OPPORTUNITY LOST: TEACHERS’ UNION REFORM - PAST, PRESENT & FUTURE

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The status of teachers unions in the United States is somewhat difficult to gauge. On the one hand, the country’s two largest teachers unions, the American Federation of Teachers (AFT) with 1.5 million members,¹ and the National Education Association (NEA) with 3.2 million members,² rank tenth and fourth respectively among all organizations making political contributions to candidates and parties since 1989.³ Their combined contributions exceed $90 million.⁴ Such political clout would seem to suggest the preeminence of teachers unions for years to come.

On the other hand, recent events suggest the opposite conclusion. For example, in Lawrence, Massachusetts, where the school district has been in state receivership since 2011,⁵ the Lawrence Teachers’ Union and its parent organization, the AFT Massachusetts, have drafted legislation to curtail the district superintendent/receiver’s

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⁴ The total contributions of each organization are actually somewhat unclear. The Center for Responsive Politics, in one instance, calculates that the NEA and the AFT have contributed roughly $54 million and $38 million respectively. Supra note 3. However, the Center’s organization specific pages cite to higher figures, with the NEA contributing over $72 million since 1990, CENTER FOR RESPONSIVE POLITICS, National Education Assn., http://www.opensecrets.org/orgs/summary.php?id=D000000064&cycle=A (last visited Sept. 9, 2013), and the AFT contributing nearly $55 million during the same time period. CENTER FOR RESPONSIVE POLITICS, American Federation of Teachers, http://www.opensecrets.org/orgs/summary.php?id=D000000083&cycle=A (last visited Sept. 9, 2013).
⁵ In an attempt to reverse the district’s chronic failure, the state Board of Elementary and Secondary Education voted to place the system under state control, and appointed a special administrator to serve as receiver. James Vaznis, State Sets Plans to Fix Schools in Lawrence, BOSTON.COM, http://www.boston.com/news/education/articles/2012/05/30/massachusetts_education_leaders_unveil_plan_to_turn_around_lawrence_schools/ (last visited Sept. 9, 2013).
power to impose turn-around measures\(^6\) without union approval.\(^7\) In isolation, this incident may not seem to threaten the relevance of teachers unions, but the events in Lawrence are just one chapter in an ongoing tale of teachers unions besieged by the forces of change. Across the country in Wisconsin,\(^8\) Ohio,\(^9\) California,\(^10\) and New York,\(^11\) the story is the same: teachers unions, as they have existed for over 50 years, are struggling to maintain their place in America’s schools. How did this struggle come to be, and what does it mean for the future of teachers unions? Are the unions losing their place at the table in defining the terms on which American public education is delivered? Has their model of industrial unionism seen its day?

This paper examines the development of teachers unions in the United States, in particular the AFT and the NEA, focusing on the ideological and practical evolution of each union. Part II provides a brief history of both major teachers unions, beginning with their adoption of the traditional model of industrial unionism during the civil rights era. While both unions saw tremendous growth from their founding through the 1970s (in both membership and bargaining rights)\(^12\) each confronted a call for change with the publication of the seminal report: *A Nation At Risk*.\(^13\) Inventing a new model of teacher unionism seemed plausible through the 1990s, as the leadership of both unions embraced

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\(^6\) For a detailed discussion of school improvement plans under No Child Left Behind, and their impact on teachers unions see *infra* pp. 20-27.


\(^8\) See *infra* p. 43.

\(^9\) See *infra* p. 43.

\(^10\) See *infra* p. 53.

\(^11\) See *infra* p. 34.

\(^12\) See *infra* p. 5.

reformist agendas. However, by the close of the 20th Century, momentum had stalled, and the opportunity for reform appeared to be lost.

Part III describes several developments in the 21st Century that may have significantly reduced the likelihood of reform in the teachers unions. In particular, the implementation of the No Child Left Behind Act, the rapid and unanticipated growth of charter schools, the Obama administration’s Race to the Top program, and attacks on public-sector benefits in the post-recession economy, have produced not reform, but a deepening retrenchment of the industrial union model of teachers unions.

Finally, Part IV considers whether reforming the teachers unions is indeed a lost cause, or whether examples both within and beyond the world of education, suggest a way forward.

Teachers unions have seen tremendous change since their origins in the 19th Century, and will undoubtedly experience more change in the decades to come. The great unknown is how this change will look. Can teachers unions adapt to fit an evolving American education system, or will they be haunted by a missed opportunity and resigned to the annals of history?

II. The Road Not Taken

A. Forged in the Civil Rights Era

Though the National Education Association (NEA) was founded in 1857 and the American Federation of Teachers (AFT) in 1916, neither organization initially resembled the powerful labor unions they are today, either in terms of mission or of membership. The NEA originally viewed itself as an organization of professionals, not a union, and was dominated by administrators on both a staff and leadership level. Even

14 See infra pp. 7-13.
16 See, e.g., NATIONAL EDUCATION ASSOCIATION, “Our History”, supra note 2.
17 Id.
18 AMERICAN FEDERATION OF TEACHERS, About AFT, supra note 1.
the AFT, an organization originally envisioned as a union alternative to the NEA, was ultimately more symbolic than activist in nature. Teachers advocated for their inclusion in the National Labor Relations Act of 1935 (“NLRA”), but were excluded from the Act’s coverage and protection along with other government employees. The political consensus that public service and collective bargaining rights, particularly the right to strike, were not only mutually exclusive, but antagonistic to one another, persisted for several decades. The NEA and AFT internalized this reality, with each maintaining no strike policies throughout the 1950s.

The contemporary identities of these organizations began to take shape with the advent of the Civil Rights Movement. Legislative actions to expand collective bargaining rights to the public sector occurred in isolated instances at the local level up through the 1950s, and Wisconsin became the first state to adopt a public sector bargaining law in 1959. As the notion that public employees had a right to collective bargaining began to catch on, it combined with the foment of the ongoing Civil Rights Movement, coming to a head in New York City in the early 1960s.

Lead by a pair of young AFT organizers (David Selden and Albert Shanker) members of the New York City AFT local contended that their status as government

20 Id.
21 See Kahlenberg, *The History of Collective Bargaining among Teachers*, supra note 19, at 9. John Dewey, the AFT’s first official member, “wanted teachers to be in unions to help them identify with their working class students…”
22 Id.
24 See 29 U.S.C. §152(2) (excluding state and federal governments from the definition of employer under the Act).
26 Id.
employees should have no bearing on their right to bargain collectively.\textsuperscript{29} Appealing to the same sentiment as the anti-segregation boycotts in Montgomery and Birmingham, Alabama, and the sit-ins in Durham and Greensboro, North Carolina, Selden and Shanker argued that striking teachers were engaging in a form of civil disobedience.\textsuperscript{30} After a one-day walkout of 5,000 New York City teachers in November of 1960, the writing on the wall was clear.\textsuperscript{31} The mayor of New York, Robert Wagner,\textsuperscript{32} formed a committee of labor leaders to address the growing demand for representation.\textsuperscript{33} In December of 1961, the newly formed United Federation of Teachers (UFT), representing elementary and secondary teachers in New York City, prevailed over an NEA affiliate in a representation election, and, following a strike of 20,000 teachers in April of 1962, negotiated the country’s first major collective bargaining contract for teachers.\textsuperscript{34} The AFT continued to build momentum with election victories in Detroit in 1964, and Philadelphia in 1965.\textsuperscript{35} Its rapid growth forced the NEA to alter its path and embrace the idea of becoming a full-fledged union.\textsuperscript{36} Threatened with the prospect of playing second fiddle to the AFT, the NEA officially recognized teachers’ right to strike in 1969, and embarked on a decade of fierce competition over representation of the nation’s teachers.\textsuperscript{37} The rivalry between the two organizations accelerated the spread of collective bargaining rights.\textsuperscript{38} By the late

\begin{itemize}
\item \textsuperscript{29} Kahlenberg, \textit{The History of Collective Bargaining among Teachers, supra} note 19, at 11.
\item \textsuperscript{30} Kahlenberg, \textit{The History of Collective Bargaining among Teachers, supra} note 19, at 11.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} Some have suggested that the New York City teachers’ fight for recognition was hardly a struggle considering that Mayor Wagner was the son of Robert Wagner, Sr., the author of the NLRA. \textit{See} Myron Lieberman, \textit{The Teacher Unions}, 18 (1997).
\item \textsuperscript{33} Kahlenberg, \textit{The History of Collective Bargaining among Teachers, supra} note 19, at 12.
\item \textsuperscript{34} Kahlenberg, \textit{The History of Collective Bargaining among Teachers, supra} note 19, at 12-13.
\item \textsuperscript{35} Kahlenberg, \textit{The History of Collective Bargaining among Teachers, supra} note 19, at 14.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.}; Lieberman, \textit{supra} note 32, at 28.
\end{itemize}
1970s, the proportion of public school teachers represented by unions had reached 72 percent.39

That the AFT and the NEA modeled their organizing efforts on those of industrial labor unions is not surprising. By the time Selden and Shanker began their campaign in New York, industrial unionism had supplanted older organizational forms such as guilds and craft unions.40 The NLRA was written to address the needs of large-scale industry,41 and the decades that followed its passage were marked by tremendous success in the private-sector labor movement.42 Private-sector unions expanded both in terms of membership and benefits achieved; Selden and Shanker wondered why teachers, the vast majority of whom were college educated, could not similarly capitalize on the changing economic dynamics between labor and management.43 Like their industrial analogues, teachers were dissatisfied with poor working conditions; many teachers were required to perform non-educational responsibilities, had no lunch breaks, and lacked grievance proceedings.44 In addition, the classroom began to resemble the factory floor, as a larger percentage of male teachers (typically more supportive of unionization than female teachers) entered the field as a means of avoiding the draft.45 As teachers unions successfully adapted industrial unionism to their cause throughout the 1960s and 1970s, the states correspondingly modeled their public sector bargaining laws on the NLRA,

41 See 29 U.S.C. § 151 (2012) (declaring the policy of the NLRA to “to eliminate the causes of certain substantial obstructions to the free flow of commerce…”).
43 See id. In 1952, AFT president, Carl Megel, questioned why, “the average salary for teachers in the United States during the past year was approximately $400 less than the income for the average factory worker.” Id.
44 Id.
45 Lieberman, supra note 32, at 19.
further entrenching the industrial archetype. This model of collective bargaining and labor organization assumed “permanent adversaries,” and a “ritualized pattern of demands, rebuffs, and concessions.” Industrial unionism came to dominate public education by the close of the 1970’s, and continues to do so, in large part, today.

B. Confronted with Crisis

In 1981, President Ronald Reagan tasked his Secretary of Education, Terrel H. Bell, with creating a National Commission on Excellence in Education. The Commission’s goal was to define and assess the problems facing public education in America. In April of 1983, after nearly two years of examining indicators of student achievement at every level and speaking with stakeholders around the country, the Commission’s final report, A Nation at Risk, concluded that, “the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.” Calls for action were swift, and with nearly three quarters of the nation’s teachers unionized, the NEA and AFT were natural targets for criticism.

The NEA’s reaction to A Nation at Risk was cool, to say the least. Given President Reagan’s reputed animus towards unions generally, as well as toward public education, the NEA was openly suspicious of the report’s findings. Then AFT President Albert Shanker, however, took a different view, arguing instead that the

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47 Kerchner and Caufman, supra note 40, at 15.
48 Johnson and Kardos, supra note 46, at 8.
49 See Kahlenberg, The History of Collective Bargaining among Teachers, supra note 19.
50 See Nation at Risk, supra note 13.
51 Id.
52 Nation at Risk, supra note 13, at 9.
54 See Kahlenberg, The History of Collective Bargaining among Teachers, supra note 19, at 18; But see Julia E. Koppich, A Tale of Two Approaches: The AFT, the NEA, and NCLB, 80 PEABODY JOURNAL OF EDUCATION 137, 140 (2005) (“The organization took exception to the report…while echoing the report’s support for equity.”).
Commission’s recommendations should be embraced.\textsuperscript{55} In a speech to the AFT Convention in the summer of 1983, Shanker spoke of the changes that were sure to follow \textit{A Nation at Risk}: “Those individuals and organizations who are willing and able to participate, to compromise, and to talk will not be swept away. On the contrary, they will shape the direction of all the reforms and changes that are about to be made.”\textsuperscript{56} Just two years later, Shanker made a series of speeches calling for a “‘second revolution’” in teacher unionism that would adopt professionalism to a new degree.\textsuperscript{57} (Presumably, the “first revolution” in teacher unionism was the fight for collective bargaining rights and their subsequent expansion following the 1962 victory by Shanker and the UFT in New York City). Shanker was “‘convinced that unless we go beyond collective bargaining to the achievement of true professionalism, we will fail in our major objectives: to preserve public education in the United States and to improve the status of teachers, economically, socially, and politically.’”\textsuperscript{58}

Shanker’s vision of professionalism focused on compromise and creative problem solving, and stressed the issues of merit pay, dealing with bad teachers, school choice, and the standards movement.\textsuperscript{59} On the issue of merit pay, Shanker argued that differentiating pay based on administrator judgment could lead to favoritism.\textsuperscript{60} He instead proposed a system of board certification, similar to that used in the medical field, in order to reward high-quality teachers.\textsuperscript{61} Similarly, though Shanker supported tenure

\textsuperscript{55} Kahlenberg, \textit{The History of Collective Bargaining among Teachers}, supra note 19, at 19; Koppich, \textit{A Tale of Two Approaches}, supra note 54, at 141.
\textsuperscript{56} Koppich, \textit{A Tale of Two Approaches}, supra note 54, at 141.
\textsuperscript{57} See Kahlenberg, \textit{The History of Collective Bargaining among Teachers}, supra note 19, at 20.
\textsuperscript{58} \textit{Id.}
\textsuperscript{60} \textit{Id.}, at 21.
\textsuperscript{61} Richard D. Kahlenberg, \textit{Philosopher or King? The Ideas and Strategy of Legendary AFT Leader Albert Shanker}, 3 \textit{EDUCATION NEXT}, no.3, Summer 2003, at 34, 39. This proposal became the private, nonprofit National Board for Professional Teaching Standards. \textit{Id.}
protections for quality teachers, he argued that the union should be leading the charge when it came to removing incompetent ones, so long as due process was observed.\textsuperscript{62}

Regarding school choice, Shanker firmly believed that vouchers and privatization would damage both public education and American society as a whole, but he was among the first to promote choice among public schools.\textsuperscript{63} Shanker was also an early proponent of charter schools.\textsuperscript{64} The charter school concept dates back at least to 1974, when former-educator Ray Budde\textsuperscript{65} proposed that teachers be granted charters, empowering them to adopt new models of instruction within existing schools.\textsuperscript{66} Though Shanker expanded on Budde’s concept by proposing that charters be granted to establish new schools within existing district buildings\textsuperscript{67}, his role was mainly to “disseminate and popularize” the idea.\textsuperscript{68} Finally, Shanker was instrumental in advancing the nascent “standards” movement. He used his position as the head of the AFT to lobby fiercely for elevated academic standards, testing, and consequences for poor performance.\textsuperscript{69} Shanker’s efforts continued into the 1990s and the Clinton Administration, where he

\begin{itemize}
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Kahlenberg, \textit{Philosopher or King?}, supra note 61, at 38.
  \item \textsuperscript{64} Kahlenberg, \textit{Philosopher or King?}, supra note 61, at 38.
  \item \textsuperscript{65} Ray Budde began his career as an English teacher and junior high school principal in East Lansing, Michigan, before moving on to teach educational administration at the University of Massachusetts, Amherst. Susan Saulny, \textit{Ray Budde, First to Propose Charter Schools, Dies}, N.Y. TIMES, available at http://www.nytimes.com/2005/06/21/national/21budde.html?_r=0 (June 21, 2005).
  \item \textsuperscript{67} Kolderie, supra note 66.
  \item \textsuperscript{68} Kahlenberg, \textit{Philosopher or King?}, supra note 61, at 38.
  \item \textsuperscript{69} Id.
\end{itemize}
argued against a weakening of standards that was proposed during debates on the 1994 reauthorization of the Elementary and Secondary Education Act (ESEA). 70

The impact of Shanker’s rhetoric following the publication of *A Nation at Risk* is an area of contention. 71 In his book *The Teacher Unions*, Myron Lieberman posits that Shanker’s principal contribution was merely disseminating the idea that teachers unions are not a barrier to reform. 72 In Lieberman’s view, Shanker’s lofty rhetoric only served to divert reformist ire from the AFT and steer it toward the NEA, while masking the similarities between the two organizations. 73 Regardless of possible dissonance between Shanker’s message and ground-level union activity, 74 it would be hard to dispute Shanker’s words’ lasting impact on the national political conversation about the future of American public education. During his twenty-three years as AFT President 75, Shanker evolved from a zealous advocate of teachers’ rights, (once quipping – perhaps -- that he “would represent children when they started paying union dues,” 76) to a consensus-builder on a grand scale, who viewed students as deserving “‘clients.’” 77 Shanker garnered praise from both sides of the political aisle; his admirers included Presidents

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70 Id.
74 See Kahlenberg, *Philosopher or King?*, supra note 58, at 39.
75 Kahlenberg, *Philosopher or King?*, supra note 61, at 36.
76 Kahlenberg, *The History of Collective Bargaining among Teachers*, supra note 19, at 20. Whether Shanker actually said this has been a topic of debate. In May of 2012, while campaigning for the Republican Presidential nomination, candidate Mitt Romney used the quote as an example of teachers’ unions’ indifference to children’s educational needs. The WASHINGTON POST subsequently scrutinized the quote in its “Fact Checker” column, and deemed it suspect because of the quote’s biased sources and the lack of attribution to any particular date or event. Josh Hicks, *Romney’s unsubstantiated quote from union leader*, THE WASHINGTON POST, The Fact Checker, http://www.washingtonpost.com/blogs/fact-checker/post/romneys-unsubstantiated-quote-from-union-leader/2012/05/28/gJQAhbOxwU_blog.html (posted 5/29/12); see also Diane Ravitch, *Did Albert Shanker Say That?*, Diane Ravitch’s Blog, http://dianeravitch.net/2012/05/30/did-albert-shanker-say-that/ (posted 5/30/12).
Reagan, George H.W. Bush, and Clinton. Equally telling is that, as he had 30 years prior with collective bargaining, Shanker forced the NEA’s hand on education reform. After years of objection, NEA president Bob Chase echoed Shanker’s call for a “second revolution” in 1997, arguing that the time had come for a “New Unionism” that would move beyond the narrow interests of members, and embrace the reforms needed by students and schools alike. In fact, “New Unionism” became Chase’s rallying cry in support of a proposed merger of the AFT and the NEA in 1998. From Chase’s perspective “[b]oth unions agree that issues of school quality and employee professionalism—including the mentoring of new teachers, peer assistance, and professional development—must be central to union advocacy.”

Shanker’s “second revolution” and Chase’s “New Unionism” corresponded with calls for change emanating from the academy. In the wake of A Nation at Risk, some scholars urged a shift from the classic industrial model of teacher unionism towards something they labeled “professional unionism” or “reform bargaining.” These new models called for collaboration between labor and management and joint “ownership” of reform. Suggested innovations included a broadened range of bargaining issues, and the incorporation of previously marginalized groups of teachers and the needs of individual schools into decision-making processes.

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78 Lieberman, supra note 32, at 192.
80 Id.
81 Kahlenberg, The History of Collective Bargaining among Teachers, supra note 19, at 23.
83 Id. at 22.
85 Id. at 22.
86 Kerchner and Caufman, supra note 40, at 1.
87 Johnson and Kardos, supra note 46, at 8.
89 Johnson and Kardos, supra note 46, at 42.
The “professional unionism” and “reform bargaining” scholars took their cues from local reform efforts across the country not national efforts. They noted that many municipalities and union locals had tried to stem the “rising tide of mediocrity” portrayed so vividly in *A Nation at Risk* by forming dynamic and innovative partnerships. Indeed, Toledo, Ohio had implemented peer review of teachers in 1981, two years before *A Nation at Risk* was released. Shanker cited the Toledo program as an exemplar of reform, while scholars noted the adoption of “site-based management” in the Dade County Public Schools of Miami. This innovation successfully reimagined the roles of teachers and administrators. In Cincinnati, the local Federation of Teachers fought for fifteen years to strengthen academic standards and to rein in the practice of social promotion. The local succeeded in expanding the scope of bargaining to include educational policy in 1985, and then increased the extent of teacher involvement in staffing decisions in 1988. Finally, in Minneapolis, the union and the school district collaborated to implement a rigorous process of professional development required for achieving tenure.

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90 *Nation at Risk*, *supra* note 13.
93 See LaRae Phillips, *Miami: After the Hype, in A UNION OF PROFESSIONALS: LABOR RELATIONS AND EDUCATIONAL REFORM*, 116, 122 (Charles Taylor Kerchner & Julia E. Koppich eds., 1993). Site-based management focused budgetary authority and decision making powers in areas such as curriculum and hiring at the individual school level. This enabled teachers and administration to fit solutions to their school’s unique problems. *Id.* at 122-29.
94 Kerchner and Koppich, *supra* note 91, at 287. Social promotion is the practice of advancing students from grade to grade regardless of whether they have met academic requirements, based on the premise that promotion will benefit the students socially and psychologically. *Social Promotion, EDUCATION WEEK.ORG*, http://www.edweek.org/ew/issues/social-promotion/ (Sept. 21, 2004).
96 Julia E. Koppich, *The As-Yet-Unfulfilled Promise of Reform Bargaining: Forging a Better Match between the Labor Relations System We Have and the Education System*
The programs noted above are just a few examples of local unions successfully redefining labor relations in the educational context. While these reforms were driven either largely or in part by local circumstances (as opposed to the publication of *A Nation at Risk*) each illustrates a moment of change that a local union was able to grasp in the 1980’s and 1990’s.

C. A Loss of Momentum

As both the national teachers’ unions’ leadership and pioneering locals began to embrace reform, outside political and economic forces were also at work, shifting to confront the problems highlighted by *A Nation at Risk*. Education policy is primarily controlled at the state and local level. Thus, it was only natural that the nation’s governors would enter the conversation about the future of American public education. At a 1985 meeting of the National Governors Association (NGA), that organization outlined seven major tasks designed to put state education systems back on the right track. The governors also agreed to issue annual progress reports through 1991. Among the tasks outlined by the NGA were “creating a more highly professional teaching force; strengthening school leadership and management,” and “helping at-risk children and youth meet higher education standards.” While underscoring the states’ pre-eminent role in setting education policy, the NGA called for collaboration with the federal government in pushing a reform agenda. The moment for collaboration arrived in 1989, when President George H.W. Bush, who had adopted the moniker “The

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*We Want*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY’S SCHOOLS, 203, 211-12 (Jane Hannaway & Andrew J. Rotherham eds., 2006).


99 *Id.*

100 *Id.*
Education President,” during his campaign\textsuperscript{101} convened a national summit on education.\textsuperscript{102} President Bush and the governors agreed that:

The overriding objective is to develop an ambitious, realistic set of performance goals that reflect the views of those with a stake in the performance of our education system. To succeed we need a common understanding and a common mission. National goals will allow us to plan effectively, to set priorities, and to establish clear lines of accountability and authority. These goals will lead to the development of detailed strategies that will allow us to meet these objectives.\textsuperscript{103}

Several of the goals adopted at the 1989 summit made their way into legislation introduced during the Clinton administration;\textsuperscript{104} \textit{Goals 2000: The Educate America Act}, \textsuperscript{105} which provided funding for states wishing to implement standards based reforms.\textsuperscript{106} In fact, some states had adopted standards-based reforms in the 1980’s, using their own funds.\textsuperscript{107} As a result of the federal funding provided by \textit{Goals 2000}, however, nearly every state initiated a standards-based reform project.\textsuperscript{108}

There were many common elements in the standards-based reforms promoted by the NGA and President Bush, but perhaps most notable were the attempts to look beyond policy makers and educational professionals and include the input and interests of the business community, \textsuperscript{109} along with a new emphasis on “performance-based

\textsuperscript{101} Vinovskis, supra note 97, at 23.
\textsuperscript{102} Vinovskis, supra note 97, at 33.
\textsuperscript{103} Vinovskis, supra note 97, at 40. (quoting Summit Joint Communiqué, 9/28/1989).
\textsuperscript{105} 20 U.S.C. §5801 (2012) et seq.
\textsuperscript{106} Hamilton, Stecher and Yuan, supra note 104, at 24.
\textsuperscript{107} Hamilton, Stecher and Yuan, supra note 104, at 24.
\textsuperscript{108} Id.
\textsuperscript{109} Hamilton, Stecher and Yuan, supra note 104, at 20.
accountability” and incentives. For example, the National Council on Education Standards and Testing (NCEST), comprised of policy, education, and business representatives, sought to use standards, “to change the education accountability landscape from one focused on rule compliance to one focused on performance.” References to “accountability” and “incentives” reflected an ongoing economic discourse on education, which had been fully embraced by *A Nation at Risk*. That seminal document had explicitly linked the health of America’s education system to the country’s place in the global market and economy. This focus in turn dovetailed nicely with a new strand of administrative theory, the so-called “New Public Management” of the 1980s. New Public Management argues for replacing (presumably) inefficient hierarchical bureaucracies with the efficiency of free markets. Members of Congress warmly embraced NPM; conservatives saw it as creating markets and giving value for money, while liberals viewed it as open and fair. In terms of NPM then, school districts were hierarchical bureaucracies in need of reform; by disaggregating the system and evaluating schools based upon student performance, a market could be established

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111 Hamilton, Stecher and Yuan, supra note 101, at 20 (quoting NCEST, *Raising Standards for American Education* (1992)).


113 See Marzano & Kendall, supra note 112, at 4. While the authors of *A Nation at Risk* acknowledged the “moral and spiritual” value of education, the report strongly argues that the primary danger in failing to act would be the loss of America’s competitive edge as the world advanced into the information age. *Nation at Risk*, supra note 13, at 10.


115 Holt, supra note 114, at 316.
wherein high-achieving schools would thrive. 116 The accountability movement asserted that high quality education would result if schools and teachers moved away from a focus on inputs (resources; teacher training) and instead stressed outputs (i.e., student performance). 117 States instituted a variety of measures including formulaic curricula, high stakes student assessments, and systems of sanctions and rewards for schools and teachers alike. 118

Texas offers a prime example of the rapid growth of the standards-based movement. It was among the first states with an operational, integrated system of standards, assessments, and incentives. 119 Private sector groups like the Business Education Coalition played an integral role in pushing the reform agenda in Texas. 120 As the 2000 Presidential campaign got underway, the meteoric rise in Texas’ test scores and its plunging dropout rates were ballyhooed as the “Texas Miracle.” 121

SBR and NPM developed in tandem with expanding notions of school choice. The jargon of the times touted a new “educational marketplace” 122 where choice fueled competition among schools. 123 Just as A Nation at Risk inspired the standards movement to embrace a business-oriented focus on measuring outputs, a renewed push for school choice grew from “free-market principles.” 124

The contemporary school choice movement traces its origins to Nobel Laureate

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116 Holt, supra note 114, at 315 (quoting Power supra note 114, at 43).
117 Hamilton, Stecher and Yuan, supra note 104, at 11.
119 Hamilton, Stecher and Yuan, supra note 104, at 28.
120 Hamilton, Stecher and Yuan, supra note 104, at 28.
121 Rebecca Leung, The ‘Texas Miracle’, CBSNEWS.COM, http://www.cbsnews.com/2100-500164_162-591676.html (Feb. 11, 2009). President George W. Bush, who had been the Governor of Texas, subsequently named Houston School Superintendent, Rod Paige, to serve as U.S. Secretary of Education. Years later however, it was discovered that the miraculous achievements in Houston were indeed too good to be true; the revelation that district officials had engaged in rampant data manipulation lead to the resignations of school board officials and the superintendent. Id.
122 Krisbergh, supra note 28, at 1035.
123 Krisbergh, supra note 28, at 1033.
124 Krisbergh, supra note 28, at 1033.
economist Milton Friedman \(^{125}\) and his 1955 paper *The Role of Government in Education*. \(^{126}\) Friedman called for a system of vouchers, i.e., state-funded scholarships, which parents would use to enroll their children in private, as well as public, schools. \(^{127}\) Friedman’s ideas attracted little support, however, in part because “vouchers” had been heavily employed in the Southern states as a method of avoiding racial integration after the ruling in *Brown v. Board*. \(^{128}\) In 1989, however, Wisconsin adopted the nation’s first modern public voucher system, for the City of Milwaukee, \(^{129}\) and the 1990s saw widespread introduction of voucher programs. \(^{130}\) In 2002, the U.S. Supreme Court held that the Cleveland voucher system did not violate the First Amendment’s Establishment Clause, despite the fact that nearly all of the public funds spent on vouchers in Cleveland were used in religious schools. \(^{131}\) Despite its successes in Milwaukee and Cleveland, and the imprimatur of the Supreme Court, “voucher” was (and is) still a four-letter-word to many, particularly teachers unions. \(^{132}\) Opposition forces defeated or blocked the introduction of vouchers in several states during the 1990s. \(^{133}\) Vouchers were controversial because of their perceived privatization of education, and, at least prior to *Zelman*, their funding of parochial schools and the blurring of the divide between church and state. As controversy hung over voucher systems like a “specter,” \(^{134}\) new and less

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\(^{127}\) Id.


\(^{129}\) NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 125.

\(^{130}\) Krisbergh, *supra* note 28, at 1033.


\(^{132}\) *See* Krisbergh, *supra* note 28, at 1034.


divisive alternatives emerged, encouraging choice among public schools,\textsuperscript{135} not apart from them.

In their highly influential work, \textit{Politics, Markets, and America’s Schools},\textsuperscript{136} John Chubb and Terry Moe argue that earlier school choice agendas failed because of an untenable commitment to the demand side of the equation.\textsuperscript{137} Thus, agendas focused on meeting parents’ demand for choice, and in turn, allowing those parents to choose an alternate school within their district, rather than focusing on the supply of schools parents could choose from. But this form of “choice” perpetuated an ineffectual educational bureaucracy. It avoided upsetting the traditional power structure rather than creating real change.\textsuperscript{138} Chubb and Moe urged policymakers to instead increase the supply-side of the equation by encouraging and funding the creation of new and innovative schools free of hierarchical barriers.\textsuperscript{139} Unfettered by traditional models, new schools could embrace different approaches to education. If they were successful, their innovations would create a demand for more. These new schools and the real choices they offered parents would create a marketplace;\textsuperscript{140} Parents, behaving as rational actors, would choose the schools that best fit their children’s needs. Moe’s ideas were strongly endorsed by a politically influential coalition of academics and wealthy interested parties.\textsuperscript{141}

The simultaneous push for standards-based education and enhanced school choice fundamentally challenged the institutional status quo of American public education. Teachers unions, representing 86% of public school teachers by the mid-1980s,\textsuperscript{142} were perceived as a key part of that status quo.\textsuperscript{143} While the national leadership of the AFT

\textsuperscript{135} Chubb & Moe, \textit{supra} note 134, at 206.
\textsuperscript{137} \textit{See} Chubb & Moe, \textit{supra} note 134, at 207.
\textsuperscript{138} Chubb & Moe, \textit{supra} note 134, at 207-08.
\textsuperscript{139} Chubb & Moe, \textit{supra} note 134, at 207.
\textsuperscript{140} Chubb & Moe, \textit{supra} note 134, at 191.
\textsuperscript{141} Casey, \textit{supra} note 136, at 126.
\textsuperscript{142} Krisbergh, \textit{supra} note 28, at 1028.
\textsuperscript{143} Krisbergh, \textit{supra} note 28, at 1026.
and the NEA, as well as many pioneering locals, tried to re-calibrate traditional collective bargaining to meet the changing needs of public education, outside political and economic forces sought fundamental change in the structure of public education, sometimes arguing specifically for an end to unions.\textsuperscript{144} The free-market rhetoric that was a noisy contributor to the education debate increasingly threatened the gains teachers unions had made a generation earlier. Despite these threats, Shanker’s “second revolution” and Chase’s “new unionism” remained alive in various locals, offering hope that the unions could adapt to their changing environment.

By the late 1990’s however, that hope was growing dim. Reform unionism suffered a severe set back with Albert Shanker’s death in 1997.\textsuperscript{145} The loss of Shanker’s dynamic leadership\textsuperscript{146} did not end the reform movement, but the loss was considerable, given Shanker’s gravitas and his unique ability to appeal to both sides of the political aisle.\textsuperscript{147} After Shanker’s death, Bob Chase of the NEA took up the new unionism torch, citing the concept as a foundational principle for the proposed merger of the AFT and the NEA in 1998.\textsuperscript{148} Shanker himself had long dreamed of teachers joining together under the banner of a single union,\textsuperscript{149} and for a time it seemed the two organizations might unite as one voice\textsuperscript{150} to proclaim the arrival of the “second revolution”. Ultimately, however, the merger failed, due in large part to the cultural differences between the more conservative, suburban NEA, and the more activist, urban AFT.\textsuperscript{151}

The merger, had it occurred, might have offered proof of the “institutional maturation” of teachers unions,\textsuperscript{152} as well as an opportunity to consolidate power and remain relevant in the face of competing visions of reform, such as privatization through

\textsuperscript{144} See Chubb & Moe, \textit{supra} note 134, at 153-54. Chubb and Moe repeatedly cite strong union influence as a principle cause of ineffective schools. \textit{Id.}

\textsuperscript{145} Kahlenberg, \textit{Philosopher or King, supra} note 61, at 37; Kahlenberg, \textit{The History of Collective Bargaining among Teachers, supra} note 19, at 23.

\textsuperscript{146} See Kahlenberg, \textit{Philosopher or King, supra} note 61, at 34.

\textsuperscript{147} Lieberman, \textit{supra} note 32, at 192.

\textsuperscript{148} See Chase, \textit{supra} note 82.


\textsuperscript{150} Fusarelli & Cooper, \textit{supra} note 149.

\textsuperscript{151} \textit{Id.} at 35-36.

\textsuperscript{152} Fusarelli & Cooper, \textit{supra} note 149, at 34.
vouchers. But just three years after the failed merger, Bob Chase retired, leaving the fate of reform unionism up in the air.

Since Chase’s retirement, several forces – some new, some expanding – have emerged to push for education reform, including the implementation of the No Child Left Behind Act (NCLB), the rapid growth of charter schools, the Obama administration’s Race to the Top program, and the post-recession economic environment for public-sector employees. Given all of this, has the fate of reform unionism already been sealed? The retrenchment of the industrial union model suggests that the opportunity for reform may have already passed.

III. 21st Century Threats

A. No Child Left Behind

As reform unionism entered a vacuum with the loss of both Shanker and Chase, political and economic forces were coalescing around some key educational innovations. Though reforms began prior to his governorship, Governor George W. Bush of Texas presided over a substantial overhaul of his state’s public education system, strongly embracing the standards-based education movement. Like his father over a decade earlier, the younger Bush proclaimed that education was his number one priority, and held up the “Texas Miracle” as a shining example of the changes his presidency would effect. Using Texas’ model of testing and accountability as his foundation,

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153 Fusarelli & Cooper, supra note 149, at 35.
155 Id.
156 See infra p. 20.
157 See infra p. 27.
158 See infra p. 32.
159 See infra p. 36.
160 Hamilton, Stecher and Yuan, supra note 104, at 28.
161 Vinovskis, supra note 97, at 23.
163 Leung, supra note 121; Ravitch, The Death and Life of the Great American School System, supra note 162, at 96.
President Bush introduced his plan for reforming the country’s public schools on January 23, 2001. The legislation, which Bush called “No Child Left Behind,” rested on four major principles: every child should be tested annually in grades 3 to 8; specific reforms would be devised by the states; low-performing schools would get assistance; and students stuck in failing or dangerous schools would have the option to transfer. The bill garnered tremendous bipartisan support, and was signed into law on January 8, 2002, as a reauthorization of the Elementary and Secondary Education Act of 1965.

The AFT and NEA’s initial reactions to NCLB were mixed. On the one hand, the unions had successfully lobbied for the inclusion of protections for collective bargaining. The unions also succeeded in excluding publicly funded school vouchers from NCLB, contrary to the wishes of President Bush. The AFT urged its members to reserve judgment on the law, and expressed support for several of NCLB’s provisions, such as the “highly qualified teachers” requirement, the disaggregation of student achievement data by race, gender, disability and poverty, and the accountability requirements. Conversely, the NEA, though nominally supporting the Act’s goals of

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165 Ravitch, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM, supra note 162, at 94.
166 Id.
167 Id.
168 See Krisbergh, supra note 28, at 1042; See also Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 220-21.
169 See NCLB §1116 (d). This section provides that nothing in the Act shall be construed to alter or affect the rights of teachers under federal, state or local laws or under existing collective bargaining agreements; see also Paul Manna, Teachers Unions and No Child Left Behind, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY’S SCHOOLS 159, 166 (Jane Hannaway & Andrew J. Rotherham eds., 2006). The unions viewed this language as a significant victory. Id.
170 See Koppich, A Tale of Two Approaches, supra note 54, at 146.
171 Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 220.
172 Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 220. Id.
173 Krisbergh, supra note 28, at 1042.
enhancing student performance and closing the achievement gap.\textsuperscript{174} has remained openly hostile to the law from the beginning.\textsuperscript{175}

While the unions’ initial response to NCLB is probably best described as tepid, as the law’s accountability provisions kicked in, perceived threats to the core union tenets of job security and tenure moved the AFT and the NEA closer together in opposition to NCLB.\textsuperscript{176} Both organizations have voiced growing displeasure with multiple NCLB provisions,\textsuperscript{177} in particular the law’s high-stakes testing requirements, and the associated sanctions for schools that fail to show test score improvement.

Section 1111(b) (3)(A)\textsuperscript{178} of NCLB requires states that receive Title I funding to develop standardized assessments in math, language arts, and, beginning in 2007-2008, in science.\textsuperscript{179} States were initially permitted to test less frequently, but since the 2005-2006 school year, they have been required to test in every grade from third through eighth each year.\textsuperscript{180} The law also requires the states to measure students’ mastery of the material taught against “challenging standards,”\textsuperscript{181} and to disseminate both individualized and disaggregated data that enable parents, teachers and administrators to track students’ progress, both individually, and by racial, gender, disability, etc. subgroup.\textsuperscript{182}

The unions have argued that NCLB’s focus on testing drains valuable resources -- a great deal of time and money go into test creation, preparation and evaluation -- from

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\textsuperscript{175} Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 220. Due to term limits, Reg Weaver, whose position was generally antagonistic to reform, replaced Bob Chase as NEA President in 2002. Id.
\textsuperscript{176} Koppich, A Tale of Two Approaches, supra note 54, at 144.
\textsuperscript{178} NCLB § 1111(b)(3)(A).
\textsuperscript{179} Id.
\textsuperscript{180} NCLB § 1111(b)(3)(C)(vii).
\textsuperscript{181} NCLB § 1111(b)(3)(C)(vii). This provision addresses the implementation of NCLB assessments. The requirement that states develop challenging curricular standards and assessments is found in §1111(b)(1).
\textsuperscript{182} NCLB §§ 1111(b)(3)(C)(xii)-(xiii)
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other important initiatives, such as reduced class size and improved working conditions.\textsuperscript{183} And union officers and members alike object to the notion of evaluating teachers based on a single measure, such as testing data.\textsuperscript{184} This approach of evaluation teachers based on their students’ test scores also raises the specter of merit pay, long a contentious issue for the unions. In the unions’ view, merit pay is a direct attack on the classical tenet of experience-based raises, not tied to (and not fostering) competition.\textsuperscript{185}

The NEA has been especially vitriolic in its criticism of NCLB’s “obsession with high-stakes, poor quality tests,”\textsuperscript{186} which, says the union, are a product of politics, not a desire to help students.\textsuperscript{187} The AFT, for its part, has attempted to take a more balanced position, but its leadership agrees that NCLB’s testing structure handcuffs teachers and delivers poor quality education.\textsuperscript{188}

As much as teachers object to NCLB’s focus on testing, the law’s related accountability provisions, specifically, its reliance on Adequate Yearly Progress (AYP),\textsuperscript{189} and the corresponding sanctions for failing schools, are viewed by both the AFT and the NEA as completely unworkable.\textsuperscript{190} AYP is NCLB’s method of measuring whether schools and their students are making sufficient academic progress from year to year.\textsuperscript{191} Using the standardized assessments described above, each state, and every local

\textsuperscript{183} Manna, \textit{supra} note 169, at 171.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{See} Manna, \textit{supra} note 169, at 173.
\textsuperscript{186} \textit{NATIONAL EDUCATION ASSOCIATION, More About Our Positions on NCLB, supra} note 177 at 152.
\textsuperscript{187} Koppich, \textit{A Tale of Two Approaches, supra} note 54, at 147 (quoting a 2004 NEA public service announcement).
\textsuperscript{188} Koppich, \textit{A Tale of Two Approaches, supra} note 54, at 149 Louise Sundin, a former AFT vice president and Minnesota Federation of Teachers president has stated that the law undermines teachers’ professional judgment. \textit{Id}.
\textsuperscript{189} NCLB § 1111(b)(2)(B).
\textsuperscript{190} \textit{See} \textit{AMERICAN FEDERATION OF TEACHERS, No Child Left Behind (NCLB), supra} note 177; \textit{NATIONAL EDUCATION ASSOCIATION, More About Our Positions on NCLB, supra} note 177. This point is particularly salient given that the AFT and the NEA both fought to remove a provision requiring mandatory testing for teachers from an earlier draft of NCLB. Koppich, \textit{A Tale of Two Approaches, supra} note 54, at 146.
\textsuperscript{191} NCLB § 1111(b)(2)(B)-(C).
educational agency (LEA), is required to consistently increase the percentage of students scoring “proficient” or better on its tests, ultimately achieving one hundred percent proficiency by the year 2014. This one hundred percent requirement arguably creates a perverse incentive for states and educators alike to lower their testing standards, pushing out poor and minority students, or even tamper with test results, so as to achieve universal proficiency. Both the AFT and the NEA consider AYP an inaccurate and arbitrary benchmark for student achievement. They cite the formula’s failure to account for the same students’ progress over time, thus whether or not a school meets AYP does not necessarily reflect the school’s effectiveness in improving their students’ learning.

Adequate Yearly Progress is unacceptable to both the AFT and the NEA, but

192 The U.S. Dept. of Education defines an LEA as “a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State.” U.S. DEPARTMENT OF EDUCATION, http://www.ed.gov/race-top/district-competition/definitions (last visited Feb. 28, 2014).


196 AMERICAN FEDERATION OF TEACHERS, No Child Left Behind (NCLB), supra note 177; see also NATIONAL EDUCATION ASSOCIATION, More About Our Positions on NCLB, supra note 177.
more threatening than the formula itself is its impact on schools that fail to meet its demands. Section 1116(b) of NCLB outlines the procedures for “school improvement”. Under the law, local educational agencies (usually school districts) are to identify for school improvement any school failing to make AYP for two consecutive years. Upon identification, the district also notifies all students at the identified school of their right to transfer to any other public school within the district which has not been identified for improvement. Within three months of identification, the school must consult with staff, parents, and the district to formulate a two-year plan for improvement. If, after two years of implementing its improvement plan (four consecutive years of failing to make AYP), the identified school still fails to make AYP, the district shall take corrective action, such as replacing staff relevant to the failure, implementing a new curriculum, and/or restructuring the internal organization of the school. If the identified school fails to make AYP after one full year of corrective action, (five consecutive years of failure) the district shall proceed with major restructuring, which can include reopening the school as a public charter school, firing all or most of the staff (including the principal) relevant to the failure, contracting with a private company to run the school, or turning the school over to state control, if this is permitted by law.

Given this lengthy timeline, the impact of NCLB’s school improvement provisions did not begin to be felt until 2004 and beyond. However, by the 2005-2006 school year, approximately 1,750 schools in 42 states were in some stage of NCLB

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197 NCLB § 1116(b).
198 NCLB § 1116(b)(1)(A).
199 NCLB § 1116(b)(1)(E).
200 NCLB § 1116(b)(3)(A).
201 NCLB § 1116(b)(7)(C)(iv)(I).
202 NCLB § 1116(b)(7)(C)(iv)(II).
203 NCLB § 1116(b)(7)(C)(iv)(VI).
204 NCLB § 1116(b)(8)(B)(i).
205 NCLB § 1116(b)(8)(B)(ii).
206 NCLB § 1116(b)(8)(B)(iii).
207 NCLB § 1116(b)(8)(C)(iv).
restructuring, a number that was predicted to balloon rapidly. That prediction proved correct. During the 2010-2011 school year, New York State alone had 532 schools identified for improvement, 321 of them located in New York City. One hundred fifty-nine of those New York City schools were in some form of restructuring. In the 2011-2012 school year, Massachusetts had 142 schools identified for improvement in its 522 districts statewide. While changing demographics and economic factors clearly impact the public schools, NCLB’s school improvement provisions have played a significant role in the wave of school closings in urban America during the last decade.

Drastic restructuring, especially given the clear impossibility of constant gains in AYP and one hundred percent proficiency, has created apprehension within the teachers unions. Both the AFT and the NEA contend that the formula misidentifies schools needing improvement, forcing schools to re-allocate funding in suboptimal ways while failing to provide resources for the schools that are actually in need. The AFT further argues that the improvement and restructuring requirements do not provide adequate time to properly assess the troubles facing schools, or to develop and implement successful improvement plans. In effect, NCLB’s commitment to AYP

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210 *Id.*
216 AMERICAN FEDERATION OF TEACHERS, *NCLB: School Improvement, supra* note 214.
threatens teacher job security, the unions’ bread and butter, on two fronts: the threat of radical restructuring encourages administrators and school districts to push for more control of teacher assignment, and traditional due process requirements for layoffs or transfer offer little respite for teachers within chronically failing districts.

In sum, NCLB has made the path to reform unionism considerably more difficult. Both the AFT and the NEA have gathered their ranks and reformed along much more traditional labor versus management lines, hunkering down for what has thus far been a decade long war. The zealous defense of the law by the George W. Bush administration certainly contributed to the current impasse. For example, Bush’s Secretary of Education, Rod Paige, referred to the NEA as a ‘terrorist organization’ while speaking at a meeting of governors in 2003. Subsequently, the NEA went so far as to file suit against Paige’s successor as Secretary of Education, Margaret Spellings, claiming that the inadequate federal funding of NCLB amounted to an unfunded mandate. However, it would be an oversimplification to say that the Bush Administration, or No Child Left Behind, alone lead to a retrenchment of traditional unionism. Other ongoing developments within the world of school choice, and within the broader national economy have been equally as harmful to the prospects of reforming teachers unions.

B. Charter Schools – The New Vehicle of Choice

When Ray Budde wrote Education by Charter, he envisioned public schools that empowered teachers to experiment with novel approaches to management and

217 Manna, supra note 169, at 177.
218 Koppich, A Tale of Two Approaches, supra note 54, at 151.
219 Koppich, A Tale of Two Approaches, supra note 54, at 150.
220 Koppich, A Tale of Two Approaches, supra note 54, at 150.
221 John R. Munich & Rocco E. Testani, NEA Sues over NCLB: The bucks are big, but the case is weak, 5 EDUCATIONNEXT 10 (2005), available at http://educationnext.org/neasuesovernclb/ (last visited Aug. 5, 2013). The suit was ultimately dismissed for failure to state a claim, and affirmed on appeal. Sch. Dist. v. Sec’y of the United States Dept. of Educ., 584 F.3d 253 (6th Cir. 2009); Cert denied Sch. Dist. of Pontiac v. Duncan, 130 S. Ct. 3385.
222 Kolderie, supra note 66.
pedagogy within the walls of their existing public buildings.\textsuperscript{223} His goal was to encourage innovations that might then lead to a district-wide restructuring.\textsuperscript{224} When Albert Shanker picked up the idea, advocating a modified version of Budde’s plan, he spoke of creating new autonomous schools (rather than simply autonomous classrooms) within existing district buildings.\textsuperscript{225} But the end goal of the two proposals was the same: innovation for the benefit of the system at large.

In the 22 years since charter schools first appeared in Minnesota,\textsuperscript{226} their focus has shifted. Today’s charter school movement is not necessarily a tool to benefit the existing public school system. Instead, the emphasis is on charters as a solution to failing schools.\textsuperscript{227} Charter schools have become the new vehicle of choice in American K-12 education, attracting a broad range of supporters. The political left supports charters for their promise of increased access to quality education for low-income and minority children.\textsuperscript{228} While the right embraces the idea that charters must compete for students, and therefore, must be efficient.\textsuperscript{229} As if in answer to Chubb and Moe’s call for growth in the “supply side” of education,\textsuperscript{230} charter schools seem to offer an alternative to the public education status quo. In an idealized view, competition drives rational parents to innovative alternatives and away from inefficient hierarchy and teachers’ union dominance.\textsuperscript{231} Already on the defensive in combating the brave new world of NCLB, teachers’ unions also face a fundamental challenge in the form of charter school growth.

Though Minnesota was the first state to authorize charter schools in 1991,\textsuperscript{232}

\begin{footnotes}
\item[223] \textit{Id.}
\item[224] \textit{See} Ravitch, \textit{The Death and Life of the Great American School System}, \textit{supra} note 162, at 122-23.
\item[225] Kolderie, \textit{supra} note 66.
\item[226] \textit{Id.}
\item[228] \textit{Id.} at 6.
\item[229] \textit{Id.}
\item[230] Chubb & Moe, \textit{supra} note 134, at 207.
\item[232] Kolderie, \textit{supra} note 66.
\end{footnotes}
California adopted a version of charter school legislation in 1992, and six more states followed suit by 1993. A movement that began with only eight schools has grown to nearly 6,000 schools nationwide, serving nearly 2.3 million children, with an estimated 920,000 students currently on waitlists. What has fueled this meteoric growth? A partial explanation is private sector buy-in and investment. Hedge fund managers, and other wealthy private sector actors have been attracted to the results oriented ideology and flexible management structures of charter schools. They have lent very substantial financial support to the charter movement. Major philanthropic ventures such as the Bill and Melinda Gates Foundation have latched on to the idea of charter models.

Along with the very substantial private contributions just described, political forces have contributed significantly to the growing presence of charter schools in the

233 Id.
237 Trip Gabriel & Jennifer Medina, Charter Schools’ New Cheerleaders: Financiers, N.Y. TIMES, http://www.nytimes.com/2010/05/10/nyregion/10charter.html?pagewanted=all (May 9, 2010). As an example, the political action committee Democrats for Education, which supports charter school growth in New York City and across New York State, counts among its members the founders of Anchorage Capital Partners, Greenlight Capital, and Pershing Square Capital Management, managing a combined $20.3 billion. Id.
238 Ravitch, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM, supra note 162, at 144.
public education landscape. As noted, charters appeal to both the left and right; liberals view them as a sort of “firewall” against vouchers, and conservatives see an opportunity for deregulation and market-based reforms. On the federal level, both Republicans and Democrats supported the No Child Left Behind Act, which has allowed states and districts to close failing schools and reopen them as charter schools. These provisions of NCLB are, arguably, Congress’s explicit endorsement of the view that charter schools are one cure for school failure.

Union resistance to charter school growth is easy to explain: charters (as the new model of school choice, free from the “specter” of vouchers) are arguably market-based tools for breaking the union monopoly on public education, and marginalizing unions’ involvement in educational policy decisions. Today’s charter movement has much in common with the “choice” advocated by Chubb and Moe in 1990. Their vision of sweeping aside the inefficient school bureaucracy with its rigid top-down structure and replacing it with an educational “marketplace,” directly accountable to parents and students, permeates the contemporary charter school mantra. Market principles have also impacted charter schools on the micro level. Charter school management often takes its cues from the business world, adopting performance-based compensation for staff, long working hours, at-will employment status for teachers and administrators, and minimal union representation. The emergence of for-profit

240 Id.
241 Davis, supra note 227, at 7; NCLB § 1116(b)(8)(B)(i).
242 Chubb & Moe, supra note 134, at 217.
243 See Chubb & Moe, supra note 134, at 226 (explaining that the proposed choice system results in the permanent withdrawal of authority from those who previously held it, i.e. unions); Krisbergh, supra note 28, at 1026.
244 Ravitch, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM, supra note 162, at 126. This should not be all that surprising considering that Chubb and Moe published their seminal work, Politics, Markets and America’s Schools, in 1990, right as the charter movement was taking shape.
education management organizations (EMOs) has only reinforced this model of charter schools.\footnote{As of the 2010-2011 school year approximately 12\% of U.S. charter schools were run by for-profit corporations. \textit{National Alliance for Public Charter Schools, Dashboard, Schools by Management Organization} http://dashboard.publiccharter.org/dashboard/schools/page/mgmt/year/2011 (last visited Aug. 8, 2013). Interestingly, even when state law prohibits the issuance of charters to for-profit education management organizations (EMO), these EMOs generally may contract with non-profit charter organizations to oversee operations, handle human resources, operations or even control the school’s curriculum. \cite{Davis} note 227, at 7. Economies of scale have lead to consolidation within the EMO industry, with several large companies operating their schools through a franchise type model. \textit{Id.} at 26.}

Though he had been an early supporter of charter schools, Albert Shanker was repelled by the corporatization of the charter movement.\footnote{Ravitch, \textit{The Death and Life of the Great American School System}, \textit{supra} note 162, at 123.} In 1993 Shanker withdrew his support for charter schools in light of the growing influence of business interests.\footnote{\textit{Id.}} The AFT and the NEA continue to express similar concerns today; each fears that charter laws are intended as union busting mechanisms, outsourcing public education to private firms.\footnote{Krisbergh, \textit{supra} note 28, at 1038.} Accordingly, teachers’ unions employ a variety of tactics to combat charter growth. One option for teachers’ unions is to use their political clout to weaken charter laws, creating barriers for those who would seek to open new charter schools.\footnote{Krisbergh, \textit{supra} note 28, at 1039.} Union leadership in New York state attempted just that, by working with lawmakers to insert “poison pill” provisions into draft legislation lifting the cap on the number of charter schools allowed to open.\footnote{Steven Brill, \textit{The Teachers’ Unions’ Last Stand}, \textit{NY Times Magazine}, available at http://www.nytimes.com/2010/05/23/magazine/23Race-t.html?pagewanted=all# (May 17, 2010).} Though the bill initially appeared to grant the state the power to authorize more charter schools, a closer reading revealed that the law had essentially been neutered by the attachment of multiple conditions making the opening of new charters more difficult than before.\footnote{Brill, \textit{supra} note 252.} Unions have also engaged in a number of court battles. In New York City, where a dearth of available real estate requires charter schools

\begin{thebibliography}{99}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
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to co-locate within existing school buildings, serves as a prime example; the UFT annually files major lawsuits against the New York City Department of Education and charter school organizations in an attempt to thwart co-location and the spread of charters.254

Overall, unions’ approaches to charter schools have been mixed and somewhat inconsistent. The NEA has attempted to organize charter school teachers,255 and New York City’s AFT affiliate, the United Federation of Teachers (UFT), has gone so far as to open its own charter schools.256 However, in general charter schools remain largely non-union, with only 12.3% of the nation’s charter schools unionized as of 2009-2010.257 And demographics suggest that this number is unlikely to increase in the near future. Though the average charter school teacher is only 38 years old, as compared to the average non-charter teacher, who is 43,258 a younger generation of teachers are increasingly being drawn to charter schools, particularly recent college graduates participating in Teach for America (TFA).259 In Los Angeles, for example, charter

255 Krisbergh, supra note 28, at 1039.
259 Teach for America, an AmeriCorps sponsored program, places high achieving college graduates in teaching positions in low-income communities throughout the country, with the goal of combatting the effects of poverty and raising student achievement. See http://www.teachforamerica.org/ (last visited Aug. 10, 2013).
schools hired 94% of the TFA recruits for this past school year.\textsuperscript{260} In fact, nationally, TFA places around one third of its recruits in charter schools, illustrative of the way in which the charter school movement is “redefin[ing] the arc of a teaching career.”\textsuperscript{261} Younger teachers are not only less likely to believe that unions are relevant to their teaching practice, but they often view unions as a bar to innovation.\textsuperscript{262}

C. Race to the Top, but for Whom?

As illustrated above, the ongoing implementation of NCLB and the growth of charter schools over the last decade have impacted the status of teachers’ unions significantly, resulting in a retrenchment of traditional union positions. However, a new lightening rod for intransigence has emerged in just the last few years in the form of the Obama administration’s Race to the Top Fund (RTTT),\textsuperscript{263} which allocated $4.35 billion for competitive grants designed to incentivize state-level reform, innovation and improvement in public education.\textsuperscript{264} The program in many ways represents the amalgamation of multiple reform efforts and has proven a formidable challenge to the unions’ place at the table in American public education.\textsuperscript{265}

In order to be considered for RTTT funds, states were required to submit applications that detailed their proposed reforms. The applications were then rated on a 500-point scale.\textsuperscript{266} The winning states would be those whose proposals best aligned with the administration’s reform agenda, including district takeover of failing schools.

\begin{footnotesize}
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\item \textsuperscript{261} Motoko Rich, \textit{At Charter Schools, Short Careers by Choice}, N.Y. TIMES, Aug. 27, 2013, at A1. A recent study of federal employment data shows that the proportion of teachers with five years experience or less rose to 28% in the 2007-2008 school year, an 11-point increase from 20 years prior. \textit{Id.} at A15.
\item \textsuperscript{262} Koppich, \textit{A Tale of Two Approaches}, supra note 54, at 151.
\item \textsuperscript{263} U.S. DEPT. OF EDUC., \textit{Race to the Top Program: Executive Summary}, 2, \textit{available at} http://www2.ed.gov/programs/racetothetop/executive-summary.pdf (last visited Aug. 9, 2013). RTT was part of the American Reinvestment and Recovery Act of 2009 (ARRA), signed into law in order to combat the recession and stimulate the economy. \textit{Id.}
\item \textsuperscript{264} \textit{Id.}
\item \textsuperscript{265} Brill, supra note 252.
\item \textsuperscript{266} \textit{Race to the Top Program: Executive Summary}, supra note 263, at 3.
\end{itemize}
\end{footnotesize}
improved curriculum standards, and of course, charter schools. Though only forty of the 500 points were to be awarded for “ensuring successful conditions for high-performing charters and other innovative schools,” how amenable a state was to charter schools could prove to be the difference between winning an award or not. Indeed, the point-spread between the scores of the two first round winners, Delaware and Tennessee, and those of the 3rd and 4th place states that came up just short was less than 25 points. New York is a prime example of the influence that RTT has had on charter school growth; a key factor in the state’s successful second-round application, and $700 million award, was new legislation doubling the cap on charter schools to 460, despite intense union opposition.

However, as noted above, charter school growth was just one of many policy priorities included in RTTT that challenge the interests of teachers’ unions. In fact, the largest point category (138 of 500), entitled “Great Teachers and Leaders,” rewards the elimination of seniority-based compensation and permanent tenure, an obvious point of contention for teachers’ unions. Thus, states could demonstrate their commitment to reform through teacher evaluation systems designed to hold teachers individually accountable and based on measures of student achievement, including state standardized tests. Unsurprisingly, the law’s emphasis on teacher evaluations has caused strife between reform-minded lawmakers and union leadership weary of undermining their members’ job security, particularly since the law also rewards states that are able to get the participating LEAs, including local union leadership, to sign off on their commitment

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267 Brill, supra note 252.
268 Race to the Top Program: Executive Summary, supra note 263, at 3.
269 Brill, supra note 252.
271 Brill, supra note 252. The New York State United Teachers and the United Federation of Teachers, both AFT affiliates, inserted poison pill provisions into an initial draft of the legislation, in an attempt to neuter the lifting of the cap. Id.
272 Race to the Top Program: Executive Summary, supra note 263, at 3.
273 Brill, supra note 252.
274 Id.
to implement the reforms. Such high stakes stand-offs, similar to the one in New York over charter schools, have occurred in Florida and Minnesota, where the unions have opposed the implementation or expansion of systems linking teacher pay to test scores. Just as the 40 points gained by raising the charter school cap propelled New York’s application over the top, the lack of union support for Florida’s plan had the opposite effect and, at least in part, accounted for the state coming up just short in the first-round of awards. Of course, union support did not guarantee a successful application; while first-round winners Delaware and Tennessee garnered substantial union buy-in, applications by Massachusetts, Pennsylvania, Ohio and Kentucky all fell short despite strong support from teachers unions. A similar scenario continues to play out on a more micro-level with local teachers’ unions refusing to participate in, and in effect vetoeing, their districts’ plans to compete for a Race to the Top District (RTT-D) grant.

Though the law’s provisions rewarding states for generating union buy-in are meaningful, it is unquestionable that the overall thrust and impact of RTTT has been to

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275 Race to the Top Program: Executive Summary, supra note 263, at 6. States that are able to evidence their LEAs’ commitment to the reform agenda through Memoranda of Understanding (MOU) or other such binding documents are eligible to receive 45 out of 500 points on their application. Id.
277 Medina, supra note 270.
279 Id. Delaware’s plan was backed by 100% of the state’s teachers’ unions, while Tennessee’s was supported by 93%. Id.
280 Id.
challenge teachers’ unions like never before, uniting powerful political and financial forces under the banner of reform.\textsuperscript{282} As Governor Phil Bresden of Tennessee explained the proposed reforms to teachers in his state, “‘It’s coming, and you can either help structure it, or you can fight it, and it won’t be as good.’”\textsuperscript{283} Underlying Bresden’s words is the fact that the Democratic Party, long a champion of labor, though willing to work with teachers’ unions on issues of education reform, will not flinch at the prospect of moving forward without them in pursuit of RTTT funds.\textsuperscript{284} This political reality with teachers’ unions stuck between a rock and a hard place played out in the first-round of RTTT applications, where nearly every state proposed reforms that a year prior “would have been seen as pushing beyond what the teachers’ unions would allow.”\textsuperscript{285} Perhaps Education Secretary Arne Duncan has best described the position of teachers’ unions in the face of RTTT: “‘Ideally we want the adults working together, but at the end of the day, this is about doing reform.’”\textsuperscript{286}

D. Attack on Public Sector Benefits

NCLB, charter schools, and RTTT all pose challenges to the institutional power of teachers’ unions. Unfortunately for the unions, fundamental changes in the larger economy have also impacted the status of public-sector labor unions generally, including teachers’ unions. Union representation in the public sector has diverged sharply from that in the private sector over the last 40 years,\textsuperscript{287} and perhaps more significantly, so have the benefits packages provided by the respective employers.\textsuperscript{288} This increasingly stark contrast, greatly exacerbated by the recession of 2007-2009, has prompted a number

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\item \textsuperscript{282} See Brill, \textit{supra} note 252.
\item \textsuperscript{283} Brill, \textit{supra} note 252.
\item \textsuperscript{284} See Brill, \textit{supra} note 252.
\item \textsuperscript{285} Id.
\item \textsuperscript{286} Id.
\item \textsuperscript{287} Andrew Coulson, \textit{The Effects of Teachers Unions on American Education}, 30 CATO JOURNAL 155, 160 (2010).
\item \textsuperscript{288} Chris Edwards, \textit{Public Sector Unions and the Rising Cost of Employee Compensation}, 30 CATO JOURNAL 87, 88-89 (2010).
\end{itemize}
of direct attacks on public employees’ benefits and bargaining rights.\textsuperscript{289} Not surprisingly, these, often vociferous, attacks have caused unions to retrench, clinging more tightly to the tenets of industrial unionism.\textsuperscript{290}

Union membership in the private sector has declined steadily since its peak in the mid-1950s;\textsuperscript{291} current data reveal that fewer than seven percent of private sector workers are unionized.\textsuperscript{292} At the same time, public sector unionization rates have remained fairly constant since the initial boom during the 1960s and 1970s.\textsuperscript{293} As of 2013, 35.3 percent of public sector workers were members of unions,\textsuperscript{294} with approximately three quarters of all public school teachers represented by a union.\textsuperscript{295} Equally striking is the fact that the private and public sectors have deviated sharply in terms of employee benefits. For example, 2009 data show that in terms of dollars contributed per hour worked, the value of state and local employees’ health insurance is shockingly more than twice that of private sector employees.\textsuperscript{296} For retirees the discrepancy is even greater: public sector employees, who often retire as early as age 55, are covered by their government employers for ten years before having to rely on Medicare, something private sector


\textsuperscript{291} \textit{Id.} at n.18. Union membership and union representation are related, but distinct terms. Union membership refers to employees who are official members of the union. Union representation refers to not only union members, but also those employees who report no union affiliation, but whose jobs are covered by a union contract.


\textsuperscript{293} Edwards, \textit{supra} note 288, at 98.

\textsuperscript{294} BUREAU OF LABOR STATISTICS, \textit{supra} note 292.

\textsuperscript{295} Russo, \textit{supra} note 290, at n.16. The most recent data, from the 2007-2008 school year, reveals that 76.4% of public school teachers belong to unions. \textit{Id}.

employees are rarely afforded.\textsuperscript{297} However, the most glaring divergence between private and public benefits is in the area of pensions.\textsuperscript{298}

Beginning in the 1980s, private sector pensions shifted dramatically, moving away from defined benefit (DB) plans, and toward defined contribution (DC) plans.\textsuperscript{299} Under a DB plan, payments the retired worker will ultimately collect are predetermined, using a formula based on salary and years worked.\textsuperscript{300} Thus, regardless of how much (or how little) money the employer sets aside to pay the benefits, its commitment remains the same.\textsuperscript{301} In effect, any risk associated with the investments made to cover the ultimate payout is borne by the employer, not the employee. Under a DB plan contract, the employer is obliged to pay the promised benefit, whether its investments do well or do poorly.

In contrast, a DC plan requires the employer to make a predetermined monetary contribution to the employee’s pension, which is distributed among a number of investment vehicles (e.g., mutual funds, stocks, and bonds), often of the employee’s choosing.\textsuperscript{302} The ultimate value of the DC recipient’s pension is uncertain.\textsuperscript{303} It depends entirely upon the performance of his/her investments. If those investments do poorly, so to will the employee and vice versa. Thus, under a DC plan, the risk of loss falls on the employee.

The shift to DC plans as the predominant form of private sector retirement savings was both dramatic and rapid;\textsuperscript{304} from 1983 to 1998, the percentage of the U.S. labor force covered by pensions with only a defined contribution plan rose from 15

\textsuperscript{297} Edwards, \textit{supra} note 288, at 92.
\textsuperscript{299} Poterba et al., \textit{supra} note 298, at 271.
\textsuperscript{300} Leora Friedberg & Michael T. Owyang, \textit{Fed. Reserve Bank of St. Louis, Not Your Father’s Pension Plan: The Rise of 401(k) and Other Defined Contribution Plans} 23-34, 23 (2002).
\textsuperscript{301} \textit{Id.}
\textsuperscript{302} \textit{Id.} at 23-26.
\textsuperscript{303} \textit{Id.} at 23.
\textsuperscript{304} Poterba et al., \textit{supra} note 298, at 271.
percent to 59 percent.\textsuperscript{305} And those private employers who still offer DB plans often use a lower-cost approach. The plans use average career earnings, rather than the last few (most lucrative) years of employment in applying the benefit formula.\textsuperscript{306} Public plans, by contrast, virtually always use a short period to determine the income portion of the formula, including only the employee’s highest paid years. During this period, however, public sector employees, including teachers, have largely maintained their DB plans. A number of factors have contributed to this trend; an important one is that increases in DB plans have little or no short-term impact on state and local budgets, since payments are not due for many years.\textsuperscript{307} This has allowed policymakers to avoid taking on the unions, and the DB plans they have achieved through collective bargaining.\textsuperscript{308}

While the economy boomed in the late 1990s, the dissonance between public and private sector benefits had little impact. Private sector employees gained ground in terms of compensation\textsuperscript{309} and the stock market reached new heights, swelling the investments in 401(k) portfolios.\textsuperscript{310} However, the economy turned sharply downward following the mortgage crisis of 2008, the corresponding economic recession of 2007-2009, and the remarkably sluggish, yet ongoing recovery.\textsuperscript{311} Public sector employees’ relative

\textsuperscript{305}Friedberg & Owyang, supra note 300, at 24. Given the fact that these figures include the public sector, the relative percentage of private employees with a DC plan is likely considerably higher.

\textsuperscript{306}Edwards, supra note 288, at 92.

\textsuperscript{307}Edwards, supra note 288, at 92.

\textsuperscript{308}See Id.

\textsuperscript{309}Edwards, supra note 288, at 88.

\textsuperscript{310}Average compensation for both the private and public sectors actually moved in concert between 1950 and 1980, with public sector employees moving ahead until the boom of the late 1990s. Edwards, supra note 288, at 88.

\textsuperscript{311}The economy has continued to struggle in the post-recession years (June, 2009-present). Measures such as unemployment, median household income, and industrial production have yet to return to pre-recession levels. Brenda Cronin, Slow-Motion US Economy Searches for Second Gear, WALL STREET JOURNAL, http://online.wsj.com/news/articles/SB100014241278873233000045785592631975573 (June 24, 2013, 5:55 PM). However, labeling the last four plus years as an extended recession would ignore a complicated reality wherein stock markets have also continued to reach record highs. See Jia Lynn Yang, The Dow is hitting a record high. No, for real this time., Wonkblog, WASHINGTON POST (Nov. 19, 2013, 12:42 PM),
insulation from the effects of the recession\textsuperscript{312} led some to challenge both the content of their contracts, and, more fundamentally, their collective bargaining rights.\textsuperscript{313}

The warring factions offer differing assessments of the relative value and growth rates of private sector, versus public sector compensation.\textsuperscript{314} Voices on the right argue that public sector compensation has outpaced and outstripped private sector compensation.\textsuperscript{315} The Cato Institute, for instance, cites to a nearly $6,000 gap in benefits between average public sector and private sector employees as the principal reason for the compensation discrepancy.\textsuperscript{316} Similarly, a study by Costrell and Podgursky using data from 2005-06 argues that public school teachers receive a higher percentage of their earnings in the form of employer contributions to retirement funds than do private sector professionals.\textsuperscript{317} The authors revisited their study in 2013, and using updated data, argued that the benefit cost gap between public school teachers and private sector professionals has actually widened from 1.9 percent, to 6.4 percent.\textsuperscript{318} Conversely, 


\textsuperscript{312} This is not to suggest that the public sector was entirely insulated from the recession, as sequestration-related job loss demonstrated, but only that public sector employees were more insulated from the risk of poor investment returns. Whether that is still the case remains to be seen.

\textsuperscript{313} \textit{See Schaper, supra} note 289. Chief among the challengers to public sector bargaining rights have been the conservative Cato Institute, \textit{i.e.} Coulson, \textit{supra} note 287, and Edwards \textit{supra} note 288, and Tea Party backed politicians, \textit{see infra} p. 43.


\textsuperscript{315} Edwards, \textit{supra} note 288.

\textsuperscript{316} \textit{Id.} at 89. The study used Bureau of Economic Analysis data from 2008 to show that average public sector compensation was $67,812, $52,051 in wages and $15,761 in benefits, as compared to private sector compensation of $59,909, $50,028 in wages and $9,881 in benefits. \textit{Id.}


studies conducted by progressive groups, such as the Center for State & Local Government Excellence,\textsuperscript{319} reach a different conclusion. Taking into account basic earnings determinants such as age, education, years of experience, and occupation in order to achieve a true apples-to-apples comparison,\textsuperscript{320} these studies demonstrate that while benefits comprise a slightly larger percentage of public sector compensation than private sector compensation (a difference of 1-3\%).\textsuperscript{321} Overall, public sector employees earn approximately 7\% less than their private sector counterparts.\textsuperscript{322} This gap widens to approximately 10\% when comparing state and local government employees to comparable employees in large private firms.\textsuperscript{323} Studies conducted on the state, rather than national level, have reached the same conclusion that despite the fact that benefits comprise a larger percentage of public sector compensation, public sector employees remain undercompensated overall in comparison to comparable private sector employees.\textsuperscript{324}

Which side of the debate is correct goes a long way in determining how cash-strapped municipalities and states are to view several aspects of public sector compensation structures. For example, the earlier permitted retirement ages for public sector employees,\textsuperscript{325} and the calculation of their pension payments based on the last several years' earnings,\textsuperscript{326} rather than career average earnings, contribute to a perceived

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\item this gap in employer contributions accounts for a similar gap in total compensation, or if such a compensation gap exists.
\item Bender & Heywood, supra note 319, at 8; Joel Cutcher-Gershenfeld & Saul A. Rubinstein, Innovation and Transformation in Public Sector Employment Relations: Future Prospects on a Contested Terrain, 28 OHIO ST. J. ON DISP. RESOL. 107, 121 (2013).
\item Bender & Heywood, supra note 319, at 15.
\item Bender & Heywood, supra note 319, at 3.
\item Bender & Heywood, supra note 319, at 15.
\item E.g. Jeffrey H. Keefe, Ph.D., KENTUCKY CENTER FOR ECONOMIC POLICY, Public versus Private Employee Costs in Kentucky: Comparing Apples to Apples (July 2012).
\item Edwards, supra note 288, at 93.
\item Edwards, supra note 288, at 94.
\end{itemize}
inequality between public and private sector employees. However, public sector employers are able to replace early retirees with a younger, less experienced workforce, driving down average public sector salaries. Furthermore, the higher expected value of pension payments in a DB plan is a tradeoff for the risk of investment-loss faced by the public sector employee; as opposed to DC plans, DB plans are not portable and are lost if the job ends prior to the employee becoming eligible for retirement. That said, the most significant catalyst for the recent virulent reactions to public sector benefits, at least on the part of conservative groups and policy makers, is the post-recession realization that state and local pension plans are disastrously underfunded; current estimates project that state plans across the country are underfunded by approximately $4 trillion.

Just as the general view of public vs. private sector compensation varies widely along the political spectrum, the arguments regarding state pension liability diverge sharply along ideological lines. To the right, underfunding is really a misnomer; the real problem has been overpromising. Conservatives believe that the expansion of benefits, an easy sell during boom years, has resulted in massive liabilities given the current sickly economic climate. The counterargument begins with the current valuation of state plan liability. Though many states have been stretched thin, a third of all states funded their plans at more than 80%, an actuarially sound position. Among those states in a strong position is New York, one of the most heavily unionized in the country, which has funded over 90% of its pension liability. Furthermore, the conservative argument

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327 Edwards, supra note 288, at 93.
328 Bobkoff, supra note 314.
329 Friedberg & Owyang, supra note 300, at 26.
330 Edwards, supra note 288, at 87 passim.
332 Edwards, supra note 288, at 110.
333 Edwards, supra note 288, at 92.
335 Id.
ignores the reality that private companies responsible for managing public pension funds encouraged civic leaders to increase investment in riskier assets.\textsuperscript{336} Hence, when the recession hit and these investments failed, the expectation of higher returns used to justify lower annual contributions to the plan backfired.\textsuperscript{337} The problem was compounded further by the fact that DB plans must meet a targeted return each year just to maintain value, since the value in today’s dollars of the promised payments under DB plans goes up each year as those payouts get closer in time.\textsuperscript{338} Thus the losses put public pensions in an even deeper hole, particularly when compared to private firms and investors, which, ironically, has lead public pension managers to seek out the help of private equity firms in order to reduce the shortfall.\textsuperscript{339}

State level budget crises have consequently inspired conservatives to launch a crusade to dismantle public sector bargaining rights as a means to right the financial ship.\textsuperscript{340} Two of the more notable examples of this strategy occurred in Wisconsin and Ohio. In 2011, Wisconsin became the center of national attention when Governor Scott Walker signed Wisconsin Act 10 into law, severely curtailing the scope of public sector bargaining rights in an effort, it was asserted, to close the state’s budget gap.\textsuperscript{341} Along with limiting the mandatory subjects of bargaining, Act 10 required the state’s 63,000 public school teachers to contribute towards their own pensions and health care costs.\textsuperscript{342}

The opposition to the law, which commenced with a rally of 70,000 protestors outside of the capitol before its passage, was swift and fierce, culminating in both state and federal litigation and multiple recall elections involving both state legislators and Gov. Walker

\textsuperscript{337} Id.; see also Schoen, supra note 334.
\textsuperscript{338} Elliot, supra note 336, at 2.
\textsuperscript{340} See Cutcher-Gershenfeld & Rubinstein, supra note 320, at 121.
\textsuperscript{341} Russo, supra note 290, at 333.
\textsuperscript{342} Russo, supra note 290, at 334.
himself. At almost exactly the same time (20 days apart), Ohio’s Governor, John Kasich, succeeded in pushing through a similar bill also designed to address the State’s budget deficit. The Ohio statute was broader than Wisconsin’s, covering firefighters and police as well as teachers. It moved teachers from a compensation system based on seniority and degrees earned to merit pay, and it barred them from striking. The Ohio statute’s “overreach,” i.e. its inclusion of public sector workers other than teachers, may explain why opponents were able to rally more support in Ohio to repeal the law by voter referendum. Wisconsin’s Act 10, by contrast, has (to this point), survived all challenges.

Though the outcomes in Ohio and Wisconsin were quite different, both events seem to presage a return to the traditional labor stance of zero-sum bargaining, though this time at the legislature’s behest. Along with NCLB, the growth of charter schools, and the RTTT competition, the attack on public sector benefits continues to drive teachers unions and their opponents toward what Cutcher-Gershenfeld and Rubinstein call “narrow self-interest.” For example, whether Wisconsin Act 10 is characterized as providing government agencies with much needed financial flexibility, or “destroying unions with a thousand cuts,” it is clear that the law’s passage threatens the very existence of public sector unions in Wisconsin; without the ability to bargain, union membership has fallen precipitously and leadership has been forced to dig in for their survival and little else. But is this a sign of the endgame, or does an opportunity for reform survive?

343 Russo, supra note 290, at 333-38.  
344 Russo, supra note 290, at 339.  
345 Russo, supra note 290, at 339.  
346 Id.  
347 Id.  
349 Russo, supra note 290, at 322.  
350 Cutcher-Gershenfeld & Rubinstein, supra note 320, at 139.  
351 Greenhouse, supra note 348.  
352 Id.  
353 Id.
Contemporary scholars stress that it is essential to move beyond the traditional model of teachers’ unions toward a vision of collective bargaining that embraces innovation and collaboration.\(^{354}\) The particulars of such an approach have been discussed at least since *A Nation at Risk* in 1983: an increased focus on professionalism,\(^{355}\) joint decision making between union and management,\(^{356}\) and greater institutional transparency for both sides.\(^{357}\) Meanwhile, concerns about America’s place in the hyper-competitive world market are cited as often now as they were when *A Nation at Risk* was released.\(^{358}\) The challenge, of course, is to figure out how to achieve sustainable reform. Can the “second revolution” of Shanker\(^{359}\) and the “new unionism” of Chase\(^{360}\) make larger institutional inroads, or will we be left with, at best, “‘islands of success.’”\(^{361}\)

Examples from the world of education, and from the broader realm of labor in general, suggest that there may still be opportunities for reform, if the will can be found to seize them.

IV. A New Way Forward

A. Examples from the World of Education

Although the AFT and the NEA are not currently devoting their energies to reforming the unions, union reform efforts have not vanished entirely. Innovative locals continue to develop dynamic partnerships with school districts across the country in response to their individualized needs.\(^{362}\) While these approaches are promising at the

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\(^{354}\) *See id.; Russo, supra* note 290, at 344-45.
\(^{355}\) *Russo, supra* note 290, at 344-45.
\(^{356}\) *Russo, supra* note 290, at 345; *Cutcher-Gershenfeld & Rubinstein, supra* note 320, at 133.
\(^{357}\) *Cutcher-Gershenfeld & Rubinstein, supra* note 320, at 137.
\(^{358}\) *Russo, supra* note 290, at 347.
\(^{361}\) *Cutcher-Gershenfeld & Rubinstein, supra* note 320, at 140.
\(^{362}\) *Cutcher-Gershenfeld & Rubinstein, supra* note 320, at 129-35.
local level, diffusion of these successful practices has been limited. Some organizations have tried to harness this local-level energy for use in a larger, unified reform movement. One example is the Teacher Union Reform Network (TURN). Founded by the leaders of two locals in 1995, TURN is a network of 34 member organizations, including 30 AFT and NEA locals working together to “explore, develop, and demonstrate models that lead to the restructuring of unions so that they will become more responsive and responsible in organizing around projects designed to improve student learning.” TURN participants meet quarterly to exchange ideas and experiences with the goal of turning unionists into agents, rather than targets, of reform. Despite the organization’s stated mission, however, TURN difficulty generating an actual alternative to traditional unionism. The Network itself has experienced little growth, increasing from 21 to just 34 members since its founding. Furthermore, as AFT and NEA locals, TURN members have no desire to become a third

363 Cutcher-Gershenfeld & Rubinstein, supra note 320, at 140. In fact, many of the exemplary partnerships cited by Cutcher-Gershenfeld and Rubinstein, such as those in school districts in Ohio, Minnesota and Florida, id. at 129, are the same examples scholars cited in the first call for reform unionism over twenty years prior. Kerchner and Caufman, supra note 40, at 5. Though this certainly evidences the sustainability of these models, Cutcher-Gershenfeld and Rubinstein’s focus on models with longevity, as opposed to newer successes, also suggests that their impact has been fairly isolated.


367 Brief History, TURN EXCHANGE, supra note 365.

368 Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 222.


370 Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 222.

371 Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 222. Koppich’s figure of 30 AFT and NEA locals is also stated on TURN’s website, but does not include the four member organizations that appear to be unaffiliated with a national union. Brief History, TURN EXCHANGE, supra note 365.
Consequently, it can be difficult to determine whether the organization’s mission is to reform unions, or education more generally. Nonetheless, TURN could serve as a model for other “learning networks” seeking to connect school districts that are attempting to create innovative partnerships, with those that have experience doing so.

Another reform organization is the Association of American Educators (AAE), founded in 1994. Unlike TURN, the AAE does strive to become a national alternative to the AFT and the NEA, as a non-union professional organization, much as the NEA was at its inception. The AAE has members in all 50 states. It focuses primarily on providing professional benefits and services to educators, and advancing policy positions germane to education only. Though rejecting what it views as union partisanship, and refusing to engage in collective bargaining (due in large part to its status as a 501(c)(6) non-profit), the AAE shares several policy positions with the reform oriented union locals, including teacher evaluation systems based on more than standardized tests alone (often called value-added models), and the elimination of “last-hired, first-fired” practices. The AAE is currently the largest organization of its kind in the

373 Id.
374 Cutcher-Gershenfeld & Rubinstein, supra note 320, at 135-36. These networks would facilitate the sharing of resources across districts, such as access to state or national level institutions willing to provide training, technical assistance, a bargaining framework and multi-stakeholder oversight. Id.
376 Id. Though AAE’s website does not explicitly state that the organization seeks to become an alternative to the AFT and NEA, the website is explicit about what AAE represents, what it believes the problems to be with the national teachers’ unions, and what type of organization it believes educators should belong to, i.e. AAE. Id.
377 Id.
378 ASSOCIATION OF AMERICAN EDUCATORS, About Us, supra note 375.
379 ASSOCIATION OF AMERICAN EDUCATORS, About Us, supra note 375.
380 See Cutcher-Gershenfeld & Rubinstein, supra note 320, at 129-32.
country.\textsuperscript{382} Its positions opposing the forced payment of union dues, and in support of the growth of charter schools\textsuperscript{383} are likely to draw increased membership, particularly among younger teachers, many of whom see traditional teachers’ unions as burdensome to their careers.\textsuperscript{384} However, given the current hostility toward public sector employees in general -- and teachers specifically -- more senior teachers may be reluctant to relinquish their collective bargaining rights for fear of losing their benefits, or their jobs. Given this reality, the outlook for the AAE as a true alternative to traditional teacher unionism is unclear.

B. Examples from Labor Generally

Along with these attempts at systemic reform from within the world of public education, developments in the labor force more generally may offer teachers’ unions ideas for new directions. Nursing, for example, could serve as useful starting point. Like teachers, nurses are professionals who are tasked with the care and development of others (though of a different nature and degree). And, again like teachers, nurses did not win collective bargaining rights until the civil rights era, first with municipal and other public health agencies,\textsuperscript{385} and, eventually, with private non-profit hospitals and other health care organizations.\textsuperscript{386} The National Labor Relations Board officially recognized registered nurses as a distinct and appropriate bargaining unit in 1989.\textsuperscript{387} The promulgated rule was subsequently upheld by the Supreme Court in 1991.\textsuperscript{388} Today, unions represent between

\textsuperscript{382} AMERICAN EDUCATORS, About Us, supra note 375.
\textsuperscript{383} AMERICAN EDUCATORS, Education Policy Positions, supra note 381.
\textsuperscript{384} Koppich, A Tale of Two Approaches, supra note 54, at 151.
\textsuperscript{386} Id. Congress amended the National Labor Relations Act in 1974, extending the coverage of the Act, and collective bargaining rights to private, non-profit hospitals, clinics and nursing homes. Id; 29 U.S.C. § 152 (2012).
\textsuperscript{387} 29 C.F.R. § 103.30(a)(1).
sixteen and twenty-two percent of nurses.\textsuperscript{389} This is not necessarily the level of unionization seen in public school teachers of course, but it is still two to three times the unionization rate among of private-sector employees overall, depending on which measure you use.\textsuperscript{390} Along with better wages, working conditions and job security, nurses who join unions have also sought additional input when it comes to staffing and care decisions,\textsuperscript{391} reflective of their status as professionals. However, nurses’ unions, like teachers’ unions, must also confront the tension between their status as professionals, and their reliance on traditional union models and laws.\textsuperscript{392} There are also unique problems that nursing unions face which are not shared by teachers unions. For example, one of the largest nurses’ unions, the American Nurses Association (ANA),\textsuperscript{393} represents both nurses and nurse-managers.\textsuperscript{394} This complicated arrangement, seemingly straddling both sides of the bargaining table, has lead several state organizations to split off from the parent union.\textsuperscript{395}

The American Association of University Professors (AAUP) is another professional union that may offer teachers’ unions models for new directions, particularly since its members are educators. Formerly structured as a public charity, the AAUP completed a restructuring plan in January of 2013, with the stated goal of better meeting

\textsuperscript{389} Huston, supra note 385, at 279; The most recent figures released by the Bureau of Labor Statistics show that 13.7% of “healthcare practitioners and technical occupations” are represented by unions. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, “Economic News Release: Table 3: Union affiliation of employed wage and salary workers by occupation and industry,” available at http://www.bls.gov/news.release/union2.t03.htm (Jan. 24, 2014).

\textsuperscript{390} See BUREAU OF LABOR STATISTICS, “Table 3,” supra note 389. As of 2013, 6.7% of all private-sector employees were members of unions, and only 7.5% were represented by unions. Id.

\textsuperscript{391} Huston, supra note 385, at 282-83.

\textsuperscript{392} Huston, supra note 385, at 289.

\textsuperscript{393} Huston, supra note 385, at 281.

\textsuperscript{394} Huston, supra note 385, at 287. Nurse managers perform traditional nursing duties while also taking on more traditional managerial duties such as staffing and helping to set organizational goals. See Pamela F. Cipriano, Move up to the role of nurse manager, 6 AMERICAN NURSE TODAY, no. 3, March 2011, available at http://www.americannursetoday.com/Article.aspx?id=7596&fid=7364 (last visited Feb. 27, 2014).

\textsuperscript{395} Huston, supra note 385, at 287.
the needs of its members.\textsuperscript{396} The AAUP is now consists of three separate and distinct entities: a professional organization, promoting academic freedom and other professional values; a labor union, focused on traditional collective bargaining; and a public charity that serves as the fundraising branch.\textsuperscript{397} AAUP members are free to designate the part(s) of the organization their dues should support. A similar arrangement may make sense for teachers’ unions, helping them to accommodate the diverse concerns of their membership, as well as addressing internal and external criticisms regarding the use of membership dues. However, it is also important to note that university professors face very different employment circumstances than public school teachers, such as the expanding core of adjunct faculty to name just one example. Given these differences, the model of the AAUP might not have much to offer teachers’ unions in terms of a feasible new direction.

Professional unions, however, are just one possibility. Several other unconventional alternatives to traditional unions have sprung up in response to changes in the American economy. One such “Plan B”\textsuperscript{398} turns the union into an advocacy organization.\textsuperscript{399} Modeled on the AARP, the organization, currently being developed by the SEIU, would provide employees with health insurance, financial services, credit and employment counseling.\textsuperscript{400} In essence, such an organization would allow employers to outsource some of their employees’ benefits, in this case health care coverage.\textsuperscript{401} The employer’s costs would fall and employees would get a number of the tangible benefits beyond bargaining power formerly afforded by craft and occupational unions.\textsuperscript{402} An approach like this could be adapted to an education setting, given financially strapped states’ and municipalities’ need to offload some of their health insurance and pension costs. Of course the degree to which employers’ costs are offset by increased costs to

\textsuperscript{397} Id.
\textsuperscript{399} Id. at 43-44.
\textsuperscript{400} Id. at 43.
\textsuperscript{401} Id.
\textsuperscript{402} See Fine, supra note 398, at 36-37.
employees would greatly impact the viability of such a model. Open source unions offer another potential avenue for teachers’ unions to consider. Though no employers are directly involved, the model is closely related to the idea of benefits outsourcing. Open source unions are similar to craft or trade associations and aim to connect individual workers in non-traditional or non-union workplaces with one another to provide services such as low-cost health insurance and career development. The Freelancers Union and the AFL-CIO’s Working America are notable examples of these organizations. Given the growth of charter schools, which are predominantly non-union, and the increasingly negative image of teachers unions amongst a younger generation of teachers, the open source model may appeal to more entrepreneurial teachers and educational agencies alike.

Open source unions, and what Janice Fine calls “Plan B,” share two primary characteristics. Neither requires exclusive representation in order to exist, and each seeks to provide benefits and services individually tailored to the specific needs of the employees in question. Each approach is a significant departure from the traditional conception of teachers’ unions, and labor unions generally, but a new approach may be needed in order to “avoid stasis around an adversarial model of collective bargaining.”

C. Changes in the Legal Framework

If unions are to change, however, the framework of U.S. labor law may have to change as well. The National Labor Relations Act (NLRA) institutionalized the industrial union as its legal archetype. Most states followed suit by modeling their own labor statutes on the NLRA. This underlying legal structure may pose substantial challenges to reform, indeed more substantial than the practical and economic issues

404 Fine, supra note 398, at 41-42.
405 Infra at 31-32.
406 Fine, supra note 398, at 44.
407 Cutcher-Gershenfeld & Rubinstein, supra note 320, at 136.
409 Johnson and Kardos, supra note 46, at 8.
discussed above.

The NLRA applies only to terms and conditions of employment,\textsuperscript{410} or what are known as mandatory subjects of bargaining.\textsuperscript{411} As a consequence, an adversarial system of bargaining has developed, as unions and employers hammer out their respective obligations and rights; the outcomes of the process are dependent upon the bargaining power of the respective sides and each party’s ability to force the other to accept their position. The anti-union rhetoric and subsequent legislative action in both Wisconsin and Ohio\textsuperscript{412} focused on limiting the scope of public-sector collective bargaining in an effort to bring public sector workers into line with those in the private sector, and reduce the costs to the state. Thus, unions find themselves in a position of fighting tooth and nail to simply preserve their existence,\textsuperscript{413} rather than being able to consider new directions. Ironically, expanding the scope of collective bargaining, not limiting it, would likely have served the states’ interests better. Expanding the scope of bargaining to include educational policy matters, such as curriculum standards and performance measures, would have required unions and management to develop new partnerships and reach new compromises for the sake of their students.\textsuperscript{414} Though this change would pose its own challenges, it has the potential to reshape expectations,\textsuperscript{415} and arguably, has substantial advantages over the current approach, which entails heavy political, social, and economic costs.\textsuperscript{416}

A second, related challenge stems from the possible impact of ongoing litigation

\textsuperscript{410} 29 U.S.C. § 159(a).
\textsuperscript{411} Though the Act itself does not explicitly use or define the term mandatory subjects, it does establish a limitation on proposed topics of bargaining that “includes only issues that settle an aspect of the relationship between the employer and employees.” Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).
\textsuperscript{412} Russo, supra note 290, at 318.
\textsuperscript{413} Greenhouse, supra note 348.
\textsuperscript{414} Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 224.
\textsuperscript{415} Koppich, The As-Yet-Unfulfilled Promise of Reform Bargaining, supra note 96, at 224.
\textsuperscript{416} The fifteen recall elections held in Wisconsin between 2011 and 2012 cost taxpayers over $20 million. Russo, supra note 290, at 348.
around public sector unions’ ability to require compulsory dues from all bargaining unit members in order to finance routine collective bargaining action. In *Abood v. Detroit Bd. of Educ.*, the U.S. Supreme Court reiterated that unions may lawfully compel employees who are not union members, but still part of the bargaining unit, to pay dues. However, the Court held that the First Amendment prohibits unions’ from using compulsory dues of objecting employees from being used for purposes other than those germane to the union’s role as exclusive representative, namely political or ideological expenditures. Though *Abood* has remained good law for nearly 30 years, the Court’s 2012 decision in *Knox v. SEIU* essentially invited a test case to overturn it. That test case may have arrived in *Friedrichs v. California Teachers Association*, challenging a union’s right to collect any compulsory dues, regardless of their use. Should the case make it up to the Supreme Court, and should the Court overturn *Abood*, unions will face an existential threat, greater than even that already faced by unions in Wisconsin. As noted above, unions facing practical extinction are unlikely to focus time and resources on anything but self-preservation.

A final challenge arising from the current legal framework is the possible impact of the U.S. Supreme Court’s 1980 holding in *NLRB v. Yeshiva University*. In *Yeshiva*, the Court reviewed a set of bargaining agreements with quasi-managerial aspects. The

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418 *Abood*, 431 U.S. at 222.
419 Id. at 235.
423 Scheer, *supra* note 421.
425 In 2012, California unions spent approximately $75 million to defeat a ballot initiative that would have essentially done the same thing as the *Friedrichs* suit. Scheer, *supra* note 421.
426 444 U.S. 672 (1980).
Court overturned a decision by the National Labor Relations Board (the Board), recognizing university faculty as statutory “employees.” Reversing the Board, the Court held that because the faculty made recommendations as to hiring and tenure, they exercised managerial control, and were therefore not entitled to collective bargaining rights.

While the Yeshiva case is not directly applicable to public school teachers, and did not address state laws on public sector bargaining, scholars have noted Yeshiva’s chilling effect: the case has discouraged employees from expanding the scope of bargaining into areas that have traditionally been left to management. Employees fear that such expansion would essentially convert them into managers, thus costing them their collective bargaining rights. Any revisions of state law (likely to be modeled on the NLRA) will have to deal with the issues raised by the Yeshiva Court. Ohio and California stand out as states that have successfully amended their labor statutes to provide a broader scope for collective bargaining. Each state changed its law in order to adopt peer review in the teacher evaluation process.

V. Conclusion

As the bulk of this paper has suggested, the traditional model of teacher unionism, built on the labor-management dynamics of nearly a century ago, is at a critical juncture. Many of the problems identified in A Nation at Risk continue to plague American public education, while the global economy is advancing even more rapidly than it did in 1983, the date of that document’s publication. Political and economic forces are not standing still as teachers unions mull incremental reform.

Avenues for institutional restructuring exist, and the opportunity for change that

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429 Id.
430 Id.; see also Russo, supra note 290, at 345.
Shanker and Chase recognized persists, should current union leadership choose to seize it. The key, however, remains what it was a generation ago: “For Professional Unionism to be compelling to union leaders and managers, they have to be convinced that industrial bureaucracy has reached its limits in education, that change is necessary and possible, and that rethinking unionism is a requirement for reworking teaching.”

If teachers unions instead pursue zero-sum bargaining, they may well risk losing not merely a negotiation, but their future.