

SEWER SYNDICALISM: WORKER SELF-MANAGEMENT IN PUBLIC SERVICES

Eric M. Fink*

*Staat ist ein Verhältnis, ist eine Beziehung zwischen den Menschen, ist eine Art, wie die Menschen sich zu einander verhalten; und man zerstört ihn, indem man andere Beziehungen eingeht, indem man sich anders zu einander verhält.*¹

I. INTRODUCTION

In the late nineteenth and early twentieth centuries, municipal governments in various US cities assumed responsibility for utilities and other services that previously had been privately operated. In the late twentieth century, prompted by fiscal crisis and encouraged by neo-liberal ideology, governments embraced the concept of “privatization,” shifting management and control over public services² to private entities.

Despite disagreements over the merits of privatization, both proponents and opponents accept the premise of a fundamental distinction between the “public” and “private” sectors, and between “state” and “market” institutions. A more skeptical view questions the analytical soundness and practical significance of these dichotomies. In this view, “privatization” is best understood as a rhetorical strategy, part of a broader neo-liberal ideology that relies on putative antinomies of “public” v. “private” and “state” v. “market” to obscure and reinforce social and economic power relations.

While “privatization” may be an ideological definition of the situation, for public service workers the difference between employment in the “public” and “private” sectors can be real in its consequences³ for job security, compensa-

* Associate Professor of Law, Elon University School of Law, Greensboro, North Carolina. This work benefitted from the insightful comments and suggestions of participants at the UNLV Boyd School of Law’s Democracy and the Workplace Symposium (February 2012), and at the International Institute for the Sociology of Law’s Social Economy Conference (July 2011). Elon Law students Jenifer McCrae (J.D. 2013), Katherine Koone (J.D. anticipated 2014), and Madeline Obler (J.D. anticipated 2014) provided valuable research assistance. This work is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 United States License, <http://creativecommons.org/licenses/by-nc-sa/3.0/us/>.

¹ Gustav Landauer, *Schwache Staatsmänner, Schwächeres Volk!*, 12 DER SOZIALIST 89, 89 (1910), available at <http://www.yumpu.com/de/document/view/9268493/der-sozialist-organ-des-sozialistischen-bundes-02-jg-1910> (“The state is a relationship, a connection between people, one way that people behave toward one another; and we destroy it by entering into new relationships, by behaving differently toward one another.”).

² For the sake of convenience, I use the term “public services” to refer to services that are provided to the general public within a given locality, regardless of whether the provider of those services is nominally a “public” or “private” entity.

³ Cf. WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, *THE CHILD IN AMERICA: BEHAVIOR PROBLEMS AND PROGRAMS* 572 (1928) (“If men define situations as real, they are real in their consequences.”).

tion, and other respects. Yet, in both the “public” or “private” sectors, workers labor under similar conditions of bureaucratic-managerial control, regardless of whether the boss represents a government agency or private company. Against these sibling forms of hierarchical control, this work posits the alternative of “public service syndicalism,”⁴ under which workers themselves take responsibility for managing public service operations.

Worker self-management⁵ in public services has been rare in the United States. But examples, both here and elsewhere, do exist. Most recently, the British government, as part of its “Big Society” agenda, has pursued the creation of employee-run public service “mutuals.” Critics within the labor movement and the left have regarded that initiative with suspicion, seeing it as an effort to continue a neo-liberal agenda under the guise of worker empowerment. Yet, the fact that a center-right British government has at least embraced

⁴ The term public service syndicalism is used here as a shorthand for a model of public service delivery through entities directly controlled and managed by workers (“public service syndicates”). See Kenneth Casebeer, *Community Syndicalism for the United States: Preliminary Observations on Law and Globalization in Democratic Production* 5 (Miami Law Research Paper Series, Working Paper No. 2011-36, 2011), available at <http://ssrn.com/abstract=1966172> (defining “community syndicalism” as a system of “local community start-up finance and operating credit for industrial production combined with democratic worker ownership and control of production”). The choice of nomenclature consciously links the call for public service syndicalism to radical currents within the labor movement emphasizing direct worker control over the workplace. See Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575, 618 (1989) (“Syndicalism’s central ambition was to achieve direct and democratic worker control of industrial management decisions.”); Tom Brown, *Principles of Syndicalism*, LIBCOM.ORG (Nov. 27, 2006, 4:08 PM), <http://libcom.org/library/principles-of-syndicalism-tom-brown> (this material was originally published as a series of articles in *WAR COMMENTARY FOR ANARCHISM* in 1943) (defining “Syndicalism” as “a theory and movement of trade unionism . . . in which all means of production and distribution are brought under the direct control of their workers by the use of direct action, and organized through federations of labor unions; direct political and economic democracy in the workplace and community organized through labor unions and federations, including the abolition of capitalism, social classes, parliamentary government, bureaucracy and political parties”); Gaylord Wilshire, *Syndicalism: What It Is*, LIBCOM.ORG (Dec. 30, 2007, 3:58 PM), <http://libcom.org/library/syndicalism-what-it> (this work was originally published as a pamphlet in 1912 in London by Twentieth Century Press) (“The essence of Syndicalism is the control by the workers themselves, be they intellectual or manual, of the conditions of their own work.”).

⁵ I use the terms “worker self-management” and “worker control” interchangeably in this work. Cf. Sam Dolgoff, *Workers’ Control vs Workers’ Self-Management*, in *THE ANARCHIST COLLECTIVES: WORKERS SELF-MANAGEMENT IN THE SPANISH REVOLUTION 1936–1939* app. at 81 (Sam Dolgoff ed., 1974) (distinguishing “workers’ control” (“a strictly limited area of decision-making power, a voice—at best secondary—in the control of the conditions of the work place”) from “workers’ self-management” (“the organization of all workers in the work place into a workers’ council or factory committee . . . which makes all the decisions formerly made by the owners and managers”). The form of public service syndicalism envisioned here is closer to Dolgoff’s conception of “worker self-management” in its operation, though the idea of implementing this form through legal and policy intervention by the state will no doubt be met with skepticism by orthodox syndicalists. See *id.* (identifying “self-management” as “the very process by which the workers themselves overthrow their managers and take on their own management and the management of production in their own work place”). See also Wilshire, *supra* note 4 (“Instead of the State giving industrial control to the workers, as the Socialists fondly hope, the Syndicalists look to the workers taking such control and giving it to the community.”).

the language of worker control in public services suggests that similar experimentation may be politically feasible in the United States as well.

II. THE PUBLIC-PRIVATE PENDULUM

Over the course of the past hundred or so years, the management of public services has passed back-and-forth between government and private entities. In the late nineteenth and early twentieth centuries, the dominant trend was toward government responsibility for services. In the late twentieth century, a reverse trend of privatization gained momentum. In the early twenty-first century, the picture has been mixed, with both continued privatization in some areas and a return to government operation in others.

A. Municipalization

While municipal government in the United States directly provided some public services in colonial times,⁶ the general pattern began with private actors providing services under government regulation, evolving into a system of “direct public subcontracting” in the early nineteenth century, before giving way to direct municipal provision in the late nineteenth and early twentieth centuries.⁷

The early twentieth century municipal governments that assumed responsibility for public utilities and services represented the local face of the Socialist⁸ and Progressive⁹ movements. The differing ideologies of these movements appealed to different core constituencies: Socialists, rooted in the industrial working class and organized labor movement,¹⁰ were devoted to abolishing

⁶ Edward L. Glaeser, *Public Ownership in the American City* 27 (Nat'l Bureau of Econ. Research, Working Paper No. 8613, 2001), available at <http://www.nber.org/papers/w8613> (noting that, under English colonial rule, “water, fire and sanitation were the primary responsibilities of the earliest government of New York, the Common Council”).

⁷ *Id.* at 31–32 (reviewing history of sanitation services in New York); *id.* at 32–33 (street paving); *id.* at 33–37 (mass transit). See also Paul Jerome Raver, *Municipal Ownership in the Last Five Years*, 9 J. LAND & PUB. UTIL. ECON. 121, 121 n.1 (1933) (citing “rapid growth in the number and size of municipal enterprises” between 1912 and 1917); Thomas F. Campbell, *Municipal Ownership*, ENCYCLOPEDIA CLEVELAND HIST., <http://ech.case.edu/cgi/article.pl?id=MO> (last modified July 21, 1997, 1:13 PM).

⁸ The leading example here is Milwaukee under Mayors Emil Seidel and Daniel Hoan. See ELMER AXEL BECK, *THE SEWER SOCIALISTS: A HISTORY OF THE SOCIALIST PARTY OF WISCONSIN 1897–1940*, at 68, 140 (1982). For other examples, see generally RICHARD W. JUDD, *SOCIALIST CITIES: MUNICIPAL POLITICS AND THE GRASS ROOTS OF AMERICAN SOCIALISM* (1989); *SOCIALISM AND THE CITIES* (Bruce M. Stave ed., 1975).

⁹ A leading example is Cleveland Mayor Tom Johnson. See generally EUGENE C. MURDOCH, *TOM JOHNSON OF CLEVELAND* (1994); Robert H. Bremner, *The Civic Revival in Ohio: Reformed Businessman: Tom L. Johnson*, 8 AM. J. ECON. & SOC. 299 (1949). For other examples, see MARTIN J. SCHIESL, *THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA 1880–1920*, at 81–83 (1977).

¹⁰ See JUDD, *supra* note 8, at 29–35. In some cities, municipal Socialists also drew support, at least temporarily, from middle-class, business-oriented reformers, forming coalitions based on shared concerns about corruption and inefficiency in local government. See *id.* at 22–23, 36–40.

industrial capitalism in favor of a “Cooperative Commonwealth.”¹¹ Progressives, rooted in the professional and managerial middle-class, accepted industrial capitalism and sought merely to ameliorate its more adverse consequences through regulation and reform.¹²

Yet, in practice, municipal Socialists and Progressives pursued similar agendas in office, most notably the public ownership of utilities and expansion of services.¹³ For Progressives, the primary motivations were concerns over

¹¹ James R. Green, *The “Salesmen-Soldiers” of the Appeal “Army”: A Profile of Rank-and-File Socialist Agitators*, in *SOCIALISM AND THE CITIES*, *supra* note 8, at 13, 34–35; JUDD, *supra* note 8, at 32, 35; William C. Pratt, “Jimmie Higgins” and the Reading Socialist Community: An Exploration of the Socialist Rank and File, in *SOCIALISM AND THE CITIES*, *supra* note 8, at 141, 144. See also Walter Lippman, *On Municipal Socialism, 1913: An Analysis of Problems and Strategies*, in *SOCIALISM AND THE CITIES*, *supra* note 8, at 184, 189 (criticizing his fellow Socialists for “assum[ing] that we alone represent every step in progress from personal honesty to the Cooperative Commonwealth”). The idea of the “cooperative commonwealth” originated among utopian socialists in the nineteenth century, who established independent communities, organized on socialist principles, in an attempt to live and promote their vision of society. JOHN CURL, *FOR ALL THE PEOPLE: UNCOVERING THE HIDDEN HISTORY OF COOPERATION, COOPERATIVE MOVEMENTS, AND COMMUNALISM IN AMERICA* 57–58 (2d ed. 2009) (associating “the idea of a cooperative commonwealth” with the “Rochdale cooperative movement” originating in mid-nineteenth century England and spreading to America in the 1860s); see Edward W. Bemis, *Coöperation in New England*, in *6 HISTORY OF COOPERATION IN THE UNITED STATES* 17, 17 (Herbert B. Adams ed., 1888) (identifying Brook Farm Community as early example “an attempt (1842-6) to form a coöperative commonwealth”). See also LAURENCE GRONLUND, *THE COOPERATIVE COMMONWEALTH IN ITS OUTLINES: AN EXPOSITION OF MODERN SOCIALISM* 102 (1884). The Knights of Labor expressly declared the aim of “transform[ing] the country into what they came to call a Cooperative Commonwealth” by “establish[ing] co-operative institutions such as will tend to supersede the wage-system, by the introduction of a co-operative industrial system.” CURL, *supra* at 4, 87. Significantly, the Knights also called for “public ownership of railroads and other commercial transport; of telegraph and telephones, water systems and utilities.” *Id.* at 87–88. A call the Socialist Party would take up and put into practice in several cities in the early twentieth century. See JUDD, *supra* note 8, at 20–23.

¹² See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 5, 227–38 (1955); ARTHUR S. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA: 1910–1917*, at 1–2, 18–19 (1954).

¹³ See Gail Radford, *From Municipal Socialism to Public Authorities: Institutional Factors in the Shaping of American Public Enterprise*, 90 *J. AM. HIST.* 863, 866 (2003) (identifying municipal socialists and Progressives as part of “a broader political tendency in the late nineteenth and early twentieth centuries” pursuing “the agenda of public ownership”). Indeed, the similar approach to municipal government by Socialist and Progressive administrations was a subject of criticism from within the Socialist camp. Critics viewed the reformist agenda, including the focus on municipal utilities and services, as a distraction from the cause of overcoming capitalism. See, e.g., Lippman, *supra* note 11, at 184, 185–89 (criticizing Socialist administrations in Milwaukee and Schenectady for failing to “keep themselves clearly distinguished from the progressives”); Kenneth E. Hendrickson, Jr., *Tribune of the People: George R. Lunn and the Rise and Fall of Christian Socialism in Schenectady*, in *SOCIALISM AND THE CITIES*, *supra* note 8, at 72, 85–86 (discussing Lippman’s criticism). Shortly after castigating municipal Socialists for pursuing a reformist agenda, Lippman himself would abandon socialism in favor of progressive reform. *Id.*; ARTHUR MANN, *LA GUARDIA COMES TO POWER: 1933*, at 106–07 (1965) (citing Lippman’s support for Fiorello La Guardia’s 1933 mayoral campaign, which united middle-class “good government” reformers with labor unions and working class voters).

corruption and inefficiency associated with private contractors.¹⁴ Socialists shared these concerns, viewing efficient public services as a means to improve the health and living conditions of working class residents.¹⁵ They also believed that well-functioning Socialist-run cities could provide a working model for a post-capitalist society:

The Socialist urban utopia entailed democratic ownership and control of public utilities, bakeries, ice houses, coal and wood yards, department stores, slaughter houses, and many other things, all guided by the spirit of community cooperation. . . . Jobs would be provided for the unemployed; free medical care for the aged; public baths, laundries, parks, and playgrounds for the people. Socialists planned to build a show-place, an example of government run by and for the working people.¹⁶

Early twentieth century municipal reforms left a legacy of sanitation systems, water and power utilities, parks and recreation facilities, and other amenities that continued to operate under municipal control long after the Progressive and Socialist administrations that created them were a distant memory.¹⁷ Before the century's end, however, economic and ideological developments would threaten this legacy.

B. Privatization

During the last decades of the twentieth century, prompted in part by fiscal crisis¹⁸ and encouraged by an ascendant ideology of neo-liberalism,¹⁹ a trend

¹⁴ See Glaeser, *supra* note 6, at 6–13, 40. Cleveland mayor Newton Baker expressed this motivation in opining that “the movement for municipal ownership in the United States is the direct and immediate fruit of the misconduct of privately owned public utilities.” Newton D. Baker, *Municipal Ownership*, 57 ANNALS AM. ACAD. POL. SOC. SCI. 188, 188 (1915). George Stewart Brown, then a Baltimore city council member, explained support for municipal ownership among “Progressive Democrats” as resting on three beliefs: “(1) that competition in the public services is impracticable; (2) that municipal ownership will pay, either in cash savings to the taxpayer or in cheaper and better service; (3) that municipal ownership is a political necessity, and will remove the main and most threatening source of political corruption.” George Stewart Brown, *Municipal Ownership of Public Utilities*, 182 N. AM. REV. 701, 701 (1906); *Biographical Directory of Federal Judges: Brown, George Stewart*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3303&cid=999&ctype=na&instatena> (last visited Mar. 12, 2014) (identifying Baltimore City Council service).

¹⁵ JUDD, *supra* note 8, at 22, 30. It was the devotion to unglamorous but efficient public utilities gave rise to the sobriquet “sewer socialists.” See LOUIS WALDMAN, *LABOR LAWYER* 260 (1944) (crediting New York Socialist leader Morris Hillquit with coining the phrase “sewer socialism” as a term of derision aimed at Milwaukee Mayor Dan Hoan); see also Bruce M. Stave, *The Great Depression and Urban Political Continuity: Bridgeport Chooses Socialism*, in *SOCIALISM AND THE CITIES*, *supra* note 8, at 157, 176 (citing sewage treatment system established in Bridgeport, Connecticut under Socialist Mayor Jasper McLevy as “the classic example of ‘sewer socialism’”). The term has come to be used more favorably to describe the practical accomplishments of municipal Socialists. See, e.g., Joel Kotkin, Editorial, *Sewer Socialism: Cities Need a Back-to-Basics Strategy. Catering to Art-Loving Yuppies Just Won't Work*, L.A. TIMES, Sept. 12, 2004, at M1, available at <http://articles.latimes.com/2004/sep/12/opinion/op-kotkin12>.

¹⁶ JUDD, *supra* note 8, at 32.

¹⁷ See Radford, *supra* note 13, at 867.

¹⁸ See Igor Vojnovic, *Government and Urban Management in the 20th Century: Policies, Contradictions, and Weaknesses of the New Right*, 69 GEOJOURNAL 271, 275 (2007). On the impact of state fiscal crisis on government policy in the 1970s, see generally JAMES O'CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973); CLAUS OFFE, *CONTRADICTIONS OF THE*

emerged toward shifting management and control of public services to the private sector.²⁰ Privatization²¹ has taken various forms, ranging from contracting with private entities to operate and manage certain aspects of services, to selling off services entirely to private organizations.²²

At the municipal level, privatization reached its peak in the late 1990s.²³ By that time, a substantial majority of cities had engaged in at least some form of privatization, affecting about one-fifth of municipal services overall.²⁴ While nearly all types of service have been subject to some form of privatization, the extent has varied among different types of service.²⁵

Perhaps symbolizing the high-water mark of the privatization wave, in the late 1990s the City of Milwaukee privatized its municipal sewage system, the very embodiment of “sewer socialism.”²⁶ More recently, Milwaukee also considered, but ultimately abandoned, a proposal to privatize its water service.²⁷ The fate of water privatization in Milwaukee is consistent with recent trends,

WELFARE STATE (John Keane ed., 1984); Fred Block, *The Fiscal Crisis of the Capitalist State*, 7 ANN. REV. SOC. 1 (1981).

¹⁹ See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 160 (2007).

²⁰ JOHN QUIGGIN, ZOMBIE ECONOMICS: HOW DEAD IDEAS STILL WALK AMONG US 179–82 (2010); David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. SOC. SCI. 22, 35–36 (2007) [hereinafter *Neoliberalism as Creative Destruction*]; Vojnovic, *supra* note 18, at 278; Amir Hefetz & Mildred E. Warner, *Dynamics of Service Provision: Service, Market and Place Characteristics* 13 (Milan European Econ. Workshops, Working Paper No. 2010-33, 2010), available at http://wp.demm.unimi.it/tl_files/wp/2010/DEMM-2010_033wp.pdf [hereinafter *Dynamics of Service Provision*].

²¹ The term “privatization” is often attributed to business writer Peter Drucker, who argued for “reprivatization” of functions that government had assumed from the private sector beginning in the late nineteenth century. See Germà Bel, *The Coining of “Privatization” and Germany’s National Socialist Party*, J. ECON. PERSP., Summer 2006, at 187, 187–88 (citing various sources crediting Peter Drucker, *THE AGE OF DISCONTINUITY* (1969) with originating the term “privatization”). Drucker’s work was certainly influential in popularizing the term and the concept to which it refers in the 1970s and ’80s. *Id.* at 189 (noting influence of Drucker’s work on economic policy). But the term “privatization” itself pre-dates Drucker’s work by several decades. Bel traces it back to discussions of German economic policy in the 1930s and ’40s. *Id.* at 189–91.

²² See Leonard Gilroy, *Local Government Privatization 101*, REASON FOUND. (Mar. 16, 2010), <http://reason.org/news/show/local-government-privatization-101>.

²³ See *Dynamics of Service Provision*, *supra* note 20, at 4.

²⁴ Robert Jay Dilger et al., *Privatization of Municipal Services in America’s Largest Population Cities*, 57 PUB. ADMIN. REV. 21, 21–22 (1997) (citing variation among cities in definitions of privatization and measures of its extent); *Dynamics of Service Provision*, *supra* note 20, at 4; Mildred Warner & Amir Hefetz, *Privatization and Reverse Privatization in US Local Government Service Delivery 2002–2007*, at 3 (Oct. 2010) [hereinafter *Privatization and Reverse Privatization*] (conference paper) (on file with author).

²⁵ *Privatization and Reverse Privatization*, *supra* note 24, at 3, 14.

²⁶ Alan J. Borsuk, *Is ‘Sewer Socialism’ All Washed Up?*, MILWAUKEE J. SENTINEL, Dec. 14, 1997, at B1; Roger Bybee, *Sewer Socialism Down the Drain?*, IN THESE TIMES (July 10, 2009), http://inthesetimes.com/article/4544/sewer_socialism_down_the_drain/.

²⁷ Dan Egan & Larry Sandler, *Can Water Keep City Budget Afloat?: Leaders Weigh Privatization’s Revenue Against Loss of Control*, MILWAUKEE J. SENTINEL, May 25, 2009, at A1, available at <http://www.jsonline.com/news/milwaukee/45969117.html>; *Public Opposition Prevented the Privatization of Milwaukee’s Drinking Water System*, FOOD & WATER WATCH (Feb. 21, 2013), <http://www.foodandwaterwatch.org/studies/milwaukee-wi/>; Bybee, *supra* note 26.

which have seen “reverse contracting” (i.e. governments reassuming direct responsibility for previously outsourced services) matching or outpacing privatizations.²⁸

There is an extensive body of scholarship on privatization, taking a variety of analytical approaches and offering variously favorable and critical appraisals.²⁹ Despite the differences, this work generally shares one notable common feature: an inattention to public service workers. While “taxpayers,” “consumers,” and “the public at large” are typically identified as relevant “stakeholders” in privatization decisions,³⁰ the workers engaged in providing services are mostly absent, appearing only indirectly in claims that civil service rules and public-sector unions impair the efficiency of government-provided services.³¹ There is little discussion about the effect of privatization on workers, and no consideration of workers’ potential role in service management.

For public service workers, privatization may entail a loss of job protection,³² reduced wages or benefits,³³ and otherwise less-favorable working conditions as compared to public employment. For the labor movement, which in the United States has become increasingly concentrated in the public sector,³⁴ privatization threatens a loss of membership and strength.³⁵ Consequently, pub-

²⁸ Privatization and Reverse Privatization, *supra* note 24, at 3; see also Diane Cardwell, *Power to the People*, N.Y. TIMES, Mar. 14, 2013, at B1, available at <http://www.nytimes.com/2013/03/14/business/energy-environment/cities-weigh-taking-electricity-business-from-private-utilities.html>.

²⁹ For a review of this literature, see Chris Sagers, *The Myth of “Privatization”*, 59 ADMIN. L. REV. 37, 43–55 (2007).

³⁰ Otieno Mbare, *The Role of Corporate Social Responsibility (CSR) in the New Economy*, ELECTRONIC J. BUS. ETHICS & ORG. STUD., http://ejbo.jyu.fi/articles/0901_5.html (last visited Mar. 13, 2014).

³¹ See, e.g., Sergio Fernandez et al., *Employment, Privatization, and Managerial Choice: Does Contracting Out Reduce Public Sector Employment?*, 26 J. POL’Y ANALYSIS & MGMT. 57, 59 (2007); Lawrence H. White, *Privatization of Municipally-Provided Services*, 2 J. LIBERTARIAN STUD. 187, 189–90 (1978) (citing civil service rules and public employee unions as impediments to productivity in public services); Tad DeHaven, *Privatizing the U.S. Postal Service*, DOWNSIZING THE FED. GOV’T, CATO INST. 3 (Nov. 2010), <http://www.downsizinggovernment.org/usps> (arguing that wages, benefits, and work rules under union contracts reduce efficiency in US Postal Service).

³² See Richard Michael Fischl, “*Running Government Like a Business*”: *Wisconsin and the Assault on Workplace Democracy*, YALE L.J. ONLINE 47 (June 21, 2011), <http://yalelawjournal.org/images/pdfs/996.pdf> [hereinafter *Running Government Like a Business*] (noting greater job security for public employees compared to private sector).

³³ Dilger et al., *supra* note 24, at 24.

³⁴ The most recent figures from the Bureau of Labor Statistics show an overall union membership rate of 11.3 percent, with a rate of 35.9 percent in the public sector compared with only 6.6 percent in the private sector. While the total number of employees in the private sector (107.2 million) is about five times greater than in the public sector (20.4 million), public-sector union members (7.3 million) now outnumber their private-sector counterparts (7.0 million). News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, *Union Members—2012* (Jan. 23, 2013), http://www.bls.gov/news.release/archives/union2_01232013.pdf. See also *Running Government Like a Business*, *supra* note 32, at 44 (citing 2010 Bureau of Labor Statistics figures).

³⁵ Indeed, the opportunity to weaken public sector unions has been among the motivations for privatization. See QUIGGIN, *supra* note 20, at 182–83.

lic employees and labor unions have generally been strong opponents of privatization.

III. A CRITIQUE OF PRIVATIZATION AS PURE IDEOLOGY

Proponents and opponents of privatization alike share a core assumption: “that there is some distinction between the performance of certain functions by government institutions and performance by private ones, and . . . that the distinction is both real and of very deep significance.”³⁶ Yet, for both socio-legal analysts and service workers, the public-private dichotomy may be a distinction with limited difference, bearing neither the normative weight it carries in jurisprudential theory, nor the analytical weight it carries in economic argument.³⁷ As a practical matter,

the basic choice in the organization of society is not between organization by government bureaucracy on one hand, and markets on the other—a choice that is assumed in the privatization literature. Rather, the basic choice is between two kinds of bureaucracy, which really do not differ much at all.³⁸

This is particularly true from the perspective of workers. Under both government and private management, employees carry out tasks assigned by, and under the supervision and control of, managers³⁹ who are appointed by, and ultimately accountable to, capital asset owners.⁴⁰ In their day-to-day experiences on the job, public and private sector employees alike have little if any self-determination.⁴¹

³⁶ Sagers, *supra* note 29, at 38.

³⁷ *Id.* at 41. See also Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 147 (2012) (noting the “deep similarity” between direct government management of public services and management by private contractors, and arguing that there is no “non-contingent distinction between the two types of agents”).

³⁸ Sagers, *supra* note 29, at 38. Cf. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 956 (Guenther Roth & Claus Wittich eds., 1978) (observing that “bureaucracy” represents the characteristic organizational form of both the modern state agency and the modern business enterprise).

³⁹ A crucial defining feature of bureaucratic organization is the “principle of office hierarchy” entailing “a clearly established system of super- and subordination in which there is a supervision of the lower offices by the higher ones.” WEBER, *supra* note 38, at 957 (emphasis omitted); see also *id.* at 980 (“The bureaucratic structure goes hand in hand with the concentration of the material means of management in the hands of the master.”). Weber emphasizes that “[i]t does not matter for the character of bureaucracy whether its authority is called ‘private’ or ‘public.’ ” *Id.* at 957.

⁴⁰ See GREGORY K. DOW, *GOVERNING THE FIRM: WORKERS’ CONTROL IN THEORY AND PRACTICE* 4–5 (2003).

⁴¹ See *Running Government Like a Business*, *supra* note 32, at 40 (arguing that the lack of “a genuine voice in important decisions about their work lives and the power to make that voice heard” typifies the situation of employees in the United States). See also *id.* at 54–55 (quoting employees of the federal Transportation Security Administration who cite unilateral managerial control and the lack of “voice on the job” as a primary motivation for seeking union representation). To be sure, there are meaningful differences between public- and private-sector employment. Most significantly, unlike private-sector workers, who (outside the dwindling unionized segment of the workforce) can typically be fired at-will, public-sector workers generally enjoy some protection against arbitrary discharge. See *id.* at 47–50. Public-sector workers are also far less likely to face strong resistance from their employers when they seek to organize a labor union. *Id.* at 53.

That is not to say that the public-private distinction lacks any socio-legal significance. To the contrary, it “plays an important legitimating role in society and . . . conceals prevalent and very significant maldistributions of power.”⁴² As Karl Klare explains, “[t]he primary effect of the public/private distinction is . . . to inhibit the perception that the institutions in which we live are the product of human design and can therefore be changed.”⁴³ In the realm of work, the legitimate role of the public-private distinction plays out in the beliefs “that industry and commerce can only function on a largely authoritarian basis,” and that “the basic principles of democracy do not apply in the workplace.”⁴⁴

This ideological function hides behind the typical framing of privatization as a merely neutral technocratic device for achieving economic efficiency and enhanced performance in existing programs and services.⁴⁵ Yet, privatization also has the “potential to rearrange policy landscapes and to affect underlying distributions of power among democratic actors and institutions.”⁴⁶ In this sense, privatization is not a value-free economic tool, but very much a political strategy, facilitating substantive changes in policy goals and outcomes, without the same checks and balances, oversight, and accountability that apply to government agencies.⁴⁷

From this perspective, privatization is best understood as one element of the multifaceted project of neo-liberalism,⁴⁸ which has held hegemonic sway over political, economic, and legal discourse and practices for more than three decades.⁴⁹ In concrete terms, neo-liberalism “is a shorthand term used to denote a particular set of economic and political policy proposals”, notably “free trade, privatization, reduced government spending, and deregulation of capital flows.”⁵⁰ Neoliberalism’s broader significance, however, is ideological: a set of “cultural conceptions that governments and financial agencies attempt to apply and enforce along with and through economic and political practices.”⁵¹

In this broader ideological sense, neo-liberalism represents a “sophisticated class struggle on the part of the upper strata [in society] to restore . . .

⁴² Sagers, *supra* note 29, at 41.

⁴³ Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1982).

⁴⁴ *Id.*

⁴⁵ See Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 717–18 (2010) (“The case for privatization . . . has centered on its technocratic promise of efficiency and cost savings . . .”).

⁴⁶ *Id.* at 722.

⁴⁷ *Id.* at 718–19.

⁴⁸ See HARVEY, *supra* note 19 (identifying privatization as one of “four main features” of capitalist “accumulation by dispossession” under neoliberalism); *id.* at 65 (“Neoliberals are particularly assiduous in seeking the privatization of [state-owned] assets.”).

⁴⁹ See *Neoliberalism as Creative Destruction*, *supra* note 20, at 27–29. As Harvey explains, for a “system of thought to become dominant” its “fundamental concepts . . . become so deeply embedded in commonsense understandings that they are taken for granted and beyond question.” *Id.* at 24.

⁵⁰ Karen Ann Faulk, *If They Touch One of Us, They Touch All of Us: Cooperativism as a Counterlogic to Neoliberal Capitalism*, 81 ANTHROPOLOGICAL Q. 579, 587 (2008).

⁵¹ *Id.*

class dominance.”⁵² Neo-liberalism asserts that the only legitimate social institution is the market, and that the only legitimate social actor is the individual, particularly the individual as consumer.⁵³ There is no room, in the neo-liberal worldview, for non-market institutions or collective action. Within that worldview, privatization appears a “common sense” solution, because any alternative is either conceived to be inherently and irredeemably deficient (as with public services administered by government and staffed by public employees organized and represented through unions) or utterly beyond the conceptual pale (as with public services administered and staffed by self-managing workers themselves). In turn, the practice of privatization bolsters the hegemony of neo-liberal ideology, by further delegitimizing non-market collective-action modes of service provision.⁵⁴

IV. BEYOND “PUBLIC” V. “PRIVATE”: WORKER SELF-MANAGEMENT AS AN ALTERNATIVE TO BUREAUCRATIC-MANAGERIALISM

A venerable radical tradition has long advocated for direct control and management of productive enterprises by workers themselves.⁵⁵ This tradition emphatically rejects “the belief that employees lack the capacity collectively to organize and govern complex industrial enterprises.”⁵⁶

The argument for worker control is two-fold. Most immediately, self-management is a more democratic alternative to both privately-owned and state-owned modes of bureaucratic-managerial control.⁵⁷ More broadly, the exercise

⁵² *Neoliberalism as Creative Destruction*, *supra* note 20, at 41.

⁵³ *Id.* at 22–23.

⁵⁴ COLIN CROUCH, *THE STRANGE NON-DEATH OF NEOLIBERALISM* 21 (2011) (likewise identifies privatization as a core element of neo-liberalism). Consistent with the suggestion that the public/private distinction is less fundamental than commonly supposed, see *supra* notes 37–38 and accompanying text, Crouch argues that “privatization” and “marketization” of public services under neo-liberalism has not, in practice, transferred responsibility and control to a truly private market. CROUCH, *supra*. Rather, what passes for “privatization” commonly entails a hybrid structure, under which government relies on private entities to finance and manage public services, through contractual arrangements that permit the private contractors to pocket service revenues while insulating both the private contractors and the governmental authorities from meaningful accountability through either the democratic process or market discipline. *Id.* at 94–96.

⁵⁵ There is extensive literature on the ideology and practice of worker control and self-management. A few notable entries in this genre include: *THE ANARCHIST COLLECTIVES: WORKERS SELF-MANAGEMENT IN THE SPANISH REVOLUTION 1936–1939* (Sam Dolgoff ed., 1974); DAVID MONTGOMERY, *WORKERS’ CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES* (1979); GEOFFREY OSTERGAARD, *THE TRADITION OF WORKERS’ CONTROL* (1997); *OURS TO MASTER AND TO OWN: WORKERS’ CONTROL FROM THE COMMUNE TO THE PRESENT* (Immanuel Ness & Dario Azzellini eds., 2011); ANTON PANNEKOEK, *WORKERS’ COUNCILS* (Robert F. Barsky ed., 2002); RICHARD WOLFF, *DEMOCRACY AT WORK: A CURE FOR CAPITALISM* (2012).

⁵⁶ See Klare, *supra* note 43.

⁵⁷ See Dow, *supra* note 40, at 27–32 (discussing democracy as normative basis for worker control). Without going so far as syndicalists or Marxists in seeking the abolition of capitalist forms of enterprise, progressive reformers likewise seek to promote workplace democracy by institutionalizing “a . . . labor voice in . . . corporate and workplace governance” through “works councils,” “codetermination,” and the like. Richard Michael Fischl, *Labor Law, the Left, and the Lure of the Market*, 94 MARQ. L. REV. 947, 951–52 (2011); see also Kenneth

of worker control within particular enterprises is a prefigurative practice for attaining the goal of “building a new world within the shell of the old.”⁵⁸ In this dual sense, worker control “operates as a counterlogic to the individualized and materialist conception of citizenship promoted by neoliberal capitalism.”⁵⁹

A. *Worker Control in Theory*

Dow offers a comprehensive theoretical and empirical assessment of worker control as an alternative mode of firm governance.⁶⁰ He distinguishes four ideal-types of firm governance, based on two structural-functional dimensions: ownership of capital assets, and control over production.⁶¹ Along the first dimension, the distinction is between “private” and “public” ownership.⁶² Along the second dimension, the distinction is between control by providers of capital (i.e. owners) and control by providers of labor (i.e. workers).⁶³ In this typology, a capital-managed firm is “capitalist” if assets are privately owned and “socialist” if assets are publicly owned, while a labor-managed firm is “laborist” if assets are privately owned and “self-managed” if assets are publicly owned.⁶⁴

G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 804 (2011); see also Dow, *supra* note 40, at 83–91 (discussing codetermination).

⁵⁸ See, e.g., Alberto R. Bonnet, *The Political Form at Last Discovered: Workers’ Councils Against the Capitalist State*, in OURS TO MASTER AND TO OWN, *supra* note 55, at 66, 66 (arguing that “the workers’ council showed an inherent potential to overcome the division between the economic and the political spheres,” and thus a means of “overcoming the capitalist state itself.”); Sheila Cohen, *The Red Mole: Workers’ Councils as a Means of Revolutionary Transformation*, in OURS TO MASTER AND TO OWN, *supra* note 55, at 48, 49 (“[T]hese worker-generated structures simultaneously challenge the capitalist state and create the potential template for a new, worker-run society organized along the same directly democratic, accountable lines.”); Donny Gluckstein, *Workers’ Councils in Europe: A Century of Experience*, in OURS TO MASTER AND TO OWN, *supra* note 55, at 32, 33 (“[W]orkers’ councils . . . provide a glimpse of an alternative to capitalism” and “represent a transition to the future, constituting a radically different kind of power.”); PANNEKOEK, *supra* note 55, at pt. 1, § 7, available at <http://libcom.org/library/workers-councils-1-pannekoek> (“The workers’ councils are the form of self-government which in the times to come will replace the forms of government of the old world.”); Antonio Gramsci, *Unions and Councils*, <http://www.marxists.org/archive/gramsci/1919/10/unions-councils.htm> (last visited Mar. 13, 2014) (Trans. Michael Carley, originally published in L’Ordine Nuovo on Oct. 11, 1919) (“The factory council is the model of the proletarian state.”); see also MICHAEL FIELDING & PETER MOSS, *RADICAL EDUCATION AND THE COMMON SCHOOL: A DEMOCRATIC ALTERNATIVE* 149 (2011) (discussing “prefigurative practice” and citing “the syndicalist phrase, ‘to build a new world in the shell of the old’”).

⁵⁹ See Faulk, *supra* note 50, at 608–09 (discussing worker cooperatives in the Argentine “recuperated businesses movement”).

⁶⁰ See generally Dow, *supra* note 40.

⁶¹ *Id.* at 2–3.

⁶² *Id.*

⁶³ *Id.* Dow’s analysis proceeds from a neo-institutionalist conception of “a firm . . . as a set of incomplete contracts among input suppliers,” within which “the right to make decisions not previously determined by contracts must be assigned to some person or group.” *Id.* at 4–5 (assigning residual control rights is the focus of the second dimension in Dow’s typology).

⁶⁴ *Id.* at 3 tbl.1.1.

The discourse of privatization typically presumes that, regardless of whether service operations are in public or private hands, control rights will be exercised by management on behalf of asset owners. That is, the choice is presumed to be between control by government managers (in cases where government directly provides services) or control by private managers (in cases where government sells, leases, or contracts for management of service operation).

Dow's formulation highlights the option of worker self-management as an alternative to both state-managed and privatized services. In this respect, he echoes a longstanding radical-left critique of government ownership as an incomplete and inadequate alternative to capitalist exploitation of labor.⁶⁵

Reviewing and critiquing the most common normative justifications for worker control, Dow⁶⁶ suggests that the most persuasive are those based on the values of dignity and community.⁶⁷ The authoritarian nature of traditional employment relations, whether in the private or public sector, undermines these values.⁶⁸ In contrast, worker self-management enhances the dignity of workers by liberating them from subaltern status, and nurtures solidarity among workers by restructuring their work within a social relation of mutual responsibility.⁶⁹

In the dominant conception of a "public-private distinction," the workplace is located in the "private" sphere, where "public" values like dignity and community are inapplicable. Dow's argument for extending these values into the workplace implicitly rejects the public-private bifurcation, and instead recognizes that the workplace is not sharply bounded-off from other sites of social existence:

[P]eople care about social relationships apart from their consequences for individual welfare Employment may be only one dimension of life, but it is an important one; sanctions may not involve the firing squad, but being fired is painful; and nor-

⁶⁵ See, e.g., Bonnet, *supra* note 58, at 72 (noting distinction "between the socialization of the product . . . and the socialization of the production process"). For Korsch, the attempt to implement "socialization" through "statization" (under the Social Democratic leadership in post-WWI Germany, or under municipal sewer socialist administrations in the US) represented only a "simple change of employer." *Id.* at 73. "The worker as such," Korsch argued, "doesn't win more freedom; his way of life and work won't be more humanized because the manager appointed by the owners of private capital is replaced by an official appointed by the state government or the municipal administration." *Id.* at 74; see also ISTVÁN MÉSZÁROS, *BEYOND CAPITAL: TOWARDS A THEORY OF TRANSITION* xvii (1995) (identifying "the socialist mode of control, through the self-management of the associated producers" as an alternative to both the "global capitalist" and "Stalinist Soviet" systems); Wilshire, *supra* note 4 ("The Syndicalist views both nationalisation and municipalisation of industry with more or less indifference.").

⁶⁶ Dow, *supra* note 40, at 23–44.

⁶⁷ *Id.* at 36.

⁶⁸ See *id.* ("The fundamental problem is that such firms involve a unidirectional authority relationship between a boss and subordinate, where one commands and the other obeys. Such master-servant relationships are by their nature not conducive to dignity or self-respect on the part of the subordinate.").

⁶⁹ Cf. Gramsci, *supra* note 58. ("[C]ollaboration to produce well and usefully develops solidarity, multiplies the links of affection and fraternity. Everyone is indispensable, everyone is at their post, and everyone has a function and a post. . . . The existence of the council gives workers the direct responsibility of production, it draws them to improving the work, instills a conscious and voluntary discipline, creates the psychology of the producer, of the creator of history.").

mally it is hard to turn down a job if one doesn't know when the next offer will arrive. Under these circumstances, the relational aspects of unaccountable authority appear morally suspect, and encouragement of more [labor managed firms] (or even an outright ban on [capital managed firms]) might seem to be an appropriate response.⁷⁰

B. Worker Control in Practice

There has been only limited experience with worker-run public services in the United States. Outside the United States, worker control in public services has been put into practice in at least two significant, and very different, cases: in Spain during the civil war of 1936–39, and in Great Britain under the current Conservative/Liberal-Democrat coalition government's Big Society program.

1. Worker-Run Public Services in the United States

The most fertile ground for experiments in worker-controlled public services in the United States has been in public education. Several teacher-run schools have been established, in some cases with the support of local teachers unions.⁷¹ Such schools currently operate in large cities including New York,⁷² Los Angeles,⁷³ Detroit,⁷⁴ Milwaukee,⁷⁵ Boston,⁷⁶ and Newark,⁷⁷ and in smaller districts like LeSueur-Henderson, Minnesota.⁷⁸

⁷⁰ Dow, *supra* note 40, at 40.

⁷¹ Winnie Hu, *In a New Role, Teachers Move to Run Schools*, N.Y. TIMES, Sept. 7, 2010, at A1, available at http://www.nytimes.com/2010/09/07/education/07teachers.html?pagewanted=all&_r=1&.

⁷² UFT CHARTER SCHOOL, <http://www.uftcharterschool.net/> (last visited Mar. 13, 2014). The UFT Charter School has faced threats of closure over poor performance, but UFT recently received approval to remain open, conditioned on making improvements over the next two years. See Beth Fertig, *Teacher Union's Charter Wins Two-Year Reprieve*, WNYC (Mar. 13, 2014, 1:53 PM), <http://www.wnyc.org/story/301878-teacher-unions-charter-school-wins-two-year-reprieve/>. See also Hu, *supra* note 71.

⁷³ *Charter Schools Iced, Los Angeles Teachers Win Bids To Run New Schools*, LABOR NOTES (Feb. 24, 2010), <http://www.labornotes.org/blogs/2010/02/charter-schools-iced-los-angeles-teachers-win-bids-run-new-schools>; see also *LAUSD School Board Chooses Most Local Parent/Teacher Plans*, UNITED TEACHERS L.A. (Feb. 23, 2010), <http://www.utla.net/node/2758>; see also Hu, *supra* note 71.

⁷⁴ Peggy Walsh-Sarnecki, *DPS Tries Something New: A School Run by Teachers*, DETROIT FREE PRESS, July 8, 2010, at A1; Stephen Sawchuck, *Teacher-Led School Innovates with Student Regrouping*, EDUC. WK., Jan. 19, 2011, at 1, available at http://www.edweek.org/ew/articles/2011/01/19/17schedule_ep.h30.html.

⁷⁵ Beth Hawkins, *Teacher Cooperatives: What Happens When Teachers Run the School?*, 9 EDUC. NEXT 37, 40 (2009), available at <http://educationnext.org/teacher-cooperatives/> (discussing “11 teacher-governed schools” within Milwaukee public school system).

⁷⁶ *Mission, Values and History*, BOS. TEACHERS UNION SCH., <http://theunionschool.com/wp/about-the-school/> (last visited Mar. 13, 2014); see also *What's Working: BTU School*, BOS. TEACHERS UNION, <http://www.btu.org/whats-working/btu-school> (last visited Mar. 13, 2014).

⁷⁷ BRICK ACAD., <http://bricknewark.org/> (last visited Mar. 13, 2014). See also Hu, *supra* note 71.

⁷⁸ MINN. NEW COUNTRY SCH., <http://www.newcountryschool.com> (last visited Mar. 13, 2014). The New Country School was apparently among the first public schools to be organized as a teacher-governed entity. See Doug Thomas, *MCNS History*, MINN. NEW COUNTRY SCH., <http://www.newcountryschool.com/about-mncs/mncs-history> (last visited Mar. 13,

One false start in the direction of worker-run public services emerged in New York City in 2010. The New York City Taxi and Limousine Commission (“TLC”)⁷⁹ announced a “Group Ride Vehicle Pilot Program,” under which private commuter-van services would replace bus lines formerly operated by the Metropolitan Transit Authority (MTA)⁸⁰ in Brooklyn and Queens.⁸¹ Transit Workers Union Local 100 (“Local 100”), which represents MTA bus drivers, sought an injunction to halt the pilot program.⁸²

Alongside its legal challenge, Local 100 also submitted a proposal to operate its own commuter-van service under the pilot program.⁸³ The union’s plan was to operate the service under a non-profit corporation, TWU Express, and to hire laid-off bus drivers at prevailing union wages.⁸⁴ The TLC appeared poised to accept the Local 100 bid.⁸⁵ However, shortly after the court denied Local 100’s request for an injunction,⁸⁶ the union abandoned its plan to operate the commuter-van service.⁸⁷

2014); Hawkins, *supra* note 75, at 38. It is now part of a network of more than three dozen teacher cooperative schools in ten states affiliated with EdVisions Cooperative. *Network of Schools*, EDVISIONS SCHS., http://edvisionschools.org/goto/Network_of_Schools (last visited Mar. 13, 2014).

⁷⁹ The TLC is the city “agency responsible for licensing and regulating New York City’s medallion (yellow) taxicabs, for-hire vehicles (community-based liveries and black cars), commuter vans, paratransit vehicles (ambulettes) and certain luxury limousines.” *About TLC, NYC TAXI & LIMOUSINE COMM’N*, <http://www.nyc.gov/html/tlc/html/about/about.shtml> (last visited Mar. 13, 2014).

⁸⁰ The MTA is a public authority established by the State of New York to operate public transportation in the New York City metropolitan region. *The MTA Network: Public Transportation for the New York Region*, MTA, <http://www.mta.info/mta/network.htm> (last visited Mar. 18, 2014). The MTA’s New York City Transit division operates subway and bus services within the city. *Id.*

⁸¹ Samuelson v. Yassky, 911 N.Y.S.2d 570, 573 (Sup. Ct. 2010); Aaron Rutkoff, *Transit Union to Run Vans It Opposes*, WALL ST. J., Aug. 11, 2010, at A18, available at <http://online.wsj.com/news/articles/SB10001424052748704164904575421702343430886>.

⁸² Samuelson, 911 N.Y.S.2d at 573.

⁸³ Ari Paul, *TWU Ready to Give Dollar Vans a Ride for the Money: Plan to Offer Competition*, CHIEF-LEADER, Aug. 13, 2010, available at http://thechiefleader.com/news/news_of_the_week/twu-ready-to-give-dollar-vans-a-ride-for-the/article_08c07d34-3885-5063-8017-7581d0e33d60.html?mode=image&photo=0; Rutkoff, *supra* note 81; Proposal, *Transp. Workers Union of Greater N.Y. Local 100 & TWU Local 100 Express, Group Vehicle Ride Program*, NYC Taxi and Limousine Commission [hereinafter TWU Proposal] (unpublished manuscript) (copy on file with author). The Local 100 bid provided the initial impetus for this paper. The original plan had been to use Local 100’s operation of a commuter van service as a case study in public service syndicalism. As often happens with the best-laid schemes, this one went awry, as Local 100’s plan never became a reality.

⁸⁴ Paul, *supra* note 83; Rutkoff, *supra* note 81; TWU Proposal, *supra* note 83, at 1, 3–4.

⁸⁵ Lisa Chow, *Laid Off MTA Bus Drivers Win License to Operate Dollar Vans in Brooklyn*, WNYC NEWS (Aug. 11, 2010), <http://www.wnyc.org/story/90753-laid-mta-bus-drivers-win-license-operate-dollar-van-service-brooklyn/>; Rutkoff, *supra* note 81.

⁸⁶ Samuelson, 911 N.Y.S.2d at 578.

⁸⁷ Benjamin Kabak, *TLC Commuter Van Pilot to Launch Monday Sans TWU*, 2ND AVE. SAGAS (Sept. 9, 2010), <http://secondavenuesagas.com/2010/09/09/tlc-commuter-van-pilot-to-launch-monday-sans-twu/>. The union’s change of heart was apparently motivated by the MTA’s rehiring of the laid-off bus drivers, as well as concerns about the financial viability of the plan, and internal disagreement over whether operating a private van service was appropriate for a union representing public transit workers. See Ari Paul, *TWU Sends Dollar-Van Plan to Scrap Heap, Citing Start-Up Costs*, CHIEF-LEADER, Sept. 17, 2010, availa-

2. *Public Service Syndicalism in Civil War Spain*

A dramatic example of worker control in public services occurred during the Spanish Civil War (1936–39). In Barcelona and the surrounding region, workers assumed control over what had been privately-owned commercial and industrial enterprises, including (but by no means limited to) those engaged in public utilities and services.⁸⁸ These included water, gas, and electric utilities;⁸⁹ telephone services;⁹⁰ railways,⁹¹ ports,⁹² and municipal transit;⁹³ health services;⁹⁴ and even hairdressing shops.⁹⁵

Despite its historical significance, the Spanish experience—emerging under the extreme circumstances of wartime, and brought about spontaneously by a working class with a deep and rich anarchist and syndicalist tradition—might appear to have limited precedential value in the very different conditions of the United States today. A more recent case, in a social and economic context more closely resembling our own, offers better support for the premise that it may be feasible to implement some form of worker self-management in public services here.

3. *Public Service Mutuels in Great Britain*

In 2010, the British government launched a new program of “mutualization,” under which public service workers would assume managerial responsibility from government authorities. The initiative began with a pilot program under which management of selected service entities was transferred from public authorities to employee-controlled “Pathfinder mutuels.”⁹⁶ The pilot entities

ble at http://thechiefleader.com/news/news_of_the_week/twu-sends-dollar-van-plan-to-scrap-heap-citing-start/article_5998e3e7-47a3-52b7-8fe3-5f74e62bc15c.html.

⁸⁸ GASTON LEVAL, *COLLECTIVES IN THE SPANISH REVOLUTION* 227 (1975); Augustin Souchy, *Collectivizations in Catalonia*, reprinted in *THE ANARCHIST COLLECTIVES: WORKERS’ SELF-MANAGEMENT IN THE SPANISH REVOLUTION 1936–1939*, *supra* note 55 at 86, 86 [hereinafter *Collectivizations*]; Augustin Souchy, *Workers’ Self-Management in Industry*, reprinted in *THE ANARCHIST COLLECTIVES: WORKERS’ SELF-MANAGEMENT IN THE SPANISH REVOLUTION 1936–1939*, *supra* note 55 at 78, 78, 82 [hereinafter *Self-Management in Industry*]. In many cases, the workers simply took over operations after the private owners and their managers fled in the wake of fighting. *Self-Management in Industry*, *supra*, at 78. LEVAL, *supra*, at 246 offers a “piquant” anecdote involving assumption of control by workers at the Barcelona tramway system, which had been owned by the General Tramways Company:

All the top level personnel had left, and the syndical delegation found in the offices only the lawyer instructed to represent the company and to parley with them. . . . [The company’s lawyer] received [the delegation] most cordially, declaring that he accepted the new situation, and even that, as a lawyer, he was putting himself at the service of the workers.

⁸⁹ LEVAL, *supra* note 88, at 240; *Collectivizations*, *supra* note 88, at 91.

⁹⁰ *Collectivizations*, *supra* note 88, at 88.

⁹¹ LEVAL, *supra* note 88, at 253–54; *Collectivizations*, *supra* note 88, at 89.

⁹² LEVAL, *supra* note 88, at 264; *Collectivizations*, *supra* note 88, at 90–91.

⁹³ LEVAL, *supra* note 88, at 245; *Collectivizations*, *supra* note 88, at 86.

⁹⁴ LEVAL, *supra* note 88, at 264.

⁹⁵ *Collectivizations*, *supra* note 88, at 93.

⁹⁶ Press Release, Cabinet Office, Francis Maude Launches Pathfinder Mutuels (Aug. 12, 2010), *available at* <https://www.gov.uk/government/news/francis-maude-launches-pathfinder-mutuels>.

“cover a wide variety of sectors, including health, social care, youth services, school support services and further education.”⁹⁷

The stated motivation for the program was to “challenge traditional public service structures and unleash the pent-up ideas and innovation that has been stifled by bureaucracy.”⁹⁸ The hope was that the mutual model would “liberate public sector workers and ‘introduce radical shifts in ownership, accountability and financing.’”⁹⁹ Proponents anticipated that the change would lead to enhanced service quality for users,¹⁰⁰ and enhanced working experiences for employees.¹⁰¹

Despite the vaunted benefits for workers, the mutualization plan came under fire from labor unions representing public service employees. In response to the government’s announcement of the Pathfinder Mutual program, one union leader asserted, “There is no appetite from the public sector workforce or the public generally for these so-called co-operatives. It is insulting to think that these DIY co-operatives, set up on the cheap, can replace a well-established and joined-up public sector.”¹⁰² In particular, these critics were unpersuaded by the analogy to employee co-operatives in the commercial sector.

To think that cancer treatment can be equated with the values of the retail sector beggars belief. And to keep repeating the words ‘John Lewis’ as the reasoning for these changes is just mangling and perverting the English language. You go to John Lewis to buy a sofa or a fridge, not to have chemotherapy.¹⁰³

Dismissing claims that the initiative would promote service enhancements and worker autonomy, another union leader contended that, “[t]he coalition’s resort to mutuals as an alternative to directly provided public services is largely an attempt to save money on reduced pay, conditions, and pensions.”¹⁰⁴

⁹⁷ MUTUALS INFORMATION SERVICE, CABINET OFFICE, MUTUAL PATHFINDER PROGRESS REPORT: DECEMBER 2011 2–3 (2011), available at <http://mutuals.cabinetoffice.gov.uk/documents/mutual-pathfinder-progress-report> (listing 22 Pathfinder mutuals). See also JULIAN LE GRAND, MUTUALS TASK FORCE, PUBLIC SERVICE MUTUALS: THE NEXT STEPS 22–28 (2012), available at <http://eprints.lse.ac.uk/44579> (discussing public service mutuals established between 2010 and 2012).

⁹⁸ Patrick Wintour, *Public Sector Workers Encouraged to form John Lewis-style Co-operatives*, GUARDIAN, Nov. 17, 2010, at 1, available at <http://www.theguardian.com/politics/2010/nov/17/public-sector-workers-cooperatives-mutuals> (quoting Cabinet Office minister Francis Maude).

⁹⁹ *Id.* (quoting Francis Maude).

¹⁰⁰ See, e.g., TIM COOPER, ACCENTURE INST. FOR HIGH PERFORMANCE, THE BENEFIT IS MUTUALS: HARNESSING OLD MODELS OF PUBLIC VALUE IN A NEW AGE OF AUSTERITY 3 (2012), available at <http://www.accenture.com/SiteCollectionDocuments/PDF/Accenture-The-Benefit-is-Mutuals-Pov.pdf> (citing “improve[d] . . . quality of public services”); LE GRAND, *supra* note 97, at 3 (citing increased productivity, innovation, effectiveness, and efficiency as benefits for service users and communities).

¹⁰¹ See, e.g., COOPER, *supra* note 100 (citing greater engagement and motivation as benefits for employees in mutuals); LE GRAND, *supra* note 97, at 3 (citing improved “well-being,” “satisfaction,” and “working conditions” as benefits for employees).

¹⁰² Wintour, *supra* note 98 (quoting Unite joint general secretary Tony Woodley).

¹⁰³ *Id.*

¹⁰⁴ Kate Murray, *State of Emergency: Will Employee-Owned Co-Operatives Be Equipped to Provide Efficient Public Services?*, GUARDIAN, Apr. 20, 2011, at 3, available at <http://www.theguardian.com/society/2011/apr/19/mutuals-take-over-public-services> (quoting

For such opponents, the mutualization policy represents little more than an effort to mask Thatcherism with a cooperative face. Behind the rhetoric of social enterprise and worker empowerment they see the same project of dismantling what remains of the welfare state and demolishing what remains of the trade union movement.¹⁰⁵

Indeed, the Big Society program has roots in efforts, dating back to the 1980s, to identify “alternatives to the central state as the supplier of various types of public goods.”¹⁰⁶ On the political right, a key proponent was British Conservative Party figure James Douglas, who argued for increasing the role of the so-called “Third Sector” as an alternative to state provision, favored by the social-democratic left, and for-profit enterprise, favored by then-dominant strands of the New Right.¹⁰⁷ He specifically identified “mutual associations” among the Third Sector organizations that could replace government as providers of benefits and services.¹⁰⁸ In this sense, the turn from privatization to mutualization does not represent a repudiation of Thatcherism, so much as a continuation of its core project—disabling “source[s] of countervailing power in the state”¹⁰⁹—by other means.¹¹⁰

Labor opposition also reflected concerns about the material impact of mutualization on pay, benefits, and job security for service workers. Specifically, while pensions for existing workers will be unaffected by the move from

Heather Wakefield, head of local government for Unison, a health and local government workers union).

¹⁰⁵ See Andrew Gamble, *The Free Economy and the Strong State: The Rise of the Social Market Economy*, 16 SOCIALIST REG. 1, 14–16 (1979) (discussing “the political onslaught on social democracy and its main organizational support, the trade unions” as a key element of neo-liberal ideology and policy); Alan Ware, *The Big Society and Conservative Politics: Back to the Future or Forward to the Past?*, 82 POL. Q. 82, 83–84 (2011) (noting the Thatcher government’s goal of “tr[ying] to reduce the power of a whole range of intermediate organisations,” including unions).

¹⁰⁶ Ware, *supra* note 105, at 82.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* See also Johnston Birchall, *The Big Society and the ‘Mutualisation’ of Public Services: A Critical Commentary*, 82 POL. Q. 145, 145–46 (2012) (“[T]he idea of devolving provision of public services to organisations owned variously by employees, service users and local communities has been on the political agenda since the mid-1980s under the previous Conservative government headed by Margaret Thatcher and then by John Major.”). The “New Labour” government of the 1990s also embraced a “new mutualism” under which control of formerly-nationalized services was transferred to non-governmental bodies with employee participation. *Id.* at 145–46 (discussing community-employee trusts in healthcare and leisure services); Jane Wills, *A Stake in Place? The Geography of Employee Ownership and Its Implications for a Stakeholding Society*, 23 TRANSACTIONS INST. BRIT. GEOGRAPHERS 79, 79, 81 (1998) (discussing employee and employee-management buyouts in coal, bus, and railway maintenance sectors).

¹⁰⁹ Ware, *supra* note 105, at 85; Gamble, *supra* note 105, at 14–16, 19–20 (noting importance to the neo-liberal “social market strategy” of action by the Thatcherite “strong state” to “intimidate and demoralize the labour movement, so weakening its political opposition”).

¹¹⁰ Indeed, at least some mutualization advocates recognized that “the perception that supporting the transition to the mutuals model constitutes privatization via another route” represented a potential political threat to the government’s program. COOPER, *supra* note 100, at 6 (warning that “the competitive dynamics of the market in which [mutuals] are operating may be complicated by government attempts . . . to protect smaller players from acquisition by larger incumbents for political reasons”).

government employment to the mutual setting, new employees will not enjoy such protection.¹¹¹ In addition, without policies and practices in place to ensure access to capital, cultivation of management capacities, and other supportive resources, there are concerns about the ability of employee mutuals to survive in competition with larger, better-capitalized market participants.¹¹²

V. TOWARD A LEGAL FRAMEWORK FOR PUBLIC SERVICE SYNDICALISM

Radical forms of worker control “tend to arise ‘spontaneously,’ without conscious preparation.”¹¹³

Historically, worker control emerges in the wake of a “major crisis” through the autonomous effort of workers already exhibiting “a high level of independent organization.”¹¹⁴ The case of worker-run public services in Civil War-era Spain exemplifies this pattern.

Yet, the case of public service mutuals in Britain suggests the possibility of promoting some form of worker self-management in public services through deliberate policy and legal intervention. The British case further suggests that experiments in worker-controlled public services may be politically feasible in the United States as well.

A legal framework to promote worker self-management in public services could entail a mix of preferences in favor of worker-run service contractors, along with educational and training programs, and financial support for worker-run entities. This framework draws on existing policy in the area of government contracts, as well as past practices and proposed legislation aimed at supporting worker ownership in the manufacturing sector.

When contracting for goods and services, government at the federal, state, and local levels commonly grants preferences in favor of certain bidders to promote social policy goals. Preferences in favor of small businesses—predicated on beliefs about the significance of small business for maintaining a “competitive free-enterprise system,” promoting entrepreneurship and innova-

¹¹¹ Birchall, *supra* note 108, at 155; *but see* LE GRAND, *supra* note 97, at 14 (citing “US evidence” that “employee-owners generally do not sacrifice pay or benefits . . . and . . . are more likely . . . to have diversified retirement plans”).

¹¹² Birchall, *supra* note 108, at 155–56; COOPER, *supra* note 100, at 6; JONATHAN BLAND, CO-OPERATIVES UK, TIME TO GET SERIOUS: INTERNATIONAL LESSONS FOR DEVELOPING PUBLIC SERVICE MUTUALS 19–22 (2011) (discussing importance of access to capital, successful organizational models, and other forms of legal and logistical support as factors in success of public service mutuals, and noting that “[t]he UK policy context does not emerge particularly well from the comparison with” similar programs in other European countries); LE GRAND, *supra* note 97, at 20–21, 33–34 (describing “Social Enterprise Investment Fund” and “Mutuals Support Programme” intended to support financial and human capital capacities of new mutuals and recommending further efforts in that regard).

¹¹³ Cohen, *supra* note 58, at 54. By way of example, Cohen cites the emergence of workers councils during the events of May 1968 in France, a development that was “spontaneous in the sense that the official parties and unions never took the initiative.” *Id.* (quoting Daniel Singer).

¹¹⁴ Gluckstein, *supra* note 58.

tion, and spurring job creation¹¹⁵—are well established and enjoy substantial popular support.¹¹⁶ Preferences in favor of minority- or female-owned businesses have been used as a tool for promoting equal economic opportunity.¹¹⁷ State and municipal governments grant preferences for businesses that are locally-based or employ local residents, to foster the development and stability of local economies.¹¹⁸

In similar fashion, state and local governments could enact preferences in favor of worker-controlled entities when contracting for public services.¹¹⁹ Indeed, such preference would also advance the same policy goals underlying existing preferences for small, local, and minority- or female-owned businesses. By their nature, public service syndicates would be locally-based small enterprises, employing local residents, because “women and African Americans constitute a disproportionately large share of the state and local public-sector workforce,”¹²⁰ policies favoring public service syndicates would also promote affirmative action goals. At the same time, unlike traditional preferences, public service syndicalism would also promote workplace democracy and worker empowerment.

Another way to support worker self-management in public services is through education and outreach to raise awareness of this model among workers and the general public, and technical assistance for workers starting or run-

¹¹⁵ Mirit Eyal-Cohen, *Down-Sizing the “Little Guy” Myth in Legal Definitions*, 98 IOWA L. REV. 1041, 1048–60 (2013) (discussing common justifications for policies favoring small business).

¹¹⁶ See *id.* at 1078 (“The U.S. government has a long-established policy favoring small business by preferentially allocating government contracts to such entities.”); Max V. Kidalov, *Small Business Contracting in the United States and Europe: A Comparative Assessment*, 40 PUB. CONT. L.J. 443, 445–46 (2011) (“Throughout the twentieth and the early twenty-first centuries, the United States has been a global leader in small business-friendly procurement policies.”).

¹¹⁷ See Clark D. Cunningham et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835, 841–42 (2002).

¹¹⁸ See Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469, 493–99 (2008) (offering an “investment capture” theory in support of resident preferences in government procurement policies).

¹¹⁹ See United States Employee Ownership Bank Act, S. 3419, 112th Cong. § 5 (2012) (amending the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102, to grant employees a “right of first refusal” to acquire a facility slated for closing). The US Employee Ownership Bank Act and the Worker Ownership, Readiness, and Knowledge Act (“WORK Act”), were introduced by Sen. Bernard Sanders (I-VT) to promote worker ownership and control in the private sector. *Senator Sanders Introduces Bills to Support Employee Ownership*, VT. EMP. OWNERSHIP CENTER, www.veoc.org/node/68 (last visited Mar. 13, 2014). Both bills died in committee. *S. 3419 (112th): United States Employee Ownership Bank Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s3419> (last visited Mar. 13, 2014); *S. 3421 (112th): WORK Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s3421> (last visited Mar. 13, 2014). The prospects of enacting such legislation at the federal level are exceedingly dim. However, these bills offer an instructive model for potential state legislation or municipal ordinances to promote worker self-management in public services.

¹²⁰ DAVID COOPER ET AL., ECON. POL’Y INST., BRIEFING PAPER NO. 339, *THE PUBLIC-SECTOR JOBS CRISIS: WOMEN AND AFRICAN AMERICANS HIT HARDEST BY JOB LOSSES IN STATE AND LOCAL GOVERNMENTS 2* (2012), available at <http://www.epi.org/publication/bp339-public-sector-jobs-crisis/>.

ning public service syndicates. At least in the early stages, state and local governments can provide these resources, either directly or through grants to non-governmental organizations.¹²¹ As with contracting preferences, this would not represent a radically new policy or government role, but rather a refocusing of existing programs to include support for worker-controlled enterprises. As a network of public service syndicates develops, they will be able to take on this role themselves, sharing information and advice based on their own experiences.

Government can also provide direct loans, loan guarantees, or other forms of financial assistance for public service syndicates.¹²² Once again, there is precedent for this government role, for example in government programs that provide start-up loans for small businesses.¹²³ Indeed, state and local governments have facilitated worker buyouts of private firms through loans and loan guarantees.¹²⁴

Finally, tax law represents another vehicle by which government can support worker self-management in public services. Federal and state governments can offer tax incentives for transferring managerial control¹²⁵ in existing entities to workers,¹²⁶ and accord preferential tax treatment for public service syndicates.

¹²¹ See Worker Ownership, Readiness, and Knowledge Act or WORK Act, S. 3421, 112th Cong. §§ 2(c)(1)–(2), (d) (2012) (establishing program within US Department of Labor to provide education, outreach, technical assistance, and training to support the creation of worker-owned enterprises, and providing for grants to fund such efforts).

¹²² See United States Employee Ownership Bank Act, S. 3419, 112th Cong. § 4 (2012) (establishing a unit within the US Treasury Department to provide loans for employee buyouts of existing private firms).

¹²³ See, e.g., *SBA Loan Programs*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/loan> programs (last visited Mar. 13, 2014).

¹²⁴ See Dow, *supra* note 40, at 9; JOHN G. RAPPA, CONN. GEN. ASSEMBLY, OFF. LEGIS. RES., EMPLOYEE BUYOUT FINANCING (2002), available at <http://www.cga.ct.gov/2002/rpt/2002-R-0643.htm> (reviewing financial and technical support by federal, state, and local governments for employee buyouts); Ohio Employee Ownership Center, *Shutdowns, Buyouts, and Jobs: It's Time to Recognize Employee and Community Rights*, OWNERS AT WORK, Summer 1997, at 1–6 (“[P]ublic sector loans, loan guarantees, and/or interest rate buydowns have been key to the success of more than 20 employee buyouts that averted shutdowns in [Ohio.]”); *Loan Guarantee Approved for Buyout of Maine Clothier*, BANGOR DAILY NEWS, May 2, 1991, at 20 (reporting on loan guarantee provided by Finance Authority of Maine for employee buyout).

¹²⁵ The proposal here is agnostic on the question of ownership as distinct from managerial control. Ownership of assets might remain in government hands, which would alleviate one of the common impediments to acquisition by workers. Alternatively, assets might be owned by a form of community trust. See Casebeer, *supra* note 4, at 10–11. Or workers might acquire the assets, in which case a cooperative structure, rather than one based on individual share ownership, would be preferable. See Dow, *supra* note 40, at 73.

¹²⁶ See I.R.C. § 4975(e)(7) (2012) (defining “employee stock ownership plan”); I.R.C. § 409 (2012) (establishing “[q]ualifications for tax credit employee stock ownership plans”). See Dow, *supra* note 40, at 76–83. Proponents have commonly cited economic democracy and broader wealth distribution as justifications for according favorable legal treatment to ESOPs. See Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363, 366 (1990); Sean M. Anderson, *Risky Retirement Business: How ESOPs Harm the Workers They Are Supposed to Help*, 41 LOY. U. CHI. L.J. 1, 23 (2009). Anderson observes that more recent arguments in favor of ESOPs emphasize enhanced worker satisfaction, reduced labor-management conflict, and increased productivity, rather than economic democracy and equality.

VI. CONCLUSION

In the current US political climate, the prospects of implementing a robust form of public service syndicalism will surely appear remote.¹²⁷ Yet, the example of Britain suggests that at least measured steps in that direction might be politically feasible here. Particularly at the state and municipal levels, there may be opportunities to engage in “novel social and economic experiments”¹²⁸ with worker-run public services. Through such experimentation, public services under worker control can serve as demonstration projects to promote workplace democracy and worker empowerment more broadly.

Anderson, *supra*, at 25. Because ESOPs do not necessarily entail majority ownership by employees, nor confer management rights to worker-owners, proponents of worker control regard them as limited at best. See Dow, *supra* note 40, at 81; Casebeer, *supra* note 4, at 7. Despite their limitations as an approach to worker control, however, ESOPs do highlight the possibility of using tax law as an instrument for encouraging alternative organizational forms.

¹²⁷ See *Running Government Like a Business*, *supra* note 32, at 56 (commenting on the limited probability of success of more modest proposals to enhance “employee voice” within the existing framework of capitalist business organizations); Casebeer, *supra* note 4, at 8 (“[T]he ascendancy of the political Right under the banner of the ‘Tea-Party’ in local and state government currently in the United States probably makes Community Syndicalism a political impossibility.”).

¹²⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).