committee shall, within thirty (30) days after the close of the first and second quarters of the state's fiscal year, adopt a budget as may be necessary to enable it to operate without incurring a debt, as described in subsection (d).

So important is a balanced school budget to the fulfillment of the state's educational mission that directives to effect it are also peppered throughout the Rhode Island General Laws, such as at § 16-2-18, which reads, "in no fiscal year shall a deficit be permitted for school operations."[85] These provisions do not shield individual cost-saving measures, like those at issue in *North Providence School Committee*, but rather require programmatic deficit avoidance measures.

If during fiscal crisis a school committee's budget carries a shortfall, implementation of a decreased salary or benefits schedule—contra status quo ante—must be permissible. While a union may argue that something other than salaries or benefits should be cut from the school's anticipated expenditures to remedy a shortfall (as was argued in the East Providence case treated fully below), that argument is met by noting that allocation decisions are a matter of educational policy, as discussed above.

There is available some guidance on this issue from an analogous circumstance. In 1991, the Rhode Island Superior and Supreme Courts heard *In re State Employees' Unions*,[86] a case involving labor relations between state employees and the governor and implementation of terms and conditions of employment during a time of fiscal crisis.[87] The case came to court preceding arbitration on a request for an injunction.[88] The court denied

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85. *See also* R.I. GEN. LAWS § 16-2-21.4 (2012) (popularly referred to as the Caruolo Act, and detailing school budget deficit procedures). Note that the utility of a suit to increase school appropriations to adequately fund a budget is uncertain where the state and municipality are themselves facing shortfalls during times of broad economic downturn. Moreover, it simply pushes the policy problem back a step. Further financing, budgeting, appropriation, and expenditure directives are found at the municipal level of law in charters and regulations. Even though school committees carry out state functions, they are municipal departments with municipal employees, necessarily subject to Home Rule and municipal protocol. *See, e.g.*, E. Providence Sch. Comm. v. Smith, 896 A.2d 49 (R.I. 2006). *See also* Warwick Sch. Comm. v. Gibbons, 410 A.2d 1354, 1357 (R.I. 1980) ("Nevertheless, the expenditure of funds may not exceed, under [local] charter, the total amount appropriated by the council. There is no provision in the charter for deficit spending by the school committee.") (footnote omitted).

86. 1991 R.I. Super. LEXIS 186 (R.I. Super. Mar. 7, 1991), *aff'd*, 587 A.2d 919 (R.I. 1991) (Rhode Island Superior Court opinion attached and adopted).

87. *See In re* State Employees' Unions, 1991 R.I. Super. LEXIS 186, at *1–2 (R.I. Super. Mar. 7, 1991).

88. *Id.*

the union's request and ruled that the governor's implementation was legal because it was supported, and in fact mandated, by legislative directive.[89]

It was not disputed that the state was facing a massive budget deficit. Nor was it questioned that the state had a cash flow problem which, if not immediately resolved, would have had far-reaching consequences. In an effort to curb the crisis, as well as to adhere to a mandate to balance the state's budget, the governor issued an executive order that executive branch employees be subjected to intermittent shutdowns for ten business days without pay.[90]

The only question the Rhode Island Superior Court felt it necessary to answer was whether the governor had the authority to implement the planned shutdowns. It ruled that he did.[91] Pursuant to then R.I. Gen. Laws § 35-3-16, the General Assembly authorized the governor to reduce or suspend appropriations for all executive departments to maintain a balanced budget. At that time R.I. Gen. Laws § 35-3-16 read:

> Reduction or suspension of appropriations to maintain balanced budget—At any time during the fiscal year, upon notification by the budget officer that it is indicated that actual revenue receipts or resources will not equal the original estimates upon which appropriations were based or that it is indicated that spending will exceed appropriations, the governor, for the purpose of maintaining a balanced budget, shall have the power to reduce or suspend appropriations for any or all departments or subdivisions thereof, excepting the general assembly, legislative agencies, and legislative committees and commissions, and at least ten (10) business days prior to taking action to reduce or suspend or otherwise withhold appropriations, the governor shall thereupon notify, in writing, the speaker of the house, senate majority leader, and the chairpersons of the house and senate finance committees. The writing shall state specifically the action to be taken and the specific reason which necessitates the action.

The court was persuaded that there had been delegated to the governor the authority and discretion to effectuate personnel cost reductions throughout the executive branch, including the contemplated shutdowns.[92]

> The implementation of those personnel cost reductions, i.e., what the State has referred to as the "hard choices" necessary and attendant to such reductions, devolved to the Governor. Plainly,

89. *See id.* at *6–14.
90. *Id.* at *1–2.
91. *Id.* at *4.
92. *Id.* at *4–5.

> the legislature did not pass but the hilt of the sword to the Governor and, at the same moment, retain its blade. To the contrary, the legislature assigned and conveyed the saber and its cutting edge to the Governor with the authority to use it suitably in order to cut the State's deficit and to bring the State's budget to level balance. . . . Charged, as he is by the Constitution, to ensure that the laws of this State are faithfully carried out, and having a mandate to administer as well as to balance the budget, and being armed with recent legislation enabling him to effectuate personnel cost reductions to defray the deficit and cure a cash flow crisis, it follows that the shutdowns are a logical, rational, and constitutionally permissible step by the Chief Executive in accordance with a valid and legitimate interest of the State.[93]

The statutory directives and authority given to school committees by R.I. Gen. Laws §§ 16-2-9(d) and (e), and § 16-2-18, mirror in thrust the authority given to the governor by R.I. Gen. Laws § 35-3-16 and relied on by the court in that case to justify the governor's implementation. These provisions are designed to hold budgets true and incidentally allow the citizenry to distinguish among officials on an important measure of accountability.

Speaking to the cyclical circumstances facing the state in the early 1990s, the court went on to bolster its holding and provide a notable record for comparison:

> The enormity of the cash flow deficiency presently confronting the State is not questioned. It is, according to the Director of Administration, in excess of $ 20 million. The plan which the State seeks to implement, which embraces the contemplated ten-day shutdown, would largely alleviate not only the cash flow crisis, but it would also substantially achieve the mandated goal of a balanced budget. A grant of the injunctive relief which the plaintiffs demand would, on balance, be far outweighed by the damaging impact upon the legitimate interests of the State and the public in general.
>
> The budget must be balanced. The cash flow crisis must be stemmed. Imposition of the injunction which the unions seek would only augment the current economic and fiscal exigency.
>
> This Court has, earlier herein, expressed its concern for the State employees who will be affected by the shutdown, and the Court renews that sentiment now. The Court, however, is simply not

93. *Id.* at *4–6.

> empowered to insulate these employees from the effects of what our President has conceded is a recession.
>
> Countless numbers of employees in the private sector have been and continue to be subjected to widespread layoffs and shortened work weeks. Bankruptcies and receiverships are today outstripping business incorporations. The Northeast, and particularly Rhode Island, is suffering more than any other geographic area economically. The astronomical dislocations and deprivations which wage earners in private industry have been enduring are now unavoidably encroaching upon the public employees. Would that they could, but neither the State nor the courts can guarantee its employees safe harbor or refuge from the pernicious consequences of economic decline.[94]

Because school committees are directed by the General Assembly to maintain a balanced budget and refrain from deficit spending, they must be permitted to implement reduced terms and conditions of employment if expenditure cuts are necessary to comply with such mandates *because at the same time* they are required to maintain control over the educational policy prerogative delegated to them by the same body.

D. In Practice: East Providence 2008–2011

A recent Rhode Island case, *East Providence School Committee v. East Providence Education Ass'n*,[95] directly addressing post-exhaustion unilateral implementation by a school committee, partially adopted the line of logic on finance directives and in passing noted the line of logic on education policy and the hydraulics of allocation.[96] The case took a middle position by speaking only to the facts before it, thus addressing only the problems presented by the fiscal crisis. The facts and outcome of this important case are more fully recounted here.

The City of East Providence annually appropriates funds for the East Providence School Committee to operate.[97] Teachers' salaries and benefits consumed 63% of the committee's total revenue in 2009.[98] The East

94. *Id.* *13–14.

95. No. 09-1421, 2010 R.I. Super. LEXIS 52 (R.I. Super. Ct. Mar. 15, 2010).

96. E. Providence Sch. Comm. v. E. Providence Educ. Ass'n, No. 09-1421, 2010 R.I. Super. LEXIS 52, at *25–27 (R.I. Super. Ct. Mar. 15, 2010).

97. *Id.* at *2.

98. *Id.* at *26.

Providence Education Association has been the bargaining representative for the city's teachers for several decades.[99]

A collective bargaining agreement between the committee and the union covered the 2005 to 2008 fiscal years.[100] Upon expiration of that contract, the parties undertook negotiations.[101] The two entities came to loggerheads late in 2008 during the depths of economic recession.[102] They proceeded to statutorily mandated interest arbitration when no agreement was reached.[103] The union voted to accept the recommendation issued through arbitration, but the committee voted against all nonbinding monetary terms.[104] The court found that at this point the parties had reached impasse.[105]

Throughout contract renewal negotiations and arbitration, the committee operated according to the expired agreement.[106] But effective January 5, 2009 (post-exhaustion), the committee made unilateral changes to teachers' salaries and benefits.[107] The teachers' salaries were reduced to what they had been in 2006, and health benefits were reduced by requiring teachers, among other things, to contribute 20% towards monthly premiums.[108] Other benefits affected included personal leave, longevity pay, and facilitator pay.[109]

In accordance with the line of law discussed above, the union took the position that status quo ante should have continued despite exhaustion.[110] So when the school committee unilaterally implemented reduced salary and benefit schedules early in 2009 after the exhaustion of all statutory procedural processes, the union filed an unfair labor practices charge.[111] The union filed under the labor scheme at the State Labor Relations Board, the administrative forum of first instance for such disputes.[112] At the same time, the committee took the matter to the Rhode Island Superior Court and asked it to declare the relative rights of the parties at impasse ahead of the State Labor Relations Board.[113]

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99. *Id.* at *2.
100. *Id.* at *3.
101. *Id.* at *21.
102. *Id.* at *2–3.
103. *Id.* at *21.
104. *Id.*
105. *Id.*
106. *Id.* at *3.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at *21–22.
111. *Id.* at *3.
112. *Id.* at *3, *7.
113. *Id.* at *4.

The primary issue before the Superior Court was whether the finance directives mandated by R.I. Gen. Laws §§ 16-2-9(d)–(f) trumped the state labor provisions applicable to relations with teachers and the accompanying, if nascent, case-based doctrine of continuation.[114] The union argued that its unfair labor practices charge filed with the State Labor Relations Board should control the matter.[115] Ultimately, the court decided to hear the case and preempt the administrative matter.[116] It issued a ruling in favor of the committee, but not without hedging the reach.[117] The court was given an opportunity to address the absolute propriety of public sector post-exhaustion implementation in Rhode Island, but rather stopped short of definitive guidance by limiting the conditions under which implementation would be permitted to the facts before it—namely, deficit avoidance.[118]

The court adopted the priority of finance directives, construing the word "notwithstanding," as it is used in R.I. Gen. Laws § 16-2-9(d), to mean that the committee could disregard any law or doctrine that would require it to adopt or maintain an *un*balanced budget.[119] Evidence of the city's fiscal status established that the cost of continuation would exceed available revenue.[120] The parties stipulated to a greater than four million dollar deficit facing the city for fiscal year 2009.[121] The court acknowledged the financial crisis facing East Providence.[122]

One of the more difficult matters of interpretation before the court was whether R.I. Gen. Laws § 16-2-9(b), which states that nothing in § 16-2-9 generally "shall be deemed to limit or interfere with the rights of teachers and other school employees to collectively bargain," would supersede the "notwithstanding" mandate of subsection (d) requiring a school committee to maintain a balanced budget.[123] The court resolved this conflict by holding that "*under a narrow set of circumstances*, when such collective bargaining negotiations have reached an impasse . . . a school committee must comply with the mandate in subsection (d) . . . ."[124]

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114. *Id.* at *4–5.
115. *Id.* at *6–7.
116. *Id.* at *8–9. The court did reserve pre-exhaustion issues to the State Labor Relations Board, essentially drawing a jurisdictional line at impasse, which is, again, becoming synonymous with exhaustion in these types of cases. *Id.* at *7.
117. *Id.* at *8–16.
118. *Id.* at *28.
119. *Id.* at *16.
120. *Id.* at *24–25.
121. *Id.* at *25.
122. *Id.*
123. *Id.* at *8–15.
124. *Id.* at *13 (emphasis added).

But, the court, paying partial heed to the union position, then reframed the issue: "In order to determine whether or not the [c]ommittee acted lawfully in changing the terms and conditions of teachers' employment in an effort to balance the budget, the [c]ourt needs to determine if the [c]ommittee was facing an *actual deficit*."[125]

The court appeared to confine the scope of the matter to implementation taken on account of deficit because the committee supported its argument with a deficit avoidance provision.[126] The committee did not advocate for the confinement. The court thus ruled: "*[A]t least in limited circumstances* when the parties have reached an impasse in negotiations and their actions are not governed by a binding collective bargaining agreement, *a committee can make unilateral changes when faced with an actual deficit*."[127]

The court simply did not address the broader labor question regarding a trade-off of the right to strike for continuation of status quo ante at impasse. It is not clear whether the court thought it was dealing the last blow to continuation when it held that "the [collective bargaining agreement] between the [u]nion and the [c]ommittee was no longer of any force or legal effect after its expiration . . . ."[128] This statement would appear to merely continue a technical position in Rhode Island supported by statute[129] and a Providence teachers' union case from 1997, which cites a seminal U.S. Supreme Court case from 1991.[130] Whether the agreement has expired and is unenforceable is not the issue in dispute in these cases. The continuation position thus survives to see another day, at least insofar as circumstances do not include financial crisis, because it is not premised on an enforcement of the contract as the law between the parties. Continuation is a legal fiction that only takes cues from an expired agreement.

The court did touch on the education policy implications of revenue allocation. As discussed above, allocation of revenue can be viewed as a policy decision, in which case, absent an enforceable contract, a school committee could not be bound to spend in any one particular manner by a continuation model without offending its policy prerogative. In response to a union argument that "there were other avenues that the [c]ommittee could

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125. *Id.* at *23 (emphasis added).

126. *Id.* at *5, 18.

127. *Id.* at *18 (emphasis added).

128. *Id.*

129. *See* R.I. GEN. LAWS § 28-9.3-4 (2012) ("This obligation [to bargain] includes the duty to cause any agreement resulting from negotiations or bargaining to be reduced to a written contract; provided, that no contract shall exceed the term of three (3) years . . . .").

130. Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 393 (R.I. 1997) (citing Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 206 (1991)).

have taken to reduce the [2009] deficit,"[131] the court, somewhat in passing, stated that it:

> remains mindful that under [R.I.G.L.] §16-2-9 the [c]ommittee is vested with the entire care, control, and management of the interests of the East Providence public schools. Further, under the same provision the [c]ommittee has both the power and the duty to adopt a school budget. Accordingly, this Court will not discuss whether the changes to the teachers' salary and benefits were the only or even the best possible way to comply with the balanced budget mandate of [R.I.G.L.] §16-2-9(d).[132]

However, this statement too is premised on the balanced budget mandate. Perhaps then, the permissibility of implementation established by this case is indeed limited to deficit avoidance. This narrow ruling leaves open the opportunity for a future court to endorse continuation outside of deficit avoidance by, again, reading it into all statutory labor relations schemes applicable to public employers in a single opinion. There are, however, at least two other reasons not to.

IV. POLICY ARGUMENTS FOR IMPLEMENTATION: THE JUDICIAL FUNCTION AND THE SUITABILITY OF DEMOCRACY

The strategy at issue here—(1) resort to the judiciary to (2) tie the hands of elected officials by (3) reading sweeping substantive restrictions into an otherwise statutorily defined bargaining relationship despite (4) a democratic process that functions well for unions—calls the democratic legitimacy of the union position into relief. First, the judiciary is not the proper forum for the creation of supplemental statutory restrictions that reach not only the employer before it, but all like employers. Second, the position itself seeks to limit the discretion of elected officials on a subject according to which their performance is evaluated by the electorate. And third, democratic processes have historically responded so well to union positions that an external institutional intervention is unwarranted.

A. Use of Adjudication to Limit the Discretion of Elected Officials

Whether the judiciary (and its quasi-judicial equivalents) is the most or least democratic branch must be considered here because the unions have sought adjudicatory intervention. The democratic or antidemocratic nature

131. *E. Providence Sch. Comm.*, 2010 R.I. Super. LEXIS 52, at *16.
132. *Id.* (citation omitted).

of courts, particularly in relation to the executive and legislative branches, has for many years been the subject of granular analysis. "This question of democratic theory has been raised insistently . . . ."[133]

For example, some have examined the capacity of courts to make findings on which social policy can be premised.[134] Others have argued that courts do and should follow the perceived will of the majority over and above legal principle and paternal expropriation.[135] Still others have questioned the courts' efficacy at exceeding their traditional function.[136] Nearly every facet of the issue seems to have received some treatment.

Perhaps the most immediately applicable treatment is not about what the judiciary does or does not do *sua sponte*, but rather what citizens do to prompt an overextension of its function. For example, certain demands made and the remedies available from courts can at times be incongruent. Think, for example, of the lawyers and petitioners prosecuting school finance litigation who shunted the forum for the consideration of that issue from the legislature to the courts.[137] It is thus on occasion a litigant in a litigious society that tests the bounds of judicial function. "Problems which are viewed in other democratic countries as primarily social or political in nature to be addressed in political forums are seen here as legal questions to be resolved ultimately in a court of law."[138]

We are directed here to an interpretive school of judicial thought, which traces back centuries.[139] On the nature of a judiciary as contemplated at the founding of our nation, it has been said that "[t]he judicial role was not to

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133. DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 18 (1977).

134. *Id.*

135. *See* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006).

136. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 1993).

137. *See* Joshua Dunn & Martha Derthick, *Who Should Govern? Adequacy Litigation and the Separation of Powers*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 332, 340 (Martin R. West & Paul E. Peterson eds., 2007) ("If . . . active and continuing judicial supervision of school spending were to be institutionalized, the result would be a radical—and unnecessary—revision of the bedrock feature of the American constitutional system, under which elected, representative legislatures have responsibility for raising revenue and appropriating public funds. Instead, judgments of courts in combination with a new industry of costing out consultants would be substituted for the bargaining and mutual adjustment—that is, the politics—of state legislatures.").

138. LEONARD J. THEBERGE, THE JUDICIARY IN A DEMOCRATIC SOCIETY xi (1979).

139. *See, e.g.*, FRANCIS BACON, OF JUDICATURE (1625), *reprinted in* ESSAYS, CIVIL AND MORAL 137, 137 (Charles W. Eliot ed., P. F. Collier & Son 1909) ("Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law."). BLACK'S LAW DICTIONARY (9th ed. 2009) states that *jus dicere* (to declare or decide the law) is "the function and prerogative of the judiciary," and that *jus dare* (to give or make the law) is "the function and prerogative of the legislature."

impose its own views of public policy but to apply rules enacted by others, however general or obscure the intent, to the litigants before them."[140] This is an indisputable, if broad, account of the adjudicatory function in American government—to resolve discrete cases and controversies with the application of existing law.

To calculate the legitimacy of union resort to adjudication for the resolution of continuation versus implementation then, we could make it a function of two criteria: discreetness and existence. Continuation scores low on each scale. A judicial ruling for continuation would have the reach of legislation, and there is no existing law to support its onset.

The union outcome sought is a rebalancing of bargaining strength in public sector labor relations wholesale, one that gives greater weight to the deprivation of the right to strike. Should the court in the East Providence case have ruled for continuation, for instance, the holding would not have been applicable to only the 2008–2011 teachers' union contract negotiation giving rise to the suit or even just the teachers' union and school committee before it. The union position seeks a declaration that the deprivation of the right to strike must in all cases be compensated for with a floor on contract terms. Putting the substantive merit of the position aside, its arrival procedurally through adjudication would make it as applicable to all public bargaining units deprived of the right to strike as would its arrival through legislation, i.e., there were no distinguishing factors limiting application to the parties before the court in the East Providence case.

Also problematic for continuation is the fact that, while it is written into legislation in other jurisdictions, it is altogether absent from public sector bargaining schemes in Rhode Island. The restrictions imposed by the interest arbitration process come to an end where the process itself ends, not insignificantly nonbinding on the expenditure of money. Any further restrictions pronounced by a court on this score are thus made and given, not declared and decided. Moreover, they would be inconsistent with actually pre-existing legislative directives, not the least of which is, in the case of teachers' unions, an education policy prerogative stemming from the Rhode Island Constitution.

The Rhode Island scheme does not present the occasion examined by George Lovell in his 2003 book, *Legislative Deferrals*.[141] There, Lovell discusses several federal labor enactments of the late nineteenth and early

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140. THEBERGE, *supra* note 138, at 31.

141. GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003) (the 2003 book is based on Lovell's 1997 University of Michigan Ph.D. dissertation, titled *Legislative Deferrals and Judicial Policy Making in American Labor Law*).

twentieth centuries that were interpreted by courts in ways he believes were the product of "deliberately created conditions that empowered judges to make important substantive decisions on labor policy."[142] He challenges the traditional separation framework on the relationship between the legislative and judicial branches, concluding that:

> [T]he ability of judges to shape labor policies cannot be read as a sign of the independent power of judges to reverse the will of elected legislators.
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> [T]he power of unelected judges to decide issues of labor policy was not simply the result of some fixed institutional or ideological power of unelected judges, but also partly the result of decisions made by elected legislators in Congress. As a result, the judicial rulings cannot be understood as taking place independently of, or in opposition to, the democratic processes of the legislatures.[143]

In Rhode Island, the meticulous specificity of and definite end built into the statutory arbitral scheme, combined with the pre-existence of legislative models that speak to impasse from which the Rhode Island General Assembly could have drawn when crafting its arbitral scheme in the 1960s, belie any legislative intention to defer to judicial interpretation the decision to apply further interest arbitration restrictions on public employers at impasse, be them substantive or procedural. Therefore, additional judicially imposed restrictions might indeed be understood as taking place in opposition to democratic processes,[144] particularly because the reach of any one such ruling would be so extensive.

Looking for a moment at the merit of the union position, we need not appraise fairness or assess worth to fault it. What makes continuation—by adjudication or otherwise—particularly detrimental to the legitimacy unions need to interface efficiently with government is that it seeks to limit the discretion of elected officials over a matter on which they are evaluated by the electorate. A governmental arrangement that is democratically accountable ordinarily has to be accepted as legitimate in a democratic society. With proximity to democratic processes, a politically untenable arrangement should self-correct, if even only over time, and more slowly as made more remote. Degree of illegitimacy, then, would have to increase as

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142. *Id.* at 45.

143. *Id.* at xviii, 45.

144. Superior court judges are not elected in Rhode Island. Appointments to the Rhode Island Superior Court are made by the governor with confirmation by the state senate. Those appointments are for life.

remoteness from democratic processes is increased. This is why courts are the subject of like concern, because often judges are only appointed by an elected official, thereby removing them once from democratic accountability. Thus, given the importance of government finance to the electorate, particularly in times of fiscal strain, and given that the productivity of labor is reported as a function of cost,[145] to limit officials that contract with unions forbidden from striking to status quo ante or more would isolate a primary function of these officials from democratic accountability. They can only be accountable for what they can control. Using more democratic methods than adjudication to effect this position may not save it from illegitimate tendencies. The use of democracy to frustrate democracy must be guarded against, as well.

Speaking further to the merits, and again in the case of teachers' unions, the tide of education policy, for better or for worse, demands more control over teachers' pay.[146] The deepening of restrictions on pay changes that continuation can have will be thought to inflict a retrogression on the system.[147]

> [I]n thousands upon thousands of districts throughout this country, salary schedules and across-the-board raises are the norm. The status quo prevails, and it is well protected [by unions]. As a result, the American education system has been almost entirely unable to use pay as an effective tool for boosting teacher quality.[148]

The use of adjudication to write a sweeping restriction that is inconsistent with pre-existing law into an already complete statutory scheme can be viewed as procedurally antidemocratic. That continuation isolates a primary function of elected officials from democratic accountability, and can be said to retrograde the effort to create flexible pay systems, may further delegitimize the substance of continuation. Now

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145. *See, e.g.*, Hoxby, *supra* note 7.

146. Note that teacher salary schedules preceded teachers' unions. *See* JOSEPH A. KERSHAW & ROLAND N. MCKEAN, RAND CORP., TEACHER SHORTAGES AND SALARY SCHEDULES 1 (1962) (RAND Corp. Research Memoranda Series RM-3009-FF) (making the same argument a half a century ago that is being made today about a lack of incentive for professionals of certain disciplines to take up teaching).

147. A suit on the interrelationship of collective bargaining and a performance pay scheme was opened in Florida. *See* Complaint at 7–8, Robinson v. Robinson, No. 2011 CA 2526 (Fla. Cir. Ct. Sept. 14, 2011) *available at* http://www.meyerbrookslaw.com/documents/Robinson%20vs%20Robinson/Robinson_v_Robinson_Complaint.pdf (stating claim by the Florida Education Association that Senate Bill 736 is unconstitutional, arguing that pay-for-performance impedes constitutional right to bargain on mandatory subjects).

148. MOE, *supra* note 7, at 312.

again, it is especially problematic that more democratic processes are at hand.

B. The Suitability of Democracy

The use of adjudicatory procedures to effect a sweeping change in law could be brooked if resort to other processes was institutionally *in*effectual. Such is not the case for public unions, including teachers' unions. Non-adjudicatory processes responsive to their interests remain accessible.

In *Special Interest: Teachers Unions and America's Public Schools* (*Special Interest*), Terry Moe presents an aggressive articulation of this fact in the education context, one brought about by a history of union advocacy for positions perceived by some as self-interested or of questionable legitimacy:

> When public officials make their decisions about the public schools . . . they are often responding to special interest groups. And the most powerful of these groups, by far, are the teachers unions. . . . No one who is familiar with American politics outside of public education should be at all surprised at what is happening inside of it, because, in their essential features, they are basically the same. . . . To say that education is an area of special interest influence, then, is simply to say that it is normal.[149]

But what Moe is really saying throughout *Special Interest* is something more fundamental and important: public unions have been politically successful because they are good at raising money and mobilizing the electorate. At all times, however, democracy remains as fit to act on unions as they are to act on it.[150] It is plain political power that drives union policy. Again, public education is no exception.

> The teachers unions exercise power over America's schools in two ways. They do it through collective bargaining. And they do it through politics. . . . [T]he power they wield in politics may be even *more* consequential than the power they wield in collective bargaining. . . . The public schools, after all, are government agencies. Virtually everything about them is subject to the authority of local, state and national governments—and public

149. *Id.* at 24.

150. *See id.* at 143 ("Union power is also affected by local political culture. In Republican districts, as compared to Democratic districts, the teachers unions endorse candidates who are less sympathetic to union interests, and they wind up with school boards that are less sympathetic as well. It appears, then, that local democracy is operating—to some degree, anyway—to give weight to the preferences of ordinary citizens.").

> officials in all of these governments make their decisions through the political process. The public schools are therefore the *products* of politics.[151]

The East Providence case study offers a specific opportunity to test the responsiveness of democratic processes to a union position. Moe's research shows that the expected benefit of collective bargaining is the most important feature of teachers' union membership and that it even receives non-negligible support where collective bargaining is not permitted.[152] Moe's research also shows that teachers are most satisfied with the work of their local unions, over and above the state and national organizations.[153] He also shows a correlation between how teachers feel about collective bargaining and how they feel about their local unions, linked by the fact that local unions manage collective bargaining first and foremost.[154] This research should predict a strong political reaction from the East Providence Education Association to the East Providence School Committee, which succeeded in implementing a reduction in the terms and conditions of teachers' 2008–2011 employment to prior years' levels after being given clearance by the Rhode Island Superior Court on the basis of deficit avoidance.

Indeed, the reaction was strong and as expected. The 2010 election saw a routing of incumbents by first-time candidates. Local media outlets reported the story this way:

> East Providence is where the School Committee unilaterally imposed a pay cut on teachers, incurring the wrath of the national teacher's union. The National Education Association called the East Providence School Committee the worst in the nation. School Committee Chairman Anthony Carcieri says he's a target of a concerted fundraising effort to knock him out of office. He has an opponent in a first-time candidate named Charlie Tsonos. Carcieri said he thinks the union picked him. "He is a definite friend of the

151. *Id.* at 275.

152. *See id.* at 74–77 (noting some 51% of teachers' union membership says it joins mainly to support collective bargaining or a combination of collective bargaining and political activity and that collective bargaining has the support of 57% of the teachers working in districts where bargaining is not permitted).

153. *See id.* at 78–79 ("Above all else, [the data] highlights the key importance of *union locals* and *collective bargaining* in attracting teachers to their organizations and keeping them satisfied and attached.").

154. *See id.* at 78.

> unions. I think he's a stalking horse. This is somebody that they put up to knock me out . . . ."[155]
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> "Everybody knows exactly what's going on," Mr. Carcieri said. "Mr. Tsonos is backed by the unions." Mr. Carcieri said he supports a pay-for-performance system 100 percent while Mr. Tsonos said it needs more study . . . [and when] Mr. Carcieri asked Mr. Tsonos how he would have handled negotiations with the teachers' union on a new contract or the possibility of a Caruolo Act suit against the city . . . Mr. Tsonos said . . . "the answer is communication, collaboration and cooperation."[156]

The at-large representative, Luisa Abatecola, was the sole victorious incumbent, though at the smallest margin among seats (54% to 46%).[157] Each, Christine Rossi (Ward IV, victorious 66% to 34%), Ryan Tellier (Ward III, victorious 58.5% to 41.5%), Stephen Furtado (Ward II, victorious uncontested), and Charlie Tsonos (Ward I, victorious 61.6% to 38.4%), were first-time candidates.[158] This is an especially stark result given the incumbency advantage school board candidates are known to enjoy.[159] Though that starkness is offset some by the expected preference for pro-union sympathies.[160]

Democratic processes have functioned and continue to function well for public unions. They functioned well for the East Providence Education Association in 2010, specifically. While the East Providence Education Association could have rallied Rhode Island public unions and their membership to collectively mobilize for continuation legislation, it did not have to attain that level of support in the short-term to protect its position from another encroachment. The next local election after deficit avoidance implementation was a referendum on the school committee behind it. Resort to adjudication for what most closely resembles a legislative purpose is

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155. Bill Rappleye, *School Committee Chairman Faces Election Battle*, TURNTO10.COM (July 15, 2010), http://www2.turnto10.com/news/2010/jul/15/school-committee-chairman-faces-election-battle-ar-151856/.

156. *Candidates Debate in East Providence*, EASTBAYRI.COM (Oct. 29, 2010) (no longer available online, on file with author).

157. *East Providence News*, EASTBAYRI.COM (Nov. 2, 2010) (no longer available online, on file with author).

158. *Id.*

159. *See* MOE, *supra* note 7, at 139–42.

160. *See id.* at 140–41 ("[I]ncumbents who are especially negative toward union interests are systematically being removed from office, while incumbents who are more sympathetic are being kept. In addition, the losers are often being replaced by union-endorsed nonincumbents, who win 62 percent of their elections and are considerably more positive toward union interests.").

unwarranted. Public unions have demonstrated and continue to demonstrate that more democratic outlets are viable.

V. CONCLUSION

The very existence of public unionism is threatened by a political reaction to perceptions of illegitimacy. Public unions are accused of mobilizing to elect management sympathetic to their cause. Here, a teachers' union is shown to advocate for a position on contract terms perceived to be antidemocratic using means that are also perceived to be antidemocratic. Unsustainable debt levels are thus no longer associated only with shortfalls in revenue but also with the nature and extent of public union benefits themselves.

It behooves public unions to take a longer view. Democratic processes have long functioned as viable outlets for union positions. Democratic means to democratic ends will better serve a public entity than the institutionalization of unilateral goals. By removing the safety valves that permit the ebb and flow of political vicissitudes, one only hastens disproportionate paroxysm.