

Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*

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I. Introduction

Charter schools are in fashion.¹ Once the darling of the right wing, they are being embraced by educational reformers of all stripes. For the most part, however, the teacher union

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¹Since the first charter school was founded in Minnesota in 1992, charters have been formed throughout the country. By 2005, there were nearly 3,600 charter schools in 40 states and the District of Columbia, enrolling more than 1 million students. See Center for Education Reform, All About Charter Schools, <http://www.edreform.com/index.cfm?fuseAction=document&documentID=1964> (visited Mar. 11, 2006). Charters can be found at all grade levels, and generally their students are racially and economically similar to those in nearby traditional public schools. As See *Education Week's* briefing notes: "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." *Charter Schools*, EDUC. WK. <http://www.edweek.org/rc/issues/charter-schools/>. (visited Mar. 11, 2006).

response ranges from outright opposition to reluctant and qualified acceptance² The largely

² While the characterization of unions as opponents of charter schools is generally true, it is also the case that their position has moderated over the years and is quite nuanced. In 2001, the National Education Association (NEA) abandoned its outright opposition to charters and replaced it with a series of conditions under which they could be accepted:

- A charter should be granted only if the proposed school intends to offer an educational experience that is qualitatively different from what is available in traditional public schools.
- Local school boards should have the authority to grant or deny charter applications; the process should be open to the public, and applicants should have the right to appeal to a state agency decisions to deny or revoke a charter.
- Charter school funding should not disproportionately divert resources from traditional public schools.
- Charter schools should be monitored on a continuing basis and should be subject to modification or closure if children or the public interest is at risk.
- Private schools should not be allowed to convert to public charter schools, and private for-profit entities should not be eligible to receive a charter.
- Charter schools should be subject to the same public sector labor relations statutes as traditional public schools, and charter school employees should have the same collective bargaining rights as their counterparts in traditional public schools.

NEA's Policy on Charter Schools, <http://www.nea.org/charter/index.html> (visited Mar. 11, 2006)..

Meanwhile, NEA and American Federation of Teachers (AFT) locals have begun operating charter schools themselves in Houston, Dallas, and New York City. In New York City, the United Federation of Teachers operates one charter school and plans to open another. See Erik Robelen, *UFT Head Tells Charter Leaders: Teachers'*

negative reaction from organized labor to charter schools 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

Unions Are Not Your Foe, EDUC. WK., Nov. 2, 2005, at 13. The NEA has also allocated \$1.5-million toward union organizing of charters. See Ann Bradley, *Peer-Review Programs Catch Hold as Unions, Districts Work Together*, EDUC. WK., June 3, 1998, at 1.

In December 2005, the Ohio Supreme Court heard arguments in a suit brought by the state Parent Teacher Association and strongly supported by the Ohio Federation of Teachers and other unions. Essentially, the argument concerns the definition of “public” as applied to education. The plaintiffs’ lawyer argued, “It’s not a public school if it’s administered by private entities, if it’s managed by a for-profit corporation, and I think that is the key.” The attorney for the private school organizations countered, “These schools carry every indicia of a public entity. They don’t discriminate. They hire state-certified teachers. They’re publicly funded. They don’t charge tuition. There’s no entrance exams. And I think most importantly, they’re nonsectarian.” Erik Roblen, *Ohio Supreme Court to Rule on Charter Laws*, EDUC. WK., Dec. 7, 2005, at 25, 27.

³See Leo Casey, *Who’s Afraid of Teacher Voice? Charter Schools and Union Organizing*, EDWIZE NEWS & OPINION, Nov. 17, 2005, <http://edwize.org/whos-afraid-of-teacher-voice-charter-schools-and-union-organizing> (visited Mar. 11, 2006) (recounting actions of Atlantic Legal Foundation and quoting Norman Atkins of Uncommon Schools, “[G]ood charter schools organize themselves in ways that keep unions out.”); Matt Cox, *Children v. Unions*, NATIONAL REV. ONLINE, Sept. 17, 2003, at <http://www.nationalreview.com/comment/comment-cox091703.asp> (visited Aug. 9, 2006) (“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 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

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. We comment on 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 up from bureaucracy and regulation; provide teachers with increased psychological purchase, and increase diversity in approaches to education. A key factor behind the growth of charter schools, we observe, is the view that public schools have failed.

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. We observe that 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 ask whether charter schools are inherently anti-union. Implicit in the view that charter schools are anti-union is the view that teacher unions are guardians of a failed status quo and key obstacles to reform. 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

they want to help.”)see also David W. Kirkpatrick, *Organizing Charter Schools, A Challenge to Unions*, THE BUCKEYE INSTITUTE VIEWPOINT ON PUBLIC ISSUES, June 5, 2006, at <http://www.buckeyeinstitute.org/article/690> (viewed Aug. 10, 2006).

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 why. We show that, encouraged by legal doctrine, most teacher unions and school districts have internalized the traditional industrial relations model.

In Part V, we focus on the implications for charter schools. We examine the application of existing legal doctrine to charter schools. First we focus on the fundamental question of which law governs charter schools' labor relations – the National Labor Relations Act (NLRA)⁴ or state law. We next consider the diversity of approaches taken by the states to regulation of charter school labor relations. However, 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 up from traditional labor law doctrine and develop a labor law for charter schools. In Part VI, we describe the basis for a new approach to providing for teacher voice in charter schools, and in Part VII we conclude that the 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.

⁴ 29 U.S.C. §§ 151-62 (2000).

II. Why Charter Schools

The movement for charter schools has been fueled by the beliefs that public schools have failed and that at least part of the reason they have failed is because of their monopoly on providing education.⁵ Charter schools thus serve as agents that break the monopoly of traditional public schools. They offer alternatives that empower parental choice in their children's education. Furthermore, by placing competitive pressures on traditional public schools, charters shock traditional schools out of their complacency and force them to change for the better, or so the argument goes.

Charter schools have been described as the idea that 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.⁶ Such broad support is possible because the charter school structure brings together three important motivations: the revolt against bureaucratization, the introduction of choice or market mechanisms in public

⁵ See Joe Nathan, *Charter Schools: Creating Hope and Opportunity for American Education* (1996); R. Craig Sautter, *Charter Schools: A New Breed of Public Schools* (1993); James N. Goenner, *Charter Schools: The Revitalization of Public Education*, 78 PHI DELTA KAPPAN 78 32-36 (1996); Chris Pipho, *The Evolving Charter School Movement*, 78 Phi Delta Kappan 489-90 (1997).

⁶ JOSEPH MURPHY & CATHERINE DUNN SHIFFMAN, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT 11 (2002).

schooling, and increasing teacher professionalism.⁷

Albert Shanker was not the first person to advocate charter schools. That distinction belongs to Ray Budde, in a report entitled *Education by Charter: Restructuring School Districts*.⁸ But Shanker, the late president of the American Federation of Teachers, popularized the idea in a 1988 speech before the National Press Club and two subsequent *New York Times* columns.⁹ 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.”¹⁰ Taken one step further, charter schools, as originally conceived, would become places where teachers would be recognized as experts and, given the freedom to follow their own educational visions, would surely make schools better places for teachers to teach and more effective environments for students to learn.¹¹ From Shanker’s perspective, it was the system, not the teachers, that was responsible for the failure of American public schools. By breaking the grip of the system, more satisfied teachers would, in turn, mean better schools—which in turn would result in better

⁷ See LIANE BROUILLETTE, CHARTER SCHOOLS: LESSONS IN SCHOOL REFORM (2002).

⁸ RAY BUDDE, EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS: KEYS TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION (1988).

⁹ See MURPHY & SHIFFMAN, *supra* note ____, at 24.

¹⁰ KRISTINA BERGER & PETER W. COOKSON, EXPECT MIRACLES: CHARTER SCHOOLS AND THE POLITICS OF HOPE AND DESPAIR 33-34 (2003).

students.¹² However, in application, the original idea of charter schools as a community of professionals changed to a much more managerially driven organization.

As Bulkley and Fisler summarize, early charter school advocates predicted five beneficial outcomes:

1. Charter schools would lead to the creation of new schools or the reinvention of old ones, and these would increase the choices available to parents.
2. Charter schools would lead to more autonomy and flexibility than district-operated schools because they would have waivers of law and regulation. Some 29 of the 37 states with charter school legislation include the intent to “facilitate innovative teaching,” and in 24 states charter schools were designed to “create professional development opportunities for teachers.”
3. The interplay of autonomy and market forces would make charter schools more innovative and of higher quality than conventional schools “in the areas of instruction and curriculum, school organization and governance, and in some cases alter teacher qualification and union involvement.”
4. Charter schools would be more accountable because they had to meet market demands in the short run and performance contract expectations in the long run.
5. “The combination of autonomy, innovation and accountability would lead to improved

¹¹ *Id.*

¹² *Id.*

student achievement, high parent and student satisfaction, high teacher/employee satisfaction and empowerment, positive effects on the broader system of public education and positive or neutral effects on educational equity, including better services for at-risk students.”¹³

The reality of the first decade of widespread charter school use has fallen short of glowing expectations but also does not support categorical rejection of the model. Detractors point toward serious equity and accountability issues.¹⁴ Performance comparisons have not shown charters to be substantially more effective than comparable public schools. Recent reviews of student achievement found the evidence mixed or slightly positive.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

¹³ Katrina Bulkley, & Jennifer Fisler, *A Decade of Charter Schools: From Theory to Practice 2* (CPRE Policy Briefs RB-35, 2002) (Available as ERIC ED466 567), 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* (1998).

¹⁵ See B. P. GILL ET AL., *RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS* (2001); GARY MIRON & CHRISTOPHER NELSON, *STUDENT ACADEMIC ACHIEVEMENT IN CHARTER SCHOOLS: WHAT WE KNOW AND WHY WE KNOW SO LITTLE* (2001) (hereinafter MIRON & NELSON, *STUDENT ACADEMIC ACHIEVEMENT*).

¹⁶ See Diana Jean Schemo, *Charter Schools Trail in Results, U.S. Data Reveals*, N.Y. TIMES, Aug. 17 2004, at A-1.

In 2002, Bulkley reviewed the characteristics and performance of charter schools.¹⁷ She found that comprehensive evaluation of charter schools is difficult to for several reasons. “Charter schools differ considerably from state to state and district to district.”¹⁸ Thus the “charter school” label says relatively little about how the school is operated, the degree of freedom it has, or the socioeconomics of its students. Although this is changing as charter schools gain more experience, Bulkley found that they tended to be too new to have established track records, had unstable or different enrollments than corresponding public schools, and used different assessment methods that frequently varied annually.¹⁹ “In addition,” Bulkley wrote, “the quality of research varies considerably: some studies have exercised considerable effort to

The comparative data only came to light after researchers at the American Federation of Teachers provided an analysis to the *New York Times*. The AFT report also documented the long delay in releasing charter school results and the intention to reanalyze the data to explain the apparent weakness of charters. F. HOWARD NELSON ET AL., CHARTER SCHOOL ACHIEVEMENT ON THE 2003 NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (2004). Federal officials said that they had not intended to hide the performance of charter schools, which the government supports as an alternative to traditional public schools Schemo, *supra*. The event occasioned a spate of charge and counter charge about the efficacy of charter schools. *See, e.g.*, Diana Jean Schemo, *The 2004 Campaign: Student Scores: Education Secretary Defends Charter Schools*, N.Y. TIMES, Aug. 18, 2004, at A-18.

¹⁷ Bulkley & Fislser, *supra* note ____, at 7.

¹⁸ *Id.*

¹⁹ *Id.*

use appropriate controls and make suitable comparisons, while others have been less cautious.”²⁰

Bulkley 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 “Similarly, the most comprehensive analysis of findings on charter school achievement concluded ‘the charter impact on student achievement appears to be mixed or, very slightly positive.’”²²

Miron and Nelson reviewed 15 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, Connecticut suggested positive impacts while those from Michigan and the District of Columbia found negative effects. “The overall conclusion remains that the evidence of charter schools’ impact on student achievement is mixed.”²⁴

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

²⁰ *Id.* (citing MIRON & NELSON, AUTONOMY IN EXCHANGE FOR ACCOUNTABILITY, *supra*, note ____; LEWIS SOLMON ET AL., DOES CHARTER SCHOOL ATTENDANCE IMPROVE TEST SCORES? THE ARIZONA RESULTS (2001)).

²¹ *Id.* (quoting GILLET AL., *supra* note ____, at 95).

²² *Id.* (quoting MIRON & NELSON, STUDENT ACADEMIC ACHIEVEMENT, *supra* note ____, at 1).

²³ MIRON & NELSON, STUDENT ACADEMIC ACHIEVEMENT, *supra* note ____, at 24.

²⁴ *Id.* at 25.

charter schools.

III. Employment Relations and Charter Schools

Charter schools are envisioned as high performance workplaces. As observed earlier, former AFT President Albert Shanker advocated charter schools as vehicles for empowering teachers to take charge of student learning by freeing them from bureaucratic constraints. This part explores charter schools as high performance workplaces, contrasts that with the traditional industrial union model of employment relations and explores the view that charter schools are anti-union.

A. Charter Schools as High Performance Workplaces

Traditional workplace organizations were characterized by a hierarchy with leadership from the top down in a style Bradford and Cohen have termed the heroic manager.²⁵ In this model, the manager knows at all times everything that is going on in his or her department, has more expertise than any subordinate, is able to solve any problem that arises before any subordinate can, and is the primary, if not exclusive, person responsible for how the department is working.²⁶ In this command and control system, subordinates are not expected to think creatively but instead are confined to carrying out specifically and narrowly assigned tasks.²⁷

²⁵ See DAVID L. BRADFORD & ALLAN R. COHEN, *MANAGING FOR EXCELLENCE: THE LEADERSHIP GUIDE TO DEVELOPING HIGH PERFORMANCE IN CONTEMPORARY ORGANIZATIONS* (1997).

²⁶ *Id.* at 10 - 11.

²⁷ See, e.g., George Nesterchuk et al., *Taking Charge of Federal Personnel*, Heritage Foundation Backgrounder No.

In contrast, a high performance workplace emphasizes flexibility, employee involvement, responsibility and accountability and an incentive system of rewards. There is frequently a strong emphasis on workforce training and on flexibility in organizational structure.²⁸ Managers share decision-making responsibility with workers often organized into functional teams. Managers function more like coaches, facilitators and integrators.²⁹ Bradford and Cohen refer to this model as the manager as developer.³⁰

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, 137 students on average compared to 475 in district schools.³¹ Most states allow charters considerable autonomy. About half allow them to waive state law and

1404 (Jan. 10, 2001), *available at*

<http://www.heritage.org/Research/GovernmentReform/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=4941> (visited Mar. 11, 2006) (critiquing Clinton Administration partnership counsels and arguing that federal civil servants' role is confined to following directions to implement policies established by political appointees).

²⁸ See Susan Parks, *Improving Workplace Performance: Historical and Theoretical Contexts*, MONTHLY LAB. REV., May 1995, at 18, 19.

²⁹ See Martha A. Gephart & Mark E. Van Buren, *Building Synergy: The Power of High Performance Work Systems*, 50 TRAINING & DEVELOPMENT, Oct. 1996, at 21, 22.

³⁰ See BRADFORD & COHEN, *supra* note ___, at 61.

³¹ RPI INTERNATIONAL, THE STATE OF CHARTER SCHOOLS: 2000, at 46 (2000).

regulations,³² 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, and those operated by private educational management organization.³³

Clearly charters are governed and managed differently from traditional public schools, although there is no single model. Some schools are “out-sourced” to profit making or non-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.³⁴ 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.³⁵ The experiment with teacher-run schools has spread to Milwaukee, Wisconsin, where eight schools were designed to move beyond a “grievance-based culture.”³⁶ The teachers remain employees of the Milwaukee Public Schools and subject to the collective bargaining agreement

³² *Id.*

³³ Bulkley, & Fisler, *supra* note ____, at 3.

³⁴ *See generally* EDWARD J. DIRKSWAGER, TEACHERS AS OWNERS: A KEY TO REVITALIZING PUBLIC EDUCATION (2002).

³⁵ *See id.* at 87-88.

³⁶ Lynne Sobczak, *MPS "Teacher Cooperatives" Make List of top 50 Innovations 1* (Milwaukee Public Schools

for wages and benefits. But their schools are a workers' cooperatives, both organizationally and legally. The teachers develop their own work rules.

It is also clear that teacher work is 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 in a summary of charter school working conditions and their appeal as workplaces.³⁷ In 17 states charter schools are not bound by district collective bargaining agreements and in 11 states the bargaining provisions depend on the type of charter school involved.³⁸

Charter schools seem to be more attractive to teachers, who are largely satisfied with their work, and *less* secure and protected than teachers in public schools. In terms of teacher compensation, most studies report charter school teachers earning about what they would have had they been teaching in the public schools.³⁹ However, there appears to be more variability in teacher salary than would be the case in traditional public schools. Salary studies of charter school teachers reveal that about one-third reported higher salaries than would have been the case

2006).

³⁷ Courtney L Malloy & Priscilla Wohlstetter, *Working Conditions in Charter Schools: What is the Appeal for Teachers*, 35 EDUC. & URBAN SOC. 219, 223 (2003).

³⁸ See *infra* pt. V.

³⁹ See Malloy & Wohlstetter, *supra* note ____, at 224.

in regular public schools.⁴⁰ In a 9-state study, some 38% said that they were being paid less than they would have been paid in the public schools,⁴¹ and in another national study 20% reported having a lower salary than in their previous public school position.⁴² Whether charter school teachers make more or less than those in traditional public schools apparently 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.⁴³

Pay is also structured differently. The National Center for Education Statistics reveals that only 62% of charter schools reported using salary schedules compared with nearly all traditional public schools.⁴⁴ New charters are less likely to use salary schedules than those schools that have been converted from traditional schools. Podgursky and Ballou note that 46% of charter schools report that they use some kind of merit pay and 37% offer bonuses for teachers with subject matter specialties that are in short supply.⁴⁵

Charter school jobs are much less secure than those in traditional public schools. Some

⁴⁰ See Julia E. Koppich et al., *New Rules, New Roles? The Professional Work Lives of Charter School Teachers* 30 (1998).

⁴¹ See Malloy & Wohlstetter, *supra* note ____, at 224.

⁴² KOPPICH ET AL, *supra* note ____, at 30.

⁴³ Lewis Soloman, *Teacher Accountability in Charter Schools* Conservative News Service (March 1, 1999), available at www.cnsnews.org/Education/archive/EDU199990301b.html.

⁴⁴ NATIONAL CENTER FOR EDUCATION STATISTICS, *EDUCATION STATISTICS QUARTERLY*, Fall 2002, at 10.

⁴⁵ MICHAEL PODGURSKY & DALE BALLOU, *PERSONNEL POLICIES IN CHARTER SCHOOLS* 17 (2001).

charter schools use employment-at-will contracts, and only 34% of charter school teachers report that they hold tenure.⁴⁶ Tenure is much more common among teachers in schools that have been converted from traditional schools than in new charters.⁴⁷

Charter school teachers also work longer. A California study showed that charter schools operated 183 school days compared to 175 for traditional schools.⁴⁸ Other studies reported similar comparisons.⁴⁹ Johnson and Landrum suggested that longer hours derived from strong norms of work completion rather than specified start and quit times.⁵⁰

Charter school teachers are younger than their public school counterparts, a fact that may simply reflect the start-up nature of these organizations. In a Michigan study, Harris and Plank found that nearly 57% of charter school teachers had less than four years experience compared to 14% in a matched sample of teachers in traditional public schools.⁵¹

⁴⁶ KOPPICH ET AL, *supra* note ____, at 29.

⁴⁷ Malloy & Wohlstetter, *supra* note ____, at. 225.

⁴⁸ JUDITH POWELL ET AL., SRI INTERNATIONAL, EVALUATION OF CHARTER SCHOOL EFFECTIVENESS PART I (Dec. 11, 1997), available at www.lao.ca.gov/1997/121197_charter_schools/sri_charter_schools_1297-part1.html (visited Aug. 10, 2006).

⁴⁹ See Malloy & Wohlstetter, *supra* note ____, at. 227.

⁵⁰ S. M. Johnson and J. Landrum, *Sometimes Bureaucracy Has Its Charms: The Working Conditions of Teachers in Deregulated Schools*, 102 TEACHERS COLLEGE RECORD 85, 86 (2000).

⁵¹ DEBBI HARRIS & DAVID PLANK, WHO'S TEACHING IN MICHIGAN'S TRADITIONAL AND CHARTER SCHOOLS 3 (Education Policy Center at Michigan State Univ. 2003).

Given these data, one would naturally ask, as did Malloy and Wohlstetter, “why are teachers attracted to charter schools.”⁵² Charter school teachers, particularly, 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.

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. The motivational power of a common educational belief system is quite strong. In their case study research Malloy and Wohlstetter found a teacher who had chosen to teach at a charter school because it was exempt from the district reading program.⁵³ But they also found that the question of freedom of action was not just individual, as illustrated by the following statement from one of the teachers they interviewed: “The charter is something that came from within us; it represents our school philosophy. It is not lip service. It stands for who we are as teachers and what we do. We look at what we are doing, and we keep what works and change what

⁵² See Malloy & Wohlstetter, *supra* note ____, at 227.

⁵³ Malloy and Wohlstetter, *supra* note ____, at 231.

doesn't.”⁵⁴ In their case study sites, Malloy and Wohlstetter found that teachers valued collaboration and cooperation: “They spoke of a ‘spirit of openness.’ In the urban charter schools we visited, teachers also valued the collaboration and cooperation they experienced. One teacher noted, ‘In other schools, people are afraid to express their opinions, but here everyone’s opinion is valued.’”⁵⁵

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 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.”⁵⁶

Interpersonal and informal sharing, however, differs from creating a self-managing organization or a worker’s cooperative. In their survey of the literature, Murphy and Shiffman

⁵⁴ *Id.* at 232.

⁵⁵ *Id.* at 233.

⁵⁶ *Id.*

report that teachers generally felt that they had high quality and professional workplaces.⁵⁷

However, in our reading, “professional” appears to mean freedom to teach as one wishes and to innovate in the classroom rather than involvement in school operations and management.

Teachers in a National Education Association sponsored survey said that they were substantially involved in decision making about teacher hiring and assignment, curriculum development, and the content of their professional development. “The vast majority report that they have little or no say in hiring school administrators or determining how money is allocated at their schools.”⁵⁸

Some studies show increased teacher empowerment; other show less⁵⁹

Despite these variances in the degree of teacher involvement in management operations, charter schools are perceived as bastions of teacher empowerment in contrast to highly bureaucratized traditional public schools. The latter most often follow the traditional industrial labor relations model to which we now turn.

B. Traditional Public Schools and the Industrial Labor Relations Model

In his classic work, *Industrial Relations Systems*, John Dunlop identified the core elements on 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

⁵⁷ MURPHY & SHIFFMAN, *supra* note __.

⁵⁸ See KOPPICH ET AL., *supra* note __, at 35.

⁵⁹ MURPHY & SHIFFMAN, *supra* note __, at 173-74.

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 order its character: to define the status of the actors and to govern conduct of all actors at the work place and work community.⁶⁰

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. 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."⁶¹

Collective bargaining thus is viewed as an inroad on inherent managerial authority. James Atelson 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

⁶⁰ JOHN T. DUNLOP, *INDUSTRIAL RELATIONS SYSTEMS* viii (1958).

⁶¹ Clyde Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEVE. ST. L. REV. 29, 30 (1979).

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 all powers not expressly or perhaps implicitly restricted in the state’s constitution. Moreover, management would prefer that these restrictions be narrowly interpreted and limited to the express terms of the state’s constitution.⁶²

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 openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place.”⁶³ Decisions concerning the operation of the enterprise, that is those that go to the “core of entrepreneurial control,”⁶⁴ are left to the employer’s unilateral discretion, with the employees having a right to bargain only about the effects of those decisions on them.⁶⁵

⁶² JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 122 (1983).

⁶³ *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981).

⁶⁴ *Fibreboard Paper Prods. Co. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

⁶⁵ *See First Nat’l Maint.*, 452 U.S. at 686.

In other words, employees are not entitled to any voice in decisions that concern the 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 that 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 survive."⁶⁶ 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.⁶⁷ In other words, workers' roles are 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*,⁶⁸ the

⁶⁶ Steven J. Goldsmith & Louis Shulman, *Common Causes of Discipline*, in 1 LABOR AND EMPLOYMENT ARBITRATION § 10.04 (Tim Bornstein et al., eds., 2d ed. 2006).

⁶⁷ See *id.* at § 16.04[3]; ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1023 (Allen Miles Rubin ed., 6th ed. 2003).

⁶⁸ 444 U.S. 672 (1980).

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.⁶⁹

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*,⁷⁰ 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 granted and we do not believe that such a distinction is required by the Act.”⁷¹ Similarly, in *University of Dubuque*,⁷² in finding the

⁶⁹ 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*, No. 05-1060, 2006 U.S. App. LEXIS 19281 (D.C. Cir. Aug. 1, 2006).

⁷⁰ 265 N.L.R.B. 295 (1982).

⁷¹ *Id.* at 290.

faculty to be managers, the Board relied, in part, on provisions in the faculty collective bargaining agreement which gave the faculty the exclusive right to set student grading and classroom conduct standards, set degree requirements, recommend degree recipients, recommend new course offerings, recommend admissions standards and recommend department staffing needs.

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*.⁷³ 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. The teachers, working with the supervisors and guided by the goals set forth in the IEP, estimate the students' needs, design a suitable educational program, and coordinate the details associated with completing those tasks. They examine the students' qualifications and disabilities and place them in an appropriate unit of the school; design courses suited to the needs of the students in the units; select appropriate teachers, times, and educational materials; assess student performance; and determine the proper direction for the students' future educational

⁷² 289 N.L.R.B. 349 (1988).

⁷³ 262 N.L.R.B. 438 (1982).

experience. The total package is geared toward one narrow goal--remediating particular learning disabilities. The teachers act solely as professional special educators in creating and implementing this educational package.

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 decision-making is limited to the routine discharge of professional duties in projects to which they

have been assigned.⁷⁴

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

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.⁷⁵

Seventy percent of teachers feel left out of the decision making process.⁷⁶

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 extra curricular activities will be offered but instead negotiate how staff for the activities management decides to

⁷⁴ *Id.* at 443.

⁷⁵ DIRKSWAGER, *supra* note ____, at 1.

⁷⁶ *Id.*

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. Although precise statistics on teacher unionization rates nationally are not available, 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.⁷⁷ Similarly, in 2003, 42.6% of workers employed by local government (a classification that includes public school districts) were union members and 46.7% were represented by a union in 2003.⁷⁸

More than a decade ago, a union official offered up the following prediction about charter schools. “I think I know how this is going to work out,” he said. “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.” Yet, the industrial model of collective bargaining that dominates public school teacher

⁷⁷ Union affiliation of employed wage and salary workers by occupation and industry, <<http://www.nls.gov/news.release.union2.t03.htm>>.

⁷⁸ *Id.*

labor relations, on its face, appears incompatible with the vision of the charter school as a high performance workplace, a vision that attracts teachers to charter schools.⁷⁹

Therefore, it is not surprising that teachers in charter schools are far more ambivalent to union representation than their peers in traditional public schools. In a survey of 232 charter school teachers in eight states, Koppich, et al. found them satisfied with their work, but not perceiving that the teacher's union had much influence over it or much relevance to their professional work lives.⁸⁰ Only 24 percent of teachers indicated that the local teacher's union or associations was actively involved in establishing teacher working conditions and school operating rules.⁸¹ 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 85% said there was no union involvement in their working conditions.⁸²

Charter schools emphasize the battle that teacher unions face for the hearts and minds of their own membership. Existing polls done by unions themselves show substantial differences between young and veteran teachers in what they expect from their union. Older teachers tend toward wanting their unions to engage in traditional pocketbook issues and job protection, that is

⁷⁹ See *supra* notes _____ and accompanying text.

⁸⁰ KOPPICH, ET AL., *supra* note ____, at 31.

⁸¹ *Id.*

⁸² *Id.*

to follow the traditional industrial labor relations model and protect them from the risks posed by management decision making. Younger teachers want help with the problems they face in teaching.⁸³ In the case of charter school teachers, however, these differences extend to their identification with the union altogether.

In the next part, we address whether teacher collective bargaining and high performance educational workplaces are incompatible. We also address the role of the law in promoting traditional labor relations in public education and in inhibiting the development of high performance workplaces.

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 teachers are something more than worker drones who mechanically carry out the directives of management. In Section A, we discuss examples of these exceptional cases. In Section B, we analyze why these examples are the exceptions rather than the rule, focusing our analysis 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

⁸³ See, e.g., National Education Ass'n, National Teachers Opinion Poll (1980).

this. 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 review articles illustrate a broadened scope of bargaining and a rich set of informal relationships between union and districts.⁸⁴ Both national unions have reformers and traditionalists. The American Federation of Teachers has been more explicit about reforms and now calls itself “a union of professionals.” During the presidency of Bob Chase (1996-2002) the National Education Association actively pushed “the new unionism”, but old unionists pushed back and reform ideas have been marginalized. Factions of the NEA found Chase's ideas treasonable. The leaders of Wisconsin's largest affiliates wrote: "Your remarks are not only appalling, they ignore the fundamental strength of a union. ... We are union and we are proud; we stand in solidarity to defend against those who are attempting to destroy us."⁸⁵ The Teacher Union Reform Network (TURN), made up of locals from both the NEA and AFT, has been a forum for discussion and interaction among reformers. The organization has met quarterly for more than a decade.⁸⁶ Among TURN members and others, reforms have begun to focus

⁸⁴ See, e.g., CHARLES TAYLOR KERCHNER & JULIA E. KOPICH, A UNION OF PROFESSIONALS: LABOR RELATIONS AND EDUCATIONAL REFORM (1993); Johnson & Landrum, *supra*, note ____.

⁸⁵ Howard L. Fuller et al., *Collective Bargaining in Milwaukee Public Schools*, in CONFLICTING MISSIONS: TEACHERS UNIONS AND EDUCATIONAL REFORM 114, 114-15 (Tom Loveless ed. 2000).

⁸⁶ For a review of TURN member labor relations practices see Charles Taylor Kerchner & Julie E. Koppich, *Organizing Around Quality: The Frontiers of Teacher Unionism*, in CONFLICTING MISSIONS: TEACHERS UNIONS AND

explicitly on increasing educational quality. Innovation has begun to coalesce around a cluster of reforms that links four powerful elements—peer review, teacher induction, professional development, and compensation rewards—with an indicator system that shows whether and how students are achieving.

The existence of educational standards and high quality indicators of how well students are doing 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 Act⁸⁷ has riveted educators' attention to student outcome measurement. Several school districts and teacher unions have consciously developed data analysis capacity at the school level. Schools in the Los Angeles Annenberg Metropolitan Project have created data teams that analyze the disaggregated results of the Stanford 9 tests, the state's official accountability measure, and locally created indicators.⁸⁸ And a coalition of schools in suburban Chicago have started comparing themselves with the best teachers in the highest scoring nations on the Third International Math and Science Study (TIMSS).⁸⁹ They have spent five years looking at their results and understanding how their

EDUCATIONAL REFORM 281 (Tom Loveless ed. 2000).

⁸⁷ Pub. L. No. 107-110, 115 Stat. 1425 (2002), codified at various sections of 20 U.S.C.

⁸⁸ See CHARLES TAYLOR KERCHNER ET AL., THE IMPACT OF THE LOS ANGELES METROPOLITAN PROJECT ON PUBLIC EDUCATION REFORM 47-49 (2000).

⁸⁹ See Richard Lee Colvin, *Illinois Experiment Puts Teaching Methods to Test*, L.A. TIMES, June 4, 2000, at A1.

teaching practices need to change to reach world-class levels.

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 30 districts nationwide.⁹⁰ 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.⁹¹

The Toledo experience is 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 grieving 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 separating those who do not improve from the district.

⁹⁰ See C.M. Waters & T.L. Wyatt, *Toledo's Internship: The Teachers' Role in Excellence*, 66 PHI DELTA KAPPAN 365 (1985).

⁹¹ 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. BD. J., July 1985, at 22.

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 notes, "a union is not conceived with the primary mission of protecting the least competent of its members."⁹²

In Toledo, the heart of the process is an Intern Board of Review (IBR), which has five union representatives and four district representatives. (Other peer review districts have similar boards.) New teachers are required to participate in a two-year intern program, where they work with consulting teachers on mutual goal setting and detailed follow-up conferences based on detailed observations. The IBR selects the consulting teachers who serve three year terms during which they are relieved from all classroom teaching responsibilities.⁹³

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. A consulting teacher is assigned to the teacher in intervention, a plan for improvement is drawn up and the consulting teacher reports frequently to the IBR to justify actions taken and evaluate progress made.⁹⁴

Union-run peer review for elementary and secondary school teachers has produced a long

⁹² Quoted in Charles Taylor Kerchner & Julia E. Koppich, A UNION OF PROFESSIONALS: LABOR RELATIONS AND EDUCATIONAL REFORM 48 (1993).

⁹³ *Id.* at 163.

⁹⁴ *Id.*

enough record that reasonable claims can be made for its success. Started in Toledo, Ohio in 1982, it has spread to about 30 other sites.⁹⁵ 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 that practiced in conventional settings. Peer review also seems to be more effective than conventional administrative evaluation in remediation or removal of veteran teachers with serious performance problems.

Although the sample size is too small to allow a broad statistical comparison, the historical evidence in such Ohio districts as Toledo and Columbus suggests that more probationary teachers were dismissed than under the previous system of administrative review. Between 1981 and 1997, 52 experienced teachers out of a population of about 2,600 in Toledo were thought to have such serious performance problems that peer intervention was necessary. All but 10 left the classroom. About 10 percent of Toledo's intern teachers were not rehired for a second year of teaching. In Columbus, 178 teachers out of a work force of 4,800 were placed in the district's negotiated intervention program between 1985 and 1997. More than 40 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 7 percent receiving unsatisfactory ratings.⁹⁶

⁹⁵ Walters & Wyatt, *supra* note ____.

⁹⁶ Ann Bradley, *Peer-Review Programs Catch Hold As Unions, Districts Work Together*, EDUC. WEEK, June 3 1998, at 1. For a negative analysis of peer review, see MYRON LIEBERMAN, *TEACHERS EVALUATING TEACHERS: PEER*

Peer review provides much more formative assistance than conventional induction processes. In every case we know of, the union 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).

The cutting edge of peer review, of course, is the ability of supervising teachers to "call the question" (as they say in Rochester, New York) making a judgment about a novice's performance. Unionists disagree about whether peer review is a proper union role. Adam Urbanski, president of the Rochester (N.Y.) Teachers Association, is fond of saying "peer review is controversial in all the places that don't have it." And 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. 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 New York Supreme Court dismissed the suit.⁹⁷

Peer review can, of course, comprise part of an induction process and one of the ways that unions make teaching more attractive. Several union locals, including those in Cincinnati, Ohio, Miami-Dade County, Florida, and Minneapolis, Minnesota, have strong working relationships

REVIEW AND THE NEW UNIONISM (1998).

⁹⁷ See John O'Brien, *Mentor Teacher Plan Wins*, DEMOCRAT & CHRONICLE, June 19, 1987.

with local universities that provide a pathway into teaching that is grounded in a school's classroom context and pedagogy and teaching internships.⁹⁸ The program in Columbus, Ohio, works hand-in glove with the peer review program, with some of the supervising teachers also offering classes in the teacher education program offered through Ohio State University.⁹⁹

In Cincinnati, the Cincinnati Federation of Teachers, the University of Cincinnati, and the school district devised a substantial modification in teacher training based on their analysis of what is required to be an effective teacher in an urban setting. The Cincinnati program includes a program in which prospective teachers study for two undergraduate majors, one in a discipline, and one in teaching. They undertake an internship in their fifth year, and they work alongside senior teachers, who share a vision of how teaching should be accomplished, at a professional development . During the fifth year they are paid half time as interns, thus easing the economic burden of preparing to teach.¹⁰⁰

⁹⁸ See KERCHNER & KOPPICH, *supra* note ____, at 74, 126-29, 147-48; Julie Blair, *Minneapolis Labor Leaders Mold a Different Kind of Union*, EDUC. WK., Jan. 30, 2002, at 1.

⁹⁹ See Columbus Education Ass'n, Professional Development Partnership (2000), available at <http://pdpvu.org/welcome.html> (visited July 11, 2006).

¹⁰⁰ 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 Federation of Teachers, *Professional Practice Schools 2001*, available at <http://cft.mwg.org/prof/practice.html> (visited July 7, 2006).

One of the most obvious drawbacks to entering teaching, and to the effectiveness of novice teachers, is the shameful level of non-assistance that most young teachers receive from their school districts or their unions. Kauffman's exploration of the initial encounters of new teachers begins with the plaintive cry by from a novice, "You want me to teach this stuff, but I don't have the stuff to teach."¹⁰¹ 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 Kauffman's interviews, teachers said they received very little assistance from either the districts or their unions.¹⁰² Among the 50 teachers interviewed by Kauffman and his colleagues, not one of them said that their union helped them become a teacher or survive the first year. The only mention was that they had to pay union dues.¹⁰³

The bitter irony of continuing 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: big central cities. The daunting personnel practices in districts such as New York City are legendary. The same system that hires thousands of uncertified teachers each year discourages fully

¹⁰¹ DAVID KAUFFMAN ET AL., "LOST AT SEA": NEW TEACHERS' EXPERIENCES WITH CURRICULUM AND ASSESSMENT 1 (2000).

¹⁰² *Id.*

¹⁰³ *Id.*

qualified students with master's degrees, who are then wooed by suburban districts.¹⁰⁴

Professional development offers a good example of a long-term working relationship that has increasingly focused on student standards and achievement. The Minneapolis project started in 1984 with a small joint labor-management task force that over time grew to a pilot project, state legislation and a jointly governed professional development program.¹⁰⁵

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.¹⁰⁶ The utility of this system explains its long

¹⁰⁴ See NATIONAL COMMISSION ON TEACHING & AMERICA'S FUTURE, WHAT MATTERS MOST: TEACHING FOR AMERICA'S FUTURE 37 (1996).

¹⁰⁵ See KERCHNER & KOPPICH, *supra* note ___, at 295-96; Blair, *supra* note ___, at 1.

¹⁰⁶ See, ALLAN ODDEN & CAROLYN KELLEY, PAYING TEACHERS FOR WHAT THEY KNOW AND DO: NEW AND

tenure.

Only recently has there been serious discussion of alternatives. The most discussed alternative is actually a relatively slight modification of the existing system: paying for knowledge and skill. Odden and Kelley advocate linking to formal education, as it now is, and the achievement of knowledge and skills required by new curriculum standards and new roles required of teachers in reorganized schools.¹⁰⁷

They also advocate the use of contingent pay, an extension of what is commonly called "extra pay for extra work." But instead of being focused on extracurricular activities, as are most current contingent pay schemes, these 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 worked on valuable individual projects.¹⁰⁸

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 localities unions have bargained salary incentives for board certification. For example, the Los Angeles Unified School District and United Teachers Los Angeles bargained a 15 percent salary

SMARTER COMPENSATION STRATEGIES TO IMPROVE SCHOOLS 9-12 (1997).

¹⁰⁷ *Id.* at 94-127.

¹⁰⁸ *Id.* at 98-103.

supplement for any board-certified teacher. In New York City, board certification qualifies a teacher for a salary differential of approximately \$3,700. In Chicago, the union QuEst Center, with a grant from the John D. and Catherine T. MacArthur Foundation, is supporting 20 candidates for board certification.¹⁰⁹

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 fall 2005 voters approved a tax measure that would fund an incentive pay plan for teachers.¹¹⁰ A vote of Denver Classroom Teacher Association members approved the plan in 2004. 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 (as opposed to any college education school credits, which is more usual), according to the results of their professional evaluations, as an incentive to teach in hard to staff schools and in hard to find specialties, and, lastly, according to student achievement. Professional evaluation is to be 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. Veteran teachers have six years to decide whether to join or to stay with the traditional salary

¹⁰⁹ See KERCHNER & KOPPICH, *supra* note __, at 289.

¹¹⁰ See Bess Keller, *Denver Voters Pave Way for Incentive Pay*, EDUC. WEEK, Nov. 9 2005, at 3, 18.

plan.¹¹¹

In Milwaukee, Wisconsin, at the I.D.E.A.L. Charter School, teachers have remained employees of the Milwaukee Public Schools and governed by the collective bargaining agreement. However, pursuant to a memorandum of understanding between the district and the union, the teachers have flexibility concerning some provisions of the master collective bargaining agreement. The teachers at the school created the I.D.E.A.L. Charter School Cooperative which they own and through which they control all professional aspects of the school.¹¹²

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. In the following sections, we explore the law governing teacher collective bargaining and find that the law inhibits these exceptions from flourishing and spreading.

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

¹¹¹ See *Agreement* School District No. 1 and the Denver Classroom Teachers Association, (2004); Denver Public Schools Professional Compensation System for Teachers, [http://denverprocomp.org/stories/storyreader\\$88?print-friendly=true](http://denverprocomp.org/stories/storyreader$88?print-friendly=true) (visited Mar. 12, 2006).

¹¹² See DIRKSWAGER, *supra* note ____, at 63.

At one time courts upheld school district prohibitions on teachers belonging to labor unions.¹¹³ It is now well-established that such a prohibition violates the employee's First Amendment right to freedom of association.¹¹⁴ However, the right to associate with a union does not extend to a constitutional right to be represented by a union, even where the representation would be individual, rather than collective, in an employer's own unilaterally promulgated grievance system.¹¹⁵ A majority of the states and the District of Columbia have statutes giving all public employees rights to organize and bargain collectively.¹¹⁶ Several other states have statutes giving teachers rights to organize and bargain collectively, even though they do not have general public sector labor relations statutes.¹¹⁷ Some states, most notably Virginia and North Carolina, however, prohibit public entities from recognizing or bargaining with employees' collective

¹¹³ See, e.g., *Seattle High Sch. Teachers Chap. 200 v. Sharples*, 293 P. 994 (Wash. 1930); *People ex. Rel. Fursman v. City of Chicago*, 116 N.E. 158 (Ill. 1917).

¹¹⁴ See, e.g., *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 298 (7th Cir. 1968); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969).

¹¹⁵ *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 4623 (1979).

¹¹⁶ 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, Washington and Wisconsin.

¹¹⁷ Idaho, Indiana, Maryland, North Dakota, Oklahoma and Tennessee.

representatives.¹¹⁸ Others, 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.

Collective bargaining is more closely regulated in the public sector than in the private sector. Most public sector collective bargaining statutes provide mandatory impasse procedures which almost always include mediation and frequently include fact finding.¹¹⁹ In many jurisdictions, teacher unions that reach impasse with school districts may compel fact finding but have no further impasse procedure. In fact finding, 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. Other jurisdictions provide that bargaining impasses be resolved by binding interest arbitration. A few jurisdictions give teachers a right to strike following exhaustion of specified impasse procedures, which in some of these jurisdictions include fact finding and rejection of the fact finder's recommendations.¹²⁰

2. What the Law Requires School Districts to Negotiate. Although a few

¹¹⁸ N.C. GEN. STAT. §§ 95-98; VA. CODE §§40.1-57.2.

¹¹⁹ See generally JOSEPH GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 326-30 (2004).

¹²⁰ For an overview of the different models see Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REF. 313, 316-35 (1993).

jurisdictions, most notably New Jersey,¹²¹ divide subjects of bargaining into mandatory and prohibited, most follow the model developed under the NLRA, dividing subjects into mandatory, permissive and prohibited. As the names imply, mandatory subjects are those over which negotiation is required. Employers may not make unilateral changes without first bargaining and exhausting statutorily prescribed impasse procedures. Permissive subjects are those on which bargaining is allowed but not required. Generally, a party may not insist to impasse on its position on a permissive subject and disputes over such subjects are not subject to statutorily prescribed impasse procedures. An employer may choose not to bargain and may act unilaterally at its option. Prohibited subjects are those on which the parties are forbidden to bargain and on which any collective bargaining agreement is unenforceable.

Most states require bargaining over “wages, hours and other terms and conditions of employment,” a term of art developed under the NLRA.¹²² Many states also have statutory management rights provisions exempting management functions from bargaining.¹²³ A few, such as Iowa and Kansas, specify subjects over which bargaining is required, leaving all subjects not so specified as permissive.¹²⁴ Interestingly, Delaware uses the general term, wages, hours and other terms and conditions of employment to define the scope of mandatory bargaining for most

¹²¹ See *Ridgefield Park Ed. Assn v. Ridgefield Park Bd. of Ed.*, 393 A.2d 278 (N.J. 1978).

¹²² See, e.g., 26 ME. REV. STAT. ANN. § 979-D(1); MICH. COMP. L. ANN. §423.215; WISC. STAT. ANN. § 111.70.

¹²³ See, e.g., 5 ILCS 325/4, 315/7; PA. STAT. §§ 1101.701, 1101.702.

¹²⁴ IA. CODE ANN. § 20.9; KANS. STAT. ANN. § 75-4327(b).

public employees, but limits mandatory bargaining for educational employees to salaries, benefits and physical working conditions.¹²⁵

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 negotiating working conditions against the impact of the issue on managerial prerogatives and public policy.¹²⁶ 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. 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

¹²⁵ Compare 19 Del. C. § 1301(3) with 14 Del. C. § 4008(a); see *Newman v. Bd. of Educ. Mt. Pleasant Sch. Dist.*, 350 A.2d 339 (Del. 1975); *Colonial Schools Bd. v. Colonial Affiliate*, 1982 WL 17849 (Del. Ch. 1982).

¹²⁶ See, e.g., *San Jose Peace Officers v. City of San Jose*, 144 Cal. Rptr. 638 (Cal. Ct. App. 1978); *West Hartford Educ. Ass'n v. DeCourcy*, 295 A.2d 526 (Conn. 1972); *Central City Educ. Ass'n v. Ill. Educ. Lab. Rel. Bd.*, 599 N.E.2d 892 (Ill. 1992); *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So.2d 31 (Fla. 1992); *Montgomery County Educ. Ass'n v. Board of Educ.*, 534 A.2d 980 (Md. 1987); *City of Lynn v. Labor Rel. Comm'n*, 681 N.E.2d 1234 (Mass. App. 1997); *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 621 P.2d 547 (Or. 1980); *City of Brookfield v. Wisc. Emp. Rel. Comm'n*, 275 N.W.2d 723 (Wisc. 1979).

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 educational policy to an arbitrator, the employees can distort the democratic process by increasing their influence at the expense of these other groups.¹²⁷

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.”¹²⁸ What follows is a discussion of some of the more commonly litigated issues.

a. Class Size. No issue better exemplifies the tension between questions of teacher working conditions and questions of public policy than the issue of class size. At its base, 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 allocation of resources. Will children benefit more from hiring additional staff to reduce class size or from upgrading technology available in the classrooms?

¹²⁷ *Montgomery County Educ. Ass’n v. Board of Educ.*, 534 A.2d 980, 987 (Md. 1987)(citation omitted); *see also* *Appeal of City of Concord*, 651 A.2d 944, 946 (N.H. 1994)(expressing similar concerns).

¹²⁸ *City of Lynn v. Labor Rel. Comm’n*, 681 N.E.2d 1234, 1237 (Mass. App. 1997).

Not surprisingly, the 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.¹²⁹ Florida, Kansas, Massachusetts, Nebraska, New York and Wisconsin have held it to be permissive.¹³⁰ New Jersey and South Dakota have held it to be prohibited,¹³¹ and, as developed below, in the 1990s, several states amended their statutes to prohibit or restrict bargaining on class size.

b. School Calendar. *Racine Education Association v. Wisconsin Employment Relations*

¹²⁹ West Hartford Educ Ass'n v. DeCourcy, 295 A.2d 526 (Conn. 1972); Decatur Bd. of Educ. v. Ill. Educ. Lab. Rel. Bd., 536 N.E.2d 743 (Ill. App. 1989); City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973).

¹³⁰ Hillsborough Classroom Teachers Ass'n v. Sch. Bd., 423 So.2d 969 (Fla. App. 1982); NEA-Topeka v. Unified Sch. Dist. 501, 592 P.2d 92 (Kan. 1979); Boston Teachers Union v. School Committee, 350 N.E.2d 707 (Mass. 1976); Seward Educ. Ass'n v. School Dist., 199 N.W.2d 752 (Neb. 1972); W. Irondequoit Teachers Ass'n v. Helsby, 315 N.E.2d 775 (N.Y. 1974); Beloit Educ. Ass'n v. Wisc. Emp. Rel. Comm'n, 242 N.W.2d 231 (Wisc. 1976).

¹³¹ 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 and that approach, 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).

Commission¹³² 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 questions of educational policy and just as clearly 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 was a matter of educational policy on which the school board should enjoy unilateral control.

In Maryland, bargaining over the school calendar is prohibited.¹³³ On the other hand, in Connecticut, the number of teacher student contact days and number of teacher work days are mandatory subjects.¹³⁴ Other states have not seen issues of school calendar in such all or nothing ways.

California initially distinguished between the student calendar, which it held was not a mandatory subject of bargaining¹³⁵ and the teacher work calendar which it held was a mandatory subject.¹³⁶ However, the California PERB appeared to collapse that distinction in *Poway Unified*

¹³² 571 N.W.2d 887(Wisc. App. 1997).

¹³³ *Montgomery County Educ. Ass'n v. Bd. of Educ.*, 534 A.2d 980 (Md. 1987).

¹³⁴ *State v. Bd. of Lab. Rel.*, 8 Conn. L. Rptr. 210, 1993 WL 7261 (Conn. Super. 1993).

¹³⁵ *Compton Community College District*, 1990 Cal.PERB Decision No. 790.

¹³⁶ *Davis Jt. Unified Sch. Dist.* 1984 Cal. PERB Decision No. 474.

School District.¹³⁷ 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. It distinguished *Compton* 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.

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 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.¹³⁸ However, it has also held that make-up days and extra compensation for teaching on make-up days are permissive subjects of bargaining.¹³⁹

c. 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

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

¹³⁸ *Indiana Educ. Emp. Rel. Bd. v. Highland Classroom Teachers Ass'n*, 546 N.E.2d 101 (Ind. Ct. App. 1989).

¹³⁹ *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. Indiana Educ. Emp. Rel. Bd.*, 471 N.E.2d 1191 (Ind. Ct. App. 1984).

New Hampshire have held that evaluation programs are a permissive subject of bargaining.¹⁴⁰

Kansas distinguishes between evaluative criteria, which it has held are not mandatorily bargainable and evaluation procedures on which it has required bargaining.¹⁴¹

d. Miscellaneous Other Subjects. Courts and labor boards have confronted a wide diversity of other subjects in which employees' rights to bargain collectively butt up against 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 Department of Health & Human Services was required to bargain with the unions representing its workers over a ban on smoking.¹⁴² Connecticut and Vermont, however, have refused to require bargaining over smoking prohibitions in public education.¹⁴³ They reason that smoking bans are matters of working 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.

¹⁴⁰ *Wethersfield Bd. of Educ. v. St. Bd. of Lab. Rel.*, 519 A.2d 41 (Conn, 1986); *In re Pittsfield Sch. Dist.*, 744 A.2d 594 (N.H. 1999); *Saso-Valley Teachers Ass'n v. MSAD 6*, Case No. 79-56 (Me.L.R.B. Aug. 7, 1979).

¹⁴¹ *See Unified Sch. Dist. No. 314 v. Kansas Dept. of Human Resources*, 856 P.2d 1343 (Kans. 1993); *Unified Sch. Dist. No. 352, Goodland v. NEA-Goodland*, 246 Kan. 137 (1990).

¹⁴² *Dept. of Health & Human Servs. v. Federal Lab. Rel. Auth.*, 920 F.2d 45 (D.C. Cir. 1990).

¹⁴³ *AFSCME Local 1186 v. St. Bd. of Lab. Rel.*, 5 Conn. L. Rptr. 738, 1991 WL 273780 (Conn. Super. 1991); *Mt.*

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.¹⁴⁴ Similarly, the Nebraska Supreme Court has held that signing bonuses for teachers must be negotiated.¹⁴⁵

Length of the work day has produced conflicting results. The Vermont Labor Relations Board has required bargaining.¹⁴⁶ On the other hand, the South Dakota Supreme Court has held that setting maximum student contact hours is a prohibited subject of bargaining.¹⁴⁷

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, even though strikes by public

Abraham Educ. Ass'n v. Mr. Abraham High Sch. Bd. Of Sch. Directors, 4 Vt.L.R.B. 224 (1981).

¹⁴⁴ Gray-New Glouster Ass'n v. MSAD 15, Case No. 85-01 (Me.L.R.B. Oct. 11, 1984)

¹⁴⁵ Crete Educ.. Ass'n v. Saline County Sch. Dist. No. 76-0002, 654 N.W.2d 166 (Neb. 2002).

¹⁴⁶ Castleton Educ. Ass'n v. Castleton-Hubbardton Bd. Of Sch. Directors, 13 Vt.L.R.B. 60 (1990).

¹⁴⁷ Rapid City Educ. Ass'n v. Rapid City Area Sch. Dist. 51-4, 376 N.W.2d 562 (S.D. 1985).

employees were illegal.¹⁴⁸ Act 112 added mandatory fines against striking teachers and their unions, prohibited strikes over unfair labor practices and mandated that courts enjoin teacher strikes.¹⁴⁹ The act also prohibited 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.¹⁵⁰ Most of these subjects had been held to be mandatory subjects of bargaining by the Michigan courts and the Michigan Employment Relations Commission.¹⁵¹

Contemporary media commentary suggests that the act was a backlash aimed primarily at the Michigan Education Association.¹⁵² In urging support for the bill, the *Grand Rapids Press*

¹⁴⁸ See *Sch. Dist. for City of Holland v. Holland Educ. Ass'n*, 157 N.W.2d 206 (Mich. 1968).

¹⁴⁹ MICH. COMP. L. ANN. § 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, *Marching Headlong into the Past: 1994 PA 112 and the Erosion of School Employee Bargaining Rights*, 74 MICH. B. J. 1186 (1995).

¹⁵⁰ MICH. COMP. L. ANN. § 423.215(3).

¹⁵¹ See Nickelhoff, *supra* note ____.

¹⁵² See, e.g., John Foren, *Engler-GOP Drive to Cut School Costs Aims at MEA*, GRAND RAPIDS PRESS, Mar. 19, 1994, at A1.

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.”¹⁵³ It applauded that under the act “school boards could no longer be bullied into buying insurance through the MEA’s subsidiary. . . .”¹⁵⁴ A stated rationale for restricting these subjects of bargaining was to foreclose disputes over these subjects from creating impasses in negotiations.¹⁵⁵

Around the same time, legislative backlash against teacher bargaining also arose in Oregon. The Oregon Court of Appeals held that class size was a mandatory subject of bargaining.¹⁵⁶ 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

¹⁵³ *Senate’s Turn on School Costs: House-passed Bill Shifts Control from MEA to Taxpayers, . Boards*, GRAND RAPIDS PRESS, Apr. 19, 1994, at A8.

¹⁵⁴ *Id.*

¹⁵⁵ 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).

¹⁵⁶ *Tualatin Valley Bargaining Council v. Tigard Sch. Dist.*, 808 P.2d 191 (Ore. App. 1991).

evaluations of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct 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 Councils . . .¹⁵⁷

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. 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 technology¹⁵⁸ Contemporary media accounts suggest that the restrictions on bargaining were aimed at the Chicago Teachers Union.¹⁵⁹ 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

¹⁵⁷ OREGON REV.STAT. § 243.650(e).

¹⁵⁸ 115 ILL. COMP. STAT. 5/4.5, as enacted by P.A. 89-15 § 10 (effective May 30, 1995).

¹⁵⁹ See Doug Finke & Amy E. Williams, *GOP Plan for Chicago Schools Takes Aim at Union*, STATE JOURNAL-REGISTER (Springfield, Ill.), May 11, 1995, at 1.

permissive subjects of bargaining.¹⁶⁰

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, reductions in force, staffing patterns, assignments, class schedules, school calendar, pupil assessment, teacher preparation time, experimental programs, charter schools and use of technology.¹⁶¹

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 meaningful teacher voice in educational policy. Because 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 emphasize their traditional bread-and-butter interests in the issue and de-

¹⁶⁰ 115 ILL. COMP. STAT. 5/4.5, as amended by P.A. 93-3, § 10 (effective Apr. 16, 2003).

¹⁶¹ 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*, 39 J. L. & EDUC. 275, 295-96 (2001).

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 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, as 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*,¹⁶² the Wisconsin Court of Appeals held that a requirement that teachers call parents during first two 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.¹⁶³ The employer may make and implement decisions unilaterally and may deal with whatever select group of employees it desires.¹⁶⁴

The 1996 report of the Secretary of Labor's Task Force¹⁶⁵ 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

¹⁶² 580 N.W.2d 375 (Wisc. App. 1998).

¹⁶³ *See, e.g.*, Village of Franklin Park v. State Lab. Rel. Bd., 638 N.E.2d 1144, 1148 (Ill. App. 1994).

¹⁶⁴ *See, e.g.*, Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi, 10 S.W.3d 723 (Tex. App. 1999).

¹⁶⁵ WORKING TOGETHER IN THE PUBLIC SERVICE: REPORT OF THE SECRETARY OF LABOR'S TASK FORCE ON EXCELLENCE IN STATE AND LOCAL GOVERNMENT THROUGH LABOR-MANAGEMENT COOPERATION (1996) [hereinafter WORKING TOGETHER].

giving up prerogatives.¹⁶⁶

The law thus inhibits the transition to a high performance educational workplace by diverting attention from harnessing 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 channeled most teacher unions into, it is not surprising that most teachers in charter schools see their unions as lacking relevance to their working lives.¹⁶⁷ 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?

¹⁶⁶ *Id.* at 65.

¹⁶⁷ *See supra* notes ___ and accompanying text.

Many charter schools are chartered to not-for-profit corporations and are run by the corporation's board of directors. A threshold legal issue arises as to 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 defines "employer" as follows:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government Corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . .

¹⁶⁸

The Supreme Court confronted the issue of what constitutes a "State or political subdivision thereof" in *NLRB v. Natural Gas Utility District*.¹⁶⁹ At issue was whether 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 held that this issue was to be decided under federal law and thus the law of the State of Tennessee was not controlling.¹⁷⁰ The Court observed that the National Labor Relations Board had limited the exemption for political subdivisions of a state to entities "created directly by the state, so as to constitute departments or administrative arms of the government, or administered by individuals

¹⁶⁸ 29 U.S.C. § 152(2) (2000).

¹⁶⁹ 402 U.S. 600 (1971).

¹⁷⁰ *Id.* at 602-03.

who are responsible to public officials or to the electorate in general.”¹⁷¹ Under that interpretation, the NLRB had held that the district was not exempt.

The Court found it unnecessary to decide whether the exemption should be broader than as defined by the NLRB. It concluded that under the NLRB’s interpretation, the district was exempt. 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.¹⁷²

The narrowness of the political subdivision exemption is illustrated by the Seventh Circuit Court of Appeals’ decision in *NLRB v. Kemmer Village, Inc.*¹⁷³ 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 Kemmer; 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

¹⁷¹ *Id.* at 604-05.

¹⁷² *Id.* at 606-09.

¹⁷³ 907 F.2d 661 (7th Cir. 1990).

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. . . .¹⁷⁴

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.*,¹⁷⁵ 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 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.¹⁷⁶ In 1986, in *Res-Care, Inc.*,¹⁷⁷ 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

¹⁷⁴ *Id.* at 662. 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).

¹⁷⁵ 216 N.L.R.B. 584 (1975).

¹⁷⁶ *Nat'l Transp. Servs., Inc.*, 240 N.L.R.B. 565 (1979).

¹⁷⁷ 280 N.L.R.B. 670 (1986).

exercised by the governmental entity over the employer's labor relations. Nine years later, in *National Training Corp.*,¹⁷⁸ 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 and makes such conduct subject to the constraints of the Constitution and subjects the entity to liability under 42 U.S.C. § 1983. In *Rendell-Baker v. Kohn*,¹⁷⁹ 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 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 State of Massachusetts and issued high school diplomas which were certified by the Brookline school district.¹⁸⁰ The Court

¹⁷⁸ 320 N.L.R.B. 131 (1995).

¹⁷⁹ 457 U.S. 830 (1982).

¹⁸⁰ *Id.* at 832-33.

held that the school was not a governmental actor and therefore was not subject to the First and Fourteenth Amendments or section 1983.

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.¹⁸¹

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.¹⁸²

The Court acknowledged that the school performed a public function, i.e., providing free education to maladjusted high school students.¹⁸³ However, 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.¹⁸⁴

Finally, the Court rejected the argument that the school and the government had a

¹⁸¹ *Id.* at 840-41.

¹⁸² *Id.* at 841-82.

¹⁸³ *Id.* at 842.

¹⁸⁴ *Id.*

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.¹⁸⁵

A divided First Circuit Court of Appeals expanded the reach of *Rendell-Baker* in *Logiodice v. Trustees of Maine Central Institute*.¹⁸⁶ 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 payments made by the district.¹⁸⁷ 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.¹⁸⁸

By two to one vote, the court held that MCI was not a state actor and therefore not subject to the constraints of the Fourteenth Amendment. The court reasoned that the provision of education, while a public function, was not exclusively a public function.¹⁸⁹ The parents argued that MCI not only provided education, but because the school district did not operate a high

¹⁸⁵ *Id.* at 842-43.

¹⁸⁶ 296 F.3d 22 (1st Cir. 2002).

¹⁸⁷ *Id.* at 24-25.

¹⁸⁸ *Id.* at 25.

¹⁸⁹ *Id.* at 26-27.

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.¹⁹⁰

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.¹⁹¹ 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.¹⁹²

A federal district court declined to apply *Logiodice* to an Ohio charter school in *Reister v. Riverside Community School*.¹⁹³ 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 retaliated against her exercise of her First Amendment right to free speech. The court observed that the Ohio

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 27-28.

¹⁹² *Id.* at 28.

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

statute declared that charter schools were public schools and part of the state's program of public education.¹⁹⁴ The court further reasoned that the charter school provided free public education, a function that historically was the exclusive function of government in Ohio.¹⁹⁵ 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*.¹⁹⁶ Read together, *Logiodice* and *Reister* 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.*,¹⁹⁷ 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 Massachusetts statute set its tuition rates, student-faculty ratio, curriculum and health & 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,

¹⁹⁴ *Id.* at 972.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 243 N.L.R.B. 514 (1979).

personnel policies, salaries or day-to-day operations.

In *C. I. Wilson Academy, Inc.*,¹⁹⁸⁹ a National Labor Relations Board Administrative Law Judge 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 to 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 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.

The California Public Employment Relations Board (Cal PERB) Regional Director distinguished *C. I. Wilson* in holding that a charter school was a public school employer subject to Cal PERB's jurisdiction in *Options for Youth – Victor Valley, Inc.*¹⁹⁹ The school argued that it was subject to NLRB jurisdiction and not to Cal PERB jurisdiction because it was a private corporation, run by a board of directors who were not public officials and controlled its own day-to-day operations. The Regional Director, however, looked to California statute and a California appellate court decision which, in upholding the constitutionality of the California charter school

¹⁹⁸ 2002 WL 1880478 (NLRB Adm. L. Judge July 31, 2002).

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

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 in the absence of 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 a political subdivision of the state under *Natural Gas Utility District*.

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.²⁰⁰ 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,²⁰¹ it further provides that a charter school may be a public or private employer depending on the nature of the entity that operates it.²⁰² 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

²⁰⁰ D.C. CODE tit. 38, § 1702.08(d).

²⁰¹ FLA. STAT. ANN. § 1002.33(1).

²⁰² *Id.* § 1002.33(12)(i).

public officers. 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.²⁰³ 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 purposes,²⁰⁴ and provides that the school's board of trustees are considered to be public agents.²⁰⁵ The Idaho statute contains a similar declaration 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.²⁰⁶

The Delaware Charter School Act of 1995 declares that charter school employees are covered by the state's Public School Employment Relations Act,²⁰⁷ but at least one commentator has questioned whether charter schools in Delaware are public bodies and whether their employees are public employees.²⁰⁸ She has noted that Delaware charter schools are organized and managed under the Delaware General Corporation law, board members are not elected and

²⁰³ Florida Attorney General Advisory Legal Opinion No. AGO 98-48 (July 31, 1998).

²⁰⁴ MASS. GEN. L. ANN. ch. 71 § 89(aa).

²⁰⁵ *Id.* § 89(a).

²⁰⁶ *Nampa Charter School, Inc. v. Delapaz*, 89 P.3d 863 (Idaho 2004).

²⁰⁷ 14 DEL. CODE § 407(c).

²⁰⁸ Kathi A. Karsnitz, *Charter Schools: Mile Markers on the Road of Reform or a Dead End for Public Education?*,

are not appointed by a public official, and the only accouterments of public employment are the declaration that the 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 are considered not to be public bodies and their employees not public employees, the National Labor Relations Act would preempt the application of the state public school collective bargaining statute.

Whether charter schools are likely to be governed by the NLRA or state law thus will depend on the peculiarities of how the schools are treated under the law of their states. Coverage under the NLRA offers several advantages to coverage under state law. First, in states that do not have statutes recognizing teachers' rights to organize and bargain collectively, coverage under the NLRA will protect those rights and provide a vehicle whereby teachers can compel a charter school to recognize and bargain with their union.

In this regard, the *C. I. Wilson* decision is ironic. Charter schools have, at times, been attacked as vehicles for union busting. However, Arizona has no public employee collective bargaining statute. Hence, if the charter school had been governed by state law, its teachers would have had no right to organize and bargain collectively. Instead, because the charter school was held to be a private entity subject to the NLRA, its teachers received the same organizational and collective bargaining rights as any other private sector employee.

Furthermore, coverage under the NLRA frees teacher unions up from the often detailed

and laborious impasse procedures provided for in state public employee bargaining statutes. As private sector employees, charter school teachers have a right to strike and no obligation to resort to mediation or factfinding before engaging in a strike.

Additionally, the scope of bargaining will likely be broader under the NLRA than under state law. 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 straight forward working conditions and clearly mandatory subjects of bargaining. Where the charter school is a private entity, there is no concern with the delegation of nondelegable public duties to the collective bargaining process.

However, the private sector contains a much broader exclusion of managers from statutory coverage than is found in any public sector statute. As noted previously, educators who have a voice in educational policy and who exercise independent judgment or discretion have been held to be managers and excluded from coverage under the NLRA.²⁰⁹

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. Louisiana flatly declares that a charter school is governed by the terms of a collective bargaining agreement entered into by the school board in whose jurisdiction the charter school is located.²¹⁰ Alaska provides that

²⁰⁹ See *supra* notes _____ and accompanying text.

²¹⁰ LA. REV. STAT. tit. 17, § 3996(D).

all provisions of a collective bargaining agreement governing a school district and its teachers or other employees also govern the employees of a charter school within that district unless the school district and the union agree otherwise.²¹¹ Maryland provides that charter school employees are employees of the public school employer where the school is located but that the union and the charter school (rather than the regular school board) may negotiate contract amendments to address the charter school's particular needs.²¹² Connecticut provides similarly, but allows a majority of the charter school employees and a majority of the charter school governing board to modify the district's collective bargaining agreement as applied to the school.²¹³

In California, the Cal. PERB interpreted the state's charter school statute as exempting charter schools from the state's collective bargaining law.²¹⁴ This holding prompted an amendment to the statute, which 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 is located is the employer.²¹⁵ Thus, whether employees of a charter school are covered under an existing

²¹¹ AK. STAT. § 14.03.270(b).

²¹² ANN. CODE MD. § 9-108(a)(2), (b).

²¹³ CONN. GEN STAT. ANN. § 10-66dd(4).

²¹⁴ San Francisco Unified Sch. Dist., 25 Pub. Emp. Rep. Cal. ¶ 32071 (Cal PERB 2001).

²¹⁵ CAL. EDUC. CODE § 47611.5(b).

collective bargaining agreement depends on the declaration in the charter. If the charter declares the school to be the employer, then employees of the school must organize from scratch to achieve collective bargaining representation.

Massachusetts distinguishes between schools chartered by the state and those chartered by a local school district. For the former, the charter school's board of trustees is deemed to be the employer and consequently, the school will be its own bargaining unit. However, the statute facilitates organizing such a school's employees by mandating recognition once a union has obtained signed authorization cards from 60 percent of the employees.²¹⁶

In Massachusetts, local school boards can charter schools, but only with the agreement of the local collective bargaining agent.²¹⁷ The Massachusetts statute provides that employees of such a charter school are exempt from the local collective bargaining agreement to the extent provided for in the charter,²¹⁸ but because the charter requires approval of the union, tailoring of the collective bargaining agreement for the charter school appears to require agreement of the union and the school board.

Similarly, Michigan requires that a charter school chartered by a school district abide by the school district's collective bargaining agreements.²¹⁹ The Michigan statute contains no

²¹⁶ MASS. GEN. L. ANN. ch. 71 § 89(aa).

²¹⁷ *Id.* § 89(b).

²¹⁸ *Id.* § 89(u).

²¹⁹ MICH. COMP. L. ANN. § 380.502(3)(i).

comparable provision for schools chartered by other entities.

The Indiana statute provides that a teacher is an employee of the charter school, and has the right to organize and bargain collectively under the Indiana Educational Employees Relations Act,²²⁰ but, for collective bargaining purposes, employees of a conversion charter school are considered employees of the school district (called school corporation in Indiana) that sponsored the charter school.²²¹ New Jersey also provides that employees of conversion charter schools remain part of the school district bargaining unit while employees of a start-up are a separate unit unless the board of trustees opts to offer the employees coverage under the school district's contract.²²² New York provides that employees of a conversion charter school are subject to the existing contract unless a majority of those employees vote to modify the contract, but provides that start-ups are separate bargaining units and are not covered by existing collective bargaining agreements.²²³

The Delaware statute declares that employees of schools converted to charter status have the same rights to organize and bargain collectively as other public employees but are not to be part of the bargaining unit that represented employees of the school when it was not a charter

²²⁰ ANN. IND. CODE tit. 20, art. 5.5, ch. 6 §1(e).

²²¹ *Id.* § 1(c).

²²² N.J. STAT. ANN. tit. 18A, ch. 36A § 14(b).

²²³ N.Y. EDUC. CODE § 2854(3)(b).

school.²²⁴ Although the statute is silent, presumably employees of new start-up charter schools are in their own bargaining units, but as discussed above, there is an issue as to whether employees of start-up charter schools are public employees or subject to the NLRA.²²⁵ New Hampshire mandates that charter school employees form their own bargaining unit.²²⁶ Pennsylvania²²⁷ and Tennessee²²⁸ provide similarly. Minnesota provides that charter schools are to be separate bargaining units. However, the statute allows a charter school to be included in a school district's bargaining unit if the charter school board, the school district board, the charter school employees and the school district union agree.²²⁹

The Florida statute appears to vest in the employees the decision as to whether they have rights to organize and bargain collectively and whether they are part of an existing bargaining unit in their districts or form a separate bargaining unit. 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

²²⁴ 14 DEL. CODE § 507(b).

²²⁵ See *supra* note ___ and accompanying text.

²²⁶ N. H. REV. STAT. § 194-B:14II(b), (e).

²²⁷ PA. STAT. ANN. § 1724-A(1).

²²⁸ TENN. CODE ANN. § 49-13-118.

²²⁹ MINN. STAT. ANN. § 124D.10(21).

structure of the charter school.”²³⁰ 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.”²³¹ 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.

As one can readily see, the application of charter school specific labor law adds layers of complexity to the already complex ad hoc determination of whether a particular matter is subject to negotiation. Before teachers in a charter school ever reach the latter issue, they must determine whether their status is governed by the NLRA or state law and, if the latter, what their status is with respect to existing school district bargaining units. These added layers of complexity increase the diversion of energy away from positive cooperative problem solving to battles over legal formalisms.

Teacher employment relations in charter schools illustrate the inherent contradictions in American labor law. By unshackling schools from the bureaucratic control of school district hierarchies and restrictive work rules, charter schools sought to create high involvement work places. However, instead of creating professional communities, 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

²³⁰ FLA. STAT. ANN. § 1002.33(12)(b).

²³¹ *Id.* § 1002.33(12)(c).

that encourages charter schools to become 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. We address this need in the next Part.

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 are required in high performance organizations and how labor law can encourage those workers.

There are four basic ways to organize workers, each distinguished by the expectations of workers and legitimized by institutional and organizational rules. Any worker, can be organized as either: (1) an industrial laborer, (2) a craft worker, (3) an artist, or (4) a professional.²³² Unions can organize around any of these four, but the resulting unions emphasize different aspects of work. Artists unionize around control over the work as well as its financial rewards. For example, entertainment industry negotiations over who gets the “final cut” of a movie or control over the play-list at a radio station are as hard fought as negotiations over compensation.

Likewise, professionals organize precisely over the question of who sets and controls

²³² See CHARLES T. KERCHNER & DOUGLAS E. MITCHELL, *THE CHANGING IDEA OF A TEACHERS' UNION* 205-29 (Stanford Series in Education and Public Policy 1988).

standards: witness the current struggle of physicians against health maintenance organizations.²³³ Craft unions join economic concerns with an emphasis on skills. They wield control through apprenticeship and job placement programs. As Cobble reported, in the case of a now-disbanded waitress union, women assumed responsibility for “management” tasks such as hiring and discharge of employees, the mediation of on-the-job disputes, and the assurance of fair supervision. “In a sense workers in the culinary industry had instituted a form of self-management”²³⁴

However, by the 1960s and 1970s when the majority of teachers in the United States unionized, the word “unionism” largely meant industrial unionism. Older forms of worker organization—guilds, artisan associations, and craft unions—had largely been supplanted by a form of unionism designed to function within large hierarchies with an atomistic division of labor. In public education, industrial unionism was labor’s answer to an education system constructed on the principles of scientific management, a system in which the content and pacing of work were not designed by teachers themselves but by school administrators. As the history of education in the 20th century clearly shows, schools were bureaucratized long before they

²³³ See Charles Taylor Kerchner & Jason Abbott, *The Implications of the Health Care Revolution for the Organization of School Teachers* (Paper presented at NEA conference on Frontiers of Unionism, 1999).

²³⁴ Dorothy Sue Cobble, *Organizing the Postindustrial Work force: Lessons from the History of Waitress Unions*, 44 *INDUS. & LAB. REL. REV.* 419, 426 (1991).

were unionized.²³⁵

Lore and literature portray teachers as artists. Through its professional development and continuing education programs, management usually encourages teachers to become craft workers. Some combination of these attributes is surely necessary in charter schools. But 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.²³⁶

Art and craft are usually thought of as individual characteristics, but in the workplace they are collective ones, and this fact brings us face-to-face with the historic union problem of how to bring together people of different organizational status. This issue faced Sen. Robert Wagner and the framers of the National Labor Relations Act. The widespread use of company-sponsored unions in the 1920s led the drafters of the NLRA to require an arms-length relationship between unions and management. If close working relationships are necessary, 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

²³⁵ See generally DAVID TYACK & ELIZABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA 1820-1980* (1982); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974).

²³⁶ See KERCHNER & MITCHELL, *supra* note ____, at 208.

coercion and endogenous shaping of workers' preferences and interests?"²³⁷

The answer, we believe, is to broaden the set of choices about how charter school teachers would represent themselves. The choice is now a simple one: collective bargaining or not. In states where collective bargaining is not allowed there is no choice at all, unless the charter school is found to be a private employer subject to the NLRA. Where teachers have the choice of traditional collective bargaining, the surrounding legal doctrine channels their voices toward an industrial union model. However, the experiments in reform or professional unionism 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 engaged in what has been called reform or professional unionism, form joint labor-management teams to address educational problems. For example, the Cincinnati, Ohio, school district and the Cincinnati Federation of Teachers agreed to form and manage a professional development center. In Toledo, Ohio, and in Rochester, New York, union contracts specify the formation of joint teams to oversee the peer review systems.

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. At least one state (Minnesota) has a

²³⁷ Mark Barenberg, *The Political Economy of the Wagner Act*, 106 HARV. L. REV. 1379, 1496 (1993).

statutory requirement for consultation,²³⁸ but union leaders tell us that the requirement is often ignored. School principals and union representatives at the school level form consultative relationships more rarely. This is the case partly because union stewards or building representatives see their jobs as being the first line of protection in teacher grievance situations rather than a legitimate part of a school leadership team. But there are exceptions.

The idea of autonomous work teams originates in manufacturing with such experiments as Saturn Motors and within producer's cooperatives,²³⁹ and it is seen in education beginning with the School Site Management reforms of the 1980s and 1990s.²⁴⁰ Although applications varied widely, the general idea has been to move authority and resources to the school level and to encourage if not mandate teacher participation. In Los Angeles, a large civic coalition that included the president of United Teachers Los Angeles, created a semi-autonomous school plan in which hiring authority and most of the school's budget were to be at the disposal of a school's leadership team, which was to include the union representative at that school and a majority of teachers. The experiment, called LEARN, lasted for seven years before the political will that

²³⁸ MINN. STATE. ANN. § 179A.08.

²³⁹ See Saul A. Rubinstein, *The Impact of Co-Management on Quality Performance: The Case of the Saturn Corporation*, 53 INDUS. & LAB. REL. REV. 197 (2000); Saul, Michael Rubinstein et al., *The Saturn Partnership: Co-Management and the Reinvention of the Local Union*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 339 (Bruce E. Kaufman & Morris M. Kleiner eds. 1993).

²⁴⁰ See CHARLES TAYLOR KERCHNER ET AL., INSTITUTIONAL CHANGE IN PUBLIC EDUCATION: THE CASE OF LOS

founded it evaporated and the district reverted to a command-and-control management style.

Perhaps a score of other school districts tried similar arrangements.²⁴¹

For several reasons, it would be inappropriate, however, to mandate legislatively a particular model of employee empowerment. Such a mandate would merely substitute a new set of potentially stifling regulation for the old industrial labor relations model. Rather, charter schools must be free 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. Such a 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.²⁴²

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

ANGELES 30-42 (2006).

²⁴¹ See generally KERCHNER & KOPPICH, *supra* note ____.

²⁴² 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, Int'l Ass'n of Machinists v. Wisc. Emp. Rel. Comm'n*, 427 U.S. 132 (1976). See generally ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZING AND

charter.

A charter-by-charter approach to teacher involvement is much less likely than a specific statutory mandate to be preempted when applied to schools covered by the NLRA. When a state imposes a specific statutory mandate on all charter schools, it is acting in its regulatory capacity and subject 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, i.e., acts in its proprietary capacity, its requirements for contracting are not preempted by the NLRA.²⁴³ Moreover, in granting a charter and requiring that it contain a vehicle for teacher voice because the presence of such a vehicle is likely to provide advantages in the delivery of educational services, the public entity is acting with respect to a matter that is “deeply rooted in local feeling and responsibility.”²⁴⁴

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.

COLLECTIVE BARGAINING 1103-10 (2004).

²⁴³ See *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass.*, 507 U.S. 218 (1993).

²⁴⁴ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

VII. Conclusion

The approach we suggest offers several advantages. First, it recognizes the fundamental fairness of the tradeoff 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 develop alternative approaches to teaching and learning. The freedom from regulation thus injects variety and sometimes competition into public education with the most successful approaches expected to attract students, attain desired results, and survive competitive battles. Schools that do not perform violate the conditions of their charters, and the chartering authority is not supposed to renew charters of poorly performing schools. Thus, charter school teachers assume more risk than conventional public school teachers. Their jobs are less secure and depend on school 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, it 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. But teacher turnover is high.²⁴⁵ 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. The reduction in turnover creates the

organizational stability necessary to form a professional community.

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 cooperative4s be more effective than teacher representation on the charter'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 to the betterment of delivery of educational services.

Finally, the development of successful models of teacher involvement will place competitive pressure on traditional public schools to do likewise. 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.

²⁴⁵ See Molloy & Wohlstetter, *supra* note __, at 236.