

# Teacher Collective Bargaining, Teacher Quality, and the Teacher Quality Gap: Toward a Policy Analytic Framework

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## INTRODUCTION: TEACHER QUALITY, THE TEACHER QUALITY GAP, AND TEACHER EMPLOYMENT LAW AND COLLECTIVE BARGAINING

It is nearly beyond dispute that the quality of teaching in our elementary and secondary schools affects student performance.<sup>1</sup> It is becoming increasingly apparent that good teaching is equally if not more important for low-performing students.<sup>2</sup> Despite this general and unusual agreement about what works in the public schools that serve low-performing and disadvantaged children, it is also no secret that those schools are staffed by the least experienced teachers, the lowest paid teachers, and the teachers who are most likely to move to different schools or be laid off during lean economic times.<sup>3</sup>

Recognizing the need to attract and retain high quality professionals in teaching and further recognizing the need to distribute the best teachers fairly among schools serving children of all socioeconomic backgrounds, there has been a flurry of recent public policy making aimed at improving teaching and closing the teacher quality gap. This includes providing incentives to attract and retain teachers, establishing multiple pathways to the classroom, and designing teacher evaluation systems that are tied to student performance. Yet there has been a vocal and increasing frustration with the perceived barriers to improving teaching through policy and administrative reform. From political conservatives to the “reform” progressives,<sup>4</sup> many

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<sup>1</sup> See Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, *Teacher-Student Matching and the Assessment of Teacher Effectiveness*, 41 J. HUM. RESOURCES 778 (2006); Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417 (2005); Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence From Panel Data*, 94 AM. ECON. REV. 247 (2004).

<sup>2</sup> See Clotfelter et al., *supra* note 1; Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2000), available at <http://epaa.asu.edu/ojs/article/view/392/515>.

<sup>3</sup> See JULIAN R. BETTS, KIM S. RUEBEN & ANNE DANENBERG, PUB. POLICY INST. OF CAL., EQUAL RESOURCES, EQUAL OUTCOMES? THE DISTRIBUTION OF SCHOOL RESOURCES AND STUDENT ACHIEVEMENT IN CALIFORNIA (2000), available at [http://www.ppic.org/content/pubs/report/R\\_200JBR.pdf](http://www.ppic.org/content/pubs/report/R_200JBR.pdf); Clotfelter et al., *supra* note 1; Hamilton Lankford, Susanna Loeb & James Wyckoff, *Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis*, 24 EDUC. EVALUATION & POL'Y ANALYSIS 37 (2002).

<sup>4</sup> Those critical of unions who might be characterized as politically conservative include Wisconsin Governor Scott Walker and New Jersey Governor Chris Christie. See Daniel Di-

have pointed to a troika of constraints to reform: teacher employment and tenure laws that protect the jobs of poor-performing teachers, collective bargaining laws and the restrictive contracts that are the product of bargaining, and the teachers' unions that enjoy outsized political clout in state capitols, local-school boardrooms, and at the collective bargaining table. From the education punditry to popular media to legislative chambers, teachers' unions and the rules that they have relied upon to protect their members are under attack for being harmful to schoolchildren, particularly poor schoolchildren. Cast in the role of a villain in the widely viewed documentary film, *Waiting for "Superman,"* teachers' unions—through their spokeswoman, American Federation of Teachers President Randi Weingarten—are portrayed as the protectors of the slothful, ineffective, and even abusive teachers who spend their days in the purgatory of New York's (now abolished) "rubber rooms," getting paid to do nothing while they appeal their dismissals from the classroom.<sup>5</sup> Some who would be deemed politically "liberal," such as Washington, D.C.'s, former schools superintendent, Michelle Rhee,<sup>6</sup> have made a name for themselves by taking on the teachers' unions and the tenure and compensation rules that protect teachers' jobs and paychecks. Even President Barack Obama and his Secretary of Education, Arne Duncan, have infused their centerpiece education improvement efforts, the Race to the Top grants, with incentives to improve teacher effectiveness based on "performance," despite collective bargaining agreements that prevent performance pay schemes.<sup>7</sup>

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Salvo, *The Trouble With Public Sector Unions*, NAT'L AFF., Fall 2010, at 3; Monica Davey & Steven Greenhouse, *Wisconsin May Take an Ax to State Workers' Benefits and Their Unions*, N.Y. TIMES, Feb. 12, 2011, at A11; Michael Fletcher & Brady Dennis, *State Budget Clashes Spread to Indiana, Ohio*, WASH. POST, Feb. 23, 2011, at A1; Patrick Marley & Lee Bergquist, *With Democrats Absent, Republicans Advance Collective Bargaining Changes*, MILWAUKEE J.-SENTINEL, Mar. 9, 2011. Some also favor market-based school-reform models, such as choice (vouchers) and teacher pay-for-performance; advocates of these approaches include Terry M. Moe, Eric A. Hanushek, and Jay P. Greene, who are critical of teachers' unions. See TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS (2011); Stuart Buck & Jay P. Greene, *Blocked, Diluted, and Co-opted: Interest Groups Wage War Against Merit Pay*, EDUC. NEXT, Spring 2011, at 27; Eric A. Hanushek, *The New Unionism, Legislative Version*, EDUC. NEXT BLOG (Apr. 15, 2011), <http://educationnext.org/the-new-unionism-legislative-version/> (on file with the Harvard Law School Library). More recently, there have been calls from the political left-of-center to rein in some union-backed policies that might work to the disadvantage of poor children. See Richard D. Kahlenberg, *Gov. Scott Walker Can Thank Michelle Rhee for Making Teachers Unions the Enemy*, WASH. POST, Feb. 27, 2011, at B3; Mickey Kaus, *Dems Rally Against Unions!*, SLATE (Aug. 24, 2008, 8:52 PM), <http://www.slate.com/id/2197768/> (on file with the Harvard Law School Library). For a discussion of the shifting political terrain for teachers' unions, see MOE, *supra*, at 346–71.

<sup>5</sup> See WAITING FOR "SUPERMAN" (Walden Films, Participant Media & Electric Kinney Films 2010).

<sup>6</sup> See June Kronholz, *D.C.'s Braveheart*, EDUC. NEXT, Winter 2010, at 29.

<sup>7</sup> See U.S. DEP'T OF EDUC., RACE TO THE TOP: EXECUTIVE SUMMARY 3 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>; Sam Dillon, *Formula to Grade Teachers' Skill Gains Acceptance, and Critics*, N.Y. TIMES, Sept. 1, 2010, at A1; Michele McNeil & Lesli A. Maxwell, *States Up Ante on Applications for Race to Top*, EDUC. WK., June 9, 2010, at 27.

None of this, however, has compared with the recent assault on teacher employment laws and collective bargaining in state capitols. Many states have considered reforms to certain aspects of teacher employment laws and subjects traditionally left to collective bargaining, including reforms aimed at lengthening the time it takes to achieve “tenure”;<sup>8</sup> tying teacher evaluation and, ultimately, teacher pay to student performance on achievement tests; and streamlining teacher due process protections and thereby easing the burden on administrators who wish to discipline teachers.<sup>9</sup> In some instances, state legislators have sought (sometimes successfully) to remove entire topics from collective bargaining, and, in other instances, they have sought to eliminate collective bargaining for teachers entirely.<sup>10</sup>

Setting aside the possibility that these reforms aimed at teacher employment and collective bargaining laws are rooted in animus against unions and labor protections generally, the underlying policy assumption is that the interests of teachers-as-employees and the organizations that bargain on their behalf are not aligned with the interests of children (or the state). Take, for instance, the onerous paperwork requirements and other due process procedures necessary to discipline teachers for poor performance. Simply put by the critics, the laws and collective bargaining agreements produced by those laws result in educationally inefficient and even inequitable outcomes.

This essay wades into the teachers’ union debate by developing a framework for analyzing proposed reforms to teacher employment and collective bargaining laws, and by calling for caution and incrementalism in approaching such reform. After I discuss the primary employment and collective bargaining rules that some have identified as burdening reform efforts, I provide a framework for analyzing proposed policies that affect teacher employment and the working conditions of teachers. That framework recognizes two simple and potentially competing notions. First, the teacher-school district employment relationship is a legitimate subject for negotiation, just like any other employment relationship. Second, any policies, rules, or agreements that govern the teacher-district relationship will likely have an impact on schoolchildren and are therefore a legitimate subject for state or local policy making. There is thus an inherent potential for tension between what teachers want and what children need. But that tension may also exist with other necessary stakeholders to the teacher-school district employment relationship—including school board members, administrators, and even state policymakers—and it is not always the case that those other interests are aligned with the interests of children. Accordingly, the frame-

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<sup>8</sup> To be clear, elementary and secondary teachers do not earn “tenure” in the sense that postsecondary faculty earn lifetime employment and academic work protections. Rather, public school K–12 teachers, after a specified number of years of satisfactory employment, receive the due process protections that govern the substance and procedures for disciplining and dismissing teachers.

<sup>9</sup> See Liana Heitin, *Legislatures Approve Tougher Teacher Policies*, EDUC. WK., July 13, 2011, at 26.

<sup>10</sup> See *id.*

work I propose recognizes those competing interests and considers how best to balance them. I conclude with some modest thoughts on reform.

## I. TEACHER EMPLOYMENT LAWS AND COLLECTIVE BARGAINING

In most instances, the teacher-school district employment agreement is standardized for nearly all teachers in the district, with some terms that are either established or constrained by state laws and, in states that permit collective bargaining for teachers, many terms that are negotiated between the district and the local teachers' union.<sup>11</sup> But the teacher-school district employment relationship is hardly the typical employee-employer relationship because the terms governing teachers' work implicate the state's plenary power over education. This means that the employment terms established in statehouses or across bargaining tables not only constrain the decision making of school administrators and school boards, they affect the educational services and resources children receive. The reverse is also true. The policies established by school boards and state legislatures aimed at serving school children may seriously affect the workaday lives of teachers. Here I briefly consider those laws that are designed to structure the teacher-district employment relationship and the contracts that arise through collective bargaining.

### A. *Teacher Employment and Collective Bargaining Laws*

While most states statutorily authorize public sector teacher collective bargaining and provide procedures that govern local unionization, bargaining, and dispute resolution, all states—including those that permit bargaining—also govern certain teacher employment terms directly by statute.<sup>12</sup>

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<sup>11</sup> The National Council on Teacher Quality (NCTQ) is an excellent resource for exploring teacher collective bargaining laws across states, reviewing exemplar teacher contracts from the nation's largest school districts, and gaining familiarity with basic scope of teacher collective bargaining. NAT'L COUNCIL ON TCHR. QUALITY (NCTQ) HOMEPAGE, <http://www.nctq.org/p/> (last visited Dec. 1, 2011) (on file with the Harvard Law School Library). NCTQ's TR<sup>3</sup> database provides a sound starting point for investigating state collective bargaining laws and selected teacher contracts. *NCTQ TR3 – Teacher Rules, Roles and Rights*, NAT'L COUNCIL ON TEACHER QUALITY (NCTQ), <http://www.nctq.org/tr3/home.jsp> (last visited Dec. 1, 2011) (on file with the Harvard Law School Library); see also WILLIAM S. KOSKI & AARON TANG, POLICY ANALYSIS FOR CAL. EDUC., TEACHER EMPLOYMENT AND COLLECTIVE BARGAINING LAWS IN CALIFORNIA: STRUCTURING SCHOOL DISTRICT DISCRETION OVER TEACHER EMPLOYMENT (2011).

<sup>12</sup> Only sixteen states do not have laws establishing the right to collectively bargain, with eleven of those still permitting local bargaining (without the protections of administrative procedures) and five prohibiting teacher collective bargaining altogether. *NCTQ TR3 – Teacher Rules, Roles and Rights*, *supra* note 11. Even in those states that ban collective bargaining, local teachers' associations, particularly in large urban districts, meet and confer with school district officials in a process that looks much like collective bargaining to produce district employment policies that reflect many of the terms that would otherwise appear in collective bargaining agreements. See EMILY COHEN, KATE WALSH & RiSHAWN BIDDLE, NAT'L COUNCIL ON TEACHER QUALITY, *INVISIBLE INK IN COLLECTIVE BARGAINING: WHY KEY ISSUES ARE*

Apart from the complex rules that govern the selection and certification of local collective bargaining agents and the ability of those exclusive agents to require teachers to pay an agency fee, collective bargaining laws also establish the parameters for what must and what may be subjected to the bargaining table.<sup>13</sup> In a nutshell, there are some mandatory bargaining subjects requiring the parties to meet and confer, other permissive subjects allowing parties to choose to negotiate or not, and finally, prohibited subjects that cannot be the subject of bargaining at all.<sup>14</sup> Mandatory bargaining topics are typically those that directly affect the compensation and working conditions of teachers and often include wages, hours, teacher assignment, pension and healthcare benefits, teacher preparation time, and class size—all subjects that may also affect teaching and learning. Permissive bargaining topics are typically one step removed from core employment terms and might include educational policy matters, such as the definition of educational objectives and textbook selection. Obviously, it is in the union's interest to move as many topics as possible from the permissive column to the mandatory column as "terms and conditions of employment," so that management discretion over the topics is not unfettered. In the event that the parties reach an impasse on any topic of mandatory bargaining, collective bargaining statutes prescribe elaborate procedures for determining impasse and the conditions under which a union might strike (where permitted) or the district might impose its last, best offer (where permitted).<sup>15</sup>

But not all topics can be bargained, and those topics fall into two categories: those that are reserved for management prerogative and those that statutorily protect certain terms and conditions of teacher employment.<sup>16</sup> The latter are quite familiar, including rules that govern the conditions under which teachers will receive due process protections (e.g., teacher tenure rules and the amount of time that it takes to achieve tenure);<sup>17</sup> rules governing the compensation schedule for teachers (often requiring that teachers be paid based on years of experience and amount of additional training and education);<sup>18</sup> rules governing the process by which teachers are laid off due to economic reasons (e.g., so-called reduction-in-force rules through which the most junior teachers are laid off first);<sup>19</sup> and rules that prescribe procedures for teacher evaluation and discipline (thus statutorily limiting adminis-

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NOT ADDRESSED (2008), available at [http://www.nctq.org/p/publications/docs/nctq\\_invisible\\_ink\\_20080801115950.pdf](http://www.nctq.org/p/publications/docs/nctq_invisible_ink_20080801115950.pdf).

<sup>13</sup> See COHEN ET AL., *supra* note 12; KOSKI & TANG, *supra* note 11.

<sup>14</sup> See KOSKI & TANG, *supra* note 11.

<sup>15</sup> For a description of the unionization, bargaining, and implementation stages of collective bargaining under California law, see FRANK KEMERER & PETER SANSOM, CALIFORNIA SCHOOL LAW 131–65 (2d ed. 2009).

<sup>16</sup> See KOSKI & TANG, *supra* note 11, at 4.

<sup>17</sup> See SUSANNA LOEB & LUKE C. MILLER, INST. FOR RESEARCH ON EDUC. POLICY & PRACTICE, A REVIEW OF STATE TEACHER POLICIES: WHAT ARE THEY, WHAT ARE THEIR EFFECTS, AND WHAT ARE THEIR IMPLICATIONS FOR SCHOOL FINANCE? 31–33 (2006).

<sup>18</sup> See *id.* at 50–53; MOE, *supra* note 4, at 179–81.

<sup>19</sup> See CAL. EDUC. CODE § 44955 (West 2011) (providing that those teachers with the least seniority be laid off first in the event of budget cuts).

trative discretion over teacher dismissal).<sup>20</sup> Even in those states that prohibit collective bargaining, such as Texas, state statutes constrain administrative discretion with similar rules and may add others, such as limiting the types of contracts offered to teachers (e.g., probationary, term, and continuing contracts) and establishing minimum salary schedules.<sup>21</sup>

Although these statutory provisions are not established through bilateral negotiations with unions at the table, teachers' unions are the driving force behind the creation of these rules in the first instance. As Hoover Institution Fellow Terry Moe has demonstrated, union influence in state legislatures cannot be denied, particularly in those states controlled by labor's historic ally, the Democratic Party.<sup>22</sup>

Yet the default discretion in establishing the rules that affect teachers' workday lives lies with school districts and administrators. Some states make it clear that all those matters not subjected to mandatory bargaining are left to district discretion.<sup>23</sup> More recently, in the wake of statehouse victories by Republican candidates and media attention on teachers' unions, there has been a move to take previously mandatory bargaining topics off the table and enshrine management prerogative.<sup>24</sup> Recently, eight states passed laws tying teacher evaluation to student achievement, seven placed additional conditions on teacher tenure, six limited the role of seniority in layoff decision making, and seven restricted collective bargaining rights.<sup>25</sup> What once seemed to be a one-way ratchet of expanding teacher rights has recently been turned in favor of school district discretion.

The net result is that the teacher-district employment relationship is both directly governed by statutory rules and structured by statutes that either permit or prohibit collective bargaining and enlarge or constrain its scope.

### B. *Collective Bargaining Agreements*

The teacher contract in the Los Angeles Unified School District is about 349 pages long, Chicago's is 176 pages, and New York's is 165.<sup>26</sup> These agreements cover the typical terms of the employment relationship, such as salary, pension, healthcare, and length of workday and work year.

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<sup>20</sup> See KEMERER & SANSOM, *supra* note 15, at 185–91 (discussing the process by which teachers may be dismissed and the grounds for dismissal in California).

<sup>21</sup> See *Rights Under Types of Contracts*, TEX. ST. TEACHERS ASS'N, <http://www.tsta.org/legal/current/contracts.shtml> (last visited Dec. 1, 2011) (on file with the Harvard Law School Library).

<sup>22</sup> See MOE, *supra* note 4, at 275–341.

<sup>23</sup> See CAL. GOV'T CODE § 3543.2(a) (West 2011) (“All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . .”).

<sup>24</sup> See Heitin, *supra* note 9, at 26.

<sup>25</sup> *Id.*

<sup>26</sup> The NCTQ TR<sup>3</sup> database provides collective bargaining agreements for the ten largest school districts in the United States, including New York, Los Angeles, and Chicago. See NAT'L COUNCIL ON TEACHER QUALITY (NCTQ), *supra* note 11.

But they also cover myriad topics that might otherwise be left to the discretion of school policymakers and administrators, such as class size; professional development, coaching, and mentoring; and student behavior and discipline. Such is the tension between what might be a legitimate working condition subject to bargaining and what might affect the education that students receive. To illuminate the complexities of this tension, I will discuss three topics that receive much media and legislative attention.

### 1. *Compensation: The Step-and-Column Salary Schedule*

Teachers are not typically paid based on their classroom performance or difficulty of assignment.<sup>27</sup> Rather, nearly all teachers are paid according to a single salary schedule that is a table (or grid) in which each teacher falls into a particular cell based on the row (“step”), representing the number of years a teacher has worked in the district, and the column (“lane”), representing the educational level and additional professional training the teacher has received. While the actual amount in each of the cells is determined through bargaining, local labor markets, and other economic pressures, the two dimensions that determine a teacher’s pay remain the same.

It is easy to argue that such a compensation scheme is inefficient and misallocates resources.<sup>28</sup> Beyond the first few years of service, there is no persuasive evidence that additional years of teaching experience improve a teacher’s performance, and there is little evidence that level of education is systematically related to a teacher’s performance.<sup>29</sup> But there is a logic to the single salary schedule. From the employee’s perspective, it constrains administrative discretion, treats all teachers the same (read: fairly), reduces competition in what should be a collaborative environment, and provides incentives for teachers to remain with the district (and the union). But whether limiting administrative discretion to use compensation to incentivize teachers is good for kids will be considered shortly.

### 2. *Teacher Evaluation, Discipline, and Contract Renewal*

In a good many instances, the rules governing how an administration evaluates, disciplines, and ultimately fires teachers are guided by state statute.<sup>30</sup> Nonetheless, many collective bargaining agreements duplicate those rules and may provide local gloss and interpretation. By law or by contract, teacher evaluations must be conducted by a specific date, based on a specific

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<sup>27</sup> For a review of those policies—particularly financial incentives—designed to attract and retain high quality teachers in hard-to-staff schools and subject matters, see LOEB & MILLER, *supra* note 17, at 43–50.

<sup>28</sup> See MOE, *supra* note 4, at 170–81.

<sup>29</sup> See Tara Bêteille & Susanna Loeb, *Teacher Quality and Teacher Labor Markets*, in HANDBOOK OF EDUCATION POLICY RESEARCH 596, 597 (Gary Sykes et al. eds., 2009); Rivkin et al., *supra* note 1, at 417; Rockoff, *supra* note 1.

<sup>30</sup> See LOEB & MILLER, *supra* note 17, at 32–34 (tenure and dismissal policies); *id.* at 40–42 (evaluation processes).

number of administrative observations for a specific amount of time, and even using a specific evaluation worksheet.<sup>31</sup> Teachers must be given advance notice of the observation and an opportunity to reschedule. Administrators must provide written evaluations and hold a conference with the teacher, and the teacher is given a formal opportunity to supplement the evaluation file. When a teacher receives a poor evaluation, she is typically given the opportunity to develop a performance improvement plan and an amount of time to improve her performance. Needless to say, the paperwork is nontrivial.

Even when teachers receive unsatisfactory performance ratings, administrators cannot unilaterally dismiss teachers or even remove them from the classroom. Teachers without tenure—often called “probationary teachers”—can have their contracts “nonrenewed” (or “nonreelected”) for such unsatisfactory performance, but those with tenure are entitled to elaborate and often lengthy “progressive” disciplinary procedures that may involve the accumulation of sufficient documentation, formal meetings that may involve union representation, and even hearings before neutral hearing officers.<sup>32</sup> The result, according to critics, is that administrators are dissuaded from pursuing teacher dismissal and very few teachers are removed for poor performance.<sup>33</sup> Instead, principals seek reassignment of such teachers to other schools (or sometimes district office jobs), resulting in what is derisively known as the “dance of the lemons” in which poor performers are shared among principals in various schools.<sup>34</sup>

### 3. *Teacher Assignment, Transfer, Leave, and Layoff*

Study after study has confirmed that teachers with the least experience and those without credentials are concentrated in poor and minority schools.<sup>35</sup> Equally troubling, the estimated average salaries of California teachers in poor and minority schools lag far behind those of teachers in

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<sup>31</sup> *Id.*; see also KEMERER & SAMSON, *supra* note 15, at 180–82; DANIEL WEISBERG ET AL., NEW TEACHER PROJECT, THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS 10–12 (2009) (discussing the failure of teacher evaluation systems and finding that “in districts that use binary ratings [“satisfactory” or “unsatisfactory”], virtually all tenured teachers (more than 99 percent) receive the satisfactory rating.”).

<sup>32</sup> See KEMERER & SAMSON, *supra* note 15, at 182–91.

<sup>33</sup> See WEISBERG ET AL., *supra* note 31, at 17 (finding in their study of four large school districts that eighty-six percent of the administrators surveyed do not pursue teacher dismissal, even if warranted); *id.* at 6 (“[A]t least half of the districts studied did not dismiss a single non-probationary teacher for poor performance in the time period studied.”).

<sup>34</sup> See COHEN ET AL., *supra* note 12, at 9.

<sup>35</sup> See BETTS ET AL., *supra* note 3; CAMILLE E. ESCH ET AL., CTR. FOR THE FUTURE OF TEACHING & LEARNING, THE STATUS OF THE TEACHING PROFESSION 2005 (2005); Clotfelter et al., *supra* note 1; Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California’s Public Schools*, 43 SANTA CLARA L. REV. 1045, 1050 (2003); Lankford et al., *supra* note 3.



wealthy schools with mostly white children.<sup>36</sup> Many teachers may avoid poor and minority schools because those schools lack sufficient resources, present difficult working conditions, are plagued by poor leadership, or constrain good teachers' autonomy to teach as they wish.<sup>37</sup> Others have contended that teachers simply choose not to teach in schools with high-minority, high-poverty, low-performing students.<sup>38</sup> Apart from teachers' intrinsic preferences, noteworthy is the extent to which collective bargaining agreements contain rules for teacher hiring, teacher transfer, and reassignment of those teachers who have been "surplussed" or "excessed" out of a current teaching assignment.<sup>39</sup> Among those rules is the frequent preference that is granted to teachers with seniority in filling vacancies within the district or in maintaining teachers in current positions when schools are forced to let go of teachers.

For instance, seniority, as opposed or in addition to teacher qualifications, administrative discretion, or student need,<sup>40</sup> dictates the ability of a teacher to *voluntarily* transfer within a school district, allowing the most experienced and, arguably, the most qualified teachers the greatest ability to fill vacancies in the most desirable schools. In some cases, the contract provides for the ability of senior teachers to "bump" a more junior teacher out of his current position in a desirable school. In combination with the research showing that teachers prefer to avoid low-performing, high-poverty, high-minority schools, this suggests in theory that the most senior, experienced teachers will opt out of the schools with the most need, thus facilitating the quality gap in public schools.<sup>41</sup>

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<sup>36</sup> See Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools Fail*, in BROOKINGS PAPERS ON EDUCATION POLICY: 2004 201 (Diane Ravitch ed., 2004); see also THE EDUC. TRUST-WEST, CALIFORNIA'S HIDDEN TEACHER SPENDING GAP: HOW STATE AND DISTRICT BUDGETING PRACTICES SHORTCHANGE POOR AND MINORITY STUDENTS AND THEIR SCHOOLS (2005).

<sup>37</sup> See ESCH ET AL., *supra* note 35, at xi; Béteille & Loeb, *supra* note 29, at 602; Darling-Hammond, *supra* note 35, at 1081.

<sup>38</sup> See Béteille & Loeb, *supra* note 29, at 602; Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 29 J. HUM. RESOURCES 326 (2004).

<sup>39</sup> For extended descriptions of teacher assignment, transfer, and leave rules, see William S. Koski & Eileen L. Horng, *Facilitating the Teacher Quality Gap? Collective Bargaining Agreements, Teacher Hiring and Transfer Rules, and Teacher Assignment Among Schools in California*, 2 EDUC. FIN. & POL'Y 262, 268–71 (2007); see also MOE, *supra* note 4, at 188–92.

<sup>40</sup> Several studies have noted the surprising amount of discretion that administrators retain over teacher hiring and assignment (as well as other employment decisions). See Frederick M. Hess & Andrew P. Kelly, *Scapegoat, Albatross, or What? The Status Quo in Teacher Collective Bargaining*, in COLLECTIVE BARGAINING IN EDUCATION 53 (Jane Hannaway & Andrew J. Rotherham eds., 2006); Koski & Horng, *supra* note 39, at 265. Even where districts negotiate such flexible contract terms, however, they may not utilize this flexibility due to inertia, lack of creativity, fear of uncertainty, or fear of the union contesting the language in the future. See MITCH PRICE, CTR. ON REINVENTING PUB. EDUC., *TEACHER UNION CONTRACTS AND HIGH SCHOOL REFORM* (2009); KATHARINE STRUNK, *POLICY ANALYSIS FOR CAL. EDUC., CALIFORNIA TEACHERS' UNION CONTRACTS AND NEGOTIATIONS: MOVING BEYOND THE STEREOTYPE* (2009).

<sup>41</sup> The empirical research on this question is mixed, with some studies finding that seniority preferences exacerbate inequalities and others finding that the evidence does not confirm that strong seniority preference rules cause such inequality. Compare JESSICA LEVIN ET AL.,

Transfer provisions also frequently include rules for *involuntary* transfers. Typically, there are two types of involuntary transfers: “administrator-initiated transfers” are those that occur at the behest of a district or site-based administrator, and “surplus” or “excess” transfers are those that occur when a reduction in staff is necessary at a school site. When layoffs from the district as a whole are necessary (frequently due to declining enrollment or budget cuts), so-called “reduction in force” layoffs, seniority plays a determinative role in virtually all contracts, as the most junior teachers are laid off first.<sup>42</sup>

## II. TOWARD AN ANALYTIC FRAMEWORK FOR TEACHER EMPLOYMENT LAWS AND POLICIES

The theoretical cases for and against teachers’ unions and teacher collective bargaining are both plausible. In the broadest sense, it is possible that teachers’ unions promote student success by creating a fairly paid, stable, and satisfied teaching workforce; ensuring teacher voice and participation in the governance of schools; promoting public education; and ensuring adequate training, preparation, and continuing education for teachers.<sup>43</sup> Of course it is also possible that teachers’ unions and collective bargaining harm students by misallocating scarce educational resources (by emphasizing teacher compensation and workload reduction), inefficiently constraining administrative discretion, and protecting bad teachers.<sup>44</sup>

But this analysis misses a few key points. First, it ignores the other stakeholders in the teacher-school district employment relationship and whether those stakeholders’ interests promote or hinder student success. Second, it is at a level of abstraction that is rather unhelpful from a policy analysis perspective because the interests of students may or may not align with unions, depending upon the specific teacher employment policy matter.

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NEW TEACHER PROJECT, UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS (2005), and Terry M. Moe, *Bottom Up Structure: Collective Bargaining, Transfer Rights and the Plight of Disadvantaged Schools* (Sept. 14, 2006) (unpublished working paper) (on file with the Harvard Law School Library), with HOWARD F. NELSON, AM. FED’N OF TEACHERS, *THE IMPACT OF COLLECTIVE BARGAINING ON TEACHER TRANSFER RATES IN URBAN HIGH-POVERTY SCHOOLS* (2006), Lora Cohen-Vogel & La’Tara Osborne-Lampkin, *Allocating Quality: Collective Bargaining Agreements and Administrative Discretion Over Teacher Assignment*, 43 EDUC. ADMIN. Q. 433 (2007), Koski & Horng, *supra* note 39, and Betheny Gross, Michael DeArmond & Dan Goldhaber, *Seniority Rules: Do Staffing Reforms Help Redistribute Teacher Quality and Reduce Teacher Turnover?* (Ctr. on Reinventing Pub. Educ., Working Paper #2010\_1, 2010), available at [http://www.crpe.org/cs/crpe/view/csr\\_pubs/341](http://www.crpe.org/cs/crpe/view/csr_pubs/341).

<sup>42</sup> See MARGUERITE ROZA, CTR. ON REINVENTING PUB. EDUC., *SENIORITY-BASED LAYOFFS WILL EXACERBATE JOB LOSS IN PUBLIC EDUCATION* (2009).

<sup>43</sup> For a review of the primary arguments in favor of teacher collective bargaining, see Leo Casey, *The Educational Value of Democratic Voice: A Defense of Collective Bargaining in American Education*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 40, at 181; Katharine Strunk, *The Economics of Teachers’ Unions in the United States*, in INTERNATIONAL ENCYCLOPEDIA OF EDUCATION 512, 512–517 (Penelope Peterson et al. eds., 3d ed. 2010).

<sup>44</sup> For the case against teachers’ unions, see MOE, *supra* note 4.

And third, it conflates the political strength of unions in the statehouse with their structural advantage over outside interests (e.g., students and parents) at the collective bargaining table. Accordingly, this section sketches a framework for analyzing teacher-district employment policies on two dimensions. First, at what level are certain teacher employment policies best decided—the state or local level? Second, does the teacher employment policy recognize all stakeholder interests (including teachers, administrators, the state, and, of course, children)? This analysis allocates the choice of decision making to those most likely to consider all stakeholder interests and determines the policy choice that best balances and prioritizes all of those interests. Importantly, this analysis cannot be done in the abstract. It can only be undertaken in the context of specific employment policy matters. Here I will first flesh out the interests at stake in the teacher-school district employment relationship before briefly analyzing through this proposed framework three employment policy matters—teacher compensation, teacher assignment, and teacher evaluation. I will also discuss some of the available empirical work that addresses teacher employment rules in each of these areas.

### A. *The Interests at Stake*

#### 1. *The Interests of Children*

Nearly all recent educational policy reforms, ranging from choice to accountability, have been aimed at improving student performance as measured by standardized tests.<sup>45</sup> Efforts to improve teaching have been similarly evaluated by that (nearly singular) metric. Despite the obvious criticisms of such measures of educational quality, there can be no doubt that individual children are benefited by improving their academic skills and knowledge.<sup>46</sup> But that is not their only interest that may be affected by teacher employment policies. Children also benefit from a safe school environment, caring and compassionate teachers, stability in their schools' teaching ranks, and a learning environment that promotes other values such as tolerance (social cohesion), civic virtue and obligation, and creative and critical thinking. Fortunately, many of these interests are aligned with each other when considering which teacher employment policies best serve children, but such an alignment might not always be the case.

Children, moreover, are not a monolith and it may be that certain teacher employment policies benefit some more than others. For instance,

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<sup>45</sup> For a thoroughgoing description and critique of test-based accountability and school choice, see DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010).

<sup>46</sup> See Eric A. Hanushek, *The Economic Value of Education and Cognitive Skills*, in *HANDBOOK OF EDUCATION POLICY RESEARCH*, *supra* note 29, at 39; Sean F. Reardon & Joseph P. Robinson, *Patterns and Trends in Racial/Ethnic and Socioeconomic Academic Achievement Gaps*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY* 497, 511–12 (Helen F. Ladd & Edward B. Fiske eds., 2008).

policies that aim to place high quality teachers in certain classrooms or in certain disciplines (like special education) do not benefit those outside of those classrooms and disciplines. Thus, any deviation from the step-and-column salary schedule to incentivize certain teachers may or may not be in the best interests of children.

## 2. *The Interests of the State*

Nearly all of the interests of children are shared by the state as a collective whole. But the state's interests are both broader and narrower. Because the state is concerned both with the private goods aspects and public goods aspects of public education,<sup>47</sup> the state must be concerned with the aggregate educational achievement and attainment of children and the fair distribution of educational opportunity. But the state is likely more broadly concerned than the individual child with productive efficiency and ensuring that educational dollars are effectively spent (whereas any efficiency concerns for the individual child are swamped by the interest in securing more educational resources—witness the dramatic school spending differences between affluent suburbs and poor neighborhoods).

Beyond the state's abstract interest in educating children, states and state legislatures must be concerned with balancing the state budget, particularly in these times of fiscal austerity. Public education is often the largest single item in a state's budget and the cost of employing teachers is by far the biggest item in the budget of any school district. Thus, some of those pushing for reform of collective bargaining have argued that bargaining rights and the compensation that teachers enjoy because of those rights create a financial hardship on the state.

Some state officials may also believe that collective bargaining results in inefficiently high salaries for teachers. Research has demonstrated that teachers who are unionized and enjoy collective bargaining rights also enjoy higher salaries.<sup>48</sup> But that only begs the question of whether teachers are "overpaid."<sup>49</sup> This is also a hotly debated question and depends upon, inter alia, the professionals to whom teachers are compared, the relevant labor markets for teachers, how summer vacations are factored into teacher salaries, and how the workday of a teacher ought to be defined. I will not attempt to untangle that debate here.

On the other hand, "the state" speaks through its political leaders whose individual (read: electoral) interests are narrower and may not be aligned with some abstract notion of what is "good for the state." Nowhere is this more apparent than in the arena of labor and employment rights. It is

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<sup>47</sup> For a discussion of education as a public versus private good and the state's interests in promoting education, see William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equality in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006).

<sup>48</sup> See LOEB & MILLER, *supra* note 17, at 58.

<sup>49</sup> See Michael Podgursky, *Teacher Compensation and Collective Bargaining*, in 3 HANDBOOK ECON. OF EDUC. 279 (Eric A. Hanushek et al. eds., 2011).

hardly news that the Democratic Party has been philosophically aligned with and financially supported by organized labor. There is nothing wrong with that. But that support may, at times, create tension when teachers' unions are pushing or blocking legislation that may not be in the interest of a broader group of stakeholders that includes children, taxpayers, and the like. The Democrats are not alone. When Republican legislators sign "no tax" pledges, they are implicitly constraining the education budget. While low taxes may benefit certain taxpayers, the state and certainly many schoolchildren may not enjoy that benefit.

### 3. *The Interests of School Districts and Their Administrations*

School district leaders (i.e., school board members and administrators) are interested in educational equity, efficiency, student performance, and the like. They are also interested in exercising maximum discretion over teacher workforce decisions such as pay, benefits, assignments, discipline, and so forth. Such discretion directly contradicts teachers' unions' desire to create rules limiting arbitrary decision making. Not obvious, however, is that rules limiting administrative discretion may be more efficient than ad hoc discretionary decisions. It is also possible that individual administrators desire the cover of the rules to execute tough decisions. And, finally, it is possible that we might not trust less-than-competent administrators with making certain decisions.

Because rules limiting administrative discretion may actually be in the interest of individual administrators or even school districts as a whole and because it takes two parties to negotiate a collective bargaining agreement, we must therefore be wary of claims that unions "impose" their preferred terms at the bargaining table or that helpless and guileless school boards and administrators are muscled into union-friendly positions.

Finally, much like the state can only act through its legislators and executive decision makers, districts act primarily at the policy level through their elected board members. As Terry Moe and others have pointed out,<sup>50</sup> it is at this local electoral level that unions may exercise a great deal of power in the typically nonpartisan, low-turnout, off-cycle elections for school board. Through endorsements, funding, and get-out-the-vote drives, unions have been quite successful in placing their preferred candidates in school boardrooms. In the extreme, there may be instances in which collective bargaining becomes less than arms-length.

### 4. *The Interests of Teachers and Their Collective Organizations*

As an initial matter, one often-held notion—that union "bosses" do not act in the interests of their members—should be dispelled (or at least diminished). Recent evidence shows that rank-and-file teachers' interests and

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<sup>50</sup> See MOE, *supra* note 4, at 112–54.

views are typically in line with those of the union and union leadership, at least at the local level. In his recent book, Terry Moe provides extensive survey data suggesting that teachers (1) like their local unions, (2) support collective bargaining, (3) believe that collective bargaining does not harm public education, and (4) support the core missions of unions, including job security, higher salaries, and better working conditions.<sup>51</sup> And this makes sense. Were any union leader to stray too far from the concerns and values of the membership, that leader would be voted out of office or fail to garner support for agreements he or she negotiates. Granted, teachers are ideologically and politically diverse and do not share the same views on noneducational issues (and this is where national unions and their leaders get into hot water with teachers), but teachers' interests on the whole are remarkably aligned with union leaders.

So what are those interests? At the most narrow, self-interested level: job security, higher wages and better benefits, and better working conditions. Such interests are often secured at the collective bargaining table or state-house through the threat of political reprisal or labor actions. The result is higher salaries for unionized teachers and administrative-discretion limiting rules that govern the working conditions of teachers.<sup>52</sup>

It should also be remembered that many (maybe most? nearly all?) teachers have an interest in student performance, teaching democratic and other important social values, and creating a safe and caring learning environment. This puts them squarely in line with students, the state, and district leadership, alike. But let's face it. When those broad values clash with narrow economic and work-life interests, the narrow concerns will likely prevail.

Finally, it is worth repeating that there is nothing untoward about teachers either individually or collectively negotiating for favorable employment terms and using the threat of economic reprisal to gain such terms. Quite to the contrary, that is how our current labor laws and markets work, and teachers, like other employees, have the right to advocate for statutory rules that protect them or give them advantage in the bargaining process. So do administrators and school districts. Those who would push for limitations on the collective action of teachers through their unions, on the ground that unions only pursue their narrow interests, argue too much. There are myriad adults and their groups that advocate for their narrow interests in the educational policy arena (think wealthy suburban interests who would block redistributive school finance schemes aimed at making school funding more fair).

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<sup>51</sup> See *id.* at 66–111.

<sup>52</sup> There is solid empirical research demonstrating that unionized teachers secure higher wages than their non-unionized peers. See Joshua M. Cowen, *Teacher Unions and Teacher Compensation: New Evidence for the Impact of Bargaining*, 35 J. EDUC. FIN. 172 (2009); Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 40, at 46–50; Robert J. Lemke, *Estimating the Union Wage Effect for Public School Teachers When All Teachers Are Unionized*, 30 E. ECON. J. 273 (2004).

Why should teachers' unions be uniquely singled out for their advocacy? Stated differently, educational policy making is not beyond politics, and it seems odd to burden one interest group whose interests may not always be aligned with children, yet permit others unfettered advocacy.

*B. Picking the Right Forum and Aligning Interests*

Because states have plenary power over education, any educational policy decision—including decisions that go to the heart of the teacher-district employment relationship—*could* be made by the state legislature or delegated to a state agency. But, as I discussed in Section I.A., many state legislatures exercise that plenary power only sparingly, leaving decision making to local school boards or the collective bargaining table. Because each of these fora is better or worse situated to consider the most impacted stakeholder interests, the question of “Who decides?” becomes important.<sup>53</sup>

Thus, the analytic framework proposed here first asks the question of whether the decision-making forum—state capitol, local collective bargaining table, or local boardroom—will effectively consider all stakeholder interests. For instance, is K–3 class size best mandated by state legislatures (as it has effectively been in many states)? Or is it better to leave class-size decisions (which directly and significantly affect teacher working conditions) up to collective bargaining? Or is class size so context dependent and so important to school budgets and student success that it should be left to local school boards without the interference of unions? Granted, such a process-oriented analysis quickly becomes substantive because the interested stakeholders must be identified to determine the best decision-making forum, but the failure to consider the decision-making forum blindly includes irrelevant or excludes important stakeholder interests.<sup>54</sup>

The second prong of the analysis is much more straightforward to articulate and much more difficult to apply: Balancing all of the relevant stakeholder interests, does the proposed policy sufficiently account for and prioritize those interests? Using our class-size example again, teachers have an interest in reducing their student workloads, students and parents routinely prefer the attention of small class sizes, but small class size means more teachers and more money, so administrators and districts would prefer to keep those class sizes large without compromising student learning. Which leads to the thorny empirical question of whether small class sizes improve student outcomes.<sup>55</sup> No doubt this inquiry is driven as much by values and theory as by empirical evidence, but it at least demonstrates that,

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<sup>53</sup> On the topic of comparative institutional choice in educational policy decision making, see Michael A. Rebell, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (2009).

<sup>54</sup> In practice, then, the two prongs are difficult to analyze discretely and sequentially. Considering them together is necessary, as we will see.

<sup>55</sup> See June Ahn & Dominic J. Brewer, *What Do We Know About Reducing Class and School Size?*, in *HANDBOOK OF EDUCATION POLICY RESEARCH*, *supra* note 29, at 428–32.

in the abstract, there is no reason to believe that the interests of unions and teachers are opposed to those of students, and that such a decision may be context dependent.

Now let's look at three teacher employment policy subjects more closely. I do not claim here that my analyses are "correct" or that I have reached the "right" conclusions. I am only trying to demonstrate how a simple decision-making forum and stakeholder analysis might work in practice.

### 1. *Teacher Compensation Schemes*

Here I will not discuss how much teachers ought to be paid or,<sup>56</sup> if they are paid for performance, how performance ought to be measured;<sup>57</sup> rather, I consider whether teachers should be paid on a common salary schedule and which factors should determine a teacher's pay. Put bluntly, should the step-and-column salary schedule be abandoned or at least modified to consider other factors to determine teacher pay?

*Selecting the Forum.* The first prong of the analysis of this question requires the identification of the relevant stakeholders and the forum in which those stakeholders can all participate in decision making. Teachers—at least organized teachers—would prefer a standardized salary schedule that is stable, allows for no discretion or arbitrary determinations by administrators, and ensures "fairness" among teachers so that there is no envy or potential for tension in the workplace. Interestingly, many individual administrators might agree with that, though school districts and certain other individual administrators would view such a rigid salary regime as hamstringing them from incentivizing teachers. There is no doubt, then, that teachers and districts should be at the table.

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<sup>56</sup> There is solid empirical support for the notion that teachers will choose teaching over other professions when starting wages are high relative to those professions. See Marigee P. Bacolod, *Do Alternative Opportunities Matter? The Role of Female Labor Markets in the Decline of Teacher Quality*, 89 REV. ECON. & STAT. 737, 748–49 (2005); Sean P. Corcoran, William N. Evans & Robert M. Schwab, *Women, the Labor Market, and the Declining Relative Quality of Teachers*, 23 J. POL'Y ANALYSIS & MGMT. 449, 454 (2004). However, there is little agreement on how to measure and whether teachers are paid "enough." Compare Michael Podgursky, *Is Teacher Pay "Adequate"?*, in SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 131 (Paul E. Peterson & Martin R. West eds., 2007), with SYLVIA A. ALLEGRETTO, SEAN P. CORCORAN & LAWRENCE MISHEL, ECON. POLICY INST., THE TEACHING PENALTY: TEACHER PAY LOSING GROUND (2008), available at [http://www.epi.org/publication/book\\_teaching\\_penalty/](http://www.epi.org/publication/book_teaching_penalty/), and Sean P. Corcoran & Lawrence Mishel, *How Much Are Public School Teachers Paid?*, in THINK TANK RESEARCH QUALITY: LESSONS FOR POLICY MAKERS, THE MEDIA, AND THE PUBLIC (Kevin G. Weiner et al. eds., 2010).

<sup>57</sup> There has been a recent resurrection of the sometimes contentious and vast body of literature surrounding teacher "merit pay" and a lively resurgence of research into how best to design a performance pay regime. See Dale Ballou, *Pay for Performance in Public and Private Schools*, 20 ECON. EDUC. REV. 51 (2001); Dan Goldhaber, *Teacher Quality and Teacher Pay Structure: What Do We Know, and What Are the Options?*, 7 GEO. PUB. POL'Y REV. 81 (2002); see also Richard J. Murnane & David K. Cohen, *Merit Pay and the Evaluation Problem: Why Most Merit Pay Plans Fail and a Few Survive*, 56 HARV. EDUC. REV. 1 (1986).



The question is whether the state has an interest in being involved in the decision-making process over teacher salary schedules. Probably. But maybe only to create incentives or set the broad parameters for what should be considered in teacher compensation. Because state-level decision makers ought to be the farthest away from individual student or narrow community interests, they are better situated to promote equity (or reduce the teacher quality gap) through compensation systems. For instance, the state could provide grants to teachers (either directly or through districts) to teach in hard-to-staff schools or subject areas. The state could mandate that a teacher's willingness to take on such assignments be a factor in determining his or her pay. Or the state could reward those teachers who improve the performance of disadvantaged children or mandate that such a consideration be considered in determining teacher pay.

Similarly, states (and districts) are also quite interested in productive efficiency. Enter the current debate over teacher performance pay schemes that would help to ensure that states and districts get the most in student achievement for their teacher salary dollars.<sup>58</sup> That debate has tended to focus on the extent to which student test scores or test-score growth should be factored into a teacher's evaluation and, ultimately, compensation. Several states have already mandated that such value-added measures be included in teacher pay-for-performance schemes and even the slow-moving National Education Association recently approved a resolution that allows student performance to be part of the teacher-evaluation conversation (though under certain very rigid conditions).<sup>59</sup> Such a move toward performance pay, however, would seem unlikely at the local collective bargaining table, as most teachers as individuals would be wary of such a scheme and therefore op-

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<sup>58</sup> The literature on using student performance to evaluate teachers is in its early stages. See, e.g., MATTHEW G. SPRINGER ET AL., NAT'L CTR. ON PERFORMANCE INCENTIVES, TEACHER PAY FOR PERFORMANCE: EXPERIMENTAL EVIDENCE FROM THE PROJECT ON INCENTIVES IN TEACHING (2010), available at [http://www.rand.org/content/dam/rand/pubs/reprints/2010/RAND\\_RP1416.pdf](http://www.rand.org/content/dam/rand/pubs/reprints/2010/RAND_RP1416.pdf); Carolyn Kelley et al., *Teacher Motivation and School-Based Performance Awards*, 38 EDUC. ADMIN. Q. 372 (2002); Michael Podgursky & Matthew G. Springer, *Teacher Performance Pay: A Review*, 26 J. POL'Y ANALYSIS & MGMT. 909 (2007); Thomas J. Kane et al., *What Does Certification Tell Us About Teacher Effectiveness? Evidence From New York City* (Nat'l Bureau of Econ. Research, Working Paper No. 12155, 2006). However, there has been a great deal of interest among policy makers in tying teacher pay to their students' performance. See Laura Meckler, *Education Push Includes Merit Pay*, WALL ST. J., Mar. 11, 2009, at A6; Dorie Turner, *States Push to Pay Teachers Based on Performance*, USA TODAY, April 8, 2010. But see Nora Fleming, *Some States, Districts Abandoning Performance Pay*, EDUC. WK., Sept. 16, 2011, at 1.

<sup>59</sup> See, e.g., Reginald Fields, *Teacher Merit Pay System in Ohio's New Collective Bargaining Law Could Be the First of Its Kind in the Country*, CLEVELAND.COM (Apr. 23, 2011, 7:00 PM), [http://www.cleveland.com/open/index.ssf/2011/04/teacher\\_merit\\_pay\\_provision\\_in.html](http://www.cleveland.com/open/index.ssf/2011/04/teacher_merit_pay_provision_in.html) (on file with the Harvard Law School Library); Stephen Sawchuck, *NEA Passes Teacher-Evaluation Policy, With a Catch-22 on Test Scores*, EDUC. WK. (July 4, 2011, 1:34 PM), [http://blogs.edweek.org/edweek/teacherbeat/2011/07/nea\\_passes\\_teacher\\_evaluation.html](http://blogs.edweek.org/edweek/teacherbeat/2011/07/nea_passes_teacher_evaluation.html) (on file with the Harvard Law School Library); J.K. Wall, *New Laws Hang Indiana Public School Teacher Pay on Performance*, IND. ECON. DIG. (May 9, 2011, 7:09 PM), <http://www.indianaeconomicdigest.net/main.asp?SectionID=31&SubSectionID=135&ArticleID=59912> (on file with the Harvard Law School Library).

pose it through collective bargaining.<sup>60</sup> The upshot is that the decision to include parameters—other than years of experience and education—in the compensation schedule to promote equity or efficiency might best be made at the state level.<sup>61</sup>

But the details might best be worked out locally at the bargaining table or in the boardroom. Teachers may respond to pay incentives, but the size of the incentive and the other factors that motivate them are numerous and include school working conditions, composition of the student body, and so forth.<sup>62</sup> Teachers make complex tradeoffs among their preferences, and salary schemes play only a part in their decision making. Moreover, these concerns may vary from school to school and district to district, depending upon cost of living, commute time, and so forth. So, any radical or broad mandates from the state level may have unintended or perverse consequences if they are not sufficiently attuned to local conditions. Again, this means that although states have an interest and role to play in establishing the outlines of teacher pay schemes, much of the work would still best be done locally.

*Balancing the Stakeholder Interests.* The choice among various compensation schemes is difficult. We know that teachers' years of experience and educational attainment are not correlated with student performance (beyond the first couple years of teaching), and, therefore, there is good reason to deviate from the step-and-column salary schedule. Beyond that, however, there is little empirical evidence regarding some key matters, including (1) whether high quality teachers can be systematically incentivized to teach in hard-to-staff schools through (unfortunately named) "combat pay"; (2) whether such incentives can attract and retain teachers in difficult subject areas such as math and science; and (3) whether performance pay schemes tied to student test scores will create perverse and unintended consequences, ranging from narrowing the curriculum to outright cheating. Although there is a substantial body of literature on so-called "merit pay" and teacher preferences, we are just beginning to explore these questions in the context of actual pay schemes. The lesson, it seems, is that there is a need to employ thoughtful, theory-driven pay schemes that account for all of the interests, but that such schemes should be employed with caution and locally on the small scale.

## 2. *Teacher Assignment*

To close the teacher quality gap, many have argued that principals and district human resource officers should be given broad discretion to assign

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<sup>60</sup> Even confident and successful teachers might be concerned about their ability to raise the test scores of any new group of students who come to the classroom with untold background difficulties.

<sup>61</sup> I hasten to remind the reader that state policy makers may not be sufficiently insulated from union pressures to fully and fairly consider important values such as equity and efficiency. See MOE, *supra* note 4.

<sup>62</sup> See *supra* notes 37–38 and accompanying text.

teachers to low-performing schools.<sup>63</sup> Yet many argue that seniority preference rules make such assignments difficult and that the seniority rules should be relaxed or abandoned totally, thus permitting complete administrative discretion.

*Selecting the Forum.* While the state's interests in equity and productive efficiency and students'—particularly economically disadvantaged students'—interest in having high quality teachers might align and suggest that teacher assignment policy should be made at the state level, I am not so sure. Apart from the concern that state legislatures have proven vulnerable to political pressures from unions, it seems that almost any one-size-fits-all rule from the state would have perverse consequences, particularly where most local collective bargaining agreements already provide some substantial amount of discretion to administrators to override seniority preferences and place teachers where they are needed most.<sup>64</sup> Take for instance, a rule that would require reduction-in-force layoffs to be evenly distributed among all schools or to be visited only in schools that are not low performing. Would not such rules potentially protect poor-performing teachers in low-performing schools? Might they cause good—and slightly more experienced—teachers in some schools to be laid off? Nuance and context seem important in making layoff decisions, and any rigid rule could cause problems. Perhaps teacher assignment decisions are best left to locals.

*Balancing the Stakeholder Interests.* So how do the stakeholders' interests balance on the issue of teacher assignment? Teachers have a keen interest in not being assigned to schools in which they do not want to teach. It is even likely that many teachers would prefer to leave the district rather than take a job in a school they do not like, thus harming district children. Yet allowing principals to choose from among all applicants (regardless of seniority) or allowing principals to lay off poor-performing teachers during economic downturns (regardless of seniority) would seem to benefit students.<sup>65</sup> It would also benefit teachers who get and keep their jobs. Flexibility in hiring and assignment rules—with some role for seniority—might make sense.

So why do current collective bargaining agreements fail to provide such flexibility? At least in California, many, if not most, actually do provide such flexibility to hire teachers who are better suited to the position, regardless of whether there is a more senior applicant for the position in the dis-

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<sup>63</sup> See, e.g., MOE, *supra* note 4, at 188–92; Michael Barbaro & Nicholas Confessore, *Bloomberg Presses Cuomo on Teacher Seniority Rule*, N.Y. TIMES, Jan. 31, 2011, at A14; Deborah Simmons, *Rhee Seeking to Revamp D.C. Rules on Teacher Tenure*, WASH. TIMES, May 24, 2010, at 7.

<sup>64</sup> See Koski & Horng, *supra* note 39, at 296.

<sup>65</sup> Surveys of principals show that that they would, if given the opportunity, terminate only one or two teachers for poor performance. See BRUCE FULLER ET AL., POLICY ANALYSIS FOR CAL. EDUC., CALIFORNIA'S PRINCIPALS' RESOURCES: ACQUISITION, DEPLOYMENT AND BARRIERS 45 (2007), available at [http://irepp.stanford.edu/documents/GDF/STUDIES/13-Fuller/13-Fuller\(3-07\).pdf](http://irepp.stanford.edu/documents/GDF/STUDIES/13-Fuller/13-Fuller(3-07).pdf).

trict.<sup>66</sup> In other words, local collective bargaining has not uniformly resulted in rigid, determinative seniority rules. Rule making over how vacancies are filled thus can be a proper subject of collective bargaining and can recognize and prioritize the various stakeholder interests. Whether administrators exercise the discretion for which they bargain is another question because it is also true that there is a very large experience and credential gap between affluent and low-income schools.<sup>67</sup>

### 3. *Teacher Evaluation*

Hoover Institution Fellow Eric Hanushek has argued that, were American schools to replace the bottom five to eight percent of teachers (as measured by their students' performance) with average teachers, the United States would move to near the top of international math and science rankings, generating a present value of \$100 trillion in future earnings for students.<sup>68</sup> But how do we know who are the "worst performing" teachers? This question has evaluation process and evaluation metrics aspects, both of which are currently under hot debate. As discussed above, current teacher evaluation systems—whether mandated by state law or governed by the rules of collective bargaining agreements—are rigid and, arguably, limited. From the teacher's or union's perspective, such rigid and predictable systems minimize arbitrary administrative evaluations that may be based on personality conflicts, inappropriate factors, or sloppy observations. From the administration's perspective, these rigid systems do not sufficiently account for a teacher's impact on student performance, are time consuming due to paperwork, and do not give the principal sufficient flexibility to provide meaningful feedback and, ultimately, make decisions about the teacher's future employment.

*Selecting the Forum.* So, who *ought* to decide on a better teacher evaluation system? With the U.S. Department of Education's nudging through Race to the Top monies, many states have been mandating that teacher evaluation systems include some measure of student performance, particularly a measure of how much "value" the teacher adds to student achievement (i.e., test score growth). Because performance evaluations have direct and significant downstream effects on teacher continuing education and improvement of instructional practices; teacher discipline; teacher assignment; and, ultimately, teacher contract renewal or dismissal, and because teacher quality is one of the few things that we know affects student performance, the state's equity and efficiency interests here are great. But does this mean that the

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<sup>66</sup> See STRUNK, *supra* note 40, at 3–4.

<sup>67</sup> Even if the rules give them discretion in filling teacher vacancies, administrators may use seniority as the decisive factor for various reasons: administrative ease; fear of being the subject of a teacher grievance; custom, culture, and practice; concern about losing a senior teacher to another school district; and so forth.

<sup>68</sup> Eric A. Hanushek, *The Economic Value of Higher Teacher Quality*, 30 ECON. EDUC. REV. 466, 475 (2011).

state should conduct teacher evaluations on the ground? Probably not. This would require a state bureaucracy that would dwarf most other state functions and constitute the largest ever state intervention in schools and classrooms. But the state's interests here are clear, and the state probably should be involved in encouraging districts and teachers' unions to adopt evaluation processes and standards that promote student achievement and equity among students, classrooms, and schools.

*Balancing the Stakeholder Interests.* In a few states, this has meant grants to encourage innovative processes such as peer review or other forms of mentoring and coaching for teachers. In a few other states, this has meant a mandate to ensure student test scores be included in the evaluation formula. But in nearly all instances, the details are left to the local collective bargaining table to work out. I do not pretend to know what evaluation process is appropriate nor which performance measures are fair and effective, but I would argue that the state needs to be involved in establishing the outlines for those processes and measures and that, to date, union influence in state legislatures and collective bargaining have created an evaluation system that does not do enough to enhance teacher quality and student performance.

### III. TOWARD LAW AND POLICY REFORM TO IMPROVE TEACHER QUALITY AND NARROW THE QUALITY GAP

Let's bring this back to where it started. There is no way to avoid affecting—at least indirectly—the terms and conditions of teacher employment if we want to improve teacher quality and close the teacher quality gap. Public educational policy making, then, will always stand in some degree of tension with public teacher employment, and labor interests and rights. Striking the right balance among all the interests of the relevant stakeholders means, at a minimum, that all of those interests be viewed as relevant, even if they do not always carry the same weight on every employment-affecting policy decision. Here I have advanced the outlines of an analytic approach to striking the balance. To some, this approach may seem intuitive. Maybe so, but it has hardly been the explicit approach of policy makers who either polarize on the side of unions or on the side of union detractors. To some, this approach may seem unsatisfying. True, I do not lay out the silver-bullet reform package for teacher employment laws and collective bargaining, but I have provided a modest way forward. I will conclude the essay with a few thoughts on where that path should lead.

#### A. *Radical Reform and Its Unknown and Unintended Consequences*

Let Wisconsin be the standard-bearer for what I will call radical reform: the push to ban public employee collective bargaining and diminish the power of public employee unions. The absence of collective bargaining is

not in itself radical. Many states already function without the procedural and administrative protections afforded by collective bargaining laws. What *is* radical is the sudden and complete removal of those rights and the unknown consequences of disrupting local policy-making practices that—as I have argued—benefit not only teachers but also students in many instances and administrators in a surprising number of instances. Although there might be some notion that the absence of collective bargaining will liberate local superintendents and principals to do the good work they always wanted to do, such newfound discretion puts new and potentially overwhelming burdens on their shoulders. Moreover, the absence of collectively bargained rules hardly ensures the absence of employment rules that constrain administrative decision making. Unions have proven adept at shifting their focus from local bargaining to state capitols and may work to replicate collective bargaining rules in codified laws. Rarely will such one-size-fits-all reform work to the benefit of all stakeholders.

### *B. Modest Reform to Encourage Experimentation*

Reform, however, is necessary. The current, rigid step-and-column salary schedule needs to be reformed to encourage young people to enter the profession, remain in classrooms, teach in those hard-to-staff schools, and be recognized for exemplary performance. Seniority should not be the sole factor determining who gets laid off and which schools, usually schools with low-income children, experience the greatest number of layoffs during force reductions. But these reforms are issue specific and require a thoughtful balancing of the legitimate stakeholder interests. Equally important, the design and implementation of many of the reforms ought to be left up to local administrators with the input of teachers as individuals, committees, or even unions. Modesty—or “tinkering,” as David Tyack and Larry Cuban so aptly described the school reform process—may be the best policy.<sup>69</sup>

### *C. Litigation and the Constitutional Backstop*

Notwithstanding my call for modesty and balancing of interests, there may be those instances in which the effects of teacher employment and collective bargaining rules visit such harm on students—who are not at the bargaining table—that there must be some backstop to prevent such harm. This is particularly true where the interests of adults—policy makers, administrators, and teachers—conspire to undermine the interests of children.

Take the case of *Reed v. State of California*, in which children in poor schools in the Los Angeles Unified School District (LAUSD) suffered the

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<sup>69</sup> See DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* (1995).

direct and serious consequences of a rigid teacher employment law.<sup>70</sup> As a result of California's budget cuts during the 2008–09 academic year, thousands of teachers in the LAUSD received “pink slips,” letting them know that they were being laid off.<sup>71</sup> Because these teachers were at the bottom of the seniority ladder and because California law prescribed a last-in, first-out layoff process, those layoffs disproportionately affected low performing schools that had higher concentrations of junior teachers.<sup>72</sup> The complaint focused on three middle schools in which one of the schools lost seventy percent of its faculty, while the other two lost more than forty percent.<sup>73</sup> Some schools lost less than ten percent of their teachers.<sup>74</sup> At the beginning of the 2009–10 school year, many students in those three middle schools entered classrooms with substitute teachers who would be there for months.<sup>75</sup> Because the budget situation in LAUSD was worsening, further layoffs seemed imminent.<sup>76</sup>

Consequently, the children in those schools alleged that the budget-based layoffs violated their right to an education and their right to equal protection under the California Constitution.<sup>77</sup> As anticipated, LAUSD issued further layoff notices in the spring of 2010 and the plaintiff students moved to preliminarily enjoin the district from laying off teachers in those schools.<sup>78</sup> The court granted that injunction and the parties ultimately reached a settlement that would ensure future reduction-in-force layoffs would not harm students in the lowest performing schools and would be spread fairly among the schools in the district.<sup>79</sup>

*Reed* is an extreme, though not unimaginable, case in which a rigid employment rule adversely affected an identifiable group of children. It should be noted that the reduction-in-force rules employed by LAUSD probably made layoff decision making more efficient and less contentious in that district of more than 694,000 students and 45,000 teachers. In such cases, constitutional values and rights may trump negotiated or legislated rules. But this should be the rare event in which specific employment rules adversely affect specific students who otherwise are unprotected in the policy-making process.

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<sup>70</sup> See Complaint for Injunctive and Declaratory Relief, *Reed v. State*, BC434240 (Cal. Super. Ct. filed Feb. 24, 2010).

<sup>71</sup> *Id.* at 1.

<sup>72</sup> *Id.* at 3.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 3–4.

<sup>76</sup> *Id.* at 5.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> *Id.* at 28.

<sup>79</sup> See John Fensterwald, *Judge Resolves L.A. Layoff Suit*, THOUGHTS ON PUB. EDUC. (Jan. 21, 2011), <http://toped.svefoundation.org/2011/01/21/judge-resolves-l-a-layoff-suit/> (on file with the Harvard Law School Library); John Fensterwald, *Landmark Ruling on Teacher Layoffs*, THOUGHTS ON PUB. EDUC. (May 14, 2010), <http://toped.svefoundation.org/2010/05/14/landmark-ruling-on-teacher-layoffs/> (on file with the Harvard Law School Library).

## CONCLUSION

Beyond the rancor of the debates in state capitols over public employee and teacher collective bargaining; beyond the anecdote-driven punditry; beyond the Chicken Little histrionics of labor leaders and detractors; there is a very real concern that the tension between public policy aimed at improving teaching and closing the teacher quality gap on the one hand and teacher employment and collective bargaining rules on the other might shortchange students. Here I have argued that such a tension might be ameliorated by a modest approach to policy making—one that takes each employment issue, one at a time, considers whether the decisions over such issues are best made locally or at the state level, and ensures that all stakeholders with legitimate interests are considered. Such a process will lead to reform. Though it will hardly be the radical reform desired in some corners.