

# TEACHER EVALUATION AND COLLECTIVE BARGAINING: THE NEW FRONTIER OF CIVIL RIGHTS

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## INTRODUCTION

The fiftieth anniversary of the Civil Rights Act<sup>1</sup> and sixtieth anniversary of *Brown v. Board of Education*<sup>2</sup> merit both celebration for how far we have come and critical evaluation of how far we have left to go. Since *Brown* was decided in 1954, the United States has engaged in a vast array of reforms undertaken at least partly in the name of educational equality.<sup>3</sup> Desegregation, school finance reform, the education of students with disabilities and English language learners (ELLs), the various iterations of the Elementary and Secondary Education Act (ESEA), standards and accountability based reforms, and school choice round out only the most high profile of these reform efforts. These reforms have spanned across the judicial, legislative, and executive branches. They have involved federal and state governments and school districts, and they sometimes have been undertaken with the ambitious aim of transforming teaching and learning at the school and classroom levels.

Despite this persistent commitment to the ideal of educational equality, such reforms have reflected a range of ideas about the place of education in our broader society and, in turn, what an equal and high-quality education actually means.<sup>4</sup> Large-scale education reform in the period immediately following *Brown* and the civil rights era was largely aimed at providing students with equal educational access and learning opportunities for two main purposes: maintaining an inclusive and robustly functioning democracy and facilitating social mobility.<sup>5</sup> Since then, other goals have become central as well, such as supporting the international economic competitiveness of the United States in an increasingly globalized world<sup>6</sup> and ensuring that parents have the individual freedom to

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 401-410, 78 Stat. 241, 246-49 (codified as amended at 42 U.S.C. §§ 2000c to 2000c-9 (2012)).

2. 347 U.S. 483 (1954).

3. See generally BENJAMIN MICHAEL SUPERFINE, *EQUALITY IN EDUCATION LAW AND POLICY, 1954-2010* (2013).

4. See David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RES. J. 39, 41-43 (1997).

5. See AMY GUTMANN, *DEMOCRATIC EDUCATION* 48-70 (Princeton Univ. Press rev. ed. 1999) (analyzing the political purposes of education); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY* 75-77 (1983) (charting the relationship between education and democracy).

6. See NAT'L COMM'N ON EXCELLENCE IN EDUC., U.S. DEP'T OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983) [hereinafter A

make educational choices for their children.<sup>7</sup> While it is important to keep these newer goals in mind and critically consider their place in the history of education reform, it is also important for us to understand our current efforts in relation to the conceptions of equality underlying *Brown*, the Civil Rights Act, and concurrent education reform efforts. Indeed, although equalizing educational opportunities for students has been a primary aim of education law and policy since at least *Brown*, we now risk taking an overly narrow view of why we educate students.

Grounded in a commitment to the goals historically underlying *Brown* and the Civil Rights Act, this Article analyzes two of the most important types of education reforms currently being undertaken—states' development of teacher evaluation and accountability systems and changes to states' collective bargaining laws for teachers. Reformers have framed both of these changes as necessary for increasing and equalizing teachers' effectiveness and ultimately students' learning opportunities.<sup>8</sup> Since the late 2000s, a wave of state-level laws aimed at enhancing teacher evaluation and accountability has emerged across the United States.<sup>9</sup> These laws generally increase the frequency of teacher evaluation, specify in detail how teachers must be evaluated, and increase accountability for teachers' performance.<sup>10</sup> New requirements formally tying teacher evaluation to student performance on standardized tests and anchoring decisions about teacher employment and tenure in these evaluations constitute central elements of these laws. From 2009 to 2012, as many as twenty-four states put in place new legislation requiring teacher evaluations to include student achievement data.<sup>11</sup>

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NATION AT RISK], available at [http://www.datacenter.spps.org/uploads/sotw\\_a\\_nation\\_at\\_risk\\_1983.pdf](http://www.datacenter.spps.org/uploads/sotw_a_nation_at_risk_1983.pdf) (focusing national attention on the quality of work students completed and comparative deficiencies in the nation's educational system, stating that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people").

7. See generally Chris Lubienski, *Redefining "Public" Education: Charter Schools, Common Schools, and the Rhetoric of Reform*, 103 TCHRS. C. REC. 634 (2001).

8. See Liana Heitin, *Chicago Strike Puts Spotlight on Teacher-Evaluation Reform: Conflict Reflects Broader Tensions over Use of Test Scores*, EDUC. WK., Sept. 19, 2012, at 16, 16-17 (highlighting how teacher evaluation and collective bargaining reform influenced the Chicago teachers' strike).

9. *Id.* at 17.

10. *Id.*

11. See *id.*; see also JULIE GREENBERG, ARTHUR MCKEE & KATE WALSH, TEACHER PREP REVIEW: A REVIEW OF THE NATION'S TEACHER PREPARATION

Moreover, the push for evaluating teachers and holding them accountable for their performance has begun to bleed into other areas, such as state laws governing teacher preparation.<sup>12</sup> Although states have been the primary sites for teacher evaluation and accountability reform, the federal government also has pushed states in this direction. The Race to the Top Fund (RTT), contained in the American Recovery and Reinvestment Act of 2009 (ARRA), included financial incentives for states to implement such systems.<sup>13</sup> Waivers releasing states from certain requirements of the No Child Left Behind Act of 2001 (NCLB) incentivized such changes as well.<sup>14</sup>

Given that modern teacher evaluation and accountability systems are generally aimed at identifying and removing poorly performing teachers and form the basis for alterations to teacher compensation policies, these reforms directly intersect with collective bargaining laws for teachers. A large majority of states has long had in place laws that allow teachers' unions to require school districts to engage in collective bargaining over a range of issues, including teacher salaries, layoff procedures, and grievance and dismissal procedures.<sup>15</sup> These laws form the foundation and ultimately the boundaries for the collective bargaining agreements that can be made between school districts and local teachers' unions. As such, these laws generally frame the tenure and employment

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PROGRAMS 63 (2013), available at [http://www.nctq.org/dmsView/Teacher\\_Prep\\_Review\\_2013\\_Report](http://www.nctq.org/dmsView/Teacher_Prep_Review_2013_Report).

12. See Benjamin Michael Superfine & Alison Castro Superfine, *Improving Mathematics Teacher Preparation Policy in Illinois*, in 2 UIC RESEARCH ON URBAN EDUCATION POLICY INITIATIVE POLICY BRIEF 1, 2 (2013), available at <http://c-stemec.org/wp-content/uploads/2013/08/Improving-Mathematics-Teacher-Preparation-Policy-in-Illinois.pdf> (examining recent changes in teacher preparation policy).

13. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005-06, 123 Stat. 115, 282-83.

14. See Alyson Klein, *Ed. Dept. to Offer Some Waiver States Time, Flexibility on Teacher Evaluation*, EDUC. WK. (July 2, 2014), [http://blogs.edweek.org/edweek/campaign-k-12/2014/07/ed\\_dept\\_to\\_offer\\_some\\_waiver\\_s.html](http://blogs.edweek.org/edweek/campaign-k-12/2014/07/ed_dept_to_offer_some_waiver_s.html); Alyson Klein, "Race to the Top" Standards Link Questioned, EDUC. WK. (Dec. 15, 2009), [http://www.edweek.org/ew/articles/2009/12/16/15standards\\_ep-2.h29.html?qs=Alyson+Klein](http://www.edweek.org/ew/articles/2009/12/16/15standards_ep-2.h29.html?qs=Alyson+Klein) (reporting on the use of NCLB waivers to initiate education reform in states).

15. Benjamin A. Lindy, Note, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence from a New Mexico Natural Experiment*, 120 YALE L.J. 1130, 1133 (2011) (surveying the landscape of collective bargaining laws in education).

decisions that are implicated by recently enacted teacher evaluation systems. However, many of these laws recently have been weakened in concert with the enactment of teacher evaluation systems. For example, at least twelve states modified their laws governing collective representation of public employees in 2010 alone.<sup>16</sup> In doing so, many of these states have weakened teachers' unions' abilities to bargain over issues such as teacher employment, grievance procedures, compensation, and working conditions.<sup>17</sup> Together, states' enactment of teacher evaluation and accountability systems and modifications of laws governing collective bargaining form the centerpiece of reforms aimed at equalizing and increasing teachers' effectiveness.

Although these intertwined reform efforts have some promise for improving and equalizing students' learning opportunities, a deep examination of them reveals that they are not well designed to fulfill the goals historically underlying *Brown* and the Civil Rights Act. On one hand, the broad aim of improving teachers' effectiveness reflects an important advance over many education reforms of the past. Although much energy has been devoted to equalizing and improving students' educational opportunities, such reform efforts have generally failed to achieve the significant and lasting effects at scale that many of the reformers driving such changes have sought.<sup>18</sup> However, a growing consensus among education researchers indicates that teacher quality and effectiveness are some of the most important factors influencing student learning.<sup>19</sup> Moreover, while

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16. Martin H. Malin, *Sifting Through the Wreckage of the Tsunami That Hit Public Sector Collective Bargaining*, 16 EMP. RTS. & EMP. POL'Y J. 533, 533 (2012) (examining changes in collective bargaining law in twelve states).

17. *See id.* at 535, 539-44 (discussing the following states that have drastically narrowed the scope of collective bargaining for teachers since 2010: Idaho, Illinois, Indiana, Michigan, Ohio, Tennessee, and Wisconsin).

18. *See generally* Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417 (2004) (discussing the limitations of judicial action in desegregation and school funding litigation).

19. *See* JENNIFER KING RICE, UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES, at v (2003); BRIAN ROWAN, RICHARD CORRENTI & ROBERT J. MILLER, WHAT LARGE-SCALE, SURVEY RESEARCH TELLS US ABOUT TEACHER EFFECTS ON STUDENT ACHIEVEMENT: INSIGHTS FROM THE PROSPECTS STUDY OF ELEMENTARY SCHOOLS 6, 9-10, 14, 23 (2002), available at [http://cppe.org/images/stories/cpre\\_pdfs/tr51.pdf](http://cppe.org/images/stories/cpre_pdfs/tr51.pdf). One study estimated that teacher quality explains 7.5% of the variation in student achievement. *See* Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Teachers, Schools, and Academic Achievement* 21, 32 (Nat'l Bureau of Econ. Research, Working Paper No. 6691, 1998), available at <http://www.nber.org/papers/w6691.pdf>.

teacher quality and effectiveness are especially important for improving the performance of poor and minority students, they are inequitably distributed among students.<sup>20</sup> Exacerbating such issues, most traditional teacher evaluation systems have resulted in almost every teacher receiving a high rating.<sup>21</sup> Recent reforms aimed at improving teacher effectiveness accordingly reflect an effort to improve, at least in part, the inequitable distribution of students' learning opportunities.

On the other hand, these reforms are poorly designed to provide all students with the educational opportunities they need to engage deeply with the democratic process and facilitate their social mobility. The teacher evaluation and accountability reforms suffer from a range of problems, including technical issues with the design of testing systems, the likely effects of these systems on teachers' motivation, and ultimately the watered-down vision of teaching and learning underlying these systems. Indeed, the vision underlying these laws of what it means to teach effectively is one closely aligned with industrial work, in which teaching is treated as mechanistic and routine. Such industrial work stands in stark contrast to that of a professional teacher, who can skillfully and flexibly engage with a variety of students to promote rigorous and analytical thinking. This type of thinking is precisely what is needed to support a highly functioning democracy and facilitate social mobility among students in the twenty-first century. Compounding such problems, the primary legal defenses available to teachers who have been terminated under teacher evaluation and accountability systems protect teachers the most when they act more like industrial workers than professionals.

State laws governing collective bargaining with teachers' unions generally drive teaching and learning in a similar direction. While there are important differences among states' collective

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20. The U.S. Department of Education found that "only 23% of all teachers, and only 14% of teachers in high-poverty schools, come from the top third of college graduates," and 90% of high-minority districts face significant challenges attracting highly qualified science and mathematics teachers. U.S. DEP'T OF EDUC., *OUR FUTURE, OUR TEACHERS: THE OBAMA ADMINISTRATION'S PLAN FOR TEACHER EDUCATION REFORM AND IMPROVEMENT* 5, 6 (2011), available at <http://www.ed.gov/sites/default/files/our-future-our-teachers.pdf>.

21. For example, the New Teacher Project found in a study of ten school districts that 94% of teachers were rated as satisfactory. DANIEL WEISBERG ET AL., *THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS* 6, 11 (2d ed. 2009), available at [http://tntp.org/assets/documents/TheWidgetEffect\\_2nd\\_ed.pdf](http://tntp.org/assets/documents/TheWidgetEffect_2nd_ed.pdf).

bargaining laws for teachers, they are also fundamentally grounded in a vision of teaching as industrial labor.<sup>22</sup> Under the conditions put in place by these laws, teachers' unions 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.<sup>23</sup> 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. The net result of such reform is that the quality of teaching and learning, which is critical for achieving our most fundamental political and social goals, is being driven in the wrong direction.

In order to analyze recent developments in teacher evaluation and their relationship with collective bargaining, this Article is divided into five primary parts. In Part I, this Article surveys the major goals underlying *Brown*, the Civil Rights Act, and major education reforms since the civil rights era. This Part also considers reforms particularly aimed at the teacher workforce. In Part II, this Article examines recent developments in teacher evaluation and the legal protections teachers potentially have available to them. This Part focuses on the major problems these systems involve and highlights the form of teaching and learning such systems incentivize. In Part III, this Article analyzes the terrain of laws governing collective bargaining for teachers. This Part particularly covers the issues over which teachers' unions and school districts can and must bargain and the potential effects on schools. In Part IV, this Article offers recommendations for moving forward more productively and in a way that is sensitive to the historical goals underlying *Brown* and the Civil Rights Act. These recommendations are particularly attuned to how these reforms can be structured more productively to provide equal and high-quality educational opportunities for all students. Finally, this Article offers concluding thoughts.

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

23. *Id.* at 693.

## I. STUDENTS, TEACHERS, AND EDUCATION REFORM

## A. History of Large-Scale Education Reform

Large-scale education reform long has aimed at equalizing and increasing students' educational opportunities. However, since the civil rights era, the focus of major education reform efforts has shifted along at least three major dimensions. First, while major education reform efforts were originally structured to protect the rights of harmed groups of students, they shifted to focus on reforming entire school systems built in ways that produced inequalities. Second, while major education reforms originally focused on educational inputs, such as access to predominantly white schools, they shifted to focus on educational outputs such as student performance. Third, while major education reforms originally were structured around *sameness* between different groups of students, they shifted to emphasizing that all students receive at least an adequate, or standard, level of educational opportunities and exhibit at least adequate performance.<sup>24</sup> As such, the modern wave of education reform focuses on increasing and equalizing teacher quality and effectiveness to increase student performance in school systems as a whole.

Large-scale education law and policy during the civil rights era largely focused on educational inputs and access. *Brown v. Board of Education* and the desegregation litigation that immediately followed primarily focused on ensuring that African-American students had access to the same schools that white students do.<sup>25</sup> These reforms were grounded in the twin goals of ensuring that the U.S. democracy functions well and facilitating social mobility for students.<sup>26</sup> Although courts faced significant political resistance, especially during the decade of "massive resistance," other governmental branches soon became involved in the fray.<sup>27</sup> Similarly grounded in

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24. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 401-410, 78 Stat. 241, 246-49 (codified as amended at 42 U.S.C. §§ 2000c to 2000c-9 (2012)) (discussing the transformation of equality in education law and policy).

25. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1602-03 (2003) (surveying the history of desegregation litigation).

26. See Labaree, *supra* note 4, at 43, 50 (discussing educational goals underlying civil rights era reforms).

27. During the era of "massive resistance," the politics of Southern states moved far to the right as these states actively resisted the requirement to desegregate. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE

the goal of access, particularly in education, the Civil Rights Act of 1964 marked the beginning of involvement of the other branches. Title VI of the Civil Rights Act was especially important for requiring that no person can be subjected to discrimination under any program or activity receiving federal funds on the basis of race, color, or national origin.<sup>28</sup> Building on the foundation of the Civil Rights Act, the ESEA was aimed at addressing the inequalities in educational outcomes and opportunities between low-income students and their more affluent peers.<sup>29</sup> The cornerstone of this legislation was Title I. Since its inception, Title I has granted billions of dollars to states, which in turn passed on that funding to school districts and schools, depending on the number of low-income students.<sup>30</sup> Indeed, as the governmental branches worked together during the mid-1960s to early 1970s, desegregation efforts were at their most successful.<sup>31</sup>

Given the perceived success of education law and policy to advance a civil rights agenda, reformers continued to focus their efforts in a similar direction. School finance litigation, largely beginning in the late 1960s and 1970s, focused on equalizing funding for low-income students.<sup>32</sup> In the 1970s, courts and legislatures also put in place formal procedures for protecting the rights of disabled students<sup>33</sup> and ELLs.<sup>34</sup> However, the slate of civil rights-style reforms

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SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 389-92 (2004) (examining Southern resistance to the requirement to desegregate).

28. Civil Rights Act of 1964 § 601 (codified as amended in 42 U.S.C. § 2000d).

29. Elementary and Secondary Education Act of 1965 § 1001, 20 U.S.C. § 6301 (2012).

30. See *id.* §§ 6301-6578. See generally Janet Y. Thomas & Kevin P. Brady, *The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, 29 REV. OF RES. IN EDUC. 51 (2005).

31. Only 1.18% of African-American students in the South attended desegregated schools in 1964, and only 6.1% of these students attended desegregated schools in 1966. However, this figure increased to 16.9% in 1967, 32% in 1969, and 90% in 1973. KLARMAN, *supra* note 27, at 363.

32. For a strong history of school finance reform litigation and policy, see generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995) (providing a detailed overview of different school funding schemes and litigation through the mid-1990s).

33. For a good overview of litigation and policy aimed at improving conditions for students with disabilities, see generally Elizabeth Palley, *The Role of the Courts in the Development and Implementation of the IDEA*, 77 SOC. SERV. REV. 605 (2003).

faced a slew of problems as the 1970s wore on.<sup>35</sup> For example, there was initially very limited state and local capacity to comply with the funding distribution requirements of the ESEA, and Title I funding was improperly allocated.<sup>36</sup> Especially given its changing political composition, the Supreme Court became increasingly skeptical about the efficacy of top-down governance arrangements.<sup>37</sup> As such, the Court leaned on the concept of “local control” to limit the expansion of federal judicial involvement in desegregation and prevent federal judicial involvement in school finance reform, thus making school finance reform a state issue.<sup>38</sup> Large-scale education reform efforts also faced significant political pushback, such as resistance against busing plans to desegregate school districts and the refusal of state legislatures to respond fully to court orders to reform funding states’ school-funding systems. Moreover, there was little indication that equalizing or increasing school funding was having the theorized effect on students’ learning opportunities.<sup>39</sup>

The education law and policy reforms that followed developed partly in response to such problems and the new politics that emerged during the early 1980s. The 1983 publication of *A Nation at Risk*, a report drafted under the Reagan administration by the National Committee on Educational Excellence, marked the beginning of significant changes in large-scale education reform.<sup>40</sup> This report argued that the poor state of the U.S. education system constituted a national crisis because it failed to support U.S.

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34. For a good overview of litigation and policy aimed at improving conditions for ELLs, see generally David Nieto, *A Brief History of Bilingual Education in the United States*, 6 PERSP. ON URB. EDUC. 61 (2009).

35. See SUPERFINE, *supra* note 3, at 97-98 (discussing the interaction of several problems plaguing large-scale education reforms during the 1970s).

36. DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* 6-9 (2009) (discussing the history of Title I of the ESEA).

37. See SUPERFINE, *supra* note 3, at 98.

38. *Milliken v. Bradley*, 418 U.S. 717, 741-44 (1974) (citing the importance of local control in desegregation litigation); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973) (citing the importance of local control in school finance litigation).

39. Jay P. Greene & Julie R. Trivitt, *Can Judges Improve Academic Achievement?*, 83 PEABODY J. EDUC. 224, 225 (2008) (“[W]e find no evidence to suggest that student learning improves as a result of court-ordered changes in school finance systems.”).

40. See *A NATION AT RISK*, *supra* note 6 (“[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”).

international competitiveness in a world that was beginning to undergo globalization.<sup>41</sup> As such, the report sparked a shift in the focus of education reform away from the educational needs of low-income and minority students to that of the United States as a whole. Immediately after the report was released, the educational excellence movement swept through the states and sparked the passage of several laws and regulations aimed at increasing high school graduation requirements and implementing tests for students and teachers.<sup>42</sup> Largely in response to these sorts of changes, a “second wave” of reforms swept through the United States in the mid- to late-1980s that emphasized bottom-up change and increasing teacher professionalism by emphasizing the school building as the primary site of reform.<sup>43</sup>

Building on these movements, states began to institute standards-based reforms in the mid-1980s and through the 1990s. These reforms aimed at ensuring that all students learn particular sets of knowledge and skills within each grade and certain content areas as specified by standards. The logic of standards-based reform particularly framed the problem facing education as one of fragmented, incoherent policies that failed to create meaningful change in classroom practice.<sup>44</sup> The federal government became directly involved in this type of reform as well with the 1994 passage

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41. *Id.*

42. Richard Jung & Michael Kirst, *Beyond Mutual Adaptation, into the Bully Pulpit: Recent Research on the Federal Role in Education*, EDUC. ADMIN. Q., Summer 1986, at 80, 97 (surveying changes during the educational excellence movement). “During the mid-1980s, 41 states increased requirements for high school graduation, 29 states required that prospective teachers pass a standardized test either before entering training or as a condition for certification . . . .” Lorraine M. McDonnell, *No Child Left Behind and the Federal Role in Education: Evolution or Revolution?*, 80 PEABODY J. EDUC. 19, 27 (2005) (analyzing changes in the federal role in education). In addition, “40 States put new testing provisions into effect.” MICHAEL KIRST, ACCOUNTABILITY: IMPLICATIONS FOR STATE AND LOCAL POLICYMAKERS 1 (1990), available at <http://files.eric.ed.gov/fulltext/ED318804.pdf> (analyzing new accountability requirements created during the educational excellence movement).

43. Richard F. Elmore, *Introduction: On Changing the Structure of Public Schools*, in RESTRUCTURING SCHOOLS: THE NEXT GENERATION OF EDUCATIONAL REFORM 1, 1 (1990) (analyzing factors influencing the success of school restructuring efforts).

44. See Marshall S. Smith & Jennifer O’Day, *Systemic School Reform, in THE POLITICS OF CURRICULUM AND TESTING* 233, 236-37 (Susan H. Fuhrman & Betty Malem eds., 1991) (discussing the problems of policy fragmentation and incoherence).

of the Goals 2000: Educate America Act<sup>45</sup> and the Improving America's Schools Act (IASA), which reauthorized the ESEA.<sup>46</sup> While Goals 2000 provided funding to states to engage in standards-based reform, the IASA required states to engage in this reform as a condition of receiving continuing Title I funding. As such, law and policy reform efforts responded to the problems of past reforms by moving past issues far from the classroom that could easily be regulated (e.g. inequality of funds) and closer to classroom teaching and learning. At the same time, reforms were beginning to focus on adequacy for all students, restructuring school systems, and student performance with regard to set standards.

The passage of the American Recovery and Reform Act of 2009 (ARRA) moved schools even further in this direction. The ARRA was designed to provide stability to the U.S. economy after the 2008 financial meltdown and to stimulate the economy. It was to be a one-time appropriation, passed under extraordinary circumstances. Of the \$787 billion total funds, almost \$80 billion were set aside for education.<sup>47</sup> The primary lever for the new education reform efforts was the Race to the Top (RTT) competition. RTT was a competitive grant program in which states competed for a share of \$4.35 billion.<sup>48</sup> RTT particularly incentivized states to create new teacher evaluation systems that incorporated measures of student achievement into the way in which teachers were evaluated.<sup>49</sup> As discussed below, many states followed the lead of the federal government by quickly developing and implementing such systems, and using these systems as the basis for critical decisions about teacher tenure and employment.<sup>50</sup>

To be sure, not all large-scale education reforms moved in the same direction. For example, school choice became an increasingly

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45. See Goals 2000: Educate America Act, Pub. L. No. 103-227, § 308, 108 Stat. 125, 168 (1994) (codified as amended at 20 U.S.C. § 5888 (1995)).

46. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at 20 U.S.C. § 6301 (1995)).

47. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115; John E. Chubb, *The Learning Stimulus?*, EDUC. WK. (July 15, 2009), <http://www.edweek.org/ew/articles/2009/07/15/37chubb.h28.html>.

48. See *id.* §§ 14001, 14006; Press Release, U.S. Dep't Educ., President Obama, U.S. Sec'y of Educ. Duncan Announce Nat'l Competition to Advance Sch. Reform (July 24, 2009), *available at* <http://www2.ed.gov/news/pressreleases/2009/07/07242009.html>.

49. See *id.* §§ 14005(d), 14006 (highlighting the importance of tying educator improvement strategies to performance-based incentive systems).

50. See GREENBERG, MCKEE & WALSH, *supra* note 11, at 63.

popular reform strategy beginning in the early 1990s.<sup>51</sup> Largely proceeding through charter school and voucher programs, school choice is ultimately aimed at improving school performance by giving individuals and local organizations the room to innovate, compete, and adapt to local conditions.<sup>52</sup> However, much of the large-scale education law and policy reform currently focuses on adequacy, the reform of school systems, and outcomes. It is precisely in this climate that recent changes in collective bargaining and teacher evaluation have emerged.

## B. Changes in Teacher Workforce Policy

Although there has been a significant amount of law and policy focused on large-scale education reform since the civil rights era, teachers have become located at the center of this reform only recently. For most of U.S. history, states maintained the primary authority over the basic requirements for ensuring teacher quality, including requirements governing licensure, the approval of teacher education programs, professional development, and several aspects of compensation.<sup>53</sup> The large majority of states also guaranteed tenure rights statutorily.<sup>54</sup> Because such authority has resided at the state level, these requirements have varied across states.<sup>55</sup> Substantial governance authority over teacher policy has traditionally resided at the local level as well. School-level administrators have been the primary entities responsible for evaluating teachers and selecting teachers' curricula, and teachers have exercised their authority with much autonomy when they close the classroom door.<sup>56</sup> As school

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51. In 2011, there were "more than 5,700 charter schools serving more than 1.9 million students" in forty-one states. *Choice & Charter Schools: Facts*, CENTER FOR EDUC. REFORM, <https://www.edreform.com/issues/choice-charter-schools/facts/> (last visited Sept. 26, 2014). In 2010, only Louisiana, Ohio, Wisconsin, and Washington, D.C. operated traditional voucher programs. *School Vouchers*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/education/school-choice-vouchers.aspx> (last visited Sept. 26, 2014).

52. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 185-220 (1990) (laying out the fundamentals of school choice theory).

53. See Thomas B. Corcoran, *The Changing and Chaotic World of Teacher Policy*, in *THE STATE OF EDUCATION POLICY RESEARCH* 307, 308-09 (David K. Cohen, Susan H. Fuhrman & Fritz Mosher eds., 2007).

54. See *id.* at 316.

55. *Id.*

56. LARRY CUBAN, *HOW TEACHERS TAUGHT: CONSTANCY AND CHANGE IN AMERICAN CLASSROOMS 1890-1980*, at 252-53 (1984) (discussing the tradition of teacher autonomy).

districts grew and federal and state governments enacted laws governing collective bargaining through the first half of the twentieth century, districts gained more authority over teacher employment decisions. Through collective bargaining processes, most school districts and teachers' unions have agreed upon teacher compensation and procedural protections for teachers' employment rights within the boundaries set by state law, and such processes have often generated intricate and often unwieldy processes for administrators to undertake when evaluating and firing teachers.<sup>57</sup>

Despite this historical emphasis on local control, education policies have swung back and forth between prioritizing teacher autonomy and oversight for much of the twentieth century. While education policies always have included some degree of teacher autonomy and oversight, one often has garnered more emphasis. For example, in the early part of the twentieth century, many states gave basic skills competency tests to teacher candidates.<sup>58</sup> But as requirements for teachers to graduate from college and be certified to teach were enacted around the United States, states used these tests less often.<sup>59</sup> During the 1960s and 1970s, "Competency/Performance Based Teacher Education" models similarly gained significant attention from the federal government as a way to improve teacher education through the application of systems and job analysis.<sup>60</sup> However, these models ultimately had a minimal impact on teacher education programs.<sup>61</sup>

The 1980s marked the beginning of increasing state and federal involvement in teacher workforce policy. As noted above, education policies enacted by a large range of states during the educational excellence movement increased student testing and the use of

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57. See generally COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY'S SCHOOLS (Jane Hannaway & Andrew J. Rotherham eds., 2006) [hereinafter COLLECTIVE BARGAINING IN EDUCATION] (surveying the landscape of collective bargaining law).

58. See Martha M. McCarthy, *Teacher-Testing Programs*, in THE EDUCATIONAL REFORM MOVEMENT OF THE 1980s, at 189, 189 (Joseph Murphy ed., 1990).

59. *Id.*

60. See Kenneth M. Zeichner & Daniel P. Liston, *Traditions of Reform in U.S. Teacher Education*, 41 J. CHR. EDUC. 3, 7 (1990) (discussing the history of reforms aimed at improving teacher education).

61. *Id.*

standardized curriculum.<sup>62</sup> The application of such management techniques arguably “deskilled” teachers by preventing them from employing their professional discretion.<sup>63</sup> However, a second wave of state-level reforms in the mid-1980s was aimed at restructuring schools to promote autonomy and flexibility at the school level, and enhance teachers’ professional discretion.<sup>64</sup> A movement to professionalize teachers, often by upgrading teachers’ skills and knowledge and providing teachers with more discretion, similarly emerged during the 1990s.<sup>65</sup> In addition, the standards-based reform movement that emerged in states during this time formally constrained what teachers should teach through the explicit articulation of standards. However, it left pedagogical decisions in the hands of teachers. States’ increasing emphasis on educational outcomes and accountability put additional pressure on teachers to teach particular content and use particular methods. As such, federal and state policies governing standards, teacher evaluation, student testing, and accountability became increasingly important sources of authority governing teachers’ classroom practices.<sup>66</sup>

As also noted above, federal policy moved deeper into the core work of teaching with the passage of NCLB in 2002.<sup>67</sup> By including much more robust testing and accountability requirements for schools than its predecessors, NCLB exerted strong pressure on teachers to “teach to the test” (e.g. by narrowly emphasizing test-taking skills) in many cases.<sup>68</sup> Moreover, NCLB squarely focused federal policy on improving teachers’ performance by requiring there

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62. See William Lowe Boyd, *Balancing Control and Autonomy in School Reform: The Politics of Perestroika*, in *THE EDUCATIONAL REFORM MOVEMENT OF THE 1980s*, *supra* note 58, at 85, 85-86 (discussing the move toward standards).

63. See LINDA M. McNEIL, *CONTRADICTIONS OF CONTROL: SCHOOL STRUCTURE AND SCHOOL KNOWLEDGE* 185-86 (1986).

64. See Boyd, *supra* note 62, at 86.

65. See generally Brian Rowan, *Comparing Teachers’ Work with Work in Other Occupations: Notes on the Professional Status of Teaching*, *EDUC. RES.*, Aug.-Sept. 1994, at 4, 4-6 (examining movements to professionalize teaching).

66. See MARIS A. VINOVSIS, *FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY 1-2* (2009) (charting the rise of standards at the state and federal levels).

67. See Elementary and Secondary Education Act of 1965 §§ 1001-1908, 20 U.S.C. §§ 6301-6578 (2012).

68. See *CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 4 OF THE NO CHILD LEFT BEHIND ACT 103* (2006) (quoting Hillside Elementary Principal Michele Sandro), available at <http://www.cepdc.org/displayDocument.cfm?DocumentID=301> (discussing several analyses of the relationship between NCLB and student test score gains).

to be a highly qualified teacher (HQT) in every public school classroom.<sup>69</sup> Moving even deeper into the core work of teaching, the ARRA and RTT incentivized states to enact policies that require the use of student achievement data as a significant part of teacher evaluation and, in turn, personnel decisions about teachers. So, recent reforms have focused on increasing teacher effectiveness, particularly through the specification of student outcomes, evaluation, and accountability. However, these reforms also narrow the traditional scope of teachers' authority and notions about what constitutes effective teacher behavior. As such, many modern, large-scale education reforms are squarely aimed at increasing teachers' performance through a focus on adequacy, instituting system-wide changes, and student test scores.

## II. TEACHER EVALUATION AND STUDENTS' LEARNING OPPORTUNITIES

The recent wave of laws aimed at teacher evaluation is ultimately aimed at equalizing and increasing student learning opportunities and performance. There is a growing consensus among the education research community that teachers are one of the most important influences on student learning and performance.<sup>70</sup> Teacher quality appears to be especially important for improving the learning opportunities of poor and minority students.<sup>71</sup> However, teacher quality is inequitably distributed among students.<sup>72</sup> In addition, most traditional teacher evaluation systems have yielded high ratings for almost every teacher.<sup>73</sup> Still, the new laws aimed at enhancing teacher evaluation and accountability involve several problems, such as a host of psychometric problems that weaken the validity about whether teachers are performing acceptably and incentives poorly tailored for improving teachers' performance.<sup>74</sup> Perhaps most

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69. See 20 U.S.C. § 6319(a)(2). While the definition of what constitutes an HQT varies for different types of teachers, NCLB generally requires teachers to have received a bachelor's degree, be fully certified, and have demonstrated their knowledge and skills. *Id.* § 7801(23).

70. See *supra* note 19 and accompanying text.

71. See, e.g., LAURA GOE, NAT'L COMPREHENSIVE CTR. FOR TEACHER QUALITY, THE LINK BETWEEN TEACHER QUALITY AND STUDENT OUTCOMES: A RESEARCH SYNTHESIS 1 (2007), available at <http://www.files.eric.ed.gov/fulltext/ED521219.pdf>.

72. See *supra* note 20 and accompanying text.

73. See WEISBERG ET AL., *supra* note 21, at 6.

74. See *id.* at 2.

importantly, these systems fail to encourage teachers to engage in instructional practices that will generate the sorts of learning opportunities that all students need in the twenty-first century.

This Part analyzes the recent wave of teacher evaluation laws that have been enacted. First, this Part examines the current landscape of teacher evaluation and accountability laws and particularly highlights the sort of instructional practices encouraged by these laws. Second, this Part analyzes the litigation that could potentially be generated by these laws as tenured teachers are fired on the basis of poor evaluations. Finally, this Part discusses the educational research bearing upon these laws.

### A. The Current Landscape of Teacher Evaluation

The enactment of teacher evaluation and accountability systems has quickly become a strategy employed by both state and federal governments to improve teacher effectiveness and in turn, student performance. However, several pre-existing efforts have been in place at the state level for some time. The reform strategy of teacher evaluation particularly gained momentum in the mid-1980s as a way to improve students' learning opportunities.<sup>75</sup> By 1992, thirty-eight states had in place legislation with specific requirements for teacher evaluation.<sup>76</sup> Under most of these early teacher evaluation systems, principals and administrators were completely responsible for evaluating teachers, and almost all teachers were rated as performing satisfactorily.<sup>77</sup>

By the mid-2000s, some states had begun to focus more intensely on teacher evaluations and their relationship with student performance. For example, by this time Tennessee had developed a database linking student achievement gains on standardized tests to individual teachers and required teachers to be evaluated in six areas (such as planning and assessment of students).<sup>78</sup> And by 2003, at least nine states had enacted laws encouraging teachers to be paid for performance, although only two states had in place policies that tied

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75. See Carole A. Veir & David L. Dagley, *Legal Issues in Teacher Evaluation Legislation: A Study of State Statutory Provisions*, 2002 BYU EDUC. & L.J. 1, 3.

76. See *id.*

77. See WEISBERG ET AL., *supra* note 21, at 6.

78. J. E. STONE, EDUC. CONSUMERS FOUND., POLICY HIGHLIGHTS FROM TENNESSEE'S RACE TO THE TOP APPLICATION 6-8 (2010), available at [http://www.education-consumers.org/ECF\\_RTTC\\_Commentary.pdf](http://www.education-consumers.org/ECF_RTTC_Commentary.pdf).

teacher evaluation to student achievement.<sup>79</sup> Spurred in part by the ARRA and RTT, states adopted teacher evaluation and accountability policies more quickly in the late 2000s and early 2010s. In 2009, only fourteen states required annual evaluations of all teachers, and four states required student achievement to be an important factor in assessing teacher performance. But by 2013, forty states required teacher evaluations to include student achievement data, thirty-five states required student growth to be the preponderant criterion, and twenty states tied evaluation to tenure decisions.<sup>80</sup> Furthermore, twelve states made legislative modifications adding poor performance as a grounds for “just cause” dismissal, eleven states made modifications requiring that reduction in force decisions may not be based entirely on seniority, and five states made modifications requiring teachers to lose their tenure protections after the receipt of a certain number of poor performance evaluations.<sup>81</sup> The teacher evaluation systems that incorporate student achievement data often rely on value-added modeling (VAM), a statistical calculation that ties student growth on standardized achievement tests to particular teachers.<sup>82</sup>

While student achievement data is central in many recently enacted teacher evaluation systems, these systems include several other components as well. Many of these systems incorporate classroom observations conducted by administrators, who are generally the teachers’ principals.<sup>83</sup> Some of these systems also use direct assessments of teacher knowledge and student ratings of teachers.<sup>84</sup> Some of these systems include other sources of information as well, including ratings of teachers’ commitment to the school community, measures of teacher professionalism (such as unexcused teacher absences and late arrivals), and student test score

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79. *Education Counts*, EDUC. WK. (June 8, 2007), <http://www.edweek.org/rc/2007/06/07/edcounts.html?intc-intst>.

80. NAT’L COUNCIL ON TEACHER QUALITY, 2013 STATE TEACHER POLICY YEARBOOK 10 (2014), [http://www.nctq.org/dmsView/2013\\_State\\_Teacher\\_Policy\\_Yearbook\\_National\\_Summary\\_NCTQ\\_Report](http://www.nctq.org/dmsView/2013_State_Teacher_Policy_Yearbook_National_Summary_NCTQ_Report); see also Ann Elizabeth Blankenship, *Teacher Tenure: The Times, They Are a Changin’*, 1 EDUC. L. & POL’Y REV. 193, 200 (2014).

81. *See id.* at 203.

82. *Id.* at 216 & n.147.

83. *See* STEVEN GLAZERMAN ET AL., PASSING MUSTER: EVALUATING TEACHER EVALUATION SYSTEMS 14 (2011), available at <https://www.dartmouth.edu/~dstaiger/Papers/2011/passing%20muster%202011.pdf>.

84. *See id.* at 3.

gains for a teacher's school.<sup>85</sup> This push for teacher evaluation to become a central part of state education systems also has begun to infiltrate state laws governing teacher preparation—teacher preparation programs in a small handful of states are beginning to be assessed on the basis of evaluations of the teachers they produce.<sup>86</sup>

Notably, there has been strong political pushback to many of these changes, particularly from teachers' unions. Randi Weingarten, president of the American Federation of Teachers (AFT), repeatedly argued that teacher evaluation systems can improve student learning opportunities only when they are aimed at continually developing teachers' skills instead of teacher accountability.<sup>87</sup> Echoing historical criticisms of efforts to restrict teachers' autonomy, Chicago Teachers Union (CTU) president Karen Lewis stressed during the 2012 CTU teacher strike that teacher evaluation and accountability systems focused on student achievement deskilled teachers and make them less able to help students learn important knowledge and skills.<sup>88</sup> At the very least, such criticisms from high-profile teachers' union leaders underscore the contentious nature of these systems and potential not just for political blowback but legal blowback as well.

## B. Teacher Evaluation and Potential Litigation

Given that new teacher evaluation and accountability systems threaten teachers' job security in ways that they have not previously faced, there is the strong potential for adversely affected teachers to engage in litigation. Teachers who feel that they have been unfairly disciplined or fired as a result of poor ratings on evaluations may sue

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85. *See id.* at 1.

86. As reported by the National Comprehensive Center for Teacher Quality, at least six states have enacted significant changes to their policies governing teacher preparation programs. JANE G. COGGSHALL, LAUREN BIVONA & DANIEL J. RESCHLY, *EVALUATING THE EFFECTIVENESS OF TEACHER PREPARATION PROGRAMS FOR SUPPORT AND ACCOUNTABILITY* 23 (2012), available at [http://www.gtlcenter.org/sites/default/files/docs/TQ\\_RandP\\_BriefEvaluatingEffectiveness.pdf](http://www.gtlcenter.org/sites/default/files/docs/TQ_RandP_BriefEvaluatingEffectiveness.pdf).

87. *See* Press Release, Am. Fed'n of Teachers, AFT Statement on NCTQ's 2013 Teacher Evaluation Report (Oct. 30, 2013), available at <http://www.aft.org/newspubs/press/2013/102913.cfm>.

88. Monica Davey & Steven Yaccino, *Teachers End Chicago Strike on Second Try*, N.Y. TIMES (Sept. 18, 2012), [http://www.nytimes.com/2012/09/19/us/vote-scheduled-on-chicago-teachers-contract.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/19/us/vote-scheduled-on-chicago-teachers-contract.html?pagewanted=all&_r=0); George N. Schmidt, *Angry Union President Announces Teachers Ready to Strike Because of CPS and Emanuel Hypocrisy, Bullying*, SUBSTANCE NEWS (Apr. 5, 2012), <http://www.substancenews.net/articles.php?page=3187>.

schools or school districts in response to such actions.<sup>89</sup> As Professors Green, Baker, and Oluwole argue, there are several potential approaches that teachers might take in such lawsuits, but a few stand out as the most likely: lawsuits involving Due Process Clause challenges, Equal Protection Clause challenges, and claims under Title VII of the Civil Rights Act.<sup>90</sup> While such litigation might serve as a needed protection for teachers' rights, it ultimately would do little, and perhaps even work against, leveraging for stronger and more equal student learning opportunities that are attuned to the needs of the twenty-first century.

Because tenured teachers have explicitly articulated job protections under both state statute and collective bargaining agreements, they are the most likely to sue if adversely affected by teacher evaluation and accountability systems. Such teachers are particularly likely to bring Due Process Clause challenges. As the Due Process Clause of the Fourteenth Amendment states, no "State [shall] deprive any person of life, liberty, or property, without due process of law."<sup>91</sup> A person can bring a procedural or substantive Due Process Clause challenge if he or she is deprived of a life, liberty, or property interest. One may establish deprivation of a liberty interest if a governmental act has imposed a stigma or disability that has damaged his or her standing in the community or diminished the freedom to find employment elsewhere.<sup>92</sup> However, as Professors Green, Baker, and Oluwole argue, it is unlikely that teachers terminated under recently enacted teacher evaluation systems can establish a liberty interest—teachers who received unsatisfactory evaluations in part based on student achievement scores only failed to meet professional standards and did not have their ability to find employment elsewhere damaged.<sup>93</sup>

On the other hand, teachers may be able to establish a property interest if they are terminated on the basis of such evaluations.<sup>94</sup> The Supreme Court found that teacher tenure derived from a state statute

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89. See Preston C. Green, Bruce D. Baker & Joseph Oluwole, *The Legal and Policy Implications of Value-Added Teacher Assessment Policies*, 2012 BYU EDUC. & L.J. 1, 15-16.

90. See *id.* This article is used extensively in this Section to outline the potential legal bases for litigation brought in response to recently enacted teacher evaluation and accountability systems.

91. U.S. CONST. amend. XIV, § 1.

92. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972).

93. Green, Baker & Oluwole, *supra* note 89, at 17 (citing *St. Louis Teachers Union, Local 420 v. Bd. of Educ.*, 652 F. Supp. 425 (E.D. Mo. 1987)).

94. *Id.* at 17.

provides teachers with a property right to continued employment.<sup>95</sup> However, Supreme Court cases from the last two decades indicate that the approach for identifying property interests under the Due Process Clause may change. Under the traditional approach to identifying property rights, as defined through Supreme Court decisions in cases such as *Board of Regents v. Roth*<sup>96</sup> and *Perry v. Sindermann*,<sup>97</sup> courts are required to determine whether an “independent source of authority constrains official discretion to remove a public employee, such that the employee has a legitimate claim of entitlement to employment that is protected by due process.”<sup>98</sup> Tenured teachers in several states would be able to establish property interests under such an approach.<sup>99</sup> However, recent Supreme Court cases indicate that the Court may adopt a new analytic framework to replace this approach.<sup>100</sup> This new framework could define a property interest on the basis of whether the deprivation of that interest would impose an “atypical and significant hardship” on a party.<sup>101</sup> In the context of education, this framework also would focus on whether teacher evaluation systems were enacted primarily for the benefit of students or teachers. As Camillucci argues, “Because none of the schemes primarily intend to benefit tenured teachers, dismissal of public teachers based on performance evaluations would not impose an atypical and significant hardship on those teachers, and they would not have a property interest in employment protected by due process.”<sup>102</sup>

Even if teachers can establish that they have a liberty or property interest, they still need to establish that adverse actions taken on the basis of teacher evaluation systems violate this right. As discussed below, the student achievement data used in teacher evaluation systems have high error rates and are impacted by several factors independent of an individual’s teaching. Because there is a

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95. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546-48 (1985).

96. 408 U.S. at 576-78.

97. 408 U.S. 593, 601 (1972).

98. See Karl D. Camillucci, *Regretting Roth? Why and How the Supreme Court Could Deprive Tenured Public Teachers of Due Process Rights in Employment*, 44 LOY. U. CHI. L.J. 591, 594 (2013) (synthesizing Supreme Court cases defining property interests).

99. See *id.* at 610-15 (examining tenure protections in Colorado, Florida, Idaho, Illinois, and Michigan).

100. See *id.* at 624-27.

101. See *id.* at 624-25 (quoting *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995)).

102. See *id.* at 637.

high risk of erroneous deprivation of a property interest through the procedures used, teachers who have established a liberty or property interest may be successful at establishing that teacher evaluation systems violate procedural due process.

Although procedural due process challenges arguably have the greatest chances for success, there are several other approaches that teachers could potentially take in such litigation. They could bring substantive due process challenges in which a court must determine whether a fundamental right is present. Because there are no clear fundamental rights, courts would likely use the rational basis test. While there is the possibility that a court would find a teacher evaluation system unconstitutional under this test because the use of student achievement data involves high error rates, there is no guarantee.<sup>103</sup> Tenured teachers may also bring equal protection claims. In such cases, courts similarly would use the rational basis test. In addition, teachers could also bring claims under Title VII of the Civil Rights Act. Such teachers would argue that minority teachers are disparately affected by teacher evaluation systems because they are more likely than white teachers to work in schools with low-income minority students, who tend to score lower on standardized tests.<sup>104</sup> However, schools and districts could defend themselves against such claims by establishing a legitimate, nondiscriminatory reason for its actions.<sup>105</sup>

If teachers adversely affected by recently enacted teacher evaluation and accountability systems choose to engage in such litigation, their decisions would be understandable. Such litigation would serve as a potential form of protection against what many teachers will likely perceive to be unfair decisions. However, this type of litigation would reflect and even exacerbate the problems already inherent in teacher evaluation systems. First, the litigation would only act as a shield against the problems of teacher evaluation systems and would do little for improving them in a way that would enhance students' learning opportunities.<sup>106</sup> In this way, the litigation

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103. See Green, Baker & Oluwole, *supra* note 89, at 23.

104. See *id.*

105. *Id.* at 25. To be sure, the teachers could counter that there is a "less racially discriminatory alternative." *Id.* Yet again, there is no guarantee that such a claim would succeed, and courts have long been hesitant to second-guess legislatures, districts, and schools on technical matters of education policy.

106. There is the possibility that a significant amount of such litigation would push states to modify their teacher evaluation systems to be more strongly

would only pit teachers against schools and districts instead of more directly acting toward school improvement.

Second, the analytic frameworks used in due process litigation could actually encourage teachers to act in ways that treat education reform as a zero-sum game between teacher benefits and student benefits. Under some Supreme Court cases, teachers' claims are at their strongest when reforms are intended to benefit them rather than the students.<sup>107</sup> So, teachers ultimately would be encouraged to push for reforms that solely protect them from the unfair actions of administrators. But as discussed below, such an approach does not square with the kind of reform needed to generate stronger learning opportunities for students in line with the demands of the twenty-first century—teachers and administrators must work together to create an environment in schools that supports the kind of professional behavior needed to create these learning opportunities.<sup>108</sup> As such, litigation generated in response to teacher evaluation systems has the paradoxical potential to degrade students' learning opportunities to an even greater extent.

### C. Research on Teacher Evaluation Systems

Although there is not much empirical research that directly relates to teacher evaluation and accountability systems, the extant research indicates that they likely will not improve or equalize students' learning opportunities in the intended fashion. On one hand, these reforms are based on the theory that they will help schools and districts hire and retain the most effective teachers, and incentivize low-performing teachers to improve; by focusing on student achievement gains and administrators' observations, these systems can provide the foundation for evidence-based decisions about critical teacher employment decisions, including tenure.<sup>109</sup> Indeed, there is a strong consensus among educational researchers that teachers are one of the most important factors influencing student learning.<sup>110</sup> Teachers are especially important for improving

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grounded in evidence, especially if coupled with a high-profile and savvy media strategy. However, such an impact could take years.

107. See *supra* notes 100-02 and accompanying text.

108. See *infra* note 258 and accompanying text.

109. See Camillucci, *supra* note 98, at 644-45.

110. See, e.g., Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1, 9 (2000).

the learning opportunities of poor and minority students.<sup>111</sup> On the other hand, teachers traditionally have not received robust evaluations on any consistent basis, and teacher evaluation systems have generally failed at identifying effective and ineffective teachers.<sup>112</sup>

Despite the potential of recently enacted teacher evaluation and accountability systems to resolve such problems, these systems have several serious weaknesses. As discussed above, they often employ VAM, which uses data from student achievement tests that have not been validated for these models.<sup>113</sup> Such test data especially may involve “floor” or “ceiling” effects, which means that they are ineffective at determining scores for low or high achieving students.<sup>114</sup> In order to validate these systems and the use of student achievement data, states would need to undertake validity studies, which would involve convening groups that include psychometricians, expert teachers, and experts in subject matter, in addition to conducting operational administrations of assessments, special research studies, and potentially large-scale field tests.<sup>115</sup> While some of this work has already begun, much more needs to be completed, especially to the extent that teacher evaluations are used for high-stakes accountability purposes.<sup>116</sup>

Moreover, there is a large range of factors, other than teachers, that drive student performance.<sup>117</sup> For example, VAM generally does not account for the influences on progress in students’ achievement

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111. See, e.g., GOE, *supra* note 71, at 1.

112. See GLAZERMAN ET AL., *supra* note 83, at 3.

113. See Audrey Amrein-Beardsley, *Methodological Concerns About the Educational Value-Added Assessment System*, 37 EDUC. RES. 65, 66-67 (2008).

114. Rodney S. Whiteman, Dingjing Shi & Jonathan A. Plucker, *Revamping the Teacher Evaluation Process*, 9 EDUC. POL’Y BRIEF 1, 7 (2011), available at [http://www.ceep.indiana.edu/projects/PDF/PB\\_V9N4\\_2011\\_EPB.pdf](http://www.ceep.indiana.edu/projects/PDF/PB_V9N4_2011_EPB.pdf).

115. See JOAN L. HERMAN, MARGARET HERITAGE & PETE GOLDSCHMIDT, DEVELOPING AND SELECTING ASSESSMENTS OF STUDENT GROWTH FOR USE IN TEACHER EVALUATION SYSTEMS 3-5 (2011), available at [https://www.cse.ucla.edu/products/policy/shortTermGrowthMeasures\\_v6.pdf](https://www.cse.ucla.edu/products/policy/shortTermGrowthMeasures_v6.pdf). States generally have not undertaken validity studies of the use of VAM in teacher evaluation systems.

116. THOMAS J. KANE ET AL., HAVE WE IDENTIFIED EFFECTIVE TEACHERS? VALIDATING MEASURES OF EFFECTIVE TEACHING USING RANDOM ASSIGNMENT 2 (2013), available at [http://www.metproject.org/downloads/MET\\_Validating\\_Using\\_Random\\_Assignment\\_Research\\_Paper.pdf](http://www.metproject.org/downloads/MET_Validating_Using_Random_Assignment_Research_Paper.pdf) (indicating that measures of teaching “effectiveness from the 2009-10 school year . . . identifi[ed] teachers who produced higher average student achievement following random assignment”).

117. See Whiteman, Shi & Plucker, *supra* note 114, at 5.

like family income, ethnicity, and ability. Accordingly, teachers who teach several ELLs or students with disabilities have shown lower student achievement gains than when they teach other students.<sup>118</sup> There are also many influences within schools that affect student achievement gains other than teachers. For example, a science teacher who emphasizes mathematical modeling and computation may influence how a student scores on a mathematics achievement test. As a result, it would be very difficult to pin that student's mathematics score gains to a particular teacher.<sup>119</sup> The observational components of teacher evaluation systems also involve several potential problems. For example, in an early study of the implementation of an observational rubric, principals' scores for teachers were often more lenient or severe than the external evaluators'.<sup>120</sup> Given such problems, estimates of teachers' performance have proven very unstable across tests, classes, and years.<sup>121</sup> As such, the National Research Council's Board on Testing and Assessment stated, "VAM estimates of teacher effectiveness . . . should not [be] used to make operational decisions because such estimates are far too unstable to be considered fair or reliable."<sup>122</sup>

In addition to the problems of conducting the actual evaluations, teacher evaluation and accountability systems likely will

118. LINDA DARLING-HAMMOND, STANFORD CTR. FOR OPPORTUNITY POLICY IN EDUC., *CREATING A COMPREHENSIVE SYSTEM FOR EVALUATING AND SUPPORTING EFFECTIVE TEACHING* 22-23 (2012), *available at* <https://edpolicy.stanford.edu/sites/default/files/publications/creating-comprehensive-system-evaluating-and-supporting-effective-teaching.pdf>.

119. *See* GENE V. GLASS, EDUC. POLICY RESEARCH UNIT, *TEACHER EVALUATION* 7.1, 7.8 (2004), *available at* <http://www.nepc.colorado.edu/files/EPSSL-0401-112-EPRU.pdf>.

120. *See* LAUREN SARTAIN, SARA RAY STOELINGA & EMILY KRONE, *RETHINKING TEACHER EVALUATION: FINDINGS FROM THE FIRST YEAR OF THE EXCELLENCE IN TEACHING PROJECT IN CHICAGO PUBLIC SCHOOLS 6* (2010), *available at* <https://ccsr.uchicago.edu/publications/rethinking-teacher-evaluation-findings-first-year-excellence-teaching-project-chicago>.

121. As reported by the Economic Policy Institute, one study of five large urban districts employing VAM for teacher evaluation found that among teachers ranked in the top 20% one year less than 33% were in that group the following year, and another third moved to the bottom 40%. EVA L. BAKER ET AL., *PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS 2* (2010), *available at* <http://www.epi.org/publication/bp278/>. Another study found that VAM scores for teachers in one year could only predict 4% to 16% of the variation in these ratings in the next year. *Id.*

122. BD. ON TESTING & ASSESSMENT, NAT'L RESEARCH COUNCIL, *LETTER REPORT TO THE U.S. DEPARTMENT OF EDUCATION ON THE RACE TO THE TOP FUND 10* (2009), *available at* [http://www.nap.edu/catalog.php?record\\_id=12780](http://www.nap.edu/catalog.php?record_id=12780).

not have their intended effect of generally motivating teachers to perform better. Although there is some logic that data from these systems can help administrators employ incentives to motivate stronger performance, there is mixed evidence at best to support this notion.<sup>123</sup> Because there are so many influences on student learning besides teachers, teacher evaluation and accountability reforms can discourage teachers from working in schools with poor and minority students.<sup>124</sup> These reforms could reinforce the common practice of assigning inexperienced teachers to these students.<sup>125</sup> Moreover, these reforms restrict teachers' autonomy by intensifying teachers' focus on particular learning objectives and tests. Yet, teachers highly value self-determinism, discretion, and authority over classroom work.<sup>126</sup> Increasing external evaluation and controls therefore tends to minimize the intrinsic rewards and perceived meaningfulness of the work to teachers.<sup>127</sup> Indeed, increased evaluation, characterized by a narrow focus on outputs, is often associated with private sector management techniques for work that does not involve high skill levels or motivation that transcends the terms of employment.<sup>128</sup>

Perhaps most importantly, teacher evaluation and accountability systems emphasize data from student assessments that involve a problematic vision of what students should learn. As

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123. On one hand, there is some recent evidence that teacher evaluation systems involving strong punishments (such as threats of dismissal) and rewards (such as very large merit pay bonuses) motivates very low-performing teachers to improve or leave teaching and high-performing teachers to improve even more. See Thomas Dee & James Wyckoff, *Incentives, Selection, and Teacher Performance: Evidence from IMPACT 21* (Nat'l Bureau of Econ. Research, Working Paper No. 19529, 2013), available at [http://curry.virginia.edu/uploads/resourceLibrary/16\\_De-impact.pdf](http://curry.virginia.edu/uploads/resourceLibrary/16_De-impact.pdf). On the other hand, there is other evidence that merit pay and the chance to move up a career ladder does not raise student test scores or achievement, especially when the potential merit pay is more modest. STEVEN GLAZERMAN & ALLISON SEIFULLAH, AN EVALUATION OF THE TEACHER ADVANCEMENT PROGRAM (TAP) IN CHICAGO: YEAR TWO IMPACT REPORT 17 (2010), available at [http://www.mathematica-mpr.com/~media/publications/PDFs/education/tap\\_yr2\\_rpt.pdf](http://www.mathematica-mpr.com/~media/publications/PDFs/education/tap_yr2_rpt.pdf).

124. See Whiteman, Shi & Plucker, *supra* note 114, at 3.

125. DARLING-HAMMOND, *supra* note 118, at 22.

126. See CUBAN, *supra* note 56, at 270.

127. See Linda Darling-Hammond & Elle Rustique-Forrester, *The Consequences of Student Testing for Teaching and Teacher Quality*, in USES AND MISUSES OF DATA FOR EDUCATIONAL ACCOUNTABILITY AND IMPROVEMENT 289, 297-300 (Joan L. Herman & Edward H. Haertel eds., 2005).

128. See RAYMOND E. CALLAHAN, EDUCATION AND THE CULT OF EFFICIENCY: A STUDY OF THE SOCIAL FORCES THAT HAVE SHAPED THE ADMINISTRATION OF THE PUBLIC SCHOOLS 6 (1964).

argued by the Gordon Commission on the Future of Assessment in Education, assessments serve as statements about what educators, policymakers, and parents want their students to learn.<sup>129</sup> Yet, current assessments generally fail to assess the knowledge and skills students need to succeed in the twenty-first century.<sup>130</sup> These assessments fail to assess whether students can “evaluate the validity and relevance of [different] pieces of information and draw conclusions from them[,] . . . make conjectures and seek evidence to test them,” contribute to their job or community networks, and generally make sense of the world.<sup>131</sup> Moreover, they fail to provide teachers with actionable information about their students and support high-quality instructional practices.<sup>132</sup> In short, recently enacted teacher evaluation and accountability systems are aimed at laudable goals of improving and equalizing students’ learning opportunities. However, they involve several serious problems that weaken their potential to do so and perhaps even reinforce a view of learning that serves students poorly.

### III. COLLECTIVE BARGAINING AND TEACHING

Given the recent focus on increasing teacher effectiveness through enhanced teacher evaluation and accountability, many reforms have also focused on modifying states’ collective bargaining laws. In most states that have experienced such reform, collective bargaining laws frame the tenure and employment decisions that are implicated by teacher evaluation and accountability systems. These laws form the foundation and ultimately the boundaries for the collective bargaining agreements that can be made between school districts and local teachers’ unions. In some states, the legal requirements regarding collective bargaining with teachers’ unions simply have been modified to align with recently enacted teacher evaluation and accountability laws. However, laws governing collective bargaining for teachers have been more drastically modified and severely weakened in other states. In these states, changes include prohibition of bargaining over the placement of

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129. See THE GORDON COMM’N ON THE FUTURE OF ASSESSMENT IN EDUC., A PUBLIC POLICY STATEMENT 9 (2013), available at [http://www.gordoncommission.org/rsc/pdfs/gordon\\_commission\\_public\\_policy\\_report.pdf](http://www.gordoncommission.org/rsc/pdfs/gordon_commission_public_policy_report.pdf).

130. *Id.* at 7, 9.

131. *Id.* at 10.

132. See *id.* at 7, 10.

teachers, structure of performance evaluation systems, and implementation of policy regarding teacher firing and discipline.

The wave of reform aimed at scaling back collective bargaining for teachers reflects the broader political pressure that teachers' unions currently face. Teachers' unions have a wide range of strong critics and supporters. Critics generally argue that teachers' unions harm education by hamstringing administrative authority, preventing administrators from creating flexible staffing arrangements, protecting ineffective teachers, failing to reward effective teaching, and creating huge inefficiencies.<sup>133</sup> Advocates of teachers' unions argue that collective bargaining results in agreements produced by fair negotiations that protect teachers from unfair or unwise treatment from administrators.<sup>134</sup> Some advocates further argue that collective bargaining is in fact a strong tool for enhancing teacher effectiveness—it provides the space for collaboration to “promote teacher ‘professionalism,’ peer review, differentiated compensation, and professional development.”<sup>135</sup> It is worth noting that, while this debate has been highly politicized, it generally does not rest on strong attention to evidence. Given the deep influence that the landscape of laws governing collective bargaining between teachers' unions and school districts can ultimately have on student learning opportunities, it is critical to examine these changes and claims about them with more attention to what we actually know and what we do not.

This Part accordingly examines the collective bargaining landscape for teachers, with a particular focus on how this landscape is rooted in a vision of teaching as industrial labor. First, this Part briefly discusses the history of collective bargaining for teachers. Second, this Part examines the current legal landscape. This Part highlights the ways in which different jurisdictions consider teacher evaluation and how these legal structures specifically frame the work of teaching. This Part also examines the wave of recent changes to collective bargaining laws that have weakened the power of teachers' unions to engage in collective bargaining with school districts. Third, this Part examines professional unionism in education, which characterizes a more cooperative type of bargaining between unions

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133. Frederick M. Hess & Andrew P. Kelly, *Scapegoat, Albatross, or What? The Status Quo in Teacher Collective Bargaining*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 57, at 53, 53.

134. *Id.*

135. *Id.*

and districts. Finally, this Part examines research on the effects of teachers' unions.

### A. History

States began to enact collective bargaining laws for public sector workers like teachers in the 1960s.<sup>136</sup> Since the enactment of laws allowing public sector workers to unionize, the number of unionized public sector workers has grown considerably.<sup>137</sup> Thirty-eight states have granted at least a portion of their public sector workers the right to unionize.<sup>138</sup> Although collective bargaining began in the private sector, bargaining in the public sector has become widespread, and the proportion of public sector workers represented by unions has grown far greater than that of private sector workers. In 2012, 6.6% of private sector workers were represented by unions, while 35.9% of public sector workers were represented by unions.<sup>139</sup> However, the ideas underlying states' public sector bargaining laws extend back to those originally driving bargaining in the private sector and particularly those underlying the National Labor Relations Act (NLRA).

Originally enacted as the Wagner Act and passed in 1935, the NLRA provided most private sector workers across the United States the right to collectively bargain through unions.<sup>140</sup> This law was grounded in the assumption that collective bargaining would occur in a traditional industrial workplace.<sup>141</sup> In this kind of workplace, management controls all decision making, and workers narrowly carry out tasks as decided by management.<sup>142</sup> As such, the rules governing the relationship between management and employees are

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136. See Chris Edwards, *Public-Sector Unions*, TAX & BUDGET BULL., No. 61 (CATO Inst.), March 2010, available at [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).

137. *Id.*

138. *Id.*

139. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2012, at 1 (Jan. 23, 2012), available at [http://www.bls.gov/news.release/archives/union2\\_01232013.pdf](http://www.bls.gov/news.release/archives/union2_01232013.pdf).

140. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-166 (Supp. I 1935)).

141. 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, 897 (2007). This work provides a substantial amount of detail on the history of the NLRA.

142. *Id.*

very rigid.<sup>143</sup> In interpreting the NLRA, the Supreme Court stated that decisions about the core operations of business must be left entirely in the hands of management and workers only have the right to force bargaining over “wages, hours, and other terms and conditions of employment.”<sup>144</sup> Under this logic, employees are granted protections that act as a shield against the unfair acts of more powerful management; employees are not permitted to direct the organizations in which they work through collective bargaining. As stated by Professors Malin and Kerchner, “a worker’s role is to obey and not to think” under the NLRA.<sup>145</sup> Indeed, workers who exercise discretion and maintain some control over the direction of an enterprise are considered management rather than employees under the law.<sup>146</sup> As the Supreme Court indicated in *NLRB v. Yeshiva University*, university faculty are considered management because they engage in managerial functions such as recruitment and hiring, tenure decisions, admissions, and setting curricula for courses.<sup>147</sup>

Teachers constitute one of the largest groups of public sector union members. The National Education Association (NEA) is the largest union in the country and has about 3.2 million members, and the American Federation of Teachers (AFT) has about 1.5 million members.<sup>148</sup> Moreover, the proportion of teachers that are unionized is very high—in the 2007–2008 school year, 76.4% of public school teachers belonged to a union.<sup>149</sup> Despite the current status of the NEA and AFT as large public sector unions, these organizations have not always focused on representing teachers through collective bargaining.<sup>150</sup> The NEA was founded in 1857, and the AFT was founded in 1916.<sup>151</sup> In these early years, the members of the NEA

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143. *Id.*

144. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 667 (1981) (quoting 29 U.S.C. § 158(d) (1976)).

145. See Malin & Kerchner, *supra* note 141, at 899.

146. *Id.*

147. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980).

148. See Monica Teixeira de Sousa, *The State of Our Unions: How President Obama’s Education Reforms Threaten the Working Class*, 50 U. LOUISVILLE L. REV. 201, 233 (2011).

149. According to a recent federal report, 76.4% of public school teachers in 2007–2008, down from 77.6% in 2003–2004 and 79.1% in 1999–2000, belonged to unions of employees’ associations. *Schools & Staffing Survey (SASS)*, NAT’L CENTER FOR EDUC. STAT., [http://nces.ed.gov/surveys/sass/tables/sass0708\\_043\\_t1s.asp](http://nces.ed.gov/surveys/sass/tables/sass0708_043_t1s.asp) (last visited Sept. 26, 2014).

150. See Richard D. Kahlenberg, *The History of Collective Bargaining Among Teachers*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 57, at 7, 7.

151. *Id.*

largely considered the group to be a professional organization of teachers and administrators. Given the strong presence of administrators in the NEA, it was largely opposed to collective bargaining in the beginning of the twentieth century. Moreover, there was internal dissension in these organizations about the goals of any potential collective bargaining efforts—while female elementary teachers wanted a single salary scale, white male teachers wanted higher pay and salary differential based on the grade level of teaching.

Frustrated by what they considered poor working conditions and aware of the success of private sector unions, teachers' unions forged sufficient internal compromise to begin collective bargaining efforts in the early 1960s.<sup>152</sup> The AFT forged an internal compromise that differential pay should not be based on the grades taught but instead on teachers' level of education and seniority. With this compromise in place, the local AFT union in New York City staged a strike, arguing that administrators did not treat teachers like other professionals who received higher pay, had greater autonomy, and were not treated arbitrarily by management.<sup>153</sup> The number of teachers in unions dramatically expanded by the end of the 1960s, especially as the NEA officially recognized a right to strike in 1969.<sup>154</sup> Given the expansion of teachers' union membership throughout the rest of the twentieth century, teachers' unions gained significant political and financial power.<sup>155</sup> Together, the annual revenue of the AFT and NEA is larger than \$1 billion.<sup>156</sup> By the mid-2000s, the AFT was rated as the seventh largest donor to the Democratic Party, while the NEA was ranked twelfth.<sup>157</sup>

According to some observers, teachers are part of a class of growing professional workers that is unionizing. Over the past two decades, professional employees such as college professors, lawyers, and doctors have joined unions in increasing numbers.<sup>158</sup> These types of employees join other groups traditionally considered to be professionals that have already unionized, such as journalists,

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152. *Id.* at 10-11. By the 1950s, private sector unions represented more than one-third of private sector workers and won large wage increases. *Id.* at 10. Such success influenced the shift of teachers' unions toward collective bargaining. *See id.*

153. *See id.* at 11-13.

154. *Id.* at 14-15.

155. *See id.*

156. *Id.* at 15.

157. *Id.* at 16.

158. *See Rabban, supra* note 22, at 690.

engineers, and nurses. However, observers do not universally consider teachers to be professionals.<sup>159</sup> The National Labor Relations Board's (NLRB) consideration of the law governing collective bargaining for teachers in *Wordsworth Academy* reflects this idea.<sup>160</sup> According to the NLRB in *Wordsworth Academy*, teachers only play a limited managerial role because they do not make recommendations to the administration in governance issues such as faculty hiring, tenure, sabbaticals, firing, and promotion. Moreover, teachers must work with supervisors to determine the academic content to which students are exposed. Under this logic, teachers act like traditional industrial workers who inhabit a role at the bottom of a rigid hierarchy and proceed "in the manner directed by their employer."<sup>161</sup> Indeed, this basic principle of public sector collective bargaining law, rooted in the NLRA, continues to animate reform efforts currently aimed at modifying both collective bargaining and teacher evaluation and accountability systems.

## B. The Current Landscape of Collective Bargaining Law in Education

Almost every state has in place laws permitting collective bargaining for teachers. Only five states—Georgia, North Carolina, South Carolina, Texas, and Virginia—do not permit collective bargaining for teachers.<sup>162</sup> Twenty-four states (including these five states) have in place "right-to-work" provisions under a state constitution or statute.<sup>163</sup> In a right-to-work state, labor unions and

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159. See generally Barbara J. Dray & Cathy Newman Thomas, *Teaching Is Not a Profession: How General and Special Education Teacher Education Have Failed*, in 20 ADVANCES IN SPECIAL EDUCATION: CURRENT ISSUES AND TRENDS IN SPECIAL EDUCATION: RESEARCH, TECHNOLOGY, AND TEACHER PREPARATION 187 (Festus E. Obiakor, Jeffrey P. Bakken & Anthony F. Rotatori eds., 2010).

160. *Wordsworth Acad.*, 262 N.L.R.B. 438, 443 (1982).

161. See Malin & Kerchner, *supra* note 141, at 900. It is also worth noting that although many state statutes governing collective bargaining for teachers are directly rooted in the NLRA, the NLRB indicated that the Supreme Court's decision in *Yeshiva* showed that university faculty as management does not directly apply to public school teachers. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980); see also *supra* text accompanying note 147.

162. See Gus Lubin, *The Five States Where Teachers Unions Are Illegal Have the Lowest Test Scores in America*, BUS. INSIDER (Feb. 23, 2011, 9:02 PM), <http://www.businessinsider.com/states-where-teachers-unions-are-illegal-2011-2>.

163. The right-to-work states are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota,

employees may not require employees to join unions or pay union dues as a condition of employment. As such, the power of unions to form and bargain collectively is significantly weakened in these states. At the same time, collective bargaining is required by school districts if requested by a teachers' union in thirty states, and fifteen states permit but do not require districts to engage in collective bargaining.<sup>164</sup> In these states, bargaining can occur over a potentially wide range of issues, including teacher salaries, healthcare, grievance and dismissal procedures, length of the school day and year, and transfer and layoff procedures.<sup>165</sup> Moreover, bargaining may occur over issues that border those that are sometimes left to administrators, such as class size, professional development, coaching, and student discipline.<sup>166</sup> Independent of a teachers' union's ability to engage in collective bargaining, the First Amendment guarantees teachers the right to join a union and engage in certain union activities without being disciplined.<sup>167</sup>

In states that at least permit collective bargaining with teachers' unions, statutes widely vary over the scope of what can and cannot be bargained. Moreover, many of the relevant provisions in state collective bargaining statutes are vague, which has paved the way for judicial and labor board interpretations of this scope. Under such state statutes and judicial decisions, the potential issues for collective bargaining generally fall into three categories: mandatory, permissive, and excluded.<sup>168</sup> Mandatory issues are those that primarily relate to employee working conditions and over which teachers' unions and school districts must bargain.<sup>169</sup> In the case of teaching, mandatory issues directly affect teacher compensation and

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Tennessee, Texas, Utah, Virginia, and Wyoming. See *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., INC., <http://www.nrtw.org/rtws.htm> (last visited Sept. 26, 2014).

164. *State Influence*, NAT'L COUNCIL ON TCHR. QUALITY, <http://www.nctq.org/districtPolicy/stateInfluence.do> (last visited Sept. 26, 2014).

165. See Lindy, *supra* note 15, at 1133.

166. See 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 (2012).

167. See, e.g., *Federación de Maestros v. Anibal Acevedo-Vila*, 545 F. Supp. 2d 219, 223 (D.P.R. 2008).

168. See Charles J. Russo, *A Cautionary Tale of Collective Bargaining in Public Education: A Teacher's Right or Tail Wagging the Dog?*, 37 U. DAYTON L. REV. 317, 330 (2012).

169. See 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, 26.

working conditions and generally include salary, hours, pension, and healthcare.<sup>170</sup>

Permissive issues are those that can be bargained if a school district and union choose.<sup>171</sup> These issues are generally those that do not primarily relate to working conditions but are not solely set aside for management.<sup>172</sup> Permissive issues may begin to touch upon matters of education policy, such as defining educational objectives and textbook selection.<sup>173</sup> It is worth noting that placement of an issue in the permissive category often means in practice that a school district will refuse to bargain over the issue, essentially foreclosing bargaining and teacher input over the issue.<sup>174</sup>

Finally, issues that are excluded cannot be bargained over, regardless of the wishes of a union and school district. Some excluded issues are those defined by statute that protect certain terms and conditions of teacher employment, such as due process protections for teacher tenure, rules governing the compensation schedule for teachers (often requiring that teachers are paid on the basis of experience, training, and education), and layoff procedures.<sup>175</sup> Other excluded issues are those considered to relate to education policy and require managerial discretion, such as staffing and principal appointment.<sup>176</sup>

Despite this framework, many potential issues for bargaining do not clearly fall into one of these three categories under state statutes. As a result, issues that are permissive or excluded in one state may be mandatory in another.<sup>177</sup> Such issues “include class size, workload, student discipline, calendar, [professional development,] . . . and guidelines for promotion, tenure, and retrenchment.”<sup>178</sup> Where state statutes are vague, courts and administrative boards often decide the categories into which certain issues fall. These decisions often depend on the extent to which an issue is related to teacher working conditions or managerial

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170. Koski, *supra* note 166, at 71.

171. Paige, *supra* note 169, at 26.

172. *Id.*

173. See Koski, *supra* note 166, at 71.

174. See Rabban, *supra* note 22, at 714 (“[D]eclaring governance a permissive subject . . . can also undermine traditional means of professional influence.”).

175. See Koski, *supra* note 166, at 71.

176. See Russo, *supra* note 168, at 331.

177. Rabban, *supra* note 22, at 706.

178. *Id.* (footnotes omitted).

discretion or public policy.<sup>179</sup> As discussed above, an issue should be classified as mandatory the closer it relates to working conditions, while an issue should be classified as excluded the closer it relates to managerial discretion or public policy. Discussing the theoretical roots of this framework, the New Jersey Supreme Court stated that the “foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiation, where citizen participation is precluded.”<sup>180</sup> However, classifying issues as either relating to working conditions or managerial authority or policy is complex and laden with value judgments. As the Court of Appeals of Maryland stated, “every managerial decision in some way relates to salaries, wages, hours, and other working conditions, and is therefore arguably negotiable.”<sup>181</sup> “At the same time, virtually every such decision also involves educational policy considerations and is therefore arguably nonnegotiable.”<sup>182</sup>

Teacher evaluation particularly reflects the problems in making such decisions. As Professors Malin and Kerchner argued, “[e]valuations can affect job security, pay, and assignments. However, how evaluations are conducted also raises questions of educational policy.”<sup>183</sup> As such, states have classified teacher evaluation differently. For example, courts and labor boards in Connecticut, Maine, and New Hampshire found that teacher evaluation systems are a permissive subject of bargaining.<sup>184</sup> On the other hand, states such as Florida, Michigan, and Wisconsin have prohibited bargaining over the process and substance of teacher evaluations.<sup>185</sup> Kansas takes a more nuanced approach by requiring bargaining over procedures for evaluating teachers but only

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179. See Paige, *supra* note 169, at 25-26.

180. Ridgefield Park Educ. Ass’n v. Ridgefield Park Bd. of Educ., 393 A.2d 278, 287 (N.J. 1978).

181. Montgomery Cnty. Educ. Ass’n v. Bd. of Educ., 534 A.2d 980, 986 (Md. 1987) (internal quotation marks omitted).

182. *Id.*

183. Malin & Kerchner, *supra* note 141, at 917.

184. Wethersfield Bd. of Educ. v. Conn. State Bd. of Labor Relations, 519 A.2d 41, 44 (Conn. 1986); *In re* Pittsfield Sch. Dist., 744 A.2d 594, 597 (N.H. 1999); Saco-Valley Teachers Ass’n v. MSAD No. 6 Bd. of Dirs., No. 79-56 (Me. Labor Relations Bd. 1979), available at <http://www.maine.gov/mlrb/decisions/ppc/79-56.htm>.

185. See Paige, *supra* note 169, at 30.

permitting bargaining over evaluation criteria.<sup>186</sup> Teacher evaluation has also become a central issue in *Doe v. Deasy*, a case decided in 2012, in which the California Superior Court ordered Los Angeles Unified School District (LAUSD) to include student progress in teacher evaluations.<sup>187</sup> The litigation particularly involved an unfair labor practice charge filed by United Teachers Los Angeles that LAUSD intended to implement changes to evaluation procedures without collectively bargaining those changes.<sup>188</sup> Although the court ruled that LAUSD had some discretion about how to include student progress, the court emphasized that such inclusion is required by state statute and cannot be ignored because of the collective bargaining process.<sup>189</sup>

Decisions about how to classify potential issues for bargaining can fundamentally shape the relationships between teachers and schools. If an issue is not classified as mandatorily negotiable, a district can unilaterally cut out a teachers' union from decision making over that issue.<sup>190</sup> A district or school can then go even further by selecting individual teachers and administrators to provide input. At the same time, teachers' unions may engage in "impact bargaining"—even if an issue is excluded, unions may bargain over facets of that issue that impact employee terms and working conditions.<sup>191</sup> For example, although some courts have found that the length of the school day is not mandatory, the exact hours and compensation associated with extended hours could be bargained.<sup>192</sup> Given both impact bargaining and the principle that matters of educational policy and managerial discretion should not be mandatory, collective bargaining is channeled toward "bread-and-butter" issues.<sup>193</sup> As a result, collective bargaining agreements often focus on shielding teachers against decisions imposed by schools and districts and deemphasize the broader policy facets of an issue.

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186. See Bd. of Educ., Unified Sch. Dist. No. 314 v. Kan. Dep't of Human Res., 856 P.2d 1343, 1345 (Kan. Ct. App. 1993); Bd. of Educ. v. NEA-Goodland, 785 P.2d 993, 994 (Kan. 1990).

187. *Doe v. Deasy*, BS 134604, at 24 (Cal. Sup. Ct. 2012), available at <http://edvoicce.org/sites/default/files/sites/default/files/Doe%20v%20%20Deasy%20Tentative%20Ruling%20Compact%20PDF.pdf>.

188. *Id.* at 11-12.

189. *Id.* at 25.

190. See Martin H. Malin, *The Paradox of Public Sector Law*, 84 IND. L.J. 1369, 1389 (2009).

191. See Paige, *supra* note 169, at 26.

192. See *id.* at 26-27.

193. See Malin & Kerchner, *supra* note 141, at 921.

As noted by Professors Malin and Kerchner, teachers often wish to provide input on several important policy issues but cannot because the structure of collective bargaining processes is not geared for such action.<sup>194</sup> For example, teachers often seek a voice on issues like curriculum reform, student assessment, and the allocation of resources for remedial assistance.<sup>195</sup> However, these issues are not easily classified in terms of wages or working conditions. Teacher evaluation presents a particularly tricky situation because it involves the hiring, evaluation, and retention power of schools and districts. Indeed, such thinking is reflected in the states that have recently classified teacher evaluation as excluded.<sup>196</sup>

Some critics have noted the potentially harmful effects of such legal principles. According to these critics, collective bargaining law in education does not provide an environment that facilitates the development of high-performance schools.<sup>197</sup> In high-performance workplaces, employees generally take responsibility in an organization for decision making in their areas of expertise. Although collective bargaining law does not necessarily prevent teachers and administrators from developing such a relationship, it provides a foundation for a more industrial-style relationship. Similarly, although teacher “buy-in” to education policy and administrative decision making are critical factors in school performance, collective bargaining law does little to facilitate relationships that engender this sort of support.<sup>198</sup> Moreover, when teachers’ unions are blocked from negotiating over issues, they in turn often focus on blocking the implementation of reforms in ways available to them.<sup>199</sup>

It is also worth noting that collective bargaining laws typically include provisions for “exclusive representation” that drive bargaining in a similar direction. Exclusive representation for teachers generally means that school districts cannot bargain with any other teachers and must bargain only with a teachers’ union—the

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194. *Id.* at 922.

195. *Id.*

196. *See* Paige, *supra* note 169, at 30.

197. *See, e.g.,* Malin, *supra* note 190, at 1379.

198. *See* Jennifer A. Mueller & Katherine H. Hovde, *Theme and Variation in the Enactment of Reform: Case Studies*, in *THE IMPLEMENTATION GAP: UNDERSTANDING REFORM IN HIGH SCHOOLS* 21, 24-25 (Jonathan A. Supovitz & Elliot H. Weinbaum eds., 2008).

199. *See* Paige, *supra* note 169, at 28.

exclusive bargaining representative.<sup>200</sup> If a district attempts to bargain with individual teachers or groups of teachers, it engages in an illegal strategy of “divid[ing] and conquer[ing].”<sup>201</sup> As Professor Rabban argues, the principle of exclusive representation threatens the ability of professional employees to exercise their expertise and engage in collegial decision making.<sup>202</sup> And although the NLRB and courts have not focused on the impact of exclusive representation on a professional workplace, the NLRB has noted that exclusive representation may weaken professional governance.<sup>203</sup>

In short, collective bargaining laws in education are present in a majority of states, but they often narrowly circumscribe the role of teachers’ unions. While these laws are written differently, they are generally rooted in the conception of industrial labor. They focus on protecting teachers from the whims and potentially unwise decisions of educational administration. As discussed below, they also create a legal environment that does not naturally support the development of high-performing schools that provide high-quality and equal learning opportunities for students.<sup>204</sup> Especially in concert with recent teacher evaluation legislation, current collective bargaining laws may actually work against this goal.

### C. Recent Changes to Collective Bargaining Laws for Teachers

Several states recently have made significant changes to their collective bargaining laws. Since 2010, at least twelve states have modified their laws governing the extent to which public employees can bargain over a range of different issues.<sup>205</sup> In education, these issues include tying teacher compensation to evaluation, lengthening the time it takes for teachers to achieve tenure, and streamlining procedures for teacher discipline and firing.<sup>206</sup> In some cases, these laws entirely prohibited bargaining over such issues. In addition, while some states that had recently enacted teacher evaluation

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200. See, e.g., CAL. GOV’T CODE § 3543(a) (West 2009).

201. See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 502-04 (2d ed. 2004); Rabban, *supra* note 22, at 693.

202. See Rabban, *supra* note 22, at 693.

203. Adelpi Univ., 195 N.L.R.B. 639, 648 n.31 (1972).

204. See *infra* notes 247-54.

205. See Malin, *supra* note 16, at 533. This article is used extensively in this Section to identify states that have recently changed their teacher collective bargaining laws.

206. See Koski, *supra* note 166, at 69.

systems focused on aligning their collective bargaining laws with these systems, other states made more sweeping changes to their collective bargaining laws.

For example, Idaho restricted collective bargaining for teachers to issues of compensation, which were defined as salary and benefits, including insurance and leave.<sup>207</sup> However, Idaho voters rejected this law in November 2012.<sup>208</sup> Indiana made similar changes by restricting collective bargaining for teachers to wages, salary, and wages related to fringe benefits like insurance.<sup>209</sup> The state prohibited bargaining for teachers over everything else and expressly prohibited bargaining over teacher evaluation, dismissal procedures and criteria, the school calendar, and restructuring options.<sup>210</sup> Although collective bargaining was already limited in Michigan, the state recently prohibited bargaining over a range of issues, including teacher placement, reductions in the teaching force, performance evaluation systems, policy regarding teacher discipline or firing, and the role of evaluation in performance-based compensation.<sup>211</sup>

Tennessee replaced the possibility of collective bargaining with a process called “collaborative conferencing.”<sup>212</sup> Under this process, teachers can file a petition to engage in collaborative conferencing with a school district if 15% of the teachers show interest.<sup>213</sup> Both the district and teachers must meet and confer to exchange information, opinions, and proposals on the terms and conditions of professional employee service over issues such as salaries, grievance procedures, and payroll deductions.<sup>214</sup> However, the statute does not require the parties to reach an agreement and allows a school board to set the terms and conditions if no agreement can be reached.<sup>215</sup> Moreover, collaborative conferencing cannot occur over teacher evaluation, staffing decisions, and differential pay plans and incentive compensation.<sup>216</sup>

Perhaps the most high-profile attack on collective bargaining in education occurred in Wisconsin. Under the leadership of Governor

207. Malin, *supra* note 16, at 542 (citing S. 1108 § 17, 61st Leg., 1st Reg. Sess. (Idaho 2011)).

208. *Id.*

209. *Id.*

210. *Id.*; S. 575 § 10, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

211. Malin, *supra* note 16, at 543.

212. *Id.* at 551; TENN. CODE ANN. § 49-5-605 (2014).

213. § 49-5-605.

214. Malin, *supra* note 16, at 552; § 49-5-602(2).

215. Malin, *supra* note 16, at 552; § 49-5-609(d).

216. Malin, *supra* note 16, at 552-53; § 49-5-608(b)(1)-(4).

Scott Walker, the State passed a law limiting teachers' unions from bargaining on issues other than base wages for approximately two-thirds of the school districts.<sup>217</sup> The law also required teachers to significantly increase their contributions to their retirement and health insurance premiums.<sup>218</sup> This law was passed without any support of State Democrats and sparked vicious political fights during its consideration, including the flight of fourteen democratic members of the Wisconsin State Senate from the State to delay a vote on the law.<sup>219</sup> Similar efforts emerged in Ohio. The law in Ohio limited bargaining between teachers' unions and school boards over salary.<sup>220</sup> However, this law was quickly repealed by voter referendum by a twenty-two point margin.<sup>221</sup> So although many states have recently modified their collective bargaining laws to align with the recent enactment of teacher evaluation systems, some states have significantly weakened the power of teachers' unions to bargain over a range of other issues as well.

#### D. Professional Unionism

Although collective bargaining in education is typically characterized as a zero-sum game that treats teaching much like industrial labor, the concept of professional, or reform unionism, offers a different view of bargaining. Under this concept, teachers' unions are characterized by an emphasis on "teacher professionalism in service of student learning."<sup>222</sup> The idea of professional unionism largely grew from the work of Albert Shanker, former president of

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217. Russo, *supra* note 168, at 333-34.

218. See *id.* (citing Amy Merrick, *Wisconsin Union Law to Take Effect*, WALL ST. J., June 15, 2011, at A2) (providing that under the new law, teachers are required to contribute 5.8% of their salaries toward their retirement and at least 12.6% of the cost of health insurance premiums).

219. Russo, *supra* note 168, at 333-34; see also Scott Bauer, *All Wisconsin Dems Flee Capitol to Slow Anti-Union Steamroller*, CHI. SUN-TIMES, Feb. 18, 2011, at 2.

220. Notably, the law continued to allow bargaining over health care, sick time, and pension benefits. *Ohio's SB 5, Explained*, STATEIMPACT, <http://stateimpact.npr.org/ohio/tag/sb-5/> (last visited Sept. 26, 2014).

221. See Michele McNeil, *Ohio Vote to Scrap Bargaining a Labor Victory—for Now*, EDUC. WK. (Nov. 10, 2011), available at <http://www.edweek.org/ew/articles/2011/11/10/12election.h31.html?qs=michele+mcneil>.

222. 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).

AFT, who began using the term “reform unionism” in the 1980s as public concern about the state of U.S. education and the accompanying scrutiny of teachers’ unions rose in the wake of the publication of *A Nation at Risk*.<sup>223</sup> In a 1997 speech to the National Press Club in Washington, D.C., Bob Chase, president of the NEA, also argued for a new kind of unionism, calling for a reinvention of teachers’ unions.<sup>224</sup> Though widely covered, little change in the NEA’s approach to unionism came from his speech. The Teacher Union Reform Network (TURN), which consisted of roughly a dozen local unions, also advocated for professional unionism. While members of TURN have adopted some policies designed to promote the tenets of professional unionism, these policies have been limited in both scope and impact.<sup>225</sup>

Professional unionism in education is focused on issues of teaching and learning to a much greater extent than traditional unionism in education. The first core tenet of professional unionism is “joint custody,” shared by the union and the district, of any reform.<sup>226</sup> The second tenet is union and management collaboration, characterized by collegial working relations and ongoing problem solving, rather than periodic negotiations.<sup>227</sup> The final tenet is a shared concern for public interest, in which the union assumes partial responsibility for the long-term success of the institution and is not solely focused on bread-and-butter issues for its members.<sup>228</sup> In contrast, industrial unionism has been characterized by separation between labor and management, adversarial bargaining, and an emphasis on self-interest and protection of teachers.<sup>229</sup>

Professional unionism accordingly involves an approach to bargaining known as interest-based bargaining. Professor Koppich

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223. See *id.* at 537; TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 245 (2011). Among education researchers, Kerchner & Koppich, in their book *A Union of Professionals*, also argued for reform unionism. See generally A UNION OF PROFESSIONALS: LABOR RELATIONS AND EDUCATIONAL REFORM (Charles Taylor Kerchner & Julia E. Koppich eds., 1993) [hereinafter A UNION OF PROFESSIONALS].

224. See MOE, *supra* note 223, at 247.

225. See *id.* at 248-49.

226. See Julia E. Koppich, *Getting Started: A Primer on Professional Unionism*, in A UNION OF PROFESSIONALS, *supra* note 223, at 194, 194.

227. See *id.* at 195.

228. See *id.*

229. See Julia Koppich, *Addressing Teacher Quality Through Induction, Professional Compensation, and Evaluation: The Effects on Labor-Management Relations*, 19 EDUC. POL’Y 90, 92-93 (2005).

describes this type of bargaining as using a collaborative approach rather than an adversarial approach, in which both parties are positioned as working together to address common issues.<sup>230</sup> Interest-based bargaining is integrative, rather than distributive, in which approach to bargaining allows the union and management to strive “to identify common goals and reach agreements that have mutual advantage”<sup>231</sup> and use what is best for students as the “litmus test” for any proposed idea.<sup>232</sup> The contracts that stem from interest-based bargaining potentially include a larger range of issues than traditional contracts and have been described as “living contract[s]” in which problems are addressed as they arise instead of every few years when it becomes time to renew the contract.<sup>233</sup>

Professional unionism potentially offers several benefits that may foster conditions that promote high-performance schools and increased learning opportunities for all students. First, as reflected by its name, professional unionism could increase professionalism, both in reality and perception, of the teaching workforce. By replacing rigid work rules with more expansive and flexible contracts, teachers arguably have increased freedom to teach in ways that best meet the learning needs of their students. Additionally, professional unionism could promote a shift away from the conception of teaching as industrial labor and towards a conception of teaching as a profession. Professional unionism also could encourage a less adversarial bargaining process, especially if issues are being negotiated as they arise, rather than attempting to resolve several years’ worth of issues each time a contract needs to be renegotiated. Finally, professional unionism could allow districts to have more flexibility to adapt to changing policy environments.

Despite these potential benefits, there are strong barriers to engaging in professional unionism. First, it would require new skills and training for union leaders and their district counterparts.<sup>234</sup> Furthermore, despite the tension between the potentially negative effects of teachers’ unionism on teaching work and the need to promote schools that offer all students educational opportunities, there are few incentives for unions to adopt a more professional type

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230. *Id.* at 94.

231. *See id.*

232. *See* Adam Urbanski, *Improving Student Achievement Through Labor-Management Collaboration in Urban School Districts*, 17 *EDUC. POL’Y* 503, 516 (2003).

233. *See id.*

234. *See* Koppich, *supra* note 226, at 201-02.

of unionism or practice interest-based bargaining.<sup>235</sup> To adopt professional unionism would mean putting the common interests of the school system and the students above the interests of the members. As Professor Moe argues:

The unions are not in the business of representing children. It is not their goal to create a school system that is organized for truly effective performance. They are driven by their own interests, and those special interests are in the driver's seat even when the unions engage in 'reform.'<sup>236</sup>

Under this logic, it is unlikely that widespread professional unionism will ever happen because it would require unions to shift their focus away from bread-and-butter issues to the promotion of reforms and policies that may not be popular with their members.

#### E. Empirical Research on Collective Bargaining

Despite the high profile and often highly politicized debates about collective bargaining in education, there is very limited empirical research on this issue. Little is actually known about the effects of collective bargaining in education.<sup>237</sup> However, there is some research exploring the effects of collective bargaining on work rules, the teacher workforce, and student achievement, in addition to case studies of interest-based bargaining.

Research on the effects of collective bargaining on teacher work rules generally shows that the presence of unions and collective bargaining tends to make teaching work more bureaucratic.<sup>238</sup> In his review of the effects of labor contracts on teaching work, Professor Kerchner found that the scope of contracts tended to expand over time and that teaching has become more bureaucratized and structured, which contradicts the avowed goals of union leaders to promote teacher professionalism.<sup>239</sup> This occurs because the primary instrument of collective bargaining "is the creation of new, written

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235. See Koppich, *supra* note 229, at 94.

236. MOE, *supra* note 223, at 274.

237. See Susan Moore Johnson & Morgaen L. Donaldson, *The Effects of Collective Bargaining on Teacher Quality*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 57, at 111, 112; Jane Hannaway & Andrew J. Rotherman, *Introduction to COLLECTIVE BARGAINING IN EDUCATION*, *supra* note 57, at 1, 1.

238. Charles Taylor Kerchner, *Union-Made Teaching: The Effects of Labor Relations on Teaching Work*, 13 REV. RES. EDUC. 317, 318 (1986); Douglas E. Mitchell et al., *The Impact of Collective Bargaining on School Management and Policy*, 89 AM. J. EDUC. 147, 151 (1981).

239. See Kerchner, *supra* note 238, at 318, 321, 339.

rules of behavior.”<sup>240</sup> These new rules have been used particularly to standardize teaching behavior, a trend that continues to be present in recent teacher evaluation policies. In a series of case studies, Professors Mitchell and Kerchner also found that the presence of a union and collective bargaining created an emphasis on work rules, and caused teaching to be more highly inspected.<sup>241</sup> Moreover, in districts with more powerful unions, collective bargaining agreements contain more detailed rules about a variety of work rules, including evaluation policies, transfer rights, class size, length of the school day and school year, and frequency of faculty meetings.<sup>242</sup> In sum, more powerful unions are significantly related to the restrictiveness of collective bargaining agreements, which in turn further bureaucratizes teaching work.

Like the effect of collective bargaining overall, there is little evidence about the effect of collective bargaining on the quality of the teacher workforce.<sup>243</sup> While there is not sufficient data to support conclusions about the effect of collective bargaining on the quality of the teacher workforce as a whole, there is some evidence that collective bargaining does impact key teacher workforce policies, especially compensation and teaching assignments. A historical analysis suggests that collective bargaining is related to a 12-15% increase in teacher compensation, but this fails to take into account other factors.<sup>244</sup> In addition to this relationship to higher salaries, collective bargaining is also related to the extent to which districts frontload or backload their salary structures. Front-loading a salary structure means that larger compensation increases occur earlier in the teacher’s career, while back-loaded salary structures give larger raises to veteran teachers.<sup>245</sup> Despite the positive relationship between front-loaded salary structures and student proficiency rates, districts with collective bargaining in place are more likely to have back-loaded salary structures.<sup>246</sup>

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240. *Id.* at 323-24.

241. *See id.* at 324; Mitchell et al., *supra* note 238, at 185.

242. *See* Katharine O. Strunk & Jason A. Grissom, *Do Strong Unions Shape District Policies? Collective Bargaining, Teacher Contract Restrictiveness, and the Political Power of Teachers’ Unions*, 32 *EDUC. EVALUATION & POL’Y ANALYSIS* 389, 401-02 (2010).

243. *See* Johnson & Donaldson, *supra* note 237, at 111, 113.

244. *Id.* at 115.

245. Jason A. Grissom & Katharine O. Strunk, *How Should School Districts Shape Teacher Salary Schedules? Linking School Performance to Pay Structure in Traditional Compensation Schemes*, 26 *EDUC. POL’Y* 663, 665 (2012).

246. *Id.* at 665, 685.

Collective bargaining is often accused of preventing the assignment of highly effective teachers to struggling schools and increasing the disparities between schools that serve high-minority or high-poverty communities and schools that do not serve predominantly minority or low-income communities.<sup>247</sup> This is largely because many collective bargaining agreements contain strict provisions regarding transfers and vacancy, in which more senior teachers are given preference in school assignments. Professors Cohen-Vogel, Feng, and Osborne-Kampkin found that districts with more restrictive collective bargaining agreements “appear to have lower shares of high-quality teachers, as measured by professional certification, National Board Certification, experience, and SAT scores.”<sup>248</sup> However, while it seems that collective bargaining agreements are related to differences between districts with respect to teacher quality, collective bargaining agreements do not exacerbate disparities in teacher quality within districts. In the same study, Professors Cohen-Vogel, Feng, and Osborne-Kampkin argued that more restrictive work rules, with respect to seniority rights and transfers, did not increase the existing teacher quality gap between high-minority and low-minority schools.<sup>249</sup> These findings lend some support to prior arguments about the relationship between collective bargaining agreements and differences in teacher quality between and within districts.<sup>250</sup>

There is also very little empirical research on the relationship between collective bargaining and student achievement. While research indicates a positive relationship between teacher salaries and collective bargaining, it is unclear how or if increases in salary translate into increased student achievement.<sup>251</sup> In his review of research on the relationship between teachers’ unions and student achievement, Professor Goldhaber concluded that the results were

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247. See Paul T. Hill, *The Costs of Collective Bargaining Agreements and Related District Policies*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 57, at 89, 97.

248. Lora Cohen-Vogel, Li Feng & La’Tara Osborne-Lampkin, *Seniority Provisions in Collective Bargaining Agreements and the “Teacher Quality Gap,”* 35 EDUC. EVALUATION & POL’Y ANALYSIS 324, 334 (2013).

249. See *id.*

250. See William S. Koski & Eileen L. Hornig, *Facilitating the Teacher Quality Gap? Collective Bargaining Agreements, Teacher Hiring and Transfer Rules, and Teacher Assignment Among Schools in California*, 2 EDUC. FIN. & POL’Y 262, 297 (2007).

251. Dan Goldhaber, *Are Teachers Unions Good for Students?*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 57, at 141, 148-49.

mixed and that many of the studies faced significant methodological issues.<sup>252</sup> Other studies have found negative relationships between collective bargaining and student achievement.<sup>253</sup> Moreover, a study conducted by Professor Moe found that the effect of collective bargaining on student achievement is not consistent from district to district, but rather depends upon the district size and minority composition.<sup>254</sup> In large districts, collective bargaining had a large negative impact on student achievement, especially for high-minority schools.

Finally, empirical research on the effects of interest-based bargaining in education is fairly limited, but there are several case studies of cities that have used interest-based bargaining. For example, Cincinnati implemented some aspects of interest-based bargaining during its 1988 contract negotiations, including monthly meetings to address contract-implementation issues and joint committees to address many aspects of schooling (e.g. curriculum, professional development, and allocation of federal funds).<sup>255</sup> However, these efforts had mixed results and later negotiations assumed much of the negative tone and relationships of prior negotiations. Greece, New York also implemented interest-based bargaining in 1987.<sup>256</sup> The Council for Change, a joint union–district committee, developed a reform agenda called *The Renewal Plan*, which “called for greatly increased shared decision making by teachers at the building and district levels” and set the tone for future negotiations.<sup>257</sup> The 1989 contract increased the flexibility of teacher work rules, created new roles for teacher–leaders, and encouraged school level shared decision making.

Research on the effects of interest-based bargaining outside of education points to the benefits of this approach. Using survey data from many industries, Professors Cutcher-Gershenfeld, Kochan, and Wells found evidence of a positive relationship between interest-

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252. *Id.* at 157.

253. See Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q. J. ECON. 671, 712 (1996).

254. Terry M. Moe, *Collective Bargaining and the Performance of the Public Schools*, 53 AM. J. POL. SCI. 156, 172-73 (2009).

255. See Byron King, *Cincinnati: Betting on an Unfinished Season*, in A UNION OF PROFESSIONALS, *supra* note 223, at 61, 68-69.

256. See Anthony M. Cresswell, *Greece Central School District: Stepping Back from the Brink*, in A UNION OF PROFESSIONALS, *supra* note 223, at 79, 85-86.

257. *Id.* at 84-85.

based bargaining and certain contractual outcomes.<sup>258</sup> In particular, negotiations that used an interest-based approach resulted in contracts that had greater flexibility in work rules and new pay arrangements, both outcomes that are often desired in teachers' union negotiations. Another study of the effects of interest-based bargaining found that this approach to negotiation "[gave] rise to fewer union gains, more union concessions, and more mutual gains."<sup>259</sup> Additionally, unions make fewer gains in the areas of labor mobility and working hours when using interest-based bargaining. According to the same study, mutual gains occur far more frequently when interest-based bargaining is used, especially in the areas of grievances and disciplinary measures.<sup>260</sup> So, interest-based bargaining may reduce the sheer number of gains made by teachers' unions during negotiation but may be more likely to produce contracts that satisfy both parties and are seen as mutually beneficial.

#### IV. REINVIGORATING THE GOALS OF THE CIVIL RIGHTS ACT

##### A. Educational Goals and Policy Images of Teaching

Large-scale education reform in the period immediately following *Brown* and through the civil rights era was largely aimed at providing students with equal educational access to schools and learning opportunities. In doing so, such reforms were ultimately focused on maintaining an inclusive and robustly functioning democracy and facilitating social mobility. Other important goals for education reform, such as maintaining the international economic competitiveness of the U.S., have also emerged since the civil rights era. While these goals are also important to keep in mind when developing and implementing education reforms, it is critical that we do not forget the goals underlying the civil rights era reforms as well.

Given some of the primary education reform goals of the civil rights era, the current slate of reforms focused on teacher evaluation and collective bargaining has some promise. These reforms respond to major problems that other large-scale reforms have faced in the

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258. Joel Cutcher-Gershenfeld, Thomas Kochan & John Calhoun Wells, *In Whose Interest? A First Look at National Survey Data on Interest-Based Bargaining in Labor Relations*, 40 *INDUS. REL.* 1, 17 (2001).

259. Renaud Paquet, Isabelle Gaetan & Jean-Guy Bergeron, *Does Interest-Based Bargaining (IBB) Really Make a Difference in Collective Bargaining Outcomes?*, 16 *NEGOTIATION J.* 281, 289 (2000).

260. *Id.* at 290.

past. Perhaps most importantly, they focus on teachers, who are one of the most important influences in schools on students' learning opportunities. Indeed, teacher quality and effectiveness are especially important for improving the learning opportunities of poor and minority students. However, these reforms are poorly designed on balance to provide all students with the learning opportunities they need to engage deeply with the democratic process and facilitate their social mobility in the twenty-first century. There are several problems in the design of current teacher evaluation and accountability systems that generally weaken their ability to improve teaching, such as widespread sources of invalidity. On a more fundamental level, the learning opportunities encouraged by laws governing collective bargaining and teacher evaluation laws are not well aligned with primary education goals underlying civil rights era education reform. Today, all students need to master not only specific content knowledge and skills in disciplines like mathematics and language arts; but they must also master broader competencies, such as knowledge creation, working with abstractions, thinking systemically, cognitive persistence, and collective cognitive responsibility.

Unfortunately, the legal environment structuring both of these reforms reflects a vision of teaching that is more closely aligned with industrial work than the sort of more "professional" work that is more attuned to such knowledge and skills. Indeed, the legal environment is rooted in certain "policy images" about teachers and teaching.<sup>261</sup> Research on policy design reveals that the images policymakers hold about the target of a given policy, in this case teachers and teaching, influence the design of the policy and thus the implementation of the policy.<sup>262</sup> While there are several possible policy images policymakers could hold about teachers and teaching, existing literature points to four primary conceptions about what good teaching is and how it can be improved.<sup>263</sup>

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261. See Jonathan D. Jansen, *Image-ing Teachers: Policy Images and Teacher Identity in South African Classrooms*, 21 S. AFR. J. EDUC. 242, 242 (2001) (defining policy images as "preferred and cherished images about the [object] of an education policy").

262. See Anne L. Schneider & Helen M. Ingram, *Introduction: Public Policy and the Social Construction of Deservedness*, in *DESERVING AND ENTITLED: SOCIAL CONSTRUCTIONS AND PUBLIC POLICY* 1, 5-8 (Anne L. Schneider & Helen M. Ingram eds., 2005).

263. See Linda Darling-Hammond, Arthur E. Wise & Sara R. Pease, *Teacher Evaluation in the Organizational Context: A Review of the Literature*, 53 REV. EDUC. RES. 285, 290 (1983).

First, the conception of teaching as *labor* envisions the work of teaching as routinized and rationally planned.<sup>264</sup> This definition conjures up a vision of factory work. Viewing the work of teaching as a type of labor minimizes the need for specialized knowledge on the part of the teacher. While a focus on the teacher's work product, usually student test scores or identifiable classroom practices, implies that good teaching is a sufficient component of student performance, this focus also characterizes teaching as a set of procedures and protocols that leads to a predictable outcome.<sup>265</sup> The conception of teaching as a *craft* goes beyond the conception of labor by acknowledging that teaching requires a set of specialized techniques.<sup>266</sup>

If the conception of teaching includes the exercise of judgment as well a set of specialized techniques, then it becomes the conception of teaching as a *profession*.<sup>267</sup> Professors Achinstein and Ogawa define teaching professionals as those with "specialized expertise, who have discretion to employ repertoires of instructional strategies to meet the individual needs of diverse students, hold high expectations for themselves and students, foster learning communities among students, and participate in self-critical communities of practice."<sup>268</sup> The final conception of teaching is teaching as *art*. This conception builds upon the conception of teaching as a profession by incorporating personal insight, creativity, and improvisation into the use of judgment and specialized skills.<sup>269</sup>

Given the history of teacher evaluation, collective bargaining, and recent reforms, the legal environment is currently rooted in a strong policy image of teaching as labor. For these laws to encourage the sorts of learning opportunities needed for all students in the twenty-first century, this policy image must shift at least to profession. Providing all students with opportunities to learn competencies such as knowledge creation, working with

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264. *Id.* at 291.

265. See Samuel B. Bacharach, Sharon C. Conley & Joseph B. Shedd, *Evaluating Teachers for Career Awards and Merit Pay*, in THE NEW HANDBOOK OF TEACHER EVALUATION: ASSESSING ELEMENTARY AND SECONDARY SCHOOL TEACHERS 133, 141-42 (Jason Millman & Linda Darling-Hammond eds., 1990).

266. Arthur E. Wise et al., *Teacher Evaluation: A Study of Effective Practices*, 86 ELEMENTARY SCH. J. 60, 65 (1985).

267. See *id.*

268. Betty Achinstein & Rodney T. Ogawa, *(In)Fidelity: What the Resistance of New Teachers Reveals About Professional Principles and Prescriptive Educational Policies*, 76 HARV. EDUC. REV. 30, 32 (2006).

269. Darling-Hammond et al., *supra* note 263, at 65-66.

abstractions, thinking systemically, cognitive persistence, and collective cognitive responsibility requires instructional skills, social skills, and judgment that go beyond those associated with labor and craft. So, the question now arises: How can teacher evaluation and collective bargaining be restructured to better fulfill the goals underlying the Civil Rights Act and civil rights era education reforms in the twenty-first century?

## B. Principles for Moving Forward

Recommendations to improve teacher evaluation and collective bargaining in line with the goals underlying civil rights era education reforms could take any number of forms. Here, we aim at laying out fundamental principles to guide such improvement. First, these reforms must grow from a vision of teaching and learning that is at least partly attuned to the goals of civil rights era education reforms while remaining relevant to the demands of the modern era. As discussed above, learning opportunities for all students should be focused not only on skills and knowledge in certain disciplines, but also certain broad competencies that go beyond those currently assessed under large-scale testing practices. The policy images of teachers and good teaching accordingly should be aligned to this vision as well.

In turn, the laws governing teacher evaluation and accountability should be restructured. On a surface level, issues such as the validity of testing practices should be resolved to the extent possible. More fundamentally, assessment practices should be better aligned to a robust policy image of teachers and teaching. Moreover, the construction of teacher evaluation and accountability systems should be a more collaborative process that draws on input from the teacher workforce. As it currently stands, teacher evaluation and accountability systems are not well designed to motivate teachers. A more collaborative process would engender more “buy-in” from teachers, which is critical for ensuring that any reform aimed at improving teaching is effectively implemented.<sup>270</sup> In addition, this process should be aimed not only at incentivizing teachers to work harder, but also developing teachers’ skills and knowledge. If teachers are to engage in a more “professional” form of teaching

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270. See Mueller & Hovde, *supra* note 198, at 24-25.

more consistently, the legal environment should provide the necessary supports.<sup>271</sup>

Collective bargaining laws for teachers should be restructured around a similar set of principles. Although the actual research on the effects of collective bargaining is limited and mixed, the law in this area flows from a conception of teaching as industrial labor and typically treats bargaining as a zero-sum game between school districts and unions. Instead, the legal environment structuring collective bargaining for teachers should focus parties more on collaboration over issues that directly affect students. Indeed, as discussed above, teacher evaluation and accountability systems sit at the heart of the issues that should be bargained. By tilting bargaining away from such issues, the law fails to encourage the creation of robust learning opportunities for students.

Accordingly, state laws governing collective bargaining should encourage interest-based bargaining to a greater extent. Moreover, the law should encourage bargaining over issues that involve education policy to a greater extent. By bringing teachers' unions into issues of education policy, the law would have a greater chance of supporting the development of high-performing schools that provide high-quality and equal learning opportunities for students. To be sure, such a shift in the nature of bargaining in education would require a massive reconstruction in many areas of the very idea of collective bargaining in education and appropriate union action. The politics characterizing the relationship between schools and unions is thick, and it is structured by the attitudes of several stakeholders, ranging from those in unions and schools to politicians and the general public. Restructuring bargaining in this fashion would be very difficult, especially given the current political climate. However, it would be a crucial step in shaping unions into more professional organizations that can consistently contribute to the improvement of student learning opportunities.

## CONCLUSION

The fiftieth anniversary of the Civil Rights Act and sixtieth anniversary of *Brown* represent an important occasion to consider our current trajectory in education reform. By looking back to these

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271. See generally DAVID K. COHEN & HEATHER C. HILL, *LEARNING POLICY: WHEN STATE EDUCATION REFORM WORKS* (2001) (discussing educational reform in California).

landmark events, we can gain a vantage point to help us better understand the nature of current reform efforts. Teacher evaluation and accountability systems and states' collective bargaining laws for teachers are two of the most important and widespread types of education reforms currently being undertaken. While these intertwined reforms have promise for improving and equalizing students' learning opportunities, much work still needs to be done to help these reforms have significant and lasting effects at scale. By critically considering what types of teaching and learning are needed in the twenty-first century in light of goals underlying civil rights era education reform, we can begin to effect such changes and ultimately provide all students with the learning opportunities they deserve.