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2021

## Labor And Employment—Not Waiting for Superman: Collective Bargaining as an Affirmation of Teachers' Value

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### Recommended Citation

Christopher Yeatman, *Labor And Employment—Not Waiting for Superman: Collective Bargaining as an Affirmation of Teachers' Value*, 44 U. ARK. LITTLE ROCK L. REV. 309 (2021).

Available at: <https://lawrepository.ualr.edu/lawreview/vol44/iss2/5>

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## LABOR AND EMPLOYMENT— NOT WAITING FOR SUPERMAN: COLLECTIVE BARGAINING AS AN AFFIRMATION OF TEACHERS’ VALUE

### I. INTRODUCTION\*

What exactly makes a healthy school system? Without a doubt, there are so many nuanced factors that it’s hard to imagine a comprehensive response. But to many, collective bargaining agreements<sup>1</sup> with teachers would certainly not be included. The degree to which teachers and other school employees are valued, on the other hand, is a fairly conventional factor.<sup>2</sup> Public officials around the country purport to respect teachers by heaping praise on the profession.<sup>3</sup> These statements are only later contradicted by high-profile slights<sup>4</sup> and fraught public disputes.<sup>5</sup> In the last decade, state

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\*On April 8, 2021, the Arkansas General Assembly enacted Senate Bill 341, which prohibits collective bargaining on the part of state public-sector employees, although police and firefighters’ unions are exempted. S.B. 341, 93rd Gen. Assemb. Reg. Sess (Ark. 2021) (enacted). The bill further prohibits public employees from striking and provides that violating this prohibition will result in termination. Ark. Code Ann. § 21-1-803(b) (West 2021). This Note was largely drafted before S.B. 341 was enacted, and it has not been modified to reflect this dramatic change to Arkansas public-sector labor law. Nonetheless, the argument presented is still relevant, perhaps even more so now, as it seeks to weigh the benefits of an inclusive approach to teachers’ unions. As teachers’ unions have now been rejected entirely, perhaps there is no better time to reflect on what this could mean for Arkansas schools.

1. Collective bargaining is the process of an employer’s negotiating the terms and conditions of employment with employees who are represented by an exclusive agent, typically a union. 29 U.S.C. § 158(d) (“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]”).

2. See Katie Glueck, *Joe Biden Debuts Education Plan, Then Touts It to Teachers’ Union*, N.Y. TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/us/politics/biden-education-plan-2020.html> (quoting President Joe Biden stressing the importance of “increas[ing] the dignity of work” of teachers and the “professionalization of how [teachers are] treated” to his education platform).

3. See, e.g., Secretary of Education Betsy DeVos (@BetsyDeVos), TWITTER (May 5, 2019, 6:00 PM), [https://twitter.com/BetsyDeVosED/status/1125173328086433792?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1125173328086433792%7Ctwgr%5E%7Ctwcon%5E1\\_%26ref\\_url=https%3A%2F%2Fwww.yahoo.com%2Flifestyle%2Fteachers-respond-to-betsy-de-vos-praise-for-national-teacher-appreciation-week-humbly-ask-for-a-raise-and-your-resignation-215007252.html](https://twitter.com/BetsyDeVosED/status/1125173328086433792?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1125173328086433792%7Ctwgr%5E%7Ctwcon%5E1_%26ref_url=https%3A%2F%2Fwww.yahoo.com%2Flifestyle%2Fteachers-respond-to-betsy-de-vos-praise-for-national-teacher-appreciation-week-humbly-ask-for-a-raise-and-your-resignation-215007252.html).

4. See, e.g., Cal Thomas, *Interview of Secretary of Education Betsy DeVos*, TOWNHALL (Feb. 16, 2017, 12:00 AM), <https://townhall.com/columnists/calthomas/2017/02/16/interview-of-secretary-of-education-betsy-devos-n2286164> (quoting DeVos, who referred to teachers at the school she was visiting as being in “receive mode”).

5. See *infra* Section II.B.

legislators around the country have conducted a relentless campaign to suppress the collective bargaining power of educators in public school systems.<sup>6</sup> This begs the question, how can political leaders logically praise teachers while simultaneously striving to dismantle their most influential platform?

The Little Rock School District (LRSD) exemplifies this dichotomous relationship between teachers and school management.<sup>7</sup> On December 12, 2019, the Arkansas State Board of Education (“State Board”) elected to reconstitute the school district after almost five years of unilateral state control and dissolution of the local school board.<sup>8</sup> This development could have brought a sense of finality to the controversial “takeover” by the state. Instead, the State Board implemented three restrictions that will indefinitely prolong its oversight.<sup>9</sup> Although the LRSD has returned to local control following the November 3, 2020 general election of a local school board (“Local Board”), the Local Board is prohibited from (1) changing the superintendent, (2) recognizing any collective bargaining agent, and (3) instituting any non-routine litigation without approval from the State Board.<sup>10</sup> The State Board’s action is of particular note because, prior to the Little Rock Education Association’s (LREA) contract expiring on October 31, 2019, the LRSD was the lone school district in Arkansas where the local teachers’ union held bargaining power.<sup>11</sup>

The State Board’s decision has only intensified widespread criticisms that it is not responding to the communities zoned for the LRSD, but is rather pursuing its partisan agenda of introducing market principles into public education.<sup>12</sup> Supporters of the decision, on the other hand, posit that a grad-

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6. See David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J. L. & EDUC. 275 (2001); Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 ABA J. LAB. & EMP. L. 149 (2012).

7. For the purposes of this Note, I define “school management” broadly. I am generally referring to the bodies that control the funding and policies of a given school district, such as a school board or executive agency. However, the phrase may also encompass management at an individual school—principals, or even state legislatures that, while not directly involved in administering routine operations, enact school reform laws.

8. Cynthia Howell, *Arkansas Board of Education Approves Reconstitution Plan for Little Rock Schools*, ARK. DEMOCRAT GAZETTE (Dec. 12, 2019, 8:39 PM), <https://www.arkansasonline.com/news/2019/dec/12/arkansas-board-education-approves-reconstitution-p/>.

9. *Id.*

10. *Id.*

11. Madeline Will, *In Little Rock, Ark., Teachers to Strike for Collective Bargaining Power*, EDUC. WEEK (Nov. 13, 2019), <https://www.edweek.org/teaching-learning/in-little-rock-ark-teachers-to-strike-for-collective-bargaining-power/2019/11>.

12. See, e.g., Lindsey Millar, *Five Years of State Control of the LRSD*, ARK. TIMES (Jan. 28, 2020, 2:10 PM), [https://arktimes.com/arkansas-blog/2020/01/28/five-years-of-state-control-of-the-lrsd?pico\\_new\\_user=true&pico\\_ui=login\\_link](https://arktimes.com/arkansas-blog/2020/01/28/five-years-of-state-control-of-the-lrsd?pico_new_user=true&pico_ui=login_link) (criticizing the “dubious legal

ual return to local control is necessary to avoid returning to the same patterns of underperformance and mismanagement that prompted the state takeover in the first place.<sup>13</sup>

State takeovers implemented by political leaders have become a commonplace tactic adopted to bypass teachers' union influence and ease the implementation of reform measures.<sup>14</sup> Local districts, too, are often at odds with teachers' unions when enacting policies.<sup>15</sup> This sort of adversarial relationship between school management and teachers' unions is on display nationwide and has frequently entered the political fray.<sup>16</sup> It reflects a common sentiment that has taken root in the past decade: that teachers' unions are a burdensome, pestilent roadblock to substantive reforms.<sup>17</sup> Collective bargaining is often depicted as a means for teachers' unions to exercise outsized influence in local policy decisions and another bureaucratic cog that eliminates managerial discretion while rewarding poor performers.<sup>18</sup>

Inevitably, education policy has important implications for educators' work settings and expectations.<sup>19</sup> For example, policies relating to class size, the academic calendar, teacher evaluation, and curriculum directly affect the classroom. Collective bargaining is a mechanism that shields union mem-

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opinion by education department lawyers" allowing for only limited return to local control of the school district). This article is critical of state management of the district, accusing Education Secretary Johnny Key of making important decisions on a "purely political" basis and lamenting the dramatic expansion of charter schools operating in the LRSD while it remained under state control. *Id.*

13. Johnny Key, *The LRSD Reconstitution Framework is a Responsible Path Forward*, ARK. TALK BUS. & POL. (Oct. 6, 2019, 6:04 PM), <https://talkbusiness.net/2019/10/the-lrsd-reconstitution-framework-is-a-responsible-path-forward/>.

14. See, e.g., Andre Ujifusa, *Rhode Island the Latest State to Plan a District Intervention*, EDUC. WEEK (Aug. 21, 2019), <https://www.edweek.org/policy-politics/rhode-island-the-latest-state-to-plan-a-district-intervention/2019/08>.

15. See, e.g., Tiffany Lankes, *Buffalo Teachers Federation Sues Over Superintendent's Takeover of 20 Schools*, THE BUFFALO NEWS (Jan. 30, 2021), [https://buffalonews.com/news/local/crime-and-courts/buffalo-teachers-federation-sues-over-superintendent-s-takeover-of-20-schools/article\\_1c7056a1-40c4-5a55-bb05-5bf524f60300.html](https://buffalonews.com/news/local/crime-and-courts/buffalo-teachers-federation-sues-over-superintendent-s-takeover-of-20-schools/article_1c7056a1-40c4-5a55-bb05-5bf524f60300.html).

16. See, e.g., Scott Walker, *Why I'm Fighting in Wisconsin*, WALL ST. J. (Mar. 10, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704132204576190260787805984> (reporting on former Wisconsin Governor Scott Walker's stance against teachers unions, which received nationwide media coverage after he effectively abolished collective bargaining with most public employees, briefly thrusting him into the political spotlight as a leading presidential candidate in 2016); see Molly Ball, *How Scott Walker's Hubris Killed His Campaign*, ATLANTIC (Sept. 22, 2015), <https://www.theatlantic.com/politics/archive/2015/09/scott-walker-presidential-campaign/406618/archive/2015/09/scott-walker-presidential-campaign/406618/> ("[Walker's] battles with public-sector unions had impressed national conservatives.").

17. See Nicholas Dagostino, Note, *Giving the School Bully a Timeout: Protecting Urban Students from Teachers' Unions*, 63 ALA. L. REV. 177, 198 (2011).

18. *Id.* at 181–84.

19. See *infra* Section II.A.

bers from the impact of adverse management decisions, such as substituting time dedicated to lesson planning with morning and lunch duty. And in the right setting, collective bargaining can promote positive education reform through labor-management cooperation.<sup>20</sup> At the very least, recognition of teachers' unions as collective bargaining agents validates the voices of educators who have a limited policy platform despite being the most in tune with educational policy's target—the classroom. The common criticisms of teachers' unions are misguided. Unions function as obstacles to education reform because their membership is vulnerable to reform efforts that exclude teachers from the decision-making process. Consequently, unions focus strictly on shielding teachers from unilateral decisions by management. The legislature's efforts to mitigate union influence pigeonhole them into an obstructionist role. This pattern warrants renewed efforts for union inclusion. However, there are two sides to this coin. Union inclusion also demands that unions be more genuinely altruistic when advocating for teacher interests.

Collective bargaining in itself does not subvert school district health but rather has the potential to foster a collaborative relationship between management and educators. This Note argues that the LRSD and the LREA should negotiate by incrementally integrating those “management” decisions that directly affect the teacher-school district employment relationship into the scope of bargaining. In order to do this, Arkansas must adopt a statutory framework that fosters labor-management cooperation. Shifting from the current trend of suppressing union engagement towards labor-management cooperation would elevate the teaching profession, thereby grounding the rhetorical value heaped on teachers in policy.<sup>21</sup>

Section II of this Note presents an overview of collective bargaining law for teachers and state efforts to reform it.<sup>22</sup> Section III presents the state of that law in Arkansas.<sup>23</sup> Section IV scrutinizes the compatibility of teach-

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20. See Martin H. Malin, *Education Reform and Labor-Management Cooperation: What Role for the Law?*, 45 U. TOL. L. REV. 527, 531–34 (2014) (discussing the impact of union-led peer review as an alternative to traditional teacher evaluation systems, in addition to collaborative efforts by the teachers' union and management to select textbooks, develop curriculum, and monitor and implement school improvement plans, on the Toledo City School District). Labor-management collaboration is also applauded for creative approaches in turning around failing school districts in Providence, Rhode Island; Evansville, Indiana; and New Haven, Connecticut. *Id.* at 533.

21. This policy proposal is largely the product of a value judgment about the proper allocation of power among teachers and administrators; however, adopting it will demonstrate that teachers are professionals and not unskilled labor, and it is only the logical outgrowth of a public sentiment that respects the unique societal role held by teaching professionals.

22. See *infra* Section II.

23. See *infra* Section III.

ers' union's employment interests and the public's interest in improving school performance and argues that the two align on many fronts.<sup>24</sup> Section V critiques the Arkansas State Board of Education's reconstitution scheme and offers an alternative policy direction, namely adopting a legal framework that encourages professional unionism and cooperation between teachers' unions and school district management.<sup>25</sup>

## II. COLLECTIVE BARGAINING OVERVIEW

Teachers' unions are among the most influential labor bodies in the country.<sup>26</sup> It appears unlikely that this will change in the near future,<sup>27</sup> despite the Supreme Court's recent decision that it is unconstitutional for unions to compel dues from eligible members in districts where the union is the elected representative.<sup>28</sup> Unions have a variety of tools they may use to influence policy issues.<sup>29</sup> But collective bargaining is the unions' most tangible means of making a policy impact because these agreements limit school management, typically a school board and its administrators, contractually by confining the scope of management's discretionary authority.<sup>30</sup>

Teachers' unions were born out of a desire to confront a history of marginalization and create a formidable position to negotiate working conditions and compensation with management.<sup>31</sup> Naturally, organizers were inclined to adopt the same proven collective bargaining model used in the

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24. See *infra* Section IV.

25. See *infra* Section V.

26. See *Labor*, OPENSECRETS CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/industries/indus.php?ind=P> (last visited Feb. 2, 2021).

27. See Larry Ferlazzo, *Response: Teachers Unions 'Must Claim the Mantle of Educational Leadership'*, EDUC. WEEK (Mar. 10, 2018), <https://www.edweek.org/education/opinion-response-teachers-unions-must-claim-the-mantle-of-educational-leadership/2018/03> (discussing the future of teachers' unions).

28. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 U.S. 2448, 2486 (2018) (holding that union security agreements, which compel union membership or union fees for all employees governed by a collective bargaining agreement, are not authorized in the public sector as they constitute a violation of the First Amendment right to free speech).

29. Teachers' unions spend heavily on advertisements and lobbying, for example. See Soloman Moore & Harriet B. Rowan, *COVID'S political impact: teachers union outspends Big Oil in Sacramento*, THE MERCURY NEWS (May 16, 2021), <https://www.mercurynews.com/2021/05/16/covids-political-impact-teachers-union-outspends-big-oil-in-sacramento/> (last visited Nov. 1, 2021).

30. See *infra* Section II.B (discussing the importance and scope of collective bargaining agreements with teachers' unions).

31. See generally, Adam Mertz, *A Century of Teacher Organizing: What Can We Learn?*, THE LABOR AND WORKING CLASS HISTORY ASS'N., <https://www.lawcha.org/century-teaching-organizing/> (last visited Nov. 1, 2021) (discussing the history of teachers' unions' evolution from the late 19<sup>th</sup> century to present).

industrial sector.<sup>32</sup> Under this adversarial “industrial labor relations” model, employees leverage their collective ability to halt standardized work outputs via the threat of striking to secure commitments from management.<sup>33</sup> While this model has been a resounding success in securing improved pay, benefits, and job security for school employees, it is flawed. Teachers and administrators, supposed partners in the educational enterprise, are often pitted against one another in negotiations, invariably resulting in a zero-sum outcome. This Section provides an overview of the collective bargaining process and places the policy proposals advocated for in this Note in the proper legal and political context.

### A. The Scope of Bargaining

Public-sector labor law generally reaffirms the notion of teaching as industrial labor by excluding certain managerial matters from the scope of bargaining, thereby limiting labor influence on those matters.<sup>34</sup> Not all states authorize collective bargaining by public employees, however.<sup>35</sup> The National Labor Relations Act (NLRA),<sup>36</sup> which grants employees the right to engage or refrain from union activity, does not apply to federal, state, or local government employers.<sup>37</sup> While the First Amendment guarantees a right to unionize and participate in most union activities, it does not require school management to recognize or bargain with unions.<sup>38</sup> Thus, states are

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32. See generally, David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689, 691–94 (1990) (discussing the historical roots of collective bargaining law in the industrial labor movement).

33. *Id.*

34. Benjamin M. Superfine & Jessica J. Gottlieb, *Teacher Evaluation and Collective Bargaining: The New Frontier of Civil Rights*, 2014 MICH. ST. L. REV. 737, 742–43 (2014).

35. See, e.g., N.C. GEN. STAT. §§ 95–98 (“Any . . . contract[] between the governing authority of any . . . institution of the State of North Carolina, and any labor union . . . as bargaining agent for any public employees . . . is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.”); TEX. GOV’T CODE ANN. § 617.002(a) (“An official of the state . . . may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees.”).

36. 29 U.S.C. §§ 151–69.

37. 29 U.S.C. § 152(2).

38. Am. Fed’n of State, Cnty., & Mun. Emps., AFL-CIO v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“The First Amendment protects the right of one citizen to associate with other citizens for any lawful purpose free from government interference. The guarantee of the ‘right of assembly’ protects more than ‘the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.’”).

permitted to craft their own statutory framework pertaining to public sector collective bargaining agents, which they began to implement in the 1960s.<sup>39</sup>

Some states have passed legislation prohibiting public entities from recognizing collective bargaining agents entirely.<sup>40</sup> This is not standard policy. The majority of states explicitly permit collective bargaining for teachers and require school districts to recognize a teachers' union, elected by a majority of eligible district employees, to be their authorized agent.<sup>41</sup> "Permissive" states, on the other hand, delegate school districts the discretionary authority to engage in collective bargaining.<sup>42</sup>

In states where public-sector collective bargaining is authorized, the range of issues on the table for negotiation, the "scope of bargaining," varies. Often, the legislature authorizes bargaining for "terms and conditions of employment" while expressly limiting that term of art from the NLRA, committing certain matters to the discretion of the employer.<sup>43</sup> Inevitably, the statutory language does not encompass all potential points of dispute, and courts or administrative bodies must discern whether particular issues are mandatory, permissible, or altogether excluded from the scope of bargaining.<sup>44</sup> Pensions, wages, hours, benefits, and dismissal procedures are almost invariably considered terms and conditions of employment.<sup>45</sup> Managerial or administrative matters, such as the length of the school day and year, transfer procedures, class size, teacher evaluations, student discipline,

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39. Chris Edwards, *Public-Sector Unions*, 61 CATO INST. TAX & BUDGET BULLETIN (Mar. 2010), [http://www.cato.org/sites/cato.org/files/pubs/pdf/tbb\\_61.pdf](http://www.cato.org/sites/cato.org/files/pubs/pdf/tbb_61.pdf) ("Princeton University's Henry Farber has documented the rise in public-sector unionism since the 1950s. He found that the number of states allowing collective bargaining for public-sector workers jumped from just one in 1955 to 10 by 1965. New York City granted collective bargaining privileges to most city workers in 1958. By 1970, about half of the nation's state-level workers had collective-bargaining privileges, while more than half of the states allowed collective bargaining in local governments.")

40. Benjamin A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence from a New Mexico Natural Experiment*, 120 YALE L.J. 1130, 1137 (2011).

41. *Id.*

42. *Id.*

43. *Id.* at 1144 n.71.

44. *See, e.g., In re Bd. of Educ. of City Sch. Dist. of City of New York v. New York State Pub. Empl. Rels. Bd.*, 554 N.E.2d 1247, 1251 (N.Y. 1990) (reviewing determination of Public Employment Retirement Board and holding that teacher disclosure requirements were mandatory, not permissive subject of bargaining); *Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n*, 462 A.2d 137, 140–41 (1983) (contemplating an employer's discretion to hire, retain, promote, transfer, or dismiss employees); *W. Cent. Educ. Ass'n v. W. Cent. Sch. Dist.* 49-4, 655 N.W.2d 916, 917 (2002) (contemplating changes in school calendars); *City of Pittsburgh v. Com., Pennsylvania Lab. Rels. Bd.*, 653 A.2d 1210 (1995) (contemplating pension plans).

45. *Suprefine & Gottlieb, supra* note 34, at 769–70.

professional development, are more contentious if not explicitly referenced.<sup>46</sup>

Negotiations often sour when there is a dispute regarding whether a matter is appropriately considered a term or condition of employment.<sup>47</sup> Because it is difficult to define the scope of bargaining with precision and certainty at the outset, these disputes are often resolved through litigation.<sup>48</sup> The outcomes of these disputes often directly impact educational policy, such as where the disputed matter is defining educational objectives or textbook selection.<sup>49</sup> Therefore, legislation will frequently include limiting language in a management rights provision recognizing the importance of managerial prerogatives and affording school administrators deference in implementing these prerogatives without union interference.<sup>50</sup>

When interpreting the scope of bargaining, administrative bodies and the courts will often apply a balancing test that weighs “whether a particular decision is primarily related to the wages, hours, and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy.”<sup>51</sup> This decision may be imbued with value judgments on the proper role of labor and management.<sup>52</sup> Further, these decisions are very contentious because each matter may reflect a policy choice and be politicized. The Court of Appeals of Maryland aptly reflected on this dilemma when it stated, “[E]very managerial decision in some way relates to ‘salaries, wages, hours, and other working conditions,’ and is therefore arguably negotiable. At the same time, virtually every such decision also involves educational policy considerations and is therefore arguably nonnegotiable.”<sup>53</sup>

Determining what exactly is on the table for negotiation fundamentally shapes the relationship between teachers’ unions and their affiliated school district. Unions may be completely excluded from non-mandatory matters

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46. *Id.* at 769.

47. See Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL’Y 885, 915–18 (2007).

48. *Id.* at 914.

49. *Id.*

50. *Id.* at 913.

51. See, e.g., *Unified Sch. Dist. No. 1 of Racine Cty. v. Wis. Emp. Rls. Comm’n*, 259 N.W.2d 724, 731–32 (Wis. 1977).

52. See *Waterloo Educ. Ass’n v. Iowa Pub. Emp. Rels. Bd.*, 740 N.W.2d 418, 424 (Iowa 2007) (“[T]he ill-defined nature of balancing tests in general gives rise to the possibility that invisible, unconscious, but perhaps inevitable judicial bias could creep into the decision-making process.”).

53. *Montgomery Cty. Educ. Ass’n Inc. v. Bd. Of Educ. of Montgomery Cty.*, 534 A.2d 980, 986 (Md. 1987).

and denied information pertaining to those subjects.<sup>54</sup> In fact, this is frequently the case. A 2012 Gallup survey reported that K-12 teachers were the least likely of twelve different occupations to agree that, “At work, my opinions seem to count.”<sup>55</sup> This dim outlook has negative repercussions, with seventy percent of teachers not feeling engaged at work.<sup>56</sup>

Reformers concerned with professional detachment argue that excluding unions only encourages union leadership to prioritize protecting members from the consequences of unilateral decisions by management, prompting power struggles between union leadership and administrators.<sup>57</sup> The industrial relations model fosters this sort of in-fighting and creates an obstructionist environment. In this environment, unions focus on defending themselves against actions by schools and districts that adversely affect the “bread and butter” issues concerning terms and conditions of employment without emphasizing policy objectives.<sup>58</sup> Therefore, teachers’ union’s objectives are typically confined to employment interests rather than general education policy objectives and concern for students, although union leadership certainly attempts to pair the two together when garnering public support.<sup>59</sup>

## B. The Political Landscape

Due to unions’ circumscribed role and strong support among teachers, they have been largely successful in achieving security in the workplace.<sup>60</sup> Many collective bargaining agreements duplicate statutes governing the process by which teachers are evaluated, disciplined, and fired, posing an additional due process barrier before removal.<sup>61</sup> Employment perks, such as voluntary transfer, are prioritized based on seniority rather than qualifications or administrative discretion.<sup>62</sup> Unions have scored major victories

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54. See, e.g., *Vill. of Franklin Park v. Ill. State Lab. Rels. Bd.*, 638 N.E.2d 1144, 1148–49 (Ill. App. Ct. 1994) (holding that the employer was not compelled to produce information on a non-mandatory subject of bargaining).

55. Gallup, *State of America’s Schools: The Path to Winning Again in Education 29* (2014).

56. *Id.* at 26.

57. Malin, *supra* note 20, at 537 (demonstrating the power struggles that occurred through drawn out litigation prompted by the teacher’s union in Racine, Wisconsin after the school district unilaterally decided to experiment with a year-round schedule).

58. See Malin & Kerchner, *supra* note 47, at 921.

59. See *infra* Section III.

60. See Dagostino, *supra* note 17, at 191–98 (discussing union input on teacher tenure, teacher evaluation, and layoff protections that provide a buffer to discretionary employment decisions by management).

61. William S. Koski, *Teacher Collective Bargaining, Teacher Quality, and the Teacher Quality Gap: Toward a Policy Analytic Framework*, 6 HARV. L. & POL’Y REV. 67, 73–74 (2012).

62. *Id.* at 75.

through political influence by introducing many other permissive subjects into the scope of bargaining.<sup>63</sup>

Union opponents attempt to peg the failure of schools on these sorts of protections afforded teachers, prompting efforts to restrict bargaining rights and advocate for altering employment protections such as tenure.<sup>64</sup> Recent history illustrates that this sentiment is gaining momentum. The 1990s saw a considerable legislative backlash against collective bargaining rights.<sup>65</sup> The following decade saw sizeable gains by teachers.<sup>66</sup> But the 2010 elections brought a renewed sense of hostility towards teachers' unions.<sup>67</sup> The following Section is an overview of state legislators' recent efforts to reign in the impact of collective bargaining through teachers' unions.

### 1. *Repealing the Right to Bargain*

In 2011, Oklahoma repealed provisions protecting public employees' collective bargaining rights so that collective bargaining was no longer mandatory but rather up to school districts' discretion.<sup>68</sup> Shortly afterward, in 2018, teachers underwent a historic strike seeking to secure both increased salaries, which were at the time the lowest in the country, and funding for schools generally.<sup>69</sup> An Oklahoma representative responded by intro-

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63. See Malin, *supra* note 6, at 151–53 (noting efforts in Michigan, Oregon, Wisconsin, Ohio, New Mexico, Pennsylvania, and Chicago to restrict previously negotiable items in the scope of bargaining).

64. See, e.g., Dagostino, *supra* note 17, at 180.

65. Malin, *supra* note 6, at 150–51.

66. *Id.* at 151–52. (“Illinois amended the Chicago School Reform Act to change the prohibited subjects of bargaining to permissive subjects. Illinois also imposed first-contract interest arbitration for bargaining units of thirty-five or fewer employees. Wisconsin repealed the QEO, granted collective bargaining rights to state university faculty and research assistants, made teacher preparation time and changes to teacher evaluation plans mandatory subjects of bargaining, and mandated that grievance arbitration continue during contract hiatus periods. Illinois, New Jersey, Oregon, New Hampshire, California, and Massachusetts mandated ‘card check’ recognition. Numerous states extended collective bargaining rights to home health care aides and in-home daycare providers by designating the state as employer of record for collective bargaining purposes; otherwise, they would be considered independent contractors. In 2003, New Mexico enacted a public employee collective bargaining statute that was stronger than the one that had sunset four years earlier. In 2004, Oklahoma extended collective bargaining rights to employees of municipalities with populations of 35,000 or more.”).

67. *Id.*

68. Evan McMorris-Santoro, *Unions Lose One in Oklahoma*, TALKING POINTS MEMO (Apr. 20, 2011, 1:20 PM), <https://talkingpointsmemo.com/dc/unions-lose-one-in-oklahoma>.

69. Andrea DenHoed, *Striking Oklahoma Teachers Win Historic School-Funding Increase and Keep on Marching*, THE NEW YORKER (Apr. 4, 2018), <https://www.newyorker.com/news/news-desk/striking-oklahoma-teachers-win-historic-school-funding-increase-and-keep-on-marching>.

ducing House Bill 2214, which not only proposed making it illegal for school district employees to strike, but also would have denied pay to employees who violated the prohibition.<sup>70</sup> The bill died in committee.<sup>71</sup>

The same year that Oklahoma revoked mandatory bargaining, the Tennessee legislature repealed the Education Professional Negotiations Act, which guaranteed the right to collectively bargain, replacing it with the Professional Educators Collaborative Conferencing providing procedures for “collaborative conferencing.”<sup>72</sup> This repeal was a more moderate approach that still sought to give groups representing teachers a seat at the table. Under this negotiation scheme, teacher representatives that are supported by at least fifteen percent of employees may confer with the school board after an initial petition for collaborative conferencing.<sup>73</sup> However, the scope of conferencing is limited to salaries, grievance procedures, insurance, and fringe benefits and excludes items relating to working conditions, such as school placements and teacher evaluations.<sup>74</sup> Even matters relating to compensation, such as differential pay plans and incentive compensation, are off the table.<sup>75</sup> The new scheme also watered down teacher influence because management can simply ignore teacher input and unilaterally make decisions.<sup>76</sup>

The restrictive Oklahoma legislation ultimately resulted in a strike seven years after it repealed the right to bargain.<sup>77</sup> The changes in this legislation did not ease educational reform efforts but rather antagonized the teachers’ unions.<sup>78</sup> The unions focused their efforts on organizing to strike rather than collaborating with school district management.<sup>79</sup> Ultimately, repealing the right to bargain only worsened the relationship between labor and management.<sup>80</sup> Meanwhile, Tennessee implemented a more collaborative approach that eliminated the bargaining monopoly afforded to teachers’ unions

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70. See Andrea Eger, *Political Payback for the Statewide Teacher Walkout? Slew of Newly Filed Bills Aim to Punish, Limit Future Protests*, TULSA WORLD (Aug. 31, 2019), [https://tulsa-world.com/homepagelatest/political-payback-for-the-statewide-teacher-walkout-slew-of-newly/article\\_55ab887d-d669-50cc-8dff-ca5af283d23e.html](https://tulsa-world.com/homepagelatest/political-payback-for-the-statewide-teacher-walkout-slew-of-newly/article_55ab887d-d669-50cc-8dff-ca5af283d23e.html); H.B. 2214, 57th Gen. Assemb. Reg. Sess. (Okla. 2019) (introduced Jan. 17, 2019; failed).

71. *About 2,000 Measures Died in the Oklahoma Legislature. What’s Still Alive This Session?*, TULSA WORLD (Mar. 17, 2019), <https://tulsa-world.com/news/state-and-regional/about-2-000-measures-died-in-the-oklahoma-legislature-whats-still-alive-this-session/collection2b21c25f-c116-590c-9e6c-25ab43ade0cd.html#1>.

72. 2011 Tenn. Pub. Acts 378 (codified at TENN. CODE ANN. § 49-5-601(a) (West 2021)).

73. TENN. CODE ANN. § 49-5-605(b)(1) (West 2021).

74. *Id.* § 49-5-608(a)–(b).

75. *Id.* § 49-5-608(b)(1).

76. See *id.* § 49-5-609(d).

77. DenHoed, *supra* note 69.

78. *Id.*

79. *Id.*

80. *Id.*

as the sole representative of school district employees.<sup>81</sup> While the law did target teachers' unions in this sense, teachers' unions were not entirely excluded and were welcome to participate in collaborative conferencing along with other groups that met the threshold level of support.<sup>82</sup> This non-exclusionary approach did not result in the same fallout as in Oklahoma. The divergent outcomes in these recent efforts to repeal collective bargaining in school systems demonstrate the importance of labor inclusion in the decision-making process.

## 2. *Restricting the Scope of Bargaining*

The most common changes in the relationship between administration and unions concern the scope of bargaining. Legislators have endeavored to remove both "bread and butter" issues, such as health care and those more closely related to working conditions, from the bargaining table.<sup>83</sup> This agenda is typically associated with efforts to cut costs.<sup>84</sup>

In 2011, Ohio enacted Senate Bill 5, which removed health care, sick time, and pension benefits from the scope of bargaining.<sup>85</sup> This cost-saving measure would have made employees responsible for at least fifteen percent of employee health care costs while banning strikes and shifting towards performance-based pay.<sup>86</sup> However, the bill was repealed that same year after an aggressive campaign to introduce a popular referendum that easily passed by a twenty-two-point margin.<sup>87</sup>

Similar efforts were simultaneously underway in Wisconsin with the nationally politicized Act 10, which passed on March 11, 2011.<sup>88</sup> This bill limited collective bargaining agents to negotiations over base wages while mandating that employees contribute to their pensions and health care premiums.<sup>89</sup> More recently, the Iowa Legislature rewrote the state's collective bargaining law to limit bargaining over health insurance, holidays, and over-

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81. TENN. CODE ANN. § 49-5-601 (West 2021).

82. *Id.*

83. Malin & Kerchner, *supra* note 47, at 918–21.

84. *Id.*

85. S.B. 5, 129th Gen. Assemb. (Ohio 2011–2012) (enacted); OHIO REV. CODE ANN. § 4117 (repealed 2011).

86. The Associated Press, *Ohio Moves to Restrict Collective Bargaining*, EDUC. WEEK (Apr. 5, 2011), <https://www.edweek.org/ew/articles/2011/04/06/27brief-b2.h30.html>.

87. Jim Provance, *Kasich Accepts Defeat of Issue 2*, THE BLADE (Nov. 9, 2011, 8:47 AM), <https://www.toledoblade.com/local/politics/2011/11/08/Issue-2/stories/20111108101>.

88. Amy Merrick, *Wisconsin Union Law to Take Effect*, WALL ST. J. (June 15, 2011), <https://www.wsj.com/articles/SB10001424052702303848104576386122936205978>.

89. *Id.*

time to unions where thirty percent of membership work in a public-safety capacity.<sup>90</sup>

The common themes in these disputes are the negative press and animosity they generate. Given the adversarial nature of any collective bargaining dispute, one side is left resenting the other due to lost leverage. This is not productive and inhibits meaningful reform. The partisan nature of labor-management disputes distracts from the substantive policy targeting classrooms.

Efforts to restrict the scope of bargaining, though less heavy-handed than altogether eliminating the right to collectively bargain, similarly reflect an anti-union sentiment. This sentiment has taken root in Arkansas among state officials. Before the Arkansas legislature advances its anti-union agenda further by restricting the permissible scope of bargaining or repealing public-sector collective bargaining altogether, it must reexamine the industrial-labor relations paradigm that defines the LRSD-LREA relationship.<sup>91</sup>

### III. COLLECTIVE BARGAINING IN ARKANSAS AND THE LITTLE ROCK SCHOOL DISTRICT

Arkansas is a “right-to-work” state, meaning that all labor unions, organized and independent, while categorically protected, are prohibited from compelling membership among the employee pool it represents.<sup>92</sup> While most states require schools to bargain over the “terms and conditions of employment[,]”<sup>93</sup> Arkansas has traditionally allowed school districts to choose whether to recognize unions and engage in collective bargaining.<sup>94</sup> Any agreement between a school district and the union would preempt state education personnel policies.<sup>95</sup> Further, school districts were prohibited from “tak[ing] or threaten[ing] actions which interfere with, restrain, or coerce a

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90. See Shelby Fleig & Robin Opsahl, *In a Victory for Republicans, Iowa Supreme Court Upholds 2017 Law Limiting Public-Worker Unions’ Rights*, DES MOINES REGISTER (May 19, 2019, 8:03 AM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2019/05/17/collective-bargaining-iowa-legislature-afscme-61-kim-reynolds-supreme-court-unions/3705134002/>.

91. See *infra*, Section V.

92. ARK. CODE ANN. § 11-3-301 (2021) (“Freedom of organized labor to bargain collectively and freedom of unorganized labor to bargain individually is declared to be the public policy of the state under Arkansas Constitution, Amendment 34.”).

93. Lindy, *supra* note 40, at 1183. “Terms and conditions of employment” is a term of art developed from the NLRA. 29 U.S.C. § 151.

94. See Act of April 18, 2001, ch. 6, 1765 Ark. Laws 979 (codified at ARK. CODE ANN. § 6-17-202) (excluding school districts that “choose[ ] to officially recognize in its policies an organization representing the majority of the teachers of the school district for the purpose of negotiating personnel policies, salaries, and educational matters of mutual concern under a written policy agreement” from state education personnel policies).

95. See *id.*

teacher in the exercise of the teacher's right to have an organization represent a majority of the teachers."<sup>96</sup>

The Arkansas General Assembly attempted to reign in the LREA, the collective bargaining agent for the LRSD, in 2019. In this sense, the LRSD and its relationship with the LREA has been a microcosm of the national trend of suppressing teachers' unions. Recent developments began with the "state takeover" of the LRSD in 2015 that occurred after the LRSD failed to meet performance standards and was classified as in need of "Level 5—Intensive Support."<sup>97</sup> The state placed control of the district in the hands of the State Board, which supplanted the democratically-elected school board.<sup>98</sup> This takeover gave the State Board the purported authority to implement several measures suppressing union influence.

In an effort to improve teacher quality in low-performing schools, the State Board waived the Arkansas Teacher Fair Dismissal Act of 2018 in the face of significant opposition.<sup>99</sup> This law provides statutory due process protections to teachers statewide, including strict evaluation and counseling procedures that management must follow before firing a teacher for performance-based reasons.<sup>100</sup> The waiver was originally intended to be selectively applied to schools that scored a "D" or "F" on the district's accountability metric.<sup>101</sup> Still, a State Board member asked District Superintendent Michael Poore in the hearing if he needed a "hatchet in his tool belt" to assist in firing staff rather than a "scalpel."<sup>102</sup>

Teachers resisted the decision, citing concerns that they would not receive a fair hearing prior to any adverse decisions.<sup>103</sup> However, the LREA

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96. *Id.*

97. ARK. CODE ANN. § 6-15-2916 (2021) (granting the Department of Education the power to take over the elected school board).

98. The authority of the State of Arkansas to take over democratically elected school boards stems from a landmark Arkansas Supreme Court decision holding that the State's constitution mandates that school funding and performance be adequate and equitable. *Lake View Sch. Dist. No. 25 of Phillips Cty., Ark. v. Huckabee*, 362 Ark. 520, 526, 210 S.W.3d 28, 32 (2005). The court's decision delegated oversight of this constitutional mandate from local school districts and school boards to the State. *Id.* The State Board now reserves the authority to take control of districts that are in need of "Level 5 Intensive Support." ARK. CODE ANN. § 6-15-2916(2)(B)(iii) (West 2021).

99. See Benjamin Hardy, *After State Waives Due Process Protections for LR Teachers, Poore Promises Fairness and Caution*, ARK. TIMES (Dec. 21, 2018, 4:19 am), <https://arktimes.com/arkansas-blog/2018/12/21/after-state-waives-due-process-protections-for-lr-teachers-poore-promises-fairness-and-caution>.

100. ARK. CODE ANN. §§ 6-17-1501–1510.

101. See Hardy, *supra* note 99.

102. See Lindsey Millar, *Update: State Board Approves Waiver of Teacher Fair Dismissal Law in the LRSD, Denies Most Other Proposals*, ARK. TIMES (Dec. 21, 2018, 2:30 AM), <https://arktimes.com/arkansas-blog/2018/12/21/update-state-board-approves-waiver-of-teacher-fair-dismissal-law-in-the-lrsd-denies-most-other-proposals>.

103. Hardy, *supra* note 99.

found solace in the grievance process contained in its collective bargaining agreement.<sup>104</sup> Without this procedural backstop, there would have been little recourse for teachers fired indiscriminately.

The following year, the State Board unanimously decided to oust the LREA as teachers' representative by refusing to contract with any teachers' group that mandated collective bargaining.<sup>105</sup> As a consolation, the State Board revoked the Teacher Fair Dismissal Act waiver, and reinstated the Act's procedural safeguards afforded to teachers facing dismissal<sup>106</sup> The decision to oust the teachers' union, despite seventy percent of teachers supporting union representation, resulted in a one-day strike, reflecting the common sentiment that the "[State Board] thinks it knows better than teachers."<sup>107</sup>

Personnel Policy Committees (PPC) became the default model for employee representation.<sup>108</sup> The personnel committees, composed of at least five classroom teachers and no more than three administrators for each school district,<sup>109</sup> are a watered-down model of employee representation. The committees are structured to review school district personnel policies and propose amendments or new policies altogether to the local school board.<sup>110</sup> All policies that pertain to the "terms and conditions of a teacher's employment" are on the table.<sup>111</sup> These terms and conditions explicitly include benefits, compensation, designation of workdays, holidays, the annual calendar, teacher evaluations, extra duties, leave, grievances, dismissal or nonrenewal, reduction in force, and assignment of teacher aides.<sup>112</sup> However, the list is not exhaustive.<sup>113</sup> The language regarding what the committee may consider mirrors that of many collective bargaining agreements.<sup>114</sup> But the committees do not have the same binding power as collective bargaining agreements.

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104. *Id.*

105. See Lindsey Millar, *The Second Little Rock Crisis*, ARK. TIMES (Oct. 28, 2019, 5:57 PM), <https://arktimes.com/news/cover-stories/2019/10/28/the-second-little-rock-crisis>.

106. *Id.*

107. *Id.*

108. See Cynthia Howell, *Local Control of Little Rock District OK'd Under Revised Plan; Board Riles Teachers on Collective Bargaining*, ARK. DEMOCRAT GAZETTE (Oct. 11, 2019, 7:25 AM), <https://www.arkansasonline.com/news/2019/oct/11/local-control-of-lrsd-ok-d-under-revise/?news>. The State Board reasoned that Personnel Policy Committees negated the need for union representation. *Id.*

109. ARK. CODE ANN. § 6-17-203(a) (West 2021).

110. *Id.* § 6-17-205(b).

111. *Id.* § 6-17-201(b).

112. *Id.* § 6-17-201(c).

113. *Id.*

114. See *supra* Section II.A.

Committee proposals are subject to the discretion of school management who may simply reject proposed policies or amendments,<sup>115</sup> unlike the contractual provisions in a collective bargaining agreement. Teachers composing the personnel committees lack expertise in drafting budgets, policy, and the law that union leaders typically hold. Additionally, the committee approach divides the employee pool into separate factions, thereby eroding the leverage that unions hold as the sole representative of employee interests.

After more than five years of state control, the State Board has elected to reconstitute the school district;<sup>116</sup> however, until the district meets the State Board's Level 5–Intensive Support exit criteria, the school district will remain restricted from recognizing collective bargaining agents.<sup>117</sup> Concerned district residents have challenged this decision in court.<sup>118</sup> They posit that to “reconstitute” does not include powers outside of making personnel decisions before returning the reigns to the Local Board.<sup>119</sup> The state legislature repealed the constrained statutory definition of “reconstitute” supporting this position, resulting in ambiguity.<sup>120</sup> According to the State Board, reconstitution is not defined in applicable state law.<sup>121</sup> Plaintiffs, however, contend that the Arkansas Department of Education's lawyers should rely on a definition of reconstitution that appears elsewhere in state law.<sup>122</sup> According to that definition, “reconstitution” is confined to removing and replacing a district superintendent or removing and replacing a school board.<sup>123</sup>

If the State Board reauthorizes the school board to recognize collective bargaining agreements, the school board will almost assuredly do so, given that a majority of the newly elected members were endorsed by the LREA.<sup>124</sup> However, given the aforementioned statutory changes, the LRSD may be restrained in its collective bargaining agreement due to significant

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115. ARK. CODE ANN. § 6-17-205 (West 2021).

116. *See id.* § 6-15-2917(c)(1).

117. Howell, *supra* note 8.

118. *See* Petition for Declaratory Judgment & for Issuance of a Writ of Mandamus, Speyer-Rainbolt v. Key, No. 60 CV-20-2396 (Mar. 27, 2020) [hereinafter *Speyer-Rainbolt v. Key Petition*].

119. *Id.* at ¶¶ 18, 20, 25, 26, 32, 34–40.

120. Act of Aug. 1, 2017, No. 930, § 1, 2017 Ark. Acts 1 (codified at ARK. CODE ANN. § 6-15-401–2918).

121. Motion to Stay, Pending Resolution of Separate Related Litig. & Inc. Brief in Support of the Motion to Stay, Speyer-Rainbolt v. Key, No. 60 CV-20-2396 (Oct. 20, 2020).

122. *Speyer-Rainbolt v. Key Petition*, *supra* note 118, ¶ 20.

123. *Id.*

124. *See generally* Cynthia Howell, *In First Little Rock School Board Election Since 2014, 7 Slots Filled, 2 Run-offs Set*, ARK. DEMOCRAT GAZETTE (Nov. 4, 2020, 12:49 AM), <https://www.arkansasonline.com/news/2020/nov/04/first-little-rock-school-board-election-2014-7-slo/>.

statutory amendments in 2019 that require schools to implement the personnel policy committees.

The legislature removed the statutory language explicitly referencing a school district's agency to enter into collective bargaining agreements with teachers' unions.<sup>125</sup> Specifically, by striking the following language from Ark. Code Ann. § 6-17-202, the legislature extended statewide personnel policies to cover school districts that recognize teachers' unions as a bargaining agent:

The provisions of this subchapter shall not apply in any school district which [sic] chooses to officially recognize in its policies an organization representing the majority of the teachers of the school district for the purpose of negotiating personnel policies, salaries, and educational matters of mutual concern under a written policy agreement.<sup>126</sup>

Removing this provision demonstrates the legislature's effort to subvert local flexibility in its terms of employment with teachers' unions. With this legislation, collective bargaining agreements may now be preempted by state personnel policies. The intent to reign in union power is obvious, given the anti-union sentiment of the bill's sponsor, Senator Bob Ballinger, who has referred to union supporters as "thugs" and "bullies who don't care about children."<sup>127</sup>

With this statutory amendment, there is uncertainty as to whether future collective bargaining agreements will be meaningful at all, considering the state can simply enact top-down personnel policies that apply to previously exempt school districts that recognize teachers' unions. The bill even goes so far as permitting school districts to take actions that interfere with teacher efforts to "have an organization represent a majority of the teachers[.]" instead preventing only actions that interfere with their right to "join a professional organization."<sup>128</sup>

The statutory changes restrict school districts' relationship with unions and remove references to a local school district's ability to shape their interactions with unions. It is unclear whether the LREA and LRSD will be able to engage in collective bargaining agreements once again without the state contesting the revised statutory language that limits their ability to do so.

Given this significant uncertainty, it is essential for all interested parties to reevaluate policy judgments regarding the proper role of teachers' unions in determining conditions of employment and policy matters. Before Arkansas continues in line with other states' efforts to retract union influ-

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125. S.B. 392, 92nd Gen. Assemb. Reg. Sess (Ark. 2019) (enacted) [hereinafter *S.B. 392*].

126. *Id.*

127. Senator Bob Ballinger (@Bob\_Ballinger), TWITTER (Nov. 14, 2019, 11:57 AM), [https://twitter.com/bob\\_ballinger/status/1195038018312298497?lang=en](https://twitter.com/bob_ballinger/status/1195038018312298497?lang=en).

128. *S.B. 392*, *supra* note 125.

ence,<sup>129</sup> it would be prudent to consider whether this approach of ostracizing teachers by diminishing their democratically elected representative actually benefits the educational enterprise. In the following Sections, this Note argues that inclusion, not exclusion, is the proper policy moving forward and proceeds to offer a legal framework for promoting collaboration between teachers and management.

#### IV. THE COMPATIBILITY OF UNION EMPLOYMENT INTERESTS AND EDUCATIONAL OUTCOMES

Educational policy implicates a complex web of parties with various interests, some mutually exclusive and others overlapping, in the broader effect of those policies. This Note does not seek to untangle that web or establish a hierarchy, but instead, it identifies the landscape educational policy must navigate. Assuming that the reform efforts targeting collective bargaining are not rooted in a general animus against organized labor and the protections afforded to them, these policies are grounded in the belief that union interests are not aligned with those of children or of the State.<sup>130</sup> An interest-based analysis is essential for determining the proper role of collective bargaining with teachers' unions.<sup>131</sup> This Section presents the inherent tensions between teacher employment interests and other parties to the public school system and reconciles some of these interests. It argues that while teachers' and students' interests do not always align, the same can be said for school management collectively, whether school board members, administrators, or policymakers. Establishing this value framework is necessary to move forward with policy proposals on teacher inclusion in the education policy decision-making process.

##### A. The Interests Inherent to Educational Policy

The public has an aggregate interest in achieving strong educational outcomes across the socioeconomic spectrum. In the past two decades, this public concern has manifested itself in efforts to improve student performance metrics, the most important of which is standardized testing.<sup>132</sup> Regardless of the merits of standardized testing, the notion that the public benefits from a more knowledgeable, skilled, and socialized citizenry is the

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129. *See supra* Section II.B.

130. Koski, *supra* note 61, at 77.

131. *See id.* (introducing a framework from which workable solutions can be evaluated given the deeply polarizing issue of teachers' unions).

132. *Id.*

American education system's bedrock.<sup>133</sup> Underlying these interests in the outcome, however, are less tangible factors contributing to outcome metrics such as a safe school environment, stability in a school's rank-and-file, teacher quality, and dynamic learning environments that foster creativity, problem-solving, critical thinking, and social cohesion.<sup>134</sup> Undoubtedly, teacher quality plays an outsized role in these interests.

The public at large and the State, however, must balance these interests with fiscal efficiency.<sup>135</sup> Public education is generally a state's top priority, as reflected in the budget, and teacher compensation is the largest item of spending for most school districts.<sup>136</sup> Research indicates that teachers who are afforded collective bargaining rights enjoy higher salaries.<sup>137</sup> Whether teachers are overpaid or not is outside the scope of this Note; however, for administrators navigating budgetary restrictions, increasing teacher pay could be a concern.

School management seeks strong educational outcomes but overriding budget concerns are a limit that lies squarely on its shoulders. Flexibility and discretion are touted as essential to achieving administrative goals, contravening union interests in limiting arbitrary decision-making relating to teaching assignments, discipline, and benefits.<sup>138</sup> Importantly, administrators are not infallible and an ad hoc approach does not necessarily support better educational outcomes.<sup>139</sup> While administrators are more in tune with the fiscal realities of school district management and educational policy, they are not always more qualified than teachers on pedagogy and lack the personal insights into students that teachers develop in the classroom.

School management and teachers' unions' interests are not always transparent, as both public officials and teachers' unions have broader interests contrary to the public good, such as re-election, career advancement,

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133. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

134. Koski, *supra* note 61, at 77.

135. *Id.* at 78.

136. *Id.*

137. *Id.*

138. Lindy, *supra* note 40, at 1140.

139. Koski, *supra* note 61, at 79.

private notions of lifestyle, and financial well-being, respectively.<sup>140</sup> Therefore, union officials calling for increased pay at the behest of teachers' unions or, conversely, singular opposition to tax increases, even to the detriment of the education budget, does not necessarily reflect good educational policy.

Critics of teachers' unions often go so far as asserting that union leadership does not act in the interests of its own members but rather represents a bureaucratic force distinct from its membership.<sup>141</sup> However, this view does not carry water. Survey data reveals that teachers "(1) like their local unions, (2) support collective bargaining, (3) believe that collective bargaining does not harm public education, and (4) support the core missions of unions, including job security, higher salaries, and better working conditions."<sup>142</sup> If teacher sentiment was to turn against union leaders, they would simply be voted out of office. Therefore, unions overwhelmingly reflect teachers' interests. And there is nothing untoward about teachers organizing themselves to advocate for their interests. This is the norm in policy discussions, such as when wealthy citizens organize to block redistributive school finance schemes<sup>143</sup> or break away from an existing school district.<sup>144</sup> Professionally, bar associations and medical associations around the country are extremely influential, not to mention the myriad of industrial groups and lobbyists that advocate for favorable policy decisions. Teachers, however, have a leverage problem. A threat of striking to gain favorable employment terms implicates the well-being of children. Thus, strikes often result in harsh condemnation. But given the role of the profession, this outcome is simply the reality of a free market at work.

Teaching, as a profession, though not a monolith, also has a more sympathy-evoking interest in student achievement and imparting social values to students.<sup>145</sup> This is not insignificant and may be likened to an attorney's

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140. *Id.*

141. *Id.*

142. *Id.* at 80.

143. See, e.g., Hadley Barndollar, *Portsmouth Fears NH Return to 'Donor Town' Education Funding*, PORTSMOUTH HERALD (Jan. 16, 2021, 12:16 PM), <https://www.seacoastonline.com/story/news/education/2021/01/16/portsmouth-fears-return-donor-town-education-funding-nh/6630453002/>.

144. See, e.g., Kendi A. Rainwater, *Signal Mountain to Consider Forming Own School District*, CHATTANOOGA TIMES FREE PRESS (Dec. 1, 2016), <https://www.timesfreepress.com/news/local/story/2016/dec/01/signal-mountain-residents-consider-forming-own-school-district-breaking-away-hamilton-county-schools/400676/>.

145. The two largest national teachers' unions in the country formally recognize teachers' obligation to work towards student success. See *Mission*, AM. FED'N FOR TEACHERS, <https://www.aft.org/about/mission> (last visited Sept. 21, 2021); NEA, *Code of Ethics for Educators*, NAT'L EDUC. ASS'N (Sept. 14, 2020), <https://www.nea.org/resource-library/code-ethics-educators>.

supposed interest in promoting values of justice in our legal system. While certainly present and not easily discounted, the reality is that when these broader interests clash with narrower economic interests, the latter prevails more often than not.

Overall, schools must balance dueling public interests in fiscal responsibility and strong educational outcomes. The issue is that the further each party is removed from the classroom, the more sympathetic each becomes to the interests in administrative ease and budgetary restrictions to the detriment of the classroom. School management's policy choices are not immune from politics. Simply put, "it seems odd to burden [teachers' unions] whose interests may not always be aligned with children, yet permit others unfettered advocacy."<sup>146</sup>

## B. Aligning Interests

To many, teacher interests and public interests are simply too divergent for teachers to participate in the decision-making process without undermining policy objectives directed towards student interests.<sup>147</sup> Critiques of the collective bargaining process are grounded in a few common principles. Primarily, it is asserted that unions hinder effective administration, which requires a degree of flexibility that collectively bargained terms restrict.<sup>148</sup> Removing poor performers, discretionary hiring, and incentivizing teacher performance is all made extremely difficult, if not impossible.<sup>149</sup> The administrative tight-rope is said to have a deleterious effect on school finances as well, as bloated teacher salaries, typically based on seniority, reduce direct spending on students.<sup>150</sup>

Critics also posit that collective bargaining incentivizes unions to distort the democratic process by exercising outsized influence at the polls.<sup>151</sup> Teachers' unions are an extremely powerful political force, especially at the local level.<sup>152</sup> Elected school board members are often thrust into that position behind an endorsement from their respective teacher's union.<sup>153</sup> There-

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146. Koski, *supra* note 61, at 81.

147. See Dagostino, *supra* note 17, at 185–98.

148. Lindy, *supra* note 40, at 1140.

149. *Id.*

150. *Id.*

151. See Dagostino, *supra* note 17, at 181–83.

152. See Lauren FitzPatrick & Nader Issa, *Chicago Teachers Union Inc.: How the Clout-Heavy Labor Group Spends its Money*, CHICAGO SUN TIMES (Jan. 17, 2020, 4:00 PM), <https://chicago.suntimes.com/2020/1/17/21071027/chicago-teachers-union-ctu-spending-labor> (noting that the Chicago Teachers Union spent nearly \$1.5 million on lobbying and political activity from March 2018 to July 2019).

153. See Cynthia Howell, *Callaway, Hatter Win Runoffs for Little Rock School Board*, ARK. DEMOCRAT GAZETTE (Dec. 1, 2020, 11:12 PM), <https://www.arkansasonline.com/>

fore, school administrators' bargaining position may be skewed and not necessarily reflect the educational priorities of the public and students. As a result, teachers' unions may advance teachers' self-interests unchecked by democratic institutions charged with oversight of school, to the detriment of other interests.

While these arguments are not without merit, they defer to administrative judgment on what is good for the classroom. It assumes that decisions strictly made by management, unfettered by union input, would represent the optimum policy outcome for the public. This is a flawed position. Administrators are removed from the classroom environment. Instead, the administrative focus is directed towards budget concerns and performance metrics.<sup>154</sup> It is very possible that these interests could be pursued to the detriment of students.<sup>155</sup> For example, unilateral administrative decisions to reduce lesson plan preparation time, increase class size, or implement mandatory morning or lunch duty requirements may result in a less prepared or fatigued teacher.<sup>156</sup> This class-size example further illustrates how the various interests intersect:

. . . teachers have an interest in reducing their student workloads, students and parents routinely prefer the attention of small class sizes, but small class size means more teachers and more money, so administrators and districts would prefer to keep those class sizes large without compromising student learning. Which leads to the thorny empirical questions of whether small class sizes improve student outcomes.<sup>157</sup>

This inquiry is easier stated than applied, but it does demonstrate that union and teachers' interests in the amalgam of matters that are subject to collective bargaining are not opposed to strong educational outcomes *per se*. Therefore, diminishing teachers' seat at the table when it comes to these issues is shortsighted.

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news/2020/dec/01/callaway-hatter-win-runoffs-little-rock-school-boa/ (noting victors of closely contested runoff elections for school board seats in Zone 3 and Zone 6 of the LRSD were backed by the LREA).

154. See, e.g., ARK. CODE. ANN. § 6-13-620 (2021) (outlining the powers and duties of school boards, including overseeing district finances, facility management, and adhering to federal education laws).

155. See generally Meredith Broussard, *Why Poor Schools Can't Win at Standardized Testing*, ATLANTIC (July 15, 2014), <https://www.theatlantic.com/education/archive/2014/07/why-poor-schools-cant-win-at-standardized-testing/374287/> (reporting on the dubious nature of standardized test results).

156. See Eileen G. Merritt, *Time for Teacher Learning, Planning Critical for School Reform*, PHI DELTA KAPPAN (Dec. 1, 2016), <https://kappanonline.org/time-teacher-learning-planning-critical-school-reform/>.

157. Koski, *supra* note 61, at 81.

Additionally, critics of collective bargaining do not address the adverse consequences of denying a democratically supported collective bargaining agent a seat at the table. Doing so creates significant malcontent among employee ranks.<sup>158</sup> There is no alternative process for teachers to exert a binding influence on educational policy or narrow employment interests, for that matter.<sup>159</sup> This is an absurd consequence given the unique nature of the teaching profession and discounts the potential contribution teachers' expertise could have. Rejecting popular initiatives, in effect, implies that teachers' voices are not relevant to the decision-making process.

It is intuitive that holding employees in such low esteem fosters cynicism and disinterest. Management practices furthering these sentiments should be discouraged. However, the opposite is currently occurring in the LRSD.<sup>160</sup> It is apparent that the current adversarial path regularly results in polarization and withdrawal. The Arkansas legislature must consider a new way forward.

## V. AN ALTERNATIVE MODEL: PROFESSIONAL UNIONISM

This Section offers an approach to labor-management relations that seizes upon mutual interests. To counter the negative impacts commensurate with stripping teachers' unions of collective bargaining power, it offers a concept of professional unionism that promotes teacher engagement and collaboration while not deferring entirely to teacher interests. The Arkansas legislature should seize upon this model and introduce legislation that expressly protects school districts' ability to recognize teachers' unions rather than following its current restrictive trajectory.

### A. The Paradox of Suppressing Union Bargaining Power

Public sector unions at large, not just teachers' unions, have been targeted as undemocratic and impeding effective government.<sup>161</sup> Diminishing unions' institutional voices, however, results in unions hardening their opposition to unfavorable decisions implemented by management.<sup>162</sup> Union exclusion does not necessarily result in a more streamlined decision-making process because the union itself may still exist. Unilateral decision-making,

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158. See, e.g., Howell, *supra* note 108 (reporting on response from LRSD teachers after the State Board voted to not recognize the LREA).

159. Lindy, *supra* note 40, at 1140.

160. See *infra* Section III.

161. Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective From the United States*, 34 COMP. LAB. L. & POL'Y J. 277, 289 (2013).

162. Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1370 (2009).

on the contrary, hardens union resolve to use whatever tools are available, such as impact bargaining,<sup>163</sup> to insulate themselves from potential adverse effects on membership that any decision may invite. Others have labeled this the “paradox theory” of public sector labor law.<sup>164</sup> This anti-productive outcome is a product of the industrial-labor relations model of collective bargaining that has taken root in education.<sup>165</sup> By characterizing every matter as either reserved for unilateral management control or subject to mandatory negotiation, no room is left for collaborative input by the employees.<sup>166</sup>

Applied to teachers’ unions specifically, the paradox theory aptly characterizes the deleterious effects of narrowing the scope of collective bargaining or prohibiting it all together. Without a meaningful stake in educational policy decisions, teachers are removed from the risks of the educational enterprise and strictly focus on the “bread-and-butter” issues of employee benefits.<sup>167</sup> This strictly self-serving bargaining position results in a focused effort to stymie reform, undercutting the time and effort necessary for actual implementation. Therefore, a legal structure that encourages collaboration rather than union exclusion is essential.

Recent events in the LRSD may illustrate the deleterious effect of union exclusion. Just like all school districts around the country, the LRSD was confronted with reopening schools for the Fall 2020 semester in the midst of the COVID-19 pandemic.<sup>168</sup> As early as June 5, 2020, the Arkansas Department of Education Secretary Johnny Key released guidance that required school districts to provide in-person instruction five days a week once the summer vacation concluded.<sup>169</sup> The guidance generally charted the

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163. *Id.* at 1390; *Sch. Dist. of Indian River Cty. v. Fla. Pub. Employees Rels. Commn.*, 64 So. 3d 723, 728–29 (Fla. Dist. Ct. App. 2011) (defining impact bargaining as negotiations on a subject that reflects a managerial prerogative but may impact the terms or conditions of employment within the scope of bargaining).

164. Malin, *supra* note 162, at 1391.

165. *Id.* at 1390.

166. *Id.*

167. *See* Superfine & Gottlieb, *supra* note 34, at 743. (“[u]nions and school districts are incentivized to bargain in a way that foregrounds ‘bread and butter issues’ involving the protection of teachers against the decisions of management. On a broader level, such collective bargaining laws weaken the possibility of robust teacher input into the design of teacher evaluation, which is critical for a highly functioning school environment characterized by collaboration and professional activity.”).

168. *See generally* *School Responses to the Coronavirus (COVID-19) Pandemic During the 2020-2021 Academic Year*, BALLOTPEDIA, [https://ballotpedia.org/School\\_responses\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic\\_during\\_the\\_2020-2021\\_academic\\_year](https://ballotpedia.org/School_responses_to_the_coronavirus_(COVID-19)_pandemic_during_the_2020-2021_academic_year) (cataloguing individual states’ responses to the challenges of reopening schools in the midst of the pandemic).

169. *See* Cynthia Howell, *State Tells Schools to Prepare Blend of In-Person, Online Education*, ARK. DEMOCRAT GAZETTE (June 5, 2020), <https://www.arkansasonline.com/news/2020/jun/05/state-tells-schools-to-prepare-blend-of/>.

sort of organization and stakeholder involvement that would be essential to open schools back up with little mention of teacher input.<sup>170</sup>

The LREA opposed in-person teaching and voted to teach virtually only, citing the potential threat posed by exposure to the coronavirus.<sup>171</sup> Only limited guidance on protective health measures was available at the time.<sup>172</sup> In response, the LRSD strayed from its original plan of in-person-only instruction, adopting a phased re-entry schedule only five days before schools reopened.<sup>173</sup> The schedule allocated two in-person instruction days for students, designating days of the week by a student's last name.<sup>174</sup> The LREA acquiesced to the governor's compromise and reported to in-person duty, but only one week later, the school district returned to a conventional school schedule to the union's consternation.<sup>175</sup>

The LREA quickly renewed its calls for remote learning, citing that charter schools in the area had already taken that precaution.<sup>176</sup> In a letter, union spokesperson Theresa Knapp Gordon spoke harshly of the LRSD's approach to COVID-19, hinting that a strike was possible.<sup>177</sup> With the State as the sole proprietor of the decision-making process, there was no other avenue for the teachers to use as leverage, despite the serious health risks.<sup>178</sup> The union came close, as sixty-eight teachers performed a remote "teach-in" from home, refusing to be onsite at the school as is required.<sup>179</sup>

In the midst of all this upheaval and back and forth between the union and school district management, what resulted was uncertainty. Despite a

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170. ARK. DEP'T. OF EDUC., *ARKANSAS READY FOR LEARNING: PLANNING FOR RE-ENGAGEMENT 4* (June 16, 2020), [https://arsba.org/files/documents/Arkansas\\_Ready\\_for\\_Learning\\_Final\\_6\\_17\\_20.pdf](https://arsba.org/files/documents/Arkansas_Ready_for_Learning_Final_6_17_20.pdf).

171. Cynthia Howell, *Little Rock School District Says It Will Phase in Re-Entry Schedule*, ARK. DEMOCRAT GAZETTE (Aug. 19, 2020, 6:12 PM), <https://www.arkansasonline.com/news/2020/aug/19/little-rock-school-district-will-phase-re-entry-sc/>.

172. ARK. DEPT. OF EDUC., *ARKANSAS READY FOR LEARNING: HEALTHY SCHOOL GUIDE 1* (June 16, 2020), [https://dese.ade.arkansas.gov/Files/20201016163210\\_Return\\_to\\_School\\_Guide\\_81220.pdf](https://dese.ade.arkansas.gov/Files/20201016163210_Return_to_School_Guide_81220.pdf).

173. Cynthia Howell, *On-site Schedule Decided by LRSD; Phased Reentry Ends After Week*, ARK. DEMOCRAT GAZETTE (Aug. 27, 2020, 7:14 AM), <https://www.arkansasonline.com/news/2020/aug/27/on-site-schedule-decided-by-lrsd/>.

174. *Id.*

175. *Id.*

176. Cynthia Howell, *Little Rock Educators Meet Over Safety Plan*, ARK. DEMOCRAT GAZETTE (Sept. 8, 2020, 7:23 AM), <https://www.arkansasonline.com/news/2020/sep/08/educators-meet-over-safety-plan/>.

177. *Id.*

178. Dave Perozek, *Teachers' Dual Roles Doubling Their Work*, ARK. DEMOCRAT GAZETTE (Oct. 25, 2020, 4:15 AM), <https://www.arkansasonline.com/news/2020/oct/25/teachers-dual-roles-doubling-their-work/?news-arkansas>.

179. Cynthia Howell, *Teachers' Reprimands Stick So Far*, ARK. DEMOCRAT GAZETTE (Nov. 15, 2020, 2:30 AM), <https://www.arkansasonline.com/news/2020/nov/15/teachers-reprimands-stick-so-far/>.

months-long window for management and the union to collaboratively find some middle ground solutions that both benefitted the students and properly acknowledged the risk teachers were taking in coronavirus exposure, plans for school reopening changed dramatically only one week before the first day of school was set to begin.<sup>180</sup> Without a formal negotiation process, management was in a defensive position after any decision was made or plan adopted. A post hoc approach to addressing teacher concerns substantially increased the risk of widespread malcontent amongst the teachers and came close to causing a strike.<sup>181</sup> At the same time, it created an environment where decisions were seemingly made at random.

If, alternatively, both parties engaged with one another, a more comprehensive plan that appeased all parties could be more obtainable. Additionally, forcing the union to play an active role in policy formulation forces the teachers to give hands-on attention to the merits of the policy rather than strictly the hardships imposed on teachers.

Union opponents may attribute the above narrative to the union undermining managerial decisions in a difficult time. This Note does not seek to parse the merits of that argument because the LREA is a persistent presence in the LRSD and, absent indications that support among membership wains, it will continue to zealously advocate for its members.

## B. Professional Unionism: Adopting a New Model

Collective bargaining does not have to operate as a zero-sum game as is standard under the existing industrial labor relations model. Some education leaders have advocated for teachers' unions to pivot towards a bargaining position that emphasizes student needs to the same degree as the needs of its members.<sup>182</sup> Teachers' unions' leadership itself has advocated for this model. A network of thirty American Federation for Teachers and National Education Association local union chapters, known as the Teacher Union Reform Network, has organized to empower teachers to become the driving force behind education reform and promote labor management collaboration.<sup>183</sup>

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180. Cynthia Howell, *Little Rock School District Says It Will Phase in Re-Entry Schedule*, ARK. DEMOCRAT GAZETTE (Aug. 19, 2020, 6:12 PM), <https://www.arkansasonline.com/news/2020/aug/19/little-rock-school-district-will-phase-re-entry-sc/>.

181. Howell, *supra* note 169.

182. See Daniel F. Jacoby & Keith Nitta, *The Bellevue Teachers Strike and Its Implications for the Future of Postindustrial Reform Unionism*, 26 EDUC. POL'Y 533, 534 (2011).

183. *TURN's Mission*, TEACHER UNION REFORM NETWORK (Sept. 21, 2021), <https://www.turnweb.org/about/>.

First and foremost, professional unionism promotes the idea of “joint custody” of any reform efforts that a school district adopts.<sup>184</sup> Under this idea, in a major shift away from strictly focusing on the “bread and butter” issues of its membership, the union assumes a partial stake in all policies implemented by the school district, thereby expanding the scope of bargaining.<sup>185</sup> This approach seeks to reconcile the adversarial approach to collective bargaining that generally defines teachers’ unions and promotes a collegial working environment focused on problem-solving rather than periodic zero-sum negotiations.<sup>186</sup> Finally, professional unionism provides that the union approaches bargaining with the public interest on equal footing as their own “bread-and-butter” interests.<sup>187</sup> By adopting this model of management and union relations, the LRSD could navigate its way out of the existing “paradox” created by excluding the teacher’s union from the decision-making process and foster an environment that values teachers and encourages meaningful educational reform.

To adopt this model of professional unionism, an appropriate legal foundation encouraging the model is essential.<sup>188</sup> In Arkansas, a legal structure including subjects that are typically viewed as managerial prerogatives, such as teacher evaluations, into the scope of bargaining would create the right atmosphere for collaboration. Union opponents and management may be hesitant to adopt this approach due to fears that union leadership only uses this additional leverage to further obstruct the implementation of policy.<sup>189</sup> However, conditioning union involvement on good-faith bargaining would mitigate this risk.<sup>190</sup> This is the legal framework New Hampshire has adopted, and Arkansas should follow suit.<sup>191</sup> There, courts have construed teacher evaluations, a managerial prerogative, to be within the scope of collective bargaining.<sup>192</sup> However, a state labor board decision altered the industrial-relations model by threatening to shut out unions if they overstepped their position during negotiations and attempted to reign in management’s use of a mutually-crafted procedure for teacher evaluations.<sup>193</sup> Under this framework, unions may be shut out completely from the deci-

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184. Superfine & Gottlieb, *supra* note 34, at 777.

185. *Id.*

186. *Id.*

187. *Id.*

188. Mark Paige, *Applying the “Paradox” Theory: A Law and Policy Analysis of Collective Bargaining Rights and Teacher Evaluation Reform From Selected States*, 2013 BYU EDUC. & L.J. 21, 39 (2013).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Ass’n of Portsmouth Teachers/NEA-NH v. Portsmouth Sch. Dist.*, No. E-0043-1, Dec. No. 2008-025 (N.H. Pub. Emp. Lab. Rels. Bd. Feb 15, 2008).

sion-making process if they overreach.<sup>194</sup> Therefore, they are incentivized to work with school district management closely. The Arkansas legislature could enact a statute that similarly provides a platform for collaborative collective bargaining on many managerial matters that affects the terms and conditions of employment. The following are examples of structures for the State to model upon.

The Toledo City School District in Ohio has received widespread acclaim for its achievements in education.<sup>195</sup> The school district is unique in its use of peer-review rather than management-driven evaluations of teacher performance.<sup>196</sup> This is a stark contrast to the traditional system in which school administrators unilaterally critique teachers and unions stand ready to protect negative reviews from harming their members. Instead, the union acts as an arbiter of professional standards more akin to a medical licensing board. According to Professor Malin, “[a]ttention rates for poor performers tend to be higher under peer review than under traditional evaluation systems.”<sup>197</sup>

Additionally, the teacher’s union in Toledo collaborates with school district administration to “select textbooks, develop curriculum, monitor and implement school improvement plans, and . . . [establish] reading and math academies to improve early literacy and computational skills.”<sup>198</sup> The success of Toledo Public Schools demonstrates the merits of cooperation between the administration and teachers’ unions.

More conservative measures than Toledo’s wholesale adoption of managerial prerogatives into the scope of bargaining have also resulted in meaningful reform, and therefore Arkansas and the LRSD could take a more incremental approach to professional unionism. In Illinois, the state legislature enacted the Performance Evaluation Reform Act in January 2010.<sup>199</sup> The statute created a commission where equal numbers of teachers and administrators collaborated to incorporate certain indicators of student growth into teacher evaluation plans.<sup>200</sup> The use of student growth factors in teacher evaluation plans itself was not a subject of bargaining, but the collective bargaining agreement called for a collaborative effort by teachers’ unions and administrators.<sup>201</sup> The Illinois legislature used this same model as an

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194. *Id.*

195. Malin, *supra* note 20, at 531.

196. *Id.*

197. *Id.* at 532.

198. *Id.* at 533.

199. Performance Evaluation Reform Act of 2010, Pub. Act 096-861, 2009 Ill. Laws 8655.

200. *Id.* § 24A-4.

201. Malin, *supra* note 20, at 531.

innovative procedure for laying off teachers during a reduction in force.<sup>202</sup> Under this statutory scheme, a joint labor-management committee may elevate certain teachers into a higher priority list for retention. Additionally, committee members serve as watchdogs for targeting of certain subsets for removal.<sup>203</sup>

Even this incremental approach shows a significant departure from the adversarial approach that is typical of the labor-management industrial relations model. The U.S. Department of Education has praised this model as something for other school districts to aspire towards.<sup>204</sup>

In addition to adopting a legal framework that expands the scope of bargaining, the LRSD, and the LREA could adopt a mechanism known as interest-based bargaining.<sup>205</sup> Under this model, the collective bargaining process is framed by the underlying merits of a particular issue and not the individual interests of the bargaining parties.<sup>206</sup> Interest-based bargaining creates a neutral forum for the best possible solution to policy concerns.<sup>207</sup> The process facilitates joint resolution of problems so that individual parties are more vested in the results.<sup>208</sup> The process could ensue as follows:

Management may bring to the table the issue of adopting or reforming the district's teacher evaluation process. Management and unions would jointly establish objective criteria to measure possible solutions. Such criteria might ask whether a proposed solution does any of the following: (1) improves teacher effectiveness; (2) is fair to employees; or (3) provides necessary resources for both management and employees. Both parties would brainstorm potential solutions that address the problem and also can be measured against these criteria. Thus, management and unions, would constructively and positively address the problem.<sup>209</sup>

This is an idealistic outlook on the negotiation process, but it could serve as an ideal to aspire to. By enacting a statute protecting collective bargaining with teachers' unions, the Arkansas General Assembly could condi-

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202. 105 ILL. COMP. STAT. § 5/24-12(c)(1)–(2) (2021).

203. *Id.* § 5/24-12(c)(5) (2021).

204. U.S. DEP'T OF EDUC., SHARED RESPONSIBILITY: A U.S. DEPARTMENT OF EDUCATION WHITE PAPER ON LABOR-MANAGEMENT COLLABORATION, 12 (May 2012), <https://www2.ed.gov/documents/labor-management-collaboration/white-paper-labor-management-collaboration.pdf>.

205. Paige, *supra* note 188, at 41 (“[Interest based bargaining] focuses on building relationships through negotiations. It recognizes that parties to a negotiated agreement must live and work under that agreement. Thus, the bargaining process should foster positive relationships between union and management. It stands in contrast to traditional ‘positional bargaining that can be hostile to education reform.’”).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 41–42.

tion collective bargaining upon an interest-based bargaining approach to negotiations.

## VI. CONCLUSION

Teachers' unions remain a stalwart in education despite being confronted by legislative efforts to subvert their influence, judicial decisions that restrict compelling membership, and the prevalence of charter schools. Working alongside teachers' unions is absolutely essential to foster a school system where reform efforts are not met by resistance at every corner. The LRSD, though currently restricted in its ability to recognize the LREA as the representative of school district employees, will have a unique opportunity in coming years to set the tone for union relations once district control is returned to the school board. The State of Arkansas must collectively recognize that legislation seeking to subvert union influence does more harm than good and should pivot towards incorporating teachers' unions into the decision-making process.

If the State of Arkansas continues its current trajectory, policy measures will only be met by teachers' unions threatening to strike. If our civic institutions treat teachers like industrial labor, teachers' unions will follow suit and strictly make decisions out of self-interest and not for the betterment of our schools.

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