

## GIVING THE SCHOOL BULLY A TIMEOUT: PROTECTING URBAN STUDENTS FROM TEACHERS' UNIONS

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#### INTRODUCTION

“[T]he [National Education Association (teachers’ union)] has been the single biggest obstacle to education reform in this country. We know, because we worked for the [National Education Association].”<sup>1</sup>

– John Lloyd and Billy Boyton, former Executive Directors of National Education Association state affiliates

Futures Elementary School is located in a violent Oakland neighborhood with a ninety-three percent poverty rate and a history of academic failure.<sup>2</sup> In 2007, the school sought to address its poor academic record by bringing in a new teaching staff.<sup>3</sup> In California, schools are rated on a 1000-point scale based on standardized test scores.<sup>4</sup> Since the new teaching staff was hired, Futures Elementary has improved more than 100 points.<sup>5</sup>

Most would expect that such success would be rewarded; instead, every single teacher at Futures Elementary is facing being laid off at the end of the 2010–2011 school year.<sup>6</sup> The Oakland School District is expecting to layoff about twenty percent of its teachers due to the effects of a struggling econ-

1. Editorial, *Vote Down Big Labor*, AUGUSTA CHRONICLE (Ga.), Feb. 28, 2009, [http://chronicle.augusta.com/stories/2009/02/28/edi\\_513010.shtml](http://chronicle.augusta.com/stories/2009/02/28/edi_513010.shtml).

2. Katy Murphy, *Poor Schools Bear Layoff Brunt: Campuses in Neediest Neighborhoods Could See Teaching Staff Slashed Under “Last-in, First-Out,”* OAKLAND TRIB., Mar. 16, 2011, at 1.

3. Lillian R. Mongeau, *All Teachers and Administrators at Futures Elementary in Danger of Lay Offs*, OAKLAND NORTH, Mar. 17, 2011, <http://oaklandnorth.net/2011/03/17/all-teachers-and-admin-at-futures-elementary-in-danger-of-lay-offs>.

4. *Id.*

5. *Id.*

6. *Id.*

omy on K-12 education funding.<sup>7</sup> California law requires that teacher layoffs be based upon years of seniority, with the least senior teachers laid off first.<sup>8</sup> The result is that schools with less experienced teachers, like Futures Elementary, will have a disproportionate number of its teachers laid off with no consideration given to the effectiveness of those teachers. This policy, called “last-in, first-out,” is just one of many policies promoted by teachers’ unions that place the unions’ interests ahead of the interests of students.<sup>9</sup>

Proponents of urban education reform, on both sides of the political aisle, cite teachers’ unions as obstructing their reform efforts.<sup>10</sup> In urban areas, school districts are often among the largest employers, and this often leads to policies that prioritize employment interests over educational interests.<sup>11</sup> These employment interests are promoted by teachers’ unions, which are stronger in urban areas than in suburban or rural school districts.<sup>12</sup> However, some urban schools are so bad that many teachers who comprise the teachers’ unions and benefit from the placing of employment interests above students’ interests frequently pay to have their children attend private schools instead of the public schools in which they teach.<sup>13</sup> This does not mean that teachers’ unions are the sole source of urban educational shortcomings. In fact, on rare occasions they have been positive agents for educational reform.<sup>14</sup> There are numerous other problems, including the breakdown of the family unit,<sup>15</sup> startling rates of teenage pregnancy,<sup>16</sup> and a woeful teacher education system.<sup>17</sup>

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7. *Id.*

8. CAL. EDUC. CODE § 44955(b) (West 2011).

9. Murphy, *supra* note 2.

10. See, e.g., Patricia Alex, *NJEA to Talk About Tenure Reform Today*, HERALD NEWS (N.J.), Dec. 7, 2010, at A3 (noting that Republican Governor Chris Christie criticizes the state’s teachers’ union over failing schools and tenure reform); David M. Herszenhorn, *\$250 Million City Program to Promote Charter Schools*, N.Y. TIMES, Sep. 10, 2005, at B3 (noting that Independent Mayor of New York City Michael Bloomberg criticizes the teachers’ union contract as a hindrance to good instruction); Patrick J. McDonnell & David Zahniser, *Villaraigosa Takes on Teachers Union: In a Speech to State Leaders, the Mayor Brands United Teachers Los Angeles as an Obstacle to Reform as the City Stands at ‘A Critical Crossroads.’* L.A. TIMES, Dec. 10, 2010, <http://articles.latimes.com/2010/dec/10/local/la-me-mayor-speech-20101210> (noting that the Democratic mayor of Los Angeles, Antonio Villaraigosa, said, “At every step of the way, when Los Angeles was coming together to effect real change in our public schools, UTLA was there to fight against the change and slow the pace of reform.”).

11. See Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1667–68 (2005) [hereinafter Saiger, *Legislating Accountability*].

12. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS & AMERICA’S SCHOOLS* 173 (1990) (“[T]eachers’ unions and the constraints they seek rapidly gain influence as parents decline in education, affluence, and occupational status . . . . Schools with tough constraints are more likely to be found in urban areas.”) [hereinafter CHUBB & MOE, *POLITICS, MARKETS & AMERICA’S SCHOOLS*]; see also Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1460 (2007).

13. See, e.g., *Their Kids, Your Kids*, CHICAGO TRIB., Dec. 16, 2010, at 30 (noting that thirty-nine percent of Chicago Public School teachers place their own children in private schools).

14. Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL’Y 885, 903–11 (2007) (noting also that this is rare because “the law inhibits these exceptions from flourishing and spreading.”).

15. See, e.g., Suet-Ling Pong, *Family Structure, School Context, and Eighth-Grade Math and Read-*

Often, a lack of funding is blamed for poor educational outcomes. However, spending on education has been increasing steadily in America.<sup>18</sup> For example, Newark, New Jersey spends approximately \$22,000 per pupil, compared to the national average of \$10,800.<sup>19</sup> Despite this extravagant spending, only twenty-two percent of Newark students graduate from high school and pass state proficiency exams within four years.<sup>20</sup> Similarly, in Washington D.C., the public school system spends about \$24,600 per student.<sup>21</sup> However, less than fifty percent of D.C. public school students graduate on time.<sup>22</sup>

Teachers' unions do not support policies that are harmful to students due to malicious intent.<sup>23</sup> Rather, like any other interest group, they advocate for their interests. Regretfully, their interests are often adverse to the interests of students. Teachers' unions have an interest in expanding their membership and protecting the employment interests of their members. The actions teachers' unions take to promote their interests harm students' interest in having highly effective teachers in front of every classroom. The response of education reforms should be to empower parents through school choice, return control over employment decisions to the local level, and decrease the number of teaching candidates that schools must hire.

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*ing Achievement*, 59 J. MARRIAGE & FAM. 734 (1997).

16. See, e.g., *Shocking Rate of Teen Mothers*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Jan. 20, 2011, at B7 (noting that approximately twenty percent of students at one Memphis high school were pregnant at some point during the past school year).

17. See TALIA MILGROM-ELCOTT, CARNEGIE CORP. OF N.Y., *THE ELUSIVE TALENT STRATEGY: AN EXCELLENT TEACHER FOR EVERY STUDENT IN EVERY SCHOOL 2-4* (2011), available at <http://carnegie.org/publications/search-publications/pub/377/>.

18. MCKINSEY & COMPANY, *HOW THE WORLD'S BEST-PERFORMING SCHOOL SYSTEMS COME OUT ON TOP 10* (2007), available at [www.mckinsey.com/App\\_Media/Reports/SSO/Worlds\\_School\\_Systems\\_Final.pdf](http://www.mckinsey.com/App_Media/Reports/SSO/Worlds_School_Systems_Final.pdf) ("Between 1980 and 2005, public spending per student increased by 73 percent in the United States of America, after allowing for inflation. Over the same period, the U.S. employed more teachers: the student-to-teacher ratio fell by 18 percent and by 2005, class sizes in the nation's public schools were the smallest they had ever been. The federal government, state governments, school boards, principals, teachers, teacher unions, listed companies, non-profit organizations, and others launched tens of thousands of initiatives aimed at improving the quality of education in the nation's schools. Actual student outcomes, however, as measured by the Department of Education's own national assessment program, stayed almost the same.").

19. Matt Miller, Editorial, *A Better Way to Spend \$100 Million*, WASH. POST, Sep. 27, 2010, at A15.

20. David Giambusso, *Booker: It's Time to Move on Schools*, THE STAR-LEDGER (N.J.), Feb. 6, 2011, at 6.

21. Andrew J. Coulson, Editorial, *The Real Cost of Public Schools*, WASH. POST, Apr. 6, 2008, at B8 (noting that the district generally only reports a fraction of its actual spending).

22. Michael Birnbaum, *D.C. Graduation Rates Down; New Study also Finds Md., Va. Numbers Stalled Since Mid-'90s*, WASH. POST, June 9, 2009, at B3.

23. TERRY M. MOE & JOHN E. CHUBB, *LIBERATING LEARNING: TECHNOLOGY, POLITICS, AND THE FUTURE OF AMERICAN EDUCATION* 33 (2009) [hereinafter MOE & CHUBB, *LIBERATING LEARNING*].

## I. TEACHERS' UNIONS HAVE EXTENSIVE INFLUENCE OVER AMERICAN EDUCATION POLICY

“When schoolchildren start paying union dues, that’s when I’ll start representing the interests of schoolchildren.”<sup>24</sup>

– Albert Shanker, former American Federation of Teachers President

In order to understand the effect of teachers’ unions on education policy, it is critical to first understand the influence they wield through politics and collective bargaining. Teachers’ unions are arguably the most powerful special interest in America. They lead the nation in special interest political spending, they are among the top special interest spenders in almost all states, and they exercise substantial power over local school board elections. Further, what they cannot get through the political process, teachers’ unions often get through collective bargaining.

### *A. Teachers’ Unions Possess Tremendous Political Power over Education Laws*

“[The] NEA will become a political power second to no other special interest group.”<sup>25</sup>

– Sam Lambert, NEA Council (stated in 1967).

At the national, state, and local levels of government, teachers’ unions have become a major political force. At the national level, there are two teachers’ unions, the National Education Association (NEA) and American Federation of Teachers (AFT).<sup>26</sup> In the 2007–2008 election cycle, the NEA was the biggest contributor to political campaigns in the nation.<sup>27</sup> It spent more than Wal-Mart, Microsoft, Exxon-Mobile, the American Bankers Association, the National Association of Realtors, and the AFL-CIO combined.<sup>28</sup> When combined with the AFT, the second largest teachers’ union in the nation, they spent a total of \$71.7 million.<sup>29</sup>

The NEA and AFT have state affiliates that serve the same purpose as their national counterparts but that tailor their activism to state politics and

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24. Joel Kline, *The Failure of American Schools*, THE ATLANTIC, July 2011, <http://www.theatlantic.com/magazine/archive/2011/06/the-failure-of-american-schools/8497/>.

25. ROD PAIGE, THE WAR AGAINST HOPE: HOW TEACHERS’ UNIONS HURT CHILDREN, HINDER TEACHERS, AND ENDANGER PUBLIC EDUCATION 24 (2006).

26. Mike Antonucci, *The Long Reach of Teachers Unions: Using Money to Win Friends and Influence Policy*, EDUC. NEXT 24, 25 (2010), available at <http://educationnext.org/the-long-reach-of-teachers-unions/>.

27. *Id.*

28. *Id.* at 24–25.

29. *Id.* at 26.

work more closely with their individual members.<sup>30</sup> “[I]n the vast majority of states [teachers’ unions] are among the top five contributors to political candidates, and in many states they are the number one contributor.”<sup>31</sup> In the 1990s, a study of state politics classified teachers’ unions as the single most powerful special interest in the country.<sup>32</sup>

The extent of teacher union power at the local level, where the employment contract is made, is especially troubling. School board elections are set up in a manner that favors well-organized special interests.<sup>33</sup> Turnout often ranges from ten to twenty percent.<sup>34</sup> As a result, teachers’ unions commonly end up with allies on both sides of the negotiating table, subverting the interests of parents and taxpayers.<sup>35</sup> On the local level, teachers’ unions strategically support school board candidates that not only can win the district they seek to represent, but also are as friendly to the union’s interests as can be elected in that district.<sup>36</sup> Local teachers’ unions have “major advantages over other groups [involved in local education] in both incentives and resources, and they appear to use these advantages quite effectively and strategically in getting what they want.”<sup>37</sup>

Although there are other groups interested in the politics of education, teachers’ unions are unique in that they both wield substantial political power and are primarily focused on education issues.<sup>38</sup> They are able to focus their considerable political strength to ensure politicians support them on the handful of issues that most affect their union. Even if these policies are not in the best interest of a politician’s constituents, politically, it often is to his or her benefit to side with the teachers’ union. If politicians oppose the teachers’ union, they will face the full opposition of the union. If they support a policy contrary to their constituents’ interests, a politician can avoid many of the consequences due to the politician’s ability to shift attention to other issues, the fact that their re-election depends on a wide variety of concerns beyond education, and the public’s apathy and ignorance.<sup>39</sup> This reality makes politicians more “responsive to mobilized interest groups or

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30. MYRON LIEBERMAN, *THE TEACHER UNIONS: HOW THE NEA AND AFT SABOTAGE REFORM AND HOLD STUDENTS, PARENTS, TEACHERS, AND TAXPAYERS HOSTAGE TO BUREAUCRACY* 89–108 (1997).

31. MOE & CHUBB, *LIBERATING LEARNING*, *supra* note 23, at 31.

32. *Id.*

33. TERRY M. MOE, *SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS* 114 (2011) [hereinafter MOE, *SPECIAL INTEREST*].

34. *Id.*

35. See Terry M. Moe, *Teacher Unions and School Board Elections*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 254, 254–86 (William G. Howell ed., 2005).

36. See *id.* at 271.

37. *Id.* at 286.

38. MOE & CHUBB, *LIBERATING LEARNING*, *supra* note 23, at 32.

39. See PATRICK MCGUINN, *BREAKING OPEN THE IRON TRIANGLE—INTEREST GROUPS, PUBLIC OPINION, AND FEDERAL EDUCATION POLICY* 2–3 (2003), available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/8/9/6/0/pages89603/p89603-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/8/9/6/0/pages89603/p89603-1.php) [hereinafter MCGUINN, *BREAKING OPEN THE IRON TRIANGLE*].

party activists than to the public at large,” and the status quo, which favors these entrenched special interests, is protected from policy changes.<sup>40</sup>

Thankfully, the public is becoming increasingly concerned about education policy. In the 1960s and 1970s, education was one of the least important issues to American voters.<sup>41</sup> However, since the 1980s, voter concern over education has increased significantly, and it is now one of the most important issues for voters.<sup>42</sup> Even more recently, the issue of education reform has received increased attention from the public due to reform efforts by President Barack Obama,<sup>43</sup> New Jersey Governor Chris Christie,<sup>44</sup> and documentaries such as *Waiting for Superman*.<sup>45</sup> This increase in public attention to education policy could help to mitigate the influence of teachers’ unions.

*B. Teachers’ Unions Wield Immense Control over Public Policy Decisions, Beyond Wages and Benefits, Through Collective Bargaining*

“Collective bargaining . . . is the key to [the teachers’ unions] political power.”<sup>46</sup>

– Myron Lieberman

In addition to state laws, many of the restrictions on a school’s leadership come from collective bargaining contracts. The restrictions that collective bargaining creates have the effect of bureaucratizing the education process and eliminating managerial discretion.<sup>47</sup> “Collective bargaining has imposed an enormous bureaucratic burden on school management—a burden monitored daily by building [teachers’ union] representatives eager to pounce on any deviation from the [collective bargaining] contract in the name of ‘policing the contract.’”<sup>48</sup> Most states allow collective bargaining

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40. Patrick McGuinn, *Swing Issues and Policy Regimes: Federal Education Policy and the Politics of Policy Change*, 18 J. POL’Y HIST. 205, 206–07 (2006); see also MOE & CHUBB, *LIBERATING LEARNING*, *supra* note 23, at 29 (“The key decisions about public schools are made within the political process, and the problem . . . is that the politics of education is inherently biased toward the status quo. This bias comes about because powerful groups have a stake in protecting traditional arrangements and resisting change—and as the nation pursues reform, they are often able to block. As a result, many good reforms never make it through the political process, and the ‘reforms’ that do are either weak versions of the real thing or are essentially just retreads of the past, unable to bring significant achievement gains.”).

41. See MCGUINN, *BREAKING OPEN THE IRON TRIANGLE*, *supra* note 39, at 15.

42. *Id.*

43. See Sam Dillon, *Bipartisan Group Backs Common School Curriculum*, N.Y. TIMES, Mar. 7, 2011, at A12 (noting that the Obama Administration endorsed common standards, and as a result many states passed the standards to help their applications for race to the top, a competition for federal money).

44. See Editorial, *School Reform Rainmakers*, WALL ST. J., Oct. 2, 2010, at A14 (discussing Chris Christie’s advocacy of school choice and the \$100 million donation that he has been entrusted with by Facebook’s founder Mark Zuckerberg).

45. See THE CENTER FOR EDUCATION REFORM, *2011 CHARTER SCHOOL LAWS ACROSS THE STATES 1* (2010).

46. LIEBERMAN, *supra* note 30, at 47.

47. CHUBB & MOE, *POLITICS, MARKETS & AMERICA’S SCHOOLS*, *supra* note 12, at 49.

48. LIEBERMAN, *supra* note 30, at 59.

while “only a few states severely limit the abilities of teachers to organize, affiliate with national teachers’ unions, or negotiate as a group with school district authorities.”<sup>49</sup>

In states that allow collective bargaining for teachers, state statutes define the scope of that bargaining.<sup>50</sup> Many states model their collective bargaining laws on the National Labor Relations Act (NLRA), which requires bargaining “with respect to wages, hours, and other terms and conditions of employment.”<sup>51</sup> Such an ambiguous definition of what must be bargained over leaves many matters for interpretation by state courts. The approach taken by courts has been to classify potential subjects of bargaining as mandatory, permissive, or prohibited.<sup>52</sup> Mandatory subjects require bargaining at the behest of either party.<sup>53</sup> The parties may bargain over permissive subjects, but only if both sides agree to do so.<sup>54</sup> The school’s leadership must decide prohibited subjects unilaterally.<sup>55</sup> Some state legislatures have proactively sought to define the scope of bargaining themselves by specifically designating certain topics as mandatory, permissive, or prohibited topics for collective bargaining.<sup>56</sup>

Classification of specific topics for negotiation as mandatory, permissive, or prohibited varies significantly from state to state.<sup>57</sup> “In general, issues relating to the terms and conditions of teachers’ employment are mandatory subjects of negotiation. These include hours of employment, length of the work year, workload, extra duties, salary, sick leave and other fringe benefits, grievance procedures, and issues of teacher safety.”<sup>58</sup>

Decisions that are often found to be illegal to bargain over include “promotions, curriculum, length of school year, transfer and assignment, staff size, and academic freedom.”<sup>59</sup> Even when finding a subject prohibited or permissive, courts have often found the effects of the subject on teachers to be mandatory.<sup>60</sup> For example, in some states bargaining over class size is mandatory, but even if it is not, the effects it has on a teacher’s workload may be.<sup>61</sup>

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49. VICTORIA J. DODD, *PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY* 283 (2003).

50. *Id.* at 283.

51. Jonathan P. Krisbergh, *Marginalizing Organized Educators: The Effect of School Choice and ‘No Child Left Behind’ on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1029 (2006).

52. See MICHAEL IMBER & TYLL VAN GEEL, *EDUCATION LAW* 466 (3d ed. 2004).

53. *Id.*

54. *Id.*

55. *Id.*

56. See, e.g., OR. REV. STAT. § 243.650(e) (2008) (“For school district bargaining, ‘employment relations’ excludes class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes . . .”).

57. IMBER & GEEL, *supra* note 52, at 466.

58. *Id.*

59. *Id.*

60. *Id.* at 467.

61. *Id.*

The school district and local teachers' union are required to negotiate over each mandatory subject in good faith.<sup>62</sup> While the meaning of this requirement can vary from state to state, generally it requires that both parties be "open and fair mind[ed]" and . . . make a genuine effort to resolve differences."<sup>63</sup>

Often teachers' unions are able to get candidates elected to school boards of education that are friendly to their interests.<sup>64</sup> However, even when they are not able to get what they want through general collective bargaining procedures, teachers' unions have additional tools at their disposal to force school boards to acquiesce to their demands. As of 2002, thirty-one states allow for mediation to assist in resolving a dispute.<sup>65</sup> Twenty-eight states "allow an impartial panel to review both sides of the dispute, report their findings and occasionally make recommendations for settlement."<sup>66</sup> "Eighteen states provide for voluntary arbitration in which one side or the other can request a hearing. Four states mandate arbitration in which the two sides have to submit to a formal hearing."<sup>67</sup> These procedures increase the cost of negotiations and arbitration divests the school board of decision-making power.

Collective bargaining partially transfers decision-making power from the public's elected (or appointed) representatives to teachers' unions, which have their own interests to pursue in the collective bargaining process. A study of the impact of collective bargaining shows that restrictive collective bargaining contracts do not have much effect on affluent school districts, but in larger districts, collective bargaining "has a very negative impact . . . , especially at the secondary level, and the magnitude is greater for high-minority schools."<sup>68</sup> Collective bargaining is critical to the teachers' unions' power, but it is harmful to urban students.

## II. THE INTERESTS PROMOTED BY TEACHERS' UNIONS ARE CONTRARY TO ENSURING THAT URBAN STUDENTS HAVE HIGHLY EFFECTIVE TEACHERS

Teacher effectiveness warrants special consideration when discussing urban education reform because it arguably presents the most meaningful disparity between urban and suburban schools.<sup>69</sup> Regardless of students' backgrounds, if they have multiple effective "teachers in a row, [they] will

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62. DODD, *supra* note 49, at 290.

63. *Id.* at 290.

64. See *supra* notes 33–37.

65. EDUC. COMM'N OF THE STATES, STATE COLLECTIVE BARGAINING POLICIES FOR TEACHERS 2 (2002), available at <http://dev.ecs.org/clearinghouse/37/48/3748.pdf>.

66. *Id.*

67. *Id.*

68. Terry Moe, *Collective Bargaining and the Performance of the Public Schools*, 53 AM. J. POL. SCI. 156, 171 (2009).

69. See HEATHER G. PESKE & KATI HAYCOCK, THE EDUC. TRUST, TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY 2 (2006), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/TQReportJune2006.pdf>.

eventually excel.”<sup>70</sup> In contrast, high-need students that have “even two weak teachers in a row will never recover.”<sup>71</sup> However, “often the weakest teachers are relegated to teaching the neediest students, poor minority kids in inner-city schools.”<sup>72</sup>

The sad truth is that America is doing a very poor job of getting its brightest young adults to enter the teaching profession. Only twenty-three percent of American teachers are from the top-third of college graduates, a statistic that is reduced to fourteen percent in high-need schools.<sup>73</sup> In contrast, some top-performing foreign school systems fill one hundred percent of their teaching positions with students from the top one-third of college graduates.<sup>74</sup>

The goal of having highly effective teachers in front of every classroom is hindered by the efforts of teachers’ unions. The teachers’ unions have an interest in expanding their membership, which provides them incentive to promote policies such as smaller class sizes and decreased teacher workloads, which lead to more teachers needing to be hired. This decreases the quality of teaching applicants because it requires funding for teachers’ salaries to be split among more teachers. Then, to fill their increased needs, school districts must hire progressively worse teaching candidates from within this applicant pool. Further, teachers’ unions have an interest in protecting their members’ employment interests, regardless of their teaching effectiveness. As a result, when an ineffective teacher is hired, it is very difficult to fire him or her.

*A. Teachers’ Unions Have an Interest in Expanding Their Memberships, by Increasing the Number of Teachers Hired, Which Hurts Educational Quality*

“I’ve gone in and defended teachers who shouldn’t even be pumping gas.”<sup>75</sup>

– Unnamed New Jersey Education Association Representative

Teachers’ unions, like any special interest, want to expand their membership. Policies that force more teachers to be hired, such as smaller class sizes and reduced hours teachers spend per year in front of a classroom, will allow unions to expand their membership. However, research shows that

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70. Evan Thomas & Pat Wingert, *Why We Can’t Get Rid of Failing Teachers*, NEWSWEEK, Mar. 15, 2010, at 24.

71. *Id.*

72. *Id.*; see also Sonja Ralston Elder, *Adding Autonomous Schools to New Orleans’ Menu of School Choice*, 11 LOY. J. PUB. INT. L. 389, 433–34 (2010).

73. See MILGROM-ELCOTT, *supra* note 17, at 3.

74. *Id.*

75. Frederick M. Hess & Martin R. West, *Strike Phobia: School Boards Need to Drive a Harder Bargain*, EDUC. NEXT 39, 41 (2006), available at [http://educationnext.org/files/ednext20063\\_38.pdf](http://educationnext.org/files/ednext20063_38.pdf).

these policies hurt teacher quality and have especially perverse effects on the educational opportunities of urban students.

*1. The Increased Demand for Teachers Disproportionately Hurts Urban Education*

Urban schools are faced with several problems in their pursuit to hire highly effective teachers compared to suburban schools. They generally make their hiring decisions late in the summer, when several of the more promising teaching candidates already have jobs.<sup>76</sup> This timing issue, along with generally difficult working conditions at many urban schools, limits these schools from attracting many talented teachers.<sup>77</sup> This, of course, is generally not the teachers' unions' fault.<sup>78</sup>

*2. Class Size*

The belief that smaller class sizes are good for education is widely held but is generally incorrect.<sup>79</sup> Smaller class sizes are great for teachers' unions but are harmful to the education of students, especially urban students. Smaller classes force more teachers to be hired, which increases union membership. However, this increase in hiring leads to increasingly poor candidates being hired and teacher salaries being lower than they otherwise would be since funding gets split between more teachers. These negative effects are experienced even worse in urban schools, which already have a difficult time recruiting highly effective teachers.

The result of these disincentives for teaching candidates to take jobs at urban schools is that urban schools get a disproportionate number of the least desirable teaching candidates.<sup>80</sup> The negative effects of this reality become increasingly detrimental to the quality of teachers at urban schools as the number of teachers that must be hired expands, and as urban schools are forced to dig deeper into the applicant pool to meet their needs.<sup>81</sup>

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76. See MILGROM-ELCOTT, *supra* note 17, at 3–4.

77. Brian A. Jacob, *The Challenges of Staffing Urban Schools with Effective Teachers*, 17 THE FUTURE OF CHILDREN 129, 141–42 (2007), available at [http://futureofchildren.org/futureofchildren/publications/docs/17\\_01\\_07.pdf](http://futureofchildren.org/futureofchildren/publications/docs/17_01_07.pdf).

78. Cf. JOINT COMM'N ON LAUSD GOVERNANCE, THE NEW TEACHER PROJECT, BARRIERS TO TEACHER HIRING 2 (2006), available at [http://ens.lacity.org/council/commission/lausd/presentations/lausdpresentations245037038\\_04122006.pdf](http://ens.lacity.org/council/commission/lausd/presentations/lausdpresentations245037038_04122006.pdf) (showing that in Los Angeles Unified School District, urban schools are often not able to hire highly qualified applicants because of “[t]eachers [u]nion transfer requirements” that force schools to hire teachers from other schools who they do not want to hire).

79. MCKINSEY & COMPANY, *supra* note 18, at 11 (“Of 112 studies which looked at the impact of the reduction in class sizes on student outcomes, only 9 found any positive relationship. 103 found either no significant relationship, or a significant negative relationship. Even when a significant relationship was found, the effect was not substantial. More importantly, every single one of the studies showed that within the range of class sizes typical in OECD countries, ‘variations in teacher quality completely dominate any effect of reduced class size.’”).

80. See, e.g., Jacob, *supra* note 77, at 134.

81. For example, let's assume that there are 500 teaching candidates applying for a job at both an urban and suburban school district and those candidates would all prefer to work at the suburban school

There are sincerely held concerns over increasing class size, but these concerns are generally based on faulty or less than ideal research.<sup>82</sup> More recent research shows that “[s]maller classes are better, but only if the teacher is a very good one. In other words, class size matters, but teacher effectiveness matters more.”<sup>83</sup>

A thorough analysis of the impact of class size should consider both the direct impact of small class sizes and the impact of needing to hire additional teachers. The additional teachers that must be hired, in the aggregate, will be teaching candidates who would not have otherwise been hired—generally the weakest candidates. At the very least, a study looking at the effects of class size on student achievement should look at the impact of hiring these weaker teaching candidates.

Research that attempts to look at the total effect of smaller class sizes shows that occasionally smaller class sizes are a good idea, but generally, smaller classes do not have a positive impact on student learning.<sup>84</sup> A review of research regarding the effect of smaller class sizes on student outcomes reports that fourteen percent of studies show a positive correlation, fourteen percent find a negative correlation, and seventy-two percent report a statistically insignificant impact.<sup>85</sup> Another similar review of previous research was conducted by the Center for Public Education, and it finds that smaller class sizes had little effect for middle school and high school students.<sup>86</sup> They showed some improvement for students in kindergarten through third grade who were learning to read, but even then only significant reductions in class size made a difference.<sup>87</sup>

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(in reality, some would be uniquely motivated to work in the urban school, but this will not change the general result). Let’s also assume that these teachers can be rated from 1 to 500 in terms of their potential to be effective teachers (this is, of course, not possible to do quite as precisely in reality). If there are 200 job openings for teachers and they are split evenly between the urban and suburban districts, the teachers ranked 1 through 100 will be hired by the suburban districts and teachers 101 through 200 will be hired by the urban district. If, however, the number of candidates remains the same but the demand doubled to 400 job openings, teachers 1 through 200 will be hired by the suburban school district and teachers 201 through 400 will be hired by the urban school district. The end result is that the very best teacher the urban school district hired when demand for teachers was increased is a less desirable candidate than the very worst teacher they would have hired if demand had remained low.

82. See Caroline M. Hoxby, *The Effects of Class Size on Student Achievement: New Evidence from Population Variation*, 115 Q. J. ECON. 1239, 1240–41 (2000) (“The vast majority of variation in class size is the result of choices made by parents, schooling providers, or courts and legislatures. Thus, most of the observed variation in class size is correlated with other determinants of student achievement and is likely to produce biased results. This may appear to be an obvious point, but though researchers often claim that the variation they use is not endogenous to student achievement, they rarely go on to explain where the variation *does* come from.”).

83. Andrew J. Rotherham, *When It Comes to Class Size, Smaller Isn’t Always Better*, TIME, Mar. 3, 2011, <http://www.time.com/time/nation/article/0,8599,2056571,00.html>.

84. See, e.g., Jay Matthews, *Better Teachers, Not Tinier Classes, Should Be Goal*, WASH. POST, Mar. 2, 2009, at B2.

85. Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 ECON. J. F64, F78 (2003).

86. Matthews, *supra* note 84.

87. *Id.*

In 1996, California passed a law that reduced class sizes, increased educational spending, and lengthened the school year.<sup>88</sup> At the time the law was passed, there was only a slight disparity between the qualifications of teachers based on the racial and economic make-up of a school's students.<sup>89</sup> In just three years from the law's passing, a "large gap[] in teacher qualifications [had] emerged between schools attended by nonwhite and low-income students [compared to] other schools."<sup>90</sup> The evidence suggests that the result of the smaller class size law was that many teachers in struggling schools left to fill the new jobs created in other school districts.<sup>91</sup> As a result, struggling schools had to turn to novice teachers to fill both the vacancies created by these departing teachers and those created by the class size reduction effort.<sup>92</sup>

The result of the California reforms was a ten student reduction in class size, but only a modest increase of about four percent in math scores and three percent for reading.<sup>93</sup> Even these minor gains were not seen in urban schools.<sup>94</sup> Schools with a high percentage of black students "appear[ed] to benefit little if at all from smaller classes."<sup>95</sup> More money was spent, and the students most in need of help did not realize the gains that resulted. More than one billion dollars were spent per year on this law,<sup>96</sup> money that would have been better spent to draw new people into the teaching field and improve the supply of teachers, as opposed to increasing the demand for teachers.

Small class sizes are great for teachers' unions, which benefit from the increase in the number of teachers that must be hired. However, the research has shown that smaller classes provide little, if any, benefit for urban students.<sup>97</sup> Further, any benefit they do provide is outweighed by the negative impact they have on teacher quality, which is more important for student learning.

### 3. Teacher Workload

The number of hours that teachers spend teaching in front of a classroom per year is surprisingly low.<sup>98</sup> This forces schools to hire more teach-

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88. Mary Nebgen, *The Public School Performance and Accountability Program: Making the Grade*, 31 MCGEORGE L. REV. 386, 387 (2000).

89. CHRISTOPHER JEPSEN & STEVEN RIVKIN, PUB. POLICY INST. OF CAL., CLASS SIZE REDUCTION, TEACHER QUALITY, AND ACADEMIC ACHIEVEMENT IN CALIFORNIA PUBLIC ELEMENTARY SCHOOLS ix (2002), available at [http://www.ppic.org/content/pubs/report/R\\_602CJR.pdf](http://www.ppic.org/content/pubs/report/R_602CJR.pdf).

90. *Id.*

91. *Id.* at iii.

92. *Id.*

93. *Id.* at 66.

94. *Id.*

95. *Id.* at xi.

96. *Id.* at iv.

97. *Id.* at 51.

98. See Caroline M. Hoxby, *What Has Changed and What Has Not*, in OUR SCHOOLS AND OUR FUTURE . . . ARE WE STILL AT RISK? 73, 104 (Paul E. Peterson ed., 2003).

ers than if teachers taught for more hours per year. As a result, the increased size of the teaching workforce requires that funding be split among more teachers, leading to lower salaries. This increased number of teachers is great for teachers' unions, which benefit from the increased membership. However, for the same reasons discussed in conjunction with smaller class sizes, the increase in hiring leads to a decline in teacher quality, which is exacerbated at urban schools.

Limitations on the number of hours teachers spend in front of the classroom are accomplished through two main restrictions. First, states generally limit the length of the school year to 180 days.<sup>99</sup> Second, the number of hours that teachers spend teaching students per day is generally restricted by collective bargaining contracts.<sup>100</sup> For the purpose of this article, the relevant consideration is how many hours a teacher spends teaching a class of students, not how many hours a teacher spends working. It is the amount of time that a teacher spends in front of a class that directly impacts the number of teachers that a school district must hire. The number of hours that teachers spend in front of a classroom per day is often difficult to determine because of the lengthy and ambiguous nature of many collective bargaining agreements,<sup>101</sup> but, for example, in New York City, the collective bargaining contract limits the time a teacher spends in front of a classroom to 3.75 hours per day.<sup>102</sup> A study in 1999 showed that departmentalized teachers, teaching on a period schedule, taught an average of 3.8 hours per day, down from 4.5 hours per day in 1982.<sup>103</sup>

#### *4. Overall Conclusion on Policies that Expand Teachers' Union Membership*

Teachers' unions aggressively promote policies that force school districts to hire more teachers. This benefits teachers' unions by increasing their membership, but it hurts teacher quality. This decrease in teacher quality is especially pronounced at urban schools that generally employ the weaker teaching candidates seeking jobs.

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99. EDUC. COMM'N OF THE STATES, NUMBER OF INSTRUCTIONAL DAYS/HOURS IN THE SCHOOL YEAR 1 (2008), available at <http://www.ecs.org/clearinghouse/78/24/7824.pdf> ("While state requirements vary on the number of instructional days and hours in the year, the majority of states set the school year at 180 days (30 states). Eleven states set the minimum number of instructional days between 160 and 179 days, and two states set the minimum above 180 days (Kansas and Ohio). Finally, eight states currently do not set a minimum number of instructional days. Instead, the school year in these states is measured in numbers of hours.")

100. See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1380-81 (2009).

101. See generally LOS ANGELES UNIFIED SCHOOL DISTRICT, LOS ANGELES UNIFIED SCHOOL DISTRICT COLLECTIVE BARGAINING AGREEMENT (2008 - 2011), available at [http://www.utla.net/contract/2011/Final\\_2008-2011\\_contract.pdf](http://www.utla.net/contract/2011/Final_2008-2011_contract.pdf).

102. Malin, *supra* note 100, at 1381.

103. Hoxby, *supra* note 98, at 104.

*B. Teachers' Unions Have an Interest in Protecting Their Members' Employment Interests, Regardless of Their Effectiveness, Which Hurts Educational Quality*

"A lot of people who have been hired as teachers are basically not competent."<sup>104</sup>

– Albert Shanker, former American Federation of Teachers President

In just about any organization except for a school, the organizational leader—the principal at a school—would have very significant, if not total, control over who staffed the organization and what role those individuals played. However, in public schools, principals and school boards are severely limited in who they can hire, who they can fire, why they can fire teachers, how they can evaluate teachers, and what they can have teachers do while at work. As a result, principals are left without the ability to put together a team of educators that are a good fit for their school and can work well together and with the principal.<sup>105</sup> The understandable response of principals is not to trust teachers and to resist sharing control of the school with these teachers.<sup>106</sup> Consequently, “[p]rincipals and teachers are not really on the same team at all. Nor are teachers a team in their own right. There is no team. All these people just happen to work at the same school.”<sup>107</sup>

*1. Teacher Tenure*

Teacher tenure<sup>108</sup> is a statutory protection that applies to teachers once they have been employed for a probationary period, the duration of which is set by state statute.<sup>109</sup> Once a teacher obtains tenure, he or she is no longer an at-will employee.<sup>110</sup> Rather, to terminate a teacher’s contract, the school

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104. Patricia Kean, *Seeking the Best and the Brightest*, WASH. POST, Nov. 6, 1994, at R5.

105. CHUBB & MOE, *POLITICS, MARKETS & AMERICA’S SCHOOLS*, *supra* note 12, at 51.

106. *Id.*

107. *Id.*

108. This section will include arrangements that are called something other than tenure, but for all practical purposes operate the same as tenure. There is often confusion over tenure, because states use different terms to describe the job protections given to teachers: some states use the term ‘tenure,’ some use ‘continuing contracts,’ and still others refer to the protections as ‘permanent employment status.’ Some states have also passed laws explicitly ‘ending’ tenure, but have created evaluation and/or dismissal processes that nonetheless effectively guarantee permanent employment for the vast majority of experienced teachers.

PATRICK MCGUINN, *CTR. FOR AM. PROGRESS, RINGING THE BELL FOR K-12 TEACHER TENURE REFORM 4* (2010), available at [www.americanprogress.org/issues/2010/02/pdf/teacher\\_tenure.pdf](http://www.americanprogress.org/issues/2010/02/pdf/teacher_tenure.pdf) [hereinafter, MCGUINN, *TENURE REFORM*].

109. See, e.g., LA. REV. STAT. ANN. § 17:442 (2001); MINN. STAT. ANN. § 122A.41(2)(a) (West 2008).

110. See, e.g., LA. REV. STAT. ANN. § 17:442 (2001); MINN. STAT. ANN. § 122A.41(4)(a) (West 2008).

district must show that it has permissible cause to fire that teacher according to the tenure laws.<sup>111</sup>

Teachers are the intended beneficiaries of teacher tenure laws, so courts interpret them liberally in favor of teachers.<sup>112</sup> Some have gone so far as to say that “the broad purpose of the statutory teacher tenure provision . . . ‘is . . . to provide the greatest measure of protection possible against dismissal of employees.’”<sup>113</sup> Once a teacher gets tenure, it is almost impossible to fire him or her.<sup>114</sup> “[T]here is a legal presumption that certificated teachers are competent, the longer they serve without documented difficulties, the stronger the presumption becomes. To this end, the burden of proof of incompetence . . . is on school officials . . . .”<sup>115</sup> Additionally, teachers’ unions defend teachers that school districts attempt to terminate for ineffectiveness, regardless of the merits.<sup>116</sup>

Teachers’ unions have vigorously opposed tenure reforms. A ballot initiative was introduced in California to lengthen the period before a new teacher was eligible for tenure from two years to five years and to allow school districts an increased ability to dismiss tenured teachers with two unsatisfactory performance evaluations.<sup>117</sup> The California teachers’ union raised \$50 million dollars to combat the initiative, which was defeated.<sup>118</sup> Union activity also doomed reform efforts in New York City, which is faced with an extreme inability to get rid of ineffective teachers after they obtain tenure.<sup>119</sup> Unable to modify tenure laws, the city focused on ensuring that only effective teachers are given tenure.<sup>120</sup> Central to the reform efforts was

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111. See, e.g., LA. REV. STAT. ANN. § 17:443 (2001).

112. E.g., *Rousselle v. Plaquemines Parish Sch. Bd.*, 633 So.2d 1235, 1241 (La. 1994).

113. *Lauer v. Millville Area Sch. Dist.*, 657 A.2d 119, 120 (Pa. Commw. Ct. 1995).

114. One of the worst examples of laws that hinder a school board’s ability to terminate ineffective teachers is Oklahoma’s termination appeal procedure. It requires that if a teacher appeals their termination, they be entitled to have their appeal heard by a trial court, which will consider the matter *de novo*. OKLA. STAT. tit. 70, § 6-101.27 (2005). In essence, the school board is divested “of the authority to establish rigorous performance expectations and to render personnel decisions on the basis of those expectations.” N. Georgeann Roye, *High Hopes Hamstrung: How the “Trial De Novo” for Termination of Tenured Teachers’ Contracts Undermines School Reform in Oklahoma*, 62 OKLA. L. REV. 527, 562 (2010). The school boards (and administrators who inform their decisions) are present in the schools, well versed in educational pedagogy, and are directly accountable for the success of the school. In contrast, the judge making the decision in an Oklahoma teacher termination case may never set foot in the school, is not expected to have a strong background in educational pedagogy, and will not be held accountable for the success of the school. Both the schools and the courts may be equally well equipped to make decisions on issues such as if a teacher has committed a moral wrong that renders them unfit to teach. However, the judge tasked with making the decision on termination is in a far inferior position to make a determination about the teacher’s effectiveness.

115. CHARLES J. RUSSO, *REUTTER’S: THE LAW OF PUBLIC EDUCATION* 693–94 (7th ed. 2009).

116. See, e.g., Matthew Ladner & Lindsey M. Burke, *Closing the Racial Achievement Gap: Learning from Florida’s Reforms*, THE HERITAGE FOUND. BACKGROUNDER, Sept. 17, 2010, at 1, 4, available at [http://thf\\_media.s3.amazonaws.com/2010/pdf/bg2468.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/bg2468.pdf) (“A New York City school principal told *The New Yorker* that the current president of the American Federation of Teachers ‘would protect a dead body in the classroom.’”).

117. MCGUINN, *TENURE REFORM*, *supra* note 108, at 12.

118. *Id.*

119. See *infra* note 130 and accompanying text.

120. MCGUINN, *TENURE REFORM*, *supra* note 108, at 16.

the use of student assessment data to measure teacher effectiveness.<sup>121</sup> In response, at the behest of the teachers' union, the New York State legislature prohibited student assessment data from being the basis for tenure decisions.<sup>122</sup>

In 2008, the National Council on Teacher Quality evaluated the state tenure laws and determined that no state came close to developing an effective tenure process.<sup>123</sup> It found that "the awarding of tenure occurs virtually automatically in just about all states, with little deliberation or consideration of evidence of teacher performance."<sup>124</sup> Further, it found that only two states mandate that evidence of teacher effectiveness even be considered in awarding a teacher tenure, and even then it was not the dominate criteria for the decision.<sup>125</sup>

Urban schools have several extreme examples of teachers who are grossly unfit to be around children but cannot be fired. In Los Angeles, a teacher that responded to a student's suicide attempt by telling the student that next time he cuts his wrist he should "carve deeper" was fired by the school district, only to have the firing overturned by a review commission.<sup>126</sup> This commission also prevented the school district from firing "a high school teacher who kept a stash of pornography, marijuana and vials with cocaine residue at school."<sup>127</sup>

Statistics detailing the firing of tenured teachers in struggling school districts portray a facially absurd level of teacher retention:

In New York City in 2008, three out of 30,000 tenured teachers were dismissed for cause. The statistics are just as eye-popping in other cities. The percentage of teachers dismissed for poor performance in Chicago between 2005 and 2008 (the most recent figures available) was 0.1 percent. In Akron, Ohio, zero percent. In Toledo, 0.01 percent. In Denver, zero percent. In no other socially significant profession are the workers so insulated from accountability.<sup>128</sup>

The failure to terminate teacher contracts in extreme examples, like the ones discussed above from Los Angeles, has created an environment in which

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121. *Id.*

122. *Id.*

123. NAT'L COUNCIL ON TEACHER QUALITY, STATE TEACHER POLICY YEARBOOK: WHAT STATES CAN DO TO RETAIN EFFECTIVE NEW TEACHERS (NATIONAL SUMMARY) 69 (2008), available at [http://www.nctq.org/stpy08/reports/stpy\\_national.pdf](http://www.nctq.org/stpy08/reports/stpy_national.pdf).

124. *Id.*

125. *Id.* at 3, 70.

126. Jason Song, *Firing Teachers Can Be a Costly and Tortuous Task*, L.A. TIMES, May 3, 2009, <http://articles.latimes.com/2009/may/03/local/me-teachers> 3 ("One student wrote that [the teacher] had told the boy that he 'should cut himself more bigger next time (cuts himself like a little wussy).' Another wrote: 'Polanco tell [him] that he should cut himself with something sharper.' A third wrote that 'Polanco would call [him] "the cutter kid" and would sometimes call [him] stupid.'" (first alteration added)).

127. *Id.*

128. Thomas & Wingert, *supra* note 70.

principals have stopped trying to fire teachers for mere ineffectiveness.<sup>129</sup> The difficulty of firing ineffective and dangerous teachers has gotten so bad that New York City has the most dangerous teachers report to “rubber rooms” where there are no students and they perform no meaningful service to the district, but they still get paid.<sup>130</sup> School districts often struggle to manage the requirements for firing an ineffective teacher, and review panels often reject even the strongest cases for dismissal.<sup>131</sup> As a result, principals just learn to accept ineffective teachers or attempt to transfer them to another school.<sup>132</sup>

The current environment, where school administrators are unwilling to terminate ineffective teachers, is further solidified by the time and money required to pursue such terminations. Ineffective teachers can draw out a termination process for years, collecting a salary throughout the process and forcing the district to pay hundreds of thousands of dollars in attorney’s fees. The *L.A. Weekly* reported that:

[P]rincipals and school district leaders have all but given up dismissing [ineffective] teachers. In the past decade, LAUSD officials spent \$3.5 million trying to fire just seven of the district’s 33,000 teachers for poor classroom performance — and only four were fired, during legal struggles that wore on, on average, for five years each. Two of the three others were paid large settlements, and one was reinstated. The average cost of each battle is \$500,000.<sup>133</sup>

These appeal rights are generally very rigid. They are so unyielding that when a teacher murdered his school district’s superintendent, he was still allowed to appeal his firing from jail where he was serving life imprisonment for homicide.<sup>134</sup>

The teachers’ unions and tenure laws are not solely to blame for the failure to terminate ineffective teachers. According to a recent study looking at a diverse set of school districts:

Inattention to teacher performance and development begins from a teacher’s first days in the classroom. Though it is widely recognized that teachers are least effective in their beginning years, 66% of novice teachers received a rating *greater* than “satisfactory” on their most recent performance evaluation. Low expectations characterize

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129. Song, *supra* note 126.

130. See Susan Edelman et al., *Head of the Crass: Exiled Queens Teacher on Payroll Despite Knocking up Student*, N.Y. POST, Feb. 7, 2010, at 5.

131. Beth Barrett, *LAUSD’s Dance of the Lemons: Why Firing the Desk-Sleepers, Burnouts, Hot-heads and Other Failed Teachers Is All but Impossible*, L.A. WEEKLY, Feb. 11, 2010, <http://www.laweekly.com/content/printversion/854792/>.

132. Thomas & Wingert, *supra* note 70.

133. Barrett, *supra* note 131.

134. Julie Mack, *Teacher Tenure: What to Do with Bad Apples?*, KALAMAZOO GAZETTE (Mich.), Nov. 21, 2010, at A1.

the tenure process as well, with 41% of administrators reporting that they have never denied tenure to a teacher or “non-renewed” a probationary teacher.<sup>135</sup>

Teacher tenure directly and indirectly keeps ineffective teachers in front of classrooms. It serves this purpose directly by making it difficult to fire teachers for ineffectiveness. Perhaps more importantly, it serves the same purpose indirectly by making school leaders hesitant to fire ineffective teachers due to the lack of previous success and costs associated with trying to fire a teacher for ineffectiveness.

## 2. Restrictions on Teacher Evaluations

Principals cannot fire ineffective teachers, and apparently they are afraid even to criticize them, which would potentially result in years (if not decades) of bitterness between those involved. Farcically, in schools that rate teachers as either satisfactory or unsatisfactory, “about 99 percent of all teachers in the United States are rated ‘satisfactory.’”<sup>136</sup> Even when evaluations utilize a broader rating scale than just satisfactory and unsatisfactory, one study showed that ninety-four percent of teachers received one of the top-two ratings while less than one percent of teachers were deemed to have performed unsatisfactorily.<sup>137</sup> As a result, exceptional teachers do not get recognized (or rewarded), average teachers are not given feedback on what specifically they should improve, and poor teachers are generally retained regardless of whether they make improvements.<sup>138</sup>

Further hindrances to an effective evaluation system are present in many collective bargaining contracts.<sup>139</sup> These contracts tend to include requirements that principals provide teachers with advance notice before evaluating their classroom performance.<sup>140</sup> Collective bargaining contracts also often prohibit using standardized test scores to evaluate teacher effectiveness.<sup>141</sup>

It is important that we gather and analyze data regarding teacher effectiveness in order to figure out what strategies work and which teachers are effective. However, despite research showing the importance of effective teaching, teacher effectiveness is often “not measured, recorded, or used to inform decision-making in any meaningful way.”<sup>142</sup>

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135. Daniel Weisberg et al., *The Widget Effect: Our National Failure to Acknowledge and Act on Differences in Teacher Effectiveness*, 75 EDUC. DIG. 31, 33 (2009) (emphasis added).

136. Thomas & Wingert, *supra* note 70.

137. Weisberg et al., *supra* note 135.

138. *See id.* at 33–34.

139. MOE, SPECIAL INTEREST, *supra* note 34, at 174–75.

140. *Id.*

141. *Id.*

142. Weisberg et al., *supra* note 135, at 32.

One potential method to improve teacher evaluation is using “value-added” data. A value-added assessment measures the change in a student’s knowledge or ability from the beginning of the school year to the end of the year to determine how much a teacher has “added” to that student’s education.<sup>143</sup> Efforts to utilize value-added data as part of the teacher evaluation process, even in struggling school districts, have met fierce resistance from teachers’ unions in places like Los Angeles<sup>144</sup> and New York City.<sup>145</sup> The data in Los Angeles has been made public by the *Los Angeles Times* and shows “huge disparities among teachers in the same buildings, disparities that in many cases hold up over seven years of data.”<sup>146</sup>

### 3. Last in, First out Approach to Teacher Layoffs

When school districts decide that it is necessary to layoff employees for budgetary reasons, an important issue becomes deciding which teachers are going to be let go. In many schools the determination is made entirely, or predominately, through what is referred to as a “last-in, first-out” approach.<sup>147</sup> This requires school districts to make layoffs based on terminating the contract of the most recently hired teacher first and continuing until enough teachers have been laid off.<sup>148</sup> The effect is that layoffs are based on seniority instead of teacher effectiveness.

In fourteen states, public school administrators are legally required to layoff the most recently hired teachers without any consideration of the effectiveness of those teachers.<sup>149</sup> Only three states and Washington D.C. require that teacher effectiveness be a major factor in the determination of which teachers are laid off.<sup>150</sup> Additional schools are forced to use last-in, first-out policies because of their collective bargaining agreements with their local teachers’ unions.<sup>151</sup>

Two recent studies have shown that only about thirteen to sixteen percent of the teachers that are laid off through a last-in, first-out system would

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143. STEVEN GLAZERMAN ET AL., THE BROWN CTR. ON EDUC. POLICY AT BROOKINGS, EVALUATING TEACHERS: THE IMPORTANT ROLE OF VALUE-ADDED 2 (2010), available at [http://www.brookings.edu/~mediaFiles/rc/reports/2010/1117evaluating\\_teachers/1117\\_evaluating\\_teachers.pdf](http://www.brookings.edu/~mediaFiles/rc/reports/2010/1117evaluating_teachers/1117_evaluating_teachers.pdf).

144. Howard Blume, *California; UTLA Won't Accept Pay Cuts, 'Value-Added'; Teachers Stand Firm Against Larger Classes and Evaluations Using Students' Test Scores*, L.A. TIMES, Dec. 16, 2010, at AA3.

145. Malin, *supra* note 100, at 1392.

146. Amanda Ripley, *Waiting for "Superman": A Call to Action for Our Schools*, TIME, Sep. 23, 2010, [http://www.time.com/time/specials/packages/printout/0,29239,2019663\\_2020590\\_2020592,00.html](http://www.time.com/time/specials/packages/printout/0,29239,2019663_2020590_2020592,00.html).

147. THE NEW TEACHER PROJECT, THE CASE AGAINST QUALITY-BLIND TEACHER LAYOFFS: WHY LAYOFF POLICIES THAT IGNORE TEACHER QUALITY NEED TO END NOW 1-3 (2011), available at [http://tntp.org/files/TNTP\\_Case\\_Against\\_Quality\\_Blind\\_Layoffs\\_Feb2011.pdf](http://tntp.org/files/TNTP_Case_Against_Quality_Blind_Layoffs_Feb2011.pdf).

148. See, e.g., CAL. EDUC. CODE § 44955(b) (West 2011).

149. THE NEW TEACHER PROJECT, *supra* note 147, at 1.

150. *Id.* at 2.

151. See, e.g., AGREEMENT BETWEEN THE SCHOOL DISTRICT OF THE CITY OF DETROIT AND THE DETROIT FEDERATION OF TEACHERS LOCAL 231 59 (July 1, 2005 to June 30, 2009), available at <http://mi.aft.org/dft231/index.cfm?action=article&articleID=b6f43071-265a-4cb9-9a57-468a0290bc88>.

be laid off if the decision was made based on teacher effectiveness.<sup>152</sup> Additionally, since teachers are paid based on years of experience, laying off less experienced teachers will require that more teachers be laid off to achieve the same budgetary reduction.<sup>153</sup> The result of last-in, first-out policies is that when a reduction in force is necessary, there are fewer remaining teachers, and the remaining teachers are individually less effective than if no such policy was in place. This means that students are more likely to have successive years with ineffective teachers, a very bad thing for a child's education.

There is significant resistance to last-in, first-out policies among politicians of all political persuasions. For example, in 2011 in New York City, budget problems required that teachers be laid off. Mayor Bloomberg, who is not affiliated with a political party, has identified thousands of teachers whom he believes should be fired, but absent legislative reform, teachers will be laid off based solely on the date they were hired.<sup>154</sup> New York Democratic Governor Andrew Cuomo attempted to change the law to allow teacher effectiveness to be considered in layoff decisions, and the Republican-controlled State Senate approved his plan, but the State Assembly is unlikely to pass the bill.<sup>155</sup>

Last-in, first-out is an indefensible practice that should be a priority for reform efforts. Its negative effect on the education students receive is inexcusable and disproportionately removes effective teachers from the struggling schools that most need their help.

#### 4. *Bumping Policies*

Perhaps the single most perverse aspect of teacher employment in some districts is the existence of what are known as bumping policies. These policies provide a contractual right for teachers to transfer from one school within a district to another school based solely on seniority.<sup>156</sup> Bumping policies are obtained through collective bargaining and are consistent with

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152. THE NEW TEACHER PROJECT, *supra* note 147, at 4.

153. *Id.* at 6; *see also* Jason Felch et al., *Grading the Teachers; Seniority Over Quality; When Budget Cuts Hit, Many of L.A.'s Most Promising New Teachers Were Laid Off. Poorer Students Were Particularly Hurt*, L.A. TIMES, Dec. 5, 2010, at A1.

154. Editorial, *Seniority Should Not Make Teachers Immune to Layoffs*, WASH. POST, Mar. 3, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030305779.html> (“[There are] 2,671 teachers who have been rated unsatisfactory over the past five years, 882 teachers who lack a teaching license, 291 whom an arbitrator found to be incompetent or guilty of malfeasance and 183 with records of excessive lateness or absenteeism.”).

155. Thomas Kaplan et al., *Cuomo Seeks Speedy Change in Evaluations of Teachers*, N.Y. TIMES, Mar. 2 2011, at A21.

156. *See, e.g.*, PROVIDENCE TEACHERS UNION, PROVIDENCE TEACHERS UNION—JOINT PROPOSAL § 12-2.3 (Sep. 1, 2004 to Aug. 31, 2007), *available at* [http://www.proteun.org/joint\\_proposal/JointProposal.htm](http://www.proteun.org/joint_proposal/JointProposal.htm) (“Any regularly-employed teacher who wishes to transfer to another position within the Providence schools for the commencement of the next work year must file a Request for Transfer . . . . Each . . . position will be awarded to the teacher with the most seniority (Date of Hire) bidding on the position.”).

the employment interests of teachers but are antithetical to closing educational achievement gaps.

In America, we already see that “[t]he very children who most need strong teachers are assigned, on average, to teachers with less experience, less education, and less skill than those who teach other children.”<sup>157</sup> Bumping policies exacerbate this problem by allowing experienced teachers to leave high-need schools for easier teaching assignments, meaning they will likely be replaced by novice teachers. The result is a consistent stream of new teachers being introduced to the highest-need schools. These novice teachers, because of their inexperience, are likely to be less effective than the teachers they replace.<sup>158</sup>

Not only do bumping policies have a negative impact on the quality of the teachers in urban schools, but they also hinder the ability of administrators to shape their team of teachers in a manner that they feel best suits the needs of their individual school. Bumping policies transfer staffing decisions from school leadership, where they belong, to employees.

#### *5. Overall Conclusion on Teachers’ Unions Protecting Their Members’ Employment Interests*

If education reforms are going to lead to a highly effective teacher being in every classroom, it is critical that they aggressively confront the employment interests protected by teachers’ unions. Policies, such as teacher tenure and last-in, first-out, protect the employment of ineffective teachers and hurt educational quality. Bumping policies lead to an increase in the number of novice teachers at the struggling schools most in need of experienced teachers. Reform must eliminate, or at least mitigate, these policies.

### III. EDUCATION REFORM SHOULD USE SCHOOL CHOICE TO SHIFT DECISION-MAKING POWER AWAY FROM THE POLITICAL ARENA DOMINATED BY TEACHERS’ UNIONS TO PARENTS WHO ARE UNIQUELY ACCOUNTABLE FOR THEIR CHILDREN’S EDUCATIONAL OUTCOMES

“Imagine a private-sector manager who knows that gaining or losing customers will have little or no impact on his salary, performance evaluations, or job security. Bizarre as it seems, this is exactly how ‘competition’ generally works in K-12 education today.”<sup>159</sup>

– Frederick M. Hess

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157. PESKE & HAYCOCK, *supra* note 69, at 2.

158. *Id.*

159. Frederick M. Hess, *Does School Choice “Work”?*, NAT’L AFF., Fall 2010, at 35, 45–46, available at [http://www.nationalaffairs.com/doclib/20100918\\_Hess\\_pdf\[1\].pdf](http://www.nationalaffairs.com/doclib/20100918_Hess_pdf[1].pdf).

There are few legislative approaches that can empower parents to impact their child's experience while at a public school. With the exception of recent reforms enacted by California and Mississippi, known as "parent trigger law[s],"<sup>160</sup> perhaps the only meaningful way to empower parents is by providing them with options that will remove their child from a traditional public school. This is because such reforms enable unilateral decisions by individual parents or groups of parents—decisions that would often not be possible if subjected to the normal political process. Teachers' unions most fiercely oppose school-choice reform efforts that allow students to be removed from unionized schools to nonunionized schools.<sup>161</sup>

Increasingly, decision-making power in American politics has been shifting in a manner that disenfranchises urban parents. In the early twentieth century, public education was almost exclusively a local issue controlled by "the people closest to each school: parents, interested citizens, and their elected representatives."<sup>162</sup> Since then, an "education system" has emerged that is increasingly bureaucratic and favors "elements of business, the middle class, and educational professionals."<sup>163</sup> In contrast, those with less political strength, such as "the lower classes, ethnic and religious minorities, and citizens of rural communities" have had their interests marginalized.<sup>164</sup>

Since the political process determines public school policy, the influence of parents and students is limited to their ability to influence the political process. They are not "uniquely special" to the determination of public education policy.<sup>165</sup> As a result, public schools "are peculiarly unaccountable institutions . . . [that] are insulated from the consequences of malfeasance by their natural monopoly."<sup>166</sup> In contrast, private schools,<sup>167</sup> which are controlled by market forces, "ensure that parents and students play a much more central and influential role."<sup>168</sup> Private schools shift the power away from the middle class (as a group) and teachers' unions to the parents of students who are currently, or potentially will be, enrolled in the private school.<sup>169</sup> Urban education reform should seek to create a similar shift in

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160. Mary Pasciak, *What If Parents Could Force a School to Change – or Close?*, BUFFALO NEWS, Feb. 9, 2011, [http://blogs.buffalonews.com/school\\_zone/2011/02/what-if-parents-could-force-a-school-to-change.html](http://blogs.buffalonews.com/school_zone/2011/02/what-if-parents-could-force-a-school-to-change.html).

161. See TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 26 (2001) (noting that 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.").

162. CHUBB & MOE, *POLITICS, MARKETS & AMERICA'S SCHOOLS*, *supra* note 12, at 3.

163. *Id.* at 4.

164. *Id.*

165. *Id.* at 31.

166. Saiger, *supra* note 11, at 1658.

167. I do not raise these points to advocate replacing the public school system with a private system, but merely to provide a contrast that helps explain how public schools operate and how reform can make education more receptive to the needs of urban students.

168. CHUBB & MOE, *POLITICS, MARKETS & AMERICA'S SCHOOLS*, *supra* note 12, at 32.

169. *Id.* at 35 ("Under a system of democratic control, the public schools are governed by an enormous, far-flung constituency in which the interests of parents and students carry no special status or

power away from the middle class (as a group) and teachers' unions to urban parents.

### A. Charter Schools

A charter school is a public school that is freed from having to comply with many state regulations in exchange for entering into a "charter" that sets accountability standards for that school.<sup>170</sup> The school's progress is periodically reviewed, and if progress is insufficient, the school's charter may be revoked.<sup>171</sup> Students are never required to attend a charter school; rather, their parents apply for them to attend the school.<sup>172</sup> Like any school, there are a limited number of students that a charter school may accommodate.<sup>173</sup> When more students apply than may be accommodated, a lottery is almost always legally required to determine which students get to enroll.<sup>174</sup>

Charter schools are a popular reform proposal because of the broad set of benefits that educational reformers believe they make possible.<sup>175</sup> Not only are they popular with reformers, they are popular with parents, as is evidenced by an estimated 365,000 students on charter school waiting lists.<sup>176</sup> The following provides a good summary of the ambitions of charter school advocates:

[Charter schools] will be better and more responsive schools. Deregulation is expected to produce flexibility and innovation . . . . Charter schools are expected to be effective schools, in large part, because of characteristics of "participant ownership, freedom from external constraints, and a strong and distinctive culture."

. . . .

. . . But the charter school movement has even higher aspirations. The idea is not simply to create a few effective schools, but rather to "create dynamics that will cause the main-line system to change so as to improve education for all students." According to charter

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weight. When markets prevail, parents and students are thrust onto center stage, along with the owners and staff of schools; most of the rest of society plays a distinctly secondary role, limited for the most part to setting the framework within which educational choices get made.").

170. Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 154 (2000).

171. *Id.*

172. See Robert Garda, *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & EDUC. 57, 102 (2011).

173. See Amy Moore, *Brokering Education: A Study of Charter Receipt, Renewal, and Revocation in Louisiana's Charter Schools*, 11 LOY. J. PUB. INT. L. 343, 350 (2010).

174. See, e.g., *id.*

175. See O'Brien, *supra* note 170, at 155–56.

176. Robert Tomsho, *Demand for Charter Schools Is High, Seats Are Few—Obama Wants to Expand the Alternative Program, but Laws, Labor Unions Will Make That Hard to Achieve*, WALL ST. J., Apr. 23, 2009, at A13.

school advocates, competition may play a major role in creating dynamics that favor innovation. Public schools will no longer have the luxury of ignoring the preferences and needs of parents and students if those students can choose to attend a charter school and take their public funding with them. Competition will not, however, be the only factor creating a dynamic favoring change. A major claim of the charter school movement is that these schools will work as “incubators for change” by allowing new concepts and ideas to be tried out on a small, experimental scale “before rolling educational reform through the entire school system.” The charter schools are envisioned as being laboratories for curricular innovation.<sup>177</sup>

While the ambition portrayed by this statement is great, it demonstrates the tendency of charter school advocates to set unreasonably high expectations, of which they are doomed to fall short.<sup>178</sup> Political compromise has left many of the charter school reform laws dramatically watered-down, and even statistically significant progress, under poorly written laws, is seen as not meeting the standards promised by reform activists.<sup>179</sup>

Focusing on one simple articulation of the goal for charter schools is helpful for examining their proper role within comprehensive education reform. This goal is that charter schools should provide diverse options for parents who wish to remove their children from traditional public schools. Because political compromise almost always limits reform, the emphasis should be placed on the most important and unique aspects of individual reforms to ensure that these aspects survive the political process. In the case of charter schools, this means that advocates should focus their attention on the ability of proposed legislation to provide parents with meaningful ways to remove their children from their current schools. Such reform will help remove decision-making power from the political process and transfer it to the parents who could then place their child in the school that best fits their child’s needs. This would make education more responsive to parents and less responsive to politics.

The first charter school law was passed in Minnesota in 1991.<sup>180</sup> Currently, forty states and the District of Columbia have adopted some form of legislation allowing for charter schools.<sup>181</sup> The rapid spread of charter school laws reflects their political popularity.<sup>182</sup> While charter schools have gained the support of educational reformers from widespread political stances, the response of teachers’ unions “ranges from outright opposition to

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177. O’Brien, *supra* note 170, at 155–56.

178. Hess, *supra* note 159, at 36.

179. *See id.*

180. Jennifer J. Ridley, *Charting a New Course for Public Education in Michigan—Charter Schools: A Significant Step Toward Meaningful Education Reform*, 76 U. DET. MERCY L. REV. 607, 615 (1999).

181. Elder, *supra* note 72, at 404.

182. *Id.* at 389 (noting that both Barack Obama and John McCain supported charter schools in the 2008 presidential election).

reluctant and qualified acceptance.”<sup>183</sup> If teachers’ unions realize that it is not politically feasible to prevent the adoption of charter schools, they

push hard for key restrictions in the legislation. Among them: extremely low ceilings on the number of charters allowed statewide, lower per-pupil funding than in the regular public schools, districts as the sole chartering authorities (because the districts don’t want competition, and have incentives to refuse), no charter access to district buildings, requirements that charters be covered by union contracts.<sup>184</sup>

The popularity of charter schools means that it makes political sense for teachers’ unions to say that they favor charter schools. However, the important consideration is what teachers’ unions actually do and the limitations they advocate. In the early efforts to establish charter schools, a union official stated, “We’ll fight charter schools tooth and nail; then after we lose, we’ll figure out that we can organize the teachers who teach in them.”<sup>185</sup> Albert Shanker, former AFT President, is often given credit for supporting charter schools.<sup>186</sup> However, he viewed charter schools as “a new kind of school governance framework under which successful teachers would become ‘empowered’ to create innovative programs at existing schools—but only with the express approval of their union.”<sup>187</sup> He viewed charter schools as a tool to give teachers, and their unions, more control over the schools.<sup>188</sup>

Charter school legislation can vary greatly in scope. Charter school laws that affect the options available to parents include the types of entities that are permitted to manage charter schools, the funding compared to traditional public schools, and the number of charter schools permitted.<sup>189</sup> The manner in which these laws shape the availability of charter schools will determine whether charter schools provide parents with meaningful exit options for their children.

Charter school laws range from authorizing almost anyone to start a charter school<sup>190</sup> to severely limiting what entities can manage charter schools<sup>191</sup> to requiring local school board approval.<sup>192</sup> Allowing a broad

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183. Malin & Kerchner, *supra* note 14, at 886.

184. MOE & CHUBB, *LIBERATING LEARNING*, *supra* note 23, at 51.

185. Malin & Kerchner, *supra* note 14, at 902 (this quote was from a personal conversation the article’s author had with an NEA official).

186. See, e.g., Greg Prudich, Editorial, *Freedom to Teach; How About Removing Some of Those Regulations?*, CHARLESTON GAZETTE (W. Va.), June 27, 2010, at P1C.

187. Malin & Kerchner, *supra* note 14, at 889 (quoting KRISTINA BERGER & PETER W. COOKSON, JR., *EXPECT MIRACLES: CHARTER SCHOOLS AND THE POLITICS OF HOPE AND DESPAIR* 33 (2003)).

188. *Id.*

189. See Moore, *supra* note 173, at 346–55.

190. See generally CAL. EDUC. CODE § 47605 (West 2011); D.C. CODE § 38-1802.01–.02 (2007); MICH. COMP. LAWS § 380.502 (2005); MINN. STAT. § 124D.10 (2008); N.Y. EDUC. LAW § 2851 (McKinney 2009).

191. See MD. CODE ANN. EDUC. § 9-104 (West 2008).

192. E.g., VA. CODE ANN. § 22.1-212.9 (2006).

group of entities to start charter schools will lead to more meaningful options for parents. Additionally, if those who already have an interest in the current public education system must approve charter schools, then reform will depend upon their willingness to create their own competitors, a dubious proposition. Education reformers should focus on ensuring that charter school laws allow a diverse range of entities to participate in the charter school process.

Charter schools are often expected to do more with significantly less money than traditional public schools.<sup>193</sup> Funding for charter schools is so bad that often teachers must work more hours, “clean their own classrooms (and sometimes shovel the walks), plan the curriculum, buy the materials, and serve as guidance counselors and social workers.”<sup>194</sup> In addition to these increased responsibilities, due to fiscal constraints, they are often paid the same or less than teachers in traditional schools in the same school district.<sup>195</sup> “[T]oday’s charter schools get about 75 cents for every dollar that district schools receive.”<sup>196</sup> An effective charter school law would ensure that charter schools receive funding equivalent to what traditional public schools receive.

Another major constraint on the ability of charter schools to provide parents with meaningful alternatives to traditional public schools for their children is caps on the number of charter schools that can exist in a state. Some of the more restrictive laws include limiting the number of charter schools in Texas to 215<sup>197</sup> and Massachusetts to 120.<sup>198</sup> In contrast, some states do not place caps on the number of charter schools.<sup>199</sup> The demand for charter schools has significantly outpaced their enrollment capacity,<sup>200</sup> and charter school laws should allow for this demand to be met.

Another important consideration is that states follow through on holding charter schools accountable for their students’ success. Based on 2009 data, only three states with over 250 charter schools have closed 15% or more of their charter schools.<sup>201</sup> While it would be imprudent to force an artificial

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193. THE CTR. FOR EDUC. REFORM, ANNUAL SURVEY OF AMERICA’S CHARTER SCHOOLS 6 (Jeanne Allen & Alison Consoletti eds., 2008) (“Charter schools receive fewer dollars and spend less than conventional schools. Among reporting charter schools, the average amount of per-pupil funding they received was \$6,585, and the average cost per-pupil was \$7,625. According to a 2008 study by the U.S. Census, conventional public schools received \$10,771 per pupil and spent \$9,138 per pupil. Nationwide, charter schools, which are public schools and entitled to the same funding, are only receiving 60 percent of what conventional public schools receive. This inequity forces charters to spend their valuable time and resources looking for outside additional funding sources.”).

194. Chester E. Finn et al., *Finding the Right Fit: America’s Charter Schools Get Started*, BROOKINGS REV., Summer 1996, at 18, 19.

195. *Id.* at 19.

196. Hess, *supra* note 159, at 45.

197. TEX. EDUC. CODE ANN. § 12.101(b) (West 2011).

198. MASS. GEN. LAWS ch. 71, § 89(i) (2009).

199. NICK KHOURI ET AL., MICHIGAN’S CHARTER SCHOOL INITIATIVE: FROM THEORY TO PRACTICE 19 (1999), available at [http://www.pscinc.com/Portals/0/Publications/charter/charter\\_report.pdf](http://www.pscinc.com/Portals/0/Publications/charter/charter_report.pdf).

200. See *supra* note 176 and accompanying text.

201. U.S. Chamber of Commerce et al., *Leaders and Laggards: A State-by-State Report Card on Educational Innovation 17* (2009), available at <http://icw.uschamber.com/sites/default/files/LL-2009->

number of charter schools to close, states should seek to ensure that charter schools are providing a high quality education for their students. Charter school advocates should be equally as critical, if not more so, of charter schools as they are of traditional public schools.

Recently the Center for Education Reform analyzed the effectiveness of charter school laws.<sup>202</sup> It scored states based upon the breadth of entities that can “create and manage charter schools,” the maximum number of charter schools allowed to open, the freedom provided from regulation, and the equity of funding with that of traditional public schools.<sup>203</sup> Washington, D.C. received the highest score followed by Minnesota and California.<sup>204</sup> Charter school laws should look to these states as a starting point.

Studies regarding the effectiveness of charter schools have produced varying results<sup>205</sup> and have been criticized for often failing to study randomized groups of students.<sup>206</sup> “Most of the research on charter schools . . . suffers the fatal flaw of being unable to control for selection bias.”<sup>207</sup> Sometimes, the very teachers’ unions that are negatively affected by the existence of charter schools conduct these studies.<sup>208</sup>

In considering selection bias, it is important to realize that charter school students are there because their parents wanted them to be at that specific school, unlike their peers in traditional public schools. There are at least two possible ways that this could factor into the relative success of students at charter schools. First, placing a child in a charter school, which requires additional effort, suggests that parents placing their child in a charter school may be especially motivated to ensure educational success for their child.<sup>209</sup> If this means that parents of charter school students are disproportionately involved in their child’s education, then it would seem likely that charter school students would perform better even if the charter school offered only the same quality of education as traditional public schools. Second, it is reasonable to think that the students most likely to be placed in charter schools are those that are struggling in traditional public schools.<sup>210</sup> Parents of students who are doing well would have little incentive to remove their children and place them in an unconventional setting.<sup>211</sup> If this is the case, then charter schools would be entrusted with the educa-

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202. THE CENTER FOR EDUCATION REFORM, *supra* note 45.

203. *Id.* at 5.

204. *Id.* at 2.

205. Hess, *supra* note 159, at 39 (“To a frustrating degree, the conclusions one draws from the educational-performance evidence depend on which experts one trusts.”).

206. See SUSAN DYNARSKI ET AL., THE BROWN CTR. ON EDUC. POLICY AT BROOKINGS, CHARTER SCHOOLS: A REPORT ON RETHINKING THE FEDERAL ROLE IN EDUCATION 2–3 (2010), available at [http://www.brookings.edu/~media/Files/rc/reports/2010/1216\\_charter\\_schools/1216\\_charter\\_schools.pdf](http://www.brookings.edu/~media/Files/rc/reports/2010/1216_charter_schools/1216_charter_schools.pdf).

207. Elder, *supra* note 72, at 413–14.

208. MOE & CHUBB, LIBERATING LEARNING, *supra* note 23, at 51–52.

209. Caroline M. Hoxby & Jonah E. Rockoff, *Findings from the City of Big Shoulders*, EDUC. NEXT, Fall 2005, at 52, 52.

210. *See id.*

211. *Id.*

tion of those students considered to be more difficult to educate, and even high quality charter schools would show subpar results.

Therefore, a dependable study on charter schools does at least two things. First, it controls for selection bias by studying students who are placed in charter schools by lotteries against those who applied, but were not selected. Second, it analyzes the progress made by the students from the time they start at the charter school (or would have started, had they been selected by the lottery) until the time they leave (or would have left) the charter school.

Five studies used randomized groups to test the effectiveness of charter schools.<sup>212</sup> Four showed positive results, and one showed no overall effect.<sup>213</sup> One of these surveys showed tremendously positive results of New York City's charter schools. "On average, a student who attended a charter school for all of grades kindergarten to eight would close about 86 percent of the achievement gap in math and 66 percent of the 'Scarsdale-Harlem' achievement gap in English."<sup>214</sup> In contrast, students who applied for the lottery but were not admitted to charter schools were able to stay at grade level but made very little progress towards closing the achievement gap.<sup>215</sup> Similar positive results were observed when lotteries were used to create a control group in studies of Chicago<sup>216</sup> and Boston charter schools.<sup>217</sup>

Charter schools offer a promising and politically popular method for providing parents with exit options for their children. It is important that charter school legislation be written and amended to provide meaningful competition with traditional public schools. This includes allowing a broad range of charter authorizers, eliminating caps on charter school growth, and providing equitable funding for charter schools. Charter schools should be held accountable for their results. Legislation should ensure that unsuccessful charter schools are closed.

### B. School Vouchers

School vouchers are funds given by a state to parents in voucher form to assist parents in enrolling their child in the private school of the parent's choice.<sup>218</sup> Parents who would not otherwise be able to afford a private edu-

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212. DYNARSKI ET AL., *supra* note 206, at 3.

213. *Id.*

214. CAROLINE M. HOXBY, SONALI MURARKA, & JENNY KANG, THE NEW YORK CITY CHARTER SCH. EVALUATION PROJECT: HOW NEW YORK CITY'S CHARTER SCHOOLS AFFECT ACHIEVEMENT IV-1 (2009), available at [http://www.nber.org/~schools/charterschoolseval/how\\_NYC\\_charter\\_schools\\_affect\\_achievement\\_sept2009](http://www.nber.org/~schools/charterschoolseval/how_NYC_charter_schools_affect_achievement_sept2009).

215. *Id.*

216. Hoxby & Rockoff, *supra* note 209, at 53.

217. ATILA ABDULKADIROGLU ET AL., THE BOSTON FOUND., INFORMING THE DEBATE: COMPARING BOSTON'S CHARTER, PILOT AND TRADITIONAL SCHOOLS (2009), available at [http://www.tbf.org/uploadedFiles/tbforg/Utility\\_Navigation/Multimedia\\_Library/Reports/InformingTheDebate\\_Final.pdf](http://www.tbf.org/uploadedFiles/tbforg/Utility_Navigation/Multimedia_Library/Reports/InformingTheDebate_Final.pdf).

218. Scott A. Fenton, Comment, *School Voucher Programs: An Idea Whose Time Has Arrived*, 26 CAP. U. L. REV. 645, 645 (1997).

cation for their child can choose a private school that best fits their child's needs. Private schools are less subject to the political process and more responsive to the needs of individual students. In contrast to public schools, "[i]n the private sector, schools do not have to be all things to all people. To be successful, they need to find their niche—a specialized segment of the market to which they can appeal and attract support."<sup>219</sup> The ability of private schools to specialize their educational offerings makes them more responsive to the needs of their students.

In reality, "voucher programs are hedged with restrictions: they limit who can receive voucher money, cap the total number of vouchers available, restrict the categories of institutions that can redeem vouchers, and limit the amount of the voucher to a fraction of the market price for private schooling."<sup>220</sup> As a result, the small number of school voucher programs today generally fail to create competition.<sup>221</sup> In Washington, D.C., school vouchers were capped at three percent of the student population, and the political compromise to create a school voucher system increased funding to the public school system despite vouchers leading to these schools having fewer students to educate.<sup>222</sup> In Milwaukee, a school voucher program has been in place since 1990.<sup>223</sup> Since then, the per pupil spending at traditional public schools has been nonetheless increased by eighty percent, and more teachers are currently employed by the district despite 20,000 students being removed from the public schools through vouchers.<sup>224</sup> If public schools are rewarded despite being rejected by parents, the laws fail to create competition.

Constitutionality is an important issue for school voucher programs. In *Zelman v. Simmons-Harris*, the Supreme Court of the United States found that the U.S. Constitution permits school voucher programs so long as these programs have a valid secular purpose, and their primary effects neither advance nor inhibit religion.<sup>225</sup> This requires that aid from the programs be administered in a neutral fashion and that those receiving vouchers have a meaningful choice between religious and nonreligious schools.<sup>226</sup>

Despite the ruling in *Zelman*, school vouchers face an additional hurdle in the form of state constitutions. Some state constitutions have "Blaine Amendments" which are more stringent versions of the Establishment Clause found in the U.S. Constitution.<sup>227</sup> These amendments "were moti-

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219. CHUBB & MOE, POLITICS, MARKETS & AMERICA'S SCHOOLS, *supra* note 12, at 55.

220. Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 880–81 (2006) (footnotes omitted).

221. See generally Hess, *supra* note 159, at 47 ("[A] rule-laden, risk-averse sector dominated by entrenched bureaucracies, industrial-style collective-bargaining agreements, and hoary colleges of education will not casually remake itself just because students have the right to switch schools.").

222. *Id.* at 45.

223. *Id.*

224. *Id.*

225. *Zelman v. Simmons-Harris*, 536 U.S. 639, 661–62 (2002).

226. *Id.*

227. David M. Powers, Note, *The Political Intersection of School Choice, Race, and Values*, 60 ALA.

vated by a wave of anti-Catholic hysteria that swept the United States after the Civil War.”<sup>228</sup>

An example of a Blaine Amendment found in the Florida Constitution provides:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.<sup>229</sup>

School voucher laws should consider the presence of Blaine Amendments and case law interpreting those amendments. It might be necessary to repeal any such amendments before passing school voucher programs.

When studies observe basic standards of statistical analysis, including the use of random assignment and control groups, results show that school vouchers improve student education.<sup>230</sup> In 2011 a review of school voucher studies utilizing random assignment—the “gold standard for empirical science”—was released.<sup>231</sup> It showed that vouchers help both the students who receive them and the public schools that risk losing students because of vouchers.<sup>232</sup> Out of ten studies that examine the effect of vouchers on students who received them, six show that all groups of students studied benefited from vouchers, three show that some groups benefited, one shows no visible benefit, and no studies show vouchers to have a negative effect.<sup>233</sup> Twenty-two studies look at the effect of vouchers on public schools that risk losing students to voucher programs.<sup>234</sup> Twenty-one of these studies show a positive effect on the competing public schools, one shows no visible effect, and none show a negative effect.<sup>235</sup>

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L. REV. 1051, 1052 (2009).

228. Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 134 (2000).

229. FLA. CONST. art. I, § 3.

230. GREG FORSTER, CTR. FOR EDUC. FREEDOM, *SCHOOL CHOICE IS BACK* (2011), available at <http://www.ocpathink.org/article-pdf/948.pdf> (“Ten studies have examined how vouchers impact students who use them—studies using the gold-standard method of social science, random assignment that separates treatment and control groups by lottery. Nineteen studies have examined how vouchers impact public schools. This large body of high-quality evidence consistently finds that vouchers improve results.”).

231. GREG FORSTER, THE FRIEDMAN FOUND. FOR EDUC. CHOICE, *A WIN-WIN SOLUTION: THE EMPIRICAL EVIDENCE ON SCHOOL VOUCHERS 6* (2011), available at <http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/656/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Vouchers.pdf>.

232. *Id.* at 2.

233. *Id.* There are eight total studies, but one is represented multiple times because it looks at multiple locations where vouchers were used and considers each separately.

234. *Id.* There are nineteen total studies, but three are represented twice each because they examine multiple locations and consider each separately.

235. *Id.*

Teachers' unions often argue against school vouchers on the grounds that they take money away from struggling public schools.<sup>236</sup> On its surface, this argument seems plausible. However, in reality it is overly simplistic and incorrect.<sup>237</sup> First, such concern ignores the immorality of forcing students to remain in failing schools. Second, and more important to addressing the unions' argument, both theoretically and in the real world, school vouchers increase spending on struggling public schools. School vouchers are provided for significantly less than the per pupil cost of attendance at public schools.<sup>238</sup> Since for each voucher one student is being removed from a public school for less than the per pupil expenditures of public schools, the public schools should be left with more money per pupil. In reality, this is exactly what happens. Jurisdictions with school vouchers have seen large increases in per pupil spending.<sup>239</sup> Third, as discussed above, school vouchers are proven to lead to the improvement of competing public schools.<sup>240</sup>

School vouchers offer students in failing schools the educational opportunities denied to them by public schools dominated by the political process. Teachers' unions vigorously oppose school vouchers that threaten their interests. However, the evidence that school vouchers produce positive results, when studies meet basic research standards, is clear. School vouchers allow urban parents to remove their children from inadequate and dangerous schools, improve educational quality, and do so at a lower cost per child than traditional public schools. Adopting a school voucher program, at least for economically disadvantaged families, should be a priority of education reform.

### C. Parent-Trigger Laws

In 2010, California enacted what has been referred to as a "parent-trigger law."<sup>241</sup> This law empowers parents in schools that fail to make "adequate yearly progress" for three years in a row to demand action if they can gather the signatures of at least one-half of the school's parents.<sup>242</sup> When parents with students in these failing schools collect enough signatures, they can force "one of four actions: converting [the current school] to a charter school, replacing the principal and staff, changing the budget, or

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236. See, e.g., Rachel Smolkin, *Bush Puts Different Face on School Voucher Plan*, PITTSBURGH POST-GAZETTE, Jan. 26, 2001, at A10.

237. In reality, this is similar to saying that money spent by the government on Medicare is money being taken away from struggling schools. Money spent on one thing cannot be spent on something else. The real question is the effect that school vouchers have on per pupil expenditures at public schools.

238. See, e.g., Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 178 (2003); Hess, *supra* note 159, at 45 ("[T]he per-pupil funding levels of the voucher programs in Washington, D.C., and Milwaukee amount to less than 50% of district per-pupil spending.").

239. See *supra* notes 222–24 and accompanying text.

240. See *supra* notes 221–23 and accompanying text.

241. Ramsey Cox, 'Parent Trigger' Law's Use in California Draws Attention, *Controversy*, EDUC. WEEK, Jan. 12, 2011, at 4, 4.

242. CAL. EDUC. CODE § 53300 (West Supp. 2011).

closing the school entirely.”<sup>243</sup> Mississippi recently enacted a similar law, and several other states are considering parent-trigger laws.<sup>244</sup>

Parents in Compton, California became the first to utilize the parent-trigger law when they collected signatures from sixty-two percent of the parents of Compton public school students.<sup>245</sup> Parent-trigger laws transfer decision-making power over some educational policies from the general public and school district to parents.<sup>246</sup> It will be interesting to see the results of these laws in Compton and perhaps elsewhere.

#### *D. Overall Conclusion for Empowering Parents*

Reforms that empower parents by allowing them to make additional decisions regarding their children’s education provide an important benefit to urban education reform efforts. They allow individual parents or groups of parents to have an increased role in shaping their children’s education. Decisions made this way remove power over a student’s education from the political process, which tends to disenfranchise the families most in need of assistance. Instead, it transfers decision-making power to parents who are uniquely accountable for and intensely focused on the education opportunities available for their children. In the aggregate, this will lead to better policy decisions.

#### IV. EDUCATION REFORM SHOULD DEREGULATE EMPLOYMENT ISSUES AND RESTRICT THE ABILITY OF COLLECTIVE BARGAINING TO INFRINGE ON THE PREROGATIVES OF LOCAL SCHOOL LEADERS ON EMPLOYMENT DECISIONS

“[T]here are virtually no documented instances of troubled schools being turned around without intervention by a powerful leader.”<sup>247</sup>

– Kenneth Leithwood et al.

Transferring decision-making power to the local level will be difficult work. It requires a systematic repeal of what the teachers’ unions have spent several decades fighting for and is a direct threat to their interests.<sup>248</sup> This is

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243. Cox, *supra* note 241, at 4.

244. *Id.*

245. *Id.*

246. *See id.*

247. KENNETH LEITHWOOD ET AL., THE WALLACE FOUND., HOW LEADERSHIP INFLUENCES STUDENT LEARNING 5 (2004), available at <http://www.wallacefoundation.org/knowledge-center/school-leadership/key-research/Documents/How-Leadership-Influences-Student-Learning.pdf>.

248. The process of changing the dynamic between educational decision-makers is a difficult task. “In New Orleans, a hurricane was required: since Katrina, New Orleans has made more educational progress than any other city, largely because the public-school system was wiped out.” Thomas & Wingert, *supra* note 70, at 26 (further noting that the destruction of the New Orleans school district has allowed several changes including “[u]sing nonunion charter schools, [and by doing so] New Orleans has been able to measure teacher performance in ways that the teachers’ unions have long and bitterly resisted. Under a new Louisiana law, New Orleans can track which [teacher education] schools produce

the dirty work that education reformers often lack the political courage to undertake.<sup>249</sup> It requires extensive, politically perilous deregulation, which state legislatures generally appear unwilling to pursue.

#### A. Teacher Tenure Reform

One of the most important deregulatory efforts that must be undertaken to improve teacher quality is tenure reform. It is critical that we give school administrators the power to remove ineffective teachers from the classroom. Teacher tenure reform efforts have generally sought to achieve at least one of four objectives: “lengthen the probation period for new teachers, strengthen the teacher evaluation process, streamline the teacher dismissal process, or ‘end tenure’ by moving to renewable contracts.”<sup>250</sup>

Lengthening the time requirement for teachers to obtain tenure has the potential to improve teacher quality. It is the nature of the teaching profession that teachers are expected to be less effective early in their career, and their on-the-job experiences as new teachers leads to improvement.<sup>251</sup> Due to the difficulty of firing tenured teachers for ineffectiveness, it is important that those making decisions relating to the tenure of individual teachers have adequate time to determine if a teacher is worthy of being retained. In 2008, thirty-three states granted teachers tenure after just three years of employment.<sup>252</sup> Ten states had either one or two year probationary periods.<sup>253</sup> No state had over a five-year period.<sup>254</sup> Tenure reform should lengthen these probationary periods.

Efforts to strengthen the existing evaluation process by providing meaningful consequences for poor performance have been made very difficult by current state laws.<sup>255</sup> “Only [thirteen] states specify that teachers who have been rated unsatisfactory on multiple evaluations should be eligible for dismissal. Just [twenty-six] states require that teachers who receive even one unsatisfactory evaluation are placed on an improvement plan.”<sup>256</sup> Even these statistics are misleading in regards to just how difficult it is to fire a tenured teacher for ineffectiveness since the courts and review commissions have applied tenure laws in a manner very favorable to teachers.<sup>257</sup> The frequent failure to evaluate teacher effectiveness hinders attempts to reform teacher tenure.<sup>258</sup> However, this difficulty is increasingly being overcome

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the best teachers, forcing long-needed changes in [education]-school curricula.”).

249. See Hess, *supra* note 159, at 39.

250. MCGUINN, TENURE REFORM, *supra* note 108, at 1.

251. See Weisberg et al., *supra* note 135, at 15–16.

252. NAT’L COUNCIL ON TEACHER QUALITY, *supra* note 123, at 71.

253. *Id.*

254. *Id.*

255. *Id.* at 4.

256. *Id.*

257. See *supra* notes 112–15, 126–27 and accompanying text.

258. MCGUINN, TENURE REFORM, *supra* note 108, at 10.

by “[t]he establishment of annual systematic student testing and data collection systems at the school, district, and state levels.”<sup>259</sup>

Streamlining the termination process for ineffective teachers is a critically important factor for improving schools’ ability to fire ineffective teachers. The time required to see a termination to its final conclusion will affect the costs and logistics of terminations. Reform efforts should seek to reduce the costs of litigating teacher dismissals and reduce the time and circumstances under which school districts must pay salaries to teachers who are dismissed but still have appeal rights.

There appears to be an increased willingness among politicians to eliminate teacher tenure protections altogether. Although such steps are rare, in March 2011, Idaho Governor Butch Otter signed a law that phases out tenure.<sup>260</sup> Several other governors, including those in Florida, Indiana, Nevada and New Jersey, “have called for the elimination or dismantling of tenure.”<sup>261</sup>

A relatively prominent example of the difference eliminating tenure protections can make is the Bruce Randolph School, the first Colorado school to become the Colorado equivalent of a charter school.<sup>262</sup> President Obama praised the school in his 2011 State of the Union Address by saying, “Three years ago, it was rated one of the worst schools in Colorado—located on turf between two rival gangs. But last May, [ninety-seven] percent of the seniors received their diploma.”<sup>263</sup> Notably absent from the President’s remarks was how the Bruce Randolph School achieved this dramatic turnaround. After being “granted autonomy from district and union rules,” the school administration forced each teacher “to reapply for his or her job”—after this process, only six teachers remained.<sup>264</sup> The school was able to selectively hire teachers that share the principal’s vision for the school.<sup>265</sup>

At the very least, tenure reform should establish a probationary period to allow school leaders an appropriate opportunity to evaluate teachers’ development before granting them such a significant protection. It should also simplify the process of terminating an ineffective teacher. Reforms should address the cost and time associated with dismissals so that school leaders view terminating ineffective teachers as a reasonable option. Another major problem that needs to be addressed by tenure reform is that teacher evaluation systems fail to identify the teachers who should be removed from

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259. *Id.* at 2.

260. *Otter Signs Pair of Measures Aimed at Education Reform*, LEWISTON MORNING TRIB. (Idaho), Mar. 18, 2011.

261. Trip Gabriel & Sam Dillon, *G.O.P. Governors Take Aim at Teacher Tenure*, N.Y. TIMES, Feb. 1, 2011, at A1.

262. Elder, *supra* note 72, at 430.

263. National Journal Staff, *EXCLUSIVE: Obama to Declare ‘The Rules Have Changed’*, NAT’L J., Jan. 25, 2011.

264. Deb Stanley, *Denver School Praised in President’s Speech: Bruce Randolph School Operates Independently from District*, THE DENVER CHANNEL Jan. 26, 2011, <http://www.thedenverchannel.com/news/26623356/detail.html>.

265. *Id.*

the classroom.<sup>266</sup> As a possible trade-off for weakening the protection of tenure, states may want to look towards requiring objective evidence to fire a teacher for ineffectiveness, such as value-added data. For example, a state could remove tenure protections, but legislate that, in making a decision whether to fire a teacher for incompetence, there is a strong presumption that every teacher is competent unless value-added data shows him or her to be in a specified low-performing percentile of teachers for a specified number of consecutive years.

### *B. Use of Value-Added Teacher Evaluations*

Regardless of whether tenure reforms are enacted, schools will benefit from high quality and objective methods of evaluating teachers' effectiveness. In regards to firing ineffective tenured teachers, objective evidence of ineffectiveness will help ensure that the principal is correctly identifying teachers that the school would be better without. Further, objective data is likely to improve the chances that a review commission will uphold the termination. Additionally, objective methods of evaluation will help provide feedback on which teachers and teaching strategies are effective so that schools can model improvements based on proven success.

There are different ways to calculate the value teachers add to their students' education, but, in general, a "value-added" assessment of teacher effectiveness measures student progress from the beginning of the school year to the end of the school year.<sup>267</sup> Additional adjustments can then be made as appropriate, and then teachers can be compared based on how much progress their students make in one school year.<sup>268</sup>

The use of value-added data not only would benefit school administrators in making staffing decisions, but would also benefit teachers. Teachers receive little meaningful feedback on their teaching, and for urban teachers, much of what they see is that their students are performing well below grade level.<sup>269</sup> Value-added data would provide teachers of high-need students with meaningful feedback on their effectiveness, as opposed to current indicators (state and national tests) that show students' overall education to that point is inadequate.<sup>270</sup>

Critics of value-added data express concern over the accuracy of the data.<sup>271</sup> A responsible value-added analysis makes use of confidence intervals and does not judge a teacher based on a single year's results.<sup>272</sup> Value-added

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266. MCGUINN, TENURE REFORM, *supra* note 108, at 5–6, 10.

267. GLAZERMAN ET AL., *supra* note 143, at 2.

268. *Id.*

269. *See* Abbott v. Burke, 575 A.2d 359, 400 (N.J. 1990).

270. *See* GLAZERMAN ET AL., *supra* note 143, at 4.

271. *Id.* at 6.

272. *Id.* at 5. Even when based on the ability of results from a single year to predict the next year's results, value-added data is accurate enough that schools would benefit from using it. *See* Ripley, *supra* note 146. The correlation of one year's results for teachers to the next is similar to the predictive value of the current "volume of home sales for realtors; returns on investment funds; productivity of field-service

data is not perfect, but using that data rather than ignoring it will lead to better decision-making.

Additionally, criticisms regarding the imperfection of value-added data ignore the fact that any evaluation procedure is subject to errors.<sup>273</sup> Further, this concern “affects [only] the interests of individual teachers” while not adequately accounting for the interests of the students.<sup>274</sup> Opposition to the use of value-added data on the grounds that it is imperfect places the emphasis on incorrect determinations that a teacher is ineffective, as opposed to our current system, which is biased towards incorrect determinations that a teacher is performing adequately.<sup>275</sup> Since no standard for determining teacher effectiveness can be perfect, the concern over firing effective teachers will necessarily conflict with the concern of retaining ineffective teachers.<sup>276</sup> This leads to a direct conflict between the best interests of the students (favoring the removal of ineffective teachers) and the best interests of teachers (protecting teachers against being falsely identified as ineffective).<sup>277</sup> While both sides have a valid concern and value-added classifications must be made as accurate as possible, public education exists for the benefit of the students, and conflicting interests should be resolved in their favor.

### *C. Restrict the Scope of Collective Bargaining*

In regards to the restrictions placed on a school’s leadership through collective bargaining, the solution is straightforward. Once a topic is deemed to be a matter best left to the unilateral discretion of school leadership, the state legislature should rewrite its state’s collective bargaining statute to prohibit bargaining on that topic.<sup>278</sup> Additionally, the state legislature should write the statute in a manner that avoids the potential of a court forcing negotiation over the “effects” of the topic sought to be made prohibited.<sup>279</sup>

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personnel for utility companies; output of sewing machine operators; and baseball batting averages[.]” and we use these criteria to make important decisions. GLAZERMAN ET AL., *supra* note 143, at 8.

273. See GLAZERMAN ET AL., *supra* note 143, at 5.

274. *Id.*

275. *Id.* at 6.

276. See *id.*

277. *Id.*

278. See *supra* note 56 for an example of how Oregon has done this.

279. See *supra* notes 60–61 and accompanying text.

V. EDUCATION REFORM SHOULD REDUCE THE NUMBER OF TEACHERS  
EMPLOYED AND STRUCTURE TEACHER COMPENSATION IN A MANNER  
THAT WILL DRAW MORE HIGHLY SUCCESSFUL COLLEGE GRADUATES  
INTO THE TEACHING PROFESSION

“[C]lass size is a factor in learning . . . . [B]ut the impact is minimal compared with making the instructor more effective. ‘A great teacher can teach 60 . . . . A poor teacher will struggle with five.’”<sup>280</sup>

– Jay Matthews, *Washington Post*

In 2007, McKinsey & Company completed a study that examined what makes the countries with the best performing school systems successful.<sup>281</sup> The top-performing systems they studied recruited their teachers from the top-third of college students.<sup>282</sup> All of these top-performing systems, except one, paid salaries that were above average for OECD nations when adjusted for GDP.<sup>283</sup> An approach taken by England, Australia, New Zealand, Finland, and the Netherlands is to pay teachers more at the beginning of their careers and provide more modest increases for years of service.<sup>284</sup> This attracts stronger applicants to the profession. Additionally, this approach makes sense because “teacher retention is generally not correlated strongly to salary progression,” and it is the less committed teachers who will leave the profession.<sup>285</sup>

There is a common understanding that great teachers can significantly improve the education of even the most disadvantaged students.<sup>286</sup> However, our current educational policy is not well structured towards achieving this goal. Policies that seek to reduce class size and teacher workload create more demand for teachers to be hired. This leads to the need to hire progressively lower quality teaching candidates to meet this increased demand. At the same time, the hiring practices and working conditions at urban schools result in many of the strongest teaching candidates avoiding working in these schools that most need their services. The combination of these realities results in the quality of teachers at urban schools being diminished.

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280. Matthews, *supra* note 84 (quoting Rafe Esquith, Elementary School Teacher, Los Angeles, California).

281. MCKINSEY & COMPANY, *supra* note 18.

282. *Id.* at 16. (“The top-performing systems we studied recruit their teachers from the top third of each cohort graduate from their school system: the top 5 percent in South Korea, the top 10 percent in Finland, and the top 30 percent in Singapore and Hong Kong. In the United States, programs in rapidly improving systems, such as the Boston Teacher Residency, the New York Teaching Fellows, and the Chicago Teaching Fellows do the same thing, targeting the graduates of top universities.”).

283. *Id.* at 20.

284. *Id.* at 21.

285. *Id.*

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

The solution is simple, but runs counter to the prevailing wisdom of many involved in education and the best interests of the teachers' unions. We should increase class sizes, increase the number of hours per day that teachers are in front of a classroom, and lengthen the school year. These reforms would mean that fewer teachers would need to be hired to provide the same hours of education per year for each student. This would allow schools to pay the teachers they do hire significantly more while keeping costs static. The result would be an improved pool of teaching applicants and, at the same time, it would allow schools to be more selective from this improved pool of candidates.

Having fewer teachers who are individually of higher quality is especially appealing considering the research discussed previously showing a strong correlation between student achievement and successive high-quality teachers. Reform bringing more exceptional teachers to a school while decreasing the number of teachers would ensure that more students are taught by exceptional teachers for successive years.

For example, assume a teacher currently is in front of a classroom for 4 hours per day,<sup>287</sup> 180 days per year (36 weeks not including weekends),<sup>288</sup> and that each class has 20 students.<sup>289</sup> Under such a system, this teacher would provide 14,400 hours of education to students over the course of a school year. Also, assume that this teacher is paid \$55,000 per year, slightly below the average claimed by the NEA.<sup>290</sup>

If we increase those numbers to 5 hours per day, 214 days per year (less than 43 weeks without weekends), and 27 students per class, then we would more than double the number of hours of education for students that each teacher provides. Half as many teachers would be needed and the average teacher could be paid \$110,000 while keeping staffing costs static. This increase in salary while maintaining nine weeks of vacation per year would greatly increase the quality of applicants while allowing the school district to be very selective in which candidates it hires. This does not even account for the increase in teacher salary that could be achieved in conjunction with cutting the size of the education bureaucracy.<sup>291</sup>

There are incidental costs associated with both larger or smaller class sizes that would need to be accounted for. If the school year were lengthened, costs for electricity and non-teaching staff would likely also increase to accommodate the additional school days. However, small class

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287. Four hours spent in front of a classroom per day will be low compared to some schools and slightly higher than other schools. See Malin, *supra* note 100, at 1381 (noting that the New York City teacher contract limits teaching to 3.75 hours per day).

288. EDUC. COMM'N OF THE STATES, *supra* note 99, at 1.

289. See, e.g., FLA. STAT. § 1003.03(1)(a)-(c) (2009) (limiting class size of core curriculum courses to 18 in grades K-3, 22 in grades 4-8, and 25 in grades 9-12); TEX. EDUC. CODE ANN. § 25.112 (West 2011) (limiting class size in grades K-4 to twenty-two students).

290. NAT'L EDUC. ASS'N, RANKINGS & ESTIMATES: RANKINGS OF THE STATES 2009 AND ESTIMATES OF SCHOOL STATISTICS 2010 xi (2009), available at [http://www.nea.org/assets/docs/010\\_rankings.pdf](http://www.nea.org/assets/docs/010_rankings.pdf).

291. See *infra* notes 294-296 and accompanying text.

sizes require more classrooms be built, which would likely increase construction costs and may increase electricity and janitorial expenses due to the additional classrooms that would need to be maintained. Extending the school year would have at least one additional major societal benefit. “[T]wo-thirds of American children live with two working parents or with a single working parent.”<sup>292</sup> This places a substantial burden on many families to provide for summer care.<sup>293</sup> Extending the school year would relieve some of this summer care burden. Assessing the collateral consequences of changes to class size, teacher workload, and school year would be important to determining the salary adjustment that could be afforded while maintaining static costs.

Additionally, cuts to an out-of-control educational bureaucracy should be considered to help maximize teacher salaries. For example, in Los Angeles between 2001 and 2007, student enrollment decreased by six percent and the district cut 500 teaching positions.<sup>294</sup> Nonetheless, during this time, the district’s bureaucracy grew by nearly twenty percent.<sup>295</sup> The same concern is present in New York State, where from 1997 to 2011 student enrollment decreased by over four percent, but the educational bureaucracy grew by thirty-four percent.<sup>296</sup> Reducing the size of the educational bureaucracy should be a priority in any effort to increase teacher salaries.

Another approach is to combine these reforms with a merit pay system. For example, we could cut the base pay for these teachers to an average of \$85,000 and pay fifty percent of the teachers an additional \$50,000 in bonus pay based on their students’ performance. The result would be the highest performing teachers being paid \$135,000, with the remainder of teachers being paid \$85,000. Alternatively, this system could be structured to give increasing levels of merit pay relative to student performance. Such an approach requires that at least two issues be considered. First, administrators should consider how it would affect their applicant pools. This includes what type of teaching candidates they should seek to attract to the teaching profession. Second, administrators should consider how merit pay would affect the behavior of employed teachers—notably, whether such an approach would encourage teachers to work harder, or lead to teachers failing to work together, or both.

Another good approach would be to make the same changes, but pay the teacher \$80,000 and also place a teacher’s assistant that receives \$30,000 with every teacher. This would be a pay raise for the median teach-

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292. FREDERICK M. HESS, *THE SAME THING OVER AND OVER: HOW SCHOOL REFORMERS GET STUCK IN YESTERDAY’S IDEAS* 187 (2010).

293. *Id.*

294. *Top-Heavy District; Even as Enrollment in LAUSD Has Dropped and Teaching Positions Have Been Cut, the Ranks of Highly Paid Managers Have Ballooned Beyond What is Needed to Operate the Nation’s Second-Largest School System.; Administration Swells 20% from 2001 to 2007*, L.A. DAILY NEWS, Sept. 28, 2008, at A1.

295. *Id.*

296. Brendan Scott, *Supervisor Bloat Hikes Overhead of the Class*, N.Y. POST, Apr. 4, 2011, at 2.

er's assistant.<sup>297</sup> This approach would mean that class size only increases by seven students, but there are two trained adults in the class to help students.

Yet another approach would be to use technology to deliver a portion of each student's daily education. Assume the same changes as the initial example for the length of the school year (214 days) and number of hours teachers spend in front of a classroom (5 hours per day). Then, if an additional hour of instruction per day was provided through distance learning, computer led instruction, or another approach not requiring a teacher, the average class size could be reduced to twenty-three students and teachers salaries could be raised to just over \$112,000.

There are situations where it might not make sense to increase classroom size. Special education classes, classrooms with young students (beginning readers), and recently hired teachers may require smaller classes. Giving schools the ability to structure their own affairs would let them tailor their employment decisions and workloads according to their needs.

If a school assesses its need and ability to recruit effective teachers and determines that it would benefit from smaller class sizes, it should do this. Assuming the school started with teachers being in front of a classroom of 20 students for 4 hours per day for 180 days per year, an increase to 5.5 hours per day for 214 days per year would allow the class size to be decreased to 15 students, and the average teacher salary could be raised to over \$67,000 (from \$55,000). The important legislative goal should be giving schools control over how they structure their own affairs.

Additionally, a reform such as this, even if adopted in just one location, has a better chance than most reform efforts to subsequently be adopted by other locations. This is because it still affects one of the aspects of education that is market driven. Teachers have the ability to offer their services to any school district they would like, assuming they are certified in that state. Other school districts would not only see the success of a school district implementing such a reform, they would be affected by the reform since they would not be able to compete with the significantly higher paying school district for the best teaching candidates. If these districts fail to make similar reforms, they will be unable to compete in this market for the services of the best teachers.

While unions have opposed reforms that would decrease the demand for teachers, such as larger class sizes, it should not be assumed that teachers agree with their unions. A recent study funded by the Gates Foundation showed that eighty-three percent of teachers would favor teaching more students for higher pay.<sup>298</sup>

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297. The median annual pay for a teacher's aide is just over \$20,000 per year. *Teacher Aide – U.S. National Averages*, SALARY.COM, <http://www1.salary.com/Teacher-Aide-salary.html> (last visited Oct. 16, 2011).

298. Bill Gates, Editorial, *Smarter School Reform*, WASH. POST, Feb. 28, 2011, at A15.

## CONCLUSION

“It is time for us to work together, just like Jeb [Bush] and I are doing—coming from different parties, but we came together not as Democrats and Republicans but as Americans.”<sup>299</sup>

– President Barack Obama

Now is an ideal time for education reform. An increasing number of state governors and big-city mayors have shown a willingness to adopt ideas such as those discussed in this Note.<sup>300</sup> While President Obama has focused many liberals and other Americans on the need for aggressive education reform, the very public battles between New Jersey’s Governor Chris Christie and teachers’ unions have focused many conservatives on education reform. Additionally, prominent documentaries such as *Waiting for Superman* have increased attention across America.<sup>301</sup>

Liberals and conservatives who support reforms similar to those outlined in this paper are doomed to fail unless they present a unified approach. Even in states with solid majorities for one political party, it is unlikely that the party in power will be able to pass meaningful education reform. As a party, the Democrats have become dependent on unions, while Republicans do not get a significant number of votes from urban areas and have little political motivation to focus their efforts there.

A coalition of conservatives and liberals is especially feasible between conservative governors and liberal mayors of urban cities. Governors are responsible for an entire state, as opposed to legislators that are just responsible for their district. A conservative governor is more likely than a conservative legislature to see urban schools as his or her responsibility. Liberal mayors of large urban cities are better able to politically overcome union resistance because their constituents see first-hand just how bad the schools are, and there are enough voters with other interests to overcome the unions’ political power. An actual example of such a political alliance is New Jersey Governor Chris Christie (Republican) working closely with Newark Mayor Cory Booker (Democrat) to reform the Newark city schools.<sup>302</sup> This alliance has formed despite the speculation that they might be rivals in the 2013 New Jersey governor’s election.<sup>303</sup>

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299. Abby Phillip, *At Miami School, Barack Obama Praises Jeb Bush*, POLITICO (Mar. 4, 2011, 6:11 PM), <http://www.politico.com/news/stories/0311/50695.html>.

300. See *supra* note 154 and accompanying text.

301. See *supra* note 45 and accompanying text.

302. See Richard Perez-Pena, *Despite It All, A Governor and a Mayor in Harmony*, N.Y. TIMES, Oct. 2, 2010, at A13 (“Mr. Christie, the blunt-spoken suburban white Republican, and Mr. Booker, the Scripture-quoting urban black Democrat long rumored to want [Christie’s] job, have become the state’s political odd couple. They talk to or text each other perhaps a dozen times a week, and they go out of their way to praise each other publicly.”).

303. See *id.*

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There is the potential for meaningful education reform to be enacted over the next few years. It is important both that those drafting the reforms be honest about the negative impact teachers' unions have on urban education and that their reforms address this reality.

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