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Education Reform and Labor-Management Cooperation: What Role for the Law?

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EDUCATION REFORM AND LABOR-MANAGEMENT COOPERATION: WHAT ROLE FOR THE LAW?

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INTRODUCTION

MUCH of the public debate over education reform has focused on teachers, their compensation and working conditions, and how these matters are affected by collective bargaining. “Reformers” point to teacher unions as the principal cause of the shortcomings in public education. They often trot out a junior teacher who has won accolades and awards for teaching and express outrage that he or she is paid less than and is in line to be laid off before allegedly mediocre senior teachers. They point to the costs of terminating tenured teachers and to allegedly horrid teachers reinstated by hearing officers and arbitrators.¹ Wisconsin Governor Scott Walker, defending what ultimately became Wisconsin Act 10 which gutted the collective bargaining rights of most Wisconsin public employees, argued that the legislation responded to the need to give employers “the tools to reward productive workers ... [and] confront the barriers of collective bargaining that currently block innovation and reform.”²

Measures that have been passed off as effective reform have eliminated collective bargaining or severely restricted its scope, strengthened employers in the bargaining process, weakened unions generally and teacher unions in particular, and weakened or eliminated teacher job security. Tennessee repealed the Education Professional Negotiations Act, which had provided teachers with the right to organize and bargain collectively since 1978, and replaced it with the Professional Educators Collaborative Conferencing Act of 2011.³ Under the Collaborative Conferencing Act, between October 1 and November 1, employees may file with the school district a petition for collaborative conferencing supported by a 15% showing of interest.⁴ The school board must appoint a committee with equal representation of board members and employees to conduct an election whereby employees vote whether to engage in collaborative conferencing and, if so, who shall represent them.⁵ The choices for

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1. See, e.g., Campbell Brown, Op-Ed., *Arbitrators Protect Pervert Teachers*, N.Y. POST (Oct. 10, 2013, 11:06 PM), <http://nypost.com/2013/10/10/look-who-protects-pervert-teachers/>.

2. Scott Walker, Op-Ed., *Why I'm Fighting in Wisconsin*, WALL ST. J., Mar. 10, 2011, at A17.

3. 2011 Tenn. Pub. Acts 378 (codified at TENN. CODE ANN. § 49-5-601 (2012)).

4. TENN. CODE ANN. § 49-5-605(b)(1) (Westlaw current through 2014 2d Reg. Sess.).

5. *Id.*

representation must include “unaffiliated” persons.⁶ If a majority votes for collaborative conferencing, the school board appoints a team of between 7 and 11 management personnel.⁷ An equal number of employee representatives completes the committee.⁸ Each employee representative option that receives at least 15% of the vote is entitled to proportional representation.⁹ The committee that conducts the election selects the representatives of the unaffiliated persons.¹⁰ The collaborative conferencing committee remains in effect for three years after which the election process is repeated.¹¹

The Act defines collaborative conferencing as “the process by which [the parties] meet at reasonable times to confer, consult and discuss and to exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving.”¹² The statute mandates collaborative conferencing with respect to salaries, grievance procedures, insurance, fringe benefits other than retirement benefits, working conditions, leave, and payroll deductions.¹³ It requires the parties to jointly prepare a written memorandum of understanding of any agreement reached but conditions portions of an agreement requiring funding on the appropriation of such funding by the relevant authority.¹⁴

At first glance, the Act appears to be an experiment in proportionate representation and constructive employee involvement in workplace decision-making. Although the Act limits the subjects over which collaborative conferencing must take place, good faith collaborative conferencing might lead to constructive employee involvement in other areas of workplace decision-making.¹⁵ Unfortunately, the Tennessee statute dashes such hopes. It expressly prohibits collaborative conferencing with respect to differential pay plans and incentive compensation, expenditure of grants or awards, evaluations, staffing decisions, personnel decisions concerning assignment of professional employees, and payroll deductions for political activities.¹⁶ In so doing, it begs the question, if the statute does not mandate bargaining but instead mandates only interest-based problem solving, why prohibit the parties from talking about anything? The prohibition strongly suggests that the statute’s true purpose is to erect a sham that gives an illusion of collective representation without the reality.

Wisconsin’s Act 10 prohibited bargaining over all subjects except “base wages,” which expressly excludes overtime, premium pay, merit pay,

6. *Id.* § 49-5-605(b)(1)-(2).

7. *Id.* § 49-5-605(b)(4).

8. *Id.*

9. TENN. CODE ANN. § 49-5-605(b)(4) (Westlaw current through 2014 2d Reg. Sess.).

10. *Id.* § 49-5-605(b)(5).

11. *Id.* § 49-5-605(b)(6)(A).

12. *Id.* § 49-5-602(2).

13. TENN. CODE ANN. § 49-5-608(a)(1)-(7) (Westlaw current through 2014 2d Reg. Sess.).

14. *Id.* § 49-5-609(b).

15. *Id.* § 49-5-608(a).

16. *Id.* § 49-5-608(b)(1)-(6).

performance pay, supplemental pay, and pay progressions.¹⁷ Base wages may not increase more than the growth in the Consumer Price Index as of 180 days before the expiration of the collective bargaining agreement unless authority is obtained through a voter referendum.¹⁸ Act 10 also did away with interest arbitration for all but some public safety employees.¹⁹ Consequently, even the permitted bargaining over increases in base wages has no end point. With no right to strike or to compel their employer to arbitrate impasses in negotiations, Act 10 leaves most public employees with very little bargaining power.

Act 10 also required incumbent exclusive bargaining representatives to submit to annual recertification elections to maintain their statuses as exclusive representatives.²⁰ In recertification elections, the representative is decertified unless it receives votes equal to at least 51% of the employees in the bargaining unit.²¹ Thus, any employee who does not vote is counted as a vote against retaining the existing bargaining representative.²² Indeed, in at least one instance, an incumbent union faced decertification when it received the votes of more than 50% but less than 51% of the employees in the unit.²³

Wisconsin also took aim at union treasuries. It prohibited assessment of fair share fees against employees in the bargaining unit who choose not to join the union and thereby save the cost of union dues.²⁴ Fair share fees are common provisions in collective bargaining agreements. Under fair share arrangements, unions may not require employees who are in the bargaining unit but are not members of the union to pay dues, but they may require them to pay their pro rata share of the costs of representation.²⁵ Wisconsin also prohibited employers from honoring voluntary requests by union members to pay their dues via payroll deduction.²⁶

Idaho abolished teacher tenure and limited negotiations for teachers to “compensation,” which it defined as salary and benefits, including insurance, leave time, and sick leave.²⁷ Previously, the subjects of negotiations were specified in a negotiations agreement between the parties. The Idaho enactment

17. 2011 Wis. Act 10 § 314 (codified at WIS. STAT. ANN. § 111.70(4)(mb)(1) (2012)).

18. *Id.* § 168(2) (codified at WIS. STAT. ANN. §§ 111.70(4)(mb)(2), 118.245 (2012)).

19. *Id.* § 233 (codified at WIS. STAT. ANN. § 111.77 (2012)).

20. *Id.* § 289 (codified at WIS. STAT. ANN. § 111.70(4)(d)(3)(b) (2012)).

21. *Id.*

22. *See* 2011 Wis. Act 10 § 314 (codified at WIS. STAT. ANN. § 111.70(4)(d)(3)(b) (2012)).

23. E-mail from Tim Hawks, Attorney, Hawks Quindel, S.C., to Paul Secunda, Assoc. Professor of Law, Marquette Univ. Law Sch. (Mar. 13, 2012, 09:00 CST) (on file with author) (discussing the support staff unit at the Elmbrook School District).

24. 2011 Wis. Act 10 §§ 219, 276 (codified at WIS. STAT. ANN. § 111.70(2) (2012)).

25. *See generally* Locke v. Karass, 555 U.S. 207 (2009) (holding that the local union could charge nonmembers a service fee that amounted to the ordinary costs for representational activities); Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507 (1991) (holding that the union could charge members costs associated with state and national union affiliates); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that the agency shop provision of the collective bargaining agreement that required non-union workers to pay a fee that covered the costs of the union’s collective bargaining activities was valid).

26. 2011 Wis. Act 10 §§ 227, 298 (codified at WIS. STAT. ANN. § 111.70(3g) (2012)).

27. S. 1108, 61st Leg. § 17 (Idaho 2011).

also limited collective bargaining agreements to one fiscal year, July 1 through June 30, and prohibited evergreen clauses or other provisions to the effect that an agreement continues until a new agreement is reached.²⁸ In November 2012, Idaho voters overturned these enactments by referendum.²⁹

Similar to Idaho, Indiana limited collective bargaining for teachers to wages and salary and wage related fringe benefits including insurance, retirement benefits, and paid time off.³⁰ The new statute prohibited bargaining on everything else, including express prohibitions on bargaining a school calendar, criteria and procedures for teacher discharge, restructuring options, contracting with an educational entity that provides post-secondary credits to students, and teacher evaluation procedures and criteria.³¹ It also repealed a prior provision that authorized parties to agree to arbitrate teacher dismissals.³²

Michigan added to an existing lengthy list of prohibited subjects of bargaining for educational personnel. Decision and impact bargaining are now prohibited with respect to placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption, and implementation of a policy regarding employee discharge or discipline; the format, timing, and number of classroom visits; the development, content, standards, procedures, adoption, and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content, and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.³³

Michigan also prohibited fair share fees generally.³⁴ It singled out teacher unions for especially harsh treatment by prohibiting teachers from voluntarily paying their union dues through payroll deduction.³⁵

Ohio's Senate Bill 5 stripped teachers and most other employees of their right to strike, enforcing its strike prohibition with fines for strikers of two days' pay for each day on strike, discipline or discharge of strikers, loss of dues checkoff for striking unions, and strike injunctions.³⁶ In place of the right to strike, the enactment mandated factfinding but if factfinding did not lead to agreement, the impasse was to be resolved by the employer's legislative body.³⁷

28. *Id.* § 22.

29. Election Day, Nov. 6, 2012 General Election Results, Proposition 1, Idaho Sec'y of State, http://www.sos.idaho.gov/elect/RESULTS/2012/General/tot_stwd.htm (last visited Jan. 28, 2014).

30. 2011 Ind. Acts 575 § 14 (amending IND. CODE ANN. § 20-29-6-4 (West 2011)).

31. *Id.* § 15.

32. *Id.* § 6.

33. 2011 Mich. Pub. Acts 103 § 15(3)(p) (amending MICH. COMP. LAWS ANN. § 423.215 (West 2011)).

34. 2012 Mich. Pub. Acts 348, 349 (amending scattered sections of MICH. COMP. LAWS ANN. § 423 (West 2012)).

35. 2012 Mich. Pub. Acts 53 (amending MICH. COMP. LAWS ANN. § 423.210 (West 2012)).

36. S.B. 5, 129th Gen. Assemb. (Ohio 2011) (amending OHIO REV. CODE ANN. § 4117.12(B)(4) (Westlaw current through 2013 file 59 of the 130th Gen. Assemb.)).

37. *Id.* (amending OHIO REV. CODE ANN. § 4117.14(D)(2) (Westlaw current through 2013 file 59 of the 130th Gen. Assemb.)).

The Ohio enactment was overturned by voters in a referendum in November 2011.³⁸

In North Carolina, where public employee collective bargaining is illegal,³⁹ the legislature abolished teacher tenure, replacing it with renewable contracts of one to four years' duration based on performance, but limiting four-year contracts to 25% of a school district's teachers.⁴⁰ The common theme of all of these enactments is that reform may best be achieved by top-down, unilateral employer control of the workplace.

This essay shows how the current wave of "reform" is misguided. Part II surveys successful education reforms that have resulted from empowering teachers with a true voice through their unions in educational decision-making. Part III examines the current state of the law and shows how, rather than facilitate such reforms, current legal doctrine inhibits them. Part IV suggests alternative approaches for truly effective reform.

I. TRUE REFORM THROUGH LABOR-MANAGEMENT COOPERATION

Policymakers looking for examples of successful education reform should start in Toledo, Ohio. The demographics of the Toledo Public Schools are typical of urban school districts, with 77% of the students receiving free or reduced fee lunches.⁴¹ However, the Toledo City School District stands out among urban school districts. It sustains top scores on state performance indices for grades 3–6, has the highest graduation rate and second highest attendance rate among large urban districts in Ohio, and boasts the Toledo Technology Academy ranked in the top 10% of high schools by *U.S. News & World Report*.⁴²

The Toledo City School District and the Toledo Federation of Teachers received the Innovation in Government Award from the Kennedy School of Government at Harvard University in 2001.⁴³ A key driver of Toledo's success has been its use of peer review in place of traditional methods of evaluating teacher performance for more than three decades.⁴⁴

Under traditional teacher evaluation systems, the administration unilaterally promulgates performance standards and unilaterally implements them, typically through principals' observation of teachers in their classrooms. We should not be surprised that, when confronted with such a system, the teachers' union will

38. The official vote tally is available at *State Issue 2: November 8, 2011*, JON HUSTED, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2011results/201108Issue2.aspx>.

39. N.C. GEN. STAT. ANN. § 95-98 (Westlaw current through the 2013 Reg. Sess. of the Gen. Assemb.).

40. 2013 N.C. Sess. Laws 2013-360.

41. SAUL A. RUBENSTEIN & JOHN E. MCCARTHY, REFORMING PUBLIC SCHOOL SYSTEMS THROUGH UNION-MANAGEMENT COLLABORATION 26 (2011).

42. *Id.*

43. *Id.*

44. *Id.* at 26-28. See also U.S. DEP'T OF EDUC., SHARED RESPONSIBILITY: A U.S. DEPARTMENT OF EDUCATION WHITE PAPER ON LABOR-MANAGEMENT COLLABORATION 12 (2012) [hereinafter SHARED RESPONSIBILITY].

do everything it can to protect its members from what they see as an assault by the administration. Under peer review, however, the union is transformed from a protector of the irremediably incompetent to a defender of the professional standards that it participated in creating and administering. Attrition rates for poor performers tend to be higher under peer review than under traditional evaluation systems.⁴⁵

Teacher involvement in the development of performance standards also tends to transform the system from an evaluation and discipline system to a professional development system. As the U.S. Department of Education has observed:

[I]n evaluation systems redesigned with teacher input, most new evaluations occur more frequently than before, and do more to provide teachers with ongoing feedback to improve their instruction and guide their work. These new evaluations also tend to consider both student achievement growth and teachers' own professional practice [N]ew teacher evaluation systems seek to generate more nuanced and actionable feedback than the simplistic "satisfactory" or "unsatisfactory" ratings that have characterized teacher evaluation for decades. ...[A]s such evaluation systems mature, we expect more and more of them to link to professional development tailored to teachers' needs.⁴⁶

Indeed, the American Federation of Teachers and the American Association of School administrators have partnered on a joint approach to teacher evaluation and improvement of teacher quality that links evaluation to professional development.⁴⁷

School districts have collaborated with their teacher unions to improve student academic achievement and sustain the improvements. In the Norfolk Virginia Public Schools, such collaboration has occurred over three decades despite state law prohibiting public employee collective bargaining.⁴⁸ Since 2001, the administration and union have acted pursuant to a Walkthrough Protocol, whereby teams of teachers and administrators visit schools other than their own and provide non-threatening feedback for improving student performance and teaching methods and instructional practices.⁴⁹ The school district received the Broad Prize for Urban Education in 2005, honoring "the country's urban school districts that are making the great improvements in student achievement while reducing achievement gaps among ethnic groups and

45. For further discussion of peer review, see Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885, 905-06 (2007).

46. SHARED RESPONSIBILITY, *supra* note 44, at 12, 13.

47. AM. FED'N OF TEACHERS & AM. ASS'N OF SCH. ADM'RS, EDUCATOR QUALITY FOR THE 21ST CENTURY: A COLLABORATIVE EFFORT OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE AMERICAN FEDERATION OF TEACHERS 5, <http://www.aft.org/pdfs/teachers/AFTAASA062811.pdf> (last visited Apr. 17, 2014).

48. VA. CODE ANN. § 40.1-57.2 (Westlaw current through the 2013 Reg. Sess. and the 2013 Spec. Sess. I.).

49. RUBENSTEIN & MCCARTHY, *supra* note 41, at 15.

between high- and low-income students.”⁵⁰ With 64% of its students receiving free or reduced lunch, it boasts a high school graduation rate of 80.4%⁵¹ In Toledo, teacher union and administration joint teams select textbooks, develop curriculum, monitor and implement school improvement plans, and have established reading and math academies to improve early literacy and computational skills.⁵²

It has become commonplace to malign the typical salary grid which bases teacher compensation on level of education and years of service. While so-called reformers have pushed for unilateral employer control to establish “merit pay,” joint union-employer collaborative efforts have produced models for real reform of the salary grid. One of the most highly touted models of merit pay is the Pro Comp Plan developed jointly by the Denver Public Schools and the Denver Classroom Teachers Association. The plan rewards teachers based on specific knowledge and skills acquired, student achievement, evaluation by joint teacher-administration-community teams, and willingness and ability to teach specialties and to work in hard-to-staff schools.⁵³ In Baltimore, the school district and union jointly developed a career pathways plan which added four career pathways for the lanes on the typical salary grid and based advancement on the accumulation of achievement units as well as seniority.⁵⁴

Labor-management collaboration is also playing a significant role in turning around failing schools. In Providence, Rhode Island, the school district and union created a jointly-managed non-profit called United Providence (UP) to manage turnaround schools.⁵⁵ In Evansville, Indiana, union and administration officials developed an “Equity Schools” model featuring teacher-parent compacts focused on student improvement and an “Equity Academy” to train teachers and principals in the new model.⁵⁶ In New Haven, Connecticut, the school district and the union agreed on the creation of tiers of schools with the lowest performing schools afforded particular flexibility in hiring, staff development, work rules, length of school day, and pedagogy.⁵⁷

II. OBSTACLES TO REAL REFORM

There are numerous other examples of successful teacher union-administration collaboration that have produced real reform but they remain the exceptions rather than the rule. A major obstacle to the spreading of these models is the structure of our teacher collective bargaining laws.

50. Press Release, \$1 Million Broad Prize for Urban Education Awarded to Norfolk Public Schools, Four Finalist Districts, The Broad Prize (Sept. 20, 2005), <http://www.broadprize.org/news/320.html>.

51. RUBENSTEIN & MCCARTHY, *supra* note 41, at 14.

52. *Id.* at 27-28.

53. *See* Malin & Kerchner, *supra* note 45, at 910.

54. SHARED RESPONSIBILITY, *supra* note 44, at 13.

55. *Id.* at 15.

56. *Id.*

57. *Id.*

It is perhaps not surprising that when states began enacting public employee collective bargaining statutes in the 1960s and 1970s, they modeled them on the National Labor Relations Act (NLRA), which governed most of the private sector. Of particular import, the states adopted the NLRA's distinction between mandatory and non-mandatory subjects of bargaining.

If a matter is a mandatory subject of bargaining, a party may not undertake unilateral action unless and until it has bargained to impasse.⁵⁸ However, a party may insist on its position to impasse. A party has a duty to provide the other party with relevant information unless the party's interests in keeping the information confidential outweigh the requesting party's interests in having the information for the bargaining process.⁵⁹ An employer may not bypass the exclusive representative and deal directly with individual employees, with respect to a mandatory subject, unless the exclusive representative consents to such direct dealing.⁶⁰

When a matter is a permissive subject of bargaining, a party may act unilaterally without negotiating at all.⁶¹ A party violates the law by insisting on its position with respect to a permissive subject to the point of impasse.⁶² The fate of permissive subjects of bargaining is left to the complete unilateral discretion of the party, usually the employer, with the power to control them.

In the public sector, states have tweaked the private sector doctrine concerning the scope of mandatory bargaining. Some states have refused to recognize a category of permissive subjects of bargaining. They find bargaining is either mandatory or prohibited.⁶³ Some limit mandatory subjects of bargaining to those expressly listed in the labor relations act.⁶⁴ Many have enacted statutory management rights provisions.⁶⁵

Most states follow the NLRA, imposing a duty to bargain over wages, hours and other terms and conditions of employment, although the duty often is tempered by a statutory management rights provision. Even without a management rights provision, however, states have interpreted "other terms and conditions of employment" more narrowly than the term has been interpreted under the NLRA. States recognize that, whereas in the private sector collective bargaining is largely an economic process, in the public sector it is largely a political process. As observed by the Wisconsin Supreme Court:

58. See *NLRB v. Katz*, 369 U.S. 736, 741-42 (1962).

59. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 301-03, 319-20 (1979); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-52 (1956).

60. See *J.I. Case Co. v. NLRB*, 321 U.S. 322, 332, 342 (1944).

61. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 685 (1981).

62. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 344, 349 (1958).

63. See, e.g., *In re Local 195, Int'l Fed'n of Prof'l & Technical Eng'rs v. State*, 443 A.2d 187, 191 (N.J. 1982); *Aberdeen Educ. Ass'n v. Bd. of Educ.*, 215 N.W.2d 837, 839-40 (S.D. 1974).

64. See, e.g., IOWA CODE § 20.9 (Westlaw current through 2013 Reg. Sess.); KAN. STAT. ANN. § 75-4327(b) (Westlaw current through 2013 Reg. and Spec. Sess.).

65. See, e.g., 5 ILL. COMP. STAT. 315/4 (Westlaw current through Pub. Act 98-597 of the 2014 Reg. Sess.); MONT. CODE ANN. § 39-31-303 (Westlaw current through 2013 Reg. Sess.); 43 PA. STAT. § 1101.702 (Westlaw current through 2014 Reg. Sess. Acts 1 to 21, 23, 24, 26 & 27).

Spring 2014]

EDUCATION REFORM

535

In the private sector, collective bargaining is limited by the need to protect the “core of entrepreneurial control,” particularly power over the deployment of capital. If resources are to be employed efficiently in a market economy, capital must be mobile and responsive to market forces....

Different concerns are present in the public sector, however ... [i]n the public sector, the principal limit on the scope of collective bargaining is concern for the integrity of political processes.⁶⁶

Concern that mandating bargaining over various terms and conditions of employment can undermine the political process has led many states to find that public employers need not bargain over many subjects on which bargaining would be required in the private sector. In *City of Brookfield v. Wisconsin Employment Relations Commission*, the Wisconsin Supreme Court held that an economically motivated decision to lay off firefighters was not a mandatory subject of bargaining, characterizing it as “a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government.”⁶⁷ Expressing concern that collective negotiations not impinge on the ability of “the whole people [to] speak by means of laws enacted by their representatives,” the South Dakota Supreme Court prohibited bargaining on teacher preparation periods, the scheduling of teacher conferences, and the availability of aides to perform nonteaching duties such as playground supervision.⁶⁸ Similarly, the Maryland Court of Appeals has held that school calendar and employee reclassifications were prohibited subjects of bargaining, reasoning:

Local [school] boards are state agencies, and, as such, are responsible to other appropriate state officials and to the public at large. Unlike private sector employers, local boards must respond to the community’s needs. Public school employees are but one of many groups in the community attempting to shape educational policy by exerting influence on local boards. To the extent that school employees can force boards to submit matters of educational policy to an arbitrator, the employees can distort the democratic process by increasing their influence at the expense of these other groups.⁶⁹

Every issue concerning public employees’ terms and conditions of employment is potentially an issue of public policy. Even core bread and butter issues such as wages and benefits raise issues of allocation of public resources. State courts have generally adopted a balancing test to determine whether they will mandate bargaining. As articulated by the Wisconsin Supreme Court:

66. *Unified Sch. Dist. No. 1 of Racine Cnty. v. Wisconsin Emp’t Relations Comm’n*, 259 N.W.2d 724, 730 (Wis. 1977) (internal citation omitted).

67. *Brookfield v. Wisconsin Emp’t Relations Comm’n*, 275 N.W.2d 723, 728 (Wis. 1978).

68. *Aberdeen Educ. Ass’n*, 215 N.W.2d at 841.

69. *Montgomery Cnty. Educ. Ass’n v Bd. of Educ.*, 534 A.2d 980, 987 (Md.1987) (internal citation omitted).

The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people.⁷⁰

Articulating a balancing test is much easier than applying it. As aptly described by the Iowa Supreme Court, “the balancing test requires courts to balance the apples of employee rights against the oranges of employer rights. No court has been able to successfully advance a convincing formula for determining how many employee rights apples it takes to equal an employer rights orange.”⁷¹ Consequently, the outcome of the balancing test depends on the viewpoint of the authorities reading the scales. Not surprisingly, jurisdictions have read the scales differently with respect to particular issues. Conflicting results have been reached on numerous subjects including: class size,⁷² school calendar,⁷³ drug testing,⁷⁴ smoking,⁷⁵ and subcontracting.⁷⁶

The stakes are high over whether a matter is considered a mandatory subject of bargaining. If a matter is not a mandatory subject, the union is cut out completely. For example, the employer has no obligation to provide the union with information relevant to a non-mandatory subject of bargaining.⁷⁷ Similarly, if a matter is not a mandatory subject, the employer may bypass the union

70. *Racine Cnty.*, 259 N.W.2d at 731-32.

71. *Waterloo Educ. Ass’n v. Iowa Pub. Emp’t Relations Bd.*, 740 N.W.2d 418, 424 (Iowa 2007).

72. *Compare* *West Hartford Educ. Ass’n v. DeCourcy*, 295 A.2d 526, 536-37 (Conn. 1972), and *Boston Teachers Union, Local 66 v. Sch. Comm.*, 350 N.E.2d 707, 713-14 (Mass. 1976), with *Hillsborough Classroom Teachers Ass’n v. Sch. Bd.*, 423 So. 2d 969, 969 (Fla. Dist. Ct. App. 1982), *Nat’l Educ. Ass’n-Topeka v. Unified Sch. Dist.* 501, 592 P.2d 93, 98 (Kan. 1979), *City of Biddeford v. Biddeford Teachers Ass’n*, 304 A.2d 387, 420 (Me. 1973), *Sch. Dist. of Seward Educ. Ass’n v. Sch. Dist.*, 199 N.W.2d 752, 759 (Neb. 1972), *Dunellen Bd. of Educ. v. Dunellen Educ. Ass’n*, 311 A.2d 737, 741 (N.J. 1973), and *West Irondequoit Teachers Ass’n v. Helsby*, 315 N.E.2d 775, 775 (N.Y. 1974).

73. *Compare* *State v. Connecticut Bd. of Labor Relations*, No. 379709S, 1993 WL 7261, at *6 (Conn. Super. Ct. Jan. 8, 1993), with *Montgomery Cnty. Educ. Ass’n*, 534 A.2d at 980.

74. *Compare* *Holiday v. City of Modesto*, 280 Cal. Rptr. 206, 206 (Cal. Ct. App. 1991), and *County of Cook v. Licensed Practical Nurses Ass’n*, 671 N.E.2d 787, 792-93 (Ill. App. Ct. 1996), with *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31, 31 (Fla. 1992), and *Law Enforcement Labor Servs. v. Sherburne Cnty.*, 695 N.W.2d 630, 630 (Minn. Ct. App. 2005).

75. *Compare* *Newark Valley Cent. Sch. Dist. v. Pub. Emp’t Relations Bd.*, 632 N.E.2d 443, 444 (N.Y. 1994), with *Local 1186 of Council No. 4 v. State Bd. of Labor Relations*, 620 A.2d 766, 771 (Conn. 1993).

76. *Compare* *In re Hillsboro-Deering Sch. Dist.*, 737 A.2d 1098, 1098 (N.H. 1999), with *Amalgamated Transit Union, Local 1593 v. Hillsborough Area Reg’l Transit Auth.*, 742 So. 2d 380, 380 (Fla. Dist. Ct. App. 1999), and *City of Belvidere v. Illinois State Labor Relations Bd.*, 692 N.E.2d 295, 305 (Ill. 1998), and *In re Local 195*, 443 A.2d 187, 194 (N.J. 1982).

77. *See, e.g., Village of Franklin Park v. State Labor Relations Bd.*, 638 N.E.2d 1144, 1148 (Ill. App. Ct. 1994) (relying on NLRA precedent).

completely and pick and choose individual employees from whom to seek input.⁷⁸

By shutting unions out of any legal right to voice in many decisions that affect the workplace, the law channels unions to focus on the bread and butter issues which they have a right to negotiate and to focus on protecting their members from the consequences of decisions made unilaterally by management by negotiating the impact and effects of those unilateral decisions on employees' working conditions. We should not be surprised when unions do a very good job of negotiating in the narrow areas to which they have been channeled. The problem is not that unions are obstacles to reform; it is that they have no right to voice in the discussions of reforms. Their only right to voice is in protecting their members from the effects of reforms that management has decreed unilaterally.⁷⁹

To illustrate, assume that a school district wishes to experiment with a year-round schedule. Instead of having a more than two month break during the summer, the district wants to have more and shorter breaks throughout the year. Ideally, the school board and administration should engage the teachers through their union with respect to this decision. Understanding teacher experience with the need to catch students up to speed upon return from a lengthy summer break should be a crucial component in the decision-making process. So too should be teacher input concerning what may be lost if students do not have the summer available for enrichment activities and, if classrooms are not air conditioned, the impact of summer weather on student learning. Teacher input concerning how to evaluate the experiment would also be desirable. Giving teachers a voice through their union in the decision-making process increases the probability of a better, more-informed decision and increases the probability that teachers will be "on board" with the project and focused on making it work.

When the Racine Unified School District in Wisconsin decided to experiment with a year-round schedule, it refused to bargain the decision with its teachers' union.⁸⁰ Instead of a collaborative process, what ensued was multi-year litigation, first before the Wisconsin Employment Relations Commission and then before the Wisconsin Court of Appeals.⁸¹ The Wisconsin Court of Appeals ruled that the decision was not a mandatory subject of bargaining under the pre-Act 10 version of the Municipal Employment Relations Act, reasoning that the decision involved issues of educational policy that should not be subjected to the collective bargaining process.⁸²

Consider the position of the union facing a refusal to bargain the decision concerning the experimental move to a year-round school calendar. Because

78. See, e.g., *Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi*, 10 S.W.3d 723, 729-30 (Tex. Ct. App. 1999).

79. For further development of this point, see Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1390 (2009).

80. *Racine Educ. Ass'n v. Wisconsin Emp't Relations Comm'n*, 571 N.W.2d 887, 889 (Wis. Ct. App. 1997).

81. *Id.* at 888-89.

82. *Id.* at 887.

labor boards and courts decide scope of bargaining issues on an ad hoc basis and the law is so unpredictable, it is not surprising that the union filed an unfair labor practice charge with the Wisconsin Employment Relations Commission. It had a reasonable chance of winning and even if it lost, as it eventually did, it tied up the decision for a considerable period of time with the legal uncertainty. Furthermore, consider the position of the union after having lost the unfair labor practice proceeding. The employer remains obligated to bargain the decision's impact and effects. We should not be surprised in such circumstances if the union uses impact and effects bargaining to sabotage the entire experiment. For example, it could insist that teachers working the year-round schedule be compensated with a stipend or higher salary, that only volunteers be used on the year-round schedule, or that if teachers are forced onto the year-round schedule they be selected in inverse order of seniority.

The current structure of our public sector labor laws encourages such power battles and discourages collaborative engagement to improve the quality of education provided to the students. The recent trend in state legislation detailed in Part I will merely shift the battlefields and weapons employed. In labor relations, having the power to do something is often more important than having the legal right to do it. Sometimes having the legal right may reduce the likelihood that the right will be exercised. For example, my analysis of the impact of legislation in Illinois and Ohio which made public employee strikes lawful showed that the change in the law did not increase the incidence of such strikes.⁸³ Instead, the legal changes may have caused a reduction in strikes as compared to when such activities were illegal in those states.⁸⁴ The next Part addresses approaches that can produce real collaborative reform instead of merely shifting the battlefield and weapons.

III. ROUTES TO REAL REFORM

Under current public sector labor relations statutes, the fight over whether a matter is a mandatory subject of bargaining is a high stakes battle. If classified as a mandatory subject, the full panoply of statutory consequences attaches. In states such as Illinois and Ohio, this means that the union may strike over the matter if it is unable to reach agreement with the employer. In Wisconsin before Act 10 and continuing in states such as Iowa, the dispute will end up being resolved by an arbitrator if the parties are unable to reach agreement. But if the matter is not classified as a mandatory subject of bargaining, it is left to complete unilateral employer control.

Elsewhere, I have called on states to experiment with alternatives to this all-or-nothing approach that will provide for meaningful employee voice in workplace decision-making.⁸⁵ In this section, I review two such approaches, one recently enacted in Illinois and one proposal derived from the evolving

83. Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REF. 313, 342, 347-48 (1993).

84. *Id.*

85. Malin, *supra* note 79, at 1397-99, Malin & Kerchner, *supra* note 45, at 931-32.

jurisprudence in Canada concerning a constitutional right to collective bargaining.

A. *The Illinois Legislation*

School reform in Illinois provides an encouraging example of collaboration resulting in creative alternatives to traditional collective bargaining for providing an employee voice in workplace decision-making.⁸⁶ In January 2010, Illinois enacted the Performance Evaluation Reform Act (PERA).⁸⁷ PERA requires school districts to incorporate in their teacher evaluation plans indicators of student growth as a significant factor in evaluating teacher performance. The decision as to how to do so must be made by a committee consisting of equal numbers of members appointed by the school district and the teachers and their union.⁸⁸ PERA makes clear that the use of student growth in teacher evaluations is not a mandatory subject of bargaining. In place of traditional bargaining, PERA calls for a cooperative effort by school districts and their teachers. However, it provides that if, after 180 days, the joint committee is unable to agree on a plan, the school district must adopt a default plan developed by the Illinois State Board of Education.⁸⁹ In other words, PERA substitutes a collaborative process for traditional collective bargaining where failure to reach agreement may end in a strike. Failure to reach agreement still has consequences, but those consequences are that the parties are bound by a default model approved by the State Board of Education.

In 2011, a lengthy series of meetings led by the Chair of the State Senate Special Committee on Education Reform involving the major teacher unions, school board and school administrator associations, business and community groups resulted in agreed-on reform legislation enacted by the state legislature and signed by the governor. The PERA model was used in part for reform of the process for laying off teachers during a reduction in force. Prior to the new act, state law required that untenured teachers be laid off first. When tenured teachers had to be laid off, state law required that they be selected in inverse order of seniority. A teacher who lacked seniority to retain his or her position could bump a junior teacher from another position as long as he or she met the minimal state qualifications for that position.⁹⁰ The new statute groups teachers into four categories based on their most recent performance evaluations. The

86. For an excellent discussion of the process and the results, see Mitchell Roth, *S.B. 7: A Union Perspective*, ILL. PUB. EMP. REL. REP., Spring 2012, at 1; James Franczek & Amy Dickerson, *Education Reform in Illinois: Making Performance Count*, ILL. PUB. EMP. REL. REP., Winter 2012, at 1.

87. Pub. Act No. 96-0861, 2009 Ill. Laws 8655, available at <http://www.ilga.gov/legislation/publicacts/96/PDF/096-0861.pdf>.

88. 105 ILL. COMP. STAT. 5-24A-4(b) (Westlaw current through Pub. Act 98-604 of the 2013 Reg. Sess.).

89. *Id.* PERA makes an exception for the Chicago Public Schools, allowing the Chicago School Board to implement its last best offer if the joint committee is unable to reach agreement. *Id.* § 5-24A-4(c).

90. *See id.* § 5-24-12(a).

first group to be laid off is non-tenured teachers with no evaluation as of the date of the layoff notices.⁹¹ They are selected for layoff first with the order within the group determined by the school district.⁹² Next are teachers with unsatisfactory or needs improvement ratings in one of their last two evaluations.⁹³ They are laid off based on their performance ratings, with the lowest rated laid off first.⁹⁴ The third group is teachers with satisfactory evaluations.⁹⁵ If layoffs penetrate this group, they are conducted in inverse order of seniority.⁹⁶ The final group is teachers who received ratings of excellent in their last two or two of their last three evaluations. Teachers in this group are laid off in inverse order of seniority.⁹⁷

The reform law follows the PERA model by requiring each school district to establish a joint labor-management committee. The committee may, by majority vote, provide for teachers who would otherwise be grouped in the second lowest performance classification to be moved into the next higher classification and may, by majority vote, modify the criteria for the highest performance grouping.⁹⁸ Members of the committee also serve as watchdogs against school district manipulation of evaluations to lay off the most senior, and hence the most highly paid, teachers. If committee members in good faith believe that there is a pattern where senior faculty are receiving performance evaluations lower than their prior ones, they may receive and review relevant data from the district and issue a report to the district and the union.⁹⁹

The Illinois approach presents a creative deviation from the all-or-nothing traditional labor law approach to collective representation of teachers in workplace decision-making. It has been hailed as a model for reform by the U.S. Department of Education.¹⁰⁰

B. *Lessons from Canada*¹⁰¹

Unlike the United States' Constitution, the Charter of Rights and Freedoms, Canada's constitution, expressly recognizes a right to freedom of association.¹⁰²

91. *Id.* § 5-24-12(b)(1).

92. *Id.* § 5-24-12(b).

93. 105 ILL. COMP. STAT. § 5-24-12(b)(2) (Westlaw current through Pub. Act 98-604 of the 2013 Reg. Sess.).

94. *Id.* § 5-24-12(b).

95. *Id.* § 5-24-12(b)(3).

96. *Id.* § 5-24-12(b).

97. *Id.*

98. 105 ILL. COMP. STAT. § 5-24-12(c)(1)-(2) (Westlaw current through Pub. Act 98-604 of the 2013 Reg. Sess.).

99. *Id.* § 5-24-12(c)(5).

100. SHARED RESPONSIBILITY, *supra* note 44, at 16.

101. This section draws from my article, Martin H. Malin, *Collective Representation and Employee Voice in the U.S. Public Sector Workplace: Looking North for Solutions*, 50 OSGOODE HALL L.J. 903 (2013) [hereafter Malin, *Looking North*].

102. Canadian Charter of Rights and Freedoms § 2(d), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

In *Dunmore v. Ontario*, the Supreme Court of Canada held that Ontario's repeal of its Agricultural Labour Relations Act, which reinstated the exclusion of agricultural workers from the Ontario Labour Relations Act and left those workers with no statutory protection for organizing a union, violated section 2(d) of the Charter.¹⁰³ The Court reasoned that section 2(d) protects not only the freedom of individuals to associate, but in some circumstances, the freedom of the collective.¹⁰⁴ It further reasoned that under some circumstances, the legislative exclusion of a group of individuals from a protective regime may violate section 2(d):

[T]he activities for which the appellants seek protection fall squarely within the freedom to organize, that is, the freedom to collectively embody the interests of individual workers. Insofar as the appellants seek to establish and maintain an association of employees, there can be no question that their claim falls within the protected ambit of s. 2(d) of the *Charter*. Moreover, the effective exercise of these freedoms may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer. These activities are guaranteed by the purpose of s. 2(d), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which recognizes the inevitably collective nature of the freedom to organize. Finally, while inclusion in legislation designed to protect such freedoms will normally be the province of s. 15(1) of the *Charter*, claims for inclusion may, in rare cases, be cognizable under the fundamental freedoms.¹⁰⁵

In *Health Services & Support Facilities Subsector Bargaining Ass'n v. British Columbia*,¹⁰⁶ the Court, building on the foundation it laid in *Dunmore*, held that section 2(d) included a right to collective bargaining and that the right was infringed when British Columbia enacted a statute preempting bargaining over a variety of subjects in the health services industry. The Court stated:

We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals.¹⁰⁷

103. *Dunmore v. Ontario*, [2001] 3 S.C.R. 1016, 1126 (Can.).

104. *Id.* at 1017.

105. *Id.* at 1052-53.

106. *Health Servs. & Support Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391, 395 (Can.).

107. *Id.* at 411-12.

In *Ontario v. Fraser*,¹⁰⁸ the Supreme Court of Canada considered the Charter validity of the Ontario Agricultural Employees Protection Act (AEPA) that was enacted in response to *Dunmore*. The AEPA granted agricultural employees rights to form, join and participate in employee associations, to assemble, and to make representations, orally or in writing, to their employers concerning terms and conditions of employment.¹⁰⁹ The AEPA imposed a duty on employers to listen to the representations and, when representations are made in writing, to read them and to provide a written acknowledgement that they have been read.¹¹⁰ The Court interpreted the AEPA as imposing on employers a duty to consider employee representations in good faith.¹¹¹ So interpreted, the Court held that the AEPA was consistent with section 2(d) of the Charter.¹¹² Rejecting the holding of the lower court that section 2(d) guarantees a right to an NLRA-styled system of collective bargaining, the Court found the AEPA consistent with the holding of *Health Services*, which it characterized as follows:

Health Services affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion. The logic that compels this conclusion, following settled *Charter* jurisprudence, is that the effect of denying these rights is to render the associational process effectively useless and hence to substantially impair the exercise of the associational rights guaranteed by s. 2(d). No particular bargaining model is required.¹¹³

Fraser thus recognized that a duty to engage with employees' collective representative in good faith can stand independently of the traditional labor law duty to negotiate mandatory subjects of bargaining. *Fraser*, however, did not detail the characteristics of such a legal duty. In a prior article, I expanded on the *Fraser* duty as it could be applied to the public sector in the United States.¹¹⁴ Such a duty includes providing notice and access to relevant information to the employees' exclusive representative at such a time and in such a manner as to enable the union to participate in the process before a decision is made.¹¹⁵ It also includes a duty to not bypass the exclusive representative by dealing directly with employees.¹¹⁶ The critical component of the duty, however, includes what I will here call a "hard" duty to engage in good faith with the exclusive representative. This is in contrast to a "soft" duty of good faith that exists in traditional labor law.

108. *Ontario v. Fraser*, [2011] 2 S.C.R. 3, 4 (Can.).

109. Agricultural Employees Protection Act, S.O. 2002, c. 16, secs. 2(1)-(4), 5(5) (Can.).

110. *Id.* § 5(6)-(7).

111. *Fraser*, 2 S.C.R. at 7.

112. *Id.*

113. *Id.* at 49.

114. See generally Malin, *Looking North*, *supra* note 101.

115. *Id.* at 928.

116. *Id.*

Spring 2014]

EDUCATION REFORM

543

I characterize the duty of good faith in traditional labor law as “soft” because courts and labor boards are loathe to evaluate positions taken in bargaining for signs of subjective bad faith. This is because of the traditional model’s embrace of the principle of freedom of contract. Although a purpose of the NLRA was to equalize bargaining power, it does not mandate equal bargaining power. “It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining.”¹¹⁷ A party does not breach its duty to bargain in good faith under the NLRA when it responds to the other party’s proposal by saying, “I won’t agree to that because I don’t want to and you don’t have the power to make me.” The dispute among authorities over whether to rely on parties’ positions at the bargaining table as evidence of subjective bad faith is a dispute between rarely and never doing so.¹¹⁸

Under a hard duty of good faith, a rejection of a proposal based on an assertion of power (“I reject your proposal because you can’t make me accept it”) is never acceptable and is prima facie evidence of bad faith. Rather, a truly collaborative process requires that each party explain its reasons for rejecting a proposal on its merits and, where possible, to offer alternatives. A hard duty of good faith necessarily requires inquiry into the substantive positions taken during the process, not with a view to determining which party was right or wrong or imposing one party’s position, but with a view to assessing whether there was true good faith consideration of mutual and differing interests. Such an approach offers the potential to transform a power-based collective bargaining process to a truly collaborative process in which teachers, through their unions, are actively engaged in improving the delivery of education services.

CONCLUSION

It has become fashionable in the current public debate to blame teachers and their unions for the troubles facing public education. The result has been “reforms” that weaken or eliminate teacher voice in educational workplace decision-making and clear the way for unilateral employer control. But experience teaches that meaningful reform comes from engaging teachers through their unions in solving the problems facing our schools. Unfortunately, these positive experiences occur in spite of rather than because of the law. Current labor law confines teacher voice to a power-based collective bargaining process focused on a narrow range of workplace issues. Real reform requires the development of alternative legal models that mandate a collaborative process across a wide range of workplace issues. In this article, I have suggested two potential alternative models. I invite others to propose additional creative approaches.

117. H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970).

118. For example, compare the majority and concurring opinions in *Hardesty Co. dba Mid-Continent Concrete*, 336 N.L.R.B. 258 (2001), *enf’d* 308 F.3d 859 (8th Cir. 2002).