MARGINALIZING ORGANIZED EDUCATORS: THE EFFECT OF SCHOOL CHOICE AND 'NO CHILD LEFT BEHIND' ON TEACHER UNIONS

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I. INTRODUCTION

"Our Nation is at risk. . . . [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."¹

The rhetoric of A Nation at Risk sparked the modern era of education reform and is one of the “most significant documents in the history of American public education.”² In 1983, President Ronald Reagan’s Secretary of Education, Terrel M. Bell, appointed the National Commission on Excellence in Education³ with the strange mission to recommend that the Federal Department of Education be terminated.⁴ Instead, the Committee’s findings and the language used in the report created a renewed public interest in improving education in the country and an increased role for government involvement, both at the federal and state levels.⁵

In the twenty-two years since A Nation at Risk was released, there is a feeling that “mediocrity is still on the rise” and that the attempts at

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4. Helen Ladd, Address at Duke University: Education Policy (Aug. 28, 2000); See also, Fiske, supra note 2, at B10 (noting that the President’s aides were upset because the report did not recommend the termination of the Federal Department of Education).
5. Ladd, supra note 4.
"stemming the rising tide" have been unsuccessful. Many believe that teachers' unions are at the root of the resistance to substantive reforms. There is a belief in the education community, and indeed in society at large, that one of the main reasons reforms have not taken hold despite over twenty years of effort is that the politics of education are biased toward the status quo. The teachers' unions are now in a defensive mode, having to battle "potentially crippling legislation" allowing school choice. Many share the concern that:

The only reforms that make it through the political process tend to be those that are acceptable to the established interests—particularly the teacher unions—and that leave the fundamentals and problems of the current system intact. Because of the political power of the unions, the nation has invested much of its time, effort, and money in incremental reforms that do little to improve the schools—but that don't threaten union interests. And because of union power, reforms that really can bring about a transformation—accountability and choice—tend to be eviscerated in the political process and reduced to pale reflections of what they could be.

Despite the negative outlook of some commentators, major reform efforts have been undertaken in recent years. Both at the state and federal level of government, systemic reforms have been instituted over the past decade or so. These include voucher programs, charter schools and the No Child Left Behind Act of 2001 (NCLB). Much reform has focused on efforts to increase parental choice as well as student and teacher accountability. The teachers' unions are being marginalized in the current education reform debates. Changes brought about by the debates will continue to erode the effect of the unions. This marginalization is in fact a goal of many reform efforts. The market-based models of education reform are aimed at breaking the monopoly of the teachers' unions and unbinding education from the collective bargaining agreements between the school administration and the teachers.

While most discussions of education reform focus on state and federal laws, there is another "set of rules and regulations that significantly affect what happens in a school each day—the collective bargaining agreements between school districts and teachers unions."

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6. Peterson, supra note 3, at xviii.
10. ALEX MEDLER ET AL., COLLECTIVE BARGAINING AND TEACHERS UNIONS IN A
both the role that the teachers’ unions have played in these efforts and possible implications of education reforms on teacher contracts.

The scope of this comment is twofold: To consider the role teachers’ unions have played in reform movements to elucidate whether the unions are as entrenched in the status quo as some believe; and to discuss the implications of these reforms on the future role and power of teachers’ unions in light of the changes that have taken place in public education. Specifically, these reforms include the increase in school choice, whether through school voucher initiatives, the advent of public charter schools, or school accountability regimes such as those required by No Child Left Behind.

Part II outlines the history of teachers’ unions and the statutory basis for allowing collective action among teachers. Part III discusses specific provisions of collective bargaining agreements relevant to the discussion of specific education reforms. In Part IV, the paper looks specifically at three education reform measures: voucher programs, charter schools, and No Child Left Behind. The discussion of each includes the background of the reform, the stance that unions have taken in the policy debates surrounding the passage of reform, and potential clashes the reform may have with collective bargaining agreements. Part V concludes with advice that teachers’ unions be included in the discussions of education policy to prevent both violations with existing collective bargaining agreements and impasses in future contract negotiations.

II. HISTORY OF UNION MEMBERSHIP AND COLLECTIVE BARGAINING IN PUBLIC EDUCATION

Though the right of teachers to organize was not recognized at the time, teachers began organizing at the end of the 19th Century. The National Education Association (NEA) was founded in 1857 and the American Federation of Teachers (AFT) was founded in 1916. The NEA and the AFT remain the two major teachers’ unions. The first collective bargaining contract for public school teachers is believed to have been negotiated in 1944 in Illinois.

While the National Labor Relations Act of 1935 (NLRA)\textsuperscript{15} exempts governmental employees from collective bargaining,\textsuperscript{16} its passage marked the legitimacy of the practice in the private sector.\textsuperscript{17} The first state to pass a bargaining law for the public sector was Wisconsin, and this was not until 1959.\textsuperscript{18} Federal employees’ right to form, join, and assist employee organizations was recognized by the 1962 Executive Order 10988, issued by President John F. Kennedy.\textsuperscript{19}

Executive Order 10988 sparked similar gains at the state and local levels.\textsuperscript{20} However, until the 1960’s, some states prohibited union membership among their public employees. It was not until a 1967 Supreme Court decision that public employees were guaranteed the right to organize under their free association rights.\textsuperscript{21} The judiciary has continued to reinforce teachers’ constitutional rights to participate fully in union activities. The Seventh Circuit Court of Appeals held that the individual’s right to form and join a union is protected by the First Amendment.\textsuperscript{22} “School officials have been prohibited from imposing sanctions or denying benefits to discourage protected association rights.”\textsuperscript{23}

This guaranteed right to organize does not include an inherent right to bargain collectively. Rather, each state authorizes collective bargaining via statute.\textsuperscript{24} Thirty-four states and the District of Columbia have authorized collective bargaining for teachers.\textsuperscript{25} By the mid-1980s, eighty-six percent of the nation’s public school teachers bargained collectively.\textsuperscript{26} Today, the

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18. CRESSWELL & MURPHY, supra note 14, at 20.
20. CAMBRON-MCCABE, McCARTHY, & THOMAS, supra note 17, at 439.
21. Id. (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)).
22. Id. (citing McLaughlin v. Tilendis, 398 F. 2d 287, 289 (7th Cir. 1968)).
24. In some states, even in the absence of authorizing legislation, the courts have recognized the legitimacy of contracts which were collectively bargained so long as the public employer agreed to the terms. See, e.g., Bd. of Trs. v. Pub. Employees Council No. 51, 571 S.W.2d 616, 621 (Ky. 1978) (ruling that the public employer “is authorized to contractually commit itself to a . . . condition of employment with . . . a Union representative”).
25. MARCZELY & MARCZELY, supra note 13, at 18.
26. Id. at 19.
NEA represents over 2.7 million teachers and the AFT represents about 1.3 million members. While the majority of states recognize the rights of the teachers to collectively bargain, they differ in the scope of these rights. Many states have modeled their bargaining statutes after the NLRA, which stipulates that representatives of the employer and of the employees must confer "with respect to wages, hours, and other terms and conditions of employment." A few states, such as Iowa, Tennessee, and Nevada deal directly with the scope of bargaining by identifying each item that must be negotiated. "Some states specify prohibited subjects of bargaining." States limit the scope of collective bargaining rights for public employees in general and specifically for teachers because the negotiations inherently include debates over policy decisions. The states that prohibit collective bargaining for their teachers altogether "view the prospect of public sector collective bargaining, particularly with teachers, as an unbalanced power struggle between the bargaining unit and the public sector employer." Additionally, the limits placed on teachers' rights to collectively bargain are based on a belief that:

[Allowing collective bargaining amounts to an illegal delegation of discretionary governing power to the teachers' union. The union, a private interest group, becomes a participant in the school board's legislative process, a public activity, in that the end effect of collective bargaining requires the public served to fund the contract developed through taxation and essentially gives the union an element of control over the fiscal resources of a community.

There is also concern that because public employees do not operate in a competitive market, there will be no "curb [on] extravagant bargaining settlements." Whereas in the private sector, competition forces management to make decisions in negotiations that will permit the company to remain competitive, the "virtual monopoly" of the teachers' unions allows them to hold their employer, the government, "hostage."

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27. NEA Fact Sheet, supra note 11.
29. CAMBRON-MCCABE, MCCARTHY, & THOMAS, supra note 17, at 444.
30. Id. (citing 29 U.S.C. § 158(d)(2002)); See also, MARCZELY & MARCZELY, supra note 13, at 19 (examining state bargaining requirements).
31. CAMBRON-MCCABE, MCCARTHY, & THOMAS, supra note 17, at 444 (citations omitted).
32. Id.
33. MARCZELY & MARCZELY, supra note 13, at 19.
34. Id. at 22
35. Id. at 19.
36. Id.
the negotiations reach an impasse, and a strike is imminent, the government must decide between curtailing the delivery of the public service or conceding to the union's demands. Because of these concerns, state laws preclude public employers from being forced to negotiate "governmental policy matters" while allowing negotiations that concern "conditions of employment." The courts recognize that this line becomes very blurry when dealing with teachers in the classroom, whose job requires them to implement policy on a daily basis in teaching the curricula, etc. "Virtually every managerial decision in some way relates to 'salaries, wages, hours, and other working conditions,' and is therefore arguably negotiable: yet at the same time, virtually every such decision also involves educational policy considerations, and is therefore arguably nonnegotiable."39

"With the possible exception of changes resulting from racial issues, [the advances made by teachers' unions to organize and collectively bargain] has been the most fundamental change in K-12 education in the latter half of the 20th century."40 There is a belief in the education and political communities that unions will "often respond to innovations [and reform efforts] by characterizing changes as violations of the union contract."41 The unions are now politically powerful entities that attract an increased amount of criticism based on the image of their desire to maintain the status quo and oppose change.42 The animosity toward teachers' unions is expressed by those at the highest levels of education management across the country. President George W. Bush's first Secretary of Education, Roderick Paige, said that the NEA was a "terrorist organization."43 "Paige's subsequent apology and clarification was [sic] even more revealing: he emphasized that he had been referring to the

37. Id.
38. CAMBRON-MCCABE, MCCARTHY, & THOMAS, supra note 17, at 445-46.
42. See, e.g., Robert Holland & Don Soifer, How School Choice Benefits the Urban Poor, 45 HOW. L.J. 337, 338 (2002) (arguing that "national teacher unions... have battled at every turn to preserve the status quo by spending millions of dollars to mount legal challenges to any and all experiments."); Ira C. Lupu & Robert Tuttle, Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers, 18 J.L. & POL. 539, 599 (2002) ("[T]he unions representing public school teachers... are politically influential and deeply hostile to voucher programs.").
union itself, rather than to the teachers who are its members or to the profession, and noted that his comments had been provoked by the NEA's 'obstructionist scare tactics' . . . .\textsuperscript{44}

III. THE COLLECTIVE BARGAINING AGREEMENT

The collective bargaining agreements negotiated between teachers' unions and the school district board of education govern the terms and conditions of employment for bargaining unit member employees. Some contracts include a management provision maintaining policymaking and management authority of school operations to the school board. The scope of these responsibilities reserved for the board varies across districts. However, teacher contracts may contain provisions that state that the management and control of the school board may be limited by express clauses in the contract.\textsuperscript{45} Other contracts do not reserve such powers, leaving the contract to define the roles of the different players. As districts begin to experiment with reform efforts, provisions within the contract contrast with management decisions.

A. Exclusivity

Most collective bargaining statutes provide for the principal of exclusivity and teacher contracts most likely have a clause stating that the union representing the teachers is the sole and exclusive bargaining representative for employees and teachers.\textsuperscript{46} The exclusivity principle limits the number of organizations that can be recognized as the representative bargaining unit to one, in this case, the teachers of a


\textsuperscript{45} See e.g., Collective Bargaining Agreement between the School District of Philadelphia and the Philadelphia Federation of Teachers, American Federation of Teachers, Local 3, AFL-CIO, September 1, 2004 to August 31, 2008, Article II, http://www.pft.org/contract/contract2000.html (last visited April 10, 2006) (stating that management and control is limited “only to the extent that there is a provision of this Agreement which expressly limits a management prerogative.”).

\textsuperscript{46} See e.g., Id. at art. III, § A2 (recognizing the Philadelphia Federation of Teachers, Local 3, American Federation of Teachers, AFL-CIO as the sole and exclusive bargaining representative for all employees); Agreement between The Board of Education of the City School District of the City of New York and United Federation of Teachers Local 2, American Federation of Teachers, AFL-CIO covering Teachers, November 16, 2000 to May 31, 2003, art. I, http://www.uft.org/member/rights/contracts/current_teachers_contract/(last visited April 10, 2006) (recognizing the United Federation of Teachers Local 2, American Federation of Teachers, AFL-CIO as the exclusive bargaining representative of all those assigned as teachers).
particular school district.47 This means that the district cannot negotiate a separate contract with any other organization of teachers or with individual teachers. Those teachers who choose not to be a part of the union remain subject to the contract negotiated between the union and the school district.

B. Employment Security: Seniority and Just Cause

Teacher contracts, as they govern the employment relationship, have a provision dealing with employment security for teachers. The contracts often provide for decisions regarding placement and reductions in force to be based on seniority and not on merit or some other performance criteria.48 Importantly, contracts include provisions forbidding the dismissal of a teacher without just cause. If the district dismisses alleging cause, the teacher will be afforded certain process rights, including appeal to the courts.49

C. Grievance Procedure

Employees subject to the collective bargaining agreement can seek remedies for grievances through procedures outlined in the contract for actions taken by the school district or administration. A grievance can be filed regarding a dispute or disagreement over the application or interpretation of the contract. The processes may include review by the school principal with appeal to the human resources of the school district. Further appeal can be carried to the state department of education and eventually to arbitration or to the courts.50

48. Philadelphia Collective Bargaining Agreement, supra note 45, at art. IX A.
49. See, e.g., Id. at art. IX C ("[T]he employee affected shall have the option of electing to proceed under the provision of the Pennsylvania Public School Code . . .."); Agreement Between School District No. 1, Multnomah County Oregon and Portland Association of Teachers 2004-2006, art. 9 D, http://www.patpdx.org/Contract%202004-2006.pdf ("[A] unit member having contract status may elect to appeal the dismissal to . . . the Fair Dismissal Appeals Board . . .").
50. Philadelphia Collective Bargaining Agreement, supra note 45, at Article XV B.
IV. DISCUSSION

A. Vouchers

1. Background

Vouchers are grants of money that are given to parents that apply toward the cost of tuition at schools other than their geographically assigned public school. They can be applied to other public schools, charter schools, and to private schools. The voucher concept is rooted in free-market principles of giving parents the choice of where their children are educated, with the idea that such choice will force school improvement to compete for students.

Voucher programs were not widely introduced until the 1990s. Currently, there are about eighty private voucher programs serving more than 60,000 children around the country. The vouchers usually can be used at both religiously affiliated schools and secular schools. Though the dollar amount varies from program to program, the amount is usually not enough to cover the entire cost of tuition.

There are very few publicly funded voucher programs. Proposed voucher programs were rejected in a number of states including California, Oregon, Colorado, Washington, and Michigan. The organized resistance continues to be effective in curtailing efforts to publicly fund vouchers. Despite the many successful blocks to voucher programs, Congress passed the first federally funded school voucher program on January 22, 2004, allocating $14 million to establish a program for low-income students in the District of Columbia.

One of the most controversial aspects of voucher programs is that they allow public money to be given to religious institutions, via religious schools. This is an important issue because most private schools in this country are religious schools. In Zelman v. Simmons-Harris, decided in June 2002, the U.S. Supreme Court ruled that an Ohio voucher program for

52. Id.
53. Id.
54. Id.
55. Id. at 251.
56. Id.
58. PATCHEN, supra note 51, at 250.
Cleveland school children is constitutional and does not violate the Establishment Clause of the First Amendment even though it allowed parents to use the vouchers for religious schools. 59

_Zelman_ established the legality of vouchers being used for religious school tuition without violating the federal constitution. 60 Challenges based on state constitutionality continue. For example, a Florida court recently ruled that the state’s voucher program violated the state constitution because it permitted payment to religious schools. 61 However, “the U.S. Supreme Court decision [in _Zelman_] means that the question of vouchers becomes one of ‘Is this a good idea?’ rather than ‘Is this legal?’ in much of the United States.” 62

2. Union Stance

School vouchers are one of the most contentious methods of school reform because they permit public money to go to private institutions. Many fear that vouchers represent a significant step to completely abandon public education in favor of a private system. 63 The teachers’ unions are “some of the most vocal critics” of vouchers. 64 “Teachers’ unions ‘put vouchers in a different category from virtually all other issues in the politics of education reform. Vouchers are public enemy number one, as they see it, and must be defeated at all costs.’” 65 The Wall Street Journal reported that the NEA raised its dues specifically to help fund anti-voucher efforts. 66

The unions continue to fight a multi-front assault on vouchers. They have taken the fight to the courts, the legislatures, and before the court of public opinion to defeat ballot initiatives. 67 Even after the

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60. Id.
62. PATCHEN, supra note 51, at 251.
67. Id. (pointing to a press release issued by the NEA, stating that the organization would continue to fight vouchers “at the ballot box, in state legislatures, and in state courts.”) (citations omitted).
significant defeat in *Zelman*, the teachers’ unions were adamant about their stance against vouchers. Both the NEA and the AFT “vowed to oppose voucher programs by every means available to them.”

The unions help to finance anti-voucher litigation. Unions were involved in the *Zelman* case, they “were central actors in the Milwaukee voucher” litigation, and they played a role in *Bush v. Holmes*. Public opinion was also persuaded by the efforts of the teachers’ unions. By disseminating information that vouchers were bad policy, the unions helped to defeat most initiatives in state legislatures to publicly fund vouchers.

3. Going Forward: Clashes with Collective Bargaining Agreements

One of the major premises behind the pro-voucher movement is to create an educational marketplace, which will increase competition for students among schools. Along the continuum of school-choice programs, vouchers represent the most extreme move in the direction toward the privatization of education. Voucher systems pose a threat to the bargaining power teachers’ unions currently enjoy. Such initiatives may “subject[] [teachers] to the open marketplace, leading to reductions in salaries and benefits.”

There may be conflicts with voucher programs and collective bargaining agreements. While this issue has not been litigated, unless collective bargaining agreements are renegotiated after a publicly funded voucher law is passed, voucher programs may lead to violations of the contract. The principle of exclusive representation, as discussed above, stands contrary to a school district’s siphoning money to private schools and their teachers. Teachers in private schools for which the vouchers are used are not subject to the collective bargaining agreement negotiated by the union representing the teachers in the school district.

Enabling the school districts to out-source teaching may also represent a violation of the collective bargaining agreement. A union could file a grievance for unfair labor practices if a school begins to replace teachers subject to the collective bargaining agreement with teachers in private

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68. Id.
71. Albright, supra note 64, at 529.
72. Id. at 530 n.28.
schools who are not subject to the agreement. In order to begin appropriating money to a private school, a school district would have to address provisions in the collective bargaining agreement. Teachers' unions view privatization as a direct threat to their existing collective bargaining agreements. Voucher programs could lead to "scenarios in which teachers lose the right to bargain collectively, in which their membership in a bargaining unit becomes voluntary, where they are forced to become part of a separate bargaining unit, or where they lose rights of transfer." 

The state legislatures, in enacting voucher legislation, are unable to supersede existing collective bargaining agreements. Article 1, section 10, clause 1 of the United States Constitution provides: "No State shall . . . pass any . . . law impairing the Obligation of Contracts." In order for the legislature to override an existing contract with teachers, the law would have to withstand judicial scrutiny under a standard of "reasonable and necessary" for an "important public purpose." Therefore, unless a new agreement is negotiated after the passage of legislation authorizing a publicly funded voucher program which includes language allowing for teachers to work outside of the negotiated contract, any such use of vouchers could lead to arbitration and litigation over the payment of funds to private schools.

74. See, e.g., James G. Cibulka, The NEA and School Choice, in CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM 155 (Tom Loveless ed., Brookings Inst. Press 2000) (explaining that teachers' unions oppose choice programs which allow the transfer of students out of the public school district because such programs lead to "revenue declines for districts that suffer a net loss of resident pupils" which leads to the loss of teaching jobs).
75. Id. at 157.
76. Id. at 161.
77. U.S.Const. art. 1, § 10, cl.1.
79. However, districts may argue that the scope of the collective bargaining agreement does not extend to "policy" decisions such as the use of vouchers to attend private schools. See Lupu & Tuttle, supra note 69, at 934 (noting the "policy impetus for school vouchers").
B. Charter Schools

1. Background

A second and more prevalent type of school choice program is the charter school. Charter schools are publicly funded schools that "operate autonomously from the district administration." Charter school laws differ among states, but they generally allow private groups to seek a charter to operate a school. Groups who have started charters include parents, teachers, community organizations, universities, and private profit-making firms. Each state delegates charter-granting authority to different groups, including the local school district, a community college or university, or the state department of education.

The charter school movement has spread across the country since the first charter school law was passed by Minnesota in 1991. Today, there are more than 3,000 charter schools in operation in 41 states and the District of Columbia. Charter schools are less controversial than voucher programs because charter schools are, by definition, public schools and cannot be religiously affiliated. Proponents of charter schools view charter schools as a way to increase market competition which will in turn be a way to "weaken teacher unions." Liberal supporters of charter schools believe that the charter movement is a compromise with voucher proponents and will remove pressure for full privatization.

There have been unsuccessful challenges to state charter school laws.

80. PATCHEN, supra note 51, at 237.
81. Id.
83. PATCHEN, supra note 51, at 237.
85. Although religious groups can apply for a charter, the established school cannot have a religious affiliation. See, e.g., Edith & Eloise Acad. v. Steel Valley & Pittsburgh School Dist., Docket No. CAB 2001-7, Pennsylvania (2001) (holding that a charter applicant and sectarian body must not be so entangled that the operations are merged.). If an applicant is a religious group, a charter may not be granted to it. Because the charter school will receive financial and in-kind aid from a sectarian school and church, it does not meet the requirements of the Chart School Law, which provides that no regional charter school shall be established or funded by a sectarian school, institution or other entity. The proposed Charter School would not be nonsectarian in all operations, in violation of the Chart School Law.
87. Id.
For example, the Michigan courts ruled that the charter law did not violate the state constitution. The plaintiffs:

[A]ssert[ed] that the system established by our Legislature violates art. 8, [section] 2 [of the state constitution] because public school academies are not public, 1) in that they are not under the ultimate and immediate, or exclusive, control of the state and 2) because the academy's board of directors is not publicly elected or appointed by a public body. 88

The court held for the state, finding that the constitution required the state to “support" education and that there was no constitutional requirement for “exclusive control." 89 Further, the court said that the authorizing process in the granting of the charter was a sufficient amount of control over “public school academies." 90

2. Union Stance

While the teachers' unions are in unanimous opposition to school vouchers, the unions do not all share the same views of charter schools. Both major unions are suspicious that charter school laws are “designed to blunt or even bust union influence over education." 91 However, Albert Shanker, the famed leader of the AFT, was actually one of the original proponents of charter schools. 92

The NEA, while supporting the idea of charters, is concerned that the charter laws do not consistently require accountability and that teachers hired by the charters are not as qualified as those in the public school system. 93 Though originally championed by their president, the charter movement has received more criticism from the AFT, which continues to view the charter movement as “a form of privatization and/or contracting out." 94 The AFT argues that allowing public money to fund charter schools amounts to “awarding of franchises to private firms to operate government

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89. Id.
90. Id.
94. Id.
facilities." To the public, the image remains that the unions are strictly opposed to charter schools, despite the support they have shown.

Teachers' unions use their political force to shape the strength of charter school laws when the states are considering such a law. A weak charter school law makes it more difficult for a group seeking a charter to receive the grant. This may be done by limiting the granting authority to the local education agency—that is, the school district—which stands to lose students if the charter is granted or by raising the requirements for a charter grant.

3. Going Forward: Clashes with Collective Bargaining Agreements

Charter school laws have an interesting interplay with teacher contracts. A majority of the charter laws allows teachers to decide how they will be represented in negotiations with the charter school. In these states, teachers can opt into the collective bargaining agreement with the school district or they can negotiate separately. In the minority of states, the charter law does not allow the teachers in the charter school to negotiate a separate contract with the charter school. Instead the law requires the teachers to remain part of the district's collective bargaining agreement. Like vouchers, charter schools represent a break in the monopolistic power of the teachers' unions. In the states where charter school teachers can organize separately from district representatives, different policies for the charter teachers may violate the district contract and lead to grievances for unfair labor practices. Only about one quarter of charter school teachers belonged to unions in 2002 and a smaller number were hired subject to a collective bargaining agreement. However, the NEA has begun a movement to organize charter school teachers and the number of

95. Id. (citing American Federations of Teachers, AFT On The Issues, available at http://www.aft.org (last visited April 10, 2006)).

96. See, e.g., Neal R. Pierce, Charter Schools—and Those Who Resist Them, BALTIMORE SUN, Nov. 6, 1996, at 11A (arguing that "in state after state . . . teacher unions are trying to quash charters.").


98. Id. at 2336-37.


100. Id.

101. Id.

represented teachers will likely increase in the years to come. To the extent that charters are "separate legal educational corporations that act independently of a school district," the payment of district money to charter school teachers could be seen as a contracting-out of government services.

The conflicts with the teacher contract can be numerous and can lead to a virtual paralysis of charter school management. One principal commented that he was "grieved for every single article in the contract" for violations. The charter was forced to negotiate waivers from the district collective bargaining agreement.

One major area of conflict charters face is the seniority-based hiring system required by most teacher contracts. Under this system, the charter is unable to freely choose which teachers it hires, as the schools are forced to accept teachers who can transfer in from other schools because of their seniority. Most charters view the ability to freely hire and fire teachers as essential to improving student achievement and encouraging teacher innovation. In order for a charter to have such freedom, waivers from the teacher contract must be secured or an entirely new contract that included an exemption for teachers in charter schools would have to be negotiated.

An interesting strategy used by charter schools to get the teachers to part with the job security ensured by traditional contracts is to offer teachers more decision-making input.

In addition to conflicts with those charter school teachers whose contract is part of the school district’s agreement, similar challenges that face voucher programs may trouble charter schools. The district is effectively subverting the teacher contract by providing money to other schools and teachers to educate the children outside of the contract negotiated by the union and school district. The school district, in allowing the charter to negotiate a different contract with its teachers, is authorizing

103. Id.
105. Caroline Hendrie, supra note 102 (quoting Dennis Mah, the principal of Sacramento’s first charter school).
106. Id.
107. Id.
108. Id.
110. Medler, supra note 109, at ii.
a private entity to negotiate with public funds. As discussed above, this may not be a violation of state constitutional requirements, but may be a violation of the exclusive right of the teachers being paid by the district to work subject to the collective bargaining agreement.

The General Accounting Office "found that nearly all states provided 'flexibility by releasing charter schools from some traditional public school requirements, such as teacher hiring and termination practices, schedules, and collective bargaining agreements.'" Though these laws have not been challenged as violations of the Contract Clause of the United States Constitution, the fact that the states are abrogating contracts agreed to by teachers and their employers may be a source of future litigation.

C. No Child Left Behind

1. Background

The No Child Left Behind Act of 2001 (NCLB) marked a dramatic change in the federal government's role in education. The federal government first became involved in educational policy in the early 20th century and mainly focused on helping to fund the construction of school facilities.

In 1958, Congress committed the first substantial amount of federal money to public education. In 1965, President Lyndon Johnson signed the Elementary and Secondary Education Act (ESEA), which remains the major piece of legislation granting federal money to states to supplement educational spending. Title I of the ESEA provides the largest amount of money to the states and is aimed at providing money "for educationally deprived schoolchildren." Today, federal funding accounts for about eight percent of education expenditures. The ESEA has been subject to several reauthorizations, the most recent of which was NCLB.

115. Id. at 2 (citing The National Defense Education Act, 20 U.S.C. § 401 (2005)).
117. White, supra note 114, at 4.
118. Id.
120. White, supra note 114, at 4-8.
An underlying theme of NCLB is to "afford choice to the parents of students in schools perceived . . . to be failing or on the verge of failure."\textsuperscript{121}

The accountability provisions of NCLB require that each state measure student achievement and that each school meet certain academic benchmarks, referred to as Adequate Yearly Progress (AYP).\textsuperscript{122} Schools that fail to meet AYP goals are subject to "corrective action" which the school must follow to achieve "school improvement."\textsuperscript{123} The severity of the corrective action increases every year that the school fails to meet AYP. This ranges from the provision of technical assistance to replacing school staff, extending the school day or year, or even completely closing the school and reopening it as a charter school.\textsuperscript{124}

2. Union Stance

The major unions do not support NCLB, although they subscribe to the goals of the legislation.\textsuperscript{125} The NEA argues that NCLB creates obstacles to improving student achievement and objects specifically to the focus on "punishments rather than assistance, mandates rather than support for effective programs and privatization rather than teacher-led, family-oriented solutions."\textsuperscript{126} The AFT is less critical of the law, although it too expresses reservations about NCLB and the implementation of NCLB's provisions.\textsuperscript{127} The AFT was optimistic when the law was passed and remains committed to the accountability requirements of the law.\textsuperscript{128}


\textsuperscript{123} White, supra note 114 (citing NCLB § 1116(b)(7), 20 U.S.C. § 6316(b)(7) (2001)).


\textsuperscript{125} National Education Association, 'No Child Left Behind' Act/ESEA, http://www.nea.org/esea/more.html (last visited April 10, 2006).

\textsuperscript{126} Id.


\textsuperscript{128} Id.
3. Going Forward: Clashes with Collective Bargaining Agreements

NCLB’s impact on collective bargaining agreements remains unclear. Teacher contracts may completely take the teeth out of the law and remove much of the accountability envisioned by its drafters and proponents. Section 1116(d) of the law provides that:

Nothing in this section shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded school or school district employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employees and their employers.\(^{129}\)

Given this provision, the ability of a local education agency or a state to implement the corrective actions required in section 1116 is called into serious question. For example, collective bargaining agreements may contain provisions which state that:

1. If a school fails to make AYP for four consecutive years, and is placed in the “first year of corrective action,” the district shall not replace or transfer staff that have been deemed relevant to failure under AYP.
2. The employer shall not extend the employee’s school day or school year except by mutual agreement of the parties.\(^{130}\)

These proposals are problematic because they eliminate two of the corrective actions available under NCLB in sections 1116(b)(7) and (8).\(^{131}\) NCLB allows a teacher in a school which fails to meet AYP for four consecutive years to be removed, despite the fact that the teacher faces no individual charges of misconduct or other cause for dismissal. These removal provisions run headlong into the teacher contract and the just cause provision discussed above.\(^{132}\) If teachers were removed under the corrective action provisions of NLCB they could file a grievance for violation of their contract and, pursuant to 1116(d),\(^{133}\) would be likely to win.

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Existing contracts which conflict with NCLB would thus trump the law. However, the question remains as to what contracts negotiated after the law became effective will look like. There is an "ongoing debate about whether districts will need to seek changes in collective bargaining agreements to comply with No Child Left Behind Law."\textsuperscript{134}

The U.S. Department of Education hopes local officials "uphold the content and spirit" of NCLB in the contracts they negotiate with teachers' unions.\textsuperscript{135} The Deputy Secretary of Education, Eugene Hickok, wrote that new contracts must not circumvent the school improvement mandates of the law. "He cited language from a report by the U.S. House of Representatives Committee on Education and the Workforce saying that the committee 'expects and encourages' new contracts 'to be consistent' with [NCLB], especially the sections that outline steps to be taken when a school is put into 'corrective action' or restructured."\textsuperscript{136} Former Secretary of Education Paige expressed similar sentiments, writing in a "Dear Colleague" letter that:

Section 1116 does not operate to invalidate employee protections that exist under current law and collective bargaining and similar labor agreements. However, it does not exempt state education agencies, local education agencies, and schools from compliance with Title I based on prospective collective bargaining or similar agreements or changes in state or local law.\textsuperscript{137}

While these statements by government officials seem to imply that newly negotiated teacher contracts must be compliant with NCLB, the unions have taken the position that these amount to recommendations and that the school districts are not bound to include language permitting the restructuring provisions to prevail.\textsuperscript{138} Therefore, the comments amount to guidance rather than a mandate. Unions would be reluctant to agree to a contract provision that allowed for the dismissal of teachers based on student performance. On the other side of the negotiating table, the school district will be in a weak position to demand such a provision given that their hands are not bound by the law or regulations.

\textsuperscript{134} Gewertz, \textit{supra} note 132.
\textsuperscript{135} \textit{Id.} (quoting Eugene W. Hickok, the Deputy Secretary of Education).
\textsuperscript{136} \textit{Id.}
\textsuperscript{138} Gewertz, \textit{supra} note 132.
V. CONCLUSION

Though major education reform efforts have gained ground at the state and federal levels in the past two decades since the release of *A Nation at Risk*, it remains unclear if these statutory provisions will have their desired effects due to collective bargaining agreements between teachers and the school districts. The teachers' unions secured their spot at the negotiating table and will continue to organize in order to protect the rights of teachers. Voucher programs, charter school laws, and NCLB may all face challenges based on their inherent conflicts with teacher contracts. As new contracts are negotiated after the passage of reform legislation, negotiators for the school district and for teachers will have to account for the changing educational environment. Whether efforts to create a market-place for education will be successful hinges on the teacher contracts:

Teachers remain the key people educating our children. As long as competition from charter schools, privatized school management, and voucher programs continues to put pressure on public education and public school teachers continue to seek and embrace union representation, collective bargaining will remain a force for managing and directing change.\(^{139}\)