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reform now pervades state government, as reform proposals have been rushed to a place of prominence on numerous legislative agendas.³ Figuring significantly into many of these proposals are prescriptions for improvement and reform of the teaching profession.⁴ It is widely believed that the profession requires markedly improved compensation and working conditions if educational excellence is to be attained, but that more rigorous "accountability" measures—like merit pay—must accompany the added investment. It is believed, in short, that the teaching profession requires more support but more control.⁵

Reform, it has been said, is a way of life in the public schools.⁶ As a casual review of the reform literature of the 1950's and 1980's reveals, the dilemma of public school teachers appears resistant to conclusive resolution.⁷ The persistence of this dilemma must cause mild bewilderment in the community of labor scholars, however, for intervening between the educational revivals of the 1950's and 1980's were dramatic reforms in public sector labor law.⁸ These

NATIONAL SCIENCE BOARD COMMISSION ON PRECOLLEGE EDUCATION IN MATHEMATICS, SCIENCE AND TECHNOLOGY, NATIONAL SCIENCE FOUNDATION, EDUCATING AMERICANS FOR THE 21ST CENTURY (1983) [hereinafter cited as EDUCATING AMERICANS]; T. SIZER, HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL (1983); TASK FORCE ON EDUCATION FOR ECONOMIC GROWTH, EDUCATION COMMISSION OF THE STATES, ACTION FOR EXCELLENCE (1983) [hereinafter cited as ACTION FOR EXCELLENCE]; TASK FORCE ON FEDERAL ELEMENTARY AND SECONDARY EDUCATIONAL POLICY, MAKING THE GRADE (1983); AGAINST MEDIOCRITY: THE HUMANITIES IN AMERICA'S HIGH SCHOOLS (C. Finn, Jr., D. Ravitch & R. Fancher, eds. 1984). See generally Boston Globe, June 30, 1984, at 6, col. 5.

3. According to a recent survey, every state is currently considering, or has enacted within the past year, educational reform measures. See U.S. DEPARTMENT OF EDUCATION, THE NATION RESPONDS 144-46 (1984) [hereinafter cited as THE NATION RESPONDS].

4. For example, there has been legislative consideration, or passage, of teacher salary increases in 34 states, master teacher or career ladder plans in 30 states, performance-based pay plans in 13 states, teacher preparation/certification changes in 47 states, professional development plans in 41 states, programs to address teacher shortages in 39 states, and plans to increase instructional time in 38 states. See *id.* at 23-137, 144-46.

5. For a general discussion of the admixture of corrective and supportive measures in the reform reports, see N.Y. Rev. of Books, Apr. 12, 1984, at 35, col. 1; N.Y. Times, Dec. 27, 1983, at C6, col. 1.

6. Cohen, *Reforming School Politics*, 48 HARV. EDUC. REV. 429 (1978).

7. See, e.g., ROCKEFELLER REPORT, *supra* note 1; Elliot, *Toward an Understanding of Public School Politics*, 53 AM. POL. SCI. REV. 1032, 1048 (1959) ("The profession by itself cannot, however, gain the other objective which must be reached if first-class teaching is to be the rule: it cannot raise the money needed to hire and retain excellent teachers. Good salaries, by themselves, do not produce good teachers . . . but bad salaries certainly are a factor in driving able teachers into more remunerative pursuits and in keeping potentially fine prospects out of the schools."), Pascow, *Tackling the Reform Reports of the 1980s*, PHI DELTA KAPPAN, June 1984, at 674, 675 ("The deplorable state of American education is not a theme that is unique to the current wave of reports. This theme has recurred regularly over the past 90 years or so.")

8. See *infra* text accompanying notes 19-34.

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

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 155-63 (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

experience with teacher bargaining under two prevalent legal structures: 1) conventional collective bargaining in which teachers are simply denied the right to strike; and 2) collective bargaining in which the right to strike is denied, but the opportunity to submit bargaining disputes to binding arbitration is substituted for it. The latter structure constitutes the most significant innovation in teacher bargaining during the past decade, as it has presented a viable alternative to strike-based bargaining—which remains politically unacceptable in the large majority of states.¹⁵

In Part I of this Article, we review briefly the development of teacher collective bargaining and its associated legal structures. We then examine, in Part II, evidence concerning the effects of bargaining on teachers' salaries and the processes of school government. Part III sets forth recent research findings, including our own, regarding the relative impact that arbitration has on the collective bargaining process. Finally, in Part IV of this Article, we reflect on the past decades' experience with teacher bargaining and speculate on the relationship of bargaining to current educational reform.

Past experience with teacher collective bargaining, we shall maintain, indicates that bargaining is neither the boon to organized teachers nor the blight to school government that some have feared. Through collective bargaining, teachers have achieved moderate success in obtaining higher salaries and various forms of job protection, and have expanded somewhat their participation in school administration. But the teachers' unions have been measurably less effective than unions in private industry, and the feared seizure of school government powers by teachers' unions has simply not occurred. Earlier predictions that collective bargaining would have greater impact, we shall argue, failed to account for significant political and economic factors; among these factors are the limited political base of educators, the relative advantage enjoyed by fiscally conservative forces in the local school funding process, and the increasing sophistication of school management in the bargaining process.

the three years prior to and the five years following introduction of binding arbitration procedures in Connecticut. Among the research methods included in this study are: 1) quantitative analysis of salary levels and salary distribution in Connecticut's 167 local school districts; 2) quantitative analysis of all arbitration proceedings and outcomes; 3) quantitative analysis of bargaining impasse and strike occurrence during the study period; 4) comprehensive surveys of professional labor negotiators, school superintendents, school board members, and local teacher union representatives; and 5) interviews with union, management, and state officials. All data used in this study is available from the authors.

15. See *infra* text accompanying notes 32-39.

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.

by citizens of the local school districts,¹⁸ and perform their responsibilities more or less independently of other units of county and municipal government.¹⁹ Traditionally, it is the school board that controls such matters as the opening and closing of neighborhood schools, the assignment of students, textbook selection, and the ultimate composition of the school curriculum.²⁰ Moreover, the school board formulates the school budget,²¹ which is often the largest single expenditure of local government and the primary determinant of the local tax burden.²²

The traditions of local control are also reflected in the legal structure of school labor relations. The role of state government is usually that of insuring minimum qualifications in the teaching staff, and minimum levels of employment benefits and job protection.²³ Otherwise, labor relations remain a distinctly local phenomenon. Only in Hawaii, do teachers negotiate the terms of employment at a statewide level. In the remaining states where bargaining is permitted, it occurs at the school district level between the district board of education and the elected union representative of district teachers.²⁴ As a consequence of this decentralized system of bar-

18. Approximately 85% of local school board members are elected. See F. WIRT & M. KIRST, *THE POLITICS OF EDUCATION: SCHOOLS IN CONFLICT* 94 (1982) [hereinafter cited as *SCHOOLS IN CONFLICT*].

19. See generally Project, *supra* note '6, at 1380-81.

20. See Simon, *supra* note 16, at 423-24. In most states today, these school board powers are exercised subject to state *minimum* requirements. See F. WIRT & M. KIRST, *POLITICAL AND SOCIAL FOUNDATIONS OF EDUCATION* 112 (1975). See also, Project, *supra* note 16, at 1378-80.

21. See, e.g., Doherty, *Public Education*, in *COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE* 487, 489 (G. Somers ed. 1980):

In most states school boards are fiscally independent, having a tax base and taxing authority separate from that of county and municipal government. In a large number of these states annual school budgets are submitted to the voters for approval, a matter of no small consequence for collective bargaining, particularly if a sufficient increase in the tax rate. In some areas (most of the New England states, for example, and several large cities), school districts are dependent upon town and city governments for financial support.

For a discussion of the fiscally-dependent school district, and the interrelationship of school budgeting and town funding, see Gould, *The Rejection and Funding of Teacher Contracts in Connecticut: A Statutory Enigma*, 9 *CONN. L. REV.* 608 (1977).

22. The state and local government direct expenditure for education constitutes 35.9% of their budgets. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1984, at 281 [hereinafter cited as *STATISTICAL ABSTRACT*].

23. All states, for example, require that teachers be certified, thus establishing minimum qualifications in education and competence. See Project, *supra* note 16, at 1378. Similarly, most states provide teachers retirement benefits, sick leave benefits and some form of job protection. See generally *LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, STATE LEGAL STANDARDS FOR THE PROVISION OF PUBLIC EDUCATION: AN OVERVIEW* (1978).

24. See *supra* note 17.

gaining, most of the important personnel decisions in the schools remain subject to local determination.

Though highly diffuse in structure, teacher unionism and collective bargaining have experienced remarkable growth in recent decades. The task of organizing teachers was greatly facilitated by professional associations like the National Education Association (NEA) and its local affiliates, which were developed into functioning unions.²⁵ This process was accelerated by the emergence of the more militant American Federation of Teachers (AFT), an offshoot of the AFL-CIO, as a rival to the NEA. Since the early organizational successes of the AFT in New York City and other metropolitan school districts, the two unions have waged a continual campaign for membership.²⁶ Today, eighty-eight percent of the nation's school teachers belong to either the NEA or the AFT, and eighty-three percent are members of a local teachers' organization.²⁷ By contrast, a dwindling twenty-one percent of all private sector employees currently belong to a labor organization, a decline that has occurred simultaneously with the rise in teacher unionism.²⁸

The increase in union density among public school teachers has been accompanied by a proliferation in the number of bargaining statutes and formal bargaining agreements. Since 1959, when Wisconsin first authorized teacher collective bargaining, thirty-three states have recognized a statutory duty to bargain,²⁹ and eleven

25. See generally A. CRESSWELL & M. MURPHY, *TEACHERS, UNIONS, AND COLLECTIVE BARGAINING IN PUBLIC EDUCATION* 53-102 (1980); Gee, *The Unionization of Mr. Chips: A Survey Analysis of Collective Bargaining in the Public Schools*, 15 WILLAMETTE L. J. 367, 374-80 (1979).

26. See M. LIEBERMAN & M. MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS* 55-61 (1966); A. CRESSWELL & M. MURPHY, *supra* note 25, at 84-86; Gee, *supra* note 25, at 378-80.

27. NATIONAL EDUCATION ASSOCIATION, *STATUS OF THE AMERICAN SCHOOL TEACHER*, 1980-81, 67 (1982) [hereinafter cited as *STATUS*]. Because membership in the national and local organizations was at high levels prior to the advent of collective bargaining, one cannot strictly equate such membership with the phenomenon of "unionism." See generally A. CRESSWELL & M. MURPHY, *supra* note 25, at 105-12. These membership figures might better be described as membership in organizations that either bargain (as most do) or support the right to bargain (for example, in states where bargaining is prohibited).

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

29. See ALASKA STAT. § 14.20.550 (1975); CAL. GOV'T CODE § 3540 (West 1977); CONN. GEN. STAT. § 10-153a (1979); DEL. CODE ANN. tit. 14, § 4001 (1982); FLA. STAT. § 447.201 (1980); HAWAII REV. STAT. § 89-1 (1982); IDAHO CODE § 20.9 (1978); ILL. ANN. STAT. ch. 48, § 1701 (Smith-Hurd Supp. 1984); IND. CODE § 20-7.5-1-3 (1978); IOWA CODE § 20.9 (1978); KAN. STAT. ANN. § 72-5414 (1980); ME. REV. STAT. ANN. tit. 26, § 965 (1974); MD. EDUC. CODE ANN. § 6-108 (1978); MASS. GEN. LAWS ANN. ch. 150E, § 2 (West 1981); MICH. COMP. LAWS ANN. § 423.215 (West 1978); MINN. STAT. § 179.61 (1983); MONT. CODE ANN. § 39-31-305 (1983); NEB. REV. STAT. § 79-1292 (1981); NEV. REV. STAT. § 288.150 (1983); N.H.

states have recognized some form of teacher participation in school board decision-making.³⁰ Only four states continue to prohibit collective bargaining by teachers.³¹ The nation's teaching force, moreover, has responded swiftly to the opportunities presented by the adoption of teacher bargaining laws. Current estimates indicate that approximately seventy percent of the nation's school systems operate under the provisions of a collective bargaining agreement.³²

Teacher bargaining laws have usually been patterned after private sector precedent, particularly the National Labor Relations Act. Among the labor conventions borrowed from the private sector have been: 1) recognition of a single union with exclusive power to represent local school teachers; 2) recognition of management's duty to bargain in good faith with the union representative; and 3) recognition of limitations on the scope of the duty to bargain.³³ In defining the scope of the duty to bargain, states have often accepted the private sector distinction between mandatory and permissive subjects of bargaining. Some states have expressly enumerated the mandatory subjects of bargaining, but most states have adopted the private sector definition of the scope of the bargaining duty, which extends the duty to all "terms and conditions of employment."³⁴ In

REV. STAT. ANN. § 273-A:3 (1975); N.J. REV. STAT. § 34:13A-6 (1982); N.Y. CIV. SERV. LAW § 200 (Consol. 1983); N.D. CENT. CODE § 15-38.1-12 (1969); OHIO REV. CODE ANN. § 4117.04 (1983); OKLA. STAT. ANN. tit. 70, § 509.2 (1982); OR. REV. STAT. § 243.656 (1979); 43 PA. CONS. STAT. § 1101.401 (1976); R.I. GEN. LAWS § 36-11-7 (1980); S.D. CODIFIED LAWS ANN. § 3-18-2 (1983); TENN. CODE ANN. § 49-5-501 (1978); VT. STAT. ANN. tit. 16, § 2001 (1977); WASH. REV. CODE § 41.59.140 (1983); WIS. STAT. § 111.91 (1982).

30. See ALA. CODE § 73 (1973) (mandatory consultation); Op. Att'y Gen. No. 74.11 (Ariz. May 20, 1974) (permissive consultation); Op. Att'y Gen. (Ark. Sept. 25, 1968) (permissive collective bargaining); Littleton Educ. Ass'n v. Arapahoe Cty. School Dist., 553 P.2d 793 (Col. 1976) (permissive collective bargaining); Op. Att'y Gen. (Ga. Sept. 1, 1966) (permissive consultation); Op. Att'y Gen. 65-84 (Ky. 1965) (permissive collective bargaining); Op. Att'y Gen. 74-413 (La. 1974) (permissive collective bargaining); Peters v. Board of Educ., 506 S.W.2d 429 (Mo. 1974) (permissive consultation); IBEW v. Town of Farmington, 405 P.2d 233 (N.M. 1965) (permissive collective bargaining); Op. Att'y Gen. (S.C. Sept. 27, 1978) (permissive collective bargaining); Op. Att'y Gen. (W.Va. June 26, 1974) (permissive collective bargaining).

31. See N.C. GEN. STAT. § 95-98 (1959); TEX. STAT. ANN. art. 5154C (Vernon 1947); Op. Att'y Gen. 60-003 (Utah 1960); Virginia v. County Bd. of Arlington City, 232 S.E.2d 30 (Va. 1977).

32. EDUCATIONAL RESEARCH SERVICES, INC., FRINGE BENEFITS FOR TEACHERS IN PUBLIC SCHOOLS, 1981-82, Pt. 3, at 36 (1982). This percentage, based on a national sample of school districts, increases to 75% if all written agreements, formal and informal, are included.

33. See Gee, *supra* note 25, at 452-53, 460-62.

34. See *id.* at 460-61; Simon, *supra* note 16, at 425. Twenty-seven states recognize a duty to bargain over terms and conditions of employment, subject in some states to certain qualifications. See ALASKA STAT. § 23.40.070 (1980); CAL. GOV'T CODE § 3543.2 (West 1981); CONN. GEN. STAT. § 10-153a (1979); DEL. CODE ANN. tit. 14, § 4001 (1981); FLA. STAT. § 447.301 (1980); HAWAII REV. STAT. § 89-3 (1970); ILL. STAT. ANN. ch. 48, § 1704 (Smith-

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 concomitant 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*, 71 HARV. L. REV. 1401, 1409 (1958).

38. See generally McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining*, 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

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 employees in their willingness to engage in job actions.⁴⁴ Such strike activity is still considered by many to be an essential element in collective bargaining, even though public school teachers are obviously troubled by the prospect of highly-publicized "law-breaking," and school boards by their obligation to invoke statutory sanctions.

As mentioned, most state legislators have attempted to circumvent the strike dilemma with a variety of compulsory, impasse resolution procedures. These procedures have relied on the intervention of third parties—mediators, factfinders, and arbitrators—to reconcile bargaining disputes and to avert strike activity.⁴⁵ In theory, management and employees are induced to settle because of the third party's conciliatory power and the public pressure that accumulates behind the intervenor's efforts. In theory, impasse procedures introduce into the bargaining process a degree of moderation and balance otherwise lacking.⁴⁶

The more common impasse resolution procedures have suffered the same fate as statutory strike prohibitions. They are often ineffective in strongly contended bargaining disputes. Thus, more than seventy-five percent of strikes occurring in the period 1972-80 have occurred in states employing conventional, non-binding impasse res-

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

45. See ALASKA STAT. § 14.20.570 (1975) (mediation); CAL. GOV'T CODE § 3518 (1983) (mediation); DEL. CODE ANN. tit. 14, § 4014 (1982) (permissive mediation and factfinding); FLA. STAT. § 447.403 (1977) (mediation and factfinding); HAWAII REV. STAT. § 89-11 (1978) (mediation and factfinding); IDAHO CODE §§ 33-1274, 33-1275 (1977) (mediation and factfinding); IND. CODE § 20-7.5-1-11 (1976) (mediation and factfinding); KAN. STAT. ANN. § 72-5413 (1980) (mediation and factfinding); ME. REV. STAT. ANN. tit. 26, § 3965 (1981) (permissive mediation and factfinding); M.D. EDUC. CODE ANN. § 6-408(d) (1978) (mediation and factfinding); MASS. GEN. LAWS AN. ch. 150E, § 9 (1981) (mediation and factfinding); MICH. COMP. LAWS § 423.207 (1976) (mediation and factfinding); MONT. CODE ANN. §§ 39-31-307, 39-31-308 (1979) (mediation and factfinding); NEV. REV. STAT. § 288.190 (1981) (mediation and factfinding); N.H. REV. STAT. ANN. § 273-A:12 (1983) (permissive mediation and factfinding); N.J. REV. STAT. §§ 34:13A-6, 34:13A-7 (1982) (permissive mediation and factfinding); N.Y. CIV. SERV. LAW (McKinney 1977) (mediation and factfinding); N.D. CENT. CODE § 15-38.1-13 (1983) (mediation and factfinding); OHIO REV. CODE ANN. § 4117.14 (1983) (mediation and factfinding); OKLA. STAT. tit. 70, § 509.7 (1983) (factfinding); OR. REV. STAT. §§ 243.712, 243.722 (1983) (mediation and factfinding); 43 PENN. CONS. STAT. § 1101.501 (1976) (mediation and factfinding); R.I. GEN. LAWS § 28-9.3-9 (1981) (mediation for economic disputes); S.D. CODIFIED LAWS ANN. § 3-18-8.1 (1983) (mediation); TENN. CODE ANN. § 49-5513 (1978) (mediation and factfinding); VT. STAT. ANN. tit. 3, § 925 (1977) (mediation and factfinding); WASH. REV. CODE § 41.59.120 (1983) (mediation and factfinding).

46. See generally A. CRESSWELL & M. MURPHY, *supra* note 25, at 176-83; Anderson, *supra* note 42, at 564-69; *Structuring Collective Bargaining*, *supra* note 40, at 825-31; Note, *The Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549, 562-63, 566-69.

olution procedures.⁴⁷ Evidence from these states indicates that elaborate conciliatory mechanisms will fail when teachers' unions are determined and school boards unyielding. For it is a characteristic of conventional impasse procedures that they leave intact the school board's freedom to say "no" to teacher demands, without fear of a legal strike reprisal.

There is one impasse procedure that has proven to be overwhelmingly successful in preventing strikes—binding arbitration.⁴⁸ Binding arbitration is a relatively recent phenomenon in American labor law, and one that has little precedent in the private sector.⁴⁹ It has a long history in other common law countries, however, and is now widely used in non-educational public sector bargaining in the United States.⁵⁰ This trend appears to be spreading to educational bargaining, as nineteen states have recognized some form of binding arbitration during the past decade, and seven of these compel binding arbitration to resolve bargaining disputes.⁵¹

47. The figure is based on a state-to-state comparison using strike data reported in *COLLECTIVE BARGAINING*, *supra* note 43, at 12. On the decline in the effectiveness of nonbinding impasse procedure, see L. McDONNELL & A. PASCAL, *ORGANIZED TEACHERS IN AMERICAN SCHOOLS* 63 (1979); Perry, *supra* note 41, at 9.

48. Based on GOV'T EMPL. REL. REP. (BNA) (1966-82) summaries through 1982, there had been no strikes in Connecticut, Iowa, Nebraska and Wisconsin following enactment of binding arbitration procedures. Four strikes had occurred in Minnesota, where striking is a permissible alternative to binding arbitration. It should be noted, however, that only Connecticut and Wisconsin had a significant amount of strike activity prior to enactment of binding arbitration legislation. For summaries of the powerful deterrence to strikes in public sector bargaining generally, see B. DOWNIE, *THE BEHAVIOURAL, ECONOMIC AND INSTITUTIONAL EFFECTS OF COMPULSORY INTEREST ARBITRATION* 73-78 (1979); Feuille, *Selected Benefits and Costs of Compulsory Arbitration*, 33 *INDUS. & LAB. REL. REV.* 64, 65 (1979).

49. See Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, 1 *INDUS. REL. L. J.* 427, 479-80 (1976).

50. See, e.g., B. COOPER, *supra* note 44, at 64; Feuille, *supra* note 48, at 64.

51. Binding arbitration is permitted by the following state laws: HAWAII REV. STAT. §§ 89-2, 89-11 (1978); ILL. ANN. STAT. ch. 48, ¶ 1712 (Smith-Hurd Supp. 1984) (unless both parties agree to binding arbitration, teachers may strike); IND. CODE § 20-7.5-1-13 (1976); MONT. CODE ANN. § 39-31310 (1979); NEV. REV. STAT. § 288.200 (1981); N.H. REV. STAT. ANN. § 273-A:12 (1983) (binding on non-economic items only); N.J. REV. STAT. § 34:13A-7 (1982); N.D. CENT. CODE § 15-38.1-13 (1983); OR. REV. STAT. § 243.712(2) (1983); 43 PENN. CONS. STAT. § 1101.1003 (1976); S.D. CODIFIED LAWS ANN. § 3-13-8.1 (1983); WASH. REV. CODE § 41.59.120(5) (1983).

The following state laws employ some form of *compulsory*, binding arbitration: CONN. GEN. STAT. § 10-153 (1979) (compulsory arbitration of all disputed issues); IOWA CODE § 20.22 (1977) (compulsory arbitration of all disputed issues); ME. REV. STAT. ANN. tit. 26, § 965(4) (1974) (compulsory arbitration of all disputed issues, but binding only for non-economic items); MINN. STAT. § 179.69 (1983) (compulsory arbitration of all disputed issues unless one party recognizes the right to strike); NEB. REV. STAT. § 48.818 (1980) (either party can compel binding arbitration of disputed issues before the Commission of Industrial Relations); R.I. GEN. LAWS § 28-9.3-11, 12 (1980) (either party can compel binding arbitration of disputed issues, but only non-economic arbitral decisions are binding); WIS. STAT. § 111.70(4)(cm)

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

(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

57. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1158 (1974); accord M. YUDOF, D. KIRK, T. VAN GEEL & B. LEVIN, *EDUCATIONAL POLICY AND THE LAW* 333 (1982).

58. See Eliot, *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. DEPT' 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-

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. RAUCH, *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. 384 (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 sector.

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 165. 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 state-wide 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

<u>Year</u>	<u>Average Salary in Dollars*</u>	<u>Percent Increase in Average Salary</u>	<u>CPI** (1967 = 100)</u>	<u>Percent Increase in CPI</u>	<u>Average Salary in 1967 Dollars</u>	<u>Percent Change in Average Salary in 1967 Dollars</u>
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.

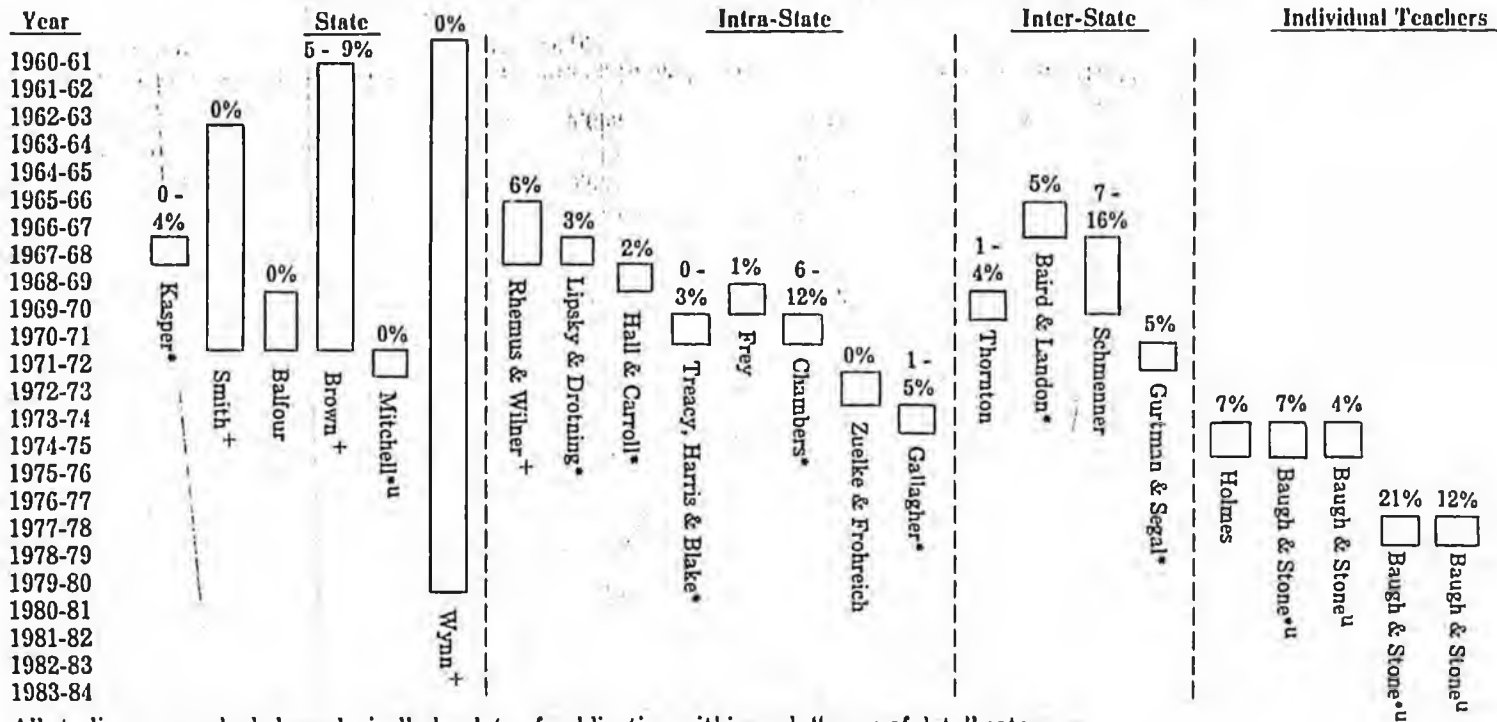
TABLE 2
Average Starting Salaries of Public School Teachers Compared
with Salaries in Private Industry

<u>Position/Field</u>	<u>1973-74</u>	<u>1980-81</u>	<u>1981-82</u>	<u>Percent change 1981-82 over 1980-81</u>	<u>Percent change 1981-82 over 1973-74</u>
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	13,293	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

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

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. SECAL, *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

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

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 163 (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-

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 (<i>de facto</i>)	6.23
Illinois (<i>de facto</i>)	5.96
Michigan (<i>de facto</i>)	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 L.A.B. 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

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-

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

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" at 27. See also *SCHOOLS IN CONFLICT*, *supra* note 18, at 245-47.

See *SCHOOLS IN CONFLICT*, *supra* note 18, at 166-68. The referenda approval rate has declined since the mid-1970's. See *N.Y. Times*, Feb. 26, 1984, at C6, col. 1. Wirtz and others have argued 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 grass-roots 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).

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, 41 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 (1981). 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-

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, Ereck & 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.

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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

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

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 policy-making.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-

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

necus 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 non-economic 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

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

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

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%;
- 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' commitment 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 features¹⁴⁷ found in: 1) a national sample of private sector agreements; 2) a national sample

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	19	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

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

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 1953) 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

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

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

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-

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 measurement. 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

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 Hull & 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 teacher.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-

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 113, 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

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 152-54. 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

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

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-S2). 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

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

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 *compatibility*, 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 schools²³⁴ and a three-year study of arbitration in Iowa public schools²³⁵ reveal no significant salary effect resulting from the use of arbitration.

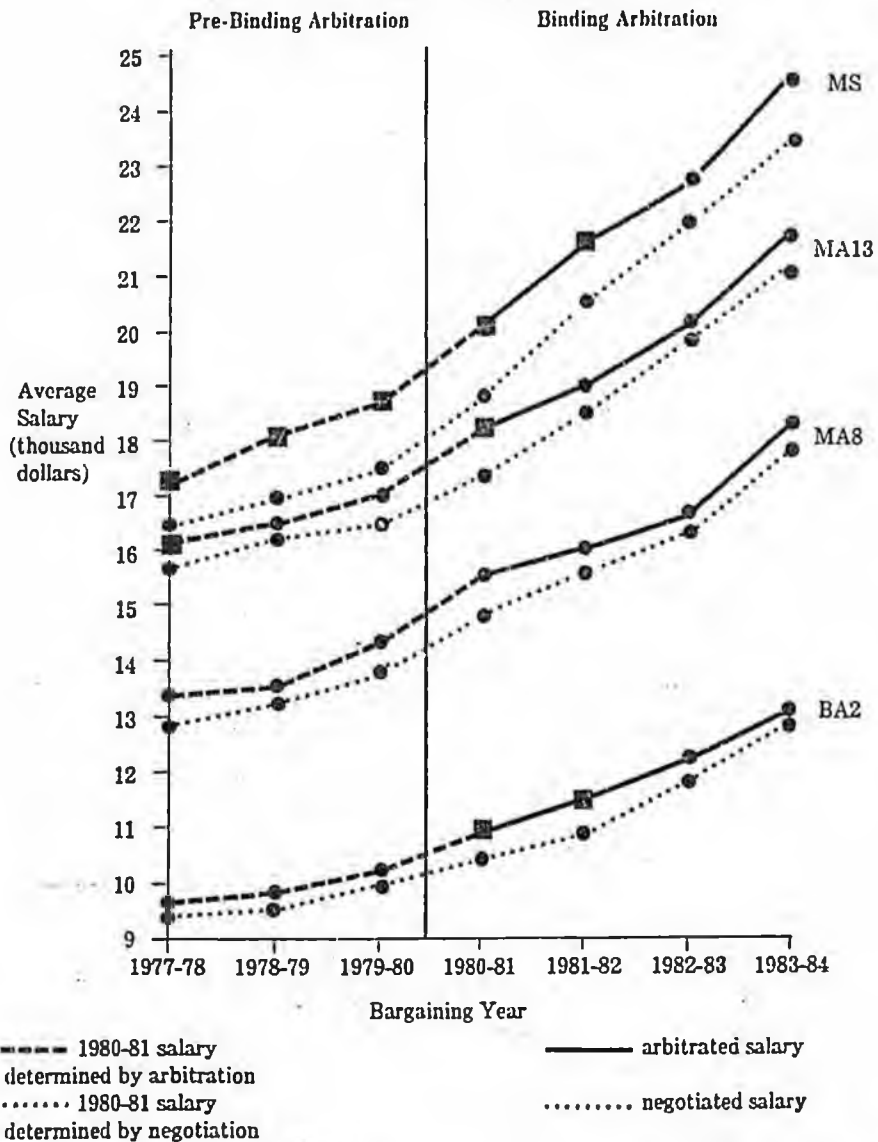
Our research findings in Connecticut confirm those of the studies outlined above. Figure 1 traces the evolution of teachers' salaries in Connecticut since 1977, and encompasses the three years prior to and the four years following the introduction of binding arbitration. This figure identifies four representative 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.

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 letter-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

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 Research 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, BA3, 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:

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

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-

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. § 10-153(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

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 variation²⁵³ 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.

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).

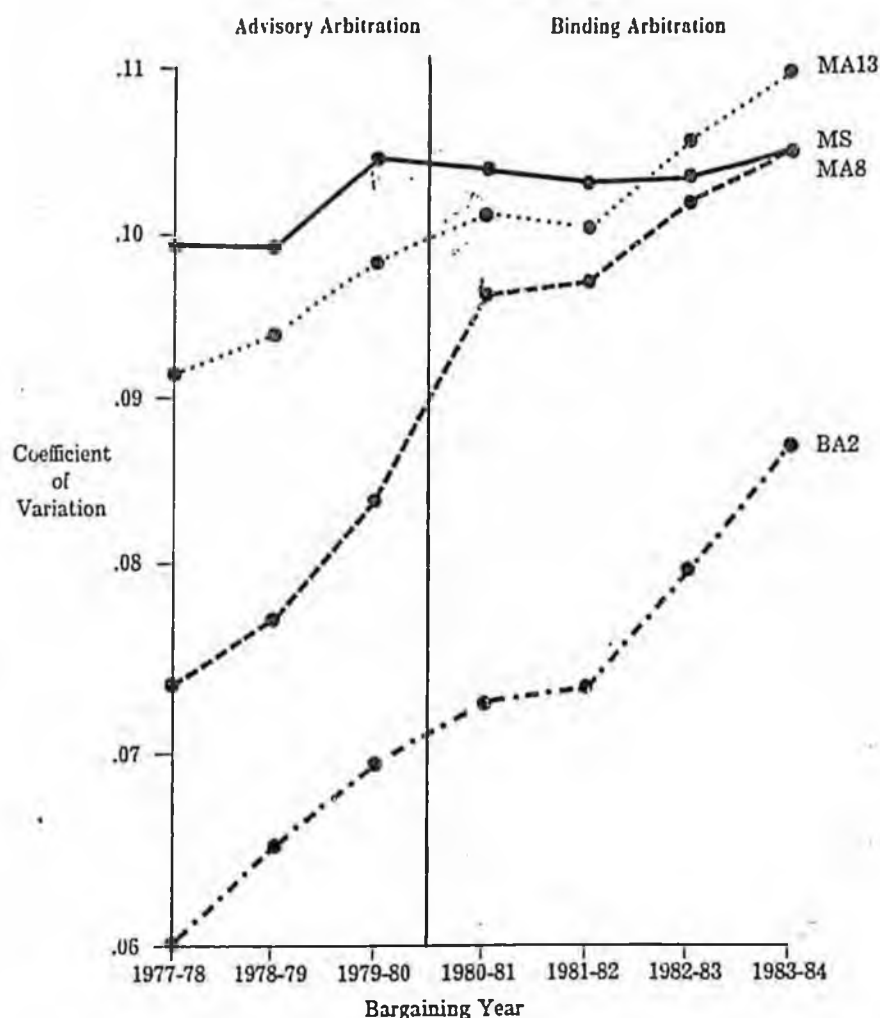
250. See, e.g., DISPUTE RESOLUTION, *supra* note 233, at 71. The strong "catch up" effect for police and firefighter bargaining under conventional arbitration in New York State was limited to the first round of bargaining. But it should be noted that it is difficult to ascertain whether even this limited 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

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.

<u>Year</u>	<u>BA2</u>	<u>MA8</u>	<u>MA13</u>	<u>MS</u>
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

pass: *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

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 Eloch & Kuskin, *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_n - 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_n - 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	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)						Minnesota (1973)			
1970-71	8,125	6,782	10.2*	5.0	1971-72	10,218	8,247	4.7	1.0		
1971-72	8,465	6,832	4.2	0.7	1972-73	10,553	8,143	3.3	-1.7		
1972-73	8,704	6,716	2.9	-1.7	1973-74	11,076	7,789	5.0	-4.3		
1973-74	9,168	6,447	5.3	-4.0	1974-75	11,790	7,490	6.4	-3.8		
1974-75	9,264	5,886	1.0	-8.7	1975-76	12,726	7,589	7.9*	1.3*		
1975-76	10,409	6,207	12.4*	5.5*	1976-77	13,963	7,858	9.7*	3.5*		
1976-77	11,172	6,287	7.3*	1.3*	1977-78	14,167	7,456	1.5	-5.1		
		Iowa (1974)						Wisconsin (1978)			
1972-73	9,597	7,405	4.5	-4.4	1976-77	13,242	7,452	7.2*	1.2*		
1973-74	9,854	6,930	2.7	-6.4	1977-78	14,045	7,390	6.1	-0.8		
1974-75	10,655	6,769	8.1	-2.3	1978-79	14,906	7,132	6.1*	-3.5*		
1975-76	12,132	7,234	13.9*	6.9*	1979-80	16,006	6,745	7.4*	-5.4*		
1976-77	12,533	7,053	3.3	-2.5	1980-81	17,606	6,671	10.0	-1.1		
1977-78	13,340	7,021	6.4*	-0.5*	1981-82	19,387	6,807	10.1*	2.0*		
1978-79	14,186	6,788	6.3*	-3.3*	1982-83	21,496	7,279	10.9*	6.9*		
		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*							

*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.**

<u>Binding Arbitration States*****</u>		<u>Other Collective Bargaining Intensive States****</u>		<u>Collective Bargaining Unintensive States</u>	
Wisconsin	24.20%	North Dakota	24.55%	Texas	24.42%
Connecticut	19.38	Utah	24.09	New Mexico	22.53
Iowa	17.72	Colorado	21.07	Virginia	20.42
UNITED STATES	17.20*	Maryland	19.94	Louisiana	20.33
Nebraska	17.00	Kansas	19.55	Alabama	17.40
		Florida	19.30	UNITED STATES	17.20*
MEAN	19.58%	New Jersey	18.62	Kentucky	16.83
		Nevada	18.33	West Virginia	15.83
		New York	17.70	South Carolina	14.47
		Arizona	17.26	Missouri	13.44
<u>Right to Strike States***</u>		UNITED STATES	17.20*	Georgia	12.74
Montana	21.99%	Indiana	16.43	North Carolina	12.45
Ohio	18.34	Idaho	16.15	Mississippi	10.03
Oregon	18.03	California	15.47		
Pennsylvania	17.38	Rhode Island	15.39	MEAN	16.75%
Hawaii	17.26	Tennessee	15.26		
UNITED STATES	17.20*	New Hampshire	14.47		
Alaska	16.89	Delaware	14.24		
Illinois	16.43	South Dakota	14.10		
Vermont	13.30	Maine	12.71		
Michigan	12.97	MEAN	17.61%		
MEAN	16.95%				

- 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 un-intensive.
- ** 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 states²⁶³ 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

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-

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

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 *permissible* 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 for 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	50%	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

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).

ill result—as has happened in Connecticut—in his stability.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

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(2), (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

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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

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

286. For a discussion of the accommodative 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.