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CHARTER SCHOOLS AND COLLECTIVE BARGAINING: COMPATIBLE MARRIAGE OR ILLEGITIMATE RELATIONSHIP?

MARTIN H. MALIN* & CHARLES TAYLOR KERCHNER**

I. INTRODUCTION.....	886
II. WHY CHARTER SCHOOLS	888
III. EMPLOYMENT RELATIONS AND CHARTER SCHOOLS	891
A. Charter Schools as High Performance Workplaces.....	891
B. Traditional Public Schools and the Industrial Labor Relations Model	897
C. The Industrial Model, Teacher Unions, and Charter Schools	901
IV. TEACHER COLLECTIVE BARGAINING AND HIGH PERFORMANCE WORKPLACES	903
A. Teacher Unions as Agents of Change: The Exceptional Cases	903
B. Why Are These the Exceptions Instead of the Rule: The Role of Legal Doctrine	911
1. The Basic Structure of the Law Governing Teacher Collective Bargaining.....	911
2. What the Law Requires School Districts to Negotiate.....	913
3. Legislative Backlash Against Teacher Bargaining.....	918

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4. The Inhibiting Effects of Current Legal Doctrine on the Attainment of High Performance Educational Workplaces. .	921
V. LABOR LAW DOCTRINE AND CHARTER SCHOOLS ..	923
A. Which Law Governs: State Law or the NLRA?	923
B. Charter School Teacher Representation Under State Law	931
VI. TOWARDS A CHARTER SCHOOL LABOR LAW	933
VII. CONCLUSION	936

I. INTRODUCTION

Charter schools are in fashion.¹ Once the darling of the right wing, they are now embraced by educational reformers of all stripes. For the most part, however, the teacher union response ranges from outright opposition to reluctant and qualified acceptance.² The largely negative reaction to charter schools from organized labor is understandable, as some of the loudest advocates of charter schools are equally loud in their condemnation of labor unions, particularly unions that represent teachers.³

1. Since the founding of the first charter school in 1992, charter schools have been formed throughout the country. By November 2006, there were close to 4,000 charter schools enrolling more than one million students. *See* Center for Education Reform, All About Charter Schools, <http://www.edreform.com/index.cfm?fuseAction=document&documentID=1964> (last visited Feb. 10, 2007); *see also* Education Week, Charter Schools, <http://www.edweek.org/rc/issues/charter-schools/> (last visited Feb. 10, 2007) ("Although they serve only a tiny fraction of the nation's public school students, charter schools have seized a prominent role in education today. They are at the center of a growing movement to challenge traditional notions of what public education means.").

2. Although the characterization of unions as opponents of charter schools is generally true, their position has moderated over the years and is quite nuanced. The National Education Association (NEA) abandoned its outright opposition to charters and replaced it with criteria for evaluating state charter laws. *See* National Education Association, Charter Schools, <http://www.nea.org/charter/index.html> (last visited Feb. 10, 2007).

Meanwhile, NEA and American Federation of Teachers (AFT) locals have begun operating charter schools in Houston, Dallas, and New York City. In New York City, the United Federation of Teachers also operates one charter school and plans to open another. *See* Erik W. Rubelen, *UFT Head Tells Charter Leaders: Teachers' Unions Are Not Your Foe*, EDUC. WK., Nov. 2, 2005, at 13.

3. *See* Matt Cox, *Children v. Unions*, NAT'L REV. ONLINE, Sept. 17, 2003, <http://www.nationalreview.com/comment/comment-cox091703.asp> ("Despite their rhetoric, teacher unions place power and money above the welfare of students. They are part of a reactionary establishment that sees schools as a giant sinecure

In this article, we confront the question of whether charter schools and collective bargaining are compatible. In Part II, we consider the various rationales that have been offered for charter schools. These rationales include the notions that charter schools will break the public school monopoly, thereby injecting free market mechanisms for the betterment of all schools; reduce school size to more manageable levels; free schools from bureaucracy and regulation; provide teachers with increased psychological purchase; and increase diversity in approaches to education.

In Part III, we examine the role of employee relations in charter schools. We contrast the model of the high performance workplace with the traditional industrial workplace. The traditional industrial relations model dominates public schools and fuels the view that charter schools are anti-union because they are intended to break from that mold.

In Part IV, we consider whether charter schools are inherently antiunion. Implicit in the view that charter schools are antiunion is the idea that teacher unions are guardians of a failed status quo and key obstacles to reform.⁴ In contrast to this view, we relate examples where teacher unions have served as agents of change and teachers have shared in the risks of the educational enterprise. We observe, however, that these examples are the exception and ask why the traditional industrial relations model continues to dominate public schools that collectively bargain with their teachers. We look to conventional labor law doctrine, as developed in the private sector and imported to the public sector, to explain this result. We show that, encouraged by legal doctrine, most teacher unions and school districts have internalized the traditional industrial relations model.

rather than something that exists to benefit children. Battling well-heeled unions every time a charter school opens is no boon to reformers or the kids they want to help.”); Posting of Leo Casey to Edwise News & Opinion, <http://edwise.org/whos-afraid-of-teacher-voice-charter-schools-and-union-organizing> (Nov. 17, 2005, 11:13 PM) (quoting Norman Atkins of Uncommon Schools, “[G]ood charter schools organize themselves in ways that keep unions out.”); *see also* David W. Kirkpatrick, The Buckeye Institute for Public Policy Solutions, *Organizing Charter Schools, A Challenge to Unions*, June 5, 2006, <http://www.buckeyeinstitute.org/article/690>.

4. *See* PAUL T. HILL, LYDIA RAINEY & ANDREW J. ROTHERHAM, *THE FUTURE OF CHARTER SCHOOLS AND TEACHER UNIONS: RESULTS OF A SYMPOSIUM 5* (2006), available at http://www.ncsrp.org/downloads/charter_unions.pdf (“Charter school leaders equate [the union] vision of professionalism with resistance to change and protection of unfit teachers.”).

In Part V, we focus on the implications for charter schools and examine the application of existing legal doctrine to charter schools. First, we address the fundamental question of which law governs charter schools' labor relations—the National Labor Relations Act (NLRA)⁵ or state law. We next consider the diversity of approaches taken by the states to regulation of charter school labor relations. We find that all of these approaches operate in a traditional industrial relations framework that is incompatible with the promise of charter schools as high performance, high involvement workplaces. Accordingly, we propose to free charter schools from traditional labor law doctrine and develop a labor law for charter schools.

In Part VI, we describe a new approach to providing a voice for teachers in charter schools. In Part VII, we conclude that this approach will help resolve the tension between risk and reward for charter school teachers and between authority and responsibility for those who sponsor those schools.

II. WHY CHARTER SCHOOLS

The movement for charter schools has been fueled by the belief that public schools have failed and that at least part of the reason they have failed is because of their monopoly on providing education.⁶ Charter schools thus serve to break the monopoly of traditional public schools. They offer alternatives that empower parental choice in their children's education. Furthermore, it can be argued that by placing competitive pressures on traditional public schools, charters shock traditional schools out of their complacency and force them to change for the better.

Charter schools have been described as the idea everyone likes. They have bipartisan support, and charter advocates can be found among free market economists, civil rights leaders, religious fundamentalists, advocates for the poor, and public educators.⁷ Such broad support is possible because the charter school

5. 29 U.S.C. §§ 151–65 (2000).

6. See JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION xiii–xiv (1996); R. Craig Sautter, *Charter Schools: A New Breed of Public Schools*, N. CENT. REGIONAL EDUC. LABORATORY POL'Y BRIEFS (REP. 2) 9 (1993); James N. Goenner, *Charter Schools: The Revitalization of Public Education*, PHI DELTA KAPPAN, Sept. 1996, at 32, 34; Chris Pipho, *The Evolving Charter School Movement*, PHI DELTA KAPPAN, Mar. 1997, at 489, 489.

7. JOSEPH MURPHY & CATHERINE D. SHIFFMAN, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT 11 (2002).

structure brings together three important motivations: the revolt against bureaucratization, the introduction of choice or market mechanisms in public schooling, and increasing teacher professionalism.⁸

Although Ray Budde was the first to advocate charter schools,⁹ it was Albert Shanker, the late president of the American Federation of Teachers, who popularized the idea.¹⁰ Shanker lauded the charter school idea as “a new kind of school governance framework under which successful teachers would become ‘empowered’ to create innovative programs at existing schools—but only with the express approval of their union.”¹¹ He conceived of the charter school as a place where teachers had more control over the educational environment because he viewed the failure of public education as the fault of the system rather than its teachers.¹² In application, however, charter schools became managerially driven organizations rather than a community of professionals as originally envisioned.

Early advocates predicted that charter schools would increase choices available to parents; facilitate innovative teaching through waivers of laws and regulations; be more innovative and of higher quality than traditional public schools due to the interplay of autonomy and market forces; be more accountable than traditional schools; and produce higher student achievement, greater parent satisfaction and greater teacher empowerment.¹³ Critics, however, have raised serious equity and accountability issues.¹⁴

8. See LIANE BROUILLETTE, *CHARTER SCHOOLS: LESSONS IN SCHOOL REFORM* 5–6 (2002).

9. RAY BUDDE, *EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS: KEYS TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION* (1988); see also MURPHY & SHIFFMAN, *supra* note 7, at 23–24 (pointing out that “Budde had written about charters since 1975”).

10. See MURPHY & SHIFFMAN, *supra* note 7, at 24 (identifying Shanker’s 1988 speech before the National Press Club as the first time that the idea of charter schools received much attention).

11. KRISTINA BERGER & PETER W. COOKSON, JR., *EXPECT MIRACLES: CHARTER SCHOOLS AND THE POLITICS OF HOPE AND DESPAIR* 33 (2003).

12. See *id.* at 33–34.

13. Katrina Bulkley & Jennifer Fisler, *A Decade of Charter Schools: From Theory to Practice*, CPRE POL’Y BRIEFS, Apr. 2002, at 1–2, available at <http://www.cpre.org/Publications/rb35.pdf>.

14. See, e.g., AMY STUART WELLS, *BEYOND THE RHETORIC OF CHARTER SCHOOL REFORM: A STUDY OF TEN CALIFORNIA SCHOOL DISTRICTS* 5 (1998).

Performance comparisons have not indicated that charters are substantially more effective in boosting student achievement than comparable public schools.¹⁵ The first nationwide comparison, using data from the National Assessment of Educational Progress, found charters either showing no positive difference when compared to traditional public schools or lagging significantly behind them in math and reading scores.¹⁶

Earlier studies reflect the complexities involved in evaluating charter school performance. In 2002, Bulkley and Fisler reviewed the characteristics and performance of charter schools.¹⁷ They found that comprehensive evaluation of charter schools is difficult to do for many reasons. Because “[c]harter schools differ considerably from state to state and district to district,”¹⁸ the “charter school” label says relatively little about how the school is operated, the degree of freedom it has, or the socioeconomic status of its students. Although this is changing as charter schools gain more experience, Bulkley and Fisler found that they had more unstable or different enrollments than corresponding public schools, and used different assessment methods that frequently varied annually and, “tend[ed] to be too new to have established track records.”¹⁹ “In addition,” Bulkley and Fisler wrote, “the quality of research varies considerably: some studies have exercised considerable effort to use appropriate controls and make suitable comparisons, while others

15. See B. P. GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS, at xiv (2001); Gary Miron & Christopher Nelson, *Student Academic Achievement in Charter Schools: What We Know and Why We Know So Little* 20 (Nat'l Ctr. for the Study of Privatization in Educ., Occasional Paper Series, Dec. 2001), available at <http://eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED471981>.

16. See Diana J. Schemo, *Charter Schools Trail in Results, U.S. Data Reveals*, N.Y. TIMES, Aug. 17, 2004, at A1. The comparative data only came to light after researchers from the American Federation of Teachers provided to the *New York Times* an analysis of publicly available online data. The AFT report also documented the long delay in releasing charter school results. F. HOWARD NELSON ET AL., CHARTER SCHOOL ACHIEVEMENT ON THE 2003 NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, at i–ii (2004). Federal officials maintained that they were not trying to cover-up or hide the data. Schemo, *supra*, at A19. The event occasioned a vigorous debate about the efficacy of charter schools. See, e.g., Diana J. Schemo, *Education Secretary Defends Charter Schools*, N.Y. TIMES, Aug. 18, 2004, at A18.

17. Bulkley & Fisler, *supra* note 13, at 7–8.

18. *Id.* at 7.

19. *Id.*

have been less cautious.”²⁰ Bulkley and Fisler continued, “It is thus not surprising that a recent review of student achievement in charter schools by RAND researchers found that ‘ . . . evidence on the academic effectiveness of charter schools is mixed.’”²¹ They also noted that in studies on charter school achievement, “the charter impact on student achievement appears to be mixed or very slightly positive.”²²

Miron and Nelson reviewed eighteen studies and classified them according to the strength of charter school impact, either positive or negative, and the quality of the study itself.²³ When they considered only the highest quality studies, those from Arizona, Texas, and Connecticut suggested positive impacts while those from Michigan and the District of Columbia found negative effects.²⁴ Miron and Nelson stated, “The overall conclusion remains that the evidence of charter schools’ impact on student achievement is mixed.”²⁵

A major factor in the success or failure of charter schools is the schools’ relationships with their teachers. The next Part examines the role of employment relations in charter schools.

III. EMPLOYMENT RELATIONS AND CHARTER SCHOOLS

Charter schools are envisioned as high performance workplaces where teachers, freed from bureaucratic constraints, take charge of student learning. This Part explores the model of charter schools as high performance workplaces, contrasting that with the traditional industrial union model of employment relations, and exploring the view that charter schools are antiunion.

A. *Charter Schools as High Performance Workplaces*

Traditional workplace organizations center around management and emphasize the “heroic manager.”²⁶ In this model, the manager knows everything that is going on in his or her

20. *Id.* (citations omitted).

21. *Id.* (quoting GILL ET AL., *supra* note 15, at 95).

22. Bulkley & Fisler, *supra* note 13, at 7 (quoting Miron & Nelson, *supra* note 15).

23. Miron & Nelson, *supra* note 15, at 21–24.

24. *Id.* at 24–25.

25. *Id.* at 25.

26. See DAVID L. BRADFORD & ALLAN R. COHEN, *MANAGING FOR EXCELLENCE: THE GUIDE TO DEVELOPING HIGH PERFORMANCE IN CONTEMPORARY ORGANIZATIONS* 10–11 (1984).

department, has more expertise than any subordinate, is able to solve any problem that arises before any subordinate can, and is the primary person responsible for the department's functioning.²⁷ In this command and control system, subordinates are not expected to think creatively but are instead confined to carrying out specifically and narrowly assigned tasks.²⁸

In contrast, a high performance workplace emphasizes flexibility, employee involvement, responsibility, accountability, and an incentive system of rewards. There is frequently a strong emphasis on workforce training and on flexibility in organizational structure.²⁹ Managers share decision-making responsibility with employees,³⁰ and function as coaches, facilitators, and integrators.³¹ Bradford and Cohen refer to this model as the manager-as-developer.³²

Charter schools are envisioned as providing a high performance alternative to traditionally bureaucratized, top-down public school systems. The most striking characteristic of charter schools is their small size—a median of 137 students compared to 475 students in district schools.³³ Most states allow charters considerable autonomy. About half allow charter schools to waive state law and regulations,³⁴ although states vary substantially in what powers are granted to the schools. Generally, charters authorized by agencies other than a local school district have more autonomy than those that operate within a district framework.³⁵

Although there is no single model, charters are governed and managed differently from traditional public schools. Some charter schools are “out sourced” to profit making or non-

27. *Id.*

28. See, e.g., George Nesterchuk, Donald J. Devine & Robert E. Moffit, *Taking Charge of Federal Personnel* (Heritage Found. Backgrounder No. 1404, 2001), available at <http://www.heritage.org/Research/GovernmentReform/BG1404es.cfm> (critiquing the Clinton Administration partnership councils and arguing that a federal civil servant's role is confined to following directions to implement policies established by political appointees).

29. See Susan Parks, *Improving Workplace Performance: Historical and Theoretical Contexts*, MONTHLY LAB. REV., May 1995, at 18, 19.

30. *Id.*; see also Martha A. Gephart & Mark E. Van Buren, *Building Synergy: The Power of High Performance Work Systems*, TRAINING & DEV. J., Oct. 1996, at 21, 22.

31. See Gephart & Van Buren, *supra* note 30, at 22.

32. See BRADFORD & COHEN, *supra* note 26, at 61.

33. RPP INTERNATIONAL, THE STATE OF CHARTER SCHOOLS: 2000, at 20 (2000).

34. Bulkley & Fisler, *supra* note 13, at 2.

35. *Id.* at 3.

profit organizations. Some are teacher-led with no traditional management structure. Some have strong boards. Some have strong charismatic principals. Some are literally producers' cooperatives in which the teachers have an ownership stake in their own professional practice.³⁶ The most striking example of teacher ownership occurs in Minnesota, where a teacher-owned site-based management company, EdVisions Cooperative, contracts to run eight small schools.³⁷ The experiment with teacher-run schools has spread to Milwaukee, Wisconsin, where eight schools were designed to move beyond a "grievance-based culture."³⁸ The teachers remain employees of the Milwaukee Public Schools³⁹ and subject to the collective bargaining agreement for wages and benefits. Yet their schools are workers' cooperatives, both organizationally and legally,⁴⁰ where the teachers develop their own work rules.⁴¹

Teacher work is also different in charter schools, both in terms of the conditions under which it takes place and the content of the jobs. "Charter schools, overall, possess a fair amount of freedom to determine salaries and working agreements for teachers," Malloy and Wohlstetter observe.⁴² In seventeen states, charter schools are not bound by district collective bargaining agreements, and in eleven states, the bargaining provisions depend on the type of charter school involved.⁴³

Teachers at charter schools are largely satisfied with their work, though they are less secure and protected than teachers in public schools. In terms of teacher compensation, most studies report charter school teachers earning amounts comparable to public school teachers,⁴⁴ but there appears to be more variability in teacher salaries. Salary studies of charter school teachers reveal that about one-third reported higher salaries

36. See generally *TEACHERS AS OWNERS: A KEY TO REVITALIZING PUBLIC EDUCATION* (Edward J. Dirks-wager ed., 2002) [hereinafter *TEACHERS AS OWNERS*].

37. See *id.* at 87–88.

38. Press Release, Lynne Sobczak, Milwaukee Public Schools, MPS "Teacher Cooperatives" Make List of Top 50 Innovations (2006), available at <http://www2.milwaukee.k12.wi.us/governance/Releases/TeacherCoopTop50.pdf>.

39. *Id.*

40. *Id.*

41. *Id.*

42. Courtney L. Malloy & Priscilla Wohlstetter, *Working Conditions in Charter Schools: What's the Appeal for Teachers?*, 35 *EDUC. & URBAN SOC'Y* 219, 223 (2003).

43. See *infra* Part V.B.

44. See Malloy & Wohlstetter, *supra* note 42, at 224.

than in their previous teaching positions.⁴⁵ In a nine-state study, thirty-eight percent said that they were being paid less than they would have been paid in the public schools,⁴⁶ and, in another national study, twenty percent reported having a lower salary than in their previous public school position.⁴⁷ Whether charter school teachers make more or less than those in traditional public schools also varies by state. A study of beginning teacher salaries in Arizona showed that the salary range was \$8,000 in conventional public schools and \$21,000 in charters.⁴⁸

Pay is also structured differently at many charter schools. The National Center for Education Statistics reveals that only sixty-two percent of charter schools reported using salary schedules compared with ninety-three percent of traditional public schools.⁴⁹ New charters are less likely to use salary schedules than those schools that have been converted from traditional schools. Over forty percent of charter schools report that they use some kind of merit pay and over thirty percent offer higher salaries to teachers with subject matter specialties that are in short supply.⁵⁰

Charter school jobs are much less secure than those in traditional public schools. Some charter schools use employment-at-will contracts, and only thirty-four percent of charter school teachers report that they hold tenure.⁵¹ Tenure is much more common among teachers in schools that have been converted from traditional schools than in new charters.⁵²

Charter school teachers also work longer. A California study showed that charter schools operated 183 school days, com-

45. See JULIA E. KOPPICH ET AL., *NEW RULES, NEW ROLES? THE PROFESSIONAL WORK LIVES OF CHARTER SCHOOL TEACHERS* 30 (1998).

46. Malloy & Wohlstetter, *supra* note 42, at 224.

47. KOPPICH ET AL., *supra* note 45, at 30.

48. Lewis Solomon & Mary Gifford, *Teacher Accountability in Charter Schools*, NCPA BRIEF ANALYSIS, Mar. 1, 1999, available at <http://www.ncpa.org/pub/ba/pdg/ba285.pdf>.

49. Kerry J. Gruber et al., *Schools and Staffing Survey, 1999-2000: Overview of the Data for Public, Private, Public Charter, and Bureau of Indian Affairs Elementary and Secondary Schools*, EDUC. STAT. Q., Fall 2002, at 10.

50. MICHAEL PODGURSKY & DALE BALLOU, THOMAS B. FORDHAM FOUND., *PERSONNEL POLICY IN CHARTER SCHOOLS* 16-17 (2001).

51. KOPPICH ET AL., *supra* note 45, at 29.

52. Malloy & Wohlstetter, *supra* note 42, at 225.

pared to 175 days for traditional schools.⁵³ Other studies reported similar comparisons.⁵⁴ Johnson and Landsman suggested that longer hours may derive from strong norms of work completion rather than specified start and quit times.⁵⁵

Charter school teachers are younger than their public school counterparts, a fact that may simply reflect the start-up nature of these organizations. A Michigan study found that nearly fifty-six percent of charter school teachers had less than four years experience compared to fourteen percent in a matched sample of teachers in traditional public schools.⁵⁶

Given these data, one might ask, "why are teachers attracted to charter schools?"⁵⁷ Charter school teachers seem to like the freedom and flexibility their workplaces offer. Most state statutes provide charter schools the ability to pick their own curriculum and instructional methods—this at a time when the trend at traditional public schools is toward centralization and a prescriptive curriculum. Virtually all the studies reviewed by Malloy and Wohlstetter showed that the freedom of individual practice was important. Financial flexibility was also mentioned as an attraction. Teachers reported having funds to purchase supplies of their own choosing and of having financial support to attend professional development events, and they liked the small size of the schools.⁵⁸

Of at least equal importance, teachers were attracted to charter schools because they could work in an environment that supported a pedagogy and philosophy of education they believed in. Although this can be expressed through individual preferences,⁵⁹ many teachers are interested not only in individual freedom of action but also in collaboration and cooperation:

53. SRI INTERNATIONAL, EVALUATION OF CHARTER SCHOOL EFFECTIVENESS, at II-3 (Dec. 11, 1997), available at http://www.sri.com/policy/cep/choice/SRI_CA_charter_schools_1997.pdf.

54. See Malloy & Wohlstetter, *supra* note 42, at 227.

55. See Susan M. Johnson & Jonathan Landman, "Sometimes Bureaucracy Has Its Charms": *The Working Conditions of Teachers in Deregulated Schools*, 102 TCHRS C. REC. 85, 95–96 (2000).

56. Debbi Harris & David N. Plank, *Who's Teaching in Michigan's Traditional and Charter Public Schools*, at 4 (Educ. Pol'y Ctr. at Mich. St. Univ., Pol'y Rep. No. 17, 2003).

57. See Malloy & Wohlstetter, *supra* note 42, at 227.

58. *Id.* at 227–35.

59. *Id.* at 231–32 (indicating that one teacher had chosen to work at a charter school because it was exempt from the district reading program).

In the urban charter schools we visited, teachers also valued the collaboration and cooperation they experienced. They spoke about a "spirit of openness" One teacher noted, "In other schools, people are afraid to express their opinions, but here everyone's opinion is valued." Another charter school teacher said, "Teachers are given an opportunity to share at our school. If they have an idea they think will work, they share it." Teachers also reported they shared both formally and informally. They shared successful strategies, classroom materials, and informative professional development offerings. "There is a great deal of communication here. People aren't stingy about what takes place in their classrooms," and "There is a great deal of sharing among teachers Sharing is Number 1 here." One teacher at a conversion charter school described an "open door policy" and said, "Informally, there is a lot of exchange. Our doors are always open, and people just drop in. There's not a sense of ownership here; we're into sharing."⁶⁰

Interpersonal and informal sharing, however, differs from creating a self-managing organization or a workers' cooperative. In their survey of the literature, Murphy and Shiffman reported that charter school teachers generally felt they had high quality and professional workplaces.⁶¹ Here, "professional" appears to mean freedom to teach as one wishes and to innovate in the classroom, rather than involvement in school operations and management. Charter school teachers in a National Education Association (NEA) sponsored survey said they were substantially involved in decision making about teacher hiring and assignment, curriculum development, and the content of their professional development.⁶² "The vast majority report that they have little or no say in hiring school administrators or determining how money is allocated at their schools."⁶³ Some studies show increased teacher empowerment but others show less.⁶⁴

Despite these variances in the degree of teacher involvement in management operations, charter schools are perceived as bastions of teacher empowerment and traditional public schools are perceived as highly bureaucratized. Public schools most often follow the traditional industrial labor relations model, which is discussed in the next Section.

60. *Id.* at 233.

61. MURPHY & SHIFFMAN, *supra* note 7, at 173.

62. KOPPICH ET AL., *supra* note 45, at 35.

63. *Id.*

64. MURPHY & SHIFFMAN, *supra* note 7, at 173–74.

B. *Traditional Public Schools and the
Industrial Labor Relations Model*

In his classic work, *Industrial Relations Systems*, John Dunlop identified the core elements of an industrial relations system:

Every industrial-relations system involves three groups of actors: (1) workers and their organizations, (2) managers and their organizations, and (3) governmental agencies concerned with the work place and the work community. Every industrial-relations system creates a complex of rules to govern the work place and work community. These rules may take a variety of forms in different systems—agreements, statutes, orders, decrees, regulations, awards, policies, and practices and customs. The form of the rule does not alter its essential character: to define the status of the actors and to govern conduct of all actors at the work place and work community.⁶⁵

In the traditional industrial workplace, the status of the actors and the rules governing their conduct are rigidly set. Management controls all decision-making, and employees' functions are limited to carrying out the narrow tasks as directed by management. Any notion of shared responsibility is anathema to principles of scientific management. Clyde Summers has aptly described the phenomenon: "The predominant response of employers to . . . demands for industrial democracy was that owners were endowed by law, if not by God, with authority and responsibility to manage the business. Insistence by workers for a voice in management decisions was a violation of property rights and the moral order."⁶⁶

Collective bargaining thus is an inroad on inherent managerial authority. James Atleson described this view as follows:

The notion that a set of inherent managerial prerogatives exists suggests a timeless historical imperative. The language in NLRB and judicial opinions, not to mention arbitration opinions where the characteristic is most easily observable, often appeals to a "Genesis" view of labor-management relations. "In the beginning" there was management and some employees. Management directed the enterprise until limited by law and collective bargaining agreements. . . . The power of an employer, then, is analogized to a state, having

65. JOHN T. DUNLOP, *INDUSTRIAL RELATIONS SYSTEMS*, at viii (1958).

66. Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 30 (1979).

all powers not expressly restricted in the state's constitution. Moreover, management would prefer that these restrictions be narrowly interpreted and limited to the express terms of [written agreements].⁶⁷

Collective bargaining's inroads on absolute managerial authority are themselves limited by the inherent management rights model. As the Supreme Court opined,

[I]n establishing what issues must be submitted to the process of collective bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place⁶⁸

Decisions concerning the operation of the enterprise—that is, those that go to the “core of entrepreneurial control”⁶⁹—are left to the employer's unilateral discretion, and the employees have a right to force bargaining only over “wages, hours, and other terms and conditions of employment.”⁷⁰ In other words, employees are not entitled to any voice in decisions that concern the overall risks of the enterprise. Their right is to negotiate agreements that insulate them from the risks of decisions made unilaterally by management.

Even the inroads collective bargaining makes in protecting employees from management's decisions are limited by the hierarchical nature of the traditional industrial relations model. The dominant obligation of workers is to obey management's commands. Indeed, insubordination is widely recognized as one of the most serious offenses a worker can commit, often justifying discharge without any prior resort to progressive discipline. The rationale is directly related to hierarchical control. “When a supervisor gives an order, there must be an expectation that it will be obeyed. Without that expectation the enterprise cannot function and sur-

67. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 122 (1983).

68. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981).

69. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

70. See *First Nat'l Maint. Corp.*, 452 U.S. at 674, 686 (citations omitted).

vive.”⁷¹ Even if the directive violates the collective bargaining agreement, with limited exceptions, the worker is expected to obey the directive and seek redress through the contract’s grievance procedure.⁷² In other words, a worker’s role is to obey and not to think.

Under the industrial model, workers who do think for themselves—that is, those who exercise discretion and who have a voice in decisions affecting the operation of the enterprise—are not employees. Rather, they are part of management. In *NLRB v. Yeshiva University*,⁷³ the Supreme Court held that because of the typical faculty governance system, university faculty are managers and therefore excluded from coverage under the NLRA. Operating through various committees and faculty meetings, faculty are deeply involved in faculty recruitment and hiring, tenure, approvals of leave requests, setting the curriculum, admissions, retention and graduation requirements, and similar decisions which the Court regarded as managerial.⁷⁴

Higher education faculty who lack such faculty governance structures and are therefore covered by the NLRA might unionize and then bargain collectively for traditional faculty governance. If they do so, they will find that they have bargained themselves out of statutory coverage. In *College of Osteopathic Medicine & Surgery*,⁷⁵ the faculty unionized and negotiated for a series of faculty committees dealing with curriculum, admissions, student promotion and evaluation, hiring, faculty rank and faculty promotions. The NLRB held that the faculty had become managers. The Board reasoned, “The *Yeshiva* decision does not expressly or impliedly distinguish situations in which managerial authority was granted through collective bargaining from situations in which such authority was more freely

71. Steven J. Goldsmith & Louis Shuman, *Common Causes of Discipline*, in 1 LABOR AND EMPLOYMENT ARBITRATION § 16.04 (Tim Bornstein et al. eds., 2d ed. 2006).

72. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 1023 (Alan Miles Rubin ed., 6th ed. 2003); see also Goldsmith & Shuman, *supra* note 71, § 16.04[3].

73. 444 U.S. 672 (1980).

74. The determination of whether a particular college’s faculty are employees or managers requires a highly fact specific and rigorous inquiry by the NLRB. See *Point Park Univ. v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006).

75. 265 N.L.R.B. 295 (1982).

granted and we do not believe that such a distinction is required by the Act.”⁷⁶

No state has applied *Yeshiva* to public schools, and the NLRB refused to apply *Yeshiva* to a private K–12 school for students with severe learning disabilities in *Wordsworth Academy*.⁷⁷ The Board distinguished *Yeshiva* based on the more limited role teachers at Wordsworth played in governance of the institution:

While it is true that the faculty at Wordsworth exercise considerable discretion in some matters, this discretion does not extend beyond the routine performance of the tasks to which they have been assigned. . . .

Thus, unlike *Yeshiva*, the teachers at Wordsworth do not make recommendations to the administration in cases of faculty hiring, tenure, sabbaticals, termination, and promotion. Nor is it true that the teachers make final decisions regarding the admission and expulsion of individual students. The teachers offer their professional opinion as to whether the school can “help the child,” but this is not in any way binding on the administration. While the faculty at *Yeshiva University* “decided questions involving teaching loads, student absence policies, tuition and enrollment levels . . .” the record reveals no role in these matters for the teachers at Wordsworth. Also, unlike the faculty in *Yeshiva*, the teachers at Wordsworth work jointly with supervisory personnel to decide on the academic content of the school’s educational program, and make the decisions under the guidelines established by the IEP. Thus, the Employer’s teachers play a diminished role in “determin[ing] . . . the product to be produced,” and play no role in determining the “terms upon which [the product] will be offered, and the customers who will be served.” They are clearly no more than professional employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned.⁷⁸

In other words, the teachers in *Wordsworth* were like the typical industrial workers. They did not think for themselves. Instead, they applied their professional expertise in the manner directed by their employer.

76. *Id.* at 298; see also *Univ. of Dubuque*, 289 N.L.R.B. 349 (1988) (relying on provisions of collective bargaining agreement in holding faculty to be managers).

77. 262 N.L.R.B. 438 (1982).

78. *Id.* at 443 (internal citations omitted).

The traditional industrial model dominates teacher collective bargaining today. As described by Edward Dirkswager of the Center for Policy Studies,

The typical organizational structure of our school system contains a rigid hierarchy of roles and decision-making power with teachers firmly positioned at the bottom of this hierarchy. Very simply, teachers are employees, and like most employees in rigid hierarchical organizations, they have a limited range of decision-making powers.⁷⁹

Seventy percent of teachers say that they feel left out of the decision making process.⁸⁰

Teacher unions do not have a voice in decision making concerning the nature or direction of the schools. Instead, they negotiate contract provisions designed to protect the employees they represent from the risks of management decision making. They negotiate salary schedules that eliminate all discretion in the fixing of base pay. Salary becomes a mechanical function of a teacher's educational level and length of service. They do not negotiate what extracurricular activities will be offered, but instead negotiate how staff for the activities that management decides to offer will be selected and what they will be paid. They negotiate for fringe benefits and how teachers will be selected for reductions in force, but do not negotiate decisions that may result in or prevent the need to reduce force. They negotiate the length of their work day and whether they will have duty-free lunch and preparation periods, but do not negotiate curriculum or methods of instruction.

C. *The Industrial Model, Teacher Unions, and Charter Schools*

Teachers are one of the most highly unionized groups of workers in the United States. The Bureau of Labor Statistics reports that in 2003, 37.7% of all workers employed in the education, training and library professions were union members and 42.3% were represented by a union.⁸¹ Similarly, in 2003, 42.6% of workers employed by local government (a classifica-

79. TEACHERS AS OWNERS, *supra* note 36, at 1.

80. *Id.*

81. Bureau of Labor Statistics, Union Members in 2003, at tbl.3 (Jan. 21, 2004), <ftp://ftp.bls.gov/pub/news.release/History/union2.01212004.news>.

tion that includes public school districts) were union members and 46.7% were represented by a union in 2003.⁸²

More than a decade ago, a union official offered up the following prediction about charter schools, "We'll fight charter schools tooth and nail; then after we lose, we'll figure out that we can organize the teachers who teach in them."⁸³ Notwithstanding this prediction, the industrial model of collective bargaining that dominates public school teacher labor relations appears incompatible with the vision of the charter school as a high performance workplace.

Because this vision is what attracts teachers to charter schools, it is not surprising that teachers in charter schools are far more ambivalent toward union representation than their peers in traditional public schools. In a survey of 232 charter school teachers in eight states, teachers reported being satisfied with their work, but did not perceive that the teacher's union had much relevance to their professional work lives.⁸⁴ Only twenty-four percent of teachers indicated that "the local teacher's union or association was actively involved in establishing teacher working conditions and school operating rules."⁸⁵ In state-by-state breakouts, a higher percentage of teachers in California (44%) and Wisconsin (40%) said that their local union was involved, but in Arizona, Colorado, Massachusetts, Michigan, and Minnesota upwards of eighty-five percent said that there was little union involvement in their working conditions.⁸⁶

The situation within charter schools illustrates the battle that teacher unions face for the hearts and minds of their own membership. Older teachers tend to want their unions to engage in traditional pocketbook and job protection—that is, to follow the traditional industrial labor relations model and protect them from the risks posed by decisions made by management. Younger teachers, however, want help with the problems they face in teaching.⁸⁷ In the case of charter school teachers, however, these differences extend to their identification with the union altogether.

82. *Id.*

83. Personal Conversation with NEA Official in Minn. (Winter 1994).

84. KOPPICH ET AL., *supra* note 45, at 31.

85. *Id.*

86. *Id.*

87. See Julie Blair, *Gen-Xers Apathetic About Union Cabel*, EDUC. WK., Jan. 30, 2002, at 1, 16–18.

IV. TEACHER COLLECTIVE BARGAINING AND
HIGH PERFORMANCE WORKPLACES

The dominant approach to teacher labor relations follows the traditional industrial relations model. However, there are exceptions where teachers, through their unions, have shared in the risks of the enterprise. Such sharing comes with a voice in decision-making that recognizes that teachers do more than mechanically carry out the directives of management. Examples of these exceptional cases are discussed in Section A. Section B offers an analysis of why these examples are the exceptions rather than the rule, focusing on the role of legal doctrine.

A. *Teacher Unions as Agents of Change: The Exceptional Cases*

Although the traditional industrial labor relations model dominates teacher collective bargaining, there is nothing inherent in the teacher-school district relationship that mandates such an arrangement. There are a number of notable examples where teachers and their unions have served as agents for change, investing in the future of the educational enterprise. Case studies of individual districts and education review articles illustrate cases demonstrating a broadened scope of bargaining and a rich set of informal relationships between unions and districts.⁸⁸

Both national unions have reformers and traditionalists. The Teacher Union Reform Network (TURN), made up of locals from both the NEA and the American Federation of Teachers (AFT), has been a forum for discussion and interaction among reformers for more than a decade.⁸⁹ Especially among TURN members, reforms have begun to focus explicitly on increasing the quality of education. Innovation has begun to coalesce around a cluster of reforms that links four powerful elements—peer review, teacher induction, professional development, and

88. See, e.g., CHARLES T. KERCHNER & JULIA E. KOPPICH, *A UNION OF PROFESSIONALS: LABOR RELATIONS AND EDUCATIONAL REFORM* (1993); Johnson & Landman, *supra* note 55.

89. For a review of TURN member labor relations practices, see Charles T. Kerchner & Julie E. Koppich, *Organizing Around Quality: The Frontiers of Teacher Unionism*, in *CONFLICTING MISSIONS: TEACHERS UNIONS AND EDUCATIONAL REFORM* 281, 298 (Tom Loveless ed., 2000); see also TURN Exchange: Teachers Union Reform Network of AFT & NEA Locals, <http://www.turnexchange.net> (last visited Feb. 28, 2007).

compensation rewards—with an indicator system that shows whether and how students are achieving.⁹⁰

The existence of educational standards and high quality indicators is essential to linking discussions about the work of teachers and the performance of schools. Although faulty in many ways, the federal No Child Left Behind Act⁹¹ has focused educators' attention on student outcome measurement. Several school districts and teacher unions have consciously developed data analysis capacity at the school level. For example, schools in the Los Angeles Annenberg Metropolitan Project created data teams that analyze the disaggregated results of the Stanford 9 tests, which was the state's official accountability measure, and created their own indicators.⁹² Members of a coalition of schools in suburban Chicago have started comparing their teaching methods with those of the highest scoring nations on the Third International Math and Science Study (TIMSS).⁹³ They have spent five years looking at their results and understanding how their teaching practices need to change to reach world-class levels.⁹⁴

Teachers are using peer review mechanisms more frequently. Since 1981, the Toledo Federation of Teachers and the Toledo Public Schools have jointly operated a peer review process, and the practice has spread to more than thirty districts nationwide.⁹⁵ Peer review brings higher standards to teaching. It significantly changes the conception of teaching work by recognizing the importance of engagement and commitment as well as skill and technique. It recognizes a legitimate role for teachers in establishing and enforcing standards in their own occupation.⁹⁶

90. See Kerchner & Koppich, *supra* note 89, at 290–98.

91. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

92. See JOAN L. HERMAN & EVA L. BAKER, LOS ANGELES COMPACT FOR EVALUATION, THE LOS ANGELES METROPOLITAN PROJECT: EVALUATION FINDINGS 6 (2003), available at <http://www.cse.ucla.edu/reports/TR591.pdf>.

93. See Richard L. Colvin, *Illinois Experiment Puts Teaching Methods to Test*, L.A. TIMES, June 4, 2000, at A1.

94. *Id.*

95. See Cheryl M. Waters & Terry L. Wyatt, *Toledo's Internship: The Teachers' Role in Excellence*, PHI DELTA KAPPAN, Jan. 1985, at 365 (1985); Kerchner & Koppich, *supra* note 89, at 290–91.

96. See Dal Lawrence, *The Toledo Plan for Peer Evaluation and Assistance*, 17 EDUC. & URBAN SOC. 347 (1985); Dal Lawrence, *Controversy and Apprehension Among Principals Nearly Killed the Toledo Plan*, 172 AM. SCH. BOARD J., July 1985, at 22.

The Toledo experience forms a sharp contrast to the traditional industrial labor relations model. Under the traditional model, management exclusively evaluates employees, disciplines them, directs them to improve their performance, and dismisses them if they fail to improve. The union protects the employee from management's actions by monitoring disciplinary action, ultimately challenging management to justify its actions in an adversarial arbitration proceeding or, in some cases, a statutory tenure dismissal hearing. In Toledo, the union shares responsibility for developing the talents of new teachers and for identifying poorly performing tenured teachers, devising remediation strategies and removing those who do not improve from the district. Under peer review, the union's role balances protection of individual teachers with the protection of teaching. As Albert Fondy, president of the Pittsburgh Federation of Teachers noted, "a union is not conceived with the primary mission of protecting the least competent of its members."⁹⁷

In Toledo, the heart of the process is an Intern Board of Review (IBR), which has five union representatives and four district representatives.⁹⁸ New teachers are required to participate in a two-year intern program, where they work with consulting teachers on mutual goal setting and participate in follow-up conferences based on detailed observations.⁹⁹ The IBR selects the consulting teachers, who serve three-year terms during which they are relieved from all classroom teaching responsibilities.¹⁰⁰

The IBR also runs an intervention program for non-probationary teachers whose performance is so far below acceptable standards that the only options are improvement or leaving the school system. The teacher's principal and the union building representative must agree to place a teacher in the intervention program. At this point, the teacher in intervention is assigned a consulting teacher, who draws up a plan for improvement and reports frequently to the IBR to justify actions taken and evaluate progress made.¹⁰¹

97. KERCHNER & KOPPICH, *supra* note 88, at 48.

98. *Id.* at 162. Other peer review districts have similar boards.

99. *Id.* at 163.

100. *Id.* at 162.

101. *Id.*

Union-run peer review for elementary and secondary school teachers has produced a long enough record that reasonable claims can be made for its success. Although no definitive list or comprehensive study exists, anecdotal evidence suggests that peer review provides a more thorough system of inducting and evaluating novices than the system used in conventional settings.¹⁰² Peer review also seems to be more effective than conventional administrative evaluation in remediation or removal of veteran teachers with serious performance problems.¹⁰³

Although the sample size is too small to allow a broad statistical comparison, the historical evidence in Ohio districts, such as Toledo and Columbus, suggests that more probationary teachers were dismissed under the peer review system than under the previous system of administrative review. Between 1981 and 1997, fifty-two experienced teachers out of a workforce of about 2,600 in Toledo were thought to have such serious performance problems that peer intervention was necessary. All but ten left the classroom. About ten percent of Toledo's intern teachers were not rehired for a second year of teaching.¹⁰⁴ In Columbus, 178 teachers out of a pool of 4,800 were placed in the district's negotiated intervention program between 1985 and 1997. More than forty percent returned to teaching in "good standing." The others resigned, retired, or were terminated. During the same period, 3,321 new teachers participated in the Columbus intern program with seven percent not receiving satisfactory ratings.¹⁰⁵

Peer review provides much more formative assistance than conventional induction processes. Repeatedly, the unions have bargained hard for funds to support the program; teachers have gone to the brink of strike to save their programs in Toledo (1995) and in Cincinnati (1999 and 2000).¹⁰⁶

102. See CHARLES T. KERCHNER, JULIA E. KOPPICH & JOSEPH G. WEERES, UNITED MIND WORKERS: UNIONS AND TEACHING IN THE KNOWLEDGE SOCIETY 89-91 (1997).

103. Kerchner & Koppich, *supra* note 89, at 291-92.

104. Ann Bradley, *Peer-Review Programs Catch Hold as Unions, Districts Work Together*, EDUC. WK., June 3, 1998, at 1.

105. *Id.* For a negative analysis of peer review, see MYRON LIEBERMAN, TEACHERS EVALUATING TEACHERS: PEER REVIEW AND THE NEW UNIONISM (1998).

106. Kerchner & Koppich, *supra* note 89, at 288, 291.

The cutting edge of peer review, of course, is the ability of supervising teachers to make a judgment about a novice's performance. Unionists disagree about whether peer review is a proper union role, but Adam Urbanski, president of the Rochester Teachers Association, is fond of saying "peer review is only controversial where it hasn't been tried."¹⁰⁷ He is largely correct. Schools and unions that have adopted the system are largely happy with it even though administrative organizations frequently oppose the idea.¹⁰⁸ In Rochester, the administrators' union sued the teachers' union and the district over the peer assistance and review program, claiming that allowing teachers to evaluate one another violated the rights of administrators. The court dismissed the suit.¹⁰⁹

Peer review can, of course, comprise part of an induction process and serve as one of the ways that unions make teaching more attractive. Several union locals, including those in Cincinnati, Miami-Dade County, and Minneapolis, have strong working relationships with local universities that provide a pathway into teaching that is grounded in a school's classroom context and pedagogy.¹¹⁰ The induction program in Columbus works hand-in-glove with the peer review program, as some of the supervising teachers also offer classes in conjunction with Ohio State University's teacher education program.¹¹¹

In Cincinnati, a consortium consisting of the Cincinnati Federation of Teachers, the University of Cincinnati, and the Cincinnati school district devised a substantial modification in teacher training based on their analysis of what being an effective teacher requires in an urban setting. The Cincinnati program includes a program in which prospective teachers study for two undergraduate majors, one in teaching and one in another discipline. They undertake an internship in their fifth year, and they work alongside senior teachers, who share a vision of how teaching should be accomplished. During that fifth

107. KERCHNER & KOPPICH, *supra* note 88, at 158.

108. *See id.* at 172-75.

109. *See* John O'Brien, *Mentor Teacher Plan Wins*, DEMOCRAT & CHRON., June 19, 1987.

110. *See* KERCHNER & KOPPICH, *supra* note 88, at 74, 126-29; Julie Blair, *Minneapolis Labor Leaders Mold a Different Kind of Union*, EDUC. WK., Jan. 30, 2002, at 17.

111. *See* Nat'l Conference on Teacher Quality, Exemplary Practices for Mentoring New Teachers, D-2: Toward a Seamless Transition: Columbus Peer Assistance and Review Program, <http://www.ed.gov/inits/teachers/exemplarypractices/d-2.html> (last visited Feb. 27, 2007).

year, they are paid half-time as interns, thus easing the economic burden of preparing to teach.¹¹²

One of the most obvious drawbacks to entering teaching, and to the effectiveness of novice teachers, is the shameful level of nonassistance that most young teachers receive from their school districts or their unions. David Kauffman and colleagues' exploration of the initial encounters of new teachers begins with the plaintive cry from a novice: "You want me to teach this stuff, but I don't have the stuff to teach."¹¹³ The way in which new teachers encounter the curriculum strongly influences their sense of accomplishment and the set of rewards that flow from teaching. In interviews, many teachers said they received very little assistance from either the districts or their unions.¹¹⁴ Among the fifty teachers interviewed, not one of them said that their union helped them become a teacher or survive the first year.¹¹⁵

The bitter irony of continuing the traditional sink-or-swim induction in teaching is that it contributes to teacher turnover in the same places where teachers are in the shortest supply: the centers of big cities. The daunting personnel practices in districts such as New York City are legendary. The same system that historically has hired thousands of uncertified teachers each year discourages fully-qualified students with master's degrees from applying, only to have them be wooed by suburban districts.¹¹⁶

112. The Cincinnati Federation of Teachers web site describes the continuing program in these terms:

The Board and Federation are committed to the implementation of Professional Practice Schools (PPS) in partnership with the University of Cincinnati College of Education. Goals of the program include improving the quality of teacher training and increasing the pool of minority applicants for CPS teaching positions. The PPS Panel shall set the terms of the partnership between CFT, CPS, and UC, consistent with this contract. The PPS Panel shall establish rules governing changes in assignments and additional assignments for Graduate Student Interns.

Cincinnati Fed. of Teachers, Professional Practice Schools, http://cft.mwg.org/prof_practice.html (last visited July 7, 2006); see also National Conference on Teacher Quality, Exemplary Practices for Mentoring New Teachers, B-4: Cincinnati Professional School Partnerships, <http://www.ed.gov/inits/teachers/exemplarypractices/b-4.html> (last visited Feb. 27, 2007).

113. David Kauffman et al., *"Lost at Sea": New Teachers' Experiences with Curriculum and Assessment*, 104 TCHRS. C. REC. 273, 273 (2002).

114. See, e.g., Susan M. Kardos et al., *Counting on Colleagues: New Teachers Encounter the Professional Cultures of Their Schools*, 37 EDUC. ADMIN. Q. 250, 265 (2001).

115. *Id.*

116. See NATIONAL COMMISSION ON TEACHING & AMERICA'S FUTURE, WHAT MATTERS MOST: TEACHING FOR AMERICA'S FUTURE 37 (1996); Thomas J. Kane et

Professional development offers a good example of a long-term working relationship that has increasingly focused on student standards and achievement. For example, the Minneapolis project started in 1984 with a small joint labor-management task force that grew over time to a pilot project, state legislation, and a jointly-governed professional development program.¹¹⁷

Union reforms have also dealt with how teachers are paid. Since 1921, when the single salary schedule was introduced in Denver and Des Moines, the rank and column, civil service-type salary schedule has become virtually universal in public schools. Regardless of gender, race, or grade level, teachers are paid the same, depending only on their years of service and level of academic preparation. Indeed, in its time, the existing salary schedule was thought to be both a model of fairness and a reasonable incentive system. The system rewarded teachers for investing their time and personal funds in further education, and it brought to a close the longstanding practice of paying men more than women and white teachers more than teachers of color. It also began to distance teacher raises from direct administrative supervision, favoritism, and political influence. The single salary schedule was also easy to administer because the basis of a teacher's pay was objective and understandable. The utility of this system explains its long tenure.¹¹⁸

Only recently has there been serious discussion of alternatives, the most discussed of which is actually a relatively slight modification of the existing system: paying for knowledge and skill. Odden and Kelley advocate linking pay to formal education, as it is now, and to the achievement of knowledge and skills required by new curriculum standards and new roles required of teachers in reorganized schools.¹¹⁹

Odden and Kelley also advocate the use of contingent pay, an extension of what is commonly called "extra pay for extra work." Instead of being focused on extracurricular activities, as

al., *Photo Finish: Certification Doesn't Guarantee a Winner*, EDUC. NEXT, Winter 2007, at 61.

117. See Kerchner & Koppich, *supra* note 89, at 295-96; Blair, *supra* note 110, at 17.

118. See, e.g., ALLAN ODDEN & CAROLYN KELLEY, PAYING TEACHERS FOR WHAT THEY KNOW AND DO 8-10 (1997); William A. Firestone, *Redesigning Teacher Salary Systems for Educational Reform*, 31 AMER. EDUC. RES. J. 549, 551-52 (1993).

119. ODDEN & KELLEY, *supra* note 118, at 96-100.

are most current contingent pay schemes, these schemes are focused on enhancing student achievement. Teachers who complete professional development tasks, for example would be eligible for bonuses, as would teachers who collaborated on projects linked to creating school programs that increase achievement or who worked on valuable individual projects.¹²⁰

A form of contingent pay can be found in assistance in preparing for and stipends for obtaining certification by the National Board for Professional Teaching Standards. Both the AFT and NEA have supported legislation to encourage teachers to become certified, and in many school districts, unions have successfully bargained salary incentives for teachers who receive board certification.¹²¹

The most imaginative and most dramatic deviation from the standard salary schedule is taking place in the 70,000-student Denver, Colorado, school district, where, in November 2005, voters approved a tax measure that would fund an incentive pay plan for teachers.¹²² The Denver Classroom Teacher Association members had previously voted in 2004 to approve the plan.¹²³ The Denver plan, which was devised by a union-management design team over six years, pays teachers for specific knowledge and skills they have acquired instead of the more usual criteria of college-level school credits, positive results on their professional evaluations, teaching in hard-to-staff schools and in hard-to-find specialties, and student achievement.¹²⁴ Professional evaluation is run by a council composed of teachers, administrators and community members. The council's procedures must be in accord with the teachers' union contract. All new teachers are automatically enrolled in the incentive plan, and veteran teachers have six years to decide whether to join or to stay with the traditional salary plan.¹²⁵

At the I.D.E.A.L. Charter School in Milwaukee, Wisconsin, teachers have remained employees of the Milwaukee Public

120. *See id.* at 98–103.

121. Kerchner & Koppich, *supra* note 89, at 289.

122. *See* Bess Keller, *Denver Voters Pave Way for Incentive Pay*, EDUC. WK., Nov. 9, 2005, at 3, 18.

123. *See* ProComp, Professional Compensation System for Teachers, [http://denverprocomp.org/stories.storyReader\\$33](http://denverprocomp.org/stories.storyReader$33) (last visited Apr. 29, 2007).

124. *See id.*

125. *See* Agreement Between School District No. 1 and the Denver Classroom Teachers Association: Professional Compensation System for Teachers, [http://denverprocomp.org/stories/storyReader\\$88](http://denverprocomp.org/stories/storyReader$88) (last visited Apr. 29, 2007).

Schools governed by the collective bargaining agreement. Pursuant to a memorandum of understanding between the district and the union, however, the teachers have flexibility concerning some provisions of the master collective bargaining agreement. The teachers created the I.D.E.A.L. Charter School Cooperative which they own and through which they control all professional aspects of the school.¹²⁶

*B. Why Are These the Exceptions Instead of the Rule:
The Role of Legal Doctrine*

The above examples have attracted considerable attention because they are the exceptions to the industrial labor relations model that dominates teacher union-school district relationships. The following Sections explore the law governing teacher collective bargaining and conclude that the law inhibits these exceptions from flourishing and spreading.

*1. The Basic Structure of the Law Governing
Teacher Collective Bargaining.*

At one time, courts upheld school district prohibitions on teachers belonging to labor unions.¹²⁷ It is now well-established, though, that such a prohibition violates the employee's First Amendment right to freedom of association.¹²⁸ The right to associate with a union, however, does not extend to a constitutional right to be represented by a union in an employer's own unilaterally-promulgated grievance system, even where the representation would be individual rather than collective.¹²⁹ A majority of the states and the District of Columbia have statutes giving all public employees the right to organize and bargain collectively.¹³⁰ Several other states have statutes

126. See *TEACHERS AS OWNERS*, *supra* note 36, at 63.

127. See, e.g., *Seattle High Sch. Chapter No. 200 v. Sharples*, 293 P. 994 (Wash. 1930); *People ex rel. Fursman v. City of Chicago*, 116 N.E. 158, 160 (Ill. 1917).

128. See, e.g., *Am. Fed'n of State, County, and Municipal Employees v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287, 288 (7th Cir. 1968).

129. See *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979).

130. The following jurisdictions have such comprehensive public sector labor relations statutes: Alaska, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont,

giving teachers the right to organize and bargain collectively, even though they do not have general public sector labor relations statutes.¹³¹ Some states, such as Arizona and Colorado, do not mandate that a public employer recognize and bargain with a representative selected by a majority of its employees but allow such bargaining at the employer's option.¹³² Other states, such as Virginia and North Carolina, prohibit public entities from recognizing or bargaining with employees' collective representatives.¹³³

Collective bargaining is more closely regulated in the public sector than in the private sector. Most public sector collective

Washington, and Wisconsin. ALASKA STAT. §§ 23.40.070-23.40.260 (2007); CAL. GOV. CODE §§ 3500-11, 3512-24, 3540-49, 3560-99, 71630-39, 71800-71829 (Deering 2007); CONN. GEN. STAT. §§ 5-270 to 5-280, 7-467 to 7-478, 10-153a to 10-153n (2006); DEL. CODE ANN. tit. 13, §§ 4001-19, tit. 19, §§ 1301-19, §§ 1601-18 (2007); D.C. CODE §§ 1-601.12 to 1-618.17 (2006); FLA. STAT. §§ 447.201-447.609 (2006); HAW. REV. STAT. §§ 89-1 to 89-20 (2006); 5 ILL. COMP. STAT. 315/1-315/27 (2007); 115 ILL. COMP. STAT. 5/1-5/21 (2007); IOWA CODE §§ 20.1-20.31 (2005); KAN. STAT. ANN. §§ 75-5410 to 72-5437, 75-4321 to 75-4337 (2006); ME. REV. STAT. ANN. tit. 26, §§ 961-74, 979 to 979S, 1021-36, 1281-94 (2006); MASS. GEN. LAWS ch. 150E, §§ 1-15 (2007); MICH. COMP. LAWS §§ 423.201-423.217 (2006); MINN. STAT. §§ 179A.01-179A.25 (2005); MONT. CODE ANN. §§ 39.31.101 to 39.31.409 (2005); NEB. REV. STAT. § 48-401 to 48-842 (2007); NEV. REV. STAT. § 288.010-288.280 (2006); N.H. REV. STAT. ANN. § 273-A:1 to 273-A:17 (2006); N.J. STAT. ANN. § 34:13A-1 to 34:13A-39 (West 2007); N.M. STAT. §§ 10-7E-1 to 10-7E-26 (2007); N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 2007); OHIO REV. CODE ANN. §§ 4117.01-4117.24 (LexisNexis 2006); OR. REV. STAT. §§ 243.650-243.782 (2006); 43 PA. CONS. STAT. §§ 1101.101-1101.2301 (2006); R.I. GEN. LAWS §§ 28-7-1 to 28-7-48 (2007); S.D. CODIFIED LAWS §§ 3-18-1 to 3-18-17 (2006); VT. STAT. ANN. 3, §§ 901-1007, 1010-43, tit. 16, §§ 1981-2027, tit. 21, §§ 1721-35 (2007); WASH. REV. CODE §§ 28B.41.56.101-28B.41.56.165, 28B.41.58.005-28B.41.58.901, 28B.41.59.001-28B.41.59.950, 28B.41.80.001-28B.41.80.910, 28B.52.010-28B.52.900, 28B.53.18.010-28B.53.18.060 (2007); WIS. STAT. §§ 111.70-111.77, 111.80-111.94 (2006).

131. Idaho, Indiana, Maryland, North Dakota, Oklahoma, and Tennessee follow this practice. IDAHO CODE ANN. §§ 33-1271 to 33-1276 (2006); IND. CODE §§ 20-7.5-1-1 to 20-7.5-1-14 (2006); MD. CODE ANN., EDUC. §§ 6-401 to 6-411, 6-501 to 6-510 (LexisNexis 2006); N.D. CENT. CODE §§ 15.1-16-01 to 15.1-16-20 (2006); OKLA. STAT. tit. 70, §§ 509.1-509.10 (2006); TENN. CODE ANN. §§ 49-5-601 to 49-5-613 (West 2006).

132. See *Bd. of Educ. v. Scottsdale Educ. Ass'n*, 498 P.2d 578 (Ariz. App. 1972) (holding that teacher unions and school boards may bargain collectively and may include in a collective bargaining agreement terms that would otherwise be included in a standard contract with an individual teacher but may not agree on impasse procedures for negotiation of a successor contract), *vacated on other grounds*, 509 P.2d 612 (Ariz. 1973); *Littleton Educ. Ass'n v. Arapahoe County Sch. Dist.*, 553 P.2d 793 (Colo. 1976). *But see Tucson Unified Sch. Dist. v. Tucson Educ. Ass'n*, 747 P.2d 602 (Ariz. 1987) (holding that collective bargaining agreement provision for resolving grievances by arbitration was not enforceable).

133. N.C. GEN. STAT. § 95-98 (2005); VA. CODE ANN. § 40.1-57.2 (2002).

bargaining statutes provide for mandatory impasse procedures that almost always include mediation and frequently include factfinding.¹³⁴ In some jurisdictions, teacher unions that reach bargaining impasses with school districts may compel factfinding but have no further recourse to additional procedures. In factfinding, a neutral third party conducts a hearing and issues findings of fact and recommendations for settlement, but either party is free to reject the recommendations. Because the employer controls terms and conditions of employment, it is free to reject the fact finder's recommendations and impose its own terms.¹³⁵ Other jurisdictions provide that bargaining impasses be resolved by binding arbitration.¹³⁶ A few jurisdictions give teachers a right to strike following exhaustion of specified impasse procedures, which in some of these jurisdictions include factfinding and rejection of the fact finder's recommendations.¹³⁷

2. *What the Law Requires School Districts to Negotiate*

Most states require school districts to bargain over "wages, hours and other terms and conditions of employment," a term of art developed under the NLRA.¹³⁸ Many states also have statutory management rights provisions exempting management functions from bargaining.¹³⁹ A few states, such as Iowa and Kansas, require bargaining over specified subjects, while permitting bargaining over non-specified subjects.¹⁴⁰

States whose statutes mandate bargaining over wages, hours and other terms and conditions of employment or states that couple such a general requirement with a management rights provision generally balance the employees' interests in

134. See generally JOSEPH R. GRODIN ET AL., *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* 326-29 (2004).

135. For a discussion of factfinding, see Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 325-27 (1993).

136. See *id.* at 330-35 (discussing interest arbitration).

137. See *id.* at 335-60 (discussing statutory right to strike in Illinois, Ohio, Oregon, and Pennsylvania).

138. See, e.g., ME. REV. STAT. ANN. tit. xxvi, § 979-D(1) (1988 & Supp. 2006); MICH. COMP. LAWS ANN. § 423.215 (West 2001 & Supp. 2006); WIS. STAT. ANN. § 111.70 (West 2002 & Supp. 2006).

139. See, e.g., 5 ILL. COMP. STAT. ANN. 315/4 (West 2005 & Supp. 2006); 43 PA. CONS. STAT. ANN. § 1101.702 (West 1991 & Supp. 2006).

140. See IOWA CODE ANN. § 20.9 (West 2001); KAN. STAT. ANN. § 75-4327(b) (1997).

negotiating working conditions against the impact of the issue on managerial prerogatives and public policy.¹⁴¹ These states express concern that, to the extent that a subject concerns issues of educational policy, mandating bargaining would intrude on nondelegable duties of the democratically elected and democratically accountable school board.¹⁴² As the Maryland Court of Appeals, in holding that school calendar and employee reclassifications are prohibited subjects of bargaining, explained:

Local [school] boards are state agencies, and, as such, are responsible to other appropriate state officials and to the public at large. Unlike private sector employers, local boards must respond to the community's needs. Public school employees are but one of many groups in the community attempting to shape educational policy by exerting influence on local boards. To the extent that school employees can force boards to submit matters of educational policy to an arbitrator, the employees can distort the democratic process by increasing their influence at the expense of these other groups.¹⁴³

The negotiability of numerous issues has been litigated under this rubric. The result has been an ad hoc approach that lacks predictability and encourages litigation. As the Massachusetts Court of Appeals candidly observed, "[A]ny attempt to define with precision and certainty the subjects about which bargaining is mandated . . . is doomed to failure."¹⁴⁴ What follows is a discussion of some of the more commonly litigated issues.

141. See, e.g., *San Jose Peace Officers Ass'n v. City of San Jose*, 144 Cal. Rptr. 638 (Ct. App. 1978); *West Hartford Educ. Ass'n v. DeCourcy*, 295 A.2d 526 (Conn. 1972); *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31 (Fla. 1992); *Central City Educ. Ass'n v. Ill. Educ. Labor Relations Bd.*, 599 N.E.2d 892 (Ill. 1992); *Montgomery County Educ. Ass'n v. Bd. of Educ.*, 534 A.2d 980 (Md. 1987); *City of Lynn v. Labor Relations Comm'n*, 681 N.E.2d 1234 (Mass. App. Ct. 1997); *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 621 P.2d 547 (Or. 1980); *City of Brookfield v. Wisc. Employment Relations Comm'n*, 275 N.W.2d 723 (Wisc. 1979).

142. See *supra* note 141.

143. *Montgomery County Educ. Ass'n*, 534 A.2d at 987 (citation omitted); see also *Appeal of the City of Concord*, 651 A.2d 944, 946 (N.H. 1994) (expressing similar concerns).

144. *City of Lynn*, 681 N.E.2d at 1237 (quoting Marc D. Greenbaum, *The Scope of Mandatory Bargaining Under Massachusetts Public Sector Labor Relations Law*, 72 MASS. L. REV. 102 (1987)).

Class Size: No issue better exemplifies the tension between teacher working conditions and public policy than the issue of class size. Class size directly relates to teacher work load, a basic working condition. However, much of the discussion over class size focuses not on appropriate work loads but on the educational costs and benefits of smaller class sizes. It costs money to reduce class size and thus issues of class size raise issues of educational policy in allocating resources. Will children benefit more from hiring additional staff to reduce class size or from other improvements, such as upgrading technology available in the classrooms?

Not surprisingly, jurisdictions are deeply divided over how to treat class size. How the balance is struck generally depends on who is reading the scales. For example, Connecticut, Illinois, and Maine have held that class size is a mandatory subject of bargaining.¹⁴⁵ Florida, Kansas, Massachusetts, Nebraska, New York, and Wisconsin have held it to be permissive.¹⁴⁶ New Jersey and South Dakota have held it to be prohibited,¹⁴⁷ and, in the 1990s, as developed below, several states amended their statutes to prohibit or restrict bargaining on class size.

School Calendar: *Racine Education Association v. Wisconsin Employment Relations Commission*¹⁴⁸ vividly illustrates the tensions between competing interests that courts balance in deciding whether to mandate bargaining over school calendars. At issue was the school district's decision to move from a nine-month to a year-round school calendar. Such an issue clearly raises ques-

145. *W. Hartford Educ. Ass'n v. DeCourcy*, 295 A.2d 526 (Conn. 1972); *Decatur Bd. of Educ. v. Ill. Educ. Labor Relations Bd.*, 536 N.E.2d 743 (Ill. App. Ct. 1989); *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387 (Me. 1973).

146. *Hillsborough Classroom Teachers Ass'n v. Sch. Bd.*, 423 So. 2d 969 (Fla. Dist. Ct. App. 1982); *Riley County Educ. Ass'n v. Unified Sch. Dist.* 501, 592 P.2d 92 (Kan. 1979); *Boston Teachers Union v. Sch. Comm.*, 350 N.E.2d 707 (Mass. 1976); *Seward Educ. Ass'n v. Sch. Dist.*, 199 N.W.2d 752 (Neb. 1972); *W. Irondequoit Teachers Ass'n v. Helsby*, 315 N.E.2d 775 (N.Y. 1974); *City of Beloit v. Wisc. Employment Relations Comm'n*, 242 N.W.2d 231 (Wisc. 1976).

147. *Dunnellen Bd. of Educ. v. Dunnellen Educ. Ass'n*, 311 A.2d 737 (N.J. 1973); *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.*, 215 N.W.2d 837 (S.D. 1974). Subsequently, the South Dakota Supreme Court held that the approach taken in *Aberdeen* defined mandatory subjects of bargaining too narrowly, although the court has not overruled the specific holding of *Aberdeen* that bargaining over class size is prohibited. Indeed, the court has indicated that it agrees with the general approach followed in New Jersey, which, as applied by the New Jersey Supreme Court, found class size to be a prohibited subject. See *Rapid City Educ. Ass'n v. Rapid City Area Sch. Dist.* 51-4, 376 N.W.2d 562 (S.D. 1985).

148. 571 N.W.2d 887 (Wisc. Ct. App. 1997).

tions of educational policy and significantly impacts teachers' working conditions. The Wisconsin Court of Appeals affirmed a decision by the Wisconsin Employment Relations Commission, which struck the balance against mandating bargaining, determining that this issue was a matter of educational policy on which the school board should enjoy unilateral control.¹⁴⁹

States are divided on whether bargaining on this topic is permissible. In Maryland, bargaining over the school calendar is prohibited.¹⁵⁰ On the other hand, in Connecticut, the number of teacher student contact days and number of teacher work days are mandatory subjects.¹⁵¹

Other states have not dealt with issues relating to the school calendar in such all-or-nothing ways. California initially distinguished between the student calendar, which it held was not a mandatory subject of bargaining,¹⁵² and the teacher work calendar, which it held was a mandatory subject.¹⁵³ However, the California Public Employment Relations Board (PERB) appeared to collapse that distinction in *Poway Federation of Teachers, Local 2357 v. Poway Unified School District*.¹⁵⁴ In *Poway*, the school board unilaterally implemented a student school calendar, setting student attendance days and school district holidays, while purporting to continue negotiating with the union over the teacher work calendar. The PERB held, however, that by setting the student calendar, the district effectively set the teacher work calendar.¹⁵⁵ It distinguished its earlier decision as a case where the calendar set as the student calendar was expressly marked tentative and subject to revision after negotiations with the teachers' union.¹⁵⁶

The Indiana Court of Appeals has held that such matters as the date of the first day of school, dates when students will attend school for half days while teachers attend for full days, starting and ending dates of winter and spring breaks, holiday

149. *Id.* at 891–92.

150. *Montgomery County Educ. Ass'n v. Bd. of Educ.*, 534 A.2d 980 (Md. 1987).

151. *State v. Bd. of Labor Relations*, 8 Conn. L. Rptr. 210, 1993 WL 7261 (Super. Ct. 1993).

152. *Compton Cmty. Coll. Fed'n of Employees v. Compton Cmty. Coll. Dist.*, 14 Pub. Emp. Rep. Cal. (LRP) ¶ 21051 (Cal. PERB 1990).

153. *Davis Joint. Unified Sch. Dist.*, 9 Pub. Emp. Rep. Cal. (LRP) ¶ 16045 (Cal. PERB 1984).

154. 25 Pub. Emp. Rep. Cal. (LRP) ¶ 32060 (Cal. PERB 2001).

155. *Id.* at 226.

156. *Id.* at 225–26.

recesses, the closing of schools for a conference on instruction and the last day of pupil attendance are encompassed within the school board's exclusive managerial power, thereby indicating that bargaining on such matters is prohibited.¹⁵⁷ However, it has also held that make-up days and extra compensation for teaching on make-up days are permissive subjects of bargaining.¹⁵⁸

Teacher Evaluations: Teacher evaluations raise similar conflicts as class size and school calendar. Evaluations can affect job security, pay, and assignments. However, how evaluations are conducted also raises questions of educational policy. Connecticut, Maine, and New Hampshire have held that evaluation programs are a permissive subject of bargaining.¹⁵⁹ Kansas distinguishes between evaluative criteria, which it has held do not require bargaining and evaluation procedures on which it has required bargaining.¹⁶⁰

Miscellaneous Other Subjects: Courts and labor boards have confronted a wide diversity of other subjects in which employees' rights to bargain collectively are in tension with school board prerogatives to set policy. In the private sector, rules barring smoking in the workplace are clearly a matter of working conditions that must be bargained. Even in the public sector, the tendency is to require bargaining. Thus, even the U.S. Department of Health & Human Services was required to bargain with the unions representing its workers over a ban on smoking.¹⁶¹ Connecticut and Vermont, however, have refused to require bargaining over smoking prohibitions in public education.¹⁶² They reason that smoking bans are matters of working

157. *Ind. Educ. Employment Relations Bd. v. Highland Classroom Teachers Ass'n*, 546 N.E.2d 101 (Ind. Ct. App. 1989).

158. *Halley v. Bd. of Sch. Trustees of Blackford County Sch. Corp.*, 531 N.E.2d 1182 (Ind. Ct. App. 1988); *Union County Sch. Corp. v. Ind. Educ. Employment Relations Bd.*, 471 N.E.2d 1191 (Ind. Ct. App. 1984).

159. *Wethersfield Bd. of Educ. v. State Bd. of Labor Relations*, 519 A.2d 41 (Conn. 1986); *In re Pittsfield Sch. Dist.*, 744 A.2d 594 (N.H. 1999); *Saco-Valley Teachers Ass'n v. MSAD 6*, No. 79-56 (Me. L.R.B. Aug. 7, 1979).

160. *See Unified Sch. Dist. No. 314 v. Kan. Dept. of Human Res.*, 856 P.2d 1343 (Kan. 1993); *Unified Sch. Dist. No. 352 v. NEA-Goodland*, 785 P.2d 993 (Kan. 1990).

161. *Dept. of Health & Human Servs. v. Fed. Labor Relations Auth.*, 920 F.2d 45 (D.C. Cir. 1990).

162. *Local 1186 of Council 4 v. Conn. St. Bd. of Lab. Rel.*, 5 Conn. L. Rptr. 738 (Super. Ct. 1991); *Mt. Abraham Educ. Ass'n v. Mt. Abraham Union High Sch. Bd. of Sch. Dires.*, 4 Vt. L.R.B. 224 (1981).

conditions but on balance the employer need not bargain a decision to ban smoking because of its educational policy to set an example for students showing that smoking is undesirable.

Merit pay has been argued to be a matter of educational policy. However, the Maine Labor Relations Board has held it to be a mandatory subject for bargaining.¹⁶³ Similarly, the Nebraska Supreme Court has held that signing bonuses for teachers must be negotiated.¹⁶⁴

Length of the work day has produced conflicting results. The Vermont Labor Relations Board has required bargaining.¹⁶⁵ On the other hand, the South Dakota Supreme Court has held that setting maximum student contact hours is a prohibited subject of bargaining.¹⁶⁶

3. *Legislative Backlash Against Teacher Bargaining*

The law has largely confined unions to a role of negotiating contracts that protect their members from the impact of management decisions. Overall, most teacher unions have performed very well in that role. In some cases, this excellent performance has resulted in major legislative backlash against teacher collective bargaining.

The 1990s saw a significant amount of backlash against teacher collective bargaining. In 1994, Michigan enacted P.A. 112. The statute was a reaction to Michigan court decisions that made it extremely difficult to enjoin a public employee strike,¹⁶⁷ even though strikes by public employees were illegal.¹⁶⁸ P.A. 112 added mandatory fines against striking teachers and their unions, prohibited strikes over unfair labor practices and mandated that courts enjoin teacher strikes.¹⁶⁹ The act also prohib-

163. *Gray-New Gloucester Teachers Ass'n v. MSAD 15*, No. 85-01 (Me. L.R.B. Oct. 11, 1984).

164. *See Crete Educ. Ass'n v. Saline County Sch. Dist.*, 654 N.W.2d 166, 179 (Neb. 2002).

165. *Castleton Educ. Ass'n v. Castleton-Hubbardton Bd. of Sch. Dirs.*, 13 Vt. L.R.B. 60 (1990).

166. *Rapid City Educ. Ass'n v. Rapid City Area Sch. Dist.* No. 51-4, 376 N.W.2d 562, 563-65 (S.D. 1985).

167. *See, e.g., Sch. Dist. v. Holland Educ. Ass'n*, 157 N.W.2d 206, 211 (Mich. 1968).

168. MICH. COMP. LAWS ANN. § 423.202 (West 2001).

169. *Id.* § 423.202(a). The requirement that courts automatically enjoin teacher strikes was struck down as a breach of the separation of powers between the legislature and the courts and apparently is now of no effect. *See Andrew Nickelhoff*,

ited bargaining on the identity of a school district's group insurance carrier, the starting day of the school term and the amount of required pupil contact time, composition of site-based decision-making bodies, decisions whether to provide interdistrict or intradistrict open enrollment opportunities, the decision to operate a charter school, the decision to contract out noninstructional support services, the decision to use volunteers for any services, and decisions to use instructional technology on a pilot basis.¹⁷⁰ Most of these subjects had been held to be mandatory subjects of bargaining by the Michigan courts and the Michigan Employment Relations Commission.¹⁷¹

Contemporary media commentary suggests that the act was a backlash aimed primarily at the Michigan Education Association (MEA).¹⁷² In urging support for the bill, the *Grand Rapids Press* editorialized that the MEA's

longstanding stranglehold on the bargaining process has given Michigan teachers a Rolls-Royce health-insurance plan, some of the highest school salaries in the country and virtual immunity from the state law forbidding public employee strikes. A consequence is that Michigan school costs from 1980 through '92 rose an average of 8.1 percent a year, with the difference being passed along to citizens in their property-tax bills.¹⁷³

It applauded that under the act "school boards could no longer be bullied into buying the insurance through the MEA's subsidiary."¹⁷⁴ A stated rationale for restricting these subjects of bargaining was to prevent ensuing disputes from creating an impasse in negotiations.¹⁷⁵

Around the same time, legislative backlash against teacher bargaining also arose in Oregon. The Oregon Court of Appeals held

Marching Headlong into the Past: 1994 PA 112 and the Erosion of School Employee Bargaining Rights, 74 MICH. B. J. 1186, 1188 (1995).

170. MICH. COMP. LAWS ANN. § 423.215(3) (West 2001).

171. See Nickelhoff, *supra* note 169, at 1188.

172. See, e.g., John Foren, *Engler-GOP Drive to Cut School Costs Aims at MEA*, GRAND RAPIDS PRESS, Mar. 19, 1994, at A1.

173. Editorial, *Senate's Turn on School Costs House-Passed Bill Shifts Control from MEA to Taxpayers, Boards*, GRAND RAPID PRESS, Apr. 19, 1994, at A8.

174. *Id.*

175. See Michael Matheson, Note, *Have Michigan Public School Teachers Lost Their Ability to Strike Under 1994 PA 112?*, 75 U. DET. MERCY L. REV. 415, 430 (1998).

that class size was a mandatory subject of bargaining.¹⁷⁶ A few years later, the legislature amended the Oregon statute to exclude from mandatory subjects of bargaining:

class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st Century Schools Councils¹⁷⁷

In Illinois, where strikes by public employees other than law enforcement personnel and firefighters are lawful, the 1995 Chicago School Reform Act prohibited strikes against the Chicago Public Schools and the City Colleges of Chicago for a specified period of time.¹⁷⁸ The statute also prohibited decision and impact bargaining on the following subjects: charter school proposals and leaves of absence to work for a charter school, subcontracting, layoffs and reductions in force, class size, class staffing and assignment, class schedules, academic calendar, hours and places of instruction, pupil assessment policies, use and staffing of pilot programs, and use of technology and staffing to provide technology.¹⁷⁹ Contemporary media accounts suggest that the restrictions on bargaining were aimed at the Chicago Teachers Union.¹⁸⁰ In 2003, after Democrats were elected to majorities in both houses of the legislature and after a Democrat was elected governor, the Chicago School Reform Act was amended to make these subjects permissive subjects of bargaining.¹⁸¹

Similar school reform legislation in Pennsylvania limited collective bargaining rights. Under Act 46, enacted in 1998, whenever the Philadelphia school system is found to be in financial distress, bargaining may not be required over subcontracting,

176. See *Tualatin Valley Bargaining Council v. Tigard Sch. Dist.* 23J, 808 P.2d 101 (Or. Ct. App. 1991), *rev'd and remanded*, 840 P.2d 657 (Or. 1992).

177. OR. REV. STAT. § 243.650(e) (2005).

178. Illinois Educational Labor Relations Act. Ill. Public Act 89-15, § 10 (codified at 115 Ill. Comp. Stat 5/13(a) (2006)) (effective May 30, 1995).

179. See 115 ILL. COMP. STAT. 5/4.5 (1997) (effective May 30, 1995).

180. See, e.g., Doug Finke & Amy E. Williams, *GOP Plan for Chicago Schools Takes Aim at Union*, ST. JOURNAL-REGISTER, May 11, 1995, at 1.

181. 115 ILL. COMP. STAT. 5/4.5 (2005) (effective Apr. 16, 2003).

reductions in force, staffing patterns, assignments, class schedules, school calendar, pupil assessment, teacher preparation time, experimental programs, charter schools and use of technology.¹⁸²

4. *The Inhibiting Effects of Current Legal Doctrine on the Attainment of High Performance Educational Workplaces*

In high performance workplaces, employees take responsibility for decision making within their areas of expertise. They invest in and assume responsibility for the risks of the enterprise and share in its rewards. Under current legal doctrine, however, traditional collective bargaining is not a likely vehicle for giving teachers a meaningful voice in educational policy. Courts and labor boards balance teacher interests in wages and working conditions against school board interests in setting educational policy in deciding whether to compel bargaining on a given issue. To gain the right to bargain a particular issue, teachers must, therefore, emphasize their traditional bread-and-butter interests in the issue and de-emphasize the educational policy aspects of the issue. Thus, where teachers have been able to compel bargaining over class size, they have done so by situating it as an issue of teacher workload, regardless of whether their motivation is to gain a voice in the educational policy concerns involved in setting class size. This emphasis on the bread-and-butter aspects of such issues can fuel political backlash, since it appears that teacher unions advocate only the personal interests of their members regardless of educational policy, leading to legislative efforts to curtail bargaining where it has occurred.

Furthermore, many issues of educational policy are simply not amenable to characterization in terms of traditional bread-and-butter concepts of wages and working conditions. In such cases, teacher arguments for bargaining are dismissed out-of-hand without resort to balancing competing interests at all. For example, in *Madison Teachers, Inc. v. Wisconsin Employment Relations Commission*,¹⁸³ the Wisconsin Court of Appeals held that a requirement that teachers call parents during the first two

182. See David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J.L. & EDUC. 275, 295 (2001).

183. 580 N.W.2d 375 (Wisc. Ct. App. 1998).

weeks of the school year was not a mandatory subject of bargaining because it had no impact on teachers wages, hours, or working conditions. Consequently, the court found it unnecessary to balance teacher interests in bargaining the subject against educational policy concerns. More significant policy issues on which teachers seek a voice, such as curriculum reform, pupil assessment, social promotion policies, and allocation of resources for providing remedial assistance, will never enter the balancing process because they cannot be characterized in terms of traditional bread-and-butter issues of wages and working conditions. Innovations that teachers may seek to press, such as peer review, will run into doctrines that the hiring, evaluation, and retention of teachers are nondelegable duties of the school board.

Under current legal doctrine, if a matter is not a mandatory subject of bargaining, the employer is under no legal obligation to give teachers a voice. The employer need not furnish information concerning the subject to the union.¹⁸⁴ The employer may make and implement decisions unilaterally and thus may deal with whatever select group of employees it desires.¹⁸⁵

The 1996 report of the Secretary of Labor's Task Force¹⁸⁶ described how this legal doctrine inhibits movement toward a high performance workplace. The task force observed:

Because it affects the capacity of an agency or jurisdiction to improve service, the clearest need is for workers, managers, and union leaders to be able to discuss the full range of issues affecting the service they are working to improve. In a traditional labor-management relationship characterized by formal or legalistic approaches, such discussion often is precluded by concerns over setting precedents that might lead to giving up prerogatives.¹⁸⁷

The law thus inhibits the transition to a high performance educational workplace by diverting attention from harnessing

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

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

186. WORKING TOGETHER FOR PUBLIC SERVICE: REPORT OF THE U.S. SECRETARY OF LABOR'S TASK FORCE ON EXCELLENCE IN STATE AND LOCAL GOVERNMENT THROUGH LABOR-MANAGEMENT COOPERATION (1996) [hereinafter WORKING TOGETHER].

187. *Id.* at 65.

teachers' talents and expertise and focusing attention on setting precedents and relinquishment of managerial prerogatives. The inhibiting nature of existing legal doctrine goes beyond the effects recognized by the Secretary's Task Force. Parties naturally internalize the legal model in their relationships. Consequently, teacher unions tend to limit their focus to protecting their members from the risks created by managerial decision making instead of sharing in the risks of the organization and becoming agents for positive change. Such an approach is politically safer for union leaders. For example, it is much easier to negotiate percentage increases to a uniform salary grid than to participate in an assessment of personnel needs and negotiate incentives that better meet those needs.

V. LABOR LAW DOCTRINE AND CHARTER SCHOOLS

In light of the role that the law has caused most teacher unions to play, it is not surprising that most teachers in charter schools do not see their unions as relevant to their working lives.¹⁸⁸ In this Part, we consider whether collective representation can serve as a vehicle for teacher voice in the high performance educational workplace that the charter school model envisions.

A. *Which Law Governs: State Law or the NLRA?*

In traditional public schools, the law diverts teacher and school district energy away from creatively solving educational problems toward legal fights over characterization of subjects of bargaining. In charter schools, the diversion of energy may be worse. Because many charter schools are chartered to a not-for-profit corporation and are run by the corporation's board of directors, a threshold legal issue is whether the charter school is considered to be a private sector employer, subject to the National Labor Relations Act (NLRA), or a public employer governed by state law. The NLRA excludes from its coverage "the United States or any wholly owned Government Corporation, or any Federal Reserve Bank, or any State or political subdivision thereof."¹⁸⁹

188. See *supra* notes 84–86 and accompanying text.

189. 29 U.S.C. § 152(2) (2000).

In *NLRB v. Natural Gas Utility District*,¹⁹⁰ the Supreme Court found that a public utility district organized under the Tennessee Utility District Law of 1937 was a subdivision of the State of Tennessee and therefore exempt from NLRA coverage. The Court emphasized that the district was administered by a board appointed by a county judge; was subject to removal for misfeasance or nonfeasance upon petition by the governor, attorney general, county prosecutor or ten citizens; had the power of eminent domain; was subject to Tennessee public records laws; had subpoena powers; and served for nominal compensation.¹⁹¹

The narrowness of the political subdivision exemption is illustrated by the Seventh Circuit Court of Appeals' decision in *NLRB v. Kemmerer Village, Inc.*¹⁹² Kemmer Village operated a foster home that depended on the Illinois Department of Children and Family Services for three-fourths of its revenue. The court rejected out of hand the employer's contention that it was an exempt political subdivision:

The state did not create or acquire Kemmerer; it is not organized as a municipal corporation or other public entity; it is heavily subsidized by the state but if *that* is the criterion then every tobacco farmer in the nation is a political subdivision. . . . The gas distributor held to be a political subdivision in *NLRB v. Natural Gas Utility District* could have been classified either way, but apparently what was decisive was that the power to appoint its governing board had been lodged in a public official.¹⁹³

At times, the NLRB has recognized a related exemption that turns on the relationship between a private entity and an exempt public entity. In *Rural Fire Protection Co.*,¹⁹⁴ decided in 1975, the Board held that it would not assert jurisdiction over a private entity if that entity's operation was intimately related to a government function or if it did not retain sufficient control

190. 402 U.S. 600 (1971).

191. *Id.* at 605–09.

192. 907 F.2d 661 (7th Cir. 1990).

193. *Id.* at 662–63 (citation omitted). On the other hand, a divided NLRB recently held that the New Mexico State Bar was an exempt political subdivision of the state, even though it was a not-for-profit corporation whose governing board was elected by the organization's members. The NLRB majority relied on the State Bar's creation by the New Mexico Supreme Court and the court's ultimate authority over its budget. *State Bar of New Mexico*, 346 N.L.R.B. No. 64 (Mar. 24, 2006).

194. 216 N.L.R.B. 584 (1975).

over its employees' terms and conditions of employment to be capable of effective collective bargaining. Four years later, the Board abandoned the intimate relationship test and held it would only hold private entities exempt if they had insufficient control over their employees' terms and conditions of employment.¹⁹⁵ In 1986, in *Res-Care, Inc.*,¹⁹⁶ the Board clarified that in determining whether meaningful collective bargaining was possible, it would examine not only the employer's control over essential terms and conditions of employment but also the control exercised by the governmental entity over the employer's labor relations.¹⁹⁷ Nine years later, in *Management Training Corp.*,¹⁹⁸ the Board overruled *Res-Care* and held that it would recognize no exemption beyond the express statutory exemption for political subdivisions of a state.

The Supreme Court has not considered whether a not-for-profit corporation operating a school closely connected with a public entity is a public entity exempt from the NLRA. However, it has considered whether such an entity's conduct constitutes state action for constitutional purposes. In *Rendell-Baker v. Kohn*,¹⁹⁹ several former teachers and a former vocational counselor sued a nonprofit school for maladjusted high school students alleging that their discharges were in retaliation for their exercise of their First Amendment right of free speech and deprived them of property without due process of law in violation of the Fourteenth Amendment. The school specialized in educating students with drug, alcohol, or behavioral problems or other special needs that impeded their completing high school. It received all of its students through referrals by the Boston or Brookline Massachusetts school districts or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. None of the students paid tuition. The school was subject to extensive regulation by the Commonwealth of Massachusetts and issued high school diplomas which were certified by the Brookline school district.²⁰⁰ The Court held that the school was not a governmental

195. *Nat'l Transp. Serv., Inc.*, 240 N.L.R.B. 565 (1979).

196. 280 N.L.R.B. 670 (1986).

197. *Id.* at 672.

198. 320 N.L.R.B. 131 (1995).

199. 457 U.S. 830 (1982).

200. *Id.* at 832-33.

actor and therefore was not subject to the First and Fourteenth Amendments or 42 U.S.C. § 1983.²⁰¹

The Court observed that the school's dependence on the government for its funding did not make it a state actor. In this regard, it considered the school no different from other private corporations whose business depends primarily on government construction contracts but who clearly were not government actors.²⁰²

The Court similarly rejected the contention that the extensive governmental regulation to which the school was subject rendered it a governmental actor. The Court reasoned that even extensive and detailed regulation does not convert a private entity into a governmental one and observed that the government exercised only minimal control over the school's personnel decisions.²⁰³

The Court acknowledged that the school performed a public function, that is, providing free education to maladjusted high school students.²⁰⁴ But it held that for a public function to render a private entity a state actor, the function must be one that has been the exclusive province of the government. The services that the school provided fell short of meeting this test.²⁰⁵

Finally, the Court rejected the argument that the school and the government had a symbiotic relationship. The Court again relied on the comparability of the school's dependence on public funding to construction contractors whose primary business was road construction or other government controlled projects.²⁰⁶

A divided First Circuit Court of Appeals expanded the reach of *Rendell-Baker* in *Logiodice v. Trustees of Maine Central Institute*.²⁰⁷ A school district operated its own schools for kindergarten through eighth grade but did not operate a high school. Instead, it contracted with Maine Central Institute (MCI), a privately operated high school in the district. The contract obligated MCI to accept and educate all of the district's ninth-through twelfth-grade students in exchange for tuition pay-

201. *Id.* at 840–43.

202. *Id.* at 840–41.

203. *Id.* at 841–42.

204. *Rendell-Baker*, 457 U.S. at 842.

205. *Id.*

206. *Id.* at 842–43.

207. 296 F.3d 22 (1st Cir. 2002).

ments made by the district.²⁰⁸ The parents of a student who had been suspended for seventeen days sued contending that the suspension deprived their child of liberty without due process of law in violation of the Fourteenth Amendment.²⁰⁹

By a two to one vote, the court held that MCI was not a state actor and therefore was not subject to the constraints of the Fourteenth Amendment.²¹⁰ The court reasoned that providing education, while a public function, was not exclusively a public function.²¹¹ The parents argued that MCI not only provided education, but, because the school district did not operate a high school, MCI was the high school of last resort for students in the district and, accordingly, performed an exclusive public function. The court majority rejected this argument as unsupported by the history of education in Maine, noting that before public high schools became widespread, private schools received public funds and were the only source of secondary education in the state.²¹²

The court also rejected the parents' contention that MCI was so entwined with the school district that its actions were clothed with the governmental nature of the school district. The court emphasized that MCI was governed by a private board of trustees, not by public officials, and that the private trustees had the authority to promulgate, administer, and enforce rules relating to student behavior.²¹³ The presence of a joint committee of three MCI trustees and three school board members did not change the outcome because the committee acted only in an advisory capacity.²¹⁴

A federal district court declined to apply *Logiodice* to an Ohio charter school in *Riester v. Riverside Community School*.²¹⁵ The court held that, although it was a private corporation, the school was subject to suit by a former teacher who alleged that her termination was retaliation for her exercise of her First Amendment right to free speech.²¹⁶ The court observed that the

208. *Id.* at 24–25.

209. *Id.* at 25.

210. *Id.* at 28.

211. *Id.* at 26–27.

212. *Logiodice*, 296 F.3d at 25.

213. *Id.* at 27–28.

214. *Id.* at 28.

215. 257 F. Supp. 2d 968 (S.D. Ohio 2002).

216. *Id.* at 971.

Ohio statute declared that charter schools were public schools and part of the state's program of public education.²¹⁷ The court further reasoned that the charter school provided free public education, a function that historically was the exclusive function of government in Ohio.²¹⁸ The declaration contained in the Ohio charter school statute and the status of free public education in Ohio, in the court's view, distinguished the case from *Logiodice*.²¹⁹ Read together, *Logiodice* and *Riester* suggest that whether a not-for-profit corporation operating a charter school will be considered a state actor may turn on the history of the provision of free education in the particular state in which the school operates.

The NLRB's approach to coverage of nominally private schools appears analogous to the courts' approach to coverage of those schools under the Constitution and section 1983. For example, in *Krebs School Foundation, Inc.*,²²⁰ the Board held that a private nonprofit corporation that operated a school providing special education services was an employer under the NLRA. The school received 90 percent of its students from contracts with public school districts, and a Massachusetts statute set its tuition rates, student-faculty ratio, curriculum, and health and safety requirements. However, the Board found that the school was not required to accept every student referred to it, and the government did not dictate the school's facilities, hours of operation, personnel policies, salaries, or day-to-day operations.²²¹

In *C. I. Wilson Academy, Inc.*,²²² a National Labor Relations Board administrative law judge (ALJ) held that an Arizona charter school was a private employer subject to the NLRB's jurisdiction. The school was chartered by the State Board of Education as a private, not-for-profit corporation. The school's incorporator controlled the composition of the school's board of directors and controlled decisions to hire and discharge the school's officers and employees. The ALJ concluded that no individual or group of individuals involved in the school's administration were responsible to the general electorate. He further surveyed the relationship between the school and the

217. *Id.* at 972.

218. *Id.*

219. *Id.* at 973.

220. 243 N.L.R.B. 514 (1979).

221. *Id.* at 514–15.

222. 2002 WL 1880478 (NLRB A.L.J. July 31, 2002).

State Board of Education and concluded that the State Board's functions were regulatory in nature and that the Board was not involved in overseeing the implementation of the school's operational policies.²²³

The California Public Employment Relations Board (PERB) regional director distinguished *C. I. Wilson* in holding that a charter school was a public school employer subject to PERB's jurisdiction in *Options for Youth-Victor Valley, Inc.*²²⁴ The school argued that it was subject to NLRB jurisdiction and not to PERB jurisdiction because it was a private corporation, whose day-to-day operations were controlled by a board of directors who were not public officials. The regional director, however, looked to a California statute and a California appellate court decision which, in upholding the constitutionality of the California charter school statute, opined that charter schools in California are responsible to and depend for their continued existence on the public body that grants the charter. In the absence of the statute and the continuing approval of the chartering body, the charter school could not exist. Furthermore, the regional director observed, the charter itself declared that the school was the public employer of the school's employees for purposes of collective bargaining and that the school would be deemed a school district for purposes of the California Education Code. The regional director concluded that the school was a public employer subject to the California Education Employment Relations Act and was also a political subdivision of the state.²²⁵

However, the reach of *C. I. Wilson* may not be limited to Arizona. For example, the District of Columbia charter school statute expressly declares that employees of charter schools shall not be considered to be employees of the D.C. Public Schools or the D.C. government.²²⁶ Although the Florida charter schools statute declares that all charter schools are part of the state's program of public education and are public schools,²²⁷ it further

223. *Id.*

224. 27 Pub. Emp. Rep. Cal. (LRP) ¶ 104 (Cal. PERB Reg. Dir. 2003).

225. *Id.* at 574-75; see also *Innovative Teaching Solutions*, N.L.R.B. Gen. Couns. Adv. Mem. 7-CA-49061 (Feb. 15, 2006) (opining that a for profit educational service provider was an exempt political subdivision because of the degree of control that public bodies exercised over its personnel and budget).

226. D.C. CODE ANN. § 38-1702.08(d) (Lexis Nexis 2001).

227. FLA. STAT. ANN. § 1002.33(1) (West 2004).

provides that a charter school may be a public or private employer depending on the nature of the entity that operates it.²²⁸ The Florida Attorney General has advised that the Florida charter school statute does not invest members of a charter school's governing body with powers and authority that would make them public officers.²²⁹ Consequently, the Florida Constitution's prohibition of one person holding two public offices at the same time does not prohibit a county commissioner from serving on a charter school governing board.²³⁰ Thus, charter schools in jurisdictions such as the District of Columbia and Florida may be subject to NLRB jurisdiction.

In contrast, the Massachusetts statute declares that charter school employees are public employees for collective bargaining purposes²³¹ and provides that the school's board of trustees are considered to be public agents.²³² The Idaho statute contains a similar declaration,²³³ and the Idaho Supreme Court has ruled that a charter school is a public school and therefore may not sue a former employee for defamation.²³⁴

The Delaware Charter School Act of 1995 declares that charter school employees are covered by the state's Public School Employment Relations Act,²³⁵ but at least one commentator has questioned whether charter schools in Delaware are indeed public bodies and whether their employees are public employees.²³⁶ This commentator has noted that Delaware charter schools are organized and managed under the Delaware General Corporation Law, board members are not elected or appointed by a public official, and the only accoutrements of public employment are a declaration that employees are subject to the public employee collective bargaining statute and a provision allowing charter schools to opt into coverage by the state pension plan. If Delaware charter schools and their employees are considered to be non-public, the National Labor Relations

228. *Id.* § 1002.33(12)(i).

229. Op. Fla. Att'y Gen. No. AGO 98-48 (July 31, 1998).

230. *Id.*

231. MASS. GEN. LAWS ANN. ch. 71, § 89(aa) (West 2002).

232. *Id.* § 89(a).

233. IDAHO CODE ANN. § 33-5204 (2006).

234. *Nampa Charter Sch., Inc. v. Delapaz*, 89 P.3d 863 (Idaho 2004).

235. DEL. CODE ANN. tit. xiv, § 507(c) (1999).

236. Kathi A. Karsnitz, *Charter Schools: Mile Markers on the Road of Reform or a Dead End for Public Education?*, DEL. LAW., Winter 1998/1999, at 5, 9-10.

Act would preempt the application of the state public school collective bargaining statute.

Thus, depending on the state, teachers and charter schools continue to fight the threshold issue of which law should govern when teachers organize collectively. The stakes will be high. In states that lack public teacher bargaining laws, NLRA coverage will be the only source of teacher collective rights. NLRA coverage will mean a right to strike and a broader scope for bargaining. Issues such as class size, teacher evaluations, tenure standards, student contact hours, and smoking prohibitions, when viewed through a private sector labor law lens, are straightforward working conditions and clearly mandatory subjects of bargaining. NLRA coverage, however, also signifies a broader classification of excluded managers. The complexity of the law almost guarantees a major diversion of energy and resources away from collective problem solving.

B. Charter School Teacher Representation Under State Law

The states that provide for a right to organize and bargain collectively employ a diversity of approaches to charter school employee collective bargaining rights. Some states provide that all or some charter schools are governed by an existing school district collective bargaining agreement.²³⁷ Some provide varying ways in which the charter school and its teachers may opt out of the existing contract.²³⁸ There is confusion in state statutes concerning the appropriate bargaining unit for charter school teachers, with some declaring that charter schools are separate bargaining units,²³⁹ while others base the bargaining unit on the charter school's pedigree.²⁴⁰

Examples of particular complexity may be found in California and Florida. In California, the PERB interpreted the state's charter school statute as exempting charter schools from the

237. See ALASKA STAT. § 14.03.270(b) (2006); LA. REV. STAT. ANN. § 17:3996(D) (2006); MICH. COMP. LAWS ANN. § 380.502(3)(i) (West 2001).

238. See, e.g., CONN. GEN. STAT. § 10-66dd(4) (2005), MD. CODE ANN., EDUC. § 9-108(a)(2), (b) (2006), MASS. GEN. LAWS ch. 71, § 89(u) (2004), N.Y. EDUC. LAW § 2854(3)(b) (2006).

239. See, e.g., DEL. CODE ANN. tit. xiv, § 507(b) (1999), MINN. STAT. ANN. § 124D.10(21) (2006), N.H. REV. STAT. ANN. § 194-B:14(II)(b), (e) (2006), 24 PA. CONS. STAT. ANN. § 17-1724-A(a) (West 996), TENN. CODE ANN. § 49-13-118 (2002).

240. See, e.g., N.J. STAT. ANN. § 18A:36A-14(b) (West 1999 & Supp. 2006), N.Y. EDUC. LAW § 2854(3)(b), (b-1) (2006).

state's collective bargaining law.²⁴¹ This holding prompted an amendment to the statute, which now provides that the charter must declare whether the charter school is deemed the exclusive public employer of the school's employees. If the charter does not declare the school to be the employer, then the school district in which the charter school is located is the employer.²⁴² Thus, whether employees of a charter school are covered under an existing collective bargaining agreement depends on the declaration in the charter.

The Florida statute vests some of these complicated decisions in charter school employees. The statute provides that "[c]harter school employees shall have the option to bargain collectively," and that they may "bargain as a separate unit or as part of the existing district collective bargaining unit as determined by the structure of the charter school."²⁴³ It further provides that employees of an existing public school converted to charter status "remain public employees for all purposes, unless such employees choose not to do so."²⁴⁴ Furthermore, the statute enables teachers at a charter school to form a partnership or cooperative and enter into a contract with the school to operate its instructional program and declares that under those circumstances the teachers are not public employees.²⁴⁵

Thus, existing legal doctrine provides many arenas in which charter schools and teachers seeking a collective voice may battle over legal formalisms. They may fight over which law governs, over the composition of the bargaining unit, over whether existing contracts apply, and finally over the complex determination of whether particular matters are subject to negotiation.

By unshackling schools from the bureaucratic control of school district hierarchies and restrictive work rules, charter schools sought to create high involvement work places. Instead of creating professional communities, however, charter school advocates have fashioned a legal and policy environment that teeters between an industrial work environment and unrestricted managerial power. There is not much in traditional collective bargaining law that encourages charter schools to be-

241. *United Educators of San Francisco v. San Francisco Unified Sch. Dist.*, 25 Pub. Emp. Rep. Cal. (LRP) ¶ 32071 (Cal. PERB 2001).

242. CAL. EDUC. CODE § 47611.5(b) (Deering 2006).

243. FLA. STAT. § 1002.33(12)(b) (2006).

244. *Id.* § 1002.33(12)(c).

245. *Id.* § 1002.33(12)(d).

come high performance workplaces. To develop a labor law that fits the promise of charter schools, it is necessary to think outside the box of traditional labor law doctrine.

VI. TOWARDS A CHARTER SCHOOL LABOR LAW

If neither unrestricted managerial authority nor an industrial work environment will lead to high performance work places in the long run, what will? Answering this question requires considering what kind of workers high performance organizations require and how labor law can encourage those workers.

There are four basic ways to organize workers. Any worker can be identified as either: (1) an industrial laborer, (2) a craft worker, (3) an artist, or (4) a professional.²⁴⁶ By the 1960s and 1970s when the majority of teachers in the United States unionized, the word "unionism" largely meant industrial unionism. In public education, industrial unionism was labor's answer to an educational system constructed on the principles of scientific management, a system in which school administrators, not teachers, designed the content and pacing of work. As the history of education in the 20th century clearly shows, schools were bureaucratized long before they were unionized.²⁴⁷

Strictly interpreted, industrial style organization would hold teachers responsible for the faithful reproduction of curricula, lesson plans, and classroom routines developed elsewhere. Following directions would be their obligation and their main responsibility. Invention, creativity, and spontaneity would not be required or expected.²⁴⁸ If charter schools are to break this model, it is necessary to ask: "What legal regime can best encourage collaborative, high-trust workplaces, and simultaneously empower and safeguard workers against 'domination,' understood as illegitimate instrumental coercion and endogenous shaping of workers' preferences and interests?"²⁴⁹

246. See CHARLES T. KERCHNER & DOUGLAS E. MITCHELL, *THE CHANGING IDEA OF A TEACHERS' UNION* 205-12 (1988).

247. See DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820-1980*, at 6-7, 17-18, 94-96, 239-41 (1982); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION*, 11, 23-25, 285-89 (1974).

248. See KERCHNER & MITCHELL, *supra* note 246, at 208.

249. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1496 (1993).

The answer is to broaden the set of choices about how charter school teachers would represent themselves. Currently, where teachers have the choice of traditional collective bargaining, the surrounding legal doctrine channels their voices toward an industrial union model. The experiments in reform or professional unionism, however, show us that during periods of cooperative relationships teachers and school management invent other forms of interaction including joint problem solving groups, systematic consultation, continuous negotiation, and autonomous work teams.

Most of the districts that engaged in what has been called reform or professional unionism formed joint labor-management teams to address educational problems. Consultation between union leaders and school superintendents is common during eras of good feeling. These meetings are seen as an informal means of problem solving and relationship building, and they work well at the interpersonal level. School principals and union representatives at the school level form consultative relationships more rarely. This lack of consultations occurs partly because union stewards or building representatives see their jobs as the first line of protection in teacher grievance situations, rather than as a legitimate part of a school leadership team. But there are exceptions.

The idea of autonomous work teams originated in manufacturing with such experiments as Saturn Motors and producers' cooperatives,²⁵⁰ and it is seen in education beginning with the School Site Management reforms of the 1980s and 1990s.²⁵¹ Although applications vary widely, the general idea has been to move authority and resources to the school level and to encourage, if not mandate, teacher participation.²⁵²

For several reasons, it would be inappropriate to mandate legislatively a particular model of employee empowerment. Such a mandate would merely substitute a new set of poten-

250. See Saul A. Rubinstein, *The Impact of Co-Management on Quality Performance: The Case of the Saturn Corporation*, 53 INDUS. & LAB. REL. REV. 197, 200 (2000); Saul Rubinstein et al., *The Saturn Partnership: Co-Management and the Reinvention of the Local Union*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 339, 339-41 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

251. See Charles T. Kerchner et al., *Institutional Change in Public Education: The Case of Los Angeles* 30-42 (April 2006) (presented at the Am. Educ. Research Ass'n, on file with the Author).

252. See generally KERCHNER & KOPPICH, *supra* note 88. For a discussion of one such experiment in Los Angeles, see Kerchner et al., *supra* note 251.

tially stifling regulation for the old industrial labor relations model. Instead, charter schools must have freedom to experiment with different approaches to teacher involvement. Moreover, to the extent that a state attempted to apply such a mandate to a charter school subject to the NLRA, it would face a strong likelihood of preemption. This type of mandate might be viewed as expanding the mandatory subjects of bargaining and thereby intruding into an area that Congress deliberately left free from mandatory regulation.²⁵³

The charter itself provides an ideal method for ensuring such experimentation. Charter school legislation should require that the school specify a vehicle for teacher involvement in decision making as a condition of the charter. The specific vehicle for teacher voice, however, would be up to the individual school and subject to the approval of the public body granting the charter.

A charter-by-charter approach to teacher involvement is less likely to be preempted than a specific statutory mandate when applied to schools covered by the NLRA. When a state imposes a specific statutory mandate on all charter schools, it acts in its regulatory capacity and subjects the statute to preemption. When a public entity grants a charter to a private entity, however, it is, in effect, contracting out some of the provision of public education. As such, the public entity has entered the market to negotiate a particular arrangement. When a public entity acts as a market participant, the NLRA does not preempt the requirements that the entity imposes on its contracts.²⁵⁴ Moreover, in granting a charter and requiring that it contain a vehicle for teacher voice on the grounds that such a vehicle could improve educational services, the public entity acts with respect to a matter that is "deeply rooted in local feeling and responsibility."²⁵⁵

253. A detailed discussion of the preemption issue is beyond the scope of this Article. The concept that states may not regulate aspects of the collective bargaining relationship that Congress deliberately left unregulated was first given force by the Supreme Court in *Lodge 76 v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). See generally ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 1103-10 (2d ed. 2004).

254. See *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993).

255. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

As different charter schools provide different vehicles for teacher voice, teachers may come to regard those options as a factor in deciding with which school to accept employment. In an expanded choice set, teachers might choose schools offering joint problem solving groups, systematic consultation, continuous negotiation, autonomous work teams, or other arrangements.

VII. CONCLUSION

The approach suggested in this Article offers several advantages. First, it recognizes the fundamental fairness of the trade-off between less job security and greater voice in running the school. Charter schools seek to create high performance by creating risk. A major tenet of the charter school concept is to free the school from bureaucratic state and school district regulation by enabling it to experiment and to develop alternative approaches to teaching and learning. The freedom from regulation injects variety and sometimes competition into public education, and the most successful approaches are expected to attract students, attain desired results, and survive competitive battles. Schools that do not perform well violate the conditions of their charters, and the chartering authority should not renew charters of poorly performing schools. Thus, charter school teachers assume more risk than conventional public school teachers. Their jobs are less secure because they depend on their school's success. In situations where teachers explicitly bet their jobs on the success of the school, teachers deserve a voice in how the school operates.

Second, the suggested approach makes good on the promise that charter schools will be different kinds of organizations, not just attempts to escape regulation for its own sake. Teachers are attracted to charter schools because they view the concept as empowering them to practice their profession free of traditional constraints. Teacher turnover, however, is high.²⁵⁶ When they find the lure of teacher empowerment illusory, they are likely to leave. Mandating a vehicle for teacher involvement as a condition of the charter may reduce teacher turnover. This reduction in turnover creates the organizational stability necessary to form a professional community.

256. See Malloy & Wohlstetter, *supra* note 42, at 236–37.

Third, placing the burden on the school itself to develop its vehicle for teacher involvement will lead to experimentation with varying approaches. Competition among the different approaches will test the comparative advantages of each. Will teacher cooperatives be more effective than teacher representation on the charter school's board of trustees? Will teacher representation on the board be more effective than teacher-administration councils? Will any of these approaches be more effective than new ones yet to be tried? The competition among different approaches developed as a result of the charter mandate will answer these questions and improve the delivery of educational services.

Finally, the development of successful models of teacher involvement will place competitive pressure on traditional public schools to similarly include teachers. The teacher union reform districts demonstrate that meaningful teacher involvement can exist in spite of stifling legal doctrine. Competitive pressures from high performance charter schools may force other traditional school districts to reexamine their labor relations systems and to move away from the industrial relations model to a high performance model. District administrators and union officials will be forced to take risks and move outside their traditional roles. In time, the success of such high performance educational workplaces may generate pressure to reform existing legal doctrine as it relates to teacher collective representation.

