SB
16

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SB 16

Revision Date: 1/21/92
Department Affected: Education
Title: An Act providing advisory arbitration for school employees prior to striking.
BRU: K - 12 Support
Component: Foundation
Sponsor: Duncan
Requestor:
COMPONENT SERIAL NO. | 1 | 4 | 1 |

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None to DOE. However, it could be considerable to districts.

ANALYSIS: (Attach a separate page if necessary.) The Department will provide technical assistance for the striking districts, contingent upon district reimbursement of travel and per diem. There will be no impact to the foundation program because funding is based on average daily membership (ADM) not the number of days in session. The impact of districts could be considerable, but undetermined, based on the length and nature of the strike.

Prepared By: Mike Maher
Phone: 465-2800
Division: Commissioner's Office
Date: 1/21/92
Approved by Commissioner: Karen E. Crane for Jerry Covey
Agency: Education
Date: 1/21/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

CORRECTED

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SB 16

Revision Date: January 22, 1992
Title: Act providing advisory arbitration for school employees prior to striking.
Sponsor: Duncan
Requestor: Senate Labor and Commerce

Department Affected: Administration
BRU: Personnel/OEEO
Component: Labor Relations

COMPONENT SERIAL NO. 0 0 5 8

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	6.0	0	6.0	0	6.0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	6.0	0	6.0	0	6.0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND	6.0	0	6.0	0	6.0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	6.0	0	6.0	0	6.0	0

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)
Assumes advisory arbitration to be conducted by paid arbitrator for one State teacher bargaining unit (Mt. Edgecumbe) at $6,000 in fees for each hearing. Assumes issues would be largely repetitive (e.g., wages). The contract expires in FY 93. Assumes teachers' bargaining will remain under PERA and that contracts will be of two years' duration. Assumes additional negotiations workload will be absorbed by current staff.

Prepared by: R. H. King
Division: Personnel/OEEO
Phone: 465-4430
Date: 1/22/92

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 1/22/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90
S/S/FN/C081153.XP

FISCAL NOTE

No. 1

STATE OF ALASKA
1992 LEGISLATIVE SESSIO.

.ll Version: SB 16

(S) Publish Date: 1-29-92

Revision Date: January 23, 1992

Title: Act providing advisory arbitration for school employees prior to striking.

Sponsor: Duncan

Requestor: Senate Labor and Commerce

Department Affected: Administration

BRU: Personnel/OEEO

Component: Labor Relations

COMPONENT SERIAL NO. 0 0 5 8

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0

REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)

The advisory arbitration provisions of this bill will affect only one State teacher bargaining unit (Mt. Edgecumbe). This fiscal note assumes that no advisory arbitrations will be required for this unit and that any additional negotiation workload will be absorbed by current staff.

Prepared by: R. H. King

Division: Personnel/OEEO

Phone: 465-4430

Date: January 23, 1992

Approved by Commissioner: Nancy Bear Usera NBU

Agency: Administration

Date: 1/23/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Changes in CSSB 16 (2XC) have no fiscal impact. This fiscal note is appropriate.

1/27/92 [illegible]

Rev 10/90
9/8FN0031163.XP

7-LS0133\D.1
Cramer
02/01/92

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 16 (L&C)

BY SENATOR ADAMS

Page 1, line 1, after "**including**":

Insert "**, for three additional years,**"

Page 1, line 5, through page 5, line 3:

Delete all material.

Insert a new bill section to read:

"* **Section 1.** Section 2, ch. 180, SLA 1990, is amended to read:

Sec. 2. Section 1 of this Act is repealed on the date five [TWO] years after the effective date of this Act."

Renumber the following bill section accordingly.

FIRST COMMITTEE OF REFERRAL

DATE: 1/21/91 FURTHER: HESS

Date of 5-Day Notice: 1-23-92
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: 1-28-92

L&C Committee considered SENATE BILL NO. 16

"An Act including public school employees in the Public Employment Relations Act as class (a)(3) employees entitled to a right to strike after advisory arbitration; and providing for an effective date."

and recommended:

[✓] replace with ______ CS SB 16 (L&C) [✓] same title
[ ] new title

[ ] attached amendment(s)

[ ] ______________________ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

[✓] individual recommendations

[ ] further referral to ______________________

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date: Department(s)/Date:

[ ] fiscal note(s) ______________

[✓] zero fiscal note(s) ADMIN
SB & CS

[ ] appropriation-no fiscal note

[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

Charles Craft
[signature]
Rick Halford
[signature]

OTHER RECOMMENDATIONS:

L&C CS SDP Same
∅ FNs to SB & CS pub (Admin)

[signature] - [illegible]

Chair: Signature and Recommendation

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

October 28, 1991

SUBJECT: Sectional summary of SB 16 (Including public school employees in the Public Employment Relations Act)

TO: Senator Jim Duncan

FROM: Teresa B. Cramer
Legislative Counsel

You have requested a sectional summary of SB 16 which makes permanent the temporary inclusion of public school employees in the Public Employment Relations Act (PERA) enacted last legislature. As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Sections 1 and 2 remove employees of the state boarding school from the education employee collective bargaining provisions in Title 14 and place them under PERA.

Sections 3 and 6 make changes to PERA to place both certificated and noncertificated employees of school districts regional educational attendance areas, and the state boarding school[1/], other than school superintendents, within Class (a)(3) of PERA. Class (a)(3) employees may engage in strikes after an impasse is reached. Section 3 leaves employees of the University of Alaska within Class (a)(2) of PERA. Those employees have a limited right to strike.

Section 4 requires that, if an impasse or deadlock is reached in negotiations, public school employees and school districts must submit to advisory arbitration before the employees may engage in a strike.

Section 5 makes clear that the legislature does not need to approve the monetary terms of a collective bargaining agreement entered into by a school district.

[1/] In this memo, I use the term "school district" to include municipal school districts, REAA's, and the state boarding school.

Section 6 amends the definition of "public employee" in PERA to include school district employees other than superintendents.

Section 7 amends the definition of "public employer" in PERA to include school districts. It also makes an editorial change by substituting "municipality" for "town, city, borough." Under AS 01.10.060(4), "municipality" is defined for the entire extent of Alaska Statutes as

> a political subdivision incorporated under the laws of the state that is a home rule or general law city, a home rule or general law borough, or a unified municipality;

Section 8 adds a definition of "regional educational attendance area" to PERA.

Section 9 makes clear that this change in the law does not terminate or modify a collective bargaining unit determination, recognition of a collective bargaining representative, or a collective bargaining agreement if it was in effect on the effective date of this Act.

Section 10 repeals the provisions for educational employee collective bargaining that are found in Title 14.

Section 11 precludes municipalities and REAA's from opting out of PERA.

Section 12 is an immediate effective date provision.

If I may be of further assistance, please advise.

TBC:gc
91-385.glc

Post-It™ brand fax transmittal memo 7671 | # of pages ▸ 2

To Senator Pearce	From Senator Duncan
Co. Rod Moorerd	Co. Dale
Dept. L&C Committee	Phone # 465-4766
Fax # 561-4194	Fax # 465-4948

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
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Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

M E M O R A N D U M — January 27, 1992

SUBJECT: Selection of arbitrator in Amendment to SB 16 - Public school employee collective bargaining (Amendment 7-LS0133\A.3 dated 1/24/92)

TO: Senator Drue Pearce, Chair
Senate Labor and Commerce Committee

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested an opinion concerning the constitutionality of the above-referenced amendment.

In my opinion, the amendment is based on supportable public purposes and probably would withstand a court challenge.

The amendment does not create a preference based on the residence of the arbitrators but rather identifies desirable experience and knowledge that an arbitrator should have. The residence of the arbitrator is not a criterion to be considered. The grounds relied on by the state supreme court in Robison v. Francis, 713 P.2d 259 (Alaska 1986), (holding that a 90 to 95 percent resident employment preference on public construction contracts was unconstitutional) and State v. Enserch Alaska Const., Inc., 787 P.2d 624 (Alaska 1989) (holding that a regional employment preference in an economically distressed zone was unconstitutional) to invalidate the employment preferences based on state or regional residence were the federal privileges and immunities clause,[1/] which forbids discrimination against the citizens of other states, and the state equal protection clause.[2/]

[1/] Art. IV, sec. 2, United States Constitution provides:

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2/] Article 1, sec. 1 of the state constitution provides, in part, that "all persons are equal and entitled to equal rights, opportunities and privileges under the law."

Since the amendment proposed to SB 16 does not create a preference based on the residence of the arbitrator, and, I believe, would not be considered by the court to be a subterfuge to do so without saying so, I believe it would withstand scrutiny under the federal privileges and immunities clause.

Under state equal state protection analysis, the court would consider whether the distinction created by the amendment, between arbitrators with local experience and those without local experience, was a reasonable one, supported by a valid state purpose. While, in Enserch, the right to public employment was found to be an important right, and the interest underlying the state's regulation was therefore required to be an important one in order to support the constitutionality of the measure, I believe that the state could successfully defend the amendment here. The distinction based on knowledge is directly related to ensuring that arbitrators who have an appreciation for the effect of their decisions on the people who will have to live with those decisions are selected. The court would probably consider this to be an important enough state purpose to support the distinction that the amendment makes between arbitrators.

If I may be of further assistance, please advise.

TBC:gc
92-065.glc

7-LS0133\A.3 ✓
Cramer
01/24/92

AMENDMENT

OFFERED IN THE SENATE BY SENATOR PEARCE

TO: SB 16

Page 3, line 31, after ".":

Insert "The arbitrator selected to conduct the advisory arbitration must be a member of the American Arbitration Association or the Federal Mediation and Conciliation Council. In selecting the arbitrator, the parties shall request a list of arbitrators who have knowledge of and recent experience in the local conditions in the school district, regional educational attendance area, or state boarding school. A list containing at least five nominees who meet the qualifications of this subsection is a complete list for the purpose of striking names and selecting the arbitrator."

NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

ANCHORAGE REGIONAL OFFICE
1411 W. 33RD AVENUE
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FAX: (907) 274-0551

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(907) 586-3090
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FAIRBANKS REGIONAL OFFICE
2118 CUSHMAN STREET
FAIRBANKS, ALASKA 99701
(907) 456-4435
FAX:(907) 456-2159

January 22, 1992

TEACHER COLLECTIVE BARGAINING IN ALASKA UNDER PERA 1991-92

Bargaining Unit	Status	Percent Change in Base Salary Over 1990-91
Adak	S	3.0
Alaska Gateway	B	
Aleutian East	TA	0.0
Aleutian Region	?	
Anchorage	A	
Annette	S	3.0
Bering Strait	M	
Bristol Bay	S	1.3
Centralized Correspondence	S	6.7
Chatham	S	2.0
Chugach	S	6.0
Copper River	S	-1.0
Cordova	S	2.0
Craig	S	2.0
Delta/Greely	M	
Dillingham	S	4.0
Fairbanks	S	3.5
Galena	?	
Haines	S	-5.0
Hoonah	S	4.5
Hydaburg	S	-5.5
Iditarod	S	2.0
Juneau	S	2.0
Kake	S	5.0
Kashunamiut	?	
Kenai	S	7.7
Ketchikan	TA	2.0
Klawock	S	2.0
Kodiak	A	
Kuspuk	?	
Lake and Peninsula	S	1.6
Lower Kuskokwim	S	2.0
Lower Yukon	S	2.0
Matanuska Susitna	S	5.8
Mount Edgecumbe	S	5.0
Nenana	S	2.5

Nome	S	3.5
North Slope	S	5.1
Northwest Arctic	S	-4.5
Pelican	S	3.0
Petersburg	S	5.0
Pribilofs	S	0.0
Railbelt	S	0.0
St.Mary's	S	0.0
Sitka	S	1.5
Skagway	B	
Southeast Island	S	2.5
Southwest Region	S	2.7
Tanana	S	0.0
Unalaska	S	3.1
Valdez	S	2.0
Wrangell	S	2.5
Yakutat	S	3.0
Yukon Flats	A	
Yukon-Koyukuk	S	2.0
Yupiit	?	
AVERAGE:		2.2

Source: NEA-Alaska Research

P	Preparing	0
B	Bargaining	2
M	Mediation	2
A	Arbitration	3
SK	Strike	0
PA	Post-Arbitration	0
TA	Tentative Agreement	2
S	Settled	42
?	Status Unknown	5

IM02/Bargstus/dl

Alaska State Legislature

Senator Drue Pearce, Chair
Senator Virginia Collins, Vice Chair
Senator Dick Eliason
Senator Rick Halford
Senator Jay Kerttula

WHILE IN JUNEAU
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3844

3111 C STREET, SUITE 150
ANCHORAGE, ALASKA 99504
(907) 561-2018

SENATE LABOR AND COMMERCE COMMITTEE

Master File cy

TO: All Senators

FROM: Drue Pearce [signature: Pearce]

DATE: February 3, 1992

RE: SB 16 Education Employee Collective Bargaining

This correspondence arrived after SB 16 moved from the Labor & Commerce Committee. Dr. Laursen was unable to testify during the teleconferenced hearings on the legislation. For this reason I am calling his correspondence to your attention.

West Valley High School

3800 Geist Road ● Fairbanks, Alaska 99701 ● (907) 479-4221

1 1992

January 28, 1992

Senator Drue Pearce
Chairman
Labor and Commerce Committee
Seventeenth Alaska State Legislature
Capitol, Room 113
Juneau, AK 99801-1182

Dear Senator Pearce:

On Friday, 24 January, there was to have been a Legislative Teleconference in Fairbanks at the Denali Bank Building concerning Senate Bill 16, Education Employee Collective Bargaining. I learned of it Thursday evening, prepared a written statement to be shared and met at the prescribed time only to learn that the teleconference had been cancelled. I was upset. When I learned there would be other opportunities to be heard, I was forgiving. Then, I learned that they would take place during times I would have to be in my classroom teaching. In fact, planned or unplanned, your lack of concern for those of us in the trenches who want to contribute, are now excluded from the teleconference process. I'm furious!

So now I find I must once again sit down and articulate my concerns via letter.

I speak in strong opposition to SB-16. "Teachers" should not be provided the right to strike, as the real loser, once again, will be our students. If passed, SB-16 would only provide that "right" to governing bodies, teachers' associations and unions. Many teachers, who may be "represented" by unions only because of closed shop or agency fee agreements negotiated by a few, but who may vehemently oppose such action or direction, will not be heard. No one-person, one-vote applies to these autocratically operated group actions.

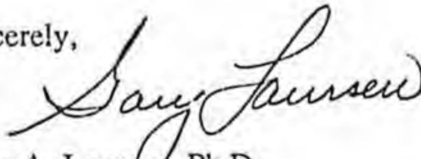
If the right to strike is issued, then strike exercises would decidedly not represent my point of view. Yet, if "the" governing group supposedly representing a collective viewpoint voted to exercise strike rights and, in concert with those actions, my school district administration opts to close my school with the intent to make up lost days later into the summer, then I would be barred from performing my contracted teaching duties. I would also be required to appear for make up days imposed on us to fulfill what would be tantamount to an altered contractual obligation to the Fairbanks North Star Borough School District. I simply find the possibility repugnant.

Above actions would impose undue hardships on students, their parents and teachers who are earnestly involved in working toward academic advancement at colleges and universities around the country, UAF not withstanding. Through intensive planning

and exerted effort, I also plan the conduct of an active summer research program involving other professionals from Europe and the contiguous states for which I receive funding from the federal government to perform "contracted" investigations, which can only be performed during our short northern interior summer months.

To have such things happen would be most unfortunate, certainly for our students and their parents. I must also say that if school district administrators choose not to close our schools in light of a strike, I would be the first to cross picket lines to meet my accepted contractual obligations, dedication to students and my teaching duties at West Valley High for which I am amply paid! Let us not make another serious mistake of providing still yet one more costly vehicle for encouraging the persistence of teacher/teaching mediocrity during this time when a changing climate for educational redirection is so very badly needed in our public schools.

Sincerely,



Gary A. Laursen, Ph.D.
Presidential Awardee for Excellence
in Science Teaching
West Valley High School
3800 Geist Rd.
Fairbanks, AK 99709

cc: Honorable Virginia Collins, Vice Chairwoman, Labor and Commerce Committee
Honorable Shirley Craft, Labor and Commerce Committee
Honorable Rick Halford, Labor and Commerce Committee
Honorable Jay Kerttula, Labor and Commerce Committee
Honorable Steve Frank
Honorable Tom Moyer
Honorable Nilo Koponen
Andy Warwick, Pres. School Board
Sue Wilkin

Alaska State Legislature

Please enter into the record my testimony to the (S) H.E and SS
committee name

committee on SB 16, dated 1-31-92.
bill/subject

To: 465-2864
JUNEAU -

FROM: BARROW LIO

Signed: EDITH VORDERSTRASSE, SCHOOL BOARD MEMBER
Testifier

NORTH SLOPE BOROUGH SCHOOL DISTRICT
Representing (Optional)

POB 169, BARROW, ALASKA 99723
Address

852-5311
Phone No.

January 30, 1992

____

The North Slope Borough School District Board of Education strongly opposes Senate Bill 16. This Bill gives teachers the right to strike and thus considerable influence over the economic decisions that school districts have to make. This comes at a time when revenues for Alaska school districts are diminishing and when there is considerable pressure nation-wide for significant reforms in the educational system. Giving teachers the right to walk away from their classrooms clearly is not in the best interest of improving student achievement.

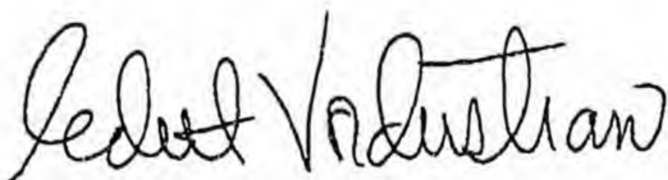
It is our position that Senate Bill 16 will also make it difficult for locally elected school boards to exercise their management rights and will provide an increased opportunity for local teacher unions to make further in-roads into those rights. Local control of schools and the right to manage schools is essential to meeting the demands for school reform and improvement.

It is also our position that under the provisions of Senate Bill 16 it will be difficult to find replacement teachers during a strike. The Landlord/Tenant Act would make it impossible to remove striking teachers from their school district housing which would mean there would be no available housing for replacement teachers in our rural community.

The Title 14 statues have served schools and teachers well. Alaska has maintained the highest teacher salaries in the nation. It has been difficult for all school districts in the State to maintain programs that benefit our children while trying to keep salaries and benefits for teachers at the present level. Senate Bill 16 does not look at the best interest of the students. It threatens the right of students to receive an uninterrupted education, free from stress they should not even have the potential of experiencing.

We urge you to defeat Senate Bill 16 and allow Senate Bill 15 to sunset, returning control of schools to locally elected school boards who know best how to meet the needs and demands of their constituents.

Thank you.



Edith Vorderstrasse, School Board Member
North Slope Borough School District

JAN 30 '92 17:13 LEG. AFFAIRS - KODIAK

TELECOPY COVER SHEET
Kodiak Legislative Information Office
Office - (907) 486-8116 Fax - (907) 486-5264

TO: The Senate H.E.S.S. Committee / Senator Sturgulewski

ATTN: Chairman Sturgulewski FAX: ____________ PHONE: ____________

FROM: Randy Busch - via Kodiak L.I.O. PHONE: 486-8116

INSTRUCTIONS: Written Testimony for T/C #92-01-147 S. H.E.S.S. regarding SB16 - on 1-31-92 8AM

SENT: Date 1-30-92 Time ____________

DISPOSAL OF ORIGINAL: Discard ______ Hold for Pickup ______

NUMBER OF PAGES: 2 (NOT counting cover sheet)

TRANSMITTED BY: LS

January 28, 1992

Senate HESS Committee
Alaska State Senate
State Capitol Building
Juneau, Alaska 99801 - 1182

Dear Members,

On Wednesday, January 22, I had the opportunity to listen and then to testify during a Labor and Commerce Committee hearing regarding SB 16. Although I testified during that hearing, now that this bill has moved to your committee, I feel that a letter would also be in order.

I was frankly amazed at the testimony that I heard on Wednesday. It was not surprising to me that school board members and superintendents would be opposed to SB 16, but I was appalled by the negative way in which most of them spoke about teachers. My testimony that day was as much in response to that negativity as it was to encourage support of SB 16.

Let me tell you a little about myself and my work week leading up to the hearing. This is my nineteenth year of teaching in Alaska. All of those years have been in Kodiak, although I am a graduate of both Lathrop High School and the University of Alaska in Fairbanks. My contracted day is supposed to be between 8:15am and 3:45pm, with a 30 minute duty free lunch. Because of scheduling, I am fortunate enough to enjoy a 45 minute lunch. On Monday, I arrived before 8:00am. Part of my lunch time was used in the computer lab developing materials for my students. After school, I met formally with several other teachers to discuss a student who is having problems. Back in my room after the meeting, I organized and completed five different book club orders for my students. One of those orders did not meet the minimum requirement, so I made up the difference with my own personal funds. This took until after 5:00pm. At 7:00pm, I attended a school board work session that lasted until after 8:30pm. Tuesday morning I arrived before 8:00am. Part of my lunch was spent helping several students who were behind on a project that was due the next day. After school, I attended a faculty meeting where we discussed an incident concerning a gun being discharged and some of our

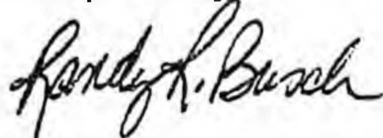
students being threatened the week before. I left by 4:30pm, since I had to return that evening from 7:00 - 9:00pm for our Junior High Parent Night as a member in the panel discussion about academic achievement. Wednesday I arrived before 8:00am. Part of my lunch time was spent helping a student complete a book that she had started in my Paper Arts Club. She had 4H that afternoon and would not be able to come during the regular club time. After school, I had students attend my Paper Arts Club. Right now, we are doing Japanese book binding. I volunteer my time for this club and provide all of the materials out of my own personal funds. It is a year-long club that meets one or two days each week after school. Because my club lasts until 4:30pm and the hearing began at 4:00pm, I rushed down to the Legislative Affairs Office, to hear that not only am I unreasonable and overpaid, but since I support SB 16, I am a "bad" teacher!

I am not complaining about my schedule or the amount of money that I donate to school programs, but anyone who thinks that a teacher works only their contracted hours and days obviously is not a very aware individual.

The most discouraging thing about the comments made during the hearing is that they were not an exception. I have been listening to remarks like that for my entire teaching career. These school board members and superintendents are supposed to be our teammates, not our adversaries! Many of them could not even keep the contempt out of their voices when they said the word "teachers." Do you need any more proof than that attitude to tell you how fair they would treat teachers if SB 16 does not pass, and there is no alternative, like binding arbitration?

I urge you to suppport SB 16. One side alone cannot have all of the advantage. Help to keep the negotiations process as fair as possible.

Respectfully,



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COLLECTIVE BARGAINING IN THE PUBLIC SCHOOLS: REASSESSING LABOR POLICY IN AN ERA OF REFORM

MICHAEL FINCH*
TREVOR W. NAGEL**

Recent calls for educational reform have sometimes presupposed that the spread of collective bargaining among teachers has contributed to the malaise in America's public schools. Binding arbitration, in particular, has been criticized as producing inflationary wage settlements and undermining the managerial discretion of local school boards. Critics such as Professors Wellington and Winter, however, have often applied to teachers' unions a general theory of the inordinate political power of public employee unions which fails to consider both the American tradition of local control of public schools and the growing body of empirical research into school labor relations. The authors draw on such research and introduce findings from their own study of Connecticut's public schools to refute the charge that collective bargaining has shifted the balance in school labor relations in favor of unionized teachers. While binding arbitration may be correlated with a wage effect mildly favorable to teachers, arbitration is an essentially conservative process closely following established salary trends. Moreover, arbitration has failed to have any significant effect on school governance or educational policy.

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> "[U]ntil we pay teachers at least as well as the middle echelon of executives we cannot expect the profession to attract its full share of the available range of talents. Salaries must be raised immediately and substantially. Almost as important as the level of pay is the fact that promotional policy for most school systems is routine and depends much more on seniority than on merit."
> —*The Pursuit of Excellence: Education and the Future of America.*[1]

At last count, there were more than a dozen reports on the quality of public education in America.[2] A certain readiness for

1. ROCKEFELLER REPORT, THE PURSUIT OF EXCELLENCE: EDUCATION AND THE FUTURE OF AMERICA 26 (1958) [hereinafter cited as ROCKEFELLER REPORT].

2. *See, e.g.*, E. BOYER, HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA (1983) [hereinafter cited as CARNEGIE REPORT]; J. COLEMAN, T. HOFFER & S. KILGROVE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982); J. GOODLAD, A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE (1984); NATIONAL COMM'N ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) [hereinafter cited as NATION AT RISK];

reforms were scheduled to address several of the problems that appear now to have endured—low teacher salaries, poor personnel relations in the schools and declining teacher morale.[9] The centerpiece of this labor reform was recognition of teachers' right to bargain collectively with school government over salaries and a broad range of employment conditions. Patterned after labor policy in private industry, teacher bargaining statutes inaugurated a version of "school system democracy" that promised decided change, even if the precise direction of that change was undetermined.

The ostensible results of these labor reforms have indeed been dramatic: teacher unionism and collective bargaining have proliferated during the past twenty years as most of the nation's teachers have been unionized and most of the nation's school districts have come to engage in collective bargaining.[10] Yet, current reform literature raises the disquieting suspicion that, for all the activity, teacher bargaining has produced few measurable improvements in the teachers' plight,[11] and worse, may have contributed to the crisis in public education.[12] If such a suspicion has substance, as a growing number of critics believe,[13] the first task of educational reform may be the restructuring of labor relations in the schools.

In this Article we present a critical assessment of the impact of collective bargaining on public school teachers and school government. In doing so, we draw upon a now-substantial body of empirical research into school labor relations, as well as introduce the findings of our recent research.[14] This analysis examines

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9. *See, e.g.*, M. DONLEY, JR., POWER TO THE TEACHER 207 (1976) ("Where will all this collective bargaining lead? In the long run, it will lead, among other things, to fewer strikes by teachers, greater professionalism of educators, higher teacher morale, an enlarged role in the school for the teacher, and higher salaries for school personnel."); M. LIEBERMAN, EDUCATION AS A PROFESSION 334-53 (1956) (setting forth the potential effects of teacher bargaining); Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017, 1024, 1028 (1969) (predicting, *inter alia*, higher salaries, improved working conditions and higher quality teachers).

10. *See infra* text accompanying notes 25-34.

11. *See, e.g.*, CARNEGIE REPORT, *supra* note 2, at 155-68 (commenting on low salaries and poor working conditions); J. GOODLAD, *supra* note 2, at 195-96 (commenting on low salaries and poor working conditions); NATION AT RISK, *supra* note 2, at 30-31 (commenting on low salaries); EDUCATING AMERICANS, *supra* note 2, at 29-37 (commenting on low salaries and poor working conditions); ACTION FOR EXCELLENCE, *supra* note 2, at 37-39 (1983) (commenting on low salaries and poor working conditions).

12. *See infra* text accompanying notes 152-202.

13. *See infra* notes 135-37 and accompanying text.

14. This work consists of a longitudinal ("before and after") study of educational collective bargaining in Connecticut, covering the years 1976-1984. This period encompasses

Nor does the introduction of binding arbitration procedures promise dramatic change in the substantive outcomes of collective bargaining. For the most part, the results of arbitration reflect prevailing market forces. Arbitration appears to have a moderately inflationary effect on salary costs, and arbitrators show little willingness to act innovatively in matters of school administration. Binding arbitration may, nonetheless, prove to be a viable legislative response to the problem of teachers' strikes, as arbitration laws are highly successful in preventing strikes, and offer teachers a form of bargaining leverage that appears to be no less effective than strike activity.

In conclusion, we shall contend that the dominant factor in educational collective bargaining is its continued reliance on decentralized decision making. Regardless of legal variations in the structure of localized bargaining, it is the willingness of local government to support the educational program that determines the success of bargaining. Past experience reveals that such support is often weak, and highly variable among local school districts. As a consequence, current efforts at statewide—and costly—instructional reform cannot depend on local initiative, or the processes of local bargaining. If there is to be sustained improvement in public school instruction, state government must reclaim its legal authority to initiate and fund reform throughout the local school districts. Otherwise, reform efforts will once again be frustrated.

I. An Overview of Educational Collective Bargaining

No governmental function in the United States has stronger traditions of local control than the provision of public education. While formally a constitutional obligation of state government,[16] public education is commonly directed by one of more than 15,000 local boards of education.[17] These school boards are usually elected

16. *See* Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L. J. 409, 423 (1973); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375-77 (1976) [hereinafter cited as Project].

17. In 1980, there were 15,601 operating school districts in the United States. With the exception of Hawaii, which has one statewide school district, the number of local operating school districts varies from 17 in Nevada, to 1076 in Texas. *See* W. GRANT & L. EIDEN, DIGEST OF EDUCATION STATISTICS 1982, at 59 [hereinafter cited as DIGEST OF EDUCATION STATISTICS]. *See generally* Project, *supra* note 16, at 1380-81.

gaining, most of the important personnel decisi
main subject to local determination.

Though highly diffuse in structure, teacher
tive bargaining have experienced remarkable
cades. The task of organizing teachers was
professional associations like the National E
(NEA) and its local affiliates, which were devel
unions.[25] This process was accelerated by the e
militant American Federation of Teachers (AF
AFL-CIO, as a rival to the NEA. Since the ear
cesses of the AFT in New York City and othe
districts, the two unions have waged a continu
bership.[26] Today, eighty-eight percent of the
ers belong to either the NEA or the AFT, and
are members of a local teachers' organizati
dwindling twenty-one percent of all private
rently belong to a labor organization, a decli
simultaneously with the rise in teacher unioni

The increase in union density among publ
been accompanied by a proliferation in the
statutes and formal bargaining agreements. S
consin first authorized teacher collective ba
states have recognized a statutory duty to

25. *See generally* A. CRESSWELL & M. MURPHY, TEA
TIVE BARGAINING IN PUBLIC EDUCATION 53-102 (1980); Gee,
A Survey Analysis of Collective Bargaining in the Public Schoo
374-80 (1979).

26. *See* M. LIEBERMAN & M. MOSKOW, COLLECTIVE
55-61 (1966); A. CRESSWELL & M. MURPHY, *supra* note 25, at
378-80.

27. NATIONAL EDUCATION ASSOCIATION, STATUS
TEACHER, 1980-81, 67 (1982) [hereinafter cited as STATUS]. B
tional and local organizations was at high levels prior to the a
one cannot strictly equate such membership with the phenom
ally A. CRESSWELL & M. MURPHY, *supra* note 25, at 105-12. T
better be described as membership in organizations that eithe
port the right to bargain (for example, in states where bargai

28. *See* Weiler, *Promises to Keep: Securing Worke*
Under the NLRA, 96 HARV. L. REV. 1769, 1771-72 (1983).

29. *See* ALASKA STAT. § 14.20.550 (1975); CAL. GO
CONN. GEN. STAT. § 10-153a (1979); DEL. CODE ANN. tit. 1
447.201 (1980); HAWAII REV. STAT. § 89-1 (1982); IDAHO CODE
ch. 48, ¶ 1701 (Smith-Hurd Supp. 1984); IND. CODE § 20-7.5
(1978); KAN. STAT. ANN. § 72-5414 (1980); ME. REV. STAT.
EDUC. CODE ANN. § 6-408 (1978); MASS. GEN. LAWS ANN. ch.
COMP. LAWS ANN. § 423.215 (West 1978); MINN. STAT. § 179.
39-31-305 (1983); NEB. REV. STAT. § 79-1292 (1981); NEV. RE

these states, the task of determining the specific scope of the duty to bargain has fallen upon the parties themselves and ultimately upon the courts.

In one significant respect, teacher labor relations have departed from the private sector paradigm: teachers are denied the right to strike, and are compelled to accept in its stead one or more of a variety of conciliatory procedures.[35] In only nine states is there recognition of a limited right to strike, and exercise of that right is usually contingent on the exhaustion of conciliatory procedures.[36]

The concommitant conferral of bargaining rights and proscription of strike rights is a major modification of the private sector model of collective bargaining. The right to bargain has long been premised on the parties' "freedom to contract," which is comprised of the employer's right to extend or withhold compensable employment and the employees' right to extend or withhold profit-productive labor. As the Supreme Court has observed in the context of private sector bargaining, "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion . . . it is part and parcel of the process of collective bargaining."[37] Furthermore, private sector bargaining is seldom regulated by formal procedures or interlaced with compulsory conciliation mechanisms.[38] Rather, it typically involves a test of power and will, virtually unregulated by government.

Hurd Supp. 1984); IOWA CODE § 20.9 (1978); KAN. STAT. ANN. § 72-5414 (1970); ME. REV. STAT. ANN. tit. 26, § 965 (1974); MD. EDUC. CODE ANN. § 6-408 (1978); MASS. GEN. LAWS ANN. ch. 150E, § 6 (1981); MICH. COMP. LAWS ANN. § 423.211 (West 1978); MINN. STAT. § 179.66 (1983); MONT. CODE ANN. § 39-31-305 (1983); NEB. REV. STAT. § 79-1288 (1980); N.H. REV. STAT. ANN. 273-A:1 (1979); N.J. REV. STAT. § 34:13A-5.3 (1982); N.Y. CIV. SERV. LAW § 203 (1983); N.D. CENT. CODE § 15.38.1-09 (1969); OHIO REV. CODE ANN. § 4117.03 (1983); OR. REV. STAT. § 243.656 (1979); 43 PA. CONS. STAT. § 1101.702 (1976); R.I. GEN. LAWS § 28-9.3-2 (1980); S.D. CODIFIED LAWS ANN. § 3-18-2 (1983); TENN. CODE ANN. § 49-5-601 (1978); WASH. REV. CODE § 41.59.020 (1983); WIS. STAT. § 111.91 (1982).

35. *See infra* note 45.

36. *See* ALASKA STAT. § 09.43.030 (1975) (mediation a prerequisite); HAWAII REV. STAT. § 89-12 (1982) (mediation and fact-finding are prerequisites); ILL. ANN. STAT. ch. 48, ¶ 1712 (Smith-Hurd Supp. 1984) (mediation a prerequisite); MINN. STAT. § 179.64 (1983) (mediation a prerequisite); MONT. CODE ANN. § 59-1603 (1983) (no prerequisite); OR. REV. STAT. § 243.726 (1979) (mediation and fact finding are prerequisites); 43 PA. CONS. STAT. §§ 1101.1002, 1101.1003 (1976) (mediation and fact finding are prerequisites); VT. STAT. ANN. tit. 21, § 1730 (1978) (mediation and fact finding are prerequisites); WIS. STAT. § 111.70(4) (1982) (mediation a prerequisite; strike impermissible unless both parties withdraw from binding arbitration).

37. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 495 (1960). *See also* Cox, *The Duty to Bargain in Good Faith*, [illegible] HARV. L. REV. 1401, 1409 (1958).

38. *See generally* McCar[illegible] [illegible]mley, *The National Labor Relations Act and the Regulation of Public Employee Collecti*[illegible] [illegible]*aining*, 13 HARV. J. ON LEGIS. 479, 510-14 (1976).

The denial of teachers' right to strike has been justified on various grounds. At a rhetorical level it is said that "no one has the right to strike the sovereign."[39] But the more substantive opposition to teacher strikes is premised on the belief that organized public employees would have disproportionate political leverage if strikes were permitted. This theory, first articulated by Professors Wellington and Winter in their work, *The Unions and the Cities*,[40] has dominated thinking in public sector bargaining for more than a decade.[41] Central to this "disproportionate power" theory is the contention that neither market nor political restraints will enable local public employers to resist union bargaining demands backed by the threat of strikes.[42] Thus, the strike prohibition is thought necessary to preserve the political and economic integrity of local government.

Notwithstanding statutory prohibitions and public policy appeals, school teachers do strike. Between 1972 and 1980, for example, there were on average more than 145 strikes each school year.[43] Teacher strikes now occur regularly with the commencement of the

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39. *See, e.g.*, A. CRESSWELL & M. MURPHY, *supra* note 25, at 363; Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1061 (1982).

40. H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 24-29 (1971) [hereinafter cited as THE UNIONS AND THE CITIES]; *see also* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1123-25 (1969) [hereinafter cited as *Limits of Collective Bargaining*]; Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 807-09 (1970) [hereinafter cited as *Structuring Collective Bargaining*]. In brief form, the Wellington and Winter position is based on the argument that: 1) public services are monopolized by public employees and have no competition from nonunion enterprises; 2) the public will exert excessive political pressure on governmental officials to prevent work stoppages, even at the cost of expensive bargaining concessions; and 3) the costs of settlement are easily disguised in "an already incomprehensible municipal budget or tax structure."

41. On the predominance of the Wellington and Winter theory in public sector labor law and commentary, see R. SUMMERS, COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE ix n.2 (IPE Monograph No. 7, 1976); Cohen, *Does Public Employee Unionism Diminish Democracy?*, 32 INDUS. & LAB. REL. REV. 189, 190-92 (1979); Kochan, *Empirical Research on Labor Law: Lessons from Dispute Resolution in the Public Sector*, U. ILL. L. REV. 161, 165-66 (1981); Perry, *Teacher Bargaining: The Experience in Nine Systems*, 33 INDUS. & LAB. REL. REV. 3 n.1 (1979); R. Freeman, Unionism Comes to the Public Sector 19-20 (1984) (unpublished report to the Sloan Foundation, Harvard University, National Bureau of Economic Research).

42. *See* THE UNIONS AND THE CITIES, *supra* note 40, at 18-21; *Structuring Collective Bargaining*, *supra* note 40, at 807-08. *See also* W. GARMS, J. GUTHRIE & L. PIERCE, SCHOOL FINANCE: THE ECONOMICS OF PUBLIC EDUCATION 114 (1978) [hereinafter cited as SCHOOL FINANCE]; Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 956-60 (1969); Hanslowe & Acierno, *supra* note 39, at 1063.

43. The figure is based on data assembled by the Bureau of Labor Statistics (BLS); BLS strike figures for the period 1972-80 are reproduced in PUBLIC SERVICE RESEARCH COUNCIL, THE EFFECT OF COLLECTIVE BARGAINING ON TEACHER SALARIES 12 (1981) [hereinafter cited as COLLECTIVE BARGAINING].

school year, and teachers lead all other public sector employ their willingness to engage in job actions.[44] Such strike acti\ still considered by many to be an essential element in collectiv gaining, even though public school teachers are obviously tr(by the prospect of highly-publicized "law-breaking," and boards by their obligation to invoke statutory sanctions.

As mentioned, most state legislators have attempted to c! vent the strike dilemma with a variety of compulsory, impass lution procedures. These procedures have relied on the interv of third parties—mediators, factfinders, and arbitrators—to cile bargaining disputes and to avert strike activity.[45] In t management and employees are induced to settle because third party's conciliatory power and the public pressure th cumulates behind the intervenor's efforts. In theory, impasse dures introduce into the bargaining process a degree of mode and balance otherwise lacking.[46]

The more common impasse resolution procedures have s: the same fate as statutory strike prohibitions. They are ofte fective in strongly contended bargaining disputes. Thus, mor seventy-five percent of strikes occurring in the period 1972-8 occurred in states employing conventional, non-binding impa:

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44. *See* B. COOPER, COLLECTIVE BARGAINING, STRIKES AND FINANCIAL PUBLIC EDUCATION: A COMPARATIVE REVIEW 40-44 (1982).

45. *See* ALASKA STAT. § 14.20.570 (1975) (mediation); CAL. GOV'T COI (1983) (mediation); DEL. CODE ANN. tit. 14, § 4014 (1982) (permissive media factfinding); FLA. STAT. § 447.403 (1977) (mediation and factfinding); HAWAII R: § 89-11 (1978) (mediation and factfinding); IDAHO CODE §§ 33-1274, 33-1275 (1977 tion and factfinding); IND. CODE § 20-7.5-1-13 (1976) (mediation and factfinding); K ANN. § 72-5413 (1980) (mediation and factfinding); ME. REV. STAT. ANN. tit. 26, § 3S (permissive mediation and factfinding); MD. EDUC. CODE ANN. § 6-408(d) (1978) (ı and factfinding); MASS. GEN. LAWS ANN. ch. 150E, § 9 (1981) (mediation and fac MICH. COMP. LAWS § 423.207 (1976) (mediation and factfinding); MONT. CODE A: 31-307, 39-31-308 (1979) (mediation and factfinding); NEV. REV. STAT. § 288.190 (1 diation and factfinding); N.H. REV. STAT. ANN. § 273-A:12 (1983) (permissive med: factfinding); N.J. REV. STAT. §§ 34:13A-6, 34:13A-7 (1982) (permissive medi: factfinding); N.Y. CIV. SERV. LAW (McKinney 1977) (mediation and factfindi: CENT. CODE § 15-38.1-13 (1983) (mediation and factfinding); OHIO REV. C § 4117.14 (1983) (mediation and factfinding); OKLA. STAT. tit. 70, § 509.7 (1983) (fa OR. REV. STAT. §§ 243.712, 243.722 (1983) (mediation and factfinding); 43 PENN. C § 1101.801 (1976) (mediation and factfinding); R.I. GEN. LAWS § 28-9.3-9 (1981) (for economic disputes); S.D. CODIFIED LAWS ANN. § 3-18-8.1 (1983) (mediation); T: ANN. § 49-5513 (1978) (mediation and factfinding); VT. STAT. ANN. tit. 3, § 925 (19 ation and factfinding); WASH. REV. CODE § 41.59.120 (1983) (mediation and factf

46. *See generally* A. CRESSWELL & M. MURPHY, *supra* note 25, at 176-83; *supra* note 42, at 964-69; *Structuring Collective Bargaining*, *supra* note 40, at 825-31; *Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549, 562-63.

The emergence of binding arbitration in teacher collective bargaining has precipitated a reexamination of procedural values in the labor relations context not unlike that precipitated by the introduction of collective bargaining itself.[52] For in theory binding arbitration is difficult to reconcile with traditions both of educational governance and labor relations.[53] First, arbitration vests ultimate authority in unelected arbitrators, thus undermining a history of local government control of personnel and budgetary matters. Second, arbitration interferes with the process of "free" collective bargaining, which is founded on the parties' power to accept or reject contract proposals. As a result, representatives of local government have begun to reexamine their opposition to a right to strike and many have concluded that, if change is needed, recognition of a teacher's right to strike is preferable to a state-imposed duty to arbitrate.[54] Public employee unions, on the other hand, have begun to rethink their historical insistence on the right to strike. Regardless of the process values supporting unrestricted "power" bargaining, unions are asking whether third-party arbitral resolutions are not preferable to the uncertain, and often disappointing, results of strikes.[55]

The policy choices confronting state legislatures in the coming years are not easy ones. As states grapple with the problem of dispute resolution in teacher collective bargaining, a growing number of critics are challenging the very legitimacy of the bargaining process.[56] This uncertainty about the common objectives of school labor relations, moreover, is exceeded by a greater uncertainty as to how existing legislative schemes have worked. Yet contemporary legislators need not operate in the experiential vacuum that made so much of early bargaining legislation a sheer experiment in transplanting private sector precedent to the public sector. The experiential base of educational collective bargaining is an increasingly rich one; and as Professor Clyde Summers has observed, labor theory

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(1982) (compulsory arbitration of all disputed issues unless both parties recognize a right to strike).

52. *Compare*, Horton, *Arbitration, Arbitrators, and the Public Interest*, 28 INDUS. & LAB. REL. REV. 497 (1975) *with* Krislov, *Arbitration, Arbitrators, and the Public Interest: Comment*, 31 INDUS. & LAB. REL. REV. 71 (1977).

53. *See generally* Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971); Gallagher, *The Use of Interest Arbitration in the Public Sector*, 33 LAB. L.J. 501 (1982); McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972); Morris, *supra* note 49.

54. *See infra* note 208.

55. *See infra* note 206.

56. *See* authorities cited *infra* note 314.

"cannot be tested by logic, but only by empirical evidence of the operation of collective bargaining in the political process."[57]

In the following discussion, then, we analyze contemporary evidence concerning the substantive results of collective bargaining and binding arbitration procedures. Those results can be subsumed under two categories: 1) the economic effects of collective bargaining, and 2) the effects of collective bargaining on school governance and educational policymaking. In analyzing these effects, we emphasize that social science research is by nature provisional, and subject to continual revision. We do conclude, however, that evidence currently available suggests important trends in bargaining in public education and, more importantly, calls into question some of the orthodoxies of educational bargaining theory.

II. Experience Under Conventional Collective Bargaining Structures

A. The Economic Effects of Bargaining

The most prominent feature of the public schools is their incessant search for funds.[58] Public schools have relied historically on the ability and willingness of local government to fund education, and this funding has usually been provided through highly visible and politically unpopular property taxes.[59] As a consequence, financial support for education has often been inadequate, thus prompting educators' appeal for state and federal support.[60] Ironically, the traditions of local control that contributed to the financial dilemma of the public schools have often generated the political resistance that frustrates reform. In both Congress and the state legislatures, advocates of local control have opposed measures that would decrease the schools' dependency on local funding decisions.[61]

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57. [illegible] ...mers [illegible] ...c *Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 115[illegible] [illegible]. YUDOF, D. KIRP, T. VAN GEEL & B. LEVIN, EDUCATIONAL POLICY AND THE [illegible] [illegible]).

58. [illegible] *supra* note 7, at 1037, 1042.

59. *See, e.g.*, SCHOOL FINANCE, *supra* note 42, at 149 ("The property tax raises more money than any other tax for schools, and in addition it is the only tax on which citizens regularly have an opportunity to express their disapproval; they express such dissatisfaction through voting for school budgets and school board members. This fact, plus the inequities in assessing property that lead to inequities in taxation, has made the property tax appear to be our most unpopular tax."); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1984, at 295, 297 (property tax is principal revenue source of local government).

60. *See* D. RAVITCH, THE TROUBLED CRUSADE 3-8 (1983).

61. Wirt and Kirst discuss this point as follows:

Federal and state funding have increased considerably since World War II, notwithstanding the opposition of local interests.[62] Yet, the impact of local funding decisions remains strongly evident in the public schools. One prominent example is the effort by state governments, in the 1970's, to reduce the large disparities in educational support among local school districts.[63] Many of these at-

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> The evolution of state influence on and financial support for local schools has been replete with philosophical and practical political struggles between state and local jurisdictions. The constitutional power of state government has been in constant tension with a widely held value that the soundest educational policy is determined locally. "Local control" has become a powerful and pervasive political shibboleth, in many states restricting the financial and leadership support of state agencies.

F. WIRT & M. KIRST, *supra* note 20, at 112, 114. *See also* D. RAVITCH, *supra* note 60, at 5, 6, 27, 39 (local resistance to federal aid).

62. In school year 1945-46, federal revenues constituted 1.4% of total school funds, state revenues 34.7%, and local revenues 63.9%. The corresponding figures for school year 1979-80 were: federal 9.8%, state 46.8%, local 43.4%. *See* DIGEST OF EDUCATION STATISTICS, *supra* note 17, at 75. A system of school financing that relies heavily on local property taxes leads to disparities between districts in the provision of educational opportunities. This uneven distribution of benefits is well documented. J. BERKE, FINANCING EQUAL EDUCATIONAL OPPORTUNITY: ALTERNATIVES FOR STATE FINANCE (1972); J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); J. GUTHRIE, SCHOOLS AND INEQUALITY (1971). The resulting financial reform movement was the source of much litigation in the 1970's alleging unconstitutional discrimination on the basis of wealth. While generally successful at the state level, the cases resulted in a Supreme Court decision declaring education not to be a fundamental right in the U.S. Constitution. *Compare* San Antonio Indep. School District v. Rodriguez, 411 U.S. 1 (1973) *with* Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, *cert. denied*, 412 U.S. 907 (1971); Robinson v. Cahill 62 N.J. 473, 303 A. 2d 273 (1973). For some commentary on equal educational opportunity litigation, see Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973); Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, DUKE L. J. 1099 (1977); Simon, *supra* note 15; Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973). *See also Symposium*, 38 LAW & CONTEMP. PROBS. 293 (1974), *reprinted in* FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM (B. Levin ed. 1974).

63. The effects of the equal educational opportunity movements are just beginning to be assessed. A study of the effects of finance reform in California, Florida, Kansas, Michigan and New Mexico concluded that, while tax equalization was achieved by state reform measures, there was little change in per-pupil instructional *expenditures*:

> Reform has done little to equalize the distribution of per-pupil instructional expenditures. (This result is consistent with other studies which have found, for example, that as districts' per-pupil budgets increase, they allocate decreasing proportions of their budgets to expenditures for teachers.) If educational quality is closely linked to instructional expenditures, and if the object of reform is to equalize the quality of education afforded to students who live in different places, the states have dissipated much of the additional resources they have put into their reform efforts.

S. CARROLL, THE SEARCH FOR EQUITY IN SCHOOL FINANCE: SUMMARY AND CONCLUSIONS vi (1979). Some commentators have concluded that only fiscal reform programs based upon centralized financing of local services will result in tax and spending equity in the school system. Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1748-50 (1979); Simon, *supra* note 16, at 414-32.

tempts faltered at the local level, when state monies were used to reduce tax burdens rather than to increase school expenditures.[64]

Probably the greatest impact of local fiscal control has been experienced by the teaching staff. The heart of the local school budget is the instructional salary account, which typically consumes more than half of total school revenues.[65] The salary account, moreover, offers the most manipulable item in a largely inelastic school budget.[66] In fact, a primary form of evidence both in legal challenges to the equity of school expenditures,[67] and in evaluations of the success of remedial programs,[68] is the extent to which local expenditures on instruction vary. As one commentator has observed, "in addressing the distribution of funds for public education, and particularly the existing district disparities in expenditures per pupil, the decisions are to a large extent about teachers."[69]

Collective bargaining laws have done little to alter the dominant role of local school districts in establishing teacher salary levels.[70] One might have expected, therefore, that the economic impact of bargaining would be diluted by its decentralized structure. Quite surprisingly, however, the most prominent early forecasts warned of potentially significant increases in teachers' salaries resulting from local bargaining. Most notably, Professors Wellington and Winter argued in their highly influential work, *The Unions and The Cities*, that local public employees are far less subject to market constraints than private employees, since they tend to monopolize services that lack close substitutes or private competition.[71] Com-

64. *See, e.g.*, Simon, *supra* note 16, at 413: "Approximately fifty-five percent of current operating costs are for teacher salaries, that figure increasing to roughly sixty-five percent when fringe benefits are included." Moreover, the structure of school budgets has undergone little change in recent years. In 1979, 67.5% of current operating expenditures concerned instructional costs and another 27% was allocated to relatively fixed costs such as pupil transportation, operation and maintenance of the physical plant, and other fixed charges like rents, insurance premiums and a variety of contractual services. Thus, only 5.5% of school budgets was expended on variable items other than instruction. U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 61 (1982) [hereinafter cited as CONDITION OF EDUCATION].

65. *See supra* note 64.

66. *Id.*

67. *See, e.g.*, Hobson v. Hansen, 327 F. Supp. 884 (D.D.C. 1971).

68. *See supra* note 63.

69. Simon, *supra* note 16, at 412-13 (emphasis omitted).

70. *See supra* text accompanying notes 19-24. Although several states prescribe a minimum salary for teachers, school districts are free to supplement that salary. *See* L. FISCHER, D. SCHIMMEL & C. KELLY, TEACHERS AND THE LAW 353-56 (1981).

71. The thesis of Professors Wellington and Winter is summarized by the following excerpt:

> To the extent union power is delimited by market or other forces in the public sector these constraints do not come into play nearly as quickly as in the private.

pounding this market failure is the power of unions to exert political pressures on local public employers, and the power of unions to strike in a monopolized field.[72]

The prediction of Wellington and Winter was based primarily on the early bargaining experience of large municipalities like New York City.[73] Since those first "heady" days of public employee unionism, however, bargaining has spread to a variety of municipalities with diverse profiles. It is appropriate, then, to consider whether the past decade's experience with teacher bargaining evidences a strong bargaining effect, or whether bargaining has been assimilated into the pre-existing habits of local school government.

> Market imposed unemployment is an important restraint on unions in the private sector. In the public sector, the trade-off between benefits and employment seems much less important. Government does not generally sell a product the demand for which is closely related to price. There usually are not close substitutes for the products and services provided by government and the demand for them is relatively inelastic. . . . Because much government activity is, and must be, a monopoly product competition, nonunion or otherwise, does not exert a downward pressure on prices and wages. Nor will the existence of a pool of labor ready to work for a wage below union scale attract and create a new, and competitively less expensive, governmental enterprise.

THE UNIONS AND THE CITIES, *supra* note 40, at 18-19. Professors Wellington and Winter specifically stressed that such problems would result from the unionization of teachers. *Id.* at 30:

> Consider education. . . . [B]ecause the demand for education is relatively inelastic, teachers rarely need fear unemployment as a result of union-induced wage increases, and the threat of an unimportant nonunion rival (competitive private schools) is not to be taken seriously so long as potential consumers of private education must pay taxes to support the public school system.

72. The Wellington and Winter thesis, we should note, gives particular emphasis to the role of the *strike* in providing public employee unions undue bargaining leverage. However, the variables that allegedly work in conjunction with the right to strike—the employees' service monopoly, the ability of local government to conceal budgetary costs, and the employees' propensity to supplement bargaining activity with political activity—can operate independently of strike activity. Thus, the Wellington and Winter thesis has usually not been restricted to a narrow, strike-dependent interpretation in subsequent literature. *See, e.g.*, R. FREEMAN, *supra* note 41; Gee, *supra* note 25, at 424-44; Kochan, *supra* note 41, at 165-66. In any event, the purpose of our discussion is to illustrate that, in public education, the variables identified by Wellington and Winter either do not operate or do not operate with great effect on collective bargaining. Consequently, the imbalance in bargaining power that Wellington and Winter argued would result from granting teachers collective bargaining rights including the right to strike has not developed. *See infra* text accompanying notes 86-90. For other commentary positing adverse results from public sector bargaining, see Anderson, *supra* note 42, at 957-58; Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 GOV'T UNION REV. 1, 5-6 (Winter 1980).

73. The thesis of Professors Wellington and Winter is based upon observations from the 1960's. At that time, only a handful of public employers like New York City and a few other large governmental units had had sufficient experience with public sector collective bargaining to generate data satisfactory for theory building. *See* Kochan, *supra* note 41, at 166. Kochan proceeds to note that: "[i]n retrospect, [Wellington and Winter's] predictions failed to recognize the wide variation in the amount of power unions would gain from collective bargaining and the strike threat in different times and environments." *Id.*

1. THE EVIDENCE REGARDING TEACHERS' SALARIES

The relative weakness of teachers' salaries in the national labor market is now well documented. Between 1967 and 1984 the average annual salary of classroom teachers declined in actual purchasing power (see Table 1). In terms of 1967 dollars, the process has been cyclic: the average public school teacher's salary rose from $7235 in 1967-68 to a high of $7852 in 1972-73; declined during a period of runaway inflation to a low of $6685 in 1980-81; and slowly climbed back to the level of $7121 in 1983-84—just marginally below the 1967-68 figure. During the past decade, when unionism firmly established itself in the public schools, teachers' salaries lagged far behind those of other professionals with a comparable education. Table 2 indicates that, from 1973 through 1982, the average starting salary for teachers has been consistently lower than that of other professionals with bachelor degrees, and the percentage increase in starting salaries for teachers (65.4%) has been strikingly lower than that of all other professional groups except accountants (59.7%). Even when compared with other state and local government employees, teachers have suffered a relative decline in their compensation.[74]

These findings do not discriminate between salaries in jurisdictions with and without collective bargaining laws, and thus say nothing specific about the effect of unionization. But since collective bargaining prevails in two-thirds of the states, one might infer that it has had little systematic effect. There are a number of empirical studies, however, that provide more precise measurement of the impact of collective bargaining. These studies indicate that, while collective bargaining may have increased teachers' salaries, these gains have been modest at best and not nearly sufficient to restore the competitive employment position of public school employers. This result is confirmed both by studies that measure salaries at a statewide level, and by intra- and inter-state studies that compare salaries in individual school districts.

Several studies have examined the effects of collective bargaining by testing the relationship of average state salaries and the incidence of collective bargaining. They are graphically represented in the first segment of Table 3, which indicates both the duration of the

74. In 1971, teachers earned 25% more than other full-time state and local government employees, but by 1978 the differential had declined to 19.5%. *See* Lipsky, *The Effect of Collective Bargaining on Teacher Pay: A Review of the Evidence*, 18 EDUC. AD. Q. 14, 14-15 (1982). Moreover, for the decade 1971-82, the percent increase in salary for government workers (100.5%) was slightly higher than that for teachers (97.2%). *See* CARNEGIE REPORT, *supra* note 2, at 168.

TABLE 1
Average Annual Salary of Public School Teachers
1967-68 to 1983-84 Deflated in Terms of 1967 Dollars

Year	Average Salary in Dollars*	Percent Increase in Average Salary	CPI** (1967 = 100)	Percent Increase in CPI	Average Salary in 1967 Dollars	Percent Change in Average Salary in 1967 Dollars
1967-68	7,423	-	102.6	-	7,235	-
1968-69	7,952	7.1	107.8	5.1	7,377	2.0
1969-70	8,635	8.6	114.2	5.9	7,561	2.5
1970-71	9,269	7.3	119.8	4.9	7,737	2.3
1971-72	9,705	4.7	123.9	3.4	7,833	1.2
1972-73	10,176	4.9	129.6	4.6	7,852	2.4
1973-74	10,778	5.9	142.2	9.7	7,579	-3.4
1974-75	11,690	8.5	157.4	10.7	7,427	-2.0
1975-76	12,591	7.7	167.7	6.5	7,508	1.1
1976-77	13,353	6.1	177.7	6.0	7,514	0.1
1977-78	14,198	6.3	190.0	6.9	7,473	-0.5
1978-79	15,032	5.9	209.0	10.0	7,192	-3.8
1979-80	15,971	6.2	237.3	13.5	6,730	-6.4
1980-81	17,642	10.5	263.9	11.2	6,685	-0.7
1981-82	19,270	9.2	284.8	7.9	6,766	1.2
1982-83	20,715	7.5	295.3	3.7	7,015	3.7
1983-84	22,019	6.3	309.2	4.7	7,121	1.5

Source: *Calculated from data in National Education Association Research, Estimates of School Statistics (rev. 1984). The 1983-84 statistic is an unrevised estimate.

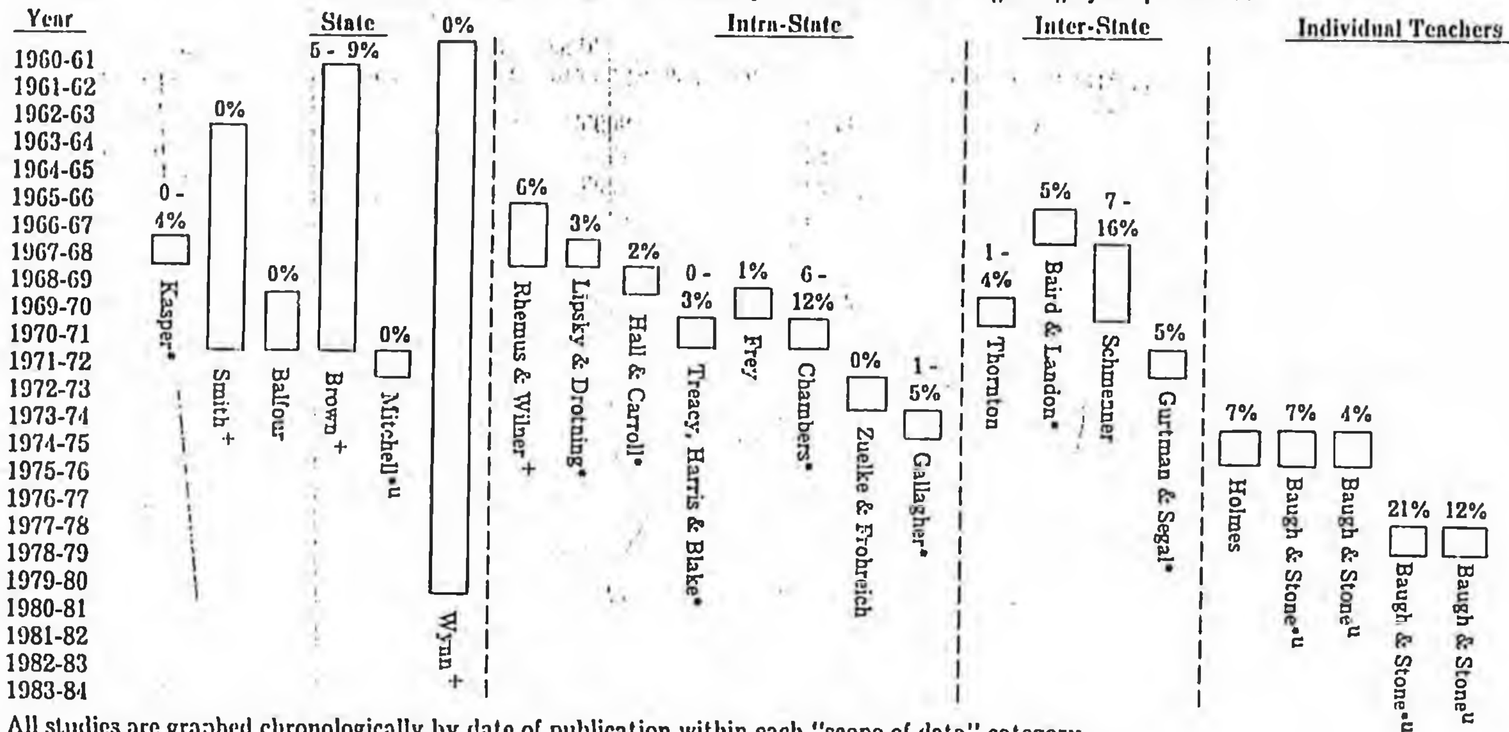
**The Consumer Price Index is the U.S. City Average for Urban Wage Earners and Clerical Workers as found in *Monthly Labor Review*. The index value is the average of the monthly values for the school year, September of one year through August of the following year.

TABLE 2
Average Starting Salaries of Public School Teachers Compared with Salaries in Private Industry

Position/Field	1973-74	1980-81	1981-82	Percent change 1981-82 over 1980-81	Percent change 1981-82 over 1973-74
Average minimum salary for teachers with bachelor's degree	$7,720	$11,758	$12,769	8.6	65.4
College graduates with bachelor's degree					
Engineering	$11,220	$20,136	$22,368	11.1	99.3
Accounting	10,632	15,720	16,980	8.0	59.7
Sales-marketing	9,660	15,936	17,220	8.1	78.3
Business admin.	8,796	14,100	16,200	14.9	84.2
Liberal arts	8,808	13,296	15,444	16.2	75.3
Chemistry	10,308	17,124	19,536	14.1	89.5
Math-statistics	10,020	17,604	18,600	5.7	85.6
Economics-finance	9,624	14,472	16,884	16.7	75.4
Computer sciences	N/A	17,712	20,364	15.0	N/A
Other fields	9,696	17,544	20,028	14.2	106.6

Source: 1973-74: National Education Association, Prices, Budgets, Salary and Income 20 (1981); all other data: National Education Association, Prices, Budgets, Salary and Income 22 (1983).
N/A = not applicable.

TABLE 3: Research Findings on the Salary Effect of Teacher Bargaining by Scope of Data



All studies are graphed chronologically by date of publication within each "scope of data" category.
* Cross-sectional research methodology (all other studies involved before and after designs).
\+ No multiple regression analysis (all other studies involved regression analyses).
u Measure of unionization only and no direct measure of collective bargaining.

study and the estimated salary effect of collective bargaining (the percentage figure). In all such studies but one the findings are statistically insignificant—neither positive nor negative effect is found.[75] These findings, while subject to the criticism that they do not capture the particular effects of bargaining in local districts,[76] are quite suggestive. These studies attempt to control for the degree of collective bargaining that occurs in particular states, either by statistically adjusting for the level of bargaining or by establishing a sample of states with "intensive" bargaining experience. If collective bargaining produces a significant salary effect one would expect to discover it in those states where bargaining is widespread. There is simply no evidence of such an effect.

The results from state-level studies are largely confirmed by studies of school district compensation (the intra- and inter-state segments of Table 3), although these more particularized measurements often reveal a modest salary effect. Examining a diverse sample of school districts, these studies report either no significant bargaining effect or an effect averaging approximately four percent in overall salary levels. The similarity in state and district level findings is noteworthy given the potential of the latter group to control better the "spillover" effects that may occur in state samples.[77]

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75. *See* Balfour, *More Evidence that Unions do not Achieve Higher Salaries for Teachers*, 3 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 289 (1974); Brown, *Have Collective Negotiations Increased Teachers' Salaries? A Comparison of Teachers' Salaries in States With and Without Collective Bargaining Laws for Public School Personnel, 1961-1971*, 4 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 53 (1975); Kasper, *The Effects of Collective Bargaining on Public School Teachers' Salaries*, 24 INDUS. & LAB. REL. REV. 57 (1970); Mitchell, *The Impact of Collective Bargaining on Compensation in the Public Sector*, in PUBLIC-SECTOR BARGAINING 118 (B. Aaron, J. Grodin & J. Sterns eds. 1979); Smith, *Have Collective Negotiations Increased Teachers' Salaries?*, PHI DELTA KAPPAN, Dec. 1972, at 268; Wynn, *The Relationship of Collective Bargaining and Teacher Salaries 1960 to 1980*, PHI DELTA KAPPAN, Apr. 1981, at 237. Both Brown and Wynn fail to use regression analysis, which is the only research design that can systematically control for the numerous variables that might produce a spurious result. They are included for purposes of illustration. *See generally* Bloch & Kuskin, *Wage Determination in the Union and Nonunion Sectors*, 31 INDUS. & LAB. REL. REV. 183 (1978); Fogel & Lewin, *Wage Determination in the Public Sector*, 27 INDUS. & LAB. REL. REV. 410 (1974); *see also* Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980).

76. Research on the impact of collective negotiations upon teacher salaries adopting state-level observations is subject to the criticism that teacher wages are determined, with the exception of Hawaii, at the school district level rather than at the state level. Thus, state-level observations can obscure much of the intrastate diversity in teacher salaries. The use of state-level averages fails to take account of a large number of factors such as teacher experience, school district tax base and the local labor market structure that may effect teacher salaries in a particular school district. For a listing of variables that could influence teacher pay, see Lipsky, *supra* note 74, at 33.

77. Studies of the effects of bargaining on teacher salaries at the school district level can incorporate either an interstate or intrastate sample of districts. The advantage of an

The only study to show a substantial salary effect resulting from teacher unionism is based on survey data involving individual

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interstate sample is reduction in the problem of "spillover." "Spillover" refers to the benefits conferred on non-bargaining employees by the indirect influence of bargaining agreements in proximate school districts. Where "spillover" occurs, there will be an underestimate of the bargaining effect if organized and unorganized teachers' salaries in the same geographic locale are compared. "Spillover" is more likely to occur, obviously, when districts within the same state are compared. Intrastate comparisons have beneficial features, however, since they reduce the likelihood that legal and other environmental variables will differ. Interstate comparisons are subject to this latter problem and thus tend to confound effects.

To some extent, the findings of the school district studies of bargaining reflect these sampling concerns. All four studies using interstate samples found some significant bargaining effect associated with teacher salary awards. A. GUSTMAN & M. SEGAL, THE IMPACT OF TEACHERS' UNIONS (1976) (although most bargaining variables were insignificant, MA maximum salary increased by 4.7% in 1971-72 under "comprehensive" agreements); Baird & Landon, *The Effects of Collective Bargaining on Public School Teachers' Salaries: Comment*, 25 INDUS. & LAB. REL. REV. 410 (1972) (negotiations added 4.9% to minimum teacher salary in 1966-67); Schmenner, *The Determination of Municipal Employee Wages*, 55 REV. ECON. & STATISTICS 83 (1973) (presence of a bargaining agreement added 6.8-9.3% to the minimum teacher salary during the period 1967-70); Thornton, *The Effects of Collective Negotiations on Teachers' Salaries*, 11 Q. REV. ECON. & BUS. 37 (1971) (presence of a collective bargaining agreement added from 1-4% to teacher salaries during 1969-70, except at MA maximum where the effect was 28.8%). Although these studies adopted different measures of salary, and their estimates varied considerably, the bargaining effect was generally *larger* than 4%. However, the problem of matching school districts in different states requires cautious interpretation of this conclusion. Moreover, these findings may be somewhat unrepresentative as all these studies compared *large city* school districts. Such districts constitute a minority of all school districts in the nation. *See* DIGEST OF EDUCATIONAL STATISTICS, *supra* note 17, at 61.

In comparison, the seven studies that adopted intrastate samples of school districts produced mixed results. Often they failed to find a significant bargaining effect, and where the effect was significant, its magnitude was, with few exceptions, in the 1-3% range. C. RHEMUS & E. WILNER, THE ECONOMIC RESULTS OF TEACHER BARGAINING: MICHIGAN'S FIRST TWO YEARS (1968) (the bargaining effect estimated at 6% on average for the two years 1966-68); J. TREACY, R. HARRIS, & C. BLAKE, SALARIES, STRIKES, SHUTDOWNS, SPLIT SHIFTS AND COLLECTIVE BARGAINING IN OHIO PUBLIC SCHOOLS (1974) (most bargaining effect estimates were insignificant, but a bargaining contract may have added up to 2.6% to average school district salary in 1970-71); Chambers, *The Impact of Collective Bargaining for Teachers on Resource Allocation in Public School Districts*, 4 J. URBAN ECON. 324 (1977) (negotiations added up to 6% to minimum teacher salary in California school districts in 1970-71); Frey, *Wage Determination in Public Schools and the Effects of Unionization*, in LABOR AND THE PUBLIC AND NON-PROFIT SECTORS 183 (D. Hamermesh ed. 1975) (most bargaining effect estimates were insignificant, but negotiations may have added up to 1.4% to salary in New Jersey school districts during the period 1969-70); Gallagher, *supra* note 33 (a bargaining contract added 1.3-4.5% to salary levels in 1973-74); Hall & Carroll, *The Effects of Teacher Organizations on Salaries and Class Size*, 26 INDUS. & LAB. REL. REV. 834 (1973) (a bargaining contract added 1.8% to average district salary in Cook County school districts in 1968-69); Lipsky & Drotning, *The Influence of Collective Bargaining on Teachers' Salaries in New York State*, 27 INDUS. & LAB. REL. REV. 18 (1973) (a bargaining contract may have added up to 3% to salary levels in 1967-68); Zuelke & Frohreich, *The Impact of Comprehensive Collective Negotiations on Teachers' Salaries: Some Evidence from Wisconsin*, 7 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR (1978) (most estimates insignificant, but some small *negative* bargaining effects in 1972-73). As it is probable that intrastate samples of school districts are contaminated by "spillover" effect, these studies may underestimate the impact of collective bargaining upon teacher sala-

teachers scattered throughout the country.[78] There are a number of methodological problems with this research, not least of which is its failure to control for several structural, political and environmental variables. Failure to control for these variables likely produces an appreciable overestimation of the salary effect.[79] Nevertheless, this research, as well as other current research in the non-educational public sector, suggests that unions may have slowed the process of salary erosion during recent periods of high inflation,[80] even if they have not secured much measurable improvement in teachers' real salaries.

Further perspective on these findings is provided by examining the wage effect of private sector collective bargaining. A fairly extensive body of research in this sector suggests an overall wage effect in the range of fifteen to twenty-five percent.[81] Measured against

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ries. But when coupled with the findings concerning interstate studies, these are the strongest and most consistent evidence for a bargaining effect, albeit of a modest nature.

78. Baugh & Stone, *Teachers, Unions, and Wages in the Late 1970s: Unionism Now Pays*, 35 INDUS. & LAB. REL. REV. 368 (1982) *reprinted in* R. EBERTS & J. STONE, UNIONS AND PUBLIC SCHOOLS 73-81 (1984) (salaries demonstrated a union effect of 7% in 1974-75, and 21% in 1977-78 in a cross section analysis of a national sample of teachers, and 4% [but insignificant] and 12% for the corresponding longitudinal analysis); Holmes, *Effects of Union Activity on Teachers' Earnings*, 15 INDUS. REL. 328 (1976) ("any form of union activity" added 7% to Oklahoma teachers in 1974-75 in a cross-section analysis.).

In all studies, longitudinal (or "before-and-after") data are probably more reliable than cross-sectional data. Longitudinal analyses enable the researcher to control for prior salary levels, and thus measure the actual effect on salaries resulting from union membership or collective bargaining. In other words, cross-sectional analyses that only examine salary levels at one point in time must be treated with special care as they may overestimate the bargaining effect by attributing existing differences in wages, explainable by other factors, to collective bargaining. In accord with this argument, Baugh and Stone's estimations are significantly lower for their longitudinal than their cross-sectional analysis. Baugh & Stone, *supra*, at 371. Only two other regression studies of the bargaining effect employed longitudinal data: Frey, *supra* note 77; Schmenner, *supra* note 77.

79. Baugh and Stone's data are taken from the Current Population Survey (CPS), a stratified and random sample of about 56,000 households conducted monthly by the U.S. Bureau of Census. Baugh & Stone, *supra* note 78, at 370. CPS data, however, fail to control for a range of variables including district size, ability to pay, and willingness to pay. Omission of these variables from its analysis will likely result in an *overestimation* of the bargaining effect. *See* Delaney, *Strikes, Arbitration, and Teacher Salaries: A Behavioral Analysis*, 36 INDUS. & LAB. REL. REV. 431, 444 n.49 (1983). Particularly problematic is the absence of control over the school district's ability to pay. Both our research, and others', reveals that the most significant determinant of salary levels is a district's financial strength. *See infra* note 308.

80. *See* R. FREEMAN, *supra* note 41, at 27 (organized teachers employ their collective power in a weak labor market "to offset some downward pressure on wages").

81. The average private sector union *wage effect* is generally considered to have boosted its members' wages by 20%. *See* D. MITCHELL, UNIONS, WAGES AND INFLATION 112 (1980). Some commentators, however, consider that the wage differential may now be on the order of 25-30% for some parts of the private sector. *See* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 53 (1984); D. MITCHELL, *supra*, at 214. For reviews of the extensive literature on the private sector union effect on wages, see R. FREEMAN & J. MEDOFF, *supra*, at 43-61;

such success in the private sector, teacher collective bargaining has produced minimal economic results, which may belie the suggestion that public school employers are unable to counter the bargaining power of unions.[82] In any event, there is good reason to doubt that collective reasoning alone can provide public school teachers with sufficient leverage to restore salaries to a competitive level in the labor market.[83]

2. INTERPRETING THE EVIDENCE

Why has collective bargaining failed to produce the salary inflation that commentators like Wellington and Winter foresaw? One plausible explanation is that most states have denied teachers the right to strike, which Wellington and Winter viewed as a substantial component of public employees' bargaining leverage.[84] Without this leverage, teachers lack full power to exploit their allegedly favorable market position. Under this view, teacher collective bargaining has been but a stunted version of private sector bargaining and predictably, could not match private sector achievements.

Research on the effects of public employee strikes is surprisingly limited, and thus one can offer only informed speculation as to the importance of the right to strike. Nonetheless, both the available evidence, and the consensus of labor commentators, indicate that the strike leverage of public employees has been considerably overstated. For example, a review of average salary rates in those states where teacher strikes are permitted reveals no appreciable salary inflation.[85] A recent quantitative analysis of teacher salaries in states

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Mellow, *Unionism and Wages: A Longitudinal Analysis*, 63 REV. ECON. & STATISTICS 43 (1981); Parsley, *Labor Union Effects on Wage Gains: A Survey of Recent Literature*, 18 J. ECON. LIT. 1 (1980). For commentaries on the relative salary effects of unions in the public and private sectors, see R. FREEMAN, *supra* note 41, at 30-35; Shapiro, *Relative Wage Effects of Unions in the Public and Private Sectors*, 31 INDUS. & LAB. REL. REV. 193 (1978).

82. For other reviews of teacher salary studies finding no substantial union effect, see A. CRESSWELL & M. MURPHY, *supra* note 25, at 448-52; *Lipsky*, *supra* note 74.

83. The *Carnegie Report*, for example, recommended that "as a national goal, salary averages for teachers be increased by at least 25% *beyond* the rate of inflation over the next three years, with immediate entry-level increases." CARNEGIE REPORT, *supra* note 2, at 168 (emphasis added). A comparison of entry salary levels for teachers and professions requiring similar education reveals the magnitude of the salary increases necessary to achieve parity. *See* Table 2, *supra* following note 74. *See also* Odden, *Financing Educational Excellence*, PHI DELTA KAPPAN, Jan. 1984, at 311, 314 (estimating a cost of $20 billion to restore teachers salaries to a competitive position).

84. *See supra* note 72.

85. *See, e.g.*, Table 6, *infra* following note 262. Based on salary data contained in National Educ. Ass'n Research, Estimates of School Statistics (rev., as of June, 1984) (unpublished) we calculated the average annual rate of salary increase in states where there is a

affording the right to strike, furthermore, yielded inconsistent results on the question whether teacher strike activity produces a statistically significant salary effect.[86]

Perhaps more indicative, if less rigorous in methodology, are the estimates of those who have observed the evolution of public sector bargaining during the past decade. The consensus of opinion is that: 1) the effects of strike activity are highly inconsistent;[87] 2) public and political resistance to strike pressure has increased dra-

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legal or *de facto* right to strike, for the period 1976-83. *See* Delaney, *supra* note 79, at 444. The following summarizes the results:

Jurisdiction	1976-83 Average Annual Salary Increase (in percent)
Nation	6.23
All Strike States	6.35
Alaska	7.00
Hawaii	5.85
Montana	7.83
Oregon	6.96
Pennsylvania	6.55
Vermont	4.50
Ohio (*de facto*)	6.23
Illinois (*de facto*)	5.96
Michigan (*de facto*)	6.24

Because these figures do not control for significant causal variables within each particular state, they are merely estimates of the effect of the right to strike. See *supra* note 76. But the proximity in salary rates between strike states and the national average suggests there is no strong or consistent effect on salaries.

86. *See* Delaney, *supra* note 79. Delaney employed two different regression models to measure the effects of strike activity. One revealed that strikes are employed *defensively* to prevent salary erosion relative to districts within the same jurisdiction, but that this does *not* result in higher salaries in districts where strikes took place. *Id.* at 442. Delaney's second model found that strikes produce "a generally positive effect on teacher salaries"; but due to methodological problems in the second model, Delaney could not conclude that strikes inflate salaries. *Id.* at 443.

By comparison, Delaney found, based on a national sampling of teachers' salaries, that the *availability* of either the right to strike *or* binding arbitration has a positive effect on teachers' salaries. *Id.* at 444-45. This result is unreliable, however, because it fails to control for crucial variables like a school district's financial ability, and historical salary levels (which might indicate that high salaries in a state *preceded* implementation of strike or arbitration laws). *See infra* note 257. Delaney's classification scheme is also flawed, since, for example, he includes Connecticut in his sample of arbitration states for a period *prior* to adoption of arbitration in Connecticut; and he includes Minnesota in his sample of strike states even though binding arbitration is an alternative to strikes there. *Compare* Delaney, *supra* note 79, at 444-45 *with supra* note 51.

Delaney's inability to find a strike effect on salaries is not surprising. As Delaney observes regarding past empirical research, "[s]ome public sector studies have found a positive effect of strike use on outcomes but others have not, whereas studies of the private sector have consistently found a positive effect." Delaney, *supra* note 79, at 435 (other research cited).

87. *See, e.g.*, L. McDONNELL & A. PASCAL, *supra* note 47, at 64-65; Kochan, *Dynamics of Dispute Resolution in the Public Sector*, in PUBLIC-SECTOR BARGAINING 150 (1979) [hereinafter cited as Kochan, *Dispute Resolution*]; Kochan, *supra* note 41, at 166.

matically since the early days of collective bargaining;[88] and 3) with increasing frequency, strike action is resorted to as a defensive measure by public employee unions.[89] Furthermore, the political activity of public employee unions in recent years indicates that union leaders no longer regard strikes as a source of substantial bargaining leverage; during the 1970's there was a decided decline in union support for the right to strike and a sharp increase in support for alternatives like binding arbitration.[90]

Thus, contemporary experience with public employee strikes provides little support for the claim that the strike is a powerful weapon in local government bargaining. Our contention, moreover, is that the political and economic forces at work in educational collective bargaining limit the power of teachers' unions, regardless of whether the right to strike is recognized. A consideration of these forces suggests that the basic market paradigm of commentators like Wellington and Winter was an inapposite description of labor relations in public education, whatever its strengths in describing such relations in other segments of the public sector. In particular, this paradigm failed to account for the evolving characteristics of the teacher labor market, the limited political base of public education, and the virulence of local fiscal conservatism.

A significant component of the theory that teachers' unions have undue bargaining leverage is the presumed monopoly power of public school teachers. As stated by Professors Wellington and Winter:

> [B]ecause the demand for education is relatively inelastic, teachers rarely need fear unemployment as a result of union-induced wage increases, and the threat of an important nonunion rival (competitive private schools) is not to be taken seriously so long as potential consumers of private education must pay taxes to support the public school system.[91]

The monopoly aspect of public school education, however, states but one side of the employment equation. In times of decreasing employment alternatives, public school employers can exercise "monopsony"[92] power over teachers, thus off-setting (if not

88. *See, e.g.*, A. CRESSWELL & M. MURPHY, *supra* note 25, at 364; Feuille, *supra* note 48, at 67-68; Kochan, *Dispute Resolution*, *supra* note 87, at 169; Olson, *The Use of the Legal Right to Strike in the Public Sector*, 33 LAB. L.J. 494, 495-96 (1982).

89. *See, e.g.*, Kochan, *Dispute Resolution*, *supra* note 87, at 168. *See also supra* note 86.

90. *See infra* text accompanying notes 203-09.

91. THE UNIONS AND THE CITIES, *supra* note 40, at 30.

92. Monopsony power is based on the degree to which a public school employer (or employers) provides the only practical employment opportunity for teachers, thus enabling

overwhelming) the claimed monopoly power of teachers. While Wellington and Winter recognized the possibility of such monopsony power, they discounted it because they presumed that "to the extent . . . most public employees work in urban areas . . . there may often be a number of substitutable and competing private and public employers in the labor market."[93]

Conditions throughout the past decade indicate that employment opportunities for teachers have diminished dramatically since the above-quoted statement was made. During the 1970's, public school enrollments declined by more than ten percent and the demand for teachers dropped by more than twenty percent.[94] At the same time, the supply of newly-qualified teachers remained relatively large—so large, in fact, that in 1979 less than fifty percent of these teachers acquired full-time teaching positions.[95] Not only were positions for recent graduates declining, but many school districts found it necessary to reduce the size of the existing teaching staff.[96]

Therefore, the contemporary labor market for teachers has been characterized by an oversupply of applicants for low-salaried entry positions.[97] In such a market, the employment options of those teachers who wished to remain in the profession were few. Consequently, it is more likely that an employer's monopsony rather than an employee's monopoly prevailed in public education. Research on compensation levels in school districts with monopsony power largely confirms the thesis that school employers will exercise that power to constrain salary increases.[98]

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the employer to exercise greater choice in setting the salaries of the teaching staff. Most research on the monopsony effect supports the theory that school employers with monopsony power suppress compensation levels. *See, e.g.*, Baird & Landon, *supra* note 77; Delaney, *supra* note 79, at 442; Landon & Baird, *Monopsony in the Market for Public School Teachers*, 51 AM. ECON. REV. 966 (1971). *But see* Thornton, *The Effects of Collective Bargaining on Public School Teachers' Salaries: Reply*, 25 INDUS. & LAB. REL. REV. 417 (1972).

93. THE UNIONS AND THE CITIES, *supra* note 40, at 18; *accord Structuring Collective Bargaining*, *supra* note 40, at 823.

94. *See* CONDITION OF EDUCATION, *supra* note 64, at 85-86.

95. *See id.* at 76, 98.

96. *See id.* at 86, 100.

97. Because of the prevalence of a salary schedule in which salaries increase with seniority, *see infra* text accompanying notes 156-59, new teachers enter teaching at low salary levels while senior teachers usually must be compensated according to their level of experience. The absence of "floating" compensation levels, accordingly, will place greatest limitation on the mobility of experienced teachers. This phenomenon is illustrated by the fact that the average teacher's tenure in a school system increased during the period from 1971 to 1981 from five to nine years. *See* STATUS, *supra* note 27, at 15.

98. *See supra* note 92. There is a disquieting aspect to this cost constraint, however, as there has been a continual decline in the qualifications (as measured by aptitude tests) of

An even stronger objection to the monopoly power theory of unionized teachers is suggested by an analysis of the political base of public education. The principal consumers of educational services, exclusive of non-voting pupils, are the parents of those pupils.[99] Current estimates indicate that such consumers comprise less than twenty-five percent of the voting public.[100] Moreover, a growing percentage of this consumer group consists of parents from low income levels, who historically refrain from active participation in voting.[101]

At the same time, non-consumers of public education are required to share its costs, and are permitted to participate in local school funding decisions.[102] Obviously, this segment of the electorate has less to gain from a better-paid teaching staff and less to lose if educational services decline—or are cut off through strike activity. The alleged monopoly power of teachers, accordingly, has little relevance to this large segment of the electorate; stated simply, unionized teachers lack practical leverage over most voters and taxpayers.

Professor Summers, in an article that challenges the monolithic view of public employee unions, has observed the importance of the non-consumer's vote when a "special purpose" government like school district is involved. To the extent that non-consumers "vote their pocketbooks," special purpose governments may be at consid-

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both those who enter and *remain* in teaching. For evidence of the declining qualifications of those entering teaching, see Vance & Schlechty, *The Distribution of Academic Ability in the Teaching Force: Policy Implications*, PHI DELTA KAPPAN, Sept. 1982, at 22; CARNEGIE REPORT, *supra* note 2, at 171-72. For evidence of the declining qualifications of those remaining in teaching, see Kerr, *Teaching Competence and Teacher Education in the United States*, 84 TEACHERS C. REC. 525, 528-29 (Spring 1983); Schlechty & Vance, *Do Academically Able Teachers Leave Education? The North Carolina Case*, PHI DELTA KAPPAN, Oct. 1981, at 106. For evidence on the correlation between attrition in the teaching force and low salaries, see Chapman & Hurtheson, *Attrition from Teaching Careers: A Discriminant Analysis*, 19 AM. EDUC. RES. J. 93, 102-04 (1982).

99. *See* Guthrie, *Emerging Politics of Educational Policy*, 3 EDUC. EVALUATION AND POLICY ANALYSIS 75 (1981); Summers, *supra* note 57, at 1169.

100. *See* Guthrie, *supra* note 99, at 76; *accord* Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891.

101. *See* Yudof, *supra* note 100; *accord* SCHOOLS IN CONFLICT, *supra* note 18, at 250; Kirst & Garms, *The Political Environment of School Finance Policy in the 1980s*, in SCHOOL FINANCE POLICIES AND PRACTICES: THE 1980S: A DECADE OF CONFLICT 47, 48-49 (J. Guthrie ed. 1980).

102. The population of non-consumers consists of those without school age children—senior citizens, for example—and those with children in private schools. It is generally agreed that the population of non-consumers will continue to increase during the coming years, and that the population of consumers will increasingly consist of those low-income parents with a history of non-involvement (or ineffective involvement) in the political process. *See* authorities cited *supra* note 101.

erable disadvantage in the political process.[103] Studies of school bond referenda confirm that the non-consumers' vote is different from that of the parents of school-aged children. Thus, those who are elderly, those who have no school-aged children, and those who have children in parochial schools are consistently less supportive of public school spending increases.[104]

Therefore, the narrow base of political support for public education suggests that teachers' unions have monopoly power over only a fraction of the public, and that non-consuming taxpayers hold at least a numerical edge in the political process. Another aspect of public school funding which exacerbates the problem is the sheer impact and visibility of the school budget. In their analysis of union political leverage, Professors Wellington and Winter minimized the likelihood of a negative public reaction to a costly wage settlement because "the delayed effect of a particular settlement on an already incomprehensible municipal budget or tax structure is rarely a matter of high visibility. . . ."[105] While this might aptly describe the effect of wage settlements for certain public employee groups, it does not seem characteristic of those for public school teachers.

As previously mentioned, the public school budget is the largest expense of local government, and the principal component of that budget is the instructional salary account.[106] The school budget, furthermore, draws heavily on the local property tax, which is always a "sensitive political issue for every homeowner."[107] Perhaps more important, fiscally conservative forces in most states have legislated a variety of public referenda requirements for school bonds

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103. Professor Summers explains this point as follows:

> The advantage enjoyed by employees in a single purpose district may be more than offset by the untempered opposition of those taxpayers who find little actual or psychic value for themselves in school expenditures and who therefore count the entire district tax as a loss. If this group is politically dominant, then budget constraints will press parents to oppose higher salaries as an alternative to reducing the number of teachers or failing to replace old equipment.

Summers, *supra* note 57, at 1169-70; *accord* Bernstein, *supra* note 53, at 464-65. Notwithstanding Professor Summer's insight on the unique problems of the school district, his impression was that consumers and non-consumers (or users and non-users as he termed them) had relatively equal political strength. *See* Summers, *supra* note 57, at 1170. On this point, obviously, we disagree with Professor Summers.

104. *See* H. HAMILTON & S. COHEN, POLICY MAKING BY PLEBISCITE: SCHOOL REFERENDA 181-83 (1974): "The age, parental status, and religious preference of voters are of extraordinary significance for school referenda." *Id.* at 183.

105. *Structuring Collective Bargaining*, *supra* note 40, at 808.

106. *See supra* notes 64-65 and accompanying text.

107. Summers, *supra* note 57, at 1171. *See supra* note 65; *see also infra* note 108.

and school taxing.[108] These requirements insure that school budgetary decisions are scrutinized with some regularity by the public. The effect of these referenda can be dramatic, as is evidenced by a drop in school bond approval rates from eighty percent to under fifty percent between the years 1962 and 1974.[109]

The political vulnerability of public education underscores the schools' continual need to retain the support of public opinion. Commitment to this most costly local service depends on the community's perception that the intangible and indirect benefits of public education are in the greater public good.[110] At the turn of the century, school administrators achieved a significant victory when they "depoliticized" public education by removing it from the control of general municipal government.[111] Until recent decades, the schools were more or less successful in eliminating partisanship, and controversiality, from the processes of educational policymaking. Insularity from the political world assured a steady, if not spectacular, level of public support.[112]

This insularity has been a principal casualty of contemporary social struggles. In recent decades, the schools have been ordered,

108. *See* H. HAMILTON & S. COHEN, *supra* note 104, at 2-8. Professors Hamilton and Cohen surveyed the variety and frequency of bond, tax levy, and school budget elections in the states. School bond elections are required in all but three states, and tax levy or school budget elections occur in 27 states. *Id.* at 3. The authors attribute these school referenda mechanisms to "conservative political forces" whose "purpose was to inhibit bond issues by requiring referenda and to clamp a tight lid on tax rates by state law." *Id.* at 3, 5.

Most of the referenda measures discussed above have been in existence throughout this century. *Id.* at 3. In the 1970's, however, new spending limitation movements spread throughout the states and succeeded in an estimated 25 states. *See* Guthrie, *United States School Finance Policy 1955-1980*, in SCHOOL FINANCE POLICIES AND PRACTICES 3, 26-27 (J. Guthrie ed. 1980). The property tax was a principal object of the spending-limitation movement, and resulted in such dramatic taxation coups as California's "Proposition 13" and Massachusetts "Proposition 2 1/2". *Id.* at 27. *See also* SCHOOLS IN CONFLICT, *supra* note 18, at 245-47.

109. *See* SCHOOLS IN CONFLICT, *supra* note 18, at 166-68. The referenda approval rate has increased, however, since the mid-1970's. *See* N.Y. Times, Feb. 28, 1984, at C6, col. 1. Wirt and Kirst observe that the approval rate for bond referenda may overstate the success rate of school finance, since it does not account for approval rates of local tax levies and school budgets; moreover, the success rate for referenda does not indicate whether school authorities have responded to fiscal conditions by seeking fewer, and smaller, funding increases. SCHOOLS IN CONFLICT, *supra* note 18, at 166.

110. Eliot, *supra* note 7, at 1042.

> [I]f we were required to give one general explanation of the behavior of professional educators, we might frame it in terms of a ceaseless search for funds. Here may well be the basic reason why educators react so emotionally to criticism: any adverse criticism may make it harder to raise money.

111. *See* H. TUCKER & L. ZEIGLER, PROFESSIONALS VERSUS THE PUBLIC: ATTITUDES, COMMUNICATION AND RESPONSE IN SCHOOL DISTRICTS 9 (1980); Boyd, *The Public, The Professionals, and Education Policy Making: Who Governs?*, 77 TEACHERS C. REC., 539, 543 (1976).

112. SCHOOLS IN CONFLICT, *supra* note 18, at 182.

literally, into the forefront of significant political causes, not least of which were attempts to end racial discrimination, to rectify economic inequalities, and to impose legal restraints on the exercise of governmental authority.[113] Much—probably too much—has been asked of the schools, and this expanded social mission has not only increased the competition for school monies, it has diminished community consensus about and commitment to public education.

The erosion of support for public education is also a by-product of increased demands for "accountability." By several measures, the steady increase in general school expenditures has not produced returns: the test performances both of students and teachers have declined.[114] The response of the public and politicians has often been to demand accountability legislation while opposing further increases in school taxes.[115]

Finally, the limited achievements of teacher bargaining must be interpreted in the context of a weak economy and a flourishing grassroots fiscal conservatism. Statewide referenda like Propositions "13" and "2 1/2" illustrated an almost singleminded commitment to fiscal containment policy.[116] Confronted with more palpable demands in the "essential" services—fire protection, sanitation and road maintenance—local government could better resist teachers' demands for higher salaries (where incremental increases had substantial budgetary impact but small promise of better services).

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113. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Goss v. Lopez, 419 U.S. 565 (1975) (due process); Brown v. Board of Education, 347 U.S. 483 (1954) (school integration); Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, *cert. denied*, 412 U.S. 907 (1971) (equal funding of education); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977). *See generally* D. RAVITCH, *supra* note 60, at 323-24:

> So customary was it to criticize the public schools . . . that it was easy to forget the ways in which the schools had been amazingly successful. Americans had long ago decided, without too much discussion of the matter, that education would be the best vehicle through which to change society. The attack against racial segregation, characteristically, was fought out in the schools, and the dismantling of the racial caste system began in the schools and spread to other areas of American life. More than any other institution in American society, the schools became the means through which the goal of equity was pursued.

114. *See* REPORT OF THE ADVISORY PANEL ON THE SCHOLASTIC APTITUDE TEST SCORE DECLINE, ON FURTHER EXAMINATION 6 (1977) [hereinafter cited as ON FURTHER EXAMINATION]; CONDITION OF EDUCATION, SUPRA note 94, at 110; *see also supra* note 98.

115. Public opinion surveys show that *opposition* to school tax increases has grown from 49% of those responding in 1969, to 60% of those responding in 1981. (This percentage declined to 52% after release of the reform reports in 1983). *See* Gallup, *The 15th Annual Gallup Poll of the Public's Attitudes Toward Public Schools*, PHI DELTA KAPPAN, Sept. 1983, at 33, 37. On the state legislatures' attempts to improve school efficiency through accountability laws, see D. RAVITCH, *supra* note 60, at 315-16 (1983). *See also* Haney & Madaus, *Making Sense of the Competency Testing Movement*, 48 HARV. EDUC. REV. 462 (1978).

116. *See supra* note 108.

Moreover, the organizational power of teachers remained highly diffused on the issue of salaries; unlike the more successful industrial unions, teachers' unions fought continual small battles at the local government level.[117] Thus, in salary negotiations teachers could seldom summon their quite considerable collective political strength, which had proved to be formidable in state and federal legislative battles.[118]

In summary, a detailed examination of the employment, fiscal and political aspects of public education reveals effective checks on the economic bargaining power of organized teachers.[119] Of course, some of these aspects may change in years to come. A mild teacher shortage should appear by the end of this decade,[120] and public misgivings about the wisdom of salary increases may dissipate in the light of national reform efforts.[121] But certain constraints on bargaining—perhaps the more important ones—could endure. Thus, state and local governments will continue to operate within limited budgets, with little prospect of significant federal aid for educa-

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117. One comentator discusses this point as follows:

> Teacher unions, for the most part, prefer to assert their influence at one central location rather than to negotiate with a large number of small districts. Unions gain strength from centralization and naturally oppose plans that allow districts to establish separate policies affecting teacher responsibilities, class size, and other working conditions. Finally, because major interest groups typically are organized on a city-wide basis, their ability to influence policy would diminish if decision-making power were less concentrated.

Project, *supra* note 16, at 1489. As a general matter, most unions prefer a centralized bargaining structure incorporating bargaining units that are coextensive with the product or labor market. *See* T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 84-123 (1980); Weber, *Stability and Change in the Structure of Collective Bargaining*, in CHALLENGES TO COLLECTIVE BARGAINING 13 (L. Ulman ed. 1967).

118. *See* McDonnell & Pascal, *Organized Teachers and Local Schools*, in GOVERNMENT IN THE CLASSROOM 33 (M. Williams ed. 1978) (teacher unions are among the most powerful lobbies at the state level); D. RAVITCH, *supra* note 60, at 315 (political influence of National Education Association in securing establishment of the U.S. Department of Education).

119. This conclusion is also supported by research into community school districts:

> [O]ur data suggest that the union-domination assertion is essentially wrong. Rather than creating unstoppable political power, we found labor relations problems to be associated with a growth in overall dissatisfaction with the public schools and consequent public toughness toward both unions and schools. The need for public support, the inability to substitute capital investment for labor, and the difficulty in linking investment costs to ultimate educational dividends has meant that public sector unions are quite vulnerable politically as a symbolic focus for dissatisfaction.

Mitchell, Kerchner, Erck & Pryor, *The Impact of Collective Bargaining on School Management and Policy*, AM. J. OF EDUC. 147, 153 (1980-81).

120. *See* CONDITION OF EDUCATION, *supra* note 64, at 4; N.Y. Times, June 24, 1984, at 24E, col. 1.

121. *See supra* note 115.

tion.[122] In addition, the population of public education's consumers may suffer further decline, particularly if efforts to privatize education prosper.[123] It is even possible that the current interest in educational quality could worsen the political climate for school support: diagnosis of the malady may lead to despair and abandonment if current reform efforts are no more productive than past ones.

In this uncertain political and economic environment, educators might wish to reappraise the current legal regime of collective bargaining with its emphasis on fractionated decisionmaking. Past experience suggests that greater centralization of educational policy may better insulate the schools from the dilemmas of local control. Accordingly, educators' best labor strategy may lie in centralized collective bargaining, or in the intermediate step to centralization—binding arbitration. We shall examine such a strategy in Part IV of this Article.

B. The Effect of Collective Bargaining On School Governance and Educational Policymaking

In devising public employee bargaining statutes, the states have relied extensively on private sector precedent. One prominent example of this is the frequent adoption of private sector definitions of the scope of the duty to bargain. These definitions typically extend the bargaining duty to all "conditions of employment," subject to the limitation that management need not negotiate matters of "policy" that are central to the direction of the business enterprise.[124] In the field of public employment, these policymaking prerogatives are preserved less for the sake of entrepreneurial freedom than for the maintenance of political control over the provision of governmental services.

Labor critics have continually challenged the equation of the bargaining duty in the public and private sectors.[125] Because of

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122. *See generally* Clark & Amiot, *The Disassembling of the Federal Education Role*, 15 EDUC. & URBAN SOC'Y 367 (1983); Clark, Astuto & Rooney, *The Changing Structure of Federal Education Policy in the 1980's*, PHI DELTA KAPPAN, Nov. 1983, at 188; Dahl, *Public Sector Bargaining Issues in the 1980's: A Management View*, 33 N.Y.U. CONF. ON LABOR 287, 290-92 (1980); Schuster, *Out of the Frying Pan: The Politics of Education in a New Era*, PHI DELTA KAPPAN, May 1982, at 583.

123. *See supra* text accompanying notes 102-04.

124. *See, e.g.*, Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 909 (1973); Sackman, *Defining the Scope of Bargaining in Public Employment*, 19 B.C.L. REV. 155, 173-78 (1977); *see generally* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342 (1958).

125. *See, e.g.*, Summers, *supra* note 57, at 1192-97; *Structuring Collective Bargaining*, *supra* note 40, at 865-66.

structural differences in the operation of the two sectors, it is alleged, public sector bargaining may result in union domination of the employment enterprise to a degree unknown in private industry. Private sector employers, critics contend, rarely bargain over the nature of the business enterprise or the product produced.[126] And in those areas where bargaining does occur, management closely scrutinizes the potential effect of contract proposals by the essential criterion of entrepreneurs—business costs.[127]

By contrast, public sector bargaining is said to generate a more expansive bargaining scope while simultaneously reducing the incentives of public employers to resist union demands. Public employers, it is noted, frequently provide labor-intensive services (like education) which are fundamentally affected by labor policy.[128] Moreover, public employee bargaining often extends to a range of issues that have no direct and ascertainable economic cost. In such situations, the most powerful interest group aligned against employee unions—local taxpayers—will provide little coordinated resistance to union demands.[129]

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126. *Structuring Collective Bargaining*, *supra* note 40, at 858.

127. Describing the private sector, Wellington and Winter observe:

> From the employer's point of view, most encroachments on what has been its unilateral power to manage are measured on a single scale: their effect on costs. . . [T]he pressure on the employer, as an enterprise, is to resist any increase in cost and, ultimately, it is hurt no more or less because that cost is extracted through inefficient work rules or high wages. Management resistance to union demands, therefore, will tend to force the union to make trade-offs based on those costs.

Id. at 857.

128. *Id.* at 859.

129. As noted by Wellington and Winter:

> But, where a demand is viewed as involving essentially political costs, trade-offs are more difficult. . . Interest groups will exert pressure against union demands only when they are directly affected. Otherwise, they will join that large constituency which wants to avoid labor trouble. Trade-offs can occur only when several demands are resisted by roughly the same groups. Thus, budgetary demands can be traded off when they are opposed by taxpayers. But when the identity of the resisting group changes with each demand, political leaders may find it expedient to strike a balance on each issue individually, rather than as a part of a total package, by measuring the political power of each interest group involved against the political power of the constituency pressing for labor peace. Expansion of the subjects of bargaining in the public sector, therefore, may increase the total quantum of union power in the political process.

Id. at 858-59; *accord* Summers, *supra* note 57, at 1182. *But see* Edwards, *supra* note 124, at 932-33 (rejecting any distinction in the bargaining scope for private and public sector employees).

Note also that Professors Wellington and Winter did *not* premise their objection to a broad scope of bargaining on the availability of the strike right. *See, e.g.*, *Structuring Collective Bargaining*, *supra* note 40, at 860.

Thus, under the prevailing theory of public sector bargaining, employee unions are believed to be in a unique position to influence the management and direction of local public services. This concern over undue union influence in local government has special vigor in public education, which is characterized by a continuing struggle between local school government and organized professionals. On one hand, the board of education symbolizes communitarian democracy in its purest form. Board members are neither professional politicians nor professional educators, and they bring to school government a distinctly lay perspective.[130] On the other hand, public school teachers (most of whom are women)[131] suffer from a long history of unilateral school government (run largely by men)[132] that has excluded them from a participatory role in educational policymaking.[133] Thus, since the advent of collective bargaining, union officials have declared their intention to improve teachers' professional status through greater autonomy from school management and greater participation in school policymaking.[134]

Today, there is growing suspicion that organized teachers have prevailed in their struggle with local government and that the schools have suffered as a consequence. President Reagan echoed considerable popular sentiment when, in response to the 1983 reports on educational reform, he identified teacher unionism as a major impediment to reform.[135] Union critics suspect that the simulta-

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130. *See infra* text accompanying notes 328-35.

131. The percentage of female teachers was 67% in 1981, a minor change from 1961 when the percentage was 69%. STATUS, *supra* note 27, at 19.

132. The percentage of teachers with male principals was 88% in 1981, and 89% in 1971. *See id.* at 16. The percentage of women on boards of education, moreover, is reported as "a fraction." SCHOOLS IN CONFLICT, *supra* note 18, at 129.

133. *See* Wollett, *supra* note 9, at 1019-20:

> [T]eachers do not have authority within local school systems commensurate with their responsibilities. They frequently lack a meaningful voice in determining the content of the courses they are teaching or in selecting appropriate textbooks. Often they are not free to formulate their own lesson plans or to modify them if they do not produce desirable classroom responses. Seldom, if ever, do they share a role in overall curricular planning. . . . [T]eachers typically have no voice in recruiting new colleagues or in promotion and tenure decisions.

Accord McDonnell & Pascal, *supra* note 118, at 44.

134. *See* Daly, *Professional Negotiations*, 54 NAT. EDUC. ASS'N J. 31 (May 1965) (NEA position); Wildman, *Collective Action by Public School Teachers*, 18 IND. & LAB. REL. REV. 3, 10 (Oct. 1964) (AFT position). A statement by the president of the AFT in 1962 illustrates the position of both unions: "nothing concerning the operation of the schools, including curriculum, content, and methodology, is immune to the joint decision-making and 'codeterminism' of collective bargaining." *Id. See also Structuring Collective Bargaining, supra* note 40, at 859 (concerning the professional ambitions of teachers in bargaining).

135. President Reagan's particular political quarrel has been with the National Education Association, which among other things, has opposed the administration's proposals for

neous proliferation of teacher collective bargaining and the decline in achievement scores of students and teachers is more than a coincidence.[136] While the precise link between collective bargaining and school performance remains uncertain, critics suggest that bargaining has significantly reduced both administrative control over the teaching staff—the "accountability" problem—and the productivity of teachers.[137]

If allegations of an unhealthy union influence in public education have substance, then meaningful labor reform may be a prerequisite to school reform. As we shall contend in the following discussion, however, there is mounting evidence to suggest that the union impact on the schools both has been overstated and misinterpreted. Systematic investigation of unionized school districts reveals that teachers' unions may be relatively less successful in negotiating noneconomic items than private sector unions, thus undermining the view that organized teachers have excessive bargaining leverage over local school government in this area. Furthermore, there is increasing reason to think that the formal bargaining achievements of the unions have not initiated significant, systemwide change in the operation of the schools. The paradox of this finding is that the yet-unfulfilled bargaining agenda of the unions may sometimes be in the best interests of public education.

1. A PROFILE OF COLLECTIVE BARGAINING AGREEMENTS

Any discussion of teacher bargaining agreements must take account of the transformation in bargaining practices that has occurred in recent years. At the outset of teacher collective bargaining, the unions held a decisive organizational advantage through their network of federal, state and local associations.[138] This network could provide both information and negotiating expertise, and could coordinate bargaining strategies among the local unions. Boards of education, by contrast, were independent units of local government

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merit pay. *See, e.g.*, N.Y. Times, July 6, 1983, at A12, col. 1. *See also* R. EBERTS & J. STONE, UNIONS AND PUBLIC SCHOOLS 1 (1984) (public fear of teachers' unions).

136. *See supra* notes 98, 114. For example, in 1962, when teacher bargaining was relatively rare, the mean score for students taking the Scholastic Aptitude Test (SAT) was 478 on the verbal segment and 502 on the mathematics segment. In 1981, the corresponding figures were 424 and 466. *See* ON FURTHER EXAMINATION, *supra* note 114, at 6.

137. *See, e.g.*, M. LIEBERMAN, PUBLIC-SECTOR BARGAINING 160-62 (1980); Clark, *Commentary*, in FACULTY AND TEACHER BARGAINING 96-101 (G. Angell ed. 1981); Doherty, *Does Teacher Bargaining Affect Student Achievement*, in FACULTY AND TEACHER BARGAINING 68-72 (G. Angell ed. 1981).

138. *See* Doherty, *supra* note 21, at 508-13.

whose affiliations were weak and whose labor expertise was minimal.[139] Thus, the early advantage was held by organized teachers, and their initial bargaining success was considerable.[140]

Contemporary bargaining efforts by school boards are characterized by far more expertise, and far less willingness to concede, than in the past. School boards increasingly retain professional labor consultants—usually attorneys—to conduct negotiations.[141] With the assistance of such professionals, management has been more inclined to bargain hard, and to assert claims of management rights.[142] Indeed, school boards now frequently refuse to bargain over issues whose negotiability in the private sector would provoke little challenge.[143]

A profile of teacher bargaining agreements in unionized school districts provides evidence that school government has been far more successful in resisting union demands than earlier predictions would suggest. There is relatively little contract language governing the more formative issues of educational policymaking—issues which one might expect to be prominent in the bargaining agenda of

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139. *Id.*

140. A review of teacher collective bargaining agreements in 1971 reveals *substantial* gains by the unions, notwithstanding the relative infancy of collective bargaining and the small minority of school districts with collective bargaining agreements. This evidence is summarized in Hazard, *Collective Bargaining and School Governance*, 5 Sw. U. L. REV. 83, 92-94 (1973).

141. *See, e.g.*, L. McDONNELL & A. PASCAL, *supra* note 47, at 41, 48, 51 (1979). Our surveys of Connecticut school districts indicate that approximately 80% use attorneys both in the negotiation and implementation of contracts, and that more than 90% of the unions use professional representatives (provided by the state union organization) for such purposes.

142. *See, e.g.*, *id.* at 41.

143. For example, it is now well-established in the private sector that the scope of bargaining extends to union organizational rights, matters relating to salaries and fringe benefits, employee discipline, employee discharge, work loads and work duties, work hours and scheduling, and time off. *See* J. WEITZMAN, THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT 7-39 (1975). Dispute over the negotiability of such matters in public education, by contrast, arises with surprising frequency. *See* Disapia, *What's Negotiable in Public Education?*, 1 GOV'T UNION REV. 23, 32-51 (1980) (surveying judicial and administrative decisions). *See, e.g.*, San Mateo City School District v. Public Employment Rel. Bd., 179 Cal. Rptr. 647 (Cal. Ct. App. 1981) (union rights, fringe benefits, preparation time); Fort Dodge Community School District v. Public Employee Rel. Bd., 319 N.W.2d 181 (Iowa 1982); Woodbine Community School District v. Public Employment Rel. Bd., 316 N.W.2d 862 (Iowa 1981) (compensation criteria); Chee-Craw Teachers Ass'n v. Unified School District, 225 Kan. 561, 593 P.2d 406 (1979) (discipline, sick-leave pay, work load and work duties, work day); NEA-Topeka v. United School District, 225 Kan. 445, 592 P.2d 93 (1979) (union rights, staff reduction); Board of Educ. v. Township of Ocean Teachers' Ass'n, 165 N.J. Super. 427, 398 A.2d 579 (1979) (work load, work day); Fargo Educ. Ass'n v. Fargo Public School District No. 1, 291 N.W.2d 267 (N.D. 1980) (layoffs, work schedule); Stroudsburg Area Bd. of Educ. v. Pennsylvania Lab. Rel. Bd., 395 A.2d 622 (Pa. Commonwealth Ct. 1978) (discipline); Blackhawk Teachers' Federation v. Wisconsin Employee Rel. Comm'n, 109 Wis. 2d 415, 326 N.W.2d 247 (Ct. App. 1982) (work load).

a professional union.[144] It is uncommon to find, for example, contract provisions that determine such matters as the content of the school curriculum, the methods of classroom instruction, the choice of textbooks and teaching materials, the policies for student grading and student discipline, the standards for the hiring of teachers and administrators, and the allocation of the non-salary portions of the school budget.[145] It is doubtlessly true that unions in some school districts have frequently proposed, and occasionally won, contract language governing these items. It is also likely that an appreciable degree of informal consultation occurs between school management and teachers on some of these issues. But the point is that most of

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144. The following prediction is illustrative of early expectations concerning the emergence of professional issues in collective bargaining: "We can expect . . . that increasingly teachers will be involved in deciding the content of courses they teach, the textbooks they use, all of the learning activities within the classroom, overall curricular planning, recruiting of new colleagues, and promotion and tenure decisions." Kleingartner, *Collective Bargaining between Salaried Professionals and Public Sector Management*, PUB. ADMIN. REV. 165, 171 (Mar./Apr. 1973); *see also* McDonnell & Pascal, *supra* note 118.

145. It is difficult to obtain exact data on the prevalence of policy items since most of them seldom appear in systematic contract studies. Our study of teacher collective bargaining agreements in Connecticut reveals the following percentages of policy items:

a) Teacher participation in curriculum or instructional policy committee—35%;
b) Teacher participation in textbook selection—20%;
c) Provision for use of teacher aides—16%;
d) Student discipline procedure—6%;
e) Teacher participation in school budgeting decisions—1%;
f) Teacher participation in hiring decisions—2%; and
g) Provision for student grading or promotion—4%.

Similar results are reported in the national contract study, L. MCDONNELL & A. PASCAL, *supra* note 47, at 12 (31% of contracts authorize teacher participation in curriculum or instructional policy making, 29% of contracts contain provision for teacher aides, no contracts contain provision for student grading or promotion).

Such matters as student discipline procedures, budgetary control, and curriculum policy are among the examples cited by Professors Wellington and Winter and Professor Summers as unsuitable subjects for collective bargaining. *See Structuring Collective Bargaining*, *supra* note 40, at 852-55; Summers, *supra* note 57, at 1181-82. Wellington and Winter also referred to class size as an unsuitable subject for bargaining, though Summers believed that the costs trade-off in class size reduction would provide school employers sufficient incentive to bargain vigorously. *Compare Structuring Collective Bargaining*, *supra* note 40, at 853-54 *with* Summers, *supra* note 57, at 1182. For a discussion of the uncertain consequences of class size provisions, see *infra* text accompanying notes 190-94.

Professors Wellington, Winter and Summers agreed that teacher *participation* in educational policy making was desirable, but they objected to the determination of certain policies through collective bargaining. *See Structuring Collective Bargaining*, *supra* note 40, at 859; Summers, *supra* note 55, at 1195. As the evidence summarized above indicates, teacher participation in educational policy making appears, in fact, to occur outside the bargaining process. Moreover, the school boards' committment to a participatory role for teachers is a minor concession: in *none* of the contracts in our Connecticut sample, and in but *eight* percent of contracts from a Michigan sample, is the school board required to act on recommendations of a curriculum committee. *See* MICHIGAN EDUC. ASS'N, SUMMARY OF SELECTED CONTRACT PROVISIONS 1979-80 (1982).

the larger issues of school governance continue to be resolved outside the collective bargaining process.[146]

With minor exceptions, the composition of teacher contracts is surprisingly similar to that of private sector contracts. To illustrate, Table 4 identifies several of the prominent features[147] found in: 1) a national sample of private sector agreements; 2) a national sample

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146. There is evidence to suggest that the mere existence of a collective bargaining relationship often has little, if any, effect on teacher participation in school governance. Eberts, for example, found that collective bargaining produced no statistically significant increase in teacher participation in such matters as student assignment, teacher assignment or curriculum planning. *See* Eberts, *Union Effects on Teacher Productivity*, 37 INDUS. & LAB. REL. REV. 346, 355 (1984). Similarly, in related research Eberts and Stone found that teacher unionization had *no* significant effect on a teacher's opportunity to choose his or her teaching assignment. *See* R. EBERTS & J. STONE, *supra* note 135, at 112.

One field researcher, who observed a sample of school districts over a 10 year period, reports that there has been increased teacher participation in policy-making but that such participation has not occurred through collective bargaining:

> There has been considerable speculation that collective bargaining can and will lead to the extension of teacher rights to the control of some or all matters of educational policy. The original study [*see* C. PERRY & W. WILDMAN, THE EVIDENCE FROM THE SCHOOLS (1970)] found little evidence of such an impact, despite the existence of contract clauses covering such policy issues as class size, teacher transfers, school integration, student discipline, and pupil grading and promotion. The more recent experience in the nine systems does not provide evidence to contradict this conclusion, despite the addition in some contracts of clauses dealing with academic freedom, 'quality integrated education,' and teacher accountability to the historic list of what was and remains a sparse population of substantive 'policy' provisions.

Perry, *supra* note 41, at 15.

147. The contract profiles set forth do not exhaust the composition of bargaining agreements. Industrial agreements will contain, for example, a variety of procedural provisions regulating the parties' contractual relationship, provisions governing grounds for employee discharge, provisions setting forth holidays, vacations and other prerequisites of employment, restrictions on the right to strike or lockout, and regulations of safety and working conditions. *See generally* BNA, BASIC PATTERNS IN UNION CONTRACTS (9th ed. 1979) [hereinafter cited as BASIC PATTERNS]. Teacher contracts may contain similar provisions, although several matters—like strike prohibitions, discharge criteria and pension rights—may be covered by state law as well as contract. For a general discussion of the typical contract profile in school districts, see A. CRESSWELL & M. MURPHY, *supra* note 25, at 293-340.

The entries on Table 4 are taken from the following sources: BASIC PATTERNS, *supra* (Private industry-1979); BNA, BASIC PATTERNS IN UNION CONTRACTS (1975) (Private industry-1975); L. MCDONNELL & A. PASCAL, *supra* note 47, at 10, 12 (Teachers-national 1975); Forbes, *Contract Language and Management Rights*, in COLLECTIVE BARGAINING: PROBLEMS AND SOLUTIONS 18-25 (P. Gonder ed. 1981) (Teachers-national 1980); MICHIGAN EDUC. ASS'N, *Summary of Selected Contract Provisions 1974-75*; MICHIGAN EDUC. ASS'N, *supra* note 145; New York State United Teachers, *1978-79 Teacher Contract Analysis*; New York State United Teachers, *1975-76 Teacher Contract Analysis*; M. Samper, School Board and Teacher Organization Collective Bargaining Agreements (1975) (unpublished manuscript) (Teachers-Connecticut 1975). Data for certain entries was obtained through interviews with the report sources. Data for the Connecticut teacher contracts in 1979 was collected by the authors through review of files in the Connecticut State Department of Education.

of teacher agreements; and 3) a cross-section of teacher agreements from states with intensive collective bargaining.[148]

As the comparison in Table 4 indicates, the conventions of industrial bargaining and teacher bargaining are substantially similar. Like private sector unions, teachers' unions seek to negotiate the levels of their compensation and fringe benefits, the amount of employment leave, a grievance procedure that employs disinterested third-parties, the length of the work schedule, a system of seniority rights governing decisions to transfer or discharge employees, and some form of union security.[149] The principal distinctions between teacher contracts and industrial contracts concern matters peculiar to education—classroom evaluation procedures,[150] class size limitations and restrictions of the scheduling of classes. More will be said about these provisions in subsequent discussion.[151] But it is noteworthy that several of the more controversial aspects of teacher bargaining—restrictions on the length of the work day, and seniority privileges in personnel decisions—occur with far less frequency in teacher contracts than in private sector agreements.

There is little evidence, then, that teachers' unions generally have greater bargaining leverage than unionized employees in the private sector; nor is there any indication that teachers' unions have dominated the management of the public schools. Indeed, measured either by the success of unionized workers in the private sector, or by teachers' own bargaining agenda, collective bargaining has been a minor disappointment. Such a finding does not, however, meet the criticism that the conventions of private sector collective bargaining may have special impact when adopted in public education. It does not, in particular, answer the charges that: 1) seniority provisions have eliminated "accountability" measures from public school administration; or 2) that contractual work restrictions have reduced the productivity of public school teachers.[152] It is to an analysis of these contentions that we now turn.

148. *See generally* Wynn, *supra* note 75; *see also* Table 6, *infra* following note 262.

149. "Union security" refers to agency fee provisions which require all teachers to pay union dues regardless of whether they belong to a union. *See* BLACK'S LAW DICTIONARY 1374 (5th ed. 1979).

150. "Classroom evaluation procedures" deal with the scope and conditions under which administrators conduct classroom visitation and evaluation: for example, contracts may limit the number of visitations or may give teachers the right to review and contest evaluation reports.

151. *See infra* notes 179-201, 268-90 and accompanying text.

152. *See* authorities cited *supra* note 137.

TABLE 4
Major Substantive Provisions of Collective Bargaining Agreements

Provision	Private Industry		Teachers National		Teachers Conn.		Teachers N.Y.		Teachers Mich.	
	1976	1979	1975	1980	1975	1979	1975	1979	1975	1979
Salaries & Insurance Benefits	100%	100%	—	—	96%	100%	99%	100%	—	100%
Paid Leave	93	91	—	—	88	100	100	100	—	100
Grievance Arbitration	96	96	83%	70%	61	69	83	83	—	85
Work Day Specified	82	82	58	—	47	50	—	63	—	—
Work Year Specified	96	92	—	40**	71	66	41	46	—	—
Transfers by Seniority (Voluntary)	48	44	3	—	—	13	—	—	—	22
Promotions by Seniority	69	67	32	—	44	23	—	—	—	—
Layoffs by Seniority	85	83	3	56**	—	54	18	15	78%	80**
Layoff Procedures	90	88	37	56	—	54	35	39	81	—
Union Security	79	74	—	—	—	N/A*	3	14	68	85
Management Rights	99	99	—	62	66	69	—	—	—	—
Classroom Evaluation	N/A	N/A	65	60	—	59	81	86	—	86
Class Size Limits	N/A	N/A	34	15	56	47	55	54	72	50
Class Load Limits	N/A	N/A	—	—	36	38	18	19	—	—
Minimum Preparation Time	N/A	N/A	—	—	—	71	66	69	62	87

* Union security provisions were illegal at the time of this contract sample (N/A = not applicable).
** Approximate

2. THE PRINCIPLE OF SENIORITY IN SCHOOL ADMINISTRATION

The principle of seniority typically appears in teacher contracts in one of three forms. First, seniority is usually one of the two primary criteria for determining a teacher's compensation, the other is academic attainment.[153] Second, seniority is often an influential, and sometimes a determinative factor, in establishing the order of reductions when the teaching staff must be decreased.[154] Finally, seniority is sometimes a criterion for determining the order in which teachers are to be transferred within a school district.[155] In all three forms, the seniority principle provides a fixed, objective standard by which personnel decisions can be made, but at the same time it reduces the prerogative of school administrators to act in accordance with their best estimate of a teacher's worth and the school system's needs.

The use of a teacher's seniority in determining her compensation is now accepted in the great majority of school districts.[156] This criterion is basic to the "single salary schedule" under which a teacher receives a yearly salary increase corresponding to her years of service and degree status. The only means of progressing in such a system, other than through accumulated service, is to attain a higher academic degree or, better yet, to advance to an administrative position. Such a system stands squarely opposed to now-popular proposals for "merit" pay, which would enable school administrators to reward financially those who are evaluated as superior teachers.[157] By adopting merit-based compensation, it is argued,

153. Compensation in most school systems is determined by the "single salary schedule", as discussed in the text. In essence, a teacher is placed in a salary category that is determined by her educational attainment, e.g., masters degree or doctorate. Within this degree category, the teacher progresses through a series of steps, usually one for each year of satisfactory service. If the teacher attains a higher degree status, she enters a new salary category which results in larger yearly increases at each step. For a discussion of the single salary schedule, and an illustration, see Doherty, *supra* note 21, at 502-04.

154. *See* Table 4, *supra* following note 152.

155. *See id.* Seniority may be used to govern both voluntary transfers (when a teacher requests assignment to a vacant position in the school system) and involuntary transfers, e.g., when shifting needs in a school necessitate that some teachers be reassigned to another position.

156. *See, e.g.*, EDUCATIONAL RESEARCH SERVICE, INC., MERIT PAY FOR TEACHERS 35 (1979) [hereinafter cited as MERIT PAY FOR TEACHERS] (survey showing merit pay schemes used in fewer than four percent of national school districts); S. Bacharach, D. Lipsky & J. Shedd, Teacher Compensation Systems and the Quality of Education 3 (1984) (unpublished manuscript).

157. *See generally* MERIT PAY FOR TEACHERS, *supra* note 156. Some form of merit pay has been advocated by a number of prestigious groups, including The National Commission on Excellence in Education and The Education Commission of the States, as well as educational leaders and politicians. *See* S. Bacharach, D. Lipsky & J. Shedd, *supra* note 156, at 1-3.

schools would introduce economic incentives like those present in the private sector, and which are effectively eliminated by the single salary schedule.[158]

Implementation of merit pay schemes promises to be the most contested aspect of contemporary educational reform.[159] Merit pay proposals have already galvanized the support of governmental officials and the resistance of teachers' unions. But the controversy should not obscure the essentially secondary role that collective bargaining has played in determining the structure of teacher compensation. The single salary schedule was introduced into American school systems long before the advent of collective bargaining. Prior to World War II, only twenty percent of the nation's school systems provided compensation bonuses to "superior" teachers.[160] And in 1959, when the first teacher bargaining law was enacted, merit pay plans existed in but six percent of the school districts surveyed in a national sample.[161] Thus, for the most part, collective bargaining agreements formalized a system of compensation that preceded teacher unionism.[162]

The single salary schedule appears to be sustained largely by institutional factors apart from the phenomenon of collective bargaining. Whatever its shortcomings, seniority-based compensation is a pay scheme that is highly acceptable to classroom teachers and is cheaply and easily administered.[163] Past attempts to introduce

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Among the alleged problems with the current "meritless" system are: 1) lack of economic incentive for prospective teachers; 2) lack of economic incentive for existing teachers of merit; and 3) lack of economic incentive for specialty teachers, e.g., math and science instructors, who have more lucrative career alternatives. *See id.* at 4-7.

158. Contrary to common belief, however, merit pay schemes are *not* widely used in private industry and appear to have greatest applicability in occupations involving sales or piecework production. *See* E. LAWLER, PAY AND ORGANIZATION DEVELOPMENT 97-98 (1981).

159. The Department of Education and its political progenitor, the NEA, have divided sharply over the issue of merit pay. For an article setting forth the Department of Education's position, see N.Y. Times, Dec. 7, 1983, at A9, col. 1. For an article setting forth the NEA's position, see N.Y. Times, July 3, 1984, at A11, col. 1. *See also* N.Y. Times, June 17, 1983, at A17, col's. 2-3 (general discussion of the merit pay debate).

160. In school year 1938-39, 20% of the nation's larger school districts reported that they provided a "superior service maximum"; experimentation in merit-related schemes declined sharply in the years that followed and, subject to minor fluctuations, declined to the present level of approximately four percent. *See* MERIT PAY FOR TEACHERS, *supra* note 156, at 26, 36. One should note that the four percent figure represents pay schemes that provide any form of merit reward—they do not necessarily use merit to determine staff-wide compensation.

161. *See id.* at 27.

162. *See, e.g.*, Doherty, *supra* note 137, at 70-71.

163. *See* S. Bacharach, D. Lipsky & J. Shedd, *supra* note 156, at 9, 24-26. It is also worth noting that the compensation criteria of the single salary schedule—experience and education—may have some relationship to teacher performance. Past research has usually

merit-based schemes, by contrast, have faltered.[164] Interestingly, the most frequently cited explanation for the discontinuance of past merit plans has been the incidence of administrative problems,[165] especially the difficulties encountered in developing fair and accurate evaluation processes. Another major reason for the abandonment of merit plans has been the antipathy of teachers and the breakdown in morale caused by introduction of the plans.[166] It is noteworthy that the phenomenon of collective bargaining has prompted the discontinuance of only eighteen percent of such plans, and that unions have expressly negotiated these plans away in but eight percent of the cases.[167] Furthermore, there appears to have been no less experimentation with merit plans in unionized states than in non-unionized ones.[168]

Therefore, it is important to identify what is, and is not, a product of collective bargaining in the schools, and to understand that the conventions of school administration may have a life independent of collective bargaining. An example of such a convention is the use of seniority to determine the order of staff reductions in the schools. While collective bargaining has no doubt played some role in consolidating the seniority principle in this context, a variety of objective factors independent of bargaining have played no less important roles.

One of the more unsettling dilemmas facing the schools in recent years has been the need to reduce the size of teaching staffs to

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found that a teacher's experience may improve performance, but evidence on the relationship of academic attainment to performance is mixed. *See id.* at 20. *See also* R. EBERTS & J. STONE, *supra* note 135, at 56-57.

164. Studies of attrition rates in merit pay schemes reveal the following percentage of programs discontinued: 81%, *see* NATIONAL EDUCATION ASSOCIATION, RESEARCH DIVISION, QUALITY OF SERVICE PROVISIONS IN SALARY SCHEDULES, 1958-59, 39-43 (1959); 66%, *see* D. McKinley, A Study of Merit Evaluation for Salary Purposes in the Public Schools of the United States (Ed. D. dissertation, Washington State University 1958) reported in MERIT PAY FOR TEACHERS, *supra* note 156, at 26-27; and 62%, *see id.* at 32, 35, 40 (this figure was derived independently by dividing the number of systems with either present *or* past merit plans by the number of plans currently in effect).

165. *See* MERIT PAY FOR TEACHERS, *supra* note 156.

166. *See id.* at 43. For a thoughtful argument on the institutional unsuitability of merit pay in public education, see Johnson, *Merit Pay for Teachers: A Poor Prescription for Reform*, 54 HARV. EDUC. REV. 175 (1984).

167. *See* MERIT PAY FOR TEACHERS, *supra* note 156, at 43.

168. For example, 14 of the 16 states having at least three districts with merit plans also authorize teacher collective bargaining, and have intensive collective bargaining experience. *Compare id.* at 36 *with supra* note 29 and Table 6, *infra* following note 262.

There is, unfortunately, no data available comparing the failure rates of merit pay schemes in unionized and non-unionized states.

accommodate declining school enrollments.[169] Like private sector unions, teachers' unions have responded to the necessity of layoffs by demanding that junior employees be released first. As the earlier review of teacher contracts illustrates, the teachers' unions have made considerable progress in negotiating seniority protections, even though their success rate is considerably below that of private sector unions.[170]

This progress has been made in the face of substantial opposition, it is true. Contract provisions for seniority-based staff reductions elicit hostilities not unlike those elicited by the single salary schedule. Critics of these provisions point out that they result in several adverse consequences for the schools—retention of an older and more high-salaried teaching staff, and elimination of junior teachers with sometimes superior teaching abilities.[171] Seniority provisions for teacher layoffs also appear to be opposed by public opinion, notwithstanding their prevalence in the unionized private sector.[172]

Factors independent of bargaining, however, have greatly enhanced the position of teachers' unions bargaining for the seniority principle. Because the need for teaching staff reductions did not arise until recent years, seniority-based practice lacks the extended history of the single salary schedule. The seniority principle in layoff decisions, nevertheless, has a strong foundation in institutional practice and labor relations norms. It has been a cornerstone of the American labor movement,[173] and is widely recognized even in the non-unionized private sector.[174] Furthermore, seniority has been

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169. Public school enrollments have declined by 10.7% between 1970-71 and 1980-81. *See* CONDITION OF EDUCATION, *supra* note 64, at 48. During this period the demand for additional teachers declined 20%. *Id.* at 85. In 1979, less than 1% of all employed teachers lost their positions. *Id.* at 86. As of 1983, however, 6% of all teachers surveyed reported that they had received notice of termination. NATIONAL EDUCATION ASSOCIATION, TEACHER OPINION POLL DEMOGRAPHIC HIGHLIGHTS (1983). Between 1979 and 1988, moreover, a 14% reduction in public secondary classroom staff is expected. *See* CONDITION OF EDUCATION, *supra* note 64, at 48.

170. *See* Table 4, *supra* following note 152.

171. *See, e.g.*, Randles & Moser, *Employers and Employees in Public Schools: A Tentative Model for Prediction*, 11 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 351, 360 (1982). *See generally* Jascourt, *The Role of Negotiations in the Equation "Declining School Enrollments = Layoffs": An Overview*, 7 J. LAW & EDUC. 239 (1978).

172. In a 1981 Gallup poll, 78% of the respondents stated that teachers should be laid off on the basis of performance rather than seniority. Gallup, *The 13th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 1981, at 33, 43.

173. *See generally* R. FREEMAN & J. MEDOFF, *supra* note 81, at 122-35.

174. Freeman & Medoff report, for example, that 68% of non-unionized firms agree that seniority is the most important factor in determining employee layoffs, compared to 84% of unionized firms. *Id.* at 124.

codified in the public employment laws of the majority of states. Most states, for example, have enacted "tenure" laws that expressly recognize the superior job entitlement of senior teachers.[175] Moreover, recent investigation of school district termination practices reveals that seniority is a significant determinant of the order of staff reductions regardless of the presence of a collective bargaining provision, though such a provision does increase the influence of the seniority factor.[176] In fact, a "striking" result of this research was the finding that teacher transfers—where there is no threat to job security—follow the hierarchy of school seniority, independently of the presence of a specific contractual requirement.[177]

Perceived weaknesses of the "merit" alternative to the seniority principle may also have contributed to the unions' success. Experience with "merit" staff reduction discloses several of the administrative and personnel problems that attend implementation of merit pay plans. Merit reductions, like merit pay, necessitate the adoption of carefully designed and implemented evaluation procedures. One investigator, based on intensive field research in studying school districts experimenting with merit staff reduction, found that the programs had disrupted the educational function of school principals, created distrust between school administration and the teaching staff, and significantly lowered the morale of the teaching staff.[178]

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175. Virtually every state has some form of legal tenure, most often prescribed by statute. These laws provide that, after a given probationary period (usually three years), teachers have a contractual right to continued employment except where "cause" for termination can be established. Many of these laws also provide that, when reductions in the teaching force are required, probationary teachers must be released before tenured ones. For general discussion of state tenure laws, see A. CRESSWELL & M. MURPHY, *supra* note 25, at 185-86; L. FISCHER, D. SCHIMMEL & C. KELLY, *supra* note 70, at 31-44; Doherty, *supra* note 21, at 525 n.53. Note also that only two states have considered alterations in their tenure laws as part of educational reform efforts, and these changes do not disturb the basic tenure principle. *See* THE NATION RESPONDS, *supra* note 3, at 88, 94.

176. In Ebert and Stone's study of teacher termination practice, regression analysis revealed that a teacher's years of experience had greatest effect on the likelihood of that teacher's retention during reductions in force. When the existence of a contractual seniority provision was entered into the equation, the provision was found to increase the likelihood of a junior teacher being dismissed. The size of that effect, however, as suggested by t-statistics (a measure of the *statistical significance* of variations in the mean values of a variable), was less than that of a teacher's experience acting alone. R. EBERTS & J. STONE, *supra* note 135, at 118-20. For an explanation on the use of t-statistics, see INTERNATIONAL ENCYCLOPEDIA OF STATISTICS 544-46 (W. Kruskal & J. Tanur eds. 1978).

177. R. EBERTS & J. STONE, *supra* note 135, at 116-18.

178. Johnson, *Performance-Based Staff Layoffs in the Public Schools: Implementation and Outcomes*, 50 HARV. EDUC. REV. 214, 216, 223-29 (1980). Johnson also found evidence that traditional school practice and institutional factors undermine attempts to implement merit staff reductions. One of the primary obstacles to introduction of merit layoffs was the need to formalize (and bureaucratize) procedures for evaluation at the local school level. Such formalization was found to interfere with principal-teacher collegiality, and to convert the

Though promising in theory, merit reduction proved nettlesome in practice.

Thus, the principle of seniority is a major institutional feature of public schools and draws life from a variety of social and administrative norms. There is little doubt that teacher collective bargaining has contributed to the entrenchment of the seniority principle, and that it will prove a major impediment to advocates of a less structured, performance-responsive system of personnel administration. The origins of the seniority principle, however, are not to be found in collective bargaining, and any attempt to root out the principle by manipulation of the bargaining process would prove ineffectual.

3. CONTRACTUAL REGULATION OF TEACHERS' WORK PRACTICES AND THE PROBLEM OF PRODUCTIVITY

The effort by teachers to bargain over the extent of their work responsibilities is perhaps as controversial as the prevalence of the seniority principle in public education. In recent years, many unions have negotiated express limitations on the length of the teachers' work day and work year, restrictions on the number and size of classes, and either restrictions on or additional compensation for non-instructional duties.[179] Such contractual stipulation of teacher responsibilities represents, at least in form, a major dilution of past administrative powers, which are plenary in the operation of public schools.[180]

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role of principal from that of educational leader to evaluator. *Id.* at 224-25. Similar reservations are expressed in Murnane, *Interpreting the Evidence on School Effectiveness*, 83 TEACHERS C. REC. 19, 29 (1981):

> There is very little systematic evidence concerning how either layoff policy [seniority- or merit-based reductions] has affected the quality of education provided to children. However, there is limited evidence, much of it anecdotal, that the latter policy has been less successful in some districts than was hoped, for several reasons. First, effective teachers may resign, not because they anticipate losing their positions, but rather because they find that the competitiveness bred by this system diminishes the enjoyment that they derive from their job. Second, the quality of education provided in schools in these districts may decline as teachers adjust their behavior to take into account the fact that they are being compared with their colleagues. This can take the form of reluctance to share teaching materials or to help a fellow teacher deal with a particularly difficult child. Third, over time, as teachers alter their behavior, principals may find that their evaluations of teachers no longer reflect performance as well as they once did. (The studies that found that principals' evaluations accurately reflect teacher performance were carried out in districts where this information was not used in layoff decisions; consequently, the evaluations did not evoke the behavioral responses just described.)

179. *See* Table 4, *supra* following note 152.

180. *See generally* Wollett, *supra* note 9.

The notion that employers should bind themselves to a declared schedule of work responsibilities and compensation is unexceptional in the private sector. In the field of public education, however, such a notion not only alters the traditional prerogatives of school administrators,[181] it arouses suspicions that unionized teachers are negotiating reductions in their own productivity. Whereas teachers are perceived once to have labored the open-ended work day of the true professional, they are now perceived to have negotiated a lighter and shorter work load—and worked to that reduced commitment.[182]

The reports of a reduced work effort among unionized teachers are usually based on informal observations of the schools,[183] and are in this respect reminiscent of perennial complaints about union featherbedding and unproductivity.[184] The latter complaint, interestingly, has been challenged in recent years, as studies of private and public sector unionism have usually found no reduction in productivity from unionization, and in several instances have discovered improvements in worker productivity.[185]

The same finding is suggested by recent systematic study of the work practices of teachers in unionized school districts. In the heavily-unionized school districts of the northeast and midwest, teachers' work practices are seldom significantly different from those of teachers in the sparsely-unionized districts of the southeast. Teachers from the unionized regions, as a group, devote as much time to compensated and uncompensated school activities and carry pupil teaching loads similar to those of non-unionized teachers.[186] Fur-

181. *See supra* note 20.

182. *See, e.g.*, M. LIEBERMAN, *supra* note 137, at 160-62; Clark, *supra* note 137, at 86-87; Doherty, *supra* note 137, at 68-69; Lieberman, *Educational Reform and Teacher Bargaining*, 4 GOV'T UNION REV., 59, 60 (Summer 1983).

Lieberman, for example, makes the following claims without reference to any supporting evidence: "[i]t is virtually certain . . . that the overall impact of public sector bargaining on productivity has been negative. The extent obviously varies, but it seems disingenuous to contend that the issue is really in doubt." M. LIEBERMAN, *supra* note 137, at 160.

183. *See* authorities cited *supra* note 137.

184. *See generally* R. FREEMAN & J. MEDOFF, *supra* note 81, at 162-80.

185. Professors Freeman and Medoff summarize the existing studies on the productivity effect of private sector unions and conclude: 1) that most studies find unionized establishments are more productive than their non-unionized counterparts; and 2) that most studies find no significant union effect on the rate of growth in productivity. *Id.* at 165-71.

186. The evidence on school practices is contained in STATUS, *supra* note 27. *Status* categorizes as "Northeastern" states the following: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania and Vermont. *Id.* at 13. All these states are characterized by "intensive" collective bargaining, i.e., more than two-thirds of state teachers are covered by collective bargaining agreements. *See* Wynn, *supra* note 75, at 238. *Status* characterizes as "Middle" states the

thermore, little variation exists in the average length of students' instructional time in the nation's school districts, perhaps reflecting the strength and homogeneity of community preferences as to the school schedule.[187] Indeed, over a twenty year period the nation's schools have maintained a surprisingly constant work routine.[188]

Recent quantitative analysis of the work practices of a national sample of teachers also indicates that unionization does not diminish teachers' productivity. Such analysis discloses, for example, that no significant difference exists in the length of the school day in un-

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following: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. STATUS, *supra* note 27, at 13. All these states, with the exception of Missouri, are characterized by intensive collective bargaining. *See* Wynn, *supra* note 75, at 238. *Status* categorizes as "Southeastern" states the following: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia. STATUS, *supra* note 27, at 13. Ten of these 12 states are characterized by "unintensive" bargaining, i.e., one-third or fewer of the states' teachers are covered by collective bargaining agreements. *See* Wynn, *supra* note 75, at 238.

The following chart lists mean averages, together with standard deviations for a sample of school district practices:

Practice	National Mean	Northeast Mean	Midwest Mean	Southeast Mean
Total Teaching-Related hrs/wk	45.94 (9.8)*	44.40 (9.2)	46.4 (10.3)	45.81 (8.7)
Voluntary School-Related hrs/wk	8.67 (6.5)	8.79 (6.3)	8.20 (6.3)	8.62 (6.2)
Voluntary Instructor-Related hrs/wk	7.53 (5.4)	7.7 (5.0)	7.33 (5.7)	7.2 (5.1)
Required School Day (hrs)	7.29 (.48)	6.99 (.49)	7.36 (.47)	7.33 (.34)
Required School Year (days)	180 (3.7)	181 (3.0)	180 (3.9)	180 (3.6)
Pupil Load per Day	118 (40.3)	117 (35.9)	119 (44.5)	117 (41.5)
Pupil Load per Class	25 (6.2)	24 (5.8)	25 (6.1)	26 (6.5)

*Standard deviation in parentheses.

See STATUS, *supra* note 27, at 138, 147, 150, 151, 153, 156, 157.

187. *See, e.g.*, Dunlop, *Commentary*, in FACULTY AND TEACHER BARGAINING 80 (G. Angell ed. 1981). In 1983, 49% of those responding in a survey of the public opposed a proposal for lengthening the school year, while only 40% supported it. *See* Gallup, *Gallup Poll of the Public's Attitude Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 1983, at 33, 40. Similarly, 48% opposed lengthening the school day. *Id.*

188. Between 1961 and 1981, the required work week for teachers declined from 36.8 hours to 36.5 hours (roughly 20 minutes per week). *See* STATUS, *supra* note 27, at 52. During that same time period there was no reduction in either the number of class periods in the school week, or in the number of weekly class periods taught by teachers. *See id.* at 56-57. The average number of instructional days per year during this period declined from 181 to 180. *See id.* at 59.

ionized and non-unionized districts.[189] Specific analysis of teachers' work practices revealed that, while total daily instructional time was somewhat reduced in unionized districts, the amount of time devoted to classroom preparation, administrative duties and parent conferences more than offset the reduction in instructional time.[190] The cumulative effect of unionization, accordingly, was as much to increase productivity as to decrease it, although the research ultimately concluded that the directional shift in marginal productivity was "unclear."[191]

Studies of the union effect on teachers' pupil assignments are similarly inconclusive. Class size research, the most common means of investigating pupil assignments, offers evidence of both decreased and increased pupil loads resulting from collective bargaining.[192] When effects are found, however, they are small, and other research discloses no effect on class size resulting from collective bargaining.[193] Like research on teachers' work hours, therefore, research on class size undermines the claim that collective bargaining has had either a substantial or consistent impact on the ostensible indicators of teacher productivity.

In the final analysis, teacher productivity ought to be measured by the academic achievement of pupils, though the correlation may never be susceptible to accurate measurment. Calculations of the amount of time put in by teachers can only provide a crude estimate of productivity, for the uses to which such time is put are of greater importance.[194] To a considerable extent, the usage and quality of a teacher's time are determined individually, without being significantly influenced by a bargaining agreement or by administrative supervision. This "loose-coupling" of classroom teachers and school

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189. *See* Eberts, *supra* note 146, at 355. *But see* Perry, *supra* note 41, at 12-13. Perry concludes, based on non-quantitative field work in nine school districts, that collective bargaining has had a discernible effect on the length of the school day and school year. As a statement of systemwide bargaining effects, however, Perry's conclusion is suspect. Not only is his conclusion based on anecdotal evidence, but his estimated impact is derived from the experience of three districts out of a total of nine districts visited. Perry may be accurate in reporting that some school districts have experienced work reductions attributable to collective bargaining, but he does not provide evidence of a systematic bargaining effect.

190. *See* Eberts, *supra* note 146, at 352, 356-57.

191. *Id.* at 357.

192. *Compare id.* at 357-58 (collective bargaining districts have one additional teacher per 200 students and, by inference, have smaller class sizes) *with* Hall & Carroll, *supra* note 77, at 834-41 (collective bargaining produces an increase of one student per class).

193. *See, e.g.*, A. Cresswell, H. Juris, K. Tooredman & M. Zacharias, Budgeting and Bargaining Interactions in School Districts (1979) (unpublished paper presented at the American Educational Research Association Annual Meeting). *See also* Perry, *supra* note 41, at 12-13 (non-quantitative field research, *see supra* note 189).

194. *See, e.g.*, Murnane, *supra* note 178, at 24-25.

government frustrates attempts to reform the classroom from without.[195]

Administrative efforts to improve teacher productivity depend on a variety of strategies whose consequences for classroom learning will be indirect and incremental at best. One such strategy includes the improvement of teachers' salaries, whether by staffwide increases or by individual increases tied to performance. But an equally significant strategy, according to current reform literature, is improvement of the working conditions of teachers.[196] Without such improvement, one commentator has noted, talk of reforming public school instruction is but "empty rhetoric."[197] The Carnegie Foundation has likewise observed that "[i]mproving working conditions is . . . at the center of our effort to improve teaching."[198] Among the improvements emphasized are increases in teachers' class preparation time, improvements in teacher facilities, decreases in teachers' non-instructional chores, and reductions in teaching loads.[199]

Predictably, the strategy of improving teachers' working conditions has been a primary component of the union's traditional bargaining agenda. In the past, these union efforts have been interpreted as manifestations of professional self-interest and have been resisted by school boards.[200] School boards have not lost sight of the economic costs entailed in providing more hospitable conditions for classroom instruction, and this cost-consciousness more than anything may have frustrated efforts to improve working conditions.[201]

Whether the current reform literature will support traditional union demands for better working conditions remains to be seen. But the reform literature does give another dimension to the ques-

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195. Describing loose-coupling, March notes:

> Loose coupling is a fundamental property of schools. The learning activities of children and teaching activities of teachers are only marginally related to the activities of administrators. . . . Most observers agree that direct administrative leverage over education is relatively small and distributed widely through a large number of only loosely coordinated administrative positions.

March, *American Public School Administration: A Short Analysis*, 86 SCHOOL REV. 217, 229-30 (1978). *Accord*, Johnson, *supra* note 178, at 223. Similarly, the Rand study reported that teachers in unionized school districts discerned no effect on classroom teaching resulting from collective bargaining. *See* L. MCDONNELL & A. PASCAL, *supra* note 47, at 80 (1979).

196. *See, e.g.*, CARNEGIE REPORT, *supra* note 2, at 159-61; J. GOODLAD, *supra* note 2, at 195; T. SIZER, *supra* note 2, at 172-79.

197. J. GOODLAD, *supra* note 2, at 195.

198. CARNEGIE REPORT, *supra* note 2, at 161.

199. *See id. See also* authorities cited *supra* note 196.

200. *See* authorities cited *supra* note 182.

201. *See, e.g.*, McDonnell & Pascal, *supra* note 118, at 43.

tion of teacher productivity. What is good for organized teachers, we have been told, may sometimes be good for education.[202] And in an era of fiscal restraint, organized teachers may provide one of the few checks on the tendency of public school government to economize on the subtle yet important conditions for classroom education.

III. THE EFFECTS OF BINDING ARBITRATION ON TEACHER BARGAINING AGREEMENTS

Teachers' unions have not achieved expected successes under conventional collective bargaining. This result has hardly gone unnoticed by the unions, and they have continued to urge legislative recognition of the right to strike or, alternatively, provision for binding arbitration.[203] With few exceptions, however, there is little indication that the right to strike has gained political acceptability.[204] Moreover, there is growing belief among public sector unions that binding arbitration procedures may be as productive in the local bargaining process as costly strike activity.[205] During the past

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202. "It becomes apparent that numerous factors can determine the achievement of students in classrooms and that, if achievement is to be used in the productivity equation, there are numerous ways that collective bargaining can influence productivity. In some ways teachers' unions represent a positive force toward improving productivity." A. CRESSWELL & M. MURPHY, *supra* note 25, at 459.

203. *See, e.g.*, NATIONAL EDUC. ASS'N, *NEA Handbook* 217 (1982-83) (Resolution E-2 supports both the right to strike and binding arbitration as means of resolving bargaining disputes).

204. Our review of bargaining legislation reveals three limited recognitions of the strike right since 1973. In Wisconsin, for example, a right to strike is recognized if the school board and the teachers' union both agree to withdraw from binding arbitration. *See* WIS. STAT. §§ 111.70-.71 (1982) (legislation enacted in 1977). In Minnesota, a right to strike is recognized if either the school board or the union chooses to forego binding arbitration. *See* MINN. STAT. § 179.64 (1983). In Illinois, teachers may strike unless both parties choose to invoke binding arbitration. *See* ILL. ANN. STAT. ch. 48, ¶ 1713 (Smith-Hurd Supp. 1984). The Illinois law, it should be noted, seems to be a legislative recognition of the *de facto* legality of strikes that has persisted for some time. *See* Delaney, *supra* note 79, at 444.

For a general discussion of the growth in public sector arbitration during the 1970's see P. FEUILLE, W. HENDRICKS & J. DELANEY, THE IMPACT OF COLLECTIVE BARGAINING AND INTEREST ARBITRATION ON POLICING 94 (Final Report to the National Institute of Justice, U.S. Dep't of Justice, Dec. 1983) [hereinafter cited as COLLECTIVE BARGAINING]; Kochan, *supra* note 87, at 153-54. For public and school officials' opinion on the issue of teacher strikes, see *infra* note 295.

205. *See* A. CRESSWELL & M. MURPHY, *supra* note 25, at 489 ("[U]nions have begun to discover that the right to strike under limited conditions does not necessarily change the balance of power in negotiations. If the threat of a strike is no longer enough to precipitate great concessions from boards of education, unions will probably come to favor alternatives to the strike."); Helsby, *Has Government Preempted Collective Bargaining?* (Address to Society of Professionals in Dispute Resolution, Oct. 25, 1976) *reprinted in* GOV'T EMPL. REL. REP. (BNA) No. 681, at F-1, 3 (Nov. 1, 1976) ("[U]nions are beginning to reassess their previous

decade, for example, the police and firefighters' unions have shifted their political efforts to winning binding arbitration legislation. Twenty-one states now provide arbitration for these and other public employee groups.[206] This shift in strategy, there is now some indication, may be occurring among the teachers' unions.[207]

While arbitration may be winning acceptance among public employee groups, it is usually opposed by local government.[208] The fear that arbitrators will subvert local political processes permeates the critical literature on collective bargaining. The abiding belief is that arbitrators, who are by qualification disinterested and unelected intervenors, will accelerate the loss of local control already perceived to have occurred under collective bargaining. This belief often prompts legal challenges to the constitutionality of binding arbitration statutes.[209] Although these challenges have

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contention that the strike is the so-called 'equalizer' at the table; that the right to strike is an essential ingredient to collective bargaining; that the strike and the threat of a strike are the only ways to receive equity from the public employer. In short, the strike, in most situations, has not proved to be the pressure device and the equalizer that it was expected to be. . . . The result is that many unions are now beginning to push for some form of statutory arbitration."); Kochan, *Dispute Resolution*, *supra* note 87, at 153-54 ("The most important shift that occurred in the last decade was the decline in interest of police and firefighters in the right to strike and their increased preference for various forms of compulsory arbitration. . . This shift in preference developed after several IAFF locals experienced a good deal of public backlash and a decline in political support following a strike.").

206. *See* Kochan, *supra* note 87, at 154.

207. For example, in 1977 the National Education Association (NEA) amended its official position and resolved to support binding arbitration as an alternative to the strike. *Compare* NATIONAL EDUC. ASS'N, NEA HANDBOOK 221 (1976-77) *with* NATIONAL EDUC. ASS'N, NEA HANDBOOK 225 (1977-78). Our discussions with officials in the states of Connecticut and Wisconsin reveal that state affiliates of the NEA were instrumental in securing the passage of arbitration legislation in those states. For a brief account of the NEA's support of binding arbitration through the seventies, see Clark, *Labor Relations in the Decade Ahead: A Management Perspective*, 10 J.L. & EDUC. 365, 371 (1981). The American Federation of Teachers, by comparison, maintains its traditional opposition to binding arbitration legislation, although its largest state affiliate, the New York State United Teachers, now recognizes the local option to invoke binding arbitration procedures. *See* Hobart, *Public Sector Bargaining Issues in the 1980's: A Union View*, 33 N.Y.U. CONF. ON LAB. 303, 310-11 (1980).

208. *See, e.g.*, Dahl, *supra* note 122, at 298; Feuille, *supra* note 48, at 68 n.21.

209. Binding arbitration statutes have been challenged, successfully, in the following cases: City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35 (S.D. 1975); Salt Lake City v. Int'l Ass'n of Firefighters Local 1645, 563 P.2d 786 (Utah 1977).

Binding arbitration laws have been upheld in the following court challenges: Anchorage Educ. Ass'n v. Anchorage School Dist., 648 P.2d 993 (Alaska 1982); Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974); City of Aurora v. Aurora Firefighters' Protective Ass'n, 193 Colo. 437, 566 P.2d 1356 (1977); The Conn. Ass'n of Brds. of Educ. Inc., v. Shedd, ___ Conn. Supp. ___ (Super. Ct. 1984); Superintending School Comm. v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981); City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Town of Arlington v. Board of Conciliation of Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980); Dearborn Fire Fighters

usually failed,[210] states have responded to them indirectly by enacting detailed statutory provisions to ensure that arbitrators exercise their authority within acceptable boundaries.

One form of statutory restraint on binding arbitration consists of procedural requirements. For example, arbitrators are usually chosen by the negotiating parties, thus ensuring that the parties have control over the nature of the decision makers if not over the decisions.[211] Furthermore, most statutes provide for a tripartite arbitration panel consisting of two partisan arbitrators and one neutral arbitrator.[212] In this manner, advocacy and explication of each party's position are carried forward into the ultimate deliberative process.[213] Finally, in a growing number of jurisdictions, arbitration awards must consist of one party's "last best offer."[214] Under this approach, each party proposes a final offer

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Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975); City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979); Orleans Educ. Ass'n v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); City of Roseburg v. Roseburg Fire Fighters, 292 Or. 266, 639 P.2d 90 (1981); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); Division 85, ATU v. Port Auth., 417 Pa. 229, 208 A.2d 271 (1965); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); Yakima County Deputy Sheriffs Ass'n v. Board of Comm'rs, 92 Wash. 2d 831, 601 P.2d 936 (1979); City of Spokane v. Spokane Police Guild, 87 Wash. 2d 457, 553 P.2d 1316 (1976); State v. City of Laramie, 437 P.2d 295 (Wyo. 1968). *See generally* Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C.L. REV. 557, 561-68 (1980).

An irony of these challenges is that local government, which is usually exercising delegated state powers in governing public employees, often finds itself arguing that arbitration statutes constitute an unlawful delegation of state power. *See, e.g., Conn. Ass'n*, ___ Conn. Supp. ___; *Bangor*, 443 A.2d 383; *City of Biddeford*, 304 A.2d 387; *Town of Arlington*, 370 Mass. 769, 352 N.E.2d 914; *Dearborn Fire Fighters*, 394 Mich. 229, 231 N.W.2d 236; *City of Richfield*, 276 N.W.2d 42; *Orleans*, 193 Neb. 675; 229 N.W.2d 172; *Seward*, 188 Neb. 772, 199 N.W.2d 752; *City of Amsterdam*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404; *City of Spokane*, 87 Wash. 2d 457, 553 P.2d 1316; *City of Warwick*, 106 R.I. 109, 256 A.2d 271; *City of Laramie*, 437 P.2d 295.

210. *See supra* note 209. These challenges have been characterized as "puny" in *Structuring Collective Bargaining*, *supra* note 40, at 834. *See generally*, Craver, *supra* note 209, at 561-63.

211. *See* H. TANIMOTO, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: IMPASSE RESOLUTION PROCEDURES 25 (1981). As Tanimoto notes, arbitration statutes usually authorize selection of arbitrators by the disputing party, which is in contrast to the normal appointment of mediators and factfinders. *Id.*

212. *See id.* at 26.

213. *See, e.g.*, Morris, *supra* note 49, at 461.

214. "Last best offer" or "final offer" arbitration is now employed in approximately one-third of public sector arbitration schemes. *See* H. TANIMOTO, *supra* note 211, at 29. Final-offer arbitration is used in three of the five state statutes that mandate arbitration of all teacher bargaining disputes. *See* CONN. GEN. STAT. ANN. § 10-153(f) (1980) (issue best offer); IOWA CODE ANN. §§ 20.1-20.29 (1974) (package last best offer); WIS. STAT. § 111.70 (1981-82). Minnesota requires final-offer arbitration (issue) for school administrators, but uses

on either each disputed issue ("issue last best offer")[215] or on the entire contract ("package last best offer").[216] The arbitrators must then select one of the final offers, rather than constructing their own compromise award as in conventional arbitration.[217] The theory of last best offer schemes is that they more fully limit the scope of arbitrators' discretion and, it is hoped, prompt the parties to make more reasonable offers and perhaps even to reach a settlement.[218]

Arbitration statutes further delimit arbitrator discretion by enumerating criteria that must be considered in formulating an award.[219] These are usually a mixture of normative and accommodative criteria.[220] Normative criteria identify such concerns as "the employees' welfare" or "the public interest," and thus invite exercise of the arbitrator's judgment and sense of fairness. Accommodative criteria require consideration of the parties' relative bargaining positions as well as prevailing economic and labor conditions.[221] Accommodative criteria thus lead the arbitrators to formulate a contract similar to what one would expect had the parties been able to negotiate a settlement.

Though the arbitration process is carefully structured, the intention is that arbitration will seldom be used..Thus, arbitration is invariably the last stage of the bargaining process, and the parties usually must negotiate and mediate their differences prior to

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conventional arbitration to settle teacher bargaining disputes. MINN. STAT. ANN. § 179.69 (West Supp. 1984).

215. *See* H. TANIMOTO, *supra* note 211, at 31.

216. *Id.*

217. *See, e.g.*, J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER & B. DENNIS, FINAL-OFFER ARBITRATION 1-4 (1975) [hereinafter cited as FINAL-OFFER ARBITRATION]. Conventional arbitration can be generally described as a process in which the arbitrator can adopt a compromise position between the actual bargaining positions of the parties. Conventional arbitration is used in approximately two-thirds of public employee bargaining statutes. *See* H. TANIMOTO, *supra* note 211, at 29.

218. *See, e.g.*, P. FEUILLE, FINAL OFFER ARBITRATION 12-14 (1975); Morris, *supra* note 49, at 465-66; Zack, *Final Offer Selection—Panacea or Pandora's Box*, 19 N.Y.L. FORUM 567, 573-76 (1974).

219. *See* H. TANIMOTO, *supra* note 211, at 13-14. Illustrative are the criteria used in Connecticut's teacher arbitration statute, which include "(A) the negotiations between the parties prior to arbitration; (B) the public interest and the financial capability of the school district; (C) the interests and welfare of the employee group; (D) changes in the cost of living; (E) the existing conditions of employment of the employee group and those of similar groups and (F) the salaries, fringe benefits, and other conditions of employment prevailing in the state labor market." CONN. GEN. STAT. § 10-153f(c)(4) (1979). Such criteria are also important in providing a standard sufficient to uphold the delegation of decisional power to arbitrators and in providing some basis for judicial review of arbitration awards. *See, e.g.*, Craver, *supra* note 196, at 565-66; *Structuring Collective Bargaining*, *supra* note 40, at 835.

220. *See, e.g.*, Morris, *supra* note 49, at 469-73, 477.

221. *See supra* note 219.

submitting them to arbitration.[222] Past experience with arbitration schemes indicates that arbitration is in fact used to resolve a minority of bargaining disputes.[223] If voluntary settlement is the primary goal of arbitration schemes, then, they have had some success.[224]

The relatively minor number of disputes ending in arbitrated awards, however, may conceal the systemic effects of those awards. An arbitration award, like a judicial ruling, has considerable precedential value. It constitutes a disinterested determination of the merits of a dispute, and presages future decisions by arbitrators who confront the same or similar issues.[225] Because negotiating parties always have the option of invoking arbitration, arbitral precedents can provide critical bargaining leverage. In theory, then, the outcomes of arbitration proceedings can have dramatic effect on non-arbitrated outcomes.

In the following discussion, we examine contemporary research into the nature of bargaining outcomes under binding arbitration schemes. Because our special concern is educational collective

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222. *See* H. TANIMOTO, *supra* note 211, at 207.

223. The most recent evidence on the percentage of bargaining disputes resolved by binding arbitration is summarized in Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation* 98 HARV. L. REV. 351, 380-81 (1984). A similar summary is found in B. DOWNIE, *supra* note 48, at 19-44. The rates of arbitration range from as low as 4% to as high as 49%, but the average is usually under 33%. *See id.*

224. Throughout the past decade there has been an abundance—in our opinion an overabundance—of research concerning arbitration's effect on the rate of bargaining impasse. There is, however, little agreement on the subject of what constitutes an acceptable rate of bargaining impasse; consequently, the ostensible empirical debate seems often a normative one. The following trilogy of discussion illustrates our point: Feuille, *Analyzing Compulsory Arbitration Experiences: The Role of Personal Preferences*, 28 INDUS. & LAB. REL. REV. 432 (1975); Thompson & Cairnie, *Analyzing Compulsory Arbitration Experiences: The Role of Personal Preferences—Reply*, 28 INDUS. & LAB. REL. REV. 435 (1975) [hereinafter cited as Thompson & Cairnie, *Reply*]; Thompson & Cairnie, *Compulsory Arbitration: The Case of British Columbia Teachers*, 27 INDUS. & LAB. REL. REV. 3 (1973) [hereinafter cited as Thompson & Cairnie, *Compulsory Arbitration*]. As we suggest in our analysis of arbitration, the actual rate of bargaining impasse seems far less important than arbitration's systemwide effects on the outcome of bargaining behavior. We acknowledge, however, that to the extent that voluntary contract settlement is accepted as an important goal of the process, impasse rates are important. *See* Bloom, *Is Arbitration Really Compatible with Bargaining?*, 20 INDUS. REL. 233 (1981); Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 INDUS. REL. 302 (1975); Wheeler, *How Compulsory Arbitration Affects Compromise Activity*, 17 INDUS. REL. 80 (1978).

225. *See, e.g.*, Dearborn Firefighters Local 412 v. City of Dearborn, 394 Mich. 228, 250-51, 231 N.W. 2d 226, 232 (1975): "[A]rbitration panels . . . recurringly establish the level of wages and working conditions for firemen and policemen across the State. The awards granted by . . . panels establish guidelines affecting compensation packages of other policemen and firemen and establish precedents which are often advanced by other public employees." *See also* Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 292 (1969).

bargaining, we shall give primary emphasis to our longitudinal study of school districts in the State of Connecticut. This research, together with preliminary research in the school districts of Wisconsin and Iowa, constitute the first quantitative investigation of arbitration procedures in American public education.[226] To bring perspective to this research, we also advert to studies of arbitration in non-educational collective bargaining. These studies are particularly instructive since non-educational arbitration has provided the experimental model upon which educational arbitration is based.[227] Moreover, findings from both systems prove to be highly consistent, thus suggesting that the dynamics of the arbitration process are highly uniform across bargaining systems.

A. The Salary Effects of Binding Arbitration.

There is nothing intrinsic to the process of binding arbitration that leads ineluctably to salary inflation. As disinterested professional intervenors, arbitrators might well render accommodative salary awards that reflect the patterns of local bargaining compromise. If arbitrators are responsive to local labor conditions,[228] and desirous of continued employment,[229] they will follow trends and not set them. Thus, arbitration could be an essentially conservative force whose primary effects are to neutralize hostilities and to legitimate outcomes.

There are reasons to expect, however, that arbitration will exert an inflationary influence on salary levels. First, arbitration transfers ultimate salary authority from interested, locally-elected officials to itinerant "neutrals"; thus, the greatest political impact of arbitration should be some diminution of governmental bargaining power,

226. Reports on the Wisconsin and Iowa research are found in WISCONSIN CENTER FOR PUBLIC POLICY, THE EFFECT OF THE SENATE BILL 15 AMENDMENTS TO THE MUNICIPAL EMPLOYMENT RELATIONS ACT (1980) [hereinafter cited as WISCONSIN REPORT] and Delaney, *supra* note 75 (Iowa). The Wisconsin study covers the first two years of experience under the state's arbitration statute and employs a variety of qualitative (e.g., surveys and field research) and quantitative (*e.g.*, regression analysis of salary trends) methods. The Iowa study is based on three years of experience under Iowa's arbitration statute, and is limited to quantitative analysis of teacher salaries and salary distributions.

227. In 1972, prior to any state's adoption of arbitration procedures in teacher bargaining, there were 36 arbitration statutes governing public employees in the nation's cities and states. *See* McAvoy, *supra* note 53, at 1192-93.

228. The most prevalent decisional criterion in arbitration statutes is that of *comparability*, thus inviting conformity with local labor conditions. *See* H. TANIMOTO, *supra* note 211, at 13.

229. As noted earlier, *see supra* text accompanying notes 211-18, most arbitration statutes allow the parties to choose their arbitrator(s). For a discussion of the effects of that selection process, see *infra* notes 280-90 and accompanying text.

which is a conservative influence on salaries. Second, because binding arbitration is often viewed as a substitute for the employees' right to strike, unions expect some improvement in outcomes over those resulting from collective bargaining alone.[230] Finally, statutory criteria usually direct arbitrators to examine "comparable" salaries in the labor market.[231] Consequently, one would expect that the lowest paid employees could invoke or threaten to invoke arbitration to achieve some equalization of salaries with better-paid employees.

Attempts to estimate the salary effect of compulsory arbitration typically employ one of three methods. The more common method is to measure the salary differential between those parties who actually use arbitration procedures and those who do not. A second method, based on the theory that arbitration standardizes salaries and thus improves the economic position of weaker employee units, involves the measurement of the distribution in salary levels among a jurisdiction's bargaining units. The third method, based on the theory that arbitration can affect systemwide salaries simply because it is available, involves measurement of the general change in a jurisdiction's salary levels regardless of arbitration usage. Each of these hypothesized salary effects will be discussed in turn.[232]

1. THE SALARY EFFECT OF ARBITRATION USAGE

The most apparent indicator of salary inflation in an arbitration system is the differential between those parties who receive an arbitrated salary award and those parties who negotiate a salary settlement. If such a differential exists, then presumably one has de-

230. *See, e.g.*, COLLECTIVE BARGAINING, *supra* note 204, at 19; Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5 INDUS. REL. 38, 51 (1966); *Structuring Collective Bargaining*, *supra* note 40, at 860.

231. *See supra* note 228.

232. For further discussion of these salary theories, see B. DOWNIE, *supra* note 48, at 15-16. The data base used in computing salary effects in Connecticut was constructed in the following manner. Four points on the contract schedule were selected as representing a teaching staff's salary experience. These include a teacher with two years' experience and a bachelor's degree (BA2), a teacher with eight years' experience and a master's degree (MA8), a teacher with thirteen years' experience and a master's degree (MA13), and a teacher at the top of the salary schedule with a master's degree (MS). Using these points as our sample, we then computerized all available salary schedules for Connecticut's local school districts, covering the period 1976-1983. The number of such districts (including two public school "academies") equaled 167 (n = 167). The actual number of salary schedules available for the study period was as follows: 1976-77 (n = 162), 1977-78 (n = 164), 1978-79 (n = 158), 1979-80 (n = 159), 1980-81 (n = 162), 1981-82 (n = 162), and 1982-83 (n = 157).

tected the relative salary effect of arbitration. This measure of salary effect constitutes the predominant method in arbitration research to date. Such research reveals little evidence that arbitration usage produces a salary differential. Several studies of arbitration in the police and firefighter services, for example, conclude there is little or no gain from proceeding to arbitration.[233] Similarly, both a two-year study of arbitration in Wisconsin public schools[234] and a three-year study of arbitration in Iowa public schools[235] reveal no significant salary effect resulting from the use of arbitration.

Our research findings in Connecticut confirm those of the studies outlined above. Figure 1 traces the evolution of teachers' salaries in Connecticut since 1977, and encompasses the three years prior to and the four years following the introduction of binding arbitration. This figure identifies four representative points in a teacher's career ladder, ranging from the position of the relatively new teacher with a bachelor's degree (BA2) to that of the most senior teacher with a master's degree (MS). Focusing on these positions, Figure 1 distinguishes the average yearly salaries resulting from negotiated settlements (the broken line) and arbitration (the solid line). The salary lines in the period 1977-79, we should note, distinguish the pre-arbitration salaries of those who either did (the solid line), or did not (the broken line), proceed to binding arbitration in 1980. We distinguish these earlier salary levels because they illustrate an important characteristic of bargaining impasse.

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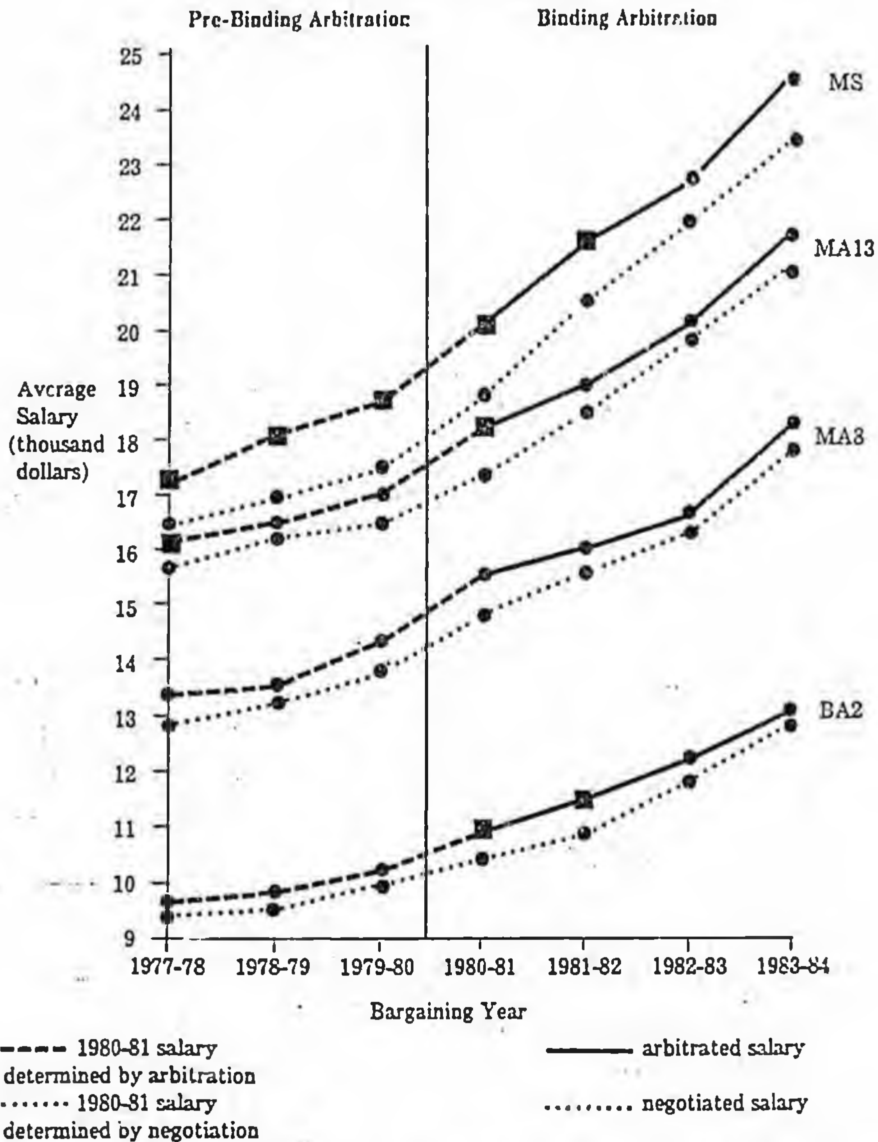
233. *See, e.g.*, COLLECTIVE BARGAINING, *supra* note 204, at 25; FINAL-OFFER ARBITRATION, *supra* note 217, at 30; T. KOCHAN, M. MIRONI, R. EHRENBERG, J. BADERSCHNEIDER & T. JICK, DISPUTE RESOLUTION UNDER FACT-FINDING AND ARBITRATION: AN EMPIRICAL ANALYSIS (1979) [hereinafter cited as DISPUTE RESOLUTION]; P. MORILANEN & K. MUDIE, COMPULSORY ARBITRATION IN MICHIGAN 9 (1972); Anderson, *Determinants of Bargaining Outcomes in the Federal Government of Canada*, 32 INDUS. & LAB. REL. REV. 224 (1979); Bedzek & Ripley, *Compulsory Arbitration versus Negotiations for Public Safety Employees: The Michigan Experience*, 3 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 167 (1974); Bloom, *Collective Bargaining, Compulsory Arbitration, and Salary Settlements in the Public Sector: The Case of New Jersey's Municipal Police Officers*, 2 J. LAB. RESEARCH 369 (1981). *But cf.* Somers, *An Evaluation of Final-Offer Arbitration in Massachusetts*, 6 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 193 (arbitrated settlements are slightly higher than negotiated settlements). This latter finding, however, could be attributable to the use of relatively primitive statistical techniques which lacked sufficient control for contaminating factors. *See id.* at 199-203.

234. *See* WISCONSIN REPORT, *supra* note 226, at 106.

235. Delaney, *supra* note 79, at 445-46. The same finding is reported in a study of teacher arbitration in the province of British Columbia in Canada. *See* Thompson & Cairnie, *Compulsory Arbitration*, *supra* note 224.

FIGURE 1
Average Negotiated and Arbitrated Salaries for Connecticut School Teachers 1977-78 to 1983-84



■ Arbitrated salary is significantly greater than the corresponding negotiated salary at $p<.05$.

Source: Calculated from data in Connecticut Education Association, Teacher Salary Schedules, 1977-78 to 1983-84.

A review of Figure 1 shows perceptible differences between the salary levels of those who negotiate settlements and those who proceed to arbitration, and a few of these differences are statistically significant. One's initial conclusion, then, is that arbitration has a positive salary effect. This conclusion is negated, however, by a closer examination of Figure 1 and by the results of more exact re-

gression analysis.[236] First, Figure 1 reveals that the salary differential predated the introduction of binding arbitration. The data suggest, then, that the better-paid teachers were more prone to use arbitration.

This hypothesis is confirmed by a series of regression analyses. Other factors being equal, higher salary levels are likely to produce bargaining impasse.[237] At the same time, teachers do not achieve a

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236. Multiple regression is a sophisticated statistical procedure that produces an equation which allows the researcher to predict the value of one variable (e.g., salary levels) from the values of others (e.g., use of arbitration, etc.). Each variable will have a particular regression weight, indicating its importance in the regression equation. Thus, this technique enables the researcher to simultaneously control the effects of a number of variables in order to focus on the effect of the remaining variable. For general outlines of multiple regression theory and techniques, see H. BLALOCK, SOCIAL STATISTICS 450-504 (rev. 2d ed. 1979); Cain, *Regression and Selection Models to Improve Non-Experimental Comparisons*, 2 EVALUATION STUD. REV. ANN. 93 (1977). For a discussion of the application of multiple regression techniques to legal problems, see Bloom & Killingsworth, *Pay Discrimination Reseach and Litigation: The Use of Regression*, 21 INDUS. REL. 318, 321-23 (1982); Fisher, *supra* note 75.

237. A series of regressions was conducted in an attempt to predict which school districts were more likely to proceed to arbitration. The dependent variable for this analysis was whether the school district contract was settled by voluntary agreement or by arbitration award (IMPASSE). This analysis employed a series of independent variables, concerning different features of the bargaining context. First, there were variables measuring characteristics of the school district: 1) the population of the school district (CITYSIZE); 2) the school district's ability to pay (ABILITY) (The measure of ability to pay used in these analyses was the "adjusted equalized net grant list per capita." This is the measure of town wealth used by the State of Connecticut Board of Education to calculate state Education Equalization Aid to towns for 1981-82. For a definition of this measure, see STATE OF CONN. BD. OF EDUC., 2 CONDITION OF EDUCATION 1980-81, at xi (1982)); 3) the school district's effort to pay (EFFORT) (for a definition of this term, see *id.*); and 4) the school district's student need (STUDNEED) (for a definition of this term, see *id.*). Second, there were variables measuring characteristics of the school: 1) the size of its student population (STUDPOP); 2) the size of the faculty (STAFFSIZE); 3) the mean age of the faculty (MAGE); 4) the mean teaching experience of the faculty (MEXP); and 5) the four measures of teaching salary adopted in our study (SALARY: BA2, BA8, MA13, MS) (each of these levels was entered into a separate regression for that salary level). Third, there was a series of dummy variables dealing with professional negotiation representatives to control for: 1) the union affiliation of the teachers (CEA, CFST); and 2) the type of attorney, if any, representing the school boards (FIRM, INDEPENDENT) (FIRM was limited to an attorney practicing in one of the major labor firms in Connecticut; all other attorneys were scored INDEPENDENT). Finally, there was a series of variables measuring the impasse history of the school district: 1) a measure of the school district's post-1966 strike history (STRIKE); 2) a measure of the number of times that the school district had resorted to advisory arbitration under the previous statute (ADARB); and 3) a measure of the number of binding arbitration awards previously rendered for the district (BARB). Thus, the basic regression equation for determining the causes of impasse was:

$$\begin{aligned} IMPASSE = {} & a_1 + b_1 CITYSIZE + b_2 ABILITY + b_3 EFFORT + \\ & b_4 STUDNEED + b_5 STUDPOP + b_6 STAFFSIZE + b_7 MAGE + \\ & b_8 MEXP + b_9 SALARY + b_{10} CEA + b_{11} CFST + b_{12} FIRM + \\ & b_{13} INDEPENDENT + b_{14} STRIKE + b_{15} ADARB + e_i. \end{aligned}$$

higher rate of increase by invoking arbitration.[238] In fact, the difference between negotiated and arbitrated rates of increase—which were seldom significant—appears to have decreased somewhat during the past four years of binding arbitration.[239]

In short, the formal arbitration process is essentially a conservative one in which negotiated salary trends are followed. This conservatism is facilitated considerably by the structure of the process. The majority of school districts commence bargaining at approximately the same time in the calendar year.[240] Since arbitration proceedings commence only after negotiations toward voluntary settlement fail, contract settlements will occur in a number of districts before there is need to render any arbitration award.[241] The participants in arbitration thus make their offers in the context of established salary trends. And, given the statutory admonition to examine comparable salaries in the jurisdiction,[242] arbitrators are highly disposed to follow those trends.[243]

Therefore, the inflationary effect of arbitration, if any, occurs through its indirect influence on negotiation behavior. While this may seem inconsistent with the general finding that arbitration be-

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A series of regressions was conducted for each of the four salary levels. The impasse equations for the first two years were significant, in general beyond the 1% level, and explained between 28 to 45% of the variance in impasse experience. In the last two years, the equations explained 20% of the variation in impasse. In all these equations, the dominant variable was MEXP, the mean *teaching experience* of the faculty. Our interviews with members of the teachers' unions indicated that this variable captured a "professionalism" factor: the more experienced teachers were particularly frustrated with the level of salaries. Interestingly, those teachers in the relatively better-paid school districts demonstrated the greatest willingness to arbitrate. Thus salary level was a variable of frequent importance in the regression equations: the higher the salary at each of the four levels of the schedule, the more likely it was that the bargaining unit would proceed to arbitration. It is interesting to note that this latter finding is opposite to the initial Wisconsin experience, where low-salaried teachers were more likely to invoke arbitration. *See* WISCONSIN REPORT, *supra* note 226, at 113. Notwithstanding, both studies show no salary effect resulting from arbitration usage.

238. T-tests for differences in the rates of salary increase for negotiated and arbitrated contracts revealed significant differences for only one salary level (MA8) in the second and third years of bargaining ($p < .05$).

239. This phenomenon is illustrated in Figure 1, which shows minor convergence of the arbitration and negotiation salary lines from 1980 to 1983.

240. Most school districts commence bargaining in the late summer or fall, in accordance with statutory timetables keyed to the budget submission date for local towns. *See* CONN. GEN. STAT. § 10-153d(b) (1979).

241. As discussed earlier, *see supra* text accompanying notes 219-24, most arbitration statutes require that the parties first exhaust negotiation and mediation efforts prior to invocation of arbitration procedures. Connecticut's statute is similarly structured. *See* CONN. GEN. STAT. § 10-153f(b), (c) (1979).

242. *See supra* note 228.

243. This same pattern of arbitration behavior was found in teacher negotiations for the province of British Columbia. *See* Thompson & Cairnie, *Reply*, *supra* note 224.

havior follows negotiation behavior, it is not. First, the fact that arbitration outcomes follow negotiation trends may tend to standardize salary settlements. That is, traditionally low-paying school districts will be forced to "catch up" with better-paying districts, thus increasing the statewide salary bill.[244] Second, the prospect of arbitration may prompt employers to settle at a higher figure because of the anticipated costs of arbitration. These costs include the actual procedural expenses of arbitrating, as well as the risk that arbitrators might select the union's position on salary as well as other issues.[245] This latter factor can be particularly important, since labor negotiators and employers share the belief (correctly or not) that arbitrators tend to inflate salary settlements.[246]

2. THE EFFECT OF ARBITRATION ON SALARY DISPERSION

The possibility that binding arbitration might lead to the equalization of salaries within a state has social as well as labor relations implications. As discussed earlier, there have been numerous, largely unsuccessful attempts to remedy inequalities in school expenditures in recent years.[247] These inequalities, as we also have noted, are closely related to differences in instructional expenditures.[248] Therefore, if theorists of binding arbitration are correct in positing a "catch-up" effect for salaries, arbitration might be employed in education to achieve both labor and social reforms.

The effect of arbitration on salary equalization should be manifested in the degree to which the distribution of district salary levels is compressed (suggesting salary equalization) or dispersed (suggesting widening differences). Past studies of police and firefighter

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244. The belief that arbitration provides a means by which weaker bargaining units can "catch up" with better-paid units is common in the labor literature. *See, e.g.*, B. DOWNIE, *supra* note 48, at 62 ("[I]t seems logical to assume that regression toward the mean is enhanced under arbitration because the very high and the very low stand out and the extremes in the labour market become more difficult to defend and maintain."); Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47, 64 (1973).

245. *See generally* COLLECTIVE BARGAINING, *supra* note 204, at 80-81; Bloom, *Is Arbitration Really Compatible with Bargaining?*, 20 INDUS. REL. 233 (1981); Farber, *Splitting-the-Difference in Interest Arbitration*, 35 INDUS. & LAB. REL. REV. 70 (1981).

246. *See* WISCONSIN REPORT, *supra* note 226, at 81-85. The data from our surveys of school board negotiators and their attorneys in Connecticut support this conclusion. Sixty-four percent of the board members considered arbitrator fiscal settlements to be "somewhat larger" than prior awards, while 19% reported that arbitration salaries were "much larger." The corresponding figures for the school board attorneys were 50% and 47%.

247. *See supra* text accompanying notes 58-64.

248. *See supra* text accompanying notes 65-71.

arbitration have found minor evidence of salary compression,[249] but the trend appears to have been short-lived.[250] Moreover, a recent study of arbitration in Iowa school districts actually reveals evidence of slight salary dispersion.[251]

Our findings from a seven-year review of salary distribution in Connecticut reveal that binding arbitration has little lasting effect on statewide salary compression. Instead, arbitration perpetuates (and may ultimately increase) the dispersion of salaries that existed under collective bargaining. Surprisingly, this dispersion occurs at a time when, pursuant to court mandate, Connecticut has attempted to redress the inequalities in local school funding by providing poorer school districts additional revenues with which to fund education.[252]

Figure 2 graphically illustrates the dispersion of teachers' salaries from 1977 to 1983, based on a sampling of positions on the teachers' salary schedule. As the graph slopes upward, the coefficient of variation[253] increases, thus signifying increasing differences in the salaries of poorer and better paid teachers. Figure 2 reveals that salary dispersion was increasing prior to the advent of binding arbitration, that salary dispersion plateaued for a brief time after the introduction of binding arbitration, and that prior rates of salary dispersion largely resumed by the third year of arbitration.

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249. *See, e.g.*, DISPUTE RESOLUTION, *supra* note 233, at 73 (police and firefighters under conventional arbitration in New York State); FINAL-OFFER ARBITRATION, *supra* note 217, at 144-45 (the dispersion of base salaries declined steadily for Wisconsin police during the first two years of package last best offer arbitration, but the date was unclear for firefighters).

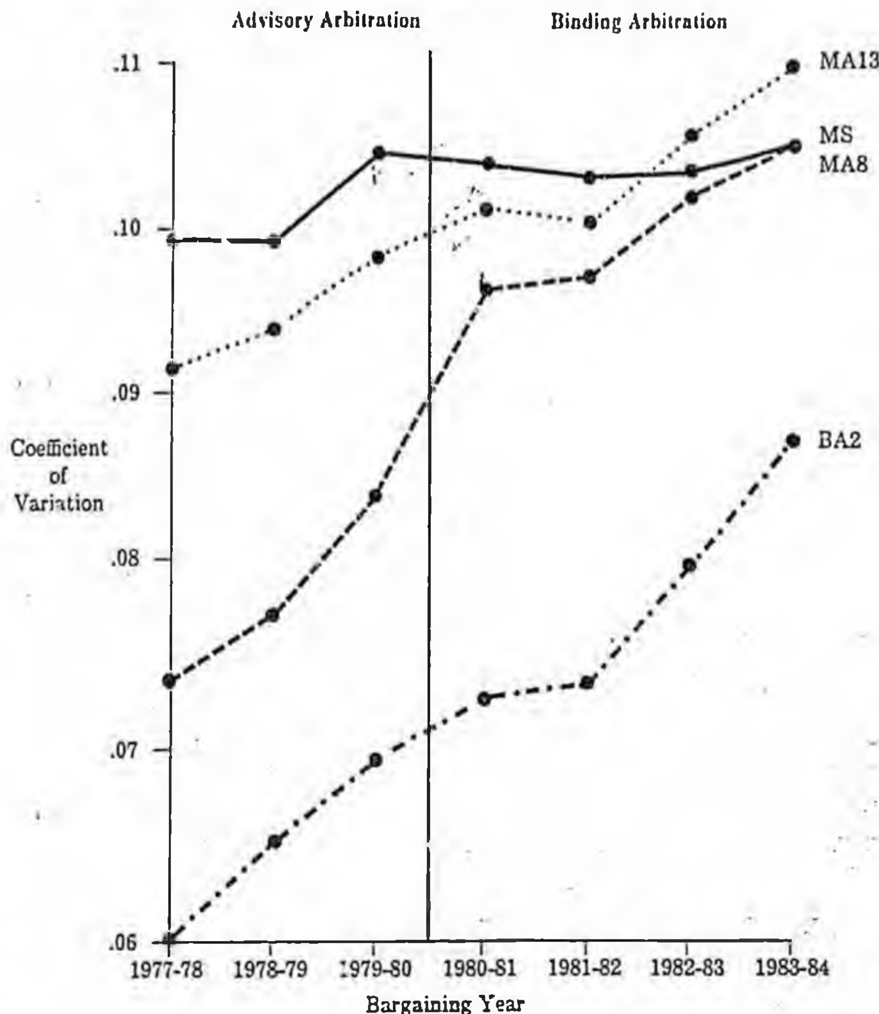
250. *See, e.g.*, DISPUTE RESOLUTION, *supra* note 233, at 71. The strong "catch up" effect for police and firefighter bargaining under conventional arbitration in New York State was limited to the first round of bargaining. But it should be noted that it is difficult to ascertain whether even this limited salary compression can be attributed to arbitration, as the "catch up" effect was also operating during the last round of negotiations under the previous fact-finding scheme.

251. Delaney, *supra* note 79, at 443-44. Unfortunately, Delaney does not report the salary dispersion trend prior to the years under review, 1978-79 to 1980-81. As binding arbitration was introduced in Iowa public schools in 1975-76, Delaney's work does not indicate the initial impact of this procedure upon salary dispersion.

252. *See* Horton v. Meskill, 172 Conn. 618, 376 A.2d 359 (1977).

253. The coefficient of variation is simply the ratio of the standard deviation of each salary level for each year to its mean salary. *See, e.g.*, FINAL-OFFER ARBITRATION, *supra* note 217, at 144. Thus, the lower the coefficient of variation, the less dispersion that exists in the salary distribution and vice-versa. This statistic is the most standardized measure of dispersion, thus allowing ready comparison between the dispersion of different salary levels on the schedule over time. A declining trend in the coefficient of variation is indicative of salary compression among school districts.

FIGURE 2
Coefficient of Variation for Connecticut School Teachers for 1977-78 to 1983-84



Source: Calculated from data in Conn. Educ. Ass'n, Teacher Salary Schedules 1977-78 to 1983-84.

This finding seems inconsistent not only with the theory of a "catch-up" effect, but also with a widely-held belief that arbitration standardizes salary behavior. Our further examination of salary trends, however, revealed a basis for reconciling the concomitant phenomena of standardized salary behavior and continued salary dispersion. This explanation is premised on the pervasive practice of negotiating percentage increases in salaries, rather than increases in actual dollar amounts. When the trend in dispersion of percentage increases is examined, we in fact find a compression in salary increases; that is, the range of percentage increases has narrowed since

the advent of arbitration.[254] By negotiating in percentage increases, however, the system's participants ultimately magnify disparities—as is evidenced in Figure 2. This is because percentage increases build on an unequal salary base; for example, ten percent of $20,000 yields a larger salary increase than ten (or even twelve) percent of $15,000. Thus, our analysis indicates that the predictions of salary compression are inaccurate not because they are premised on the phenomenon of standardization; they err, instead, by disregarding the logic of salary determination in collective bargaining. This logic, with its emphasis on percentage changes, has an inherent regressive tendency. As a consequence, arbitration can produce salary compression only if arbitrators consciously decide to give poorer bargaining units larger real salary increases than those awarded to better-paid bargaining units.[255] Otherwise, the standardization of salary behavior under arbitration shows no potential to remedy historical salary disparities.

3. THE EFFECT OF ARBITRATION ON SYSTEMWIDE SALARY LEVELS

Even though the evidence does not indicate a salary effect resulting from arbitration usage or salary compression, the conventional wisdom is that the availability of arbitration may produce a small inflationary impact on employee salaries throughout the system. This conclusion is largely based on the study of arbitration in other common law nations—Canada, Australia and Great Britain—whose experience with arbitration is much lengthier.[256] A small number of studies in non-education public service in America have

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254. The following chart illustrates the change in coefficients of variation for the annual percentage increase in salary at all salary levels measured in our study, encompassing the years 1978 through 1983. With the exception of a few anomalous coefficients—which are probably a product of the high sensitivity of this measure—the distribution of percentage increases has contracted with a fair amount of consistency.

Year	BA2	MA8	MA13	MS
1977-78	.447	.447	.481	.489
1978-79	.448	.397	.463	.391
1979-80	.320	.250	.340	.355
1980-81	.283	.281	.383	.351
1981-82	.293	.266	.593	.410
1982-83	.281	.250	.403	.244

255. Assuming unequal salary bases of some magnitude, arbitrators would have to either 1) award percentage increases to poorer districts that are large enough to yield *real* salary catch-up, or 2) award dollar increases that are larger than dollar increases awarded better-paid bargaining units. Obviously, either action would reverse the usual conservative role of arbitrators, and thus are not to be expected.

256. *See, e.g.*, Anderson & Kochan, *Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process*, 30 INDUS. LAB. REL. REV. 283 (1977); Subbarao, *Im-*

failed to produce any clear and unequivocal inference regarding the impact of binding arbitration upon salaries. Several studies of varying quality have concluded that compulsory arbitration has had a small to modest wage effect,[257] while others have reported no economic impact.[258]

The evidence from the educational sector gives reason to believe that some statewide salary effect may result from arbitration, even though it is difficult to know how much.[259] One

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passe Choice and Wages in the Canadian Federal Service, 18 INDUS. REL. 233 (1979). *See generally* B. DOWNIE, *supra* note 48, at 52-54.

257. *See, e.g.*, DISPUTE RESOLUTION, *supra* note 233 (conventional arbitration, firefighters and police); FINAL-OFFER ARBITRATION, *supra* note 217 (final offer arbitration, Michigan and Wisconsin firefighters and police); Loewenberg, *Compulsory Arbitration for Police and Firefighters in Pennsylvania in 1968*, 23 INDUS. & LAB. REL. REV. 367 (1969) (conventional arbitration); Olson, *The Impact of Arbitration on the Wages of Firefighters*, 19 INDUS. REL. 325 (1980) (final offer arbitration, Wisconsin).

The most comprehensive study of binding arbitration in the non-educational public sector is that of COLLECTIVE BARGAINING, *supra* note 204. This study encompasses a wide variety of jurisdictions in the United States, and covers a large number of collective bargaining agreements and bargaining years. The authors' best estimate of the salary effect of the availability of arbitration is that it increases salary levels by 1.4 to 4%. *Id.* at 24, 102. Their conclusion, after using more refined statistical models to calibrate the arbitration effect, is that "arbitration's *causal* influence on higher police salaries may be rather modest overall and even nonexistent in several arbitration states." *Id.* at 103.

The study by Feuille, Hendricks and Delaney (COLLECTIVE BARGAINING, *supra* note 204) is particularly instructive as to the effects that crude statistical measures can have on study results. The researchers employed a series of increasingly refined measures, and demonstrated that a large arbitration (or bargaining) effect may often be attributable to extraneous factors—for example, the historical level of salaries in a jurisdiction prior to the introduction of arbitration legislation. *See id.* at 98-99. Thus, their original estimate of arbitration's effect—3 to 9%—was reduced to 1.4 to 4% upon further analysis. *See id.* at 22-24, 102-03.

There is reason to suspect, therefore, that arbitration studies often overestimate the impact of arbitration on salaries. *See, e.g.*, *infra* note 261. Furthermore, very general salary data—like those listed in our Tables 5 and 6—should be treated with caution, since they may suggest a somewhat exaggerated view of the true effects of arbitration and strike legislation.

258. *See, e.g.*, Bloom, *supra* note 224 (conventional arbitration, New Jersey police); Lipsky & Barocci, *Final-Offer Arbitration and Public-Safety Employees: The Massachusetts Experience*, in PROCEEDINGS OF THE ANNUAL WINTER MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 65 (1978).

259. To ascertain the "true" effect of the *availability* of bargaining on teacher salaries, it is necessary to obtain a measure of teacher salaries determined in an arbitration jurisdiction, S_a, and a measure of the salaries that the same group of teachers would have been awarded were arbitration not available, S_n. Then S_a-S_n would be a "true" measure of the effect of the availability of arbitration, as the research design has controlled for all other factors that contribute to the determination of salaries. But once arbitration is instigated, S_n never occurs and it is impossible to know what salary levels would have actually been in the absence of arbitration.

There are two alternative approaches that can be taken to estimate the effect of the availability of arbitration. First, S_a can be compared with S_c, the salary level of a group of teachers from a jurisdiction without arbitration but that are comparable to the teachers used to obtain S_a. Of course, the estimate obtained by S_a-S_c is not likely to be an unbiased estimate

study, based on a national sampling of teachers from arbitration and non-arbitration states, estimates that salaries in arbitration states may be nine percent higher.[260] This study probably overstates the arbitration effect, however, for it does not measure the amount of increase attributable to arbitration and does not control for a number of potentially influential factors.[261]

Tables 5 and 6 contain alternative methods of gauging the arbitration effect through, respectively, a measurement of salary trends in states both before and after the adoption of arbitration, and a comparison of salary trends in arbitration and non-arbitration states. We emphasize that these measures invite several methodological criticisms, and we do not offer them as proof of the magnitude of the arbitration effect.[262] Cumulatively, however, these measures appear to suggest the presence of some inflationary effect.

Table 5 sets forth the rate of salary increases occurring in each of the binding arbitration states for the three years prior to the enactment of compulsory arbitration and the four years following adoption of the process. The rates of salary increase are measured both in terms of actual dollars and 1967 dollars, and those rates are

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of the impact of the availability of arbitration upon salaries. It is a difficult methodological task to match two groups of teachers such that they are identical *but for* the availability of arbitration in one group. For example, the political and economic processes that lead to the instigation of arbitration in a jurisdiction may produce a bargaining context quite different from that of a non-arbitration jurisdiction. For a more detailed critique of problems associated with using this approach to estimating the impact of arbitration, see Anderson, *The Impact of Arbitration: A Methodological Assessment*, 20 INDUS. REL. 129, 133-41 (1981).

Second, a wage determination econometric model can be used to estimate S_n. Using a number of variables highlighted by the wage determination theory, S_n is estimated by use of sophisticated wage equations. For examples of wage determination models, see Bloch & Kurkin, *supra* note 75; Fogel & Lewin, *supra* note 75. Of course, this approach is limited by the accuracy and comprehensiveness of the wage equation.

260. Delaney, *supra* note 79, at 445-46.

261. As discussed *supra* note 257, the failure to control for pre-existing salary levels in arbitration jurisdictions has potential to overstate appreciably the independent impact of arbitration. Furthermore, CPS data fail to control for such factors as a school district's *ability to pay*, and as Delaney concedes, such failure will overstate the salary effect if those factors are themselves correlated with the existence of arbitration legislation. *See* Delaney, *supra* note 79, at 444 n.49. Finally, Delaney's classification scheme contains certain errors. *See supra* note 86.

262. In essence, Table 6 is an extension of the S_a-S_c method of estimating the impact of the availability of arbitration upon teacher salaries discussed in *supra* note 259. Rather than matching the salaries in one jurisdiction where arbitration is available with the salaries of a comparable group of teachers in a jurisdiction without arbitration, Table 6 compares all the arbitration jurisdictions, in general, with all the non-arbitration jurisdictions. Of course, this technique is subject to all the criticisms of the S_a-S_c method of estimation outlined in *supra* note 259. Furthermore, as both Tables 5 and 6 incorporate state-level average salaries, any inferences based on these data are also limited by the critique of state-level studies offered in *supra* notes 75-76.

TABLE 5
Average Salary of Public School Teachers in Binding Arbitration States for the Period Three Years Before and Four Years After the Enactment of Binding Arbitration

Year	Average Salary in Dollars	Average Salary in 1967 Dollars	Percent Increase in Average Salary	Percent Change in Average Salary in 1967 Dollars
		Nebraska (1972)		
1970-[illegible]	8,125	6,782	10.2*	5.0
1971-72	8,465	6,832	4.2	0.7
1972-73	8,704	6,716	2.9	-1.7
1973-74	9,168	[illegible],447	5.3	-4.0
1974-75	9,264	5,886	1.0	-8.7
1975-76	10,409	6,207	12.4*	5.5*
1976-77	11,172	6,287	7.3*	1.3*
		Iowa (1974)		
1972-73	9,597	7,405	4.5	-4.4
1973-74	9,854	6,930	2.7	-6.4
1974-75	10,655	6,769	8.1	-2.3
1975-76	12,132	7,234	13.9*	6.9*
1976-77	12,533	7,053	3.3	-2.5
1977-78	13,340	7,021	6.4*	-0.5*
1978-79	14,186	6,788	6.3*	-3.3*
		Connecticut (1979)		
1977-78	14,299	7,526	4.7	-2.1
1978-79	15,482	7,408	8.3*	1.6*
1979-80	16,229	6,839	4.8	-7.7
1980-81	17,404	6,595	7.2	3.6
1981-82	18,858	6,621	8.4	3.9*
1982-83	20,731	7,020	9.9*	6.0*
1983-84	22,624	7,317	9.1*	4.2*

Year	Average Salary in Dollars	Average Salary in 1967 Dollars	Percent Increase in Average Salary	Percent Change in Average Salary in 1967 Dollars
		Minnesota (1973)		
1971-72	10,218	8,247	4.7	1.0
1972-73	10,553	8,143	3.3	-1.7
1973-74	11,076	7,789	5.0	-4.3
1974-75	11,790	7,490	6.4	-3.8
1975-76	12,726	7,589	7.9*	1.3*
1976-77	13,963	7,858	9.7*	3.5*
1977-78	14,167	7,456	1.5	-5.1
		Wisconsin (1978)		
1976-77	13,242	7,452	7.2*	1.2*
1977-78	14,045	7,390	6.1	-0.8
1978-79	14,906	7,132	6.1*	-3.5*
1979-80	16,006	6,745	7.4*	-5.4*
1980-81	17,606	6,671	10.0	-1.1
1981-82	19,387	6,807	10.1*	2.0*
1982-83	21,496	7,279	10.9*	6.9*

*Percent increase in state average salary exceeds the national means.

Source: Calculated from data in National Education Association Research, Estimates of School Statistics (revised) (unpublished). The 1983-84 statistic for Connecticut is an unrevised estimate.

TABLE 6
Percentage Increase in Average Salaries of Public School Teachers, 1980-81 to 1982-83.**

Binding Arbitration States*****	
Wisconsin	24.20%
Connecticut	19.38
Iowa	17.72
UNITED STATES	17.20*
Nebraska	17.00
MEAN	19.58%

Right to Strike States***	
Montana	21.99%
Ohio	18.34
Oregon	18.03
Pennsylvania	17.38
Hawaii	17.26
UNITED STATES	17.20*
Alaska	16.89
Illinois	16.43
Vermont	13.30
Michigan	12.97
MEAN	16.95%

Other Collective Bargaining Intensive States****	
North Dakota	24.55%
Utah	24.09
Colorado	21.07
Maryland	19.94
Kansas	19.55
Florida	19.30
New Jersey	18.62
Nevada	18.33
New York	17.70
Arizona	17.26
UNITED STATES	17.20*
Indiana	16.43
Idaho	16.15
California	15.47
Rhode Island	15.39
Tennessee	15.26
New Hampshire	14.47
Delaware	14.24
South Dakota	14.10
Maine	12.71
MEAN	17.61%

Collective Bargaining Unintensive States	
Texas	24.42%
New Mexico	22.53
Virginia	20.42
Louisiana	20.33
Alabama	17.40
UNITED STATES	17.20*
Kentucky	16.83
West Virginia	15.88
South Carolina	14.47
Missouri	13.44
Georgia	12.74
North Carolina	12.45
Mississippi	10.03
MEAN	16.75%

* The national average includes data from the three states and the District of Columbia that could not be categorized as either collective bargaining intensive or unintensive.

** 1982-83 data is only an estimate and has yet to be revised.

*** This list includes Illinois, Ohio and Michigan which effectively have a "de facto" right to strike. While other states arguably fall into this category, these three were chosen because they have a particular problem with "illegal" teacher strikes. Without these three states, the mean would be 17.48.

**** Massachusetts (1.59%) has not been included among the "Other Collective Bargaining Intensive States" as that state's school districts have been subject to an abnormal, legal taxing limitation since 1980. If included, the mean would be 16.80%.

***** Minnesota (25.42%) has not been included among the "Binding Arbitration States," as since 1980 teachers have had the choice of either striking or going to binding arbitration.

Source: Calculated from data in National Education Association, The Ranking of the States, 1981 and 1983.

compared to the national figures. There is no exact pattern duplicated in each of the binding arbitration states. Because each of these arbitration systems was introduced into a different educational system in a different economic and political climate, it is not surprising that the salary effects recorded on Table 4 do not replicate each other. There is, however, a general trend indicating that the salary rates in most binding arbitration states consistently overtook national averages within two to three years of the introduction of binding arbitration.

Additional inferences of the economic impact of arbitration may be drawn when one compares the rates of salary increase in arbitration states with those in other jurisdictions. Table 6 sets forth the rates of salary increase occurring in the various states from 1980 to 1983. As Table 6 demonstrates, the average rate of salary increase in arbitration states[263] exceeds both that in states with the right to strike, and that in states where collective bargaining is intensive but does not culminate in resolution by strikes or arbitration. The salary effect varies considerably from state to state, however, and thus it is not possible to quantify a consistent arbitration effect.

In summary, the best available evidence from the educational and non-educational employment sectors suggests that teachers' salaries may be moderately inflated by the introduction of binding arbitration procedures.[264] And to the extent that such salary inflation does occur, it will occur through the influence of arbitration on negotiation behavior. For this reason, the relatively modest effect of arbitration is not surprising. Even though professional negotiators may be influenced by arbitration to negotiate somewhat larger salary settlements, one would not expect substantial salary increases in the absence of a signal from arbitrators that they will establish substantial salary precedents—and this, the evidence indicates, does not occur. Therefore, even though arbitration may "matter," "'market' factors appear to matter more."[265]

This does not suggest that binding arbitration is an undesirable impasse resolution technique for teachers. In a system of localized

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263. The 1980-83 period was chosen because it is the earliest time period in which arbitration legislation was in effect for all states listed.

264. This analysis focuses on salaries, and thus does *not* reflect the impact of arbitration on economic fringe benefits. Such fringe benefits are clearly a factor in estimating the general economic impact of arbitration. The work of Feuille, Hendricks and Delaney, (COLLECTIVE BARGAINING, *supra* note 204), reveals that arbitration's impact on salaries and fringe benefits is similar—there is "little effect on the general levels of fringe benefits and total compensation or on specific fringe benefits. . . ." *Id.* at 30. But clearly more work on this subject is needed.

265. *Id.* at 27.

collective bargaining, marginal improvement in salary levels may be better than no improvement at all. In addition, if arbitration is relatively as effective in improving salaries as the right to strike, it is probably preferable to the social and political turmoil that result from a shutdown of the schools.[266] There is, however, no indication that arbitration has the potential to produce change of such magnitude as will lift teachers' salaries to a competitive level in the labor market.[267] As a technique for educational reform, therefore, it is as unpromising as other variations on the system of localized collective bargaining.

B. The Effects of Binding Arbitration on School Governance and Educational Policymaking

While the predominant fear of local government is that arbitration will inflate the local budget, there is also serious concern over its non-economic implications. In particular, there are numerous policy issues that arise in collective bargaining which are thought unsuited for resolution by anyone other than the parties. As noted by one commentator:

> [P]rofessional employees often bargain over programs. For example, teachers' unions may demand certain kinds of educational offerings or limits on class size. Even if arbitrators were capable of dealing with the complexities of budgeting and choosing programs, elected officials should not delegate the duty they owe to the electorate to settle these questions. Deciding policy issues is the vocation of officials, not of arbitrators.[268]

The claim that certain policy matters should be non-arbitrable has had little effect on the scope of arbitration statutes. Arbitration legislation generally recognizes a scope of arbitration that is coextensive with the scope of negotiations.[269] As a consequence, arbitra-

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266. *See infra* text accompanying notes 299-302.

267. *See supra* note 79.

268. Bernstein, *supra* note 53, at 467. *Accord*, Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CALIF. L. REV. 678, 689-90 (1976).

269. A review of statutes that authorize some form of arbitration in teacher bargaining (compulsory or voluntary) reveals but three states that limit the scope of arbitration. These limitations interestingly, prohibit arbitration of economic rather than policy issues. *See* ME. REV. STAT. ANN. tit. 26, § 965.4 (1974); N.H. REV. STAT. ANN. § 273-A:12 (1979), R.I. GEN. LAWS § 28-9.3-12 (1980).

When binding arbitration legislation was debated in the Connecticut Senate, an unsuccessful amendment was introduced to restrict the scope of arbitration to issues involving compensation and fringe benefits. *See* 22 CONN. GEN. ASSEMBLY, 1979 SENATE PROCEEDINGS 2719 (May 8, 1979). In support of this amendment, one state senator argued that "I am not sure that we are ready with our long history and tradition of local control of education to have

tors cannot avoid deciding policy proposals that remain unsettled in negotiations. In theory, then, arbitrators could exercise their decisional authority to determine such matters as class size, teachers' work schedule, teachers' work duties, and even merit pay.

Prior studies of education arbitration have not examined the effects of arbitration on policy issues, and there is little evidence from the non-educational sector.[270] In an effort to investigate this effect, we analyzed the composition of all arbitration offers, awards and opinions rendered during the first four years of binding arbitration in Connecticut. This analysis identified both the extent to which arbitration is invoked to obtain change in policy-related matters, and the extent to which such attempts have succeeded. Furthermore, the results of arbitration were compared with those of negotiated settlements, thereby permitting some estimate of the relative effect of arbitration on bargaining outcomes. These findings are illustrated in Table 7, which represents a cross-section of the major substantive proposals made during the study period.[271]

As Table 7 illustrates, the direct impact of arbitration on policy issues is surprisingly small. Teachers' proposals for policy change have been overwhelmingly rejected to the extent these proposals affect the scheduling or size of classes, the length of the workday,[272] the scope of teachers' work duties, or the qualifications for teacher advancement. Teachers' field of success, by comparison, has been

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these important management and educational decisions made by an outside arbitrator." *See id.* at 2721.

270. *See infra* notes 276-77 and accompanying text.

271. The contract sample constitutes 70% of all bargaining agreements in effect in the school year 1979-80. The arbitration proposal and award sample cover all arbitration proceedings. (Because we were able to obtain contract samples for those districts where policy issues have been arbitrated, the percentage figures for contract and arbitration changes coincide.) Our selection of issues encompasses those policy-related proposals that have appeared with any frequency in arbitration proceedings. We have not included those proposals that, in our judgment, make minor or technical modifications in existing policy. In exercising this judgment we relied both on our interviews with personnel in Connecticut and our knowledge of the bargaining system gained through review of bargaining agreements and arbitration proceedings. Needless to say, there is a margin of error in this approach, but we do not think it affects the strong trends reported on Table 7.

272. Proposals affecting the length of the teachers' work day (proposal 6) were often opposed by school boards on the ground that they are *permissive* subjects of bargaining. This argument seems well-founded in West Hartford Educ. Ass'n, Inc. v. DeCourcy, 162 Conn. 566, 287 A.2d 739 (1972), and thus the unions' failure to win such proposals may be largely explained on legal grounds. The arbitrators' response to this scope challenge has not been altogether favorable to the school boards, however. As demonstrated in proposal five ("compensation (or longer day-year") arbitrators have thought it equitable to require additional compensation for teachers in the event the school boards mandate the lengthening of the work day or work year.

TABLE 7
Changes in Contract Composition: 1979-1983

Provision	1979 Frequency (N = 117) As percentage of contracts	All Changes (1979-83) As percentage of contracts		Negotiated Changes As percentage of contracts		Arbitrated Changes As percentage of contracts		Arbitration Success Rate As percentage of proposals	
TEACHER PROPOSALS									
1) Seniority rights for layoff	60%	32%	(37)	25%	(29)	7%	(8)	57%	(8/14)
2) Seniority rights for rehiring	32	26	(30)	19	(22)	7	(8)	62	(8/13)
3) Compensation for longer day/year	12	17	(21)	7	(8)	11	(13)	87	(13/15)
4) Binding grievance arbitration	70	15	(19)	13	(15)	3	(4)	67	(4/6)
5) Agency fee (a)	N/A	56	(65)	33	(39)	22	(26)	64	(25/39)
6) Work day limit (b)	50	6	(7)	6	(7)	0		0	(0/13)
7) Work year limit	66	8	(9)	8	(9)	—		—	
8) Teaching period limit	38	2	(3)	2	(2)	1	(1)	8	(1/13)
9) Teaching subject limit	32	1	(1)	1	(1)	—		—	
10) Increased preparation time (c)	N/A	N/A		N/A		1	(1)	6	(1/18)
11) Class size limits	47	3	(3)	3	(3)	0		0	(0/13)
12) Change in teacher duties (c)	N/A	N/A		N/A		7	(8)	22	(8/37)
13) Change in degree qualifications (c)	N/A	N/A		N/A		0		0	(0/12)
14) Transfer restrictions	20	22	(3)	2	(3)	0		0	(0/4)
BOARD PROPOSALS									
15) New hire salary discretion	26	3	(3)	3	(3)	0		0	(0/2)
16) Merit-related salary (d)	48	0		0		0		0	(0/3)
17) Management rights	69	2	(2)	2	(2)	0		0	(0/2)
18) Change in teacher duties (c)	N/A	N/A		N/A		4	(5)	38	(5/13)
19) Change in degree qualifications (c)	N/A	N/A		N/A		12	(14)	58	(14/24)

Notes: (a) Agency fee provisions were not legal at the time the contract sample was compiled.
(b) See note 260 for further explanation.
(c) Changes in contract composition for these items were not obtained.
(d) This provision refers only to the contractual power of school boards to withhold salary increases for poor performance.
(e) N/A = either the information was not available or not obtained.

limited to a rather narrow range of traditional union concerns—recognition of seniority rights in staff reductions, provision of additional compensation for a lengthened work schedule, institution of grievance arbitration, and authorization of agency fee provisions (a costless item for school government). What is noteworthy in this award pattern is that arbitrators have consistently refrained from interjecting themselves into the routine managerial concerns of school government.

These findings take sharper focus when compared to the general composition of arbitration disputes. Arbitration, it turns out, is used primarily to settle economic disagreements.[273] Just as economic disputes are the leading cause of strike activity, they also prompt most instances of bargaining impasse and arbitration.[274] Salary disputes were the principal component of virtually every arbitration proceeding; and both survey and field research confirm that non-economic disputes are secondary concerns in most arbitration proceedings.[275]

Our findings of arbitrator conservatism on policy issues are consistent with experience in the non-educational public sector. A comprehensive national study of arbitration in the police services, for example, found that the unions obtained change on non-economic matters in but one-fifth of the cases.[276] This study's authors thus concluded that "arbitrators seem to view their role in a conservative rather than innovative manner."[277] A similar appraisal has been offered by the chairman of the New York City Office of Collective Bargaining: "[a]s for the fear that arbitrators will impose unique, innovative provisions that may prove unworkable, it is interesting to note that there has been a reticence on the part of arbitrators to be

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273. During the first four years of arbitration in Connecticut, approximately 58% of the issues concerned economic matters like salaries and fringe benefits. Furthermore, among the remaining 42% of non-economic issues, a large number were minor procedural refinements of existing language (*e.g.*, expanding time limits for asserting grievances).

A similar finding is reported in COLLECTIVE BARGAINING, *supra* note 204, at 21, 62. Their multi-state survey of police arbitration revealed that the "vast majority" of arbitrated issues (78%) were economic. *Id.* at 21.

274. Salary disputes are found to be the leading cause of strike activity among teachers. *See* B. COOPER, *supra* note 44, at 76-79.

275. Our study of arbitration proceedings in Connecticut reveals that virtually all disputes include the issue of salaries. One union official informed us that salaries are the point of contention in the great majority of bargaining impasse, and that non-economic issues are of secondary concern. Similarly, surveys of school board chairmen, superintendents and teacher representatives reveal that salaries are, overwhelmingly, the most important issue in local contract negotiations. The next two issues of importance are insurance benefits and reduction in force.

276. *See* COLLECTIVE BARGAINING, *supra* note 204, at 21-22, 56-58.

277. *Id.* at 22.

innovative. It appears that most arbitrators prefer to follow, or perhaps it is fair to say that the parties expect the arbitrators to follow, predictable paths."[278] Regarding the propensity of arbitrators to follow bargaining patterns, it is also noteworthy that in those limited areas where Connecticut's arbitrators have shown willingness to award policy change, it is usually in the context of strong bargaining trends.[279]

Thus, there is little evidence that binding arbitration produces, or is invoked to produce, significant change in educational policy or school governance. In part, this finding may reflect the arbitrators' self-imposed limitations. Arbitrators typically have backgrounds in the law and dispute resolution, but little or no experience in the particular governmental service that is regulated by the bargaining agreement.[280] Therefore, arbitrators may quite sensibly conclude that neither their expertise nor their role lends itself to the determination of matters of policy. Furthermore, arbitrators are involved in the negotiation process for a very brief time, and thus have limited acquaintance either with the parties' historical bargaining relationship or the particular nature of the local governmental service.

There are also important process dynamics at work in public sector arbitration, which implicitly encourage arbitrator conservatism. An arbitrator, whatever his quasi-governmental status, is a professional intervenor whose employment is directly dependent on his continued acceptability to labor and management. The arbitrator's acceptability, in turn, is largely a function of his awards, which must neither wholly please nor wholly displease a party. Any perception of unfairness or bias will quickly stigmatize an arbitrator,

278. Anderson, *Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions*, in ARBITRATION-1974 (BNA) 59, 64 (1975) (proceedings of the Twenty-Seventh Annual Meeting, Nat. Acad. of Arbitrators, April, 1974); *accord* B. DOWNIE, *supra* note 48, at 55 ("[A]rbitrators almost invariably are conservative with respect to change.").

279. *See* Table 7, *supra* following note 272. The exceptions to this generalization are proposals three and five. Proposal three appears to be an anomalous result attributable to a peculiarity of Connecticut's bargaining law. *See supra* note 272. Proposal six, however, is a clear example of an issue where arbitrators have generated a bargaining trend through their rulings. Nonetheless, agency fee provisions are a costless item for school government and thus do not have serious implications for school governance.

280. *See, e.g.*, Weiler, *supra* note 223, at 377-78. By way of example, only one of the neutral arbitrators on the Connecticut panel has a background in teaching and administration. The most prevalent occupation of arbitrators is law. *See* CONNECTICUT STATE DEPARTMENT OF EDUCATION, PER DIEM FEE SCHEDULES MEDIATORS AND ARBITRATORS (Conn. 1983) (unpublished).

and will result—as has happened in Connecticut—in his unemployability.[281]

The arbitrator's need to remain marketable manifests itself in several respects. One phenomenon, discussed already, is that arbitrators tend to avoid controversiality and innovation.[282] This perception is confirmed by professional bargaining representatives of both unions and school boards, who agree overwhelmingly that arbitrators are often "hesitant . . . to alter the status quo in contract provisions" and "unwilling to deal with proposals that are innovative."[283] This conservatism most often works to the detriment of unions, who are the primary proponents of policy innovation,[284] but it can also frustrate the efforts of an aggressive management that seeks change through the processes of collective bargaining.[285]

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281. Arbitration statutes in the public sector almost always permit the parties to choose their arbitrator(s). *See* H. TANIMOTO, *supra* note 211, at 25-26. In Connecticut, this process is normally one in which each party selects a "partisan" arbitrator from a panel designated by the state, and these partisan arbitrators mutually agree on the selection of a "neutral" arbitrator. *See* CONN. GEN. STAT. ANN. § 10-153F(a), (c)(1) (1979). Such use of a tripartite panel is common among public employee arbitration statutes. *See* H. TANIMOTO, *supra* note 211, at 25-26. During the first years of arbitration in Connecticut, one neutral arbitrator was perceived as "anti-union" and was selected to arbitrate but three disputes. Ultimately, that arbitrator resigned from the arbitration panel.

282. *See supra* notes 256-78 and accompanying text.

283. Eighty-one percent of school board representatives, and 91% of union representatives agreed that "arbitrators are often hesitant to award proposals that alter the *status quo* in contract provisions." Eighty-nine percent of board representatives and 86% of union representatives agreed that "arbitrators are often unwilling to deal with proposals that are innovative."

284. As Table 7 illustrates, *supra* following note 272, the unions are far more aggressive in seeking change in school administration through collective bargaining. The school boards' area of success consists primarily of efforts to increase administrative control over contract rights previously won by teachers For example, boards have succeeded in obtaining limitations on the subject area of academic degrees that will qualify teachers for higher salaries. *See id.* A similar observation has been made by a union representative with experience under the Wisconsin teacher arbitration laws:

> [c]onsequently, the desire to remain competitive through the arbitrator selection process can create a compulsion to remain cautiously attached to the status quo. The status quo generally conforms more comfortably with the employer's position than with the union's, since it is the union which has been seeking change (improvement) through its bargaining demands.

Lentz, *Can Compulsory Arbitration Work in Education Collective Bargaining? A Second Look*, 9 J. L. & EDUC. 85, 90 (1980).

285. A management representative, with experience under the Wisconsin teacher arbitration statute, has noted the existence of a "no take back" rule, which prevents management from reversing earlier concessions to the unions. *See* Rynecki, *Can Compulsory Arbitration Work in Education Collective Bargaining? A Second Look*, 9 J.L. & EDUC. 93, 98-99 (1980). Our review of arbitration proceedings in Connecticut reveals some effort by management to "take back" previous concessions: but aside from those attempts that are based on legal grounds (i.e., previous concessions are not within the mandatory scope of bargaining and thus

The conservatism of arbitrators on policy issues may work in tandem with another decisional phenomenon: arbitrators typically render awards that offer a measure of success to both sides. Arbitration, our survey research indicates, is generally viewed as an accommodative process whose outcomes should largely reflect the trade-offs and compromise of bargaining.[286] Any award lacking "balance" may be considered a distortion of the bargaining process and will surely alienate one of the parties. Thus, the great majority of bargaining representatives report that they expect a "proportionate" number of successes and failures in arbitration "regardless of the proposals' actual merit."[287]

The "balance" in an arbitrated contract, however, does not resemble the *quid pro quo* of a conventional contract. For while teachers continually seek greater compensation, fringe benefits and job security, school boards have few affirmative gains to be won through collective bargaining.[288] Instead, the school board's success is measured by the extent to which their managerial prerogatives are preserved against encroachments of unions through collective bargaining. Therefore, in the context of arbitration, both school board success and award balance are reflected in arbitrators' rejection of union policy proposals, or in their acceptance of less intrusive board counterproposals.

There are, then, process dynamics that encourage arbitrators to enhance certain employee benefits (primarily economic ones) while preserving fundamental aspects of administrative control. Central to these process dynamics is the fact that arbitrators usually are chosen by the parties. Such a selection process ensures a measure of "accountability" that, in the words of one commentator, "may be no more circuitous than the public official's accountability."[289] It is thus paradoxical that binding arbitration is viewed by school boards as a unilateral threat to local school governance. For, as our analysis shows, the principal dilutants of local educational control have been

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can be deleted by management at will) there has been little effort to win back major substantive rights.

286. For a discussion of the accomodative actions of arbitrators, see Horton, *supra* note 52, at 500-01; Krislov, *supra* note 52, at 73.

287. Eighty-four percent of school board representatives and 81% of union representatives agreed that "arbitrators often feel compelled to render 'balanced' awards that grant each party a proportionate number of its proposals, regardless of the proposals' actual merit."

288. *See, e.g.*, Doherty, *supra* note 137, at 73. *See also* Metzler, *Preparing for Negotiations*, in COLLECTIVE BARGAINING TECHNIQUES IN EDUCATION 121 (J. Herring & J. Sarthory eds. 1980) ("Many boards fail to face the facts of collective bargaining, fail to recognize that theirs is essentially a defensive not an offensive position.").

289. Krislov, *supra* note 52, at 73. *See also* Summers, *supra* note 57, at 1200.

the voluntary concessions made by school boards in collective bargaining.[290]

IV. Some Thoughts on the Future of Educational Collective Bargaining

In the preceding sections we have reviewed and interpreted the evidence concerning the effects of collective bargaining in public education. Our primary contention is that teacher bargaining has not proven to be the monolithic force in school government that some feared. Contrary to early speculation, the power of organized teachers in local school districts is relatively less than that of organized employees in private industry—particularly in the economic aspects of bargaining. Furthermore, organized teachers have not arrogated control over school policymaking through the negotiation process. The more significant success of teachers has been the attainment of various employment rights vis-a-vis administrative authority in personnel decisions; and even these job protections, the evidence indicates, are unexceptional among the conventions of labor relations.

Future developments in educational collective bargaining—whether they be changes in the methods of dispute resolution, in the scope of bargaining, or in the distribution of bargaining authority—will depend on the objectives that state government chooses to emphasize. In the early years of bargaining, these objectives often have been unarticulated and confused. Collective bargaining policy has sought simultaneously: 1) the prevention of work stoppage; 2) the provision of economic benefits and employment conditions sufficient to retain an able teaching force; 3) the preservation of a political tradition of local educational control; and 4) generally, the maintenance of an effective educational program. This ambitious wish list has, expectedly, gone unfulfilled. But a reconsideration of these objectives, in light of the schools' initial experience with collective bargaining, may at least suggest what realistically can be achieved in the coming years.

A. Prevention of Work Stoppage

One of the surest conclusions to be drawn from experience is that binding arbitration will, with infrequent exceptions, prevent strikes.[291] The record of labor peace in both the educational and

290. *See, e.g.*, Table 7, *supra* following note 272.

291. The Wisconsin Report, *supra* note 226, notes that there were 51 teacher strikes in the six years preceeding introduction of arbitration procedures in Wisconsin teacher bar-

non-educational public sector demonstrates that unionized employees are reluctant to flout the authority of arbitrators. The reasons for this record of compliance are not altogether clear. Unions may be anxious to support a system for which, in many cases, they have lobbied. The unions, furthermore, may have made a pragmatic assessment that the marginal gains resulting from arbitration are the most to be expected in the local bargaining climate. But compliance also may reflect the unions' belief in the ultimate "fairness" of an outcome derived from a "neutral" process. Arbitration is, after all, the routine method of settling individual grievances within the school system, and the *sine qua non* of an acceptable bargaining agreement.[292] The moral authority behind an arbitrated contract, therefore, should not be underestimated.[293]

Even though binding arbitration may be a successful medicament for the strike problem, one might reasonably ask whether strikes should be a "problem" at all. Indeed, in recent years some commentators have argued that the public employee strike no longer strikes fear in the hearts of local government officials, and that local government therefore no longer needs legal protection from the strike threat.[294] If such is the case, then public annoyance is arguably the greatest cost of a strike, and the legislatures might wish to reconsider their historical opposition to the strike.

It is not our purpose to resolve the strike question here. But we would note some factors in educational bargaining that might give educators and supporters of public education pause in pressing for the legalization of strikes. First, the public does not want strike legalization, and, according to our surveys, neither do school boards

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gaining. Since the introduction of arbitration, none have been reported. *Id.* at 185. Similarly, data supplied to us by the Connecticut Education Association show there were 49 teacher strikes in the 12 years preceeding introduction of arbitration, and none since implementation of arbitration. Researchers in Canada report that no strike has occurred in the 40 year experience of British Columbia teachers with arbitration. *See* Thompson & Cairnie, *Compulsory Arbitration*, *supra* note 224, at 11 (note that only economic items are arbitrable in British Columbia, and that strike data concerns only those disputes that are arbitrable).

Of course, one cannot expect that any legislative scheme will provide a fool proof method of strike prevention. *See generally, Structuring Collective Bargaining*, *supra* note 40, at 831. Nonetheless, the experience with arbitration reveals incontrovertible evidence that it is an exceptionally strong deterrent of strike activity.

292. *See* Table 7, *supra* following note 272. *See generally*, Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329 (1980); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).

293. *See Structuring Collective Bargaining*, *supra* note 40, at 832-33.

294. *See, e.g.*, Burton & Krider, *The Role and Consequence of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Cohen, *supra* note 41, at 192-93; Hanslowe & Acierno, *supra* note 39, at 1068-72. There is also some evidence that the bargaining impact of legal strike activity is relatively small and inconsistent. *See supra* notes 85-90 and accompanying text.

and school administrators.[295] And while such opposition is not ground for defaulting on the issue, there are reasons to question the wisdom of pursuing such a highly controversial technique for resolving teacher bargaining disputes. As noted earlier, the consumers of public education are a minority of the voting public; consequently, support for the schools depends on political persuasion rather than confrontation.[296] With an aging population, declining public school enrollments, growing competition from private schools, and increasing enrollments of politically disadvantaged students,[297] the public schools hardly can afford the public resentment that often attends the shutdown of local schools. In short, because of the weaker political leverage of educators, there is reason to think that strike activity in public education will be counter-productive over the long term.

There is also the possibility that strike-based bargaining will perpetuate, if not exacerbate, the current educational inequalities among local school districts. Experience with public sector strike activity indicates that its impact can vary widely,[298] depending in part on the balance of political power in local communities. One might speculate that the strike will be more productive where the employee unit is already relatively advantaged in the political process and less productive for weaker employee groups.[299] Therefore, if statewide educational equality remains a state government goal, recognition of the strike right may be undesirable in a decentralized system of collective bargaining.

Of course, the evidence we have adduced shows that binding arbitration will itself be no panacea for disparities in instructional funding.[300] In this respect, both binding arbitration and the right to strike carry the strong imprint of local conditions. Nonetheless, the fact that arbitration tends to equalize at least one component of the salary equation may suggest that arbitration is somewhat less objec-

295. The Gallup survey of public attitudes in 1980 found that 52% of the respondents opposed recognition of the right to strike, a slight increase in opposition from 1975. Gallup, *The 12th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 1980, at 33, 40. Our surveys of all state school superintendents and board chairmen in Connecticut reveal that more than 75% of each group oppose even a limited right to strike, and more than 90% of each group opposed a full right to strike.

296. *See supra* notes 94-109 and accompanying text.

297. *See supra* notes 102-04 and accompanying text.

298. *See supra* note 87.

299. The limited evidence on this subject lends support to this theory. *See* B. COOPER, *supra* note 44, at 75 (citing a study of public employee strikes where it was concluded that "well compensated unions may press for more, whereas lower wage groups may not. . . .").

300. *See supra* text accompanying notes 244-59.

tionable than the right to strike.[301] Still, the relative advantage is small and, as a matter of public policy, one might legitimately question whether it is an advantage at all.

B. Maintaining the Salaries and Employment Conditions of Teachers

The central dilemma for public education today is the same as that of earlier decades—how to fund a grand program of compulsory education for all. Much has been expected of the schools in post-war America, and the price has been considerable. In an era of generally rising costs, the schools have been charged with educating a larger body of students, many of whom require more costly forms of instruction.[302] It is not surprising that teachers' salaries have remained at the bottom of the professional scale or that teaching work loads have remained steady. Local government simply has not been willing to bear the rather imposing costs of "educational excellence," for all that phrase entails in a pluralistic society.[303]

Experience with conventional forms of teacher collective bargaining, we have argued, holds little promise for economic improvement of an order that would fundamentally change the professional status of teachers. The potential of teacher bargaining as a tool for reform, if any, depends on adoption of alternative bargaining strategies. One such strategy, binding arbitration, promises at least relative improvement in the level of teachers' salaries. Furthermore, there is some indication that binding arbitration may be as effective as the strike right in raising salaries, without the public and political costs entailed by a shut-down of the schools.[304]

There are significant limitations, however, to the potential of binding arbitration. First, there is reason to believe that arbitration systems stabilize over time and that arbitrators exert a conservative influence in the system. Arbitration, we have demonstrated, is essentially an accommodative process in which existing bargaining trends are duplicated. The marginal effect of arbitration on the overall system, therefore, cannot proximate the salary gains that are needed to make a qualitative difference in teacher compensation levels. Fur-

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301. As demonstrated earlier, binding arbitration does lead to measurable compression in the range of percentage salary increases—the standardization effect. *See supra* note 254. If salary levels were roughly proximate, then weaker bargaining units would either maintain parity with stronger units, or the decline in parity would at least be somewhat slowed.

302. *See generally* D. RAVITCH, *supra* note 60, at 267-328; Bakalis, *American Education and the Meaning of Scarcity*, PHI DELTA KAPPAN, Oct. 1981, at 102.

303. *See* Bakalis, *supra* note 302.

304. *See* Table 6, *supra* following note 262; *see also* note 86.

thermore, arbitration shows little potential to affect those conditions of classroom education with cost implications—like class size, teaching loads and teaching duties—since arbitrators refrain from awarding change in those areas.[305]

An alternative to arbitration is the centralization of the bargaining process, or at least centralization of its of economic component. In practice, arbitration achieves some degree of centralization because it tends to standardize bargaining outcomes throughout a jurisdiction. But arbitration does not affect several important features of the bargaining system—salary trends still are established by a series of local negotiations, existing salary disparities remain unaffected, and salary funding continues to be provided mainly by local taxation. This continued funding obligation of local government has proven to be one of arbitration's most fractious features, as local government complains loudly that state arbitrators are dictating local budgetary decisions and taxing policy. Therefore, if the state wishes to raise the general level of teachers' salaries, arbitration hardly seems the politically legitimate means of doing so.

Centralized salary determination and funding seem the inevitable direction of public education finance though the change may be a gradual one. Already, state government has surpassed local government in the general funding of local schools.[306] As the state's funding role increases, the state's claim to a role in determining salary levels should also increase. Furthermore, centralized salary policy would provide a direct means of ensuring greater equality among the instructional expenditures of school districts, a goal the states have yet to meet.[307] If past experience with localized collective bargaining teaches anything, it is that legal variations on the local bargaining process pale next to the influence of local wealth and local willingness to tax and spend for education.[308] Thus, a greater state

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305. *See* Table 7, *supra* following note 272.

306. In 1979, the state share of revenues for public elementary and secondary education surpassed the local share for the first time in recent history. The shares of state and local government were, respectively, 46% and 45%. *See* CONDITION OF EDUCATION, *supra* note 64, at 39-40, 56-57.

307. *See supra* notes 63-64 and accompanying text.

308. Past studies of teachers' salaries show that "[w]ealth of the community [is] the most powerful determinant of salary." A. CRESSWELL & M. MURPHY, *supra* note 25, at 447. In an attempt to test these findings, we performed a series of regressions to determine the causes of salary levels in Connecticut school districts. Employing a regression model like that reported in *supra* note 237, we found that a school district's ability to pay explained 70-85% of the variance in salaries at the top of the salary schedule ($p < .001$), and 30-60% of the variance at other points on the salary schedule ($p < .001$). Thus, our results strongly confirm the determinative value of local wealth in instructional funding.

role in determining and funding instruction costs of education may serve objectives of both quality and equality.

It is noteworthy that the governmental response to reformers' appeals for higher teacher salaries has occurred primarily at the state level.[309] State government has already demonstrated the greatest power to summon public attention to the needs of education and, more importantly, has the means to fund those needs other than through the local property tax.[310] While none of these efforts reveal a legislative intent to exercise full control over the determination of teaching salaries, the refocusing of attention on centralized solutions is itself significant. Growing state involvement should increase the organizational strength of teachers in the political process,[311] and should defuse the power of localized tax resistance. Moreover, the conspicuous role of state government in establishing salary policy may weaken the claim that salary determination is predominantly a matter of local concern.

Yet, even if centralized salary policy is the final destination of public education, one should not exaggerate the implications of that development in and of itself. The success of instructional reform depends ultimately on political will. The magnitude of costs of restoring teachers' salaries to a competitive market position is imposing.[312] One would be more sanguine about the possibility of such reform if the federal government's role were increased, and national educational goals received a national funding commitment like that of public transportation or pupil welfare programs. In the absence of a federal commitment, the possibility of reform remains uncertain even at the state level.

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309. *See supra* note 2. *See also* THE NATION RESPONDS, *supra* note 3, at 15 ("state leadership is one of the hallmarks of this reform effort.").

310. The proportion of state revenues derived from the property tax is quite small. *See* STATISTICAL ABSTRACT, *supra* note 22, at 287. Most states rely, instead, on a diverse group of alternative revenue sources like the personal income tax, the corporate income tax and general sales taxes. *See* F. WIRT & M. KIRST, SCHOOL POLITICS 235 (1982). During the past decade, as public resistance to the property tax increased, school financing shifted both to the state level and to non-property tax sources. The result has been an increasing role for state legislators and the state executive branch in public education. The current centralized efforts at educational reform, accordingly, should strengthen the shift in educational control to the state level. *See generally id.* at 207, 216-18, 234-36.

311. *See supra* note 117.

312. *See, e.g.*, Odden, *supra* note 83, at 311 (estimates for raising teachers' salaries to a competitive level range from $5 billion to $20 billion nationally). Howe, *Education Moves to Center Stage: An Overview of Recent Studies*, PHI DELTA KAPPAN, Nov. 1983, at 167 (estimate for raising teachers' salaries equals $20 to $30 billion a year nationally).

C. Preserving Local Control of Education

By far, the greatest resistance to teacher collective bargaining has come from the advocates of local educational control. Just as local control has been a "powerful and persuasive political shibboleth" in the struggle against state efforts to reclaim a leadership role in education,[313] local control has been a mainstay of opposition to recognition of the duty to bargain,[314] to expansion of the scope of bargaining,[315] and to adoption of impasse resolution techniques like binding arbitration.[316] Some of this opposition—the Wellington and Winter critique, for example—has been based on substantive fears that economic and educational outcomes might be adversely affected by a diminution of local powers.[317] A large measure of the opposition, however, has been premised on process values. In particular, proponents of local control have worked from the premise that local school control is a quintessentially democratic process which is effectively under lay control.[318] Collective bargaining, conse-

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313. F. WIRT & M. KIRST, *supra* note 20, at 114; *accord* SCHOOL FINANCE, *supra* note 42, at 348 ("The most frequently raised argument against school finance reform is the fear that it will result in a loss of local control. The concept of local control exasperates reformers, who claim that local control is a myth."). For an interesting general account of how the rhetoric of local control is employed to legitimate the decentralized state structure, see G. CLARK & M. DEAR, STATE APPARATUS: STRUCTURES AND LANGUAGE OF LEGITIMACY 157-59 (1984).

314. *See, e.g.*, M. LIEBERMAN, *supra* note 137, at 69-92; R. SUMMERS, *supra* note 41, at 1-17; Scott, *The Case Against Collective Bargaining in Public Education*, 3 GOV'T UNION REV. 16, 21 (1983). For a recent iteration of Professor Summers' view, see Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy* 1 GOV'T UNION REV. 5, 13 (1980).

315. *See, e.g.*, A. CRESSWELL & M. MURPHY, *supra* note 25, at 172-73, 477-78; Metzler, *The Need for Limitations Upon the Scope of Negotiations in Public Education*, I, in EDUCATION AND COLLECTIVE BARGAINING 33, 45-51 (A. Cresswell & M. Murphy eds. 1976).

316. *See, e.g.*, M. LIEBERMAN, *supra* note 137, at 93-95. Challenges to the legality of binding arbitration statutes have often been based on "home rule" laws, which constitute a legal manifestation of the local control theme. *See, e.g.*, The Conn. Ass'n of Brds. of Educ. v. Shedd, ___ Conn. Supp. ___ (1984); Dearborn Fire Fighters Union, Local No. 412 v. City of Dearborn, 394 Mich. 229, 243, 231 N.W. 2d 226, 229 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975).

317. *See supra* notes 71-72 and accompanying text.

318. *See, e.g.*, R. SUMMERS, *supra* note 41, at 2-3; Metzler, *supra* note 315, at 45-51. An excerpt from R. SUMMERS, *supra* note 41, illustrates the popular view. Writing of public education in the pre-bargaining era, Summers observes that:

> "democracy probably functioned more robustly [in education] than in any other local public benefit activity. In nearly all aspects of local educational decision making, powerful interest groups did not hold sway. There was usually substantial citizen interest and participation in school policy at local levels, and elected officials were by law accountable and frequently responsive.

Id. at 2.

quently, has been forced to defend itself against suspicions that it is, above all else, undemocratic.[319]

The tradition of lay governance in education is almost uniquely American;[320] even within American government one can think of few close analogues. The instrument of lay government, the local school board, is usually an elected body which is chosen in non-partisan campaigns.[321] Though elected to operate the largest and most costly public service of local government,[322] board members serve on a part-time basis, receiving neither remuneration[323] nor full-time staff assistance.[324] Moreover, though professional training and certification are required of those who implement the educational program,[325] board members themselves usually have no more professional expertise than the laity they represent.[326]

Expertise, concededly, is not always a virtue in government. Given the important role of public schools in socializing and acculturating children, there is something to be said for the ideology of lay governance. Yet, this ideology largely obscures the reality of governance. For it is now "widely confirmed"[327] by investigation of school government processes that local educational policymaking is dominated by professional school administrators. Notwithstanding a formal structure of lay government, the influence of the laity—either directly or through its representatives on the school board—is quite limited.

An impressive amount of research in local school government, dating back to the 1960's, has led most observers to regard the

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319. *See* authorities cited *supra* note 314.

320. *See* H. TUCKER & L. ZEIGLER, *supra* note 111, at 19.

321. *See id.* at 17, 229; Peterson, *The Politics of American Education*, in REVIEW OF RESEARCH IN EDUCATION 348 (F. Kerlinger & J. Carroll eds. 1974).

322. *See supra* notes 65-66 and accompanying text.

323. *See* McDonnell & Pascal, *supra* note 118, at 40; Peterson, *supra* note 321, at 351.

324. *See e.g.*, F. WIRT & M. KIRST, *supra* note 20, at 80; Cohen, *supra* note 6, at 446.

325. *See, e.g.*, Project, *supra* note 16, at 1378-79.

326. *See, e.g.*, SCHOOLS IN CONFLICT, *supra* note 18, at 129; F. WIRT & M. KIRST, *supra* note 20, at 79; Project, *supra* note 16, at 1486.

327. Boyd, *supra* note 111, at 548; *accord* H. TUCKER & L. ZEIGLER, *supra* note 111, at 229 ("The superintendent and other professional administrators consistently dominate the lay school board and public, regardless of arena or topic of decisionmaking."); Project, *supra* note 16, at 1486 ("The increasing complexity of administrative and policy problems generates the attitude among elected board members that they lack the competence to make policy decisions. The result is deference to an even narrower and less responsible circle of experts who frequently believe that they alone are capable of making policy. This has had the effect, particularly in large cities, of virtually excluding representatives, let alone parents, from a significant role in the educational systems, thus undermining one of the traditional bases of the public school system.").

school board's role as one of legitimation.[328] In practice, it is professional school administrators who determine the content and scope of the agenda for school board meetings.[329] Board action on this agenda almost always results in affirmation of the administration's proposals.[330] Moreover, those issues of central concern to educational policy making—curriculum, student affairs and personnel matters—are among the first matters ceded to administrative determination.[331] As a result of this pattern of continual deference to professional school administrators, it is said that "the board becomes the agent of legitimation that provides a facade of public control, while power is really being exercised by administrators."[332]

This view of the school board as a legitimating agent contains, no doubt, some overstatement. There is evidence, for example, that school board influence is appreciably stronger on "external" issues pertaining to the school budget and school facilities.[333] Furthermore, there is some evidence that smaller, exurban school districts exhibit a higher degree of school board and community involvement than is commonly suggested.[334] Nonetheless, there is incontrovertible evidence that the prevailing image of school government processes bears little resemblance to the normal operation of those processes.[335]

The image of lay control also is dispelled by study of public participation in school politics. Actual citizen participation in school government affairs may be the lowest of any institution of American government.[336] Public turnout at both school board elections[337]

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328. *See, e.g.*, L. ZEIGLER & M. JENNINGS, GOVERNING AMERICAN SCHOOLS 250 (1974); Kerr, *The School Board as an Agency of Legitimation*, 38 SOC. EDUC. 34-59 (1964); Peterson, *supra* note 321, at 351.

329. *See, e.g.*, H. TUCKER & L. ZEIGLER, *supra* note 111, at 123-25; L. ZEIGLER & M. JENNINGS, *supra* note 328, at 190.

330. *See, e.g.*, H. TUCKER & L. ZEIGLER, *supra* note 111, at 144-45, 231; L. ZEIGLER & M. JENNINGS, *supra* note 328, at 14-15.

331. *See, e.g.*, L. ZEIGLER & M. JENNINGS, *supra* note 328, at 128; Boyd, *supra* note 111, at 567; Wollett, *supra* note 9, at 1018.

332. Peterson, *supra* note 321, at 351. *See generally* Wertheim, *The Myth of Local School Control*, 102 INTELLECT 55 (1973).

333. *See, e.g.*, Boyd, *supra* note 111, at 565-67; Peterson, *supra* note 321, at 354.

334. *See* Boyd, *supra* note 111, at 560-61, 573. *But see* Cohen, *supra* note 6, at 438-39.

335. Conventional labor law analysis, to our knowledge, has yet to incorporate any of the social science findings discussed above. The de facto authority of school administrators has been noted, however, by two advocates of teacher collective bargaining. *See* Kay, *The Need for Limitation Upon the Scope of Negotiations in Public Education*, II, in EDUCATION AND COLLECTIVE BARGAINING 52, 53 (A. CRESSWELL & M. MURPHY eds. 1976); Wollett, *supra* note 9, at 1018.

336. *See* H. TUCKER & L. ZEIGLER, *supra* note 111, at 229.

337. *See* SCHOOLS IN CONFLICT, *supra* note 18, at 95 ("One clear point is that there is little voter turnout for board elections, even more indifference than that for other government

and school board meetings[338] is surprisingly low. Past attempts to encourage public involvement, furthermore, suggest that widespread participation could not be induced "under any imaginable system of local control of schools."[339] In addition, the public appears to have little interest in, or views on, issues of educational policy.[340] Like the school boards themselves, citizens confine their interest to external issues affecting local tax burdens and school facilities[341] —with occasional interest in ideologically-laden issues like textbook censorship.[342] Matters of educational policy invoke the same deference to professionalism that is common among school board members.[343]

There is, then, ample evidence that the school boards function as "symbolic democracies,"[344] and that lay control is often more "ritual"[345] than substance. This is not to say that local factors have no influence on the educational process. Local financing decisions, as

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offices."); Reed & Mitchell, *The Structure of Citizen Participation: Public Decisions for Public Schools*, in PUBLIC TESTIMONY ON PUBLIC SCHOOLS 194-95 (S. Weinstein & D. Mitchell eds. 1975).

338. According to a 1983 Gallup survey, 8% of the public (including both parents and non-parents) attended a local school board meeting in the 1983 school year. *See* Gallup, *The 15th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 1983, at 43.

339. G. LANOUE & B. SMITH, THE POLITICS OF SCHOOL DECENTRALIZATION 229 (1973). The pattern of public indifference appears also to extend to the collective bargaining process, notwithstanding claims that the public has been involuntarily excluded from that process. The Rand study of teacher bargaining found, for example, that the public had declined to participate even when actively solicited. Thus, the Rand researchers concluded that advocates of community involvement lead a "phantom army." L. MCDONNELL & A. PASCAL, *supra* note 47, at 43-44; *accord* Doherty, *supra* note 21, at 546; Perry, *supra* note 41, at 3, 5.

340. *See, e.g.*, H. TUCKER & L. ZEIGLER, *supra* note 111, at 231-32; SCHOOLS IN CONFLICT, *supra* note 18, at 130-31; Cohen, *supra* note 6, at 442.

341. *See, e.g.*, Boyd, *supra* note 111, at 566-67; Peterson, *supra* note 321, at 354. *See also* Belasco, Alutto & Glassman, *A Case Study of Community and Teacher Expectations Concerning the Authority Structure of School Systems*, 4 EDUC. & URB. SOC'Y 85, 90-93 (1971) (survey data showing that the community expects greatest lay control over budget, facilities and salaries).

342. Based on a survey of citizens, officials and local civic leaders, one researcher concluded that:

> [they had] no particular interest in curriculum, text books, subversive activities, personalities, athletics, race relations. . . . This suggests that these areas provide a reservoir for what we have called episodic issues—issues which emerge under unusual or special conditions and shortly subside. Thus, it is not textbooks which cause concern, but a particular textbook under a special set of circumstances.

R. MARTIN, GOVERNMENT AND THE SUBURBAN SCHOOL 55 (1962).

343. *See, e.g.*, Boyd, *supra* note 111, at 566-67. Surveys of community attitudes indicate that most parents believe *school personnel* should control issues of instructional policy. *See* Belasco, Alutto & Glassman, *supra* note 341, at 93.

344. H. TUCKER & L. ZEIGLER, *supra* note 111, at 13.

345. Cohen, *supra* note 6, at 435.

we have demonstrated, have significant impact on the quality of public education.[346] Furthermore, local parties still have a pivotal role in educational policy making and implementation, even if those parties are unelected professionals.[347] Thus, "local control" may have operational meaning even if "lay control" does not.

Advocates of collective bargaining in the schools should be relieved, however, of their historical burden of proving its compatability with democracy. If contemporary school politics are abnormally undemocratic, the loss is attributable to causes other than collective bargaining. Thus, the question put by teacher bargaining is not whether the public or the professionals shall determine educational policy; it is whether an already pervasive professional influence in the public schools should be distributed differently. The latter question, as we shall suggest in the following section, is eminently debatable. But it is an altogether different question from the one that has preoccupied labor critics in the past.

D. Collective Bargaining and the Educational Program

Most critical attention in recent years has disregarded the possibility that teacher bargaining might have salutary effects for the schools. At least until the release of reform reports in 1983, concern over teacher compensation and working conditions was drowned out by more vocal concern over local tax burdens and the diminution of local control.[348] The premise of critics usually has been that bargaining effects, whatever they are, are negative.[349]

While teacher unionism is certainly not an unalloyed good, its relationship to the educational program is far more complex, and far more ambiguous, than is often suggested. The fact that teachers' unions continually press for higher salaries and reduced work loads, for example, undoubtedly shows a measure of professional self-interest. But self-interest does not obviate the realities of the labor market or the exigencies of teaching performance; an examination of these factors suggests that professional and educational goals may sometimes be closely related.[350] Furthermore, the self-interest of school government and local taxpayers has its part, too, in the prob-

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346. *See supra* text accompanying notes 94-109.

347. *See infra* notes 354, 359-60 and accompanying text.

348. *See, e.g.*, authorities cited *supra* note 314. *See generally* R. SUMMERS, *supra* note 41.

349. For a recent example of one genre of this type of criticism of teacher bargaining see Baird, *Teacher Unions, Educational Quality, and a Free Market Remedy*, 5 GOV'T UNION REV. 3:12 (1984).

350. *See supra* notes 11, 196-99 and accompanying text.

lems of public education. As one advocate of reform has observed, "[t]here is a disturbing duplicity in a society that fails to create the conditions that would foster teacher competence and then complains of incompetent teachers."[351]

Perhaps the strongest case to be made against teacher collective bargaining concerns its effect on the processes of school administration. Like other legislative programs in the schools, statutory bargaining contributes to a process of administration by rules[352] — rules, moreover, that are formulated at the school district level rather than at the school site where they must be applied.[353] Critics rightly apprehend that such rules may compromise the leadership role of school administrators, a role that has proven important in successful schools.[354] And while the evidence of such impact is neither consistent nor unequivocal, there is little reason to doubt that bargaining has affected the processes of school administration, and that sometimes the effect has been detrimental to the schools.[355]

Yet, if collective bargaining is less than ideal as a method of ordering school labor relations, it must be compared to what it has replaced. School administration in the pre-bargaining era was characterized by broad, unilateral control over the teaching staff.[356] In an earlier period, unrestricted administrative discretion seemed no more objectionable than the schools' economic dependence on a fe-

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351. CARNEGIE REPORT, *supra* note 2, at 161.

352. *See* Yudof, *supra* note 100, at 897, 904. *See generally* B. WISE, LEGISLATED LEARNING 103-06 (1980).

353. Collective bargaining agreements are, with the exception of a statewide agreement in Hawaii, negotiated at the school district level. *See supra* note 17. In 1980, there were 15,912 public school districts. *See* DIGEST OF EDUCATION STATISTICS, *supra* note 17, at 59. By comparison, there were more than 86,000 public schools during school year 1976-77, the most recent year of reference. *See id.* at 65.

354. *See, e.g.*, CARNEGIE REPORT, *supra* note 2, at 219-29; Wellisch, MacQueen, Carriere & Duck, *School Management and Organization in Successful Schools*, 51 SOC. OF EDUC. 211 (1978).

355. The empirical evidence on collective bargaining's effect on school administration is reviewed in Nicholson & Nasstrom, *The Impact of Collective Negotiations on Principals*, 58 NAT'L ASS'N OF SECONDARY SCHOOL PRINCIPALS BULLETIN 100 (Oct. 1974). The authors conclude:

> [t]he variety of results from these studies strongly suggest considerable care in discussing implications. Nevertheless, it would appear that principals will find their decision-making role affected in the future by professional negotiations. The role is not destroyed, however, it will simply require that principals understand how to share decision-making power while exercising it.

Id. at 106. *See also* Johnson, *Teacher Unions in Schools: Authority and Accommodation*, 53 HARV. EDUC. REV. 309 (1983).

356. *See supra* note 133.

male labor supply debarred from more lucrative careers.[357] These conditions would eventually lead, however, to the widespread unionization, as teachers exerted collective strength to win greater professional recognition and a greater participatory role in school processes. The very fact that, in 1980, one-half of all teachers' union members worked in rural or small towns, and two-thirds described themselves as politically "conservative,"[358] is testimony to the broad appeal of the teachers' labor movement.

There is also a strong educational claim for teacher participation in school government, and this claim is no less compelling than the need for educational leadership. Effective schools will be founded on effective teaching.[359] It is the teaching staff, after all, that must implement the intangible program called "educational policy." And as past experience makes clear, neither legislative initiatives nor managerial directives can succeed unless there is willing and intelligent participation by the teaching staff.[360] The law may attempt to preserve educational policy making as the special responsibility of management,[361] but the realities of the educational process say it cannot.

The structure of district-wide collective bargaining, of course, hardly seems the best mechanism for ensuring fluid and responsive school administration at the school site. It is the nature of collective

357. *See, e.g.*, Grant, *The Teacher's Predicament*, 84 TEACHERS C. REC. 593 (1983) ("The drainage out of teaching has been the result of a variety of factors, not least of which is the success of the feminist movement in lifting the professional horizons for women who in earlier eras would not have looked beyond the helping professions of teaching, nursing, and social work. This was especially true of talented women who entered elite colleges; twenty years ago four times as many Smith College graduates went into teaching as into business—today the reverse is true.") *accord* A. CRESSWELL & M. MURPHY, *supra* note 25, at 62-63; D. RAVITCH, *supra* note 60, at 323.

358. *See* STATUS, *supra* note 27, at 16, 19.

359. *See, e.g.*, Murnane, *supra* note 178, at 26-27. *See also* CARNEGIE REPORT, *supra* note 2, at 154-85.

360. *See, e.g.*, Murnane, *supra* note 178, at 26 ("A necessary condition for effective teaching may be that teachers adapt instructional strategies and curricula to their own skills and personalities, and to the skills, backgrounds, and personalities of their students. In this view of teaching and learning, the technical characteristics of instructional strategies and curricula are not, by themselves, the critical components. Instead, what matters is the extent to which teachers are willing and able to adapt the curricula and instructional strategy to their needs and to the needs of their students."); McDonnell & Pascal, *supra* note 118, at 44 (concerning the importance of teacher participation to the success of federally-funded programs). *See also* Johnson, *supra* note 355, at 319-20 (concerning the interdependence of teachers and administrators). Significantly, those empirical studies that find a correlation between school effectiveness and administrative leadership *also* find that successful administrators are highly involved with classroom teachers in the coordination and implementation of the instructional program. *See* Wellisch, MacQueen, Carriere, & Duck, *supra* note 354, at 216-17, 219.

361. *See supra* note 124 and accompanying text.

bargaining agreements to substitute rule and formality for trust and informality.[362] This seems especially so in public education, where the evolution from unilateral school government has occurred under the watchful eye of school critics, and where the political legitimacy of the teacher labor movement has never been fully accepted.[363] Moreover, the zeal with which accountability measures have been forced on the schools has predictably led educators to seek contractual declaration of their rights and their defenses.[364]

In the final analysis, the contribution of collective bargaining to school personnel relations may come not from its generation of rules, but from its expansion of the non-contractual role of teachers in school policy making.[365] Even more encouraging is evidence that strong educational leadership can coexist with collective bargaining if teachers and administrators are willing to accept their mutual roles.[366] This suggests that it is often the quality of a school's personnel, and the culture they generate, that determine the success of school labor relations. As one commentator has observed:

> Those who predicted that teacher unionism would transform the schools into hostile, rigid institutions expected that teachers would pursue their self-interests narrowly, that they would aggressively enforce the contract provisions negotiated on their behalf, and that traditional educational values—flexibility, responsiveness, cooperation—would be abandoned for conformity, confrontation, and formality. Such commentators discounted the reciprocal school setting, the interdependence of teachers, and the day-to-day realities of school work.
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> . . .

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362. *See* Yudof, *supra* note 100, at 892-93.

363. *See* authorities cited *supra* note 314.

364. On the proliferation of state accountability legislation, see D. RAVITCH, *supra* note 60, at 315-16. *See also* Cohen, *supra* note 6, at 445 ("In reality . . . public schools have suffered from an excess of accountability most of their history. . . . Public-school professionals have only recently begun to attain the power that enables them to deal with local communities and special interests with some degree of autonomy, but they are still held more accountable to the community than are members of any other profession."). For a discussion of the effects on personnel of accountability practices like merit pay and merit staff reductions, see *supra* notes 164-65, 178 and accompanying text.

365. There is, in fact, evidence to suggest that an informal participatory role for teachers has evolved in mature bargaining relationships. *See, e.g.*, Perry, *supra* note 41, at 15-16. Perry, we should note, does not conclude whether the effects of expanded teacher participation are beneficial for the schools. *See id.* at 17. There is, however, a disappointing lack of evidence of any consistent increase in teacher participation in unionized school districts. *See supra* note 146. This suggests that the development of informal participatory mechanisms may depend on the nature of personnel relations in individual school districts.

366. *See, e.g.*, L. MCDONNELL & A. PASCAL, *supra* note 47, at 81-82; Johnson, *supra* note 355, at 325-26; Williams, *The Impact of Collective Bargaining on the Principal: What Do We Know?*, 11 EDUC. & URBAN SOC'Y 168, 178 (1979).

> Teachers in this study did not want to run the schools, but they were prepared to support a principal who demonstrated that their schools could be run well. For most teachers, being part of a good school took precedence over union membership or close enforcement of the contract.[367]

As is the case with educational finance, then, school labor relations may be little affected by legislated labor policy. Collective bargaining usually will not interfere with schools that work well, and collective bargaining seldom will rehabilitate schools that are run poorly. The task of labor law, therefore, is to cultivate an environment in which the better potential of educators and administrators can develop. For this reason, the legislatures should act cautiously in imposing unproven reform measures, like merit pay, on the schools. Though such measures may seem the needed antidote for an untoward union influence, their greatest potential may be to undermine the collegial working relationship that is a prerequisite to effective schools.[368]

Needed is some equilibrium between the rightful influence of professional educators and the imperative that the schools be managed. Collective bargaining may be an imperfect means of reaching that equilibrium, but it holds greater promise than the managerial traditions it replaces. Teacher collective bargaining is, after all, a relatively young institution, which has carried a heavy burden of past custom during its early years. As the realm of possibilities is reimagined, there is reason to hope that labor relations can evolve in a direction that will accommodate both professional and public interests.

V. Conclusion

The problems of contemporary educational reform are also largely the problems of school labor relations. Most prominent among these is the schools' incessant need for greater financial support, particularly in funding the costs of instruction. Experience with educational collective bargaining demonstrates that the teachers' unions, far from having "disproportionate power" as claimed by Professors Wellington and Winter, may be at a disadvantage in the

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367. Johnson, *supra* note 355, at 326. *See also* Vaughn, *Public Sector Bargaining Issues in the 1980's: A Neutral View*, 33 N.Y.U. Conf. on Labor 317, 323 (1980) ("There is now a growing body of empirical evidence emerging confirming what most professional industrial relations experts have always known—that the nature of the labor-management relationship in an organization can have significant positive or negative effects on productivity, depending on the quality of the relationship.").

368. *See* Johnson, *supra* note 166, at 183-85.

local political process. Nor is this disadvantage one that can be remedied legislatively by recognition of teachers' right to strike or arbitrate. This financial dilemma seems to inhere in the current localized processes for funding teachers' salaries, and the dilemma is exacerbated in poorer school districts. This suggests that, if reform of teacher compensation is to come, it must originate at higher levels of government where there is both the political will and the economic means to pay for it.

Experience with teacher labor relations is less suggestive of strategies for reforming the non-compensatory aspects of public education. Clearly, the schools must avoid the excesses of either an arbitrary school administration or a workplace regimented by contractual rules. Yet, while there is agreement on this in the abstract, practical proposals are lacking. The history of labor relations may also reveal the dominant influence of custom, personality and professional identity in the schools, and the futility of legislative reforms—like merit pay—that ignore the school culture. One suspects, however, that the sociologically informed labor policies will ultimately yield to public opinion, given the public's irrepressible fancy that it can—and does—run the schools.

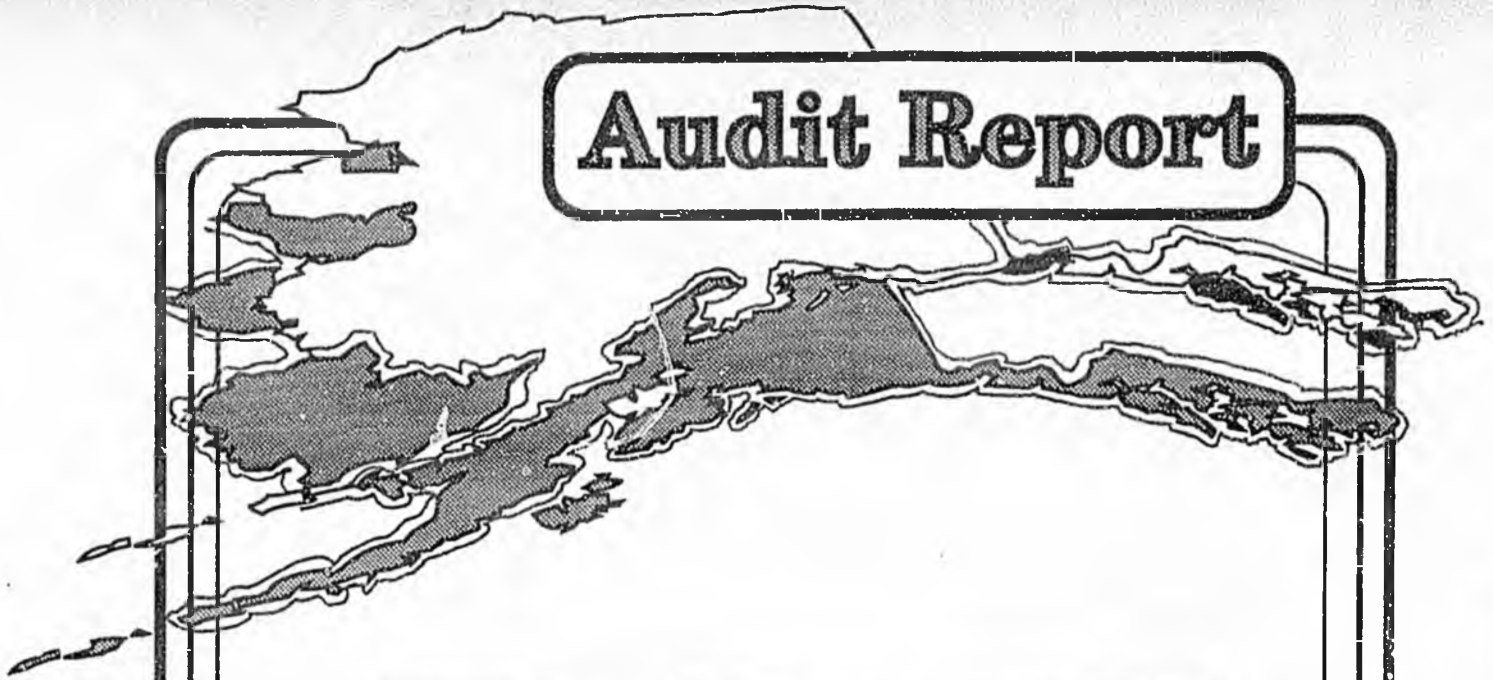
Whatever the progress of educational reform, the public schools must address the problem of dispute resolution. Indeed, if significant reform is not forthcoming, dispute resolution may become the predominant issue in school labor relations. Both our research and the research of others indicate that there is a solution to work stoppage—binding arbitration. Yet, having discarded the common law notion that teachers' strikes are *malum in se*, one must ask further whether the remedy is less appealing than the malady.

Present evidence suggests that local government will pay a moderate economic cost under binding arbitration. Whether that cost is an enduring one remains to be seen. Local school government will not, however, surrender many of its important managerial prerogatives to arbitrators (excepting some fiscal control); arbitrators are a conservative lot, by and large, and arbitration schemes provide disincentives for those who would view the process as a progressive or innovative one. Thus, arbitrators, like the parties themselves, concede and compromise so far as compelled to by their environment.

There remains the question: Is binding arbitration a politically legitimate process? The answer is indisputably "yes", insofar as both teachers and school government show an overwhelming willingness to abide by the outcome of arbitration. Furthermore, one cannot fully credit the argument that arbitration threatens local

control, since public education is a state responsibility, just as one cannot give credence to those who find arbitration a threat to "free" collective bargaining—free bargaining was never a feature of a system that denied teachers the right to strike.

Still, one is left with a niggling doubt that binding arbitration may mask the political timidity of state government, and that it may offer merely an easy peace. Binding arbitration is a tentative step toward centralized educational governance, but one under which the state can control neither the costs nor the direction of educational decision-making. It is just such diffusion and delegation of responsibility that has brought our educational system to its present sorry state.



IMPACT OF THE PUBLIC EMPLOYMENT RELATIONS ACT ON LOCAL SCHOOL DISTRICTS

November 8, 1991

Audit Control Number:

05-4419-92

Division of Legislative Audit

P.O. Box W, Juneau, Alaska 99811-3300

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November 22, 1991

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

A Report on the Impact of
the Public Employment Relations Act
on Local School Districts

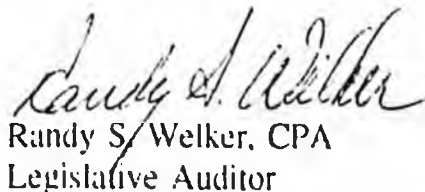
November 8, 1991

Audit Control Number

05-4419-92

The audit reports on the impact that Chapter 180, SLA 1990 has had on labor relations between school employees and the State's local school districts. This legislation made public school employees subject to the provisions of the Public Employment Relations Act (PERA), AS 23.40, Article 2. The legislation also classified public school employees as (a)(3) workers under AS 23.40.200 which gave the school employees the legal right to strike. This was a right that they had previously not been granted.

The audit was conducted in accordance with generally accepted government auditing standards. We recommend in the report that legislation be passed that will continue to classify public school employees as (a)(3) employees under AS 23.40.200 and that they continue to be subject to the other provisions of PERA. We also recommend that the legislature consider passing legislation to clearly establish what items are negotiable between school district administrators and their employees. A further statement of our audit approach is included in the Objectives, Scope, and Methodology section of this report.



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Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with a Legislative Budget and Audit Committee special request and the provisions of Title 24 of the Alaska Statutes, we conducted a review of the effects of Chapter 180, SLA 1990 (Senate Bill 15) on the State's local school districts. This legislation made public school employees subject to the provisions of the Public Employment Relations Act (PERA), AS 23.40, Article 2. Public school employees were classified as (a)(3) workers. Under PERA, class (a)(3) employees are given the legal right to strike; whereas, previously when public school employees were covered by Title 14, the Alaska Supreme Court determined that they had no legal right to strike.

Objectives

The objective of the review was to gain an understanding of the effects of Chapter 180, SLA 1990 on labor relations between public school employees and their respective school districts. Specific objectives of the review were to:

1. Determine how the legislation affected the length of time needed to reach a negotiated settlement compared to negotiations conducted under Title 14.

2. Determine if there has been an increase in the costs of attorneys or other legal costs attributable to negotiations under PERA.

3. Determine whether under PERA there has been an increased cost to school districts attributable to contract negotiations.

4. Compare the settlement process between school districts and employees under Title 14 with PERA.

5. Assess the involvement of the Alaska Labor Relations Agency (ALRA) with public school employees and school districts.

6. Review and report on the number and content of Unfair Labor Practice (ULP) filings submitted to ALRA.

7. Report on the effect of PERA classification on the general attitudes of both labor and management towards each other during the negotiations process.

Scope

We focused our examination of education employee labor relations on the 54 school districts established in the State of Alaska. In our review, we placed additional emphasis on larger districts that have negotiated agreements or are currently negotiating under the provisions of PERA.

Methodology

Our evaluation of the effects of Chapter 180, SLA 1990 involved review and analysis of the following documents:

1. Alaska Statute 14.20, Article 6. Negotiation and Mediation.

2. Alaska Statute 23.40, Article 2. Public Employment Relations Act.

3. Information pertaining to 1989's Senate Bill 15 which eventually was passed as Chapter 180, SLA 1990, an act "Including, for two years, public school employees in the Public Employment Relations Act as class (a)(3) employees entitled to a right to strike; requiring advisory arbitration before public school employees exercise the right to strike; and providing for an effective date."

4. Information pertaining to 1988's House Bill 170 which eventually was passed as Chapter 95, SLA 1988, an act "Extending collective bargaining rights to noncertificated school district employees."

5. The Alaska Supreme Court decision regarding *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977).

6. The Alaska Supreme Court decision regarding *Anchorage Education Association v. Anchorage School District*, 648 P.2d 993 (Alaska 1982).

7. Executive Order No. 77.

8. ALRA's 1990 Annual Report.

9. ALRA's ULP Case Management File.

10. ALRA's ULP Case Status Report.

11. Public Case Files at ALRA on filed education cases.

We also relied extensively on interviews with the following groups of individuals:

1. Organizations with an interest in education matters, which included the Alaska Association of School Boards (AASB), the Alaska Council of School Administrators (ACSA), and the National Education Association (NEA).

2. School district administrators, which included superintendents, personnel directors, and labor relations directors.

3. Presidents and members of negotiating teams for local teachers' unions.

4. Presidents and members of negotiating teams for local education support personnel unions.

5. ALRA's hearing examiner/administrator.

We prepared a questionnaire regarding the effects of placing public school employees under the provisions of PERA, which was mailed out to the presidents of local NEA-affiliated unions.

We also prepared a questionnaire regarding the effects of placing teachers under the provisions of PERA, which was mailed to the superintendents of 51 of the State's school districts. Because the questionnaire was designed based on their discussions, we did not mail the questionnaire to the superintendents of the three school districts we had interviewed in the survey phase of our audit work.

ORGANIZATION AND FUNCTION

Title 14 of the Alaska Statutes sets out the duties and organization of the Department of Education. The statutes establish a seven-member State Board of Education appointed by the Governor, which sets the policy for education in Alaska's public schools. The State Board appoints the Commissioner of the Department of Education to implement and carry out its policy decisions.

There are 471 public schools administered by 54 school districts in Alaska. The school districts include 21 Regional Education Attendance Areas (REAAs) and 33 City and Boroughs. The REAAs are created in politically unorganized areas in rural Alaska and the city and borough school districts serve politically-organized areas of the State.

Alaska education highly emphasizes the importance of local control. Each school district has a locally elected school board that works within the state guidelines to set policies for their respective districts. In 1990, there were about 108,000 students attending public school between preschool and twelfth grade. These students were taught by about 6,400 public school teachers.

Teachers and other school personnel were placed under Title 14 eighteen years apart

Certificated public school employees were given the right to bargain matters pertaining to their employment and the fulfillment of their professional duties in 1970. Chapter 18, SLA 1970 codified laws relating to school district labor relations under AS 14.20, Article 6 (commonly referred to as Title 14). Noncertificated public school employees were given the right to bargain matters of wages, hours, and other terms and conditions of employment in 1988 (Chapter 95, SLA 1988) when AS 14.20, Article 6 was amended.

In 1990 (Chapter 180, SLA 1990) public school employees were placed, for a two-year period, under the provisions of the Public Employment Relations Act (PERA) as class (a)(3) employees. An important aspect of labor relations under PERA is the role of the Alaska Labor Relations Agency (ALRA).

ALRA acts as referee and adjudicator for public employee labor relations

The present organization of ALRA was created on July 1, 1990 after the governor issued and the legislature approved Executive Order 77. The order consolidated three separate agencies into ALRA responsible for administering PERA and the Railroad Corporation Act. ALRA is composed of a board of three members who serve staggered three-year terms. The governor appoints and the legislature confirms the board members. No more than two board members may be from a single political party and all must have backgrounds in labor relations. One member is drawn from management, one from labor, and one from the general public.

ALRA employs a small staff of hearing officers and examiners to process and review various allegations and petitions within its jurisdiction. Perhaps the most visible aspect of ALRA's responsibilities is its resolution and adjudication of unfair labor practices (ULP).

The ALRA's process for resolving ULPs is as follows:

1. Preliminary review of allegation. The party filing a charge lays the issue out to a hearing officer/investigator. The hearing officer fills out a checklist to determine that all requirements for a charge have been met. Requirements include that the charge is sworn, that there are written addresses for the parties to the charge, and that the charge is dated. The hearing officer has 14 days to conduct an investigation, but in actuality it has been taking longer than 14 days.

2. Determination of jurisdiction. If the facts alleged appear to be true, then ALRA must decide if it has jurisdiction to hear the case. If it is determined that ALRA has jurisdiction, the facts of the charge are again examined prior to contacting witnesses on both sides. The hearing officer then forwards the case to the hearing examiner with a recommendation to dismiss or hear the case.

3. Informal Mediation or Resolution. If it is decided to hear the case, the hearing examiner attempts to bring the two parties together to have them conciliate the issues that separate them.

4. Hearing is held. If conciliation is not possible, then a hearing is held. An audio tape and written testimony is kept of each hearing. The case may be heard either by the ALRA's hearing examiner or the ALRA board may choose to hear the case as a board. When the board chooses to not be present at the hearing, the hearing examiner prepares a proposed decision for the board. When comments are received back from each board member and an agreement is reached on the wording of the decision, it becomes final. The final decision is written and is appealable in court.

BACKGROUND INFORMATION

1970 legislation first defined labor rights for teachers

In 1970, the terms and conditions by which teachers could collectively bargain were first established by the legislature in AS 14.20, Article 6. The statute sets out the negotiation and mediation processes to be followed for teachers (called certificated employees). Specifically, AS 14.20.550 requires that

> *Each city, borough and regional school board, shall negotiate with its certificated employees in good faith on matters pertaining to their employment and the fulfillment of their professional duties.*

AS 14.20, Article 6 also set out procedures for school boards to follow in recognizing organizations to bargain on behalf of teachers (the statute refers to these organizations as bargaining agencies).

Noncertificated public school employees joined teachers in obtaining the right to bargain conditions of their employment in 1988, with the passage of Chapter 95, SLA 1988. This legislation amended AS 14.20, Article 6 to include noncertificated public school employees. Noncertificated employees were allowed to bargain matters of wages, hours, and other terms and conditions of employment.

A Short Glossary of Terms Used in This Report

Advisory arbitration: An independent third party is called in to help settle a collective bargaining deadlock. After hearing both sides of the dispute, the arbitrator issues an advisory decision. Although the decision is not binding on either of the two sides, it often brings a realistic perspective to the negotiations.

Binding arbitration: As in advisory arbitration, a third party hears both sides, but then renders a decision that is binding on both parties.

Mediation: Involves third party intervention between conflicting parties. However, a mediator acts more informally than an arbitrator, often serving as a go-between for the two sides in order to promote reconciliation or compromise.

Deadlock: Point at which negotiations between two parties reaches a standstill. Often a mediator is brought in at this point to help the two sides to continue communicating and to mutually resolve differences.

Impasse: Point at which negotiations have broken down to the point that neither side to a dispute will concede on their issues. Impasse exists after a mediator and an advisory arbitrator have tried to resolve issues.

Title 14 sets out procedure for union recognition and certification

The statutes required school boards to conduct secret ballot elections to select union representation for teachers. The school boards had to hold an election if 25% of the district's teachers so requested. After such an election, the statute required school boards to recognize the union with the most votes.

After recognition, school boards were required to negotiate within 20 days after receiving a written request from the union. Negotiation meetings were required to be open to the public unless both sides mutually agreed to have the meetings closed.

1970 legislation also provided for mediation then arbitration

The statute required mediation, in a prescribed manner, of labor negotiations if and when the two sides reached a deadlock. The United States Federal Mediation and Conciliation Service would serve as the agency to resolve the dispute. The mediator would chair the mediation meetings and attempt to resolve the differences between the two sides. The mediator would prepare a written report, which would be issued to both sides. If either side rejected the report in its entirety, the mediator could make changes and prepare a final report. If either side rejected that final report, the governor could appoint an advisory arbitrator to hear the issues.

The statute also required that negotiated agreements provide for a grievance procedure. When setting up a grievance procedure, the statute required that binding arbitration be used as the final procedural step. The statute did maintain that it was not designed to abrogate school boards' rights to have final decision-making authority on policy.

1972 legislation sets out public employee labor relations rights

Two years after teachers were given the right to bargain, public employees had their rights codified in AS 23.40, Article 2. The legislation, referred to as the Public Employment Relations Act (PERA), established three classes of public employees and gave specific bargaining rights to each class.

Class (a)(1) employees include police and fire protection employees and were designated as workers whose services cannot be suspended for any length of time. Class (a)(1) employees are not allowed to strike. However, if impasse is reached in negotiations even after mediation, then the bargaining parties must submit to binding arbitration.

Class (a)(2) employees, which include public school employees other than teachers or noncertificated employees, and public utility employees, were designated as workers whose services could be suspended for short intervals. Class (a)(2) employees are allowed to engage in a strike after unsuccessful mediation. But if either the employer or the State's labor relations agency can prove that the strike threatens health, safety, or the public welfare, they can apply for a court order to stop the strike. If the impasse continues after the suspended strike, the parties must submit to binding arbitration.

Class (a)(3) employees are those employees not specifically included in the two previous groups. Class (a)(3) employees are allowed to engage in a strike if a majority of the bargaining unit votes to do so by secret ballot.

PERA rights differ significantly from Title 14 provisions

The rights conveyed to employees covered by PERA differed significantly from rights conveyed to certificated public school employees in Title 14. These rights, as listed below, differ in areas ranging from union selection to mandatory payment of dues:

1. The selection of unions (or bargaining agencies) - A major difference between PERA and Title 14 is in the area of union certification. PERA involves the Alaska Labor Relations Agency (ALRA) in selecting and certifying union representation rather than local school boards. If there is a request for union representation; ALRA, not the school board, conducts an election by secret ballot.

2. Mediation - Another difference is the process of mediation. Under PERA, when labor and management negotiating teams reach a deadlock, they can mutually select a mediator or request that ALRA appoint a mediator. The mediator tries to work with the two parties to resolve any open issues.

3. Unfair Labor Practices (ULPs) - PERA also conveys additional rights that were not mentioned in Title 14. One right under PERA is that neither the public employer or public employees may engage in ULPs. PERA defines what constitutes a ULP and assigns ALRA with the responsibility of investigating and adjudicating ULP charges. ALRA can try to help resolve ULP issues between the two parties informally or can go through a formal hearing process in accordance with the Administrative Procedures Act. ALRA has the power to issue and serve orders to stop prohibited practices or to apply for an injunction from superior court. In order to reach its decision on ULPs, ALRA has the power to subpoena witnesses. ALRA can dismiss unfounded ULP allegations.

4. Dues deduction - PERA also conveys the right to employees to bargain for an agency shop and to have union dues deducted from employees' payroll and conveyed to the representative union.

PERA was not automatically made applicable to all employers. Under the 1972 legislation, political subdivisions were allowed to "opt out" of PERA and substitute their own labor relations provisions. Some subdivisions, most notably the Municipality of Anchorage, opted out of PERA.

Judicial decisions further define public school employees' rights

The requirements and application of Title 14 were further defined by two Alaska Supreme Court decisions. The first decision was in the case of the *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), commonly referred to as "Kenai '77" (see inset on page 11). In its decision, the court established what items were negotiable and what issues were non-negotiable in the collective bargaining process between teachers and school districts.

In the second case, *Anchorage Education Association v. Anchorage School District*, 648 P.2d 993 (Alaska 1982), referred to as the "Anchorage Strike Case" (see inset at right), the court ruled that teachers did not have the right to strike. These two court cases helped provide interpretation and guidance on items that had not been specifically addressed by the 1970 legislation.

Employees resent imposed contracts

Prior to 1990, public school employees were growing increasingly frustrated with their inability to bring closure or "finality" to the bargaining process. Under Title 14 and the accompanying court decisions, school districts had the right to impose a contract when collective bargaining impasse was reached. Public school employees had no formal means to respond to a contract imposition since they did not have a legal right to strike.

Despite not having the right to strike, teachers have been effective in using informal means to get imposed contracts lifted and have both sides return to the negotiations.

Informal means used by teachers have consisted of picketing their school district, filibustering school board meetings, taking votes to have an illegal strike, and working to their contract. When certificated staff work to their contract, they put in exactly their workday hours, but no more. This means that papers may not be graded and extracurricular activities for students may be curtailed. While effective, the informal means were long and drawn out and led to increasingly poor relations between the staff and school district.

ALASKA SUPREME COURT RULES TEACHERS HAVE NO RIGHT TO STRIKE

In 1979, school teachers in Anchorage went on strike. When they had not completed contract negotiations that year by the first day of school, they decided to walk out of classes. The strike lasted five days until the state superior court issued a temporary restraining order halting the walkout. The teachers then appealed the restraining order.

In the case, *Anchorage Education Association v. Anchorage School District*, 648 P.2d 993 (Alaska 1982) the supreme court ruled that the teachers did not have the legal right to strike. The court held that PERA did not pertain to teachers, even though AS 23.40.200 (d) lists public school employees as falling under its provisions.

The courts ruled that the statute referred to public school employees other than teachers, such as principals and counselors. The courts held that if the legislature had wanted PERA and its strike provisions to apply to teachers, it would have specifically so stated.

The decision went on to say, *"No court has held that the common law permits public employees to legally strike in the absence of explicit statutory consent."* Another reason cited by the court for their decision was the absence of an established oversight agency for the teachers, under the provisions of Title 14, which the court observed has historically *contributed to the fairness of strikes.*

Although the court admitted that teachers were not being treated the same as other public employees who were covered by PERA, it added that, *unequal treatment is permissible if it is substantially related to the legitimate purposes of the legislation.* The court observed in making its ruling that apparently the legislature felt Title 14 adequately provided cooperative labor relations for teachers.

KENAI '77 CASE DEFINES NEGOTIABLE ITEMS

In the mid 1970s, the Kenai School district filed suit against the local teachers union. The district sought a ruling from the courts regarding what items were negotiable and what items fell within the district's powers and responsibilities to make final decisions on policies. The school board claimed that while employment-related issues were subject to bargaining, items that affected educational policy should not be subject to bargaining. The union contended that district policy was a proper subject for collective bargaining.

In ruling on the case in 1977 [Kenai Peninsula Borough School District v. Kenai Peninsula Education Association, 572 P.2d 416 (Alaska 1977)], the Alaska Supreme Court observed that under the general law concerning bargaining between labor unions and private employers, the "*scope of negotiable issues is broad.*" However, the court said that when the public employment sector is concerned, "*and particularly education, the question of what is properly bargainable is thrown into more doubt.*" The courts expressed concern that the autonomy of school boards could be gradually eroded by the collective bargaining process over time.

In deciding the case, the Alaska Supreme Court quoted a passage from an United States Supreme Court decision that stated,

> *Whether a teachers' union is concerned with salaries and fringe benefits, teacher qualifications and in-house training, pupil-teacher ratios, length of schoolday, student discipline, or the content of the high school curriculum, its objective is to bring school board policy and decisions into harmony with its own views.*

The court held that while school boards are required to negotiate in good faith, school boards are not required or permitted to delegate decision-making to unions. The court stated, "*a matter is more susceptible to bargaining the more it deals with the economic interests of employees and the less it concerns professional goals and methods.*"

While observing that it would be helpful if the legislature would provide more specific guidance on what items may be negotiated (see Recommendation No. 2 in this report), the court made a decision of what collective bargaining items are negotiable and which are non-negotiable.

The court then went on to list more than 30 items that could be bargained by the union and then listed nine items that it felt were nonnegotiable policy items:

1) relief from non-professional chores,
2) class size and teacher load,
3) an Ombudsman for teachers,
4) evaluation of administrators,
5) use and number of Teacher Aides,
6) use and number of Para-Professionals,
7) pupil to teacher Ratio Formula,
8) use of specialists, and
9) the school year calendar.

<u>Binding arbitration considered one method of achieving finality</u>

Public school employees lobbied the legislature for a number of years to have a formal means to bring finality to their contract negotiations. The method preferred by the

employees was binding arbitration (see glossary on page 7 for definition of binding arbitration).

School district administrators and school boards adamantly opposed binding arbitration. Administrators are opposed to binding arbitration because they felt it contributes to escalating personnel costs in other states where it is used. Administrators have also found that in many instances where they have gone to advisory arbitration, they have been the losers in the financial decision, suggesting they would fare no better if the arbitrator's rulings became binding.

Currently many school districts feel that they are constrained in what they can pay to employees because revenues are limited under the State's school foundation program. The legislature, to some extent, has recognized the validity of this viewpoint. In 1991, they provided 15 single-site school districts a total of $2,131,200 to supplement funding the districts under the foundation program.

School districts who have a taxing authority have found taxpayers unwilling to support additional property or sales taxes. While funding has not increased in recent years, costs for school districts have been rising. Some of the costs are uncontrollable, particularly rapidly increasing costs of the Teacher's Retirement System. School districts are concerned that if their employees have binding arbitration as the means to finality, salaries and benefits will be set at amounts that are impossible to fund.

1989's Senate Bill 15 attempts to resolve finality issue

In this background of public school employee frustration with the provisions of Title 14 and school district concerns about binding arbitration, Senate Bill 15 was introduced in January 1989. The original version of the bill made substantial changes to Title 14. It included giving the ALRA oversight responsibilities for union elections and a provision of "last-best-offer" mediated arbitration that would be binding on both parties. The bill was altered substantially as it moved through the Senate. The revisions continued as the bill moved from the Senate to the House for consideration. In one committee version of the bill, public school employees were placed under the provisions of PERA as class (a)(2) employees with a limited right to strike followed by binding arbitration.

To avoid having binding arbitration imposed, two organizations that represent school boards and school administrators, the Alaska Association of School Boards and the Alaska Council of School Administrators, respectively, agreed to drop their opposition to the bill. Their agreement was predicated on the bill containing a right to strike [or (a)(3) PERA status] for teachers and other school personnel rather than binding arbitration [(a)(1) or (a)(2) PERA status].

These two organizations and the National Education Association-Alaska (NEA-AK), representing teachers and other school employees, reached an agreement on a bill that would classify public school employees under PERA as class (a)(3) employees. Such classification

would give them the right to strike. The House Finance Committee version of the bill reflected the agreement reached between the three interested organizations. However, the bill was changed when it reached the House Rules Committee.

House Rules Committee add a repeal date clause

The House Rules Committee passed out legislation that would make the reclassification of school district employees under PERA effective for only two years. At the end of the two-year period, the employees would again be subject to the provisions of Title 14 unless the legislature acted to extend their coverage under PERA. There was expressed intent for the two years to serve as a trial period. One representative stated that he viewed the "legislation as an experiment in finality in collective bargaining," and that he "hoped it would put a stop to the charges and counter charges seen on both sides of this issue." SB 15, as passed out of the House Rules Committee, placed public school employees under PERA as class (a)(3) workers for a two-year period.

SB 15 was then revised again on the floor of the House. An amendment, characterized as a "technical amendment" prohibited school districts from opting out of the bill. The amendment addressed concerns that since the original passage of PERA in 1972 allowed political subdivisions to "opt-out," school boards might argue that they should be entitled to the same option. The amendment was intended to clarify the intent of the legislature that the law would apply to all school districts. Senate Bill 15 as passed by the House and Senate, was signed into law by the Governor with an effective date of June 22, 1990.

REPORT CONCLUSIONS

The Legislative Budget and Audit Committee directed that we review and report on the impact of the Public Employment Relations Act (PERA) on various aspects of labor relations between public school employees and the State's 54 school districts. We based our report conclusions on the information that we gathered through interviews with education organization groups, school district administrators, and members of local unions representing both certificated and noncertificated staff. We also relied on the results of a questionnaire we mailed to 51 school districts. We received a response from 38 or 75% of districts polled.

Length of time involved in negotiations has generally remained unchanged

There has been no significant consistent change in the length of time it takes to negotiate a contract under the provisions of PERA compared to Title 14. The issues being negotiated and the amount of available funding have more of an impact on the time spent bargaining than does the process used. Eighteen school districts responding to our survey reported that the length of time to negotiate a contract remained the same under PERA as it had under Title 14. Eleven districts reported that they either had not negotiated under PERA and therefore had no basis to form an opinion or that they simply had no opinion. Eight respondents felt that the length of time had increased while one respondent felt that the length of time had decreased.

Union members generally reported that the length of time to negotiate a contract had not changed much under PERA, but they felt that the productivity of negotiation meetings had been greatly enhanced. They attributed this change to the presence of the unfair labor practice (ULP) process which kept both union and management aware of the need to bargain honestly and in good faith.

Legal service costs at the district level generally not affected

Local unions reported that they have not experienced an increase in legal costs, while 27 (71%) of school districts also report no increase in legal costs. Local unions typically have not hired attorneys to either negotiate on their behalf or to act in legal disputes. Instead, any local union which is a party to an ULP charge or court case is assessed $10.00 for each local member and the state branch of the union pays the balance of the legal cost. The National Education Association (NEA), which represents most education employees in Alaska, report that they have had only a minimal increase in legal costs due to ULPs.

We found a total of $245,000 had been spent by school districts on legal costs in response to PERA; $120,000 paid by Alaska Association of School Boards (AASB) and $125,000 paid by individual school districts. AASB stated that they had just hired a $120,000 labor relations attorney to assist their member school boards in labor matters. Among the 11 (29%) school district respondents who reported an increase in legal costs eight reported the increase was due to negotiations and six reported the increase was due to preparations for

a ULP. We contacted the three school districts who had gone all the way to the hearing process with a ULP. One school district indicated they had hired their own in-house attorney in response to a ULP. They have budgeted $100,000 for that position. The second school district would not offer an exact estimate but said the amount was immaterial. The third school district stated they had spent about $9,000 in preparation for a ULP. In addition to school districts who had legal costs as a result of a ULP, another school district stated they had paid $16,000 for an attorney-prepared presentation for their school board and in preparation of upcoming negotiations.

The Alaska Labor Relations Agency (ALRA) also has costs that are attributable to the time they spend investigating and hearing ULP charges. Since they do not have a system to keep track of the time spent on each case, we chose to allocate ALRA's FY 91 expenditures based on the number of education-related cases handled compared to the total number of cases filed with the agency. Based on this method, ALRA has spent an estimated $35,000 to investigate and hear education ULP cases.

Use of professional negotiators has remained about the same

We did not find any increase in costs to school districts attributable to hiring a professional contract negotiator. Of the 38 school districts responding to our survey, 8 (21%) hire either a consultant or an attorney to negotiate on their behalf. Of those, three had not yet negotiated a contract under PERA, and one reported that their negotiation costs remained the same. Of the remaining four who use a hired consultant or attorney, one had already reported an increase in costs under the legal services previously discussed. The other three districts reported no increase in their negotiator's fees.

We found no school district which had decided to use a hired negotiator when it had not used one previously, as a result of being placed under the provisions of PERA. Since there has been no significant change in the length of time it takes to negotiate a contract under PERA, it seems reasonable that the costs to negotiate those contracts would not alter significantly. Also, many negotiators receive a fixed fee for their services irrespective of the length of time it takes to reach settlement or the results of the settlement.

The major difference with PERA are the issues being negotiated

The major difference in negotiations and contract settlement under PERA is the nature of the issues being negotiated. With the passage of PERA, there is a lot of uncertainty on the part of both administrators and unions about what can be negotiated in collective bargaining. Both parties are unsure if the items listed as non-negotiable in the Kenai '77 court decision still apply.

Some feel that the court case is now void since it pertained to Title 14. The National Education Association of Alaska (NEA-Ak) say that they have no plan to push for reconsideration of the issues dealt with in the Kenai '77 decision. However, individual local unions told us that they were raising previously non-negotiable items in their contract talks.

These reports were substantiated by six school districts which in their survey response related that previously non-negotiable items were being raised during bargaining. The most commonly addressed non-negotiable item being discussed is class size. Currently, ALRA is considering the negotiability of a specific issue whose status is unclear.

According to information provided by NEA-Ak, 31 negotiated contracts have been settled under the provisions of PERA. This total includes contracts for both certificated staff and support staff. Nine additional contracts are currently being negotiated and ten districts have not negotiated under the provisions of PERA. As of this time under PERA, there has been no contracts imposed on unions by the school districts nor have there been any union strikes against the school districts. Of the 37 school districts who responded to our questionnaire, only 3 (8%) said that they had gone as far as advisory arbitration to reach contract settlement.

Only 5 (13%) of our school district respondents felt they had conceded more in negotiations under PERA than they would have conceded under Title 14. When we contacted those school districts, we found that the concessions were in the way of contract language and the union classification of employees rather than of a direct financial nature.

When polled, only one school district said that being under PERA was an improvement over being under Title 14. The one district that preferred PERA thought the law provided more clearly defined ground rules for labor relations. There were 31 (82%) school districts who felt that being under PERA was a disadvantage because of increased bureaucracy. They also did not like the potential for ULPs and strikes.

<u>ALRA role has involved delay and has been less extensive than originally envisioned</u>

While ALRA has had some involvement in school district labor relations, the amount of contact has been less than what was originally anticipated by the ALRA hearing examiner. The hearing examiner said that while she had expected up to 50% of ALRA cases to involve education issues, in actuality, less than 25% of ALRA's cases have been education-related.

According to ALRA's administrative hearing examiner, the small percentage of education cases can be attributed to two factors. One factor is that not every school district has negotiated a contract under PERA; therefore, ALRA has had jurisdiction over only some of the State's 54 school districts. A second factor is that both education unions and school districts are just learning about PERA and how ALRA is available to answer questions and hear issues.

There has been some frustration expressed by the education unions and school district administrators over the length of time involved in the ALRA hearing process. Two of the education cases that have advanced to the hearing process have taken as long as eight months to one year for a decision from the ALRA board.

ALRA Education-Related Cases and Issues			
Type of Action	Date of Filing	Parties to Case	Status as of 10/7/91
Unfair Labor Practice	7/20/90	*Kenai Peninsula Borough School District v. Kenai Peninsula Educational Support Association*	Closed
Unfair Labor Practice	7/25/90	*Lower Kuskokwim Education Association v. Lower Kuskokwim School District*	Closed
Unfair Labor Practice	7/25/90	*Classified Employees Association v. Matanuska-Susitna Borough School District*	Closed
Unfair Labor Practice	7/27/90	*Yukon Flats School District v. Yukon Flats Education Association*	Open
Unfair Labor Practice	8/14/90	*Kenai Peninsula Education Association v. Kenai Peninsula Borough School District*	Closed
Unfair Labor Practice	8/20/90	*Anchorage Education Association/NEA-Alaska v. Anchorage School District*	Suspended
Unfair Labor Practice	11/26/90	*Kashunamiut School District v. Chevak Education Association*	Dismissed
Unfair Labor Practice	2/25/91	*Mid-Kuskokwim Education Association v. Kuspuk School District*	Open
Unit Clarification	4/16/91	*Classified Employees Association/NEA-Alaska v. Matanuska- Susitna Borough School District*	Closed
Amended Clarification	5/2/91	*Matanuska Susitna Education Association and Matanuska Susitna Nurses Association Merger*	Requires Posting
Representation Petition	5/24/91	*In re IBEW, petition for Decertification and Certification (Fairbanks North Star Borough School District)*	Closed
Regulatory	5/29/91	*Anchorage Education Association*	Added to project list
Unit Clarification	6/26/91	*Yakutat Education Association/NEA-Alaska v. Yakutat City School District*	Open
Representation Petition	8/7/91	*Teamsters Local 959 v. Fairbanks North Star Borough School District*	Prehearing Upcoming
Representation Petition	8/21/91	*Alaska Vocational Technical Teachers' Association v. State of Alaska*	No Action Necessary

One reason for the delay in case resolution is that ALRA, as it is currently organized, was formed only nine days after the effective date of Chapter 180, SLA 1990. And there has been a turnover of board members since that time. Executive Order No. 77 combined the labor relations functions of three separate entities under the one agency -- ALRA. There was a period immediately following this when offices were being moved, furnished, and staffed. Shortly after the agency was settled in and ready to work effectively, a new administration replaced the board members with new appointees. Because of these changes, ALRA has not had full opportunity to become as effective as originally envisioned by the legislature when they placed school employees under PERA.

ALRA has received favorable comments for its advisory role and mediation function

In spite of the frustration over delays in issuing decisions on ULPs, there have been many positive comments about ALRA. Union members and school district administrators who have contacted ALRA report that there is a considerable body of knowledge about labor relations at the agency. They have found ALRA to be a reliable, unbiased source of information. The comment was also frequently made that despite the length of delay at ALRA it is still a faster alternative than going to court to get a decision. It is significant to note that ULPs can be, and are being, filed by school districts almost as often as by unions.

ALRA's 15 education cases involve union certifications, regulations, and ULPs

The table on the opposite page summarizes ALRA's 15 education related cases. Eight of the cases involve ULP allegations (the sidebar on the right explains the types of cases filed at ALRA other than ULPs). Only three of the ULP allegations went to a final hearing. The other five ULP allegations either have been resolved by mutual consent of the two parties, dismissed by ALRA, or suspended pending completion of contract grievance procedures.

ALRA HANDLES OTHER CASES BESIDES ULPs

Union representation is the subject of three petitions filed at ALRA. Representation petitions are requests by unions that they be recognized as the bargaining agent for a group of employees.

Unit clarifications are the content of two of the cases filed at ALRA. Unit clarifications deal with which school district employees are considered confidential and therefore are prohibited from joining a union because of their access to management information.

Amendment to a unit certification is one case filed at ALRA. This case involves an agreement between two local unions and the school district regarding the merger of the two bargaining groups.

Regulatory request is one of the filed actions at ALRA. This case results from a petition from a local union requesting ALRA define in regulation their concept and approach of advisory arbitration.

The one case that has gone to the hearing process and has had a decision rendered was a case filed by the *Classified Employees Association v. Matanuska-Susitna Borough School District.* This case is of particular interest because the school district raised the question, "When the terms of a collective bargaining agreement that pre-dates application of the PERA conflicts with the Act, does the agreement or the Act govern?" In this particular instance, the collective bargaining agreement that was being questioned had been negotiated under Title 14 and not under PERA. The school district believed that any definitions of confidential employees in PERA would not apply since it had a preexisting agreement. The classified employees association felt that the PERA definition was applicable.

In their decision based on the hearing, ALRA said they did not perceive any conflict between PERA and the agreement; therefore, ALRA could reach a decision on the case without addressing the question of which would apply in the event there was a conflict. After ALRA decided that they could determine whether certain employees were designated as confidential,the issue was subsequently converted to a unit clarification petition by mutual consent of the two parties.

ALRA is still considering two ULPs as of the date of this report. Both cases have gone to a hearing and a decision is pending; one case has been open for eight months and the other case has been open for a year and three months. The first case deals with a school district that refused to open negotiations with the certificated employees association when notice of intent to bargain was received one day late.

The second pending ALRA ULP case is of considerable interest because it deals with an item that was considered as negotiable in the "Kenai '77" court case. The school district filed the case against their local education association. The school district argued that while they have to bargain procedural requirements on voluntary transfers, they do not have to bargain substantive criteria. The education association responded that the wording in the contract that the district is questioning has been there for years and is clearly a permissible subject to bargain. When ALRA makes their decision on this case, it could be the first step in defining how the "Kenai '77" court case applies to PERA.

Unions feel that playing field is level, administrators prefer Title 14 process

The general attitude of public school employees is that while they would prefer to have binding arbitration as their means to finality, they find having the right to strike an acceptable alternative. Public school employees said there has been a perceptible change at the negotiating table now that they are under the provisions of PERA. There is a feeling that PERA has brought equality to the two sides and that more serious negotiations are now taking place. The phrase used most often by education personnel is that PERA "has levelled the playing field." Education personnel say that neither side has the upper hand in negotiations; school districts can impose and school personnel can strike. They also say that the knowledge of either side being able to file ULPs has made each side less likely to resort to "game-playing" in the negotiation process.

The general attitude of school district administrators is a great deal more mixed. On their responses to the questionnaire, only 3 (8%) of the administrators felt that it would become a common practice for teachers in their district to go on strike. Yet, 28 (74%) of the respondents said that they would prefer to have their employees return to Title 14, and 29 (76%) said they were opposed to having their employees remain in PERA with a class (a)(3) classification.

When questioned in person, the respondents had attitudes that were different than those reflected in the survey. Some school district administrators said that in public they will support the position expressed by the Commissioner of Education and by their individual school boards, but their personal feeling was different. Many school district administrators stated that it is acceptable to them if public school employees remain under the provisions of PERA as class (a)(3) employees. School administrators consistently remain strongly opposed to binding arbitration for their employees, but they find the right to strike an acceptable compromise.

AUDITOR COMMENTS

School district experience with PERA has been limited by two-year trial period

Because of the cyclical nature of school district contracts, not every district has had the opportunity to negotiate under the provisions of PERA during the eighteen months prior to the time of our review. Twenty percent of the school districts have not yet begun to negotiate a contract under the provisions of PERA.

Further, since the Alaska Labor Relations Agency (ALRA) was reorganized essentially at the same time that school district personnel came under PERA, that agency has not had the opportunity to fully demonstrate its effectiveness in overseeing school district labor relations. All unfair labor practice (ULP) charges must be settled before the two parties can proceed to the next step of the negotiation process. Since ULP charges for one district have been open for more than a year, contract negotiations have been stalled.

Despite the limited period involved, we believe PERA's impact on public school employees has been beneficial enough to warrant recommending that employees remain classified under AS 23.40.200 as (a)(3) employees (see Recommendation No. 1 in the Findings and Recommendation section of this report). However, if the legislature is still unsure about the benefits and impact of PERA, we would recommend extending the provisions of Chapter 180, SLA 1990 at least another three years and as many as six in order to provide more historical experience for setting public policy in this area.

A right to strike does not necessarily lead to strikes

Even though there has been no strikes since the Anchorage School District court decision, we were told that provisions of Title 14 should not be considered as having prevented strikes. Individuals experienced with school district labor relations in both Alaska and other parts of the United States, reported that statutory prohibitions against strikes did not necessarily prevent them from happening. One example cited was the State of Michigan, where teachers often strike illegally despite statutory prohibitions.

In our interviews with school employees, we were told that in the past illegal strikes were often a very real possibility in some communities. In several instances where a school district had imposed a contract on their employees, votes had been conducted for illegal strikes. We were told by different employee unions that conducted strike votes, that from 70% to 100% of their members had voted for illegal strikes in the past. In these instances, strikes had been avoided when the school district administration heard about the results of the strike vote and agreed to return to negotiations.

Just as not having a right to strike does not prevent strikes, having that right does not necessarily cause strikes. Strikes are caused by high labor expectations and low funding available to management and administrators to meet those expectations. We were told by

many individuals from both labor and management that strikes occur when the collective bargaining system breaks down. Nobody makes the decision to go on strike, lightly. Everyone acknowledges that strikes are very disruptive to a community.

In small, rural communities employees fear for their personal safety if they were to go on strike. According to labor representatives, having the right to strike actually forces them to weigh how serious they are about items under negotiation. They must continually evaluate if the issues involved are important enough to them that they would rather strike than settle. As disruptive as all strikes are, illegal strikes are potentially even more disruptive. Most often illegal strikes take place in situations where there is no labor relations oversight agency such as the ALRA to moderate and oversee the situation.

Major benefit of PERA is not the right to strike, but in changes of attitude

Since public school employees are neither more nor less likely to go on strike by having the right to strike, then the real benefit of being under PERA is the perceived attitude change. All public school employees who spoke to us felt they had been patronized when negotiating under AS 14.20.500. In their view, both sides now recognize that there is an equality of power at the negotiating table. Public school employees feel that being under PERA offers additional benefits, such as oversight by ALRA, a more clearly defined negotiating process, and the right to bargain for a standard assessment of dues and fees.

Public school employees includes more than teachers

It is important to note that Chapter 180, SLA 1990 affected not just certificated staff but also non-certificated personnel. Non-certificated staff includes secretaries, bookkeepers, maintenance workers, and other public school employees. Prior to 1990, when the definition section of PERA excluded teachers from the provisions of PERA, it also was interpreted as excluding all non-certificated staff.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

Public school employees should remain under the provisions of the Public Employment Relations Act (PERA), classified as (a)(3) employees.

Chapter 180, SLA 1990 contained an automatic repeal provision of two years. The effect of this repeal clause would be to again subject the labor relations for public school employees to the provisions of AS 14.20, Article 6, if no legislative action is taken.

In our view, the legislation should be enacted to lift the two-year repeal provision that was originally part of Chapter 180, SLA 1990. We further suggest that public school employees remain classified as (a)(3) employees, entitled to a right to strike after submitting to advisory arbitration, as provided for under PERA (AS 23.40).

Returning public school employees to the provisions of AS 14.20.550 would result in treating the largest public employment occupational group differently than all other public employees. In our view, this would be inconsistent with the legislature's previously established public policy in this area. AS 23.40.070 states in part that

> *...The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, ... The legislature declares that it is the public policy of the state to promote* ***harmonious and cooperative relations*** *between government and its employees and to protect the public by assuring effective and orderly operations of government.*

Other public employees covered by the provisions of PERA have the means to conclude negotiations through either binding arbitration or the right to strike. AS 14.20, Article 6, as currently written, does not provide public school employees such a method to achieve finality. Under this statute school districts had the right to, and did, impose employment contracts on teachers. In testimony before the Senate Labor and Commerce committee and in interviews with us, teachers reported that imposed contracts cause severe morale problems. In the past, imposed contracts have reduced wages and benefits and have pushed teachers to consider calling illegal strikes. Such circumstances do not suggest to us that AS 14.20, Article 6 promoted ***harmonious and cooperative relations*** between the school districts and its employees.

PERA has promoted harmonious and cooperative relations

As discussed in the Auditor Comments section, we recognize that two years has not provided an adequate trial period for all aspects of the legislation. However, we feel that it has been

a sufficient period to show that PERA has successfully worked for public school employees. Based on our interviews with school district personnel, administrators, and the responses to our survey, on balance we feel that the 1990 legislation did promote harmonious and cooperative relations between school district personnel and administration.

It was widely conceded that teachers have more bargaining power under PERA than under Title 14. However, few school districts that reached agreement under the statute's provisions reported that they felt they had made major financial concessions. Although almost all districts responded that they favored a return to Title 14, from our interviews we felt this was because the district's enjoyed the wide degree of discretion and latitude provided by the statute rather than out of concern that they were at a great negotiating disadvantage under PERA.

Presence of Alaska Labor Relations Agency also beneficial

In our view, another aspect of PERA that promotes both cooperative labor relations and good faith bargaining is the jurisdictional role of the Alaska Labor Relations Agency (ALRA). Although as we report in the Auditor Comments and Report Conclusion sections, ALRA has in some respects been slow to respond to the demands of the education community; we feel that its structure and approach are of great potential benefit. Placing public school employees back under the provisions of Title 14 as currently written, will eliminate this important benefit of PERA.

AS 14.20, Article 6 has not promoted harmony or cooperative relations between school districts and its employees. There had been a growing frustration on the part of employees, prior to the 1990 legislation, with the labor relation provisions of Title 14.

These employees had been lobbying the legislature for fifteen years for a means to resolve their dissatisfaction. PERA status and classification as (a)(3) employees under AS 23.40.200 does represent a compromise that, for the most part, has satisfied school district employees. We anticipate that if school district employees are returned to the labor relations provisions of AS 14.20, the lobbying effort will begin anew. In our view, the legislature made an important step towards settling public policy in this area with passage of Chapter 180, SLA 1990. To return public school employees to Title 14 after the two year trial period would not be in the State's best interests.

Laws applicable to school employees and other public employees should be more alike

In their ruling on the Anchorage strike case (see inset on page 10), a majority of the Alaska Supreme Court presumed that the legislature had a public policy purpose for classifying teachers differently than other public employees. The court felt that absence of an oversight agency, no specific mention of teachers in PERA, and a lack of a clear right to strike under Title 14 was indicative of the legislature's desire to treat teachers differently. However, in our view the placement of teachers in Title 14 compared with statutory declaration of policy contained in AS 23.40.070 is inconsistent. Besides the language of AS 23.40.070, we are

also persuaded by the observations of Chief Justice Rabinowitz, who wrote in a dissenting opinion in the Anchorage strike case that

> *If public school teachers are so essential to society that they must be denied the right to strike then they should also be given the right to compulsory arbitration. On the other hand, if teachers are not so essential as the 'critical' employees then they should enjoy the same limited strike rights given to other 'semi-critical' public employees.*

In line with Chief Justice Rabinowitz's reasoning, we believe that retaining public school employees under PERA is in the best interests of the State and more consistent with previously established public policy in the area of public employee labor relations.

Recommendation No. 2

If certificated public school employees remain subject to the provisions of PERA, the legislature should consider adopting legislation to clarify what issues are negotiable.

When the legislature first developed labor relations statutes for teachers in 1970, it provided that nothing in the law be *construed as an abrogation or delegation of the legal responsibilities, powers, and duties of the school board including its right to make final decisions on policy* (AS 14.20.610). As observed by the courts in the Kenai '77 case, to a degree this statutory provision conflicts with the requirements of AS 14.20.550 that districts bargain with employees regarding their employment and professional duties.

Admittedly, in view of the emphasis that state public policy has traditionally placed on local control of schools, this conflict between employee rights and board prerogatives is difficult to resolve. As discussed on page 11, the Alaska Supreme Court made its distinctions about what they thought could be negotiated without abrogating the local board's legal authority over policy. However, the courts did so rather reluctantly, stating in their decision that *it would be helpful if the legislature, through future enactments, provided more specific guidance on a number of the items which the unions seek to negotiate.*

At the present time under PERA, there is even more uncertainty on the part of public school employees and administrators as to what issues are subject to negotiation. It is uncertain under PERA if the guidelines set down in the Kenai '77 case still apply. We suggest the legislature should assess this situation and consider legislation that sets out negotiable issues as compared to the policy prerogatives of local school boards. If the legislature does not address this issue, then it is most likely that future decisions regarding negotiable items will be made either by ALRA or again by the courts.

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY

Listed below are 20 questions on the topic of moving teachers into class (a)(3) of PERA. This classification change gave teachers the right-to-strike. This classification allows both teachers and school boards to file Unfair Labor Practice charges with the Alaska Labor Relations Agency. Another effect of this change is that the Alaska Labor Relations Agency certifies union elections.

Please circle the response to each question that reflects your school district's experience with Title 23. If you wish to offer additional comments, please feel free to attach a memorandum. Thank you for your time.

1. *Who negotiates on behalf of your school district?*

Superintendent	23
Personnel Director	4
Attorney	3
Hired Consultant	5
School Board Member(s)	17
Business Manager	3
School Principal	2
Labor Relations Director	1

2. *Do you feel that it costs more to negotiate a contract under Title 23 than it did to negotiate a contract under Title 14?*

Yes	13
No	12
No Opinion	13

3. *Under Title 23 as compared to Title 14 has the time involved in negotiating labor agreements with teachers:*

Not Applicable	11
Increased	8
Decreased	1
Remained the same	18

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY
(cont.)

4. *Do you feel that your district has conceded more in negotiations under Title 23 than it would have under Title 14?*

Not Applicable	**16**
Yes	**5**
No	**17**

5. *Do you feel that it will become a common practice for teachers in your district to go on strike?*

Yes	**3**
No	**33**
No Opinion	**2**

6. *Have you seen items that were non-bargainable under Title 14 now being addressed in negotiations under Title 23?*

Yes	**6**
No	**19**
No Opinion	**13**

7. *Have you filed an Unfair Labor Practice charge with the Alaska Labor Relations Agency against your teachers union?*

Yes	**3**
No	**35**

8. *Has the school district been charged with an Unfair Labor Practice?*

Yes	**3**
No	**35**

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY
(cont.)

9. *Have you experienced any direct increase in legal services costs that was attributable to Title 23?*

Yes	**11**
No	**27**

10. *If your previous answer was "Yes", were the legal costs attributable to:*

Negotiations	**8**
Preparations for ULP charge	**6**

11. *Do you feel that the negotiations process is more clearly defined under Title 23 than under Title 14?*

Yes	**2**
No	**32**
No Opinion	**4**

12. *Under Title 14 did you ever impose a contract on your teachers?*

Yes	**4**
No	**30**
No Opinion	**4**

13. *Have you had any experience with the Alaska Labor Relations Agency certifying a union election?*

Yes	**2**
No	**36**

14. *Has being under Title 23 affected the way in which your administration deals with teachers?*

Yes	**5**
No	**31**
No Opinion	**2**

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY
(cont.)

15. *Have you received any formal training about the provisions of Title 23?*

Yes	26
No	12

16. *Do you feel that being under Title 23 is an improvement over being under Title 14?*

Yes	1
No	32
No Opinion	5

17. *Have you gone to advisory arbitration under Title 23?*

Yes	3
No	35

18. *Would you prefer a return to Title 14 over remaining under Title 23?*

Yes	28
No	9
No Opinion	1

19. *Would you prefer that teachers be classed as (a)(1) or (a)(2) under Title 23, which would permit binding arbitration?*

Yes	2
No	33
No Opinion	3

20. *Would it be acceptable to you if the two-year repeal provision were lifted and teachers remained classified as (a)(3) employees under Title 23?*

Yes	8
No	29
No Opinion	3

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY

Listed below are 20 questions on the topic of moving public school employees into class (a)(3) of Title 23. This classification change gave public school employees the right to strike. This classification allows both public school employees and school boards to file Unfair Labor Practice charges with the Alaska Labor Relations Agency. Another effect of this change is that the Alaska Labor Relations Agency certifies union elections.

Please circle the response to each question that reflects your local union's experience with Title 23. If you wish to offer additional comments, please feel free to attach a memorandum. Thank you for your time.

1. *What local union are you filling out this survey on behalf of?*

Responses	38

2. *Do you feel that it costs your union more to negotiate a contract under Title 23 than it did to negotiate a contract under Title 14?*

Yes	0
No	34
No Opinion	4

3. *Under Title 23 as compared to Title 14 has the time involved in negotiating labor agreements:*

Not Applicable	14
Increased	1
Decreased	15
Remained the same	8

4. *Do you feel that your union has gained more in negotiated contract concessions under Title 23 than it would have under Title 14?*

Not Applicable	12
Yes	11
No	15

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY
(cont.)

5. *Do you feel that it will become a common practice for your union members to go on strike?*

Yes	1
No	37

6. *Do you believe that the decision reached in the Kenai court decision on what items are bargainable and nonbargainable still applies now that public school employees are under the provisions of Title 23 rather than the provisions of Title 14?*

Yes	18
No	8
No Opinion	12

7. *Under Title 23, has your union addressed any items at the negotiating table that would not have been addressed under Title 14?*

Yes	5
No	28
Not Applicable	5

8. *Have you filed an Unfair Labor Practice charge with the Alaska Labor Relations Agency against your school district?*

Yes	6
No	32

9. *Has your local union been charged with an Unfair Labor Practice by the school district?*

Yes	2
No	36

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY
(cont.)

10. *Have you experienced any direct increase in legal services costs that was attributable to Title 23?*

Yes	1
No	37

11. *Under Title 14 did your union ever take a vote to hold an illegal strike?*

Yes	5
No	33

12. *Do you feel that the negotiations process is more clearly defined under Title 23 than under Title 14?*

Yes	34
No	3
No Opinion	1

13. *Under Title 14 was a contract ever imposed on your union?*

Yes	16
No	22

14. *Has a contract been imposed on your union now that you are under the provisions of Title 23?*

Yes	0
No	38

15. *Have you had any experience with the Alaska Labor Relations Agency certifying a union election?*

Yes	3
No	35

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY
(cont.)

16. *Have you received any formal training about the provisions of Title 23?*

Yes	**24**
No	**14**

17. *Do you feel that being under Title 23 is an improvement over being under Title 14?*

Yes	**36**
No	**1**
No Opinion	**1**

18. *Would you prefer a return to Title 14 over remaining under Title 23?*

Yes	**0**
No	**37**
No Opinion	**1**

19. *Would you prefer being classed as (a)(1) or (a)(2) under Title 23, which would permit binding arbitration?*

Yes	**32**
No	**3**
No Opinion	**3**

20. *Would it be acceptable to you if the two-year repeal provision were lifted and you remained classified as (a)(3) employees under Title 23?*

Yes	**36**
No	**0**
No Opinion	**2**

WALTER J. HICKEL, GOVERNOR

GOLDBELT PLACE
801 WEST 10TH STREET, SUITE 200
JUNEAU, ALASKA 99801-1894

DEPARTMENT OF EDUCATION

OFFICE OF THE COMMISSIONER

January 7, 1992

RECEIVED
JAN 7 1992
LEGISLATIVE AUDIT

Randy S. Welker
Division of Legislative Audit
P.O. Box W
Juneau, AK 99811-3300

RE: Audit Control Number 05-4419-92

Dear Mr. Welker:

This is a reply to your preliminary audit report, "Impact of the Public Employment Relations Act on Local School Districts", dated November 8, 1991. The Department has reviewed the findings and recommendations and provides the following response:

Recommendation No. 1

Public school employees should remain under the provisions of the Public Employment Relations Act (PERA), classified as (a)(3) employees.

The Department does not concur with Recommendation No. 1. Clear direction for negotiations between local school boards and unions was established by Title 14 and further defined by two Alaska Supreme Court decisions as referenced in the audit report. Placement of public school employees under PERA (AS23.40) has the effect of re-opening issues previously set by past practice and the court decisions. Having a right to strike does not necessarily cause strikes. Under any circumstance, teacher strikes are not good for students.

Local school boards have lost their authority to negotiate evenly with unions under Title 23, and prefer, as evidenced by your report, to negotiate under Title 14. Yet the "opt out" provision which applies to municipalities is denied to school districts. Teachers have achieved and maintained the highest average teacher salaries in the nation under Title 14, and as such have not suffered at the hands of local boards. According to the September 1991, Institute of Social and Economic Research (ISER) report to the legislature, "salaries for many Alaska teachers remain substantially higher than national averages". In fact, "The average fiscal year 1989 teacher's salary and benefits cost the school district $50,000 in Anchorage, $53,000 in Fairbanks, and $58,000 in Juneau. Using ISER Anchorage/U.S. and McDowell's (1988) within Alaska differentials, these salaries are 22 percent, 24 percent, and 37 percent higher, respectively, than the U.S. average of $36,000." The report does indicate that teacher salary schedules and total compensation varies throughout the State. However, due to local control, "the difference reflects to some extent different attitudes about encouraging teachers to remain and make a commitment to the community."

SB 15 should be allowed to sunset in order to return to a system which has overwhelming local support and interpretation and guidance established by the court.

05-E13LH

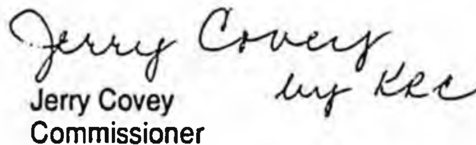
Recommendation No. 2

If certificated Public School Employees remain subject to the provisions of PERA, the Legislature should consider adopting legislation to clarify what issues are negotiable.

The Department does not concur with Recommendation No. 2. SB 15 should sunset due to the many uncertainties associated with public school employees remaining under PERA as (a)(3) employees.

Other provisions such as 2-year tenure, rehire, dismissal, non-retention, and teacher retirement which are related to total compensation and employment security are already provided for under Title 14 or have been granted by the Legislature.

Sincerely,



Jerry Covey
Commissioner

cc: Duane Guiley, Director, EFSS
Mike Maher, Special Assistant

NEA-ALASKA

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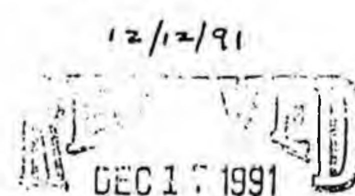

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LEGISLATIVE AUDIT

Randy S. Welker
Legislative Auditor
Legislative Budget and Audit
P.O. Box W
Juneau, AK 99811-3300

Dear Mr. Welker:

Thank you for providing NEA-Alaska with a copy of the "CONFIDENTIAL" PRELIMINARY REPORT ON:

"IMPACT OF THE PUBLIC EMPLOYMENT RELATIONS ACT ON LOCAL SCHOOL DISTRICTS."

We find the Report extremely comprehensive, thorough, and precise in its attention to the detail which pertains to the various nuances of the public school district collective bargaining process. LB & A staff are to be commended for this energetic effort.

We are also gratified to learn that LB & A intends to supplement the Report with a survey of public school employee bargaining agent union presidents, similar to the survey of superintendents. The results of this particular survey will bring more balance and broadened insights.

It is appropriate to provide some brief comments on some components of the Report before responding to the specific recommendations.

> On page 5, in the third paragraph, the number of public school teachers in Alaska is probably understated by 700+.
> On page 7, it may be more accurate to say that impasse "may" exist after a mediator and advisory arbitrator have tried to resolve issues; and, is probably more accurately described when both parties acknowledge that they are unwilling to make further modification of their positions on the issues in dispute.
> On page 8, in the second paragraph, seldom, if ever, was an actual <u>written</u> report produced by the mediator under AS 14.20.550.
> On page 9, from our perspective, it is also appropriate to emphasize that PERA contains provision for <u>finality</u> through right to strike or binding arbitration as one of its significant differences from AS 14.20.550.
> On page 10, the conclusion in the third paragraph is somewhat general in nature and while it may be true in some instances, it is certainly not accurate to all districts and/or each round of negotiations in a district.
> On page 12, in the paragraph relative to school district taxing authority it may be more accurate to say there "may be a reluctance" rather than an "unwillingness" to support additional property taxes.

- Recent national polls in fact show that the general public is willing to pay more taxes for public schools and the recent school bond vote in Anchorage is indicative of their willingness to support the operation of schools.
- In the same paragraph, it should also be noted that teachers contribute 8.65% of their pay to the retirement system and that part of that cost increase is due to benefit improvements and the RIP.

> On page 21, in the second paragraph, settlement of a pending ULP is not necessarily a prerequisite for continuation of negotiations. Naturally, resolution of ULPs is desirable for the successful potential of the negotiations process.
> In the last paragraph on page 21 the reasons given for causing strikes are not the exclusive reasons although they are certainly contributing ones. The presence of unresolved ULPs and provocative and offensive conduct are frequently major contributing factors when employees strike.

RECOMMENDATION # 1: Public School Employees Should Remain Under the Provisions of the Public Employment Relations Act (PERA), Classified as (a) (3) Employees.

NEA-Alaska agrees with this recommendation and will be working aggressively in the legislative process for the removal of the "sunset" provision from the current legislation. We will continue training programs for our members in better understanding of their rights and responsibilities under the PERA. We will seek its full implementation on behalf of all employees covered by it with a minimum of conflict and confrontation.

We will continue to work closely with the ALRA to facilitate their procedures and seek resolutions to problems and conflicts at the earliest administrative levels.

We will seek the opportunity for joint training and seminars with AASB and ACSA on our common concerns under the PERA. Pilot efforts in this regard in Anchorage and Fairbanks in the fall of 1990 were moderately successful.

RECOMMENDATION # 2: If Certificated School Employees Remain Subject to the Provisions of the PERA, the Legislature Should Consider Adopting Legislation to Clarify What Issues are Negotiable.

It is desirable to have clarity on the scope of negotiations and which issues are mandatory or permissive topics of negotiations. NEA-Alaska is confident that the "Kenai" decision will continue to provide a general frame of reference for the parties. However, over the extended period of time both circumstances and dynamics of process change.

The diversity and the magnitude of differences in public education in Alaska school districts may in fact require some flexibility in the articulation of mandatory and permissive subjects of negotiations. The policy responsibilities of school boards as employers will continue to provide sufficient guidance on disputes pertaining to negotiability.

There are two examples from the Kenai decision which may serve to emphasize the need for some flexibility in definition over the extended period and because of changing circumstances.

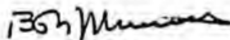
The Kenai decision makes class size a non-mandatory topic for negotiations because it is more in line with policy than with the economic interests of employees. However, increasing student enrollments, limited funding, reductions to student programs and services are just a few components which all contribute to significantly increasing class sizes, especially in urban areas. Administrators, school boards, employees and the general public are all interested in finding viable solutions to the problem.

Because a solution has not been found and because the problems continue to exacerbate it is becoming one of a "condition of employment" as well. Increasing class sizes increase negligence and liability potential, contribute to the possibility of increasing student discipline problems, mean more out of pocket employee expenses for classroom supplies and materials, contribute to an increased workload in homework, tests, preparation, and may constrain one's ability to achieve annual performance goals thereby contributing to possible negative annual evaluations. There is a point where the class size problem becomes a condition of employment and should be negotiable.

A similar scenario exists on the issue of employee workload, especially for rural secondary teachers who may be required to teach subjects out of their areas of certification. Again, adverse impacts on employee evaluations can be the direct result and a similar conclusion on negotiability is valid.

Thank you again for the opportunity to respond to the Preliminary Audit Report. I hope that our comments and recommendations are helpful to your process.

Respectfully submitted:



Bob Manners
Executive Director

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