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## *Articles*

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### Public Sector Collective Bargaining, Majoritarianism, and Reform

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#### ABSTRACT

This Article explores the majoritarian implications of collective bargaining for public employees, focusing in particular on teachers. To critics, collective bargaining supplants the ordinary legislative and administrative processes for determining public policy such as the length of the school day, teacher personnel policies, class size, and many other topics. Critics argue that bargaining thus allows teacher unions to exert disproportionate control on these issues at the expense of the broader public.

This Article first questions this critique of public sector collective bargaining. A robust system of collective bargaining need not empower unions to override the preferences of the public. Local legislatures must approve and fund labor agreements, and state laws have long defined a broad class of topics as “permissive” for bargaining, meaning that the parties can bargain on the topics only if both consent. Although governments and unions often bargain over permissive topics, the designation gives the government wide latitude to cease bargaining when mutually beneficial compromise appears unlikely, thereby shifting policy questions into the normal political process.

Yet, rather than embracing the permissive designation, bargaining critics have promoted rules that prohibit bargaining over many topics. Legislators in Wisconsin, Ohio, Indiana, Tennessee, and Idaho have recently adopted this approach. But these efforts badly miss the mark.

The real question for reformers is not how to limit unions' involvement in policymaking but rather how to ensure that *government officials* use their power to advance the wishes of the public.

In light of this new assessment of public sector bargaining, this Article suggests a different approach to bargaining rules. The proposal makes broad use of the permissive distinction while involving local legislatures more directly in bargaining. The proposal is more majoritarian—and more supportive of teachers' labor rights—than the bargaining prohibitions currently in vogue.

#### INTRODUCTION

Today, the public school system is often a battleground in which education reformers and labor advocates find themselves in opposition.<sup>1</sup> To be sure, both camps seem to share an understanding that American schools are not educating students nearly well enough. This problem has been documented most extensively in American cities. Of eighth graders in urban schools, approximately three of four do not perform at grade level in mathematics, and three of four do not perform at grade level in reading.<sup>2</sup> In the fifty largest American cities,

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<sup>1</sup> Recent skirmishes have taken place in Chicago, where teachers went on strike during contentious contract negotiations focusing in part on proposed changes to performance evaluations, see, e.g., Steven Greenhouse, *In Standoff, Latest Sign of Unions Under Siege*, N.Y. TIMES (Sept. 10, 2012), [http://www.nytimes.com/2012/09/11/education/in-chicago-teachers-strike-signs-of-unions-under-siege.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/11/education/in-chicago-teachers-strike-signs-of-unions-under-siege.html?pagewanted=all&_r=0); in Idaho, Ohio, Tennessee, and Indiana, where legislatures limited collective bargaining for teachers in the name of education reform, only to have those limits reversed by referenda in two of the four states, see *infra* notes 87–95 and accompanying text; and in the numerous states that have reduced pensions for teachers and other public employees, see Steven Greenhouse, *States Want More in Pension Contributions*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/business/16pension.html?pagewanted=all>.

<sup>2</sup> According to the 2011 National Assessment of Educational Progress, twenty-three percent of eighth grade students in large cities were at least proficient in reading and twenty-six percent were at least proficient in mathematics. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2012-455, THE NATION'S REPORT CARD: TRIAL URBAN DIST. ASSESSMENT READING 2011, at 35 (2011), *available at* <http://nces.ed.gov/nationsreportcard/pdf/dst2011/2012455.pdf>; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2012-452, THE NATION'S REPORT CARD: TRIAL URBAN DISTRICT ASSESSMENT MATHEMATICS 2011, at 30 (2011), *available at* <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2012452>. The National Assessment of Education Progress has often been called the “gold standard” of American achievement testing. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 226 (2003).

only half of students complete high school.<sup>3</sup> And although commentators continue to debate the chicken and egg dilemma of poverty and ineffective schools,<sup>4</sup> it is nevertheless clear that the inadequacies of American public education contribute to a wide range of social problems.

The common ground ends, however, when education reformers charge that teacher unions are a key part of the problem. Reformers note that collective bargaining agreements between school districts and teachers (often called “teacher contracts”) govern the operations of American public schools in many respects.<sup>5</sup> Naturally, in states that require collective bargaining for public employees, teacher contracts determine salaries, fringe benefits, grievance procedures, and other terms central to teachers’ employment. But reformers correctly observe that in many cases, contracts go further. For instance, class size is a typical subject of bargaining in the twenty-six states that do not have state laws that take precedence on the topic.<sup>6</sup> Contracts often set the length of the school day and year<sup>7</sup> and establish seniority-

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<sup>3</sup> CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., CLOSING THE GRADUATION GAP: EDUCATIONAL AND ECONOMIC CONDITIONS IN AMERICA’S LARGEST CITIES 13–14 (2009). Swanson’s analysis is based on data collected by the U.S. Department of Education for the 2004–2005 school year. *Id.* at 10–11. The highest graduation rate among the fifty largest cities was 76.6% in Mesa, Arizona; the lowest was 30.5% in Indianapolis, Indiana. *Id.* at 14.

<sup>4</sup> See, e.g., Richard Whitmire, Op-Ed., *Poverty Not All to Blame for Lousy School Outcomes*, USA TODAY (July 15, 2012, 6:00 PM), <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-07-15/poverty-schools-education-fail/56240702/1> (arguing that good teaching can overcome, at least in part, the difficulties in educating poor children).

<sup>5</sup> See, e.g., FREDERICK M. HESS & MARTIN R. WEST, A BETTER BARGAIN: OVERHAULING TEACHER COLLECTIVE BARGAINING FOR THE 21ST CENTURY 9 (2006) (“[T]eacher collective bargaining agreements shape nearly everything public schools do.”). It is indisputable that teacher contracts often include terms on a wide range of topics relevant to many aspects of school operations. Still, there are several reasons to think that statements like Hess and West’s are slightly overstated. First, even when teacher contracts include terms on a topic, these terms may be sufficiently ambiguous to give district and school leaders significant discretion. See Frederick M. Hess & Andrew P. Kelly, *Scapegoat, Albatross, or What?: The Status Quo in Teacher Collective Bargaining*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY’S SCHOOLS 53, 79–85 (Jane Hannaway & Andrew Rotherham eds., 2006). Second, state law sometimes sets policy on topics commonly believed to be determined by teacher contracts, such as teacher tenure. EMILY COHEN ET AL., NAT’L COUNCIL ON TEACHER QUALITY, INVISIBLE INK IN COLLECTIVE BARGAINING: WHY KEY ISSUES ARE NOT ADDRESSED 1 (2008). Third, several states do not permit school districts to bargain collectively with teachers’ unions at all. See *infra* note 40.

<sup>6</sup> COHEN ET AL., *supra* note 5, at 9–10.

<sup>7</sup> See, e.g., Hess & Kelly, *supra* note 5, at 82 (finding that the length of the school day was included in collective bargaining agreements in sixteen of twenty randomly selected school districts).

based systems for the assignment, transfer, and layoff of teachers.<sup>8</sup> Reformers consider each of these topics a key variable in improving American public schools, and they persuasively argue that the terms embodied in collective bargaining agreements often impede reform.<sup>9</sup>

Reformers have therefore claimed that the collective bargaining process is an obstacle to improving schools<sup>10</sup> and have proposed limitations on that process.<sup>11</sup> In recent years, those proposals have gained support from a broader movement criticizing public sector collective bargaining as unduly expensive in a time of budget shortfalls.<sup>12</sup> The combined efforts of education reformers and fiscal hawks have led to several state laws limiting collective bargaining for all public employees or for teachers specifically.<sup>13</sup> These states have

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<sup>8</sup> See, e.g., *id.* (finding that policy on transfers was included in collective bargaining agreements in fourteen of twenty randomly selected school districts). For more on agreements related to staff deployment, see *infra* Part IV.B.

<sup>9</sup> See CYNTHIA G. BROWN ET AL., CTR. FOR AM. PROGRESS, GETTING SMARTER, BECOMING FAIRER: A PROGRESSIVE EDUCATION AGENDA FOR A STRONGER NATION, at viii, 15–16 (2005) (issuing, as the top recommendation for improving American public schools, the adoption of a longer school day); Bill Gates, *How Teacher Development Could Revolutionize Our Schools*, WASH. POST (Feb. 28, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/27/AR2011022702876.html> (arguing that class size should be increased, with the savings put towards higher teacher salaries); Joel Klein & Michelle Rhee, ‘Last In, First Out’ is an Outrage: Firing Less Senior Teachers Hurts Schoolkids, N.Y. DAILY NEWS: OPINION (Jan. 26, 2011, 4:00 AM), <http://www.nydailynews.com/opinion/outrage-firing-senior-teachers-hurts-schoolkids-klein-rhee-article-1.155235> (arguing that the selection of teachers laid off should not be based on seniority).

<sup>10</sup> HESS & WEST, *supra* note 5, at 2 (“[Collective bargaining] agreements are a critical part of the problem, and the solution, to the educational challenges we now face.”). It is extraordinarily difficult to assess empirically the hypothesis that collective bargaining leads to decreased student achievement. See Susan Moore Johnson & Morgaen L. Donaldson, *The Effects of Collective Bargaining on Teacher Quality*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY’S SCHOOLS 111, 112–14, 138 (Jane Hannaway & Andrew Rotherham eds., 2006) (cataloguing problems with ascertaining the effect of collective bargaining on teacher quality and concluding that “[n]o consistent evidence shows that the quality of the teaching force has either improved or diminished as a result of collective bargaining”); Benjamin A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence from a New Mexico Natural Experiment*, 120 YALE L.J. 1130, 1144–49 (2011) (describing statistical difficulties in studies on the question). Pioneering a new empirical method, Lindy arrived at the confounding conclusion that bargaining leads to an increase in one metric of academic achievement, SAT scores, and a decrease in another, graduation rates. *Id.* at 1169.

<sup>11</sup> Such proposals specific to teachers were adopted in Tennessee and Indiana. Other states enacted similar statutes affecting all state and local government employees. See *infra* Part I.C.

<sup>12</sup> See *infra* Part I.C.

<sup>13</sup> For example, supporters hailed Wisconsin’s 2011 bargaining law as beneficial for both fiscal responsibility and education reform. E.g., Kimberley A. Strassel, *Scott*

acted by, among other approaches, classifying a wide range of topics as off limits for collective bargaining between local governments and unions. Most prominently, Wisconsin enacted a law that prohibited bargaining on all topics other than base wages for most public employees,<sup>14</sup> while other states enacted somewhat more limited measures.<sup>15</sup>

Some observers have credibly argued that certain recent efforts to restrict bargaining are about “raw power”—that is, crippling unions.<sup>16</sup> But this Article examines criticisms of public sector bargaining, on their face, as sincere expressions of concern about the implications of allowing policy to be set through bargaining. A range of critics—both past and present, in both academia and elsewhere—have claimed that public sector collective bargaining, unless limited, is inconsistent with majoritarian<sup>17</sup> values.<sup>18</sup> In critics’ view, bargaining supplants the

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*Walker’s Education Victory*, WALL ST. J. (June 7, 2012, 7:11 PM), <http://online.wsj.com/article/SB10001424052702303753904577452862561051838.html>. For a full description of recent bargaining restrictions, see *infra* Section I.C.

<sup>14</sup> See WIS. STAT. ANN. § 111.91(3) (West, Westlaw through 2011 Act 286). Even with respect to base wages, certain wage increases are barred absent authorization through a statewide referendum. § 111.91(3)(b) (Westlaw).

<sup>15</sup> See discussion of recent laws in Indiana, Ohio, Tennessee, and Idaho *infra* Part I.C.

<sup>16</sup> James J. Brudney, *Ohio Senate Bill 5, and Why We Need Collective Bargaining*, ACSBLOG (Apr. 13, 2011), <http://www.acslaw.org/acsblog/ohio-senate-bill-5-and-why-we-need-collective-bargaining>. Two federal judges have raised questions about the motives behind the Wisconsin legislation. *Wisc. Educ. Ass’n Council v. Walker*, 824 F. Supp. 2d 856, 867 (W.D. Wis. 2012) (“[The Court] cannot wholly discount evidence that the line-drawing between public safety employees and general employees was influenced (or perhaps even dictated) by whether the unions representing these employees supported Governor Walker’s gubernatorial campaign.”); *Wisc. Educ. Ass’n Council v. Walker*, Nos. 12-1854, 12-2011, & 12-2058, at 43, 73 n.10 (7th Cir. 2013) (Hamilton, J., concurring in part, dissenting in part) (concluding that Wisconsin’s justifications for portions of its collective bargaining bill were “flimsy” and seemingly unconnected from the purported goal of cost saving).

<sup>17</sup> This Article adopts the following definition of majoritarianism: a policymaking process is majoritarian if it leads to policy consistent with that which would be chosen by a referendum of citizens picking between policy alternatives.

<sup>18</sup> See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1374 (2009) (“The view that public employee collective bargaining is antidemocratic plays a major role in jurisdictions that prohibit such bargaining” and “is not confined to opponents of collective representation of public employees.”). For examples of courts and scholars who have expressed such concerns, see *Fellows v. LaTronica*, 377 P.2d 547, 550 (Colo. 1962) (concluding that public sector collective bargaining threatened to “tak[e] away from a municipality its legislative power to control its employees and vest such control in an unelected and uncontrolled private organization (a union)”); TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 174–214 (Brookings Inst. 2011) (arguing that collective bargaining allows teachers unions to force inflexible and harmful policies through teacher contracts); William L. Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look Via a*

ordinary legislative and administrative processes for creating policy, replacing those systems with a closed process in which teachers, as represented by their unions, have disproportionate influence compared to the general public.<sup>19</sup> Therefore, critics claim bargaining leads to policy outcomes inconsistent with public preferences.<sup>20</sup> This Article refers to this argument as the “majoritarian critique” of public sector collective bargaining.

This Article questions the majoritarian critique. Even in a robust system of bargaining, the government retains the power to ensure that preferences of unions do not overwhelm those of the public on matters of public policy. Local legislatures must approve and fund labor agreements, and state laws have long defined a broad class of topics as “permissive” for bargaining, meaning that the parties can bargain on the topics only if both consent. Although governments and unions often bargain over permissive topics, the designation allows the parties to cease bargaining when a mutually beneficial compromise appears unlikely, thereby leaving policy questions to be resolved in the normal political process. For these reasons and others, bargaining prohibitions like those adopted in Wisconsin are deeply misguided. But while the bargaining process does not empower unions to force their preferences on the public, public sector collective bargaining, as it is currently practiced, is susceptible to a different criticism—that government negotiators may fail to act as faithful agents of the public. To the extent that collective bargaining agreements conflict with public preferences, then, the situation is akin to an airplane crash attributable to human error rather than system defect, a diagnosis that calls for distinct preventative measures. This Article concludes that majoritarian aims are best served by a broad scope of bargaining in which few topics are prohibited, coupled with reforms that encourage local elected officials to play a central role in overseeing negotiations.

This Article analyzes public sector collective bargaining through the lens of collective bargaining for one particular group of employees: teachers. Public schools provide an ideal case study in collective bargaining and majoritarianism because teachers work in a

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*Balancing Formula*, 40 MONT. L. REV. 231, 258–64 (1979) (arguing that public sector collective bargaining deprives the public of its ability to participate in policies decisions and should be limited). Each of these critiques is discussed in more detail in Part I below.

<sup>19</sup> See, e.g., MOE, *supra* note 18, at 175–79 (arguing that the collective bargaining process is heavily biased towards producing policy favoring union interests).

<sup>20</sup> *Id.*

field laced with intense policy debates, ranging from the proper use of standardized testing to curriculum to the role of teacher seniority, with nearly every education policy debate affected by collective bargaining agreements. Not coincidentally, national teacher unions, more than any other American union, face vociferous criticism for standing in the way of policy change.<sup>21</sup>

Part I provides a historical context for recent criticisms of public sector collective bargaining. This Article argues that a common intellectual foundation links the earliest criticisms of bargaining, starting in early 1900s, to the most recent. Namely, scholars and policymakers have long worried that bargaining gives too much power to unions to shape policy to their own preferences rather than the public's. In response to these majoritarian concerns, critics have long sought to narrow the scope of bargaining by prohibiting bargaining over some or all topics.

In Part II, this Article rebuts this majoritarian critique. This Article argues that the structure of the bargaining process does not give unions disproportionate power to shape policy, especially in a system in which many topics are classified as permissive for bargaining, giving the government the ability to cease bargaining on those topics when compromise appears unlikely. Meanwhile, bargaining prohibitions may only serve to shift policymaking decisions into legislative and administrative processes that suffer from all of the same flaws that critics attribute to collective bargaining, such as special interest group influence and lack of transparency.

In Part III, this Article argues for a new perspective in analyzing public sector bargaining systems, asking not whether bargaining gives too much power to unions, but rather whether local government officials advance the wishes of the public through their own role in bargaining. This Article concludes that school boards may fail to closely oversee the bargaining process, giving extensive discretion to the government officials directly involved in negotiations. This government negotiating team generally consists of school district administrators, often led by an appointed superintendent. The negotiating team, however, may not have the right incentives or dispositions to advance public preferences through collective bargaining.

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<sup>21</sup> See, e.g., Joe Klein, *Why We're Failing Our Schools*, TIME (Jan. 28, 2010), <http://www.time.com/time/magazine/article/0,9171,1957470,00.html> (“[Teachers’] unions, and their minions in the Democratic Party, have been a reactionary force in education reform for too long.”).



Finally, in Part IV, this Article proposes a reform to the bargaining process that, without prohibiting bargaining on any topic, would help ensure that government negotiators use their power effectively. The proposal would employ a broad scope of bargaining while involving local legislatures more directly in bargaining. The broad scope of bargaining would allow wide latitude for the parties to make trades that serve the preferences of both the public and unions, while local legislators would be tasked with publicly deciding whether to continue bargaining on each permissive topic. Contrasting this reform with prohibitions on bargaining, this Article shows that the proposal is preferable from the standpoint of both majoritarianism and teachers' labor rights. The Article concludes with the suggestion that education reformers should focus on effective political advocacy for change in schools.

## I

### THREE ERAS OF BARGAINING CRITIQUES AND POLICY RESPONSES

Since public employees first began organizing into unions more than one hundred years ago, public sector unionism has been subject to serious criticism. Although critics have employed a range of arguments against bargaining, these arguments are best understood as variations of a single core theme: bargaining distorts public policy by allowing the preferences of public employees to outweigh those of the broader public. To illuminate the centrality of that theme, this Article traces the dominant arguments against bargaining through three important eras: (1) the first half of the twentieth century, in which teachers and other public employees pushed for basic organizing and bargaining rights; (2) the 1960s through 1980s, in which most states granted those rights but controversy continued as to the proper scope of bargaining; and (3) 2010 to the present, in which states have limited collective bargaining for public employees on the grounds that bargaining is unjustifiably expensive and inflexible.<sup>22</sup>

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<sup>22</sup> The first two eras discussed in this Part correspond to "First Generation" and "Second Generation" labor relations as defined in the landmark book on teacher unions authored by Charles Kerchner and Douglas Mitchell. CHARLES TAYLOR KERCHNER & DOUGLAS E. MITCHELL, *THE CHANGING IDEA OF A TEACHERS' UNION* 4-9 (1988). Kerchner and Mitchell's First Generation is characterized by consultation between districts and unions without collective bargaining. *Id.* at 4-7. The Second Generation occurs after the initial adoption of collective bargaining for teachers, and typically includes tension over the scope of bargaining. *Id.* at 7-9, 139.

*A. The First Half of the Twentieth Century: Bargaining as  
Impermissible Delegation*

Government workers engaged in collective labor activity as early as 1835,<sup>23</sup> and slightly more than seven percent of public workers belonged to unions by the 1920s.<sup>24</sup> Still, for the first half of the twentieth century, state and local public workers had no legally protected right to organize—even decades after the National Labor Relations Act granted such rights to private employees in 1935.<sup>25</sup> In opposing public sector unionism, critics argued that unions might be more loyal to their unions than to the government,<sup>26</sup> and, in particular, might cause havoc to their communities through strikes.<sup>27</sup> These arguments were premised on a perceived contradiction between the personal interests of government employees and the interests of the public—the proverbial two masters to which no public employee could serve.

That perceived contradiction also underlay a second set of arguments, focused not on organizing generally but on bargaining specifically.<sup>28</sup> Critics charged that bargaining would constitute an

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<sup>23</sup> JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962*, at 16 (2004) (describing a protest by public workers in Philadelphia aimed at limiting the work day to ten hours). Many public employee unions negotiated memoranda of understanding with municipalities, though the legal status of these agreements was unclear. *Id.* at 163 (noting that in 1957 the American Federation of State, County, and Municipal Employees reported that 445 of its locals had reached such agreements).

<sup>24</sup> SLATER, *supra* note 23, at 18. This is higher than union density in the private sector today. See U.S. Bureau of Labor Statistics, *Economic News Release: Union Members Summary*, U.S. DEP'T OF LABOR (Jan. 27, 2012), <http://www.bls.gov/news.release/union2.nr0.htm> (placing private sector union density at 6.9 percent).

<sup>25</sup> SLATER, *supra* note 23, at 71. The Lloyd-LaFollete Act, passed in 1912, gave federal employees the right to organize. *Id.* at 19.

<sup>26</sup> *Id.* at 23, 25, 29.

<sup>27</sup> Professor Joseph Slater has argued that a controversial police strike in Boston in 1919 was an extremely influential example of the ills of unionization in the public sector during this period. *Id.* at 13–14 (“Unfortunately for public sector unions, the most searing and enduring image of their history in the first half of the twentieth century and beyond was the Boston police strike. The Boston strike was routinely cited by courts and officials through the end of the 1940s.”). Woodrow Wilson called the strike an “intolerable crime against civilization.” *Id.* at 37 (internal quotation marks omitted).

<sup>28</sup> Collective bargaining rights are distinguishable from organizing rights, including the risk to strike, because employees can organize into coalitions, such as trade unions, without bargaining collectively. For example, the Lloyd-LaFollete Act gave federal workers the right to organize in 1912, but the federal government did not bargain with employee unions until fifty years later, when President Kennedy signed an Executive Order requiring federal agencies to recognize and negotiate with majority unions. See generally Wilson R. Hart, *The U.S. Civil Service Learns to Live With Executive Order*

improper delegation of government authority: Policy would be made outside the ordinary legislative process and determined largely by unions.<sup>29</sup> State courts across the country accepted this argument.<sup>30</sup> In the California case of *Nutter v. City of Santa Monica*, for example, bus operators sued their city employer claiming that the state's labor law compelled the city to engage in collective bargaining.<sup>31</sup> The court disagreed, holding that the authority to set terms of public employment "may not be delegated or surrendered to others."<sup>32</sup>

Although arguments against delegation can be motivated by a variety of concerns,<sup>33</sup> courts and scholars in this era were worried that bargaining would lead public policy to be aligned with the preferences of unions rather than the broader public. According to a 1962 Colorado Supreme Court decision, the consensus among state courts was that collective bargaining for public employees was an improper delegation because it "would result in taking away from a municipality its legislative power to control its employees and vest such control in an *unelected and uncontrolled private organization (a*

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*10,988: An Interim Appraisal*, 17 INDUS. & LAB. REL. REV. 203 (1963–1964) (discussing the Order and its immediate consequences).

<sup>29</sup> SLATER, *supra* note 23, at 75–78.

<sup>30</sup> *See id.* (detailing state court opinions). The issue was determined by states because the federal National Labor Relations Act, or Wagner Act, does not cover state and local employees. *See* 29 U.S.C. § 152(2) (defining "employer" for purposes of the Wagner Act to exclude any state or political subdivision of a state). For examples of state cases holding that bargaining is an improper delegation, see, for example, *Fellows v. LaTronica*, 377 P.2d 547, 550 (Colo. 1962) ("The reasoning of most of the reported cases is that the employer-employee relationship in government is a legislative matter which may not be delegated."); *Nutter v. City of Santa Monica*, 168 P.2d 741, 745 (Cal. Dist. Ct. App. 1946) (finding that mandatory bargaining violated nondelegation principles); *Springfield v. Clouse*, 206 S.W.2d 539, 545 (Mo. 1947) (rejecting the request of city employees for a declaratory judgment that cities could bargain collectively because the determination of terms of public employment "cannot be delegated" and "surely cannot be bargained or contracted away").

<sup>31</sup> *Nutter*, 168 P.2d at 743.

<sup>32</sup> *Id.* at 745.

<sup>33</sup> To most scholars, the nondelegation doctrine aims to preserve accountability in government decisions, though other concerns may also be at stake. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 319–20 (2000) (noting the standard accountability justification but arguing that the doctrine also serves the distinct aim of promoting the rule of law). The goal of accountability, in turn, may serve as a proxy for majoritarianism. *See* Bernard Manin et al., *Elections and Representation*, in *DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION* 29, 29 (Przeworski et al. eds., 1999) (describing the view that accountability induces politicians to "choose policies that in their judgment will be positively evaluated by citizens at the time of the next election"). *But see* Sunstein, *supra*, at 319–20 (suggesting that a primary function of the "particular [] form of accountability" advanced by the nondelegation doctrine is to guarantee individual liberty by "rais[ing] the burdens and costs associated with the enactment of federal law").

union).”<sup>34</sup> The court in *Nutter*, similarly, held that a rule requiring bargaining would “discriminate in favor of union labor.”<sup>35</sup> The following year, a California court made the majoritarian concern even more explicit when it indicated that allowing public employees to unionize would “defeat the will of the people.”<sup>36</sup> Outside of the courts, a typical expression of the majoritarian nondelegation argument came in a 1928 battle over unionization of teachers in Seattle. There, the local chamber of commerce declared that unionism could “turn over the education of our children and the direction and control of the Seattle public school system” to unions.<sup>37</sup>

Over the following decades, state law gradually shifted in favor of bargaining by government employees, but majoritarian concerns continued.

### *B. 1960s to 1980s: Controversy Over the Scope of Bargaining*

Beginning in the 1960s, the majoritarian critique mutated from an argument against bargaining broadly to an argument that bargaining should be limited so as to avoid encroaching on important issues of public policy. In 1959, Wisconsin became the first state to grant bargaining rights to public employees.<sup>38</sup> Soon after, teachers in New York City prevailed in a landmark campaign to bargain with their school district, led by Albert Shanker.<sup>39</sup> Over the next twenty years, bargaining for teachers and other public employees became widespread, and most states adopted statutes requiring the government to bargain over at least some topics.<sup>40</sup> But scholars and

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<sup>34</sup> *Fellows*, 377 P.2d at 550 (emphasis added).

<sup>35</sup> *Nutter*, 168 P.2d at 745 (internal quotation marks omitted).

<sup>36</sup> *Perez v. Bd. of Police Comm'rs*, 248 P.2d 537, 545 (Cal. Dist. Ct. App. 1947).

<sup>37</sup> SLATER, *supra* note 23, at 50.

<sup>38</sup> JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 81 (2004). The 1959 legislation did not settle the matter altogether. *See id.* After the state labor board interpreted the statute not to impose an enforceable duty to bargain on public employers, Wisconsin reestablished the bargaining right through 1972 legislation. *See id.*

<sup>39</sup> *See* KERCHNER & MITCHELL, *supra* note 22, at 1 (declaring that a “new era in American education began on the morning of 11 April 1962” when New York teachers went on strike in a bid to convince the city to bargain with the union); Richard D. Kahlenberg, *The History of Collective Bargaining Among Teachers*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY’S SCHOOLS 7, 7, 11 (Jane Hannaway & Andrew Rotherham eds., 2006) (calling Shanker’s efforts “the watershed moment” in the movement for teacher unionization). The teachers won bargaining rights by exerting pressure on the city through a strike that was illegal under state law. *Id.* at 13.

<sup>40</sup> The vast majority of states had authorized bargaining by 1979. *See* LORRAINE McDONNELL & ANTHONY PASCAL, ORGANIZED TEACHERS IN AMERICAN SCHOOLS 28 (1979) (report prepared for the National Institute of Education) (noting that in a sample of

policymakers fiercely debated the *scope of bargaining*—the set of rules determining which topics could be included in bargaining between unions and their government employers, usually by classifying topics as “mandatory,” “permissive,” and “prohibited.”<sup>41</sup> Most state statutes designated some topics as *mandatory*, meaning that school districts and unions were required to bargain over the topics in good faith.<sup>42</sup> Additionally, an employer may not implement policy changes affecting mandatory topics without first consulting the union.<sup>43</sup> Other topics were *permissive*. The employer and union may bargain over permissive topics if and only if both parties agree to do so, and either party may implement unilateral challenges on such topics absent an agreement.<sup>44</sup> Finally, the scope of bargaining rules may designate *prohibited* or “*illegal*” topics—topics on which the

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thirty three states, twenty five states authorized bargaining); see also DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945–1980*, at 315 (1983) (“By the mid-1970s, there was nothing tenuous about the position of teacher unions. . . . Indeed, both the AFT and the NEA had become major powers, not only in their school districts but in state legislatures and in the nation.”). Five states continue to ban all bargaining today. See N.C. GEN. STAT. ANN. § 95-98 (West, Westlaw through 2012 Reg. Sess.) (prohibiting teacher collective bargaining as “against the public policy of the State, illegal, unlawful, void and of no effect”); TEX GOV’T CODE ANN. § 617.002 (West, Westlaw through 2011 Reg. Sess.) (barring districts from entering into collective bargaining agreements or even “recogniz[ing] a labor organization as the bargaining agent for a group of public employees”); Commonwealth v. Cnty. Bd. of Arlington Cnty., 232 S.E.2d 30, 44–45 (Va. 1977); Chatham Ass’n of Educators, Teacher Unit v. Bd. of Public Educ., 204 S.E.2d 138, 140 (Ga. 1974) (holding that teacher collective bargaining agreements are “void, being illegal attempts by the board to delegate its powers and authority”). The situation in South Carolina is more complicated, as no state legislation either authorizes or prohibits collective bargaining.

<sup>41</sup> See Corbett, *supra* note 18, at 237–39.

<sup>42</sup> Nearly all states with public sector bargaining provide by statute that wages, hours, and “terms and conditions of employment” are mandatory for bargaining. This language is borrowed from the Wagner Act, the 1935 statute governing collective bargaining in the private sector. 29 U.S.C. § 158(d) (2006). *E.g.*, FLA. STAT. ANN. § 447.309(1) (West, Westlaw through 2012 2nd Reg. Sess.) (requiring bargaining over “wages, hours, and terms and conditions of employment”); 5 ILL. COMP. STAT. ANN. § 315/7 (West, Westlaw through 2012 Reg. Sess.) (same); MICH. COMP. LAWS ANN. § 423.215(1) (West, Westlaw through 2012 Reg. Sess.) (requiring public employers and unions to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment”); OR. REV. STAT. ANN. § 243.650(4), (7) (West, Westlaw through 2012 Reg. Sess.) (requiring bargaining over “direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment”).

<sup>43</sup> See Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1225 (1985). For a case on the topic, see, for example, *Pa. Labor Relations Bd. v. Williamsport Area Sch. Dist.*, 406 A.2d 329, 331–32 (Pa. 1979) (holding that a public employer may not implement unilateral changes on mandatory bargaining topics even after the expiration of a collective bargaining agreement).

<sup>44</sup> See GRODIN ET AL., *supra* note 38, at 205–06.

parties are not permitted to bargain.<sup>45</sup> Courts will not enforce contract terms on illegal topics.<sup>46</sup> When a topic is prohibited, or when a permissive topic is not included in bargaining, the employer will resolve the topic through other means; in the public sector, local governments will generally set policy on these topics through deliberations by the city council or school board or by administrative policymaking.

The scope of bargaining for teachers was controversial from the beginning. Shanker's union, for example, pushed for bargaining not only wages and benefits but also class size, enrichment programs, and discipline policy.<sup>47</sup> The city resisted, claiming that bargaining over those topics would circumvent the normal democratic process and deny parents and community members their rightful place in determining important matters of education policy.<sup>48</sup> As states defined the government's obligations in bargaining, many state legislatures and courts adopted this reasoning in classifying topics as illegal for bargaining.<sup>49</sup> As the New Jersey Supreme Court held in 1982, issues such as school curriculum, class size, and the length of the school year were to be decided "not by negotiation and arbitration, but by the political process. This involves the panoply of democratic institutions and practices, including public debate, lobbying, voting, legislation and administration."<sup>50</sup> New Jersey was joined by Delaware,<sup>51</sup> Nevada,<sup>52</sup> Michigan,<sup>53</sup> and Kansas,<sup>54</sup> among others, in

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<sup>45</sup> See, e.g., MICH. COMP. LAWS ANN. § 423.215(3)(g) (mandating that "collective bargaining between a public school employer and a bargaining representative of its employees shall not include," among other topics, "[t]he use of volunteers in providing services at its schools").

<sup>46</sup> See Befort, *supra* note 43, at 1262–65 (describing this outcome in cases in New Jersey, New York, and Massachusetts).

<sup>47</sup> See Kahlenberg, *supra* note 39, at 13–14 (noting that the city's school board "refused to delegate the making of policy to the union and exclude participation of parents and the public" (internal quotation marks, ellipses omitted)). The dispute contributed to a fourteen day strike in 1967. *Id.* at 14.

<sup>48</sup> *Id.* at 14.

<sup>49</sup> Professor Martin Malin has described at length the influence of the "view that public employee collective bargaining is antidemocratic" in a variety of state court cases limiting bargaining during the time period discussed in this Subpart. See Malin, *supra* note 18, at 1372–75, 1384–86. Professor Malin also describes a secondary concern that "public sector collective bargaining impedes effective government." *Id.* at 1375–84. For further discussion of that concern, see *infra* Part I.C.

<sup>50</sup> *In re Local 195, IFPTE, AFL-CIO*, 443 A.2d 187, 191 (N.J. 1982).

<sup>51</sup> *Colonial Sch. Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243, 247 (Del. 1982) (holding that topics other than "salaries, employee benefits, and working conditions" are prohibited for bargaining (internal quotation marks omitted)).

making certain topics illegal for bargaining even while requiring the government to bargain on other topics.<sup>55</sup>

Supporters of a robust category of illegal topics saw bargaining as a short circuit in democracy because it excluded the general public from participation in policy decisions while giving disproportionate power to unions.<sup>56</sup> Professor William Corbett encapsulated the concern in a law review article published in 1979. Corbett wrote: “When fundamental public policy issues are at stake, the decision-making process should not be defined so as to preclude or inhibit public participation. To do so would announce the end of democratic control over public processes.”<sup>57</sup> Corbett did not believe that bargaining needed to be eliminated completely because “th[e] use of the bilateral decision making process”—collective bargaining—was acceptable for decisions on which “wider public participation is not necessary.”<sup>58</sup> But when a “fundamental concern is involved, public participation is required for its proper consideration and resolution, and the bilateral process is inappropriate.”<sup>59</sup> Corbett considered and rejected the notion that the public could participate by communicating

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<sup>52</sup> NEV. REV. STAT. ANN. § 288.150(3) (West, Westlaw through 2011 Reg. Sess.) (listing illegal topics).

<sup>53</sup> MICH. COMP. LAWS ANN. § 423.215(3) (West, Westlaw through 2012 Legis. Sess.) (listing illegal topics, including the starting day of the school year and the use of volunteers).

<sup>54</sup> KAN. STAT. ANN. § 72-5413(1)(3) (making school scheduling illegal for bargaining).

<sup>55</sup> At the same time, many states declined to classify any topics as illegal, making all topics either mandatory or permissive. For example, in Illinois, bargaining is mandatory for “wages, hours, and other terms and conditions of employment.” 115 ILL. COMP. STAT. ANN. 5/10(a) (West, Westlaw through 2012 Reg. Sess.). Other topics are permissive. *Mt. Vernon Educ. Ass’n*, 10 Pub. Emp. Reporter for Ill. ¶ 1058, 234, 236 (Ill. Educ. Labor Relations Bd. Mar. 17, 1994).

<sup>56</sup> See, e.g., Corbett, *supra* note 18, at 258; June Miller Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685, 688, 696 (1977) (“The main public sector justification for excluding a legal topic from the mandated bargaining process is that . . . collective bargaining gives too much power to one special interest group, public employee unions, and distorts the effectiveness of the political process by causing an underrepresentation of other important interest groups of citizens unless the scope of bargaining is exceedingly narrow.”). Critics have continued to advance this argument since it became popular in the 1970s. See, e.g., Eric C. Scheiner, *Taking the Public Out of Determining Government Policy: The Need for an Appropriate Scope of Bargaining Test in the Illinois Public Sector*, 29 J. MARSHALL L. REV. 531, 554–58 (1996) (arguing that through collective bargaining “the voting public is deprived of their right to determine important government policy”).

<sup>57</sup> Corbett, *supra* note 18, at 258.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

its preferences to the public officials negotiating with the union.<sup>60</sup> If such communication came prior to bargaining, it would be based on merely “theoretical proposals,” and therefore would be meaningless.<sup>61</sup> And input could not come during negotiations because bargaining proposals were often secret and, in any case, soliciting contemporaneous input would cause the bargaining process to grind to a halt.<sup>62</sup>

Corbett and his peers utilized the vocabulary of process and transparency, but they, like the critics of the first era, were fundamentally concerned that bargaining was a non-majoritarian process that would favor the preferences of unions over those of the public. Corbett wrote that bargaining could give unions increased and disproportionate “access and influence,” thereby leading to results that “favor the employee organization.”<sup>63</sup> Another scholar described the primary critique of bargaining in this era as the argument that bargaining would give “too much power to one special interest group” and cause “an underrepresentation of other important interest groups.”<sup>64</sup>

Bargaining critics in this era advocated a balancing test in which a topic would be illegal for bargaining if the public’s interest in affecting the resolution of the topic outweighed employees’ interest in bargaining over the topic.<sup>65</sup> A similar test eventually became law under the federal statute governing private employers.<sup>66</sup> In the public sector, too, some state courts adopted the test.<sup>67</sup> In other states,

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<sup>60</sup> *Id.* at 262.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 263.

<sup>63</sup> *Id.* at 256.

<sup>64</sup> Weisberger, *supra* note 56, at 696.

<sup>65</sup> Corbett, *supra* note 18, at 267. Actually, Corbett’s balancing test was a little more complicated: The employee’s interest had to be weighed against both the public’s interest in policy formulation and the public employer’s managerial interest. *See id.* Most other commentators treated the latter two considerations as a single factor. The test is similar to that used in the private sector to determine whether a topic is mandatory or permissive. *See First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

<sup>66</sup> Under the National Labor Relations Act, where a topic has direct effect on both the employment relationship and the “direction of the enterprise,” the topic is mandatory if “the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.” *First Nat’l Maint. Corp.*, 452 U.S. at 677–79. Most other topics are mandatory.

<sup>67</sup> *See, e.g., Cent. City Educ. Ass’n, IEA/NEA v. Ill. Educ. Labor Relations Bd.*, 599 N.E.2d 892, 905–06 (Ill. 1992).



legislatures specifically enumerated prohibited topics.<sup>68</sup> In both cases, the topics most often deemed prohibited included the length of the school day and year, as well as rules for distributing staff between schools and subject areas and for laying off teachers during a reduction in force.<sup>69</sup>

After the 1980s, controversy over the scope of bargaining declined, and the issue received little scholarly or political attention until recent years.

### *C. 2010 to the Present: Bargaining as Budget Buster and Handcuff*<sup>70</sup>

The relative peace surrounding the scope of public sector bargaining ended in 2010.<sup>71</sup> In recent years, the majoritarian critique has appeared again but has taken a new form. First, critics have vigorously attacked public sector collective bargaining as unjustifiably expensive in a time when states are facing budget shortfalls.<sup>72</sup> According to a 2010 editorial in the *Wall Street Journal*, the “desperate economic and fiscal woes” caused by public employee unions was possibly “the single biggest problem” for the American economy.<sup>73</sup> That viewpoint was championed by Wisconsin governor Scott Walker, who declared months after his inauguration that bargaining rights for public employees were an “expensive entitlement.”<sup>74</sup> Walker and other critics focused particularly on public

<sup>68</sup> See, e.g., NEV. REV. STAT. ANN. § 288.150(3) (West, Westlaw through 2011 Reg. Sess.) (listing illegal topics).

<sup>69</sup> For examples, see *infra* Part IV.B.

<sup>70</sup> For a detailed discussion of this period in public sector labor relations, see Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 IND. L.J. 189, 192–215 (2012).

<sup>71</sup> See, e.g., Michael Powell, *Public Workers Face Outrage as Budget Crises Grow*, N.Y. TIMES (Jan. 1, 2011), <http://www.nytimes.com/2011/01/02/business/02showdown.html> (“Across the nation, a rising irritation with public employee unions is palpable, as a wounded economy has blown gaping holes in state, city and town budgets, and revealed that some public pension funds dangle perilously close to bankruptcy.”).

<sup>72</sup> Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT’L AFFAIRS, at 3, 4 (2010), available at [http://www.nationalaffairs.com/doclib/20100918\\_DiSalvo\\_pdf\[1\].pdf](http://www.nationalaffairs.com/doclib/20100918_DiSalvo_pdf[1].pdf) (“The cost of public-sector pay and benefits (which in many cases far exceed what comparable workers earn in the private sector), combined with hundreds of billions of dollars in unfunded pension liabilities for retired government workers, are weighing down state and city budgets. And staggering as these burdens seem now, they are actually poised to grow exponentially in the years ahead.”).

<sup>73</sup> Editorial, *The Public-Union Ascendancy*, WALL ST. J., Feb. 3, 2010, at A16, available at <http://online.wsj.com/article/SB10001424052748703837004575013424060649464.html>.

<sup>74</sup> See Steve Schultze & Don Walker, *Walker Says He Should Have Prepared Public Earlier for His Sweeping Changes*, J. SENTINEL ONLINE (June 27, 2011), <http://www.jsonline.com/news/statepolitics/124627903.html>.

employees' benefits, such as pensions and health care coverage.<sup>75</sup> In addition, and apart from costs, critics claimed that the rigidity of the bargaining process and bargaining agreements eliminated any hope of reforming schools and other public institutions.<sup>76</sup> According to Indiana Governor Mitch Daniels, teacher contracts were "handcuffs that reduce [school districts'] ability to meet the higher expectations we now have for student achievement."<sup>77</sup>

It takes some effort to untangle the arguments advanced by the most recent critics of public sector bargaining, but ultimately both the "expensive entitlement" and "handcuff" depend on the fundamental assumption that unions exert disproportionate power in the bargaining process. Start with the first critique. When critics argue that bargaining is too expensive, they are not referring to costs incurred in the negotiating process—the meetings, the expert consultants, or the gallons of coffee. Rather, the expense at issue is the difference between the cost to the government of terms and conditions of public employment determined through collective bargaining and the cost of the terms and conditions of public employment that would be set in the absence of bargaining. Thus, the claim seems to be based on two propositions. First, bargaining systematically leads to results that are more expensive to the government (and, conversely, more favorable to employees) than terms set through ordinary legislative and administrative processes. Second, the terms set through ordinary legislative and administrative processes are the appropriate baseline by which "expensiveness" should be measured.

To justify the first proposition, critics argue that bargaining gives disproportionate influence to unions, allowing them to impose their favored policies, particularly with respect to compensation and benefits.<sup>78</sup> As for the notion that the ordinary legislative and

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<sup>75</sup> See DiSalvo, *supra* note 72 (noting that states had "hundreds of billions of dollars in unfunded pension liabilities for retired government workers"). Even prior to recent bargaining restrictions, pension benefits for most public employees were set by statute rather than through bargaining, though some bargaining critics have glossed over the distinction. See Slater, *supra* note 70, at 192–98.

<sup>76</sup> See, e.g., Philip K. Howard, *The Public-Union Albatross*, WALL ST. J., Nov. 9, 2011, at A15.

<sup>77</sup> Mitchell E. Daniels Jr., 2011 State of the State Address 5 (Jan. 11, 2011) (transcript available at <http://www.in.gov/gov/11stateofstate.htm>).

<sup>78</sup> See, e.g., David G. Crane, *Should Public Employees Have Collective Bargaining?*, S.F. CHRON. (Feb. 27, 2011, 4:00 AM), <http://www.sfgate.com/opinion/article/Should-public-employees-have-collective-2473273.php> (arguing that collective bargaining makes public employees' benefits and compensation "more responsive to public employees than to 'shareholders,' that is, citizens benefiting from public services").

administrative processes set the baseline by which expensiveness should be measured, critics presumably believe that the terms of employment set through those processes reflect the real value of services provided by public employees.<sup>79</sup> Thus, the “expensive entitlement” argument is intertwined with the notion that collective bargaining is countermajoritarian, though it is focused specifically on the cost of labor agreements.

The handcuff critique is harder to parse, in part because critics complain about two different kinds of inflexibility. Some critics worry that the policies established by collective bargaining agreements cannot be expediently modified in response to changing circumstances, since any modification must be preceded by often lengthy negotiation.<sup>80</sup> This concern has featured prominently, for example, in discussions about collective bargaining rights for employees of the Transportation Security Administration (TSA).<sup>81</sup> Opponents of collective bargaining argued that the TSA needed the capability to rapidly adjust its procedures and reassign or relocate employees in response to a changing landscape of security threats.<sup>82</sup> Professor Martin Malin has characterized this concern as one about “effective government” and distinguished it from concerns that collective bargaining is “antidemocratic.”<sup>83</sup>

As manifested in the TSA context, the handcuff critique seems focused not on the particular terms of collective bargaining agreements, but rather on very existence of collective bargaining. One might argue, for example, that virtually *any* agreement covering TSA agents could become outdated at the drop of a hat (or the drop of a bomb). But in most situations, the degree of managerial discretion is itself a subject of negotiation, and inflexibility is a product of the particular terms embodied in collective bargaining agreements.

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<sup>79</sup> An alternative version of the argument asserts that market value should be determined through reference to the compensation received by private employees with similar education or similar job responsibilities. In advocating bargaining prohibitions, proponents of this approach must believe that ordinary democratic processes will produce results closer to this notion of market value than will the bargaining process.

<sup>80</sup> See Malin, *supra* note 18, at 1377–80.

<sup>81</sup> *Id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at 1369–80 (distinguishing the concerns that collective bargaining is antidemocratic and impedes effective government). Professor Malin also classifies the concern with public employee strikes as an “effective government” critique. *Id.* at 1375–76. This Article treats arguments against strikes as distinct from arguments against collective bargaining. See *supra* note 28 (noting that organizing rights can be distinguished from bargaining rights).

Proponents of the handcuff critique have most often targeted teacher contracts, arguing that managers need flexibility not to respond to grand unexpected events but rather to align day-to-day personnel decisions, like pay and dismissal, to teachers' performance. In particular, critics claim that teacher contracts often establish lockstep salary scales and "last in first out" layoff systems that prevent such discretion and therefore represent bad policy from the day those agreements are signed.<sup>84</sup>

Critics of teacher bargaining claim that unions have different preferences than the public with respect to the degree of management discretion in personnel decisions and that unions use collective bargaining to force their preference for limited flexibility.<sup>85</sup> In this account, teachers favor inflexible contract terms because such terms provide them with "convenience" and security, so they use bargaining to pursue those terms.<sup>86</sup> Consequently, this version of the handcuff concern is best characterized as a majoritarian critique of collective bargaining.<sup>87</sup>

In response to the expensive entitlement and handcuff concerns, several state legislatures have narrowed the scope of bargaining in recent years, though voters in two states rejected those limitations through referenda. Under recent legislation in Wisconsin, public

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<sup>84</sup> See, e.g., Andrew J. Rotherham, *Beyond Unions: Five New Rules for Teachers*, TIME (Feb. 24, 2011), <http://www.time.com/time/nation/article/0,8599,2053465,00.html> (arguing that school districts should abolish "[i]nflexible salary schedules" that are based solely on "length of service and academic degrees"). Terry Moe, perhaps the most prominent academic critic of teacher bargaining, exhaustively documents and critiques a variety of contract terms commonly found in collective bargaining agreements between teachers and districts. MOE, *supra* note 18, at 174–214.

<sup>85</sup> See, e.g., Howard Fuller & George A. Mitchell, *A Culture of Complaint*, EDUC. NEXT, at 18, 22 (2006) (arguing that education reform is impeded by inflexible rules in teacher contracts because bargaining shuts out the public, thereby creating an "uneven playing field" that favors unions).

<sup>86</sup> See MOE, *supra* note 18, at 179 (claiming that because unions "do not want administrators to have discretion," they negotiate for labor agreements containing "rules for every contingency" to benefit the "convenience of teachers"); HESS & WEST, *supra* note 5, at 6 (arguing that collective bargaining is an obstacle to reform because "[t]eachers unions favor existing arrangements that protect jobs, restrict the demands placed on members, limit accountability for student performance, and safeguard the privileges of senior teachers . . . whatever their implications for student achievement").

<sup>87</sup> A distinct argument is that collective bargaining has a peculiar tendency to produce rules that are encyclopedic and therefore inflexible. But that notion seems suspect in light of the great complexity of many statutes and regulations created outside of bargaining by democratically elected and appointed officials, including the rules of the Office of Personnel Management, which govern employment in the federal government. See generally 5 C.F.R.

employees, including teachers, can bargain only over wages, and even then cannot negotiate for any wage increase that exceeds the percentage change in the consumer price index.<sup>88</sup> In Indiana, teachers and school districts may no longer bargain over the school calendar, teacher evaluation, and teacher dismissal.<sup>89</sup> Idaho limited teacher bargaining to compensation as part of a package of bills labeled “Students Come First,”<sup>90</sup> but a substantial majority of voters rejected the legislation in a subsequent referendum.<sup>91</sup> Similarly, the Ohio legislature passed a law prohibiting bargaining with teachers over several topics, including class size and staff deployment, and voters later repealed the law by referendum.<sup>92</sup> Meanwhile, the Tennessee legislature replaced the state’s teacher collective bargaining law with a statute providing for “collaborative conferencing,”<sup>93</sup> a process in

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<sup>88</sup> 2011 Wisconsin Act 10, § 245 (Jan. 2011) (codified as amended at WIS. STAT. ANN. § 111.70(4)(mb) (West, Westlaw through 2011 Act 286)). Districts and unions can bargain only over “total base wages,” not merit pay or supplemental compensation. *Id.* A municipality can increase wages beyond the consumer price index if the change is approved in a local referendum. *See* WIS. STAT. ANN. §§ 66.0506, 118.245 (West, Westlaw through 2011 Act 286).

<sup>89</sup> S.B. 575, § 10, 2011 Leg., 117th Sess. (Ind. 2011) (codified at IND. CODE ANN. 20-29-6-4.5 (West, Westlaw through 2012 2nd Reg. Sess.)).

<sup>90</sup> *See* S.B. 1108, § 15, 2011 Leg., 61st Sess. (Idaho 2011) (codified at IDAHO CODE ANN. 33-1271 (West, Westlaw through 2012 2nd Reg. Sess.)) (“The board of trustees of each school district . . . is hereby empowered to and shall . . . negotiate with such party in good faith on matters related to compensation of professional employees.”). For further detail, see Betsy Z. Russell, *Idaho Senate Passes Two School Reform Bills*, THE SPOKESMAN-REV. (Feb. 24, 2011), <http://www.spokesman.com/stories/2011/feb/24/idaho-senate-backs-first-school-reform-bill-20-15/>.

<sup>91</sup> Scott Odell, *Ballot Propositions in Idaho: A Lesson for Education Policy Reform*, EDUC. NEXT (Nov. 30, 2012), <http://educationnext.org/ballot-propositions-in-idaho-a-lesson-for-education-policy-reform/> (noting that 57 percent of voters voted to repeal the law).

<sup>92</sup> Sean Cavanagh, *Ohio Voters Reject Law Limiting Teachers’ Collective Bargaining*, EDWEEK.COM (Nov. 8, 2011), [http://blogs.edweek.org/edweek/state\\_edwatch/2011/11/ohio\\_1.html](http://blogs.edweek.org/edweek/state_edwatch/2011/11/ohio_1.html).

<sup>93</sup> “Collaborative conferencing” is defined as:

[T]he process by which the chair of a board of education and the board’s professional employees, or such representatives as either party or parties may designate, meet at reasonable times to confer, consult and discuss and to exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving.

TENN. CODE ANN. § 49-5-602(2) (West, Westlaw through 2012 2nd Reg. Sess.). Under this statute, collaborative conferencing is required if the following conditions are met in a given yearly cycle: First, fifteen percent of teachers must submit a written request to conduct collaborative conferencing. § 49-5-605 (Westlaw). Second, a majority of teachers must vote to authorize collaborative conferencing. *Id.*

which school districts and teachers can discuss a variety of topics but neither side is obligated to try to reach agreement.<sup>94</sup> In collaborative conferencing, Tennessee school districts and unions may discuss salary, working conditions, grievance procedures, insurance, leave, payroll deductions, and fringe benefits (excluding pensions).<sup>95</sup> All other topics are prohibited for discussion, including teacher evaluation and staff deployment.<sup>96</sup> These recent limitations on bargaining are intended, according to their supporters, to prevent unions from exerting disproportionate influence to shape policy at the expense of public preferences.<sup>97</sup>

## II

### ASSESSING THE MAJORITARIAN CRITIQUE

As shown in Part I, critics of collective bargaining have been largely unified in their focus on the perceived countermajoritarian character of collective bargaining. In this Part and those that follow, the Article accepts the critics' implicit premise that majoritarianism is the most important criterion in assessing policymaking systems. But this Part argues that critics have erred in concluding that majoritarian concerns justify bargaining prohibitions. In fact, even in a system of bargaining in which nearly all topics are open for negotiation, local governments can retain the ability to advance public preferences, while the alternative legislative and administrative processes for setting policy are likely no more majoritarian than collective bargaining.

In making this argument, the Article envisions a robust system of collective bargaining that includes a significant category of topics that are permissive for bargaining, including many topics bearing on recent education reform debates, such as the length of the school day.

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<sup>94</sup> Although Tennessee law requires school districts to participate in collaborative conferencing, there is no obligation to bargain in good faith. *See* § 49-5-606(a) (Westlaw) (describing school district obligations).

<sup>95</sup> § 49-5-608(a) (Westlaw).

<sup>96</sup> § 49-5-608(b) (Westlaw).

<sup>97</sup> Wisconsin Governor Scott Walker, for example, said the following shortly after his election in 2010:

We can no longer live in a society where the public employees are the haves and taxpayers who foot the bills are the have-nots . . . The bottom line is that we are going to look at every legal means we have to try to put that balance more on the side of taxpayers.

Steven Greenhouse, *Strained States Turning to Laws to Curb Labor Unions*, N.Y. TIMES, Jan. 4, 2011, at A1, A3 (internal quotation marks omitted).

On these topics, the school district and union are not required to bargain unless both agree to do so, although, under the doctrine of “effects bargaining,” the parties often must negotiate over the consequences of changes on permissive topics.<sup>98</sup> The permissive designation allows local government officials to seek compromise with employees on policy issues but to cease bargaining if compromise fails. Although this conception of robust collective bargaining does not correspond to the broadest possible scope of bargaining, in which nearly all topics are mandatory, it is fitting here for two reasons. First, it resembles current law in most states that have not prohibited or severely curtailed bargaining.<sup>99</sup> Second, the Article’s primary goal is to argue that bargaining prohibitions are not necessary to ensure majoritarianism, so the Article need only defend a bargaining system that does not utilize such prohibitions.

This Part first describes the important role of government officials in collective bargaining, which has generally been ignored by bargaining critics. It then rebuts two constitutive arguments in the majoritarian critique. First, that the structure of the bargaining process gives unions power over education policy. Second, that the lack of public transparency in bargaining allows unions to exercise that power unchecked.

#### *A. The Role of Local Legislatures and Government Negotiators*

Critics of public sector bargaining typically focus on the role of unions in the bargaining process, but they rarely discuss the important functions played by local legislative bodies and government negotiators in that process.<sup>100</sup> In brief, local legislatures decide

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<sup>98</sup> See, e.g., *W. Irondequoit Teachers Ass’n v. Helsby*, 315 N.E.2d 775, 777–78 (N.Y. 1974) (holding that, although class size is not mandatory for bargaining, its impact on teachers must be bargained for). For example, if a school district decides to extend the school year from 180 days to 200 days, the district would be required to bargain over the effect on teacher’s pay.

<sup>99</sup> For example, according to the database of the National Council on Teacher Quality, in most states with bargaining, the following topics are permissive: dismissals, layoffs, teacher evaluation, class size, and the length of the school day and year. See National Council on Teacher Quality, *State Bargaining Rules*, TCHR. RULES, ROLES AND RTS., <http://www.nctq.org/tr3/scope/#interactiveMap> (last visited Jan. 19, 2013).

<sup>100</sup> Rather than discuss these functions in any detail, bargaining critics often claim instead that local government officials are captured by union influence and therefore unwilling to pursue public preferences. See, e.g., MOE, *supra* note 18, at 177–79. As this Article argues below, this claim, even if true, does not justify bargaining restrictions because the same supposedly captured government officials who oversee bargaining would also set policy in the absence of bargaining.

whether to approve and fund tentative labor agreements, which result from negotiations in which the public is represented by a government negotiating team. This Part provides a brief introduction to these functions, and the topic is examined in greater depth in Part III.

Just as union members must ratify a collective bargaining agreement before it can come into effect, a school board, city council, or local government equivalent must approve a teacher contract before it can be put into operation.<sup>101</sup> In many cases, the requirement for government approval of a teacher contract—namely, a majority vote of a local legislative body—is the same as the process that would be required for the establishment of terms and conditions of public employment in the absence of bargaining.<sup>102</sup> Aside from contract approval, the local city council or other legislative body often has the power to allocate or withhold funds necessary to implement the agreement.<sup>103</sup> Consequently, in nearly all cases, a local legislative body has the power to prevent implementation of a collective bargaining agreement that contradicts the preferences of the public, the same power that exists outside of bargaining.

When a collective bargaining agreement is presented to the school board or city council for approval or financing, there are often public hearings, and citizens and interest groups can attempt to influence legislators through lobbying or public pressure.<sup>104</sup> In an analogous situation at the federal level, the President may make decisions on international treaties with minimal public involvement, but senate ratification can provoke significant debate among legislators and the

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<sup>101</sup> GRODIN ET AL., *supra* note 38, at 2. According to a recent estimate, ninety percent of school board members are elected; others are appointed. *See* E. GORDON GEE & PHILIP T.K. DANIEL, *LAW AND PUBLIC EDUCATION: CASES AND MATERIALS* 9 (4th ed. 2008). In recent years, some cities have established mayoral control over public schools, a system that generally gives the mayor responsibility for government approval of teacher contracts, but mayoral control is still relatively rare. *See* MOE, *supra* note 18, at 154.

<sup>102</sup> However, one difference between approval of tentative collective bargaining agreements and statutes is that collective bargaining agreements cannot be amended by the legislature. *See infra* Part III.A.

<sup>103</sup> In Washington, D.C., for example, the mayor approves teacher contracts, but those contracts cannot come into effect until the city council appropriates funds necessary to implement them. *See* D.C. CODE § 1-617.17(j) (West, Westlaw through Dec. 11, 2012).

<sup>104</sup> News archives are well-stocked with accounts of such activities. *See, e.g.,* Dafney Tales & Valerie Russ, *Dueling Protests Fault Teacher Pact: For Different Reasons, They Have Doubts*, PHILA. INQUIRER (Jan. 27, 2010), [http://articles.philly.com/2010-01-27/news/24956126\\_1\\_teachers-union-teacher-assignments-teacher-contract](http://articles.philly.com/2010-01-27/news/24956126_1_teachers-union-teacher-assignments-teacher-contract) (describing protests by various groups criticizing a tentative teacher contract).



public.<sup>105</sup> Indeed, for both treaties and collective bargaining agreements, public debate can occur even while negotiations are ongoing.

Moreover, before tentative collective bargaining agreements reach the city council or school board, another group of public officials negotiates with the union to reach those agreements. The government's negotiating team is commonly led by an appointed head of the school district, another district administrator, or a school board member, often working with a variety of government officials, lawyers, outside consultants, and others.<sup>106</sup> As the parties reach compromises and draft language, this negotiating team acts on behalf of the government and, at least in theory, the public. In some localities, the school board closely oversees the government's negotiating team, while in others, the negotiating team acts with a high degree of autonomy.<sup>107</sup> In either case, as described in the remainder of this Part, government negotiators have a variety of tools at their disposal to ensure majoritarian outcomes in collective bargaining.

### *B. The Union's Role in Bargaining*

Despite the critical role of government officials in creating and approving collective bargaining agreements, critics argue that the process allows an interest group—the relevant union—to play a disproportionate role in policymaking, thereby distorting policy in favor of that group's interests. The most severe version of the concern suggests that the bargaining process gives unions a kind of veto power over education policy: No agreement can be concluded without the union's consent, and the union can therefore prevent the establishment of a policy proposal that it finds unacceptable.<sup>108</sup>

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<sup>105</sup> See, e.g., Benjamin S. Loeb, *The Limited Test Ban Treaty*, in *THE POLITICS OF ARMS CONTROL TREATY RATIFICATION* 167, 198–204 (Michael Krepon & Dan Caldwell eds., 1991) (describing extensive floor debate over the Limited Test Ban Treaty).

<sup>106</sup> See WILLIAM L. SHARP, *WINNING AT COLLECTIVE BARGAINING: STRATEGIES EVERYONE CAN LIVE WITH* 50–52 (2003) (describing a 1999 survey showing that more than a fifth of school districts had the superintendent act as the chief negotiator, with a majority using some combination of the superintendent, school board members, and district officials.).

<sup>107</sup> See *infra* Section III.A.

<sup>108</sup> See, e.g., PAUL KERSEY, MACKINAC CENTER, *RECONSIDERING MICHIGAN'S PUBLIC EMPLOYMENT RELATIONS ACT: RESTORING BALANCE TO PUBLIC-SECTOR LABOR RELATIONS* 11–14 (2011) (describing public sector collective bargaining as giving veto power to unions).

In fact, even for mandatory topics of bargaining, there are few situations in which a union has a real veto over education policy. In most states with collective bargaining for public employees, there is a statutory process for resolving bargaining stalemates. That process sometimes allows school districts to unilaterally implement their last offer if the parties remain at impasse for a specified period of time, allowing a direct path around any union attempt to veto a bargaining proposal.<sup>109</sup> In other states, statutory impasse procedures require the school and union to submit to binding arbitration,<sup>110</sup> mediation, or fact-finding that is effectively binding.<sup>111</sup> These processes allow contract terms to be imposed without union consent.<sup>112</sup>

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<sup>109</sup> See CAL. GOV'T. CODE § 3505.7 (West, Westlaw through 2012 Reg. Sess.) (allowing school districts to implement their "last, best and final offer" if mediation and fact-finding does not lead to an agreement); MASS. GEN. LAWS ANN. ch. 150E, § 9 (West, Westlaw through ch. 353 of 2012 Legis. Sess.) (allowing public employers to implement unilateral changes after the exhaustion of impasse procedures); OR. REV. STAT. ANN. § 243.712(2)(d) (West, Westlaw through 2012 Reg. Sess.) (allowing public employers to implement their last offer if statutory impasse procedures do not lead to an agreement).

<sup>110</sup> See CONN. GEN. STAT. ANN. § 10-153f(b)–(c) (West, Westlaw through 2012 Feb. Reg. Sess. and June 12 Special Sess.) (requiring mediation and then arbitration, with arbitrators' rulings binding unless rejected by two-thirds of the relevant legislative body); IOWA CODE ANN. §§ 20.19–.22 (West, Westlaw through 2012 Reg. Sess.) (in the event of an impasse, requiring school districts and unions that have not agreed to impasse procedures to submit to mediation, fact-finding, and then binding arbitration); MINN. STAT. ANN. § 179A.16 (West, Westlaw through 2012 First Special Sess.) (in the event of an impasse, empowering a state agency to submit disputes to binding arbitration); NEV. REV. STAT. ANN. 288.217(2) (West, Westlaw through 2011 Reg. Sess.) (allowing either side to submit a bargaining dispute to binding arbitration if no agreement has been reached after four bargaining sessions); R.I. GEN. LAWS ANN. §§ 28-9.3-9 to -13 (West, Westlaw through 2012 Reg. Sess.) (allowing either party in teacher contract negotiations to request binding arbitration on all matters not involving the expenditure of money). See also ALASKA STAT. ANN. § 23.40.200(b) (West, Westlaw through 2012 2nd Reg. Sess.) (establishing binding arbitration for some classes of public employee, though not teachers); HAW. REV. STAT. § 89-11(d) (West, Westlaw through Act 239 of 2012 Reg. Sess.) (establishing binding arbitration for some classes of public employees, though not teachers); N.J. STAT. ANN. § 34:13A-16(a) (West, Westlaw through 2012 Legis. Sess.) (requiring binding arbitration at impasse for police and firefighters); N.Y. CIV. SERV. LAW § 209(2) (McKinney, Westlaw through 2012 Legis. Sess.) (requiring binding arbitration at impasse for some classes of public employees, though not teachers).

<sup>111</sup> See N.H. REV. STAT. ANN. § 273-A:12 (West, Westlaw through 2012 Reg. Sess.) (requiring mediation at impasse and allowing the local legislature to impose the mediator's recommendation); see also OHIO REV. CODE ANN. § 4117.14(C)(6) (West, Westlaw through 2011 Legis. Sess.) (providing that the recommendation of a fact-finding panel after impasse will become binding unless three-fifths of the relevant legislative body or three-fifths of union members reject the recommendations).

<sup>112</sup> In addition, in most cases, state legislation will preempt subsequent collective bargaining agreements, providing another mechanism to enact policy without union approval, albeit one requiring action at the state level. See, e.g., *Lieberman v. State Bd. of Labor Relations*, 579 A.2d 505, 514–15 (Conn. 1990) (holding that a state freedom of

Admittedly, these statutory impasse procedures cannot resolve all majoritarian doubts about public sector bargaining. Relatively few states allow unilateral policy changes at impasse<sup>113</sup> and binding arbitration may only exacerbate majoritarian concerns, since arbitrators are not accountable to the public. Furthermore, statutory impasse procedures only come into play when the school district and union bargain unsuccessfully for a period of time specified by state statute.<sup>114</sup> But a period of unsuccessful bargaining, followed by fact-finding, mediation, or arbitration—sometimes all three<sup>115</sup>—is a costly way to make policy, in both time and money, and it carries risk for all parties involved.<sup>116</sup> If the public employer is deeply hesitant to utilize impasse procedures, it might feel pressured to withdraw proposals that are holding up a final deal, giving unions an effective veto over education policy.

On permissive topics, however, the government has the power to avoid this scenario. When government negotiators believe that a union's unbending position on a permissive topic is incompatible with public preferences, the negotiators can simply pull the topic off the bargaining table, leaving it to be determined through local legislation or administrative discretion.<sup>117</sup> Under the rules for permissive topics,

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information statute preempted public sector collective bargaining agreements governing destruction of personnel files).

<sup>113</sup> See discussion *supra* note 109.

<sup>114</sup> See, e.g., IND. CODE ANN. § 20-29-6-13(a) (West, Westlaw through 2012 2nd Reg. Sess.) (60 days); OR. REV. STAT. ANN. § 243.712(1) (Westlaw) (150 days).

<sup>115</sup> See IOWA CODE ANN. §§ 20.19–.22 (Westlaw) (requiring school districts and unions that have not agreed to other impasse procedures to submit to mediation, then fact-finding, and then binding arbitration at impasse).

<sup>116</sup> For example, the outcome of arbitration or fact-finding will be uncertain, and the process can lead to political instability. See Hess & Kelly, *supra* note 5, at 85 (calling arbitration at impasse a “costly, time-consuming process that antagonizes teachers and that administrators would rather avoid”).

<sup>117</sup> Inc. Vill. of Lynbrook v. N.Y. State Pub. Emp't Relations Bd., 399 N.E.2d 55, 57 n.1 (1979) (“[N]either party must continue to bargain on a permissive issue to the point of impasse.”). In applying state scope of bargaining rules, state courts typically rely on decisions interpreting the National Labor Relations Act, the federal law governing private employees. See, e.g., Detroit Police Officers Ass'n. v. Detroit, 214 N.W.2d 803 (Mich. 1974) (relying on *Kit Manufacturing Co., Inc.*, 150 N.L.R.B. 662 (1964), *aff'd* 365 F.2d 829 (9th Cir. 1966)). In *Kit Manufacturing Company, Inc.*, the National Labor Relations Board held that that, in the private sector, a party can decline to bargain about a permissive topic at any time, even if the party has bargained over the topic previously. 150 N.L.R.B. at 666–68. See also *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185–88 (1971) (holding that even after a permissive topic has been included in a collective bargaining agreement, the employer can make unilateral changes on that topic when the agreement expires).

the union will be barred from insisting that the government agree to terms on the topic—or even listen to proposals on the topic—as a condition of reaching agreement on other topics under negotiation.<sup>118</sup>

Unions are also not permitted to threaten strikes or exert other types of pressure to prevent government negotiators from invoking their power to halt bargaining, as those actions would constitute bad faith bargaining.<sup>119</sup>

Government negotiators can therefore avoid any union veto through use of their power under the permissive designation, and they can also gain bargaining leverage by threatening to use that power. While Part III of this Article discusses political and social reasons that local governments might fail to remove permissive topics from bargaining even when the union's position makes it difficult to advance public preferences, for now, the point is that government negotiators have the ability to take such action. Any hesitance to do so must be attributed to factors other than the structure of the bargaining process.

Even if bargaining does not give unions a veto over education policy, critics claim that unions' prominent role in bargaining allows them to exert disproportionate influence on education policy. Bargaining gives unions a special set of procedural tools in shaping education policy: the ability to make proposals directly to policymakers, along with significant face time with public officials to advocate for those proposals, and the ability to complicate the implementation of competing proposals (even if they cannot veto such proposals outright).<sup>120</sup> Some critics say that states are justified in

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<sup>118</sup> See, e.g., *Pasco Police Officers' Ass'n v. Pasco*, 938 P.2d 827, 833–34 (Wash. 1997). The Washington Supreme Court decision relied on the Supreme Court's ruling in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), where the Court held that a party who insists on a permissive topic violates the scope of bargaining rules because “such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.” *Id.* at 349.

<sup>119</sup> See, e.g., *Nassau Ins. Co.*, 280 N.L.R.B. 878, 885 (1986) (finding an NLRA violation where the union struck in order to pressure the employer to accept terms on a permissive topic). In September 2012, the City of Chicago claimed that the ongoing strike by its teachers was an illegal strike over permissive topics, though the case became moot before it was decided. See Plaintiff's Verified Motion for Temporary Restraining Order at 1–2, *Bd. of Educ. v. Chi. Teachers Union*, No. CHI-1863170v1 (Cir. Ct. Cook County Ill. Sept. 17, 2012) (arguing that the strike was “unlawful . . . because it is in response to a dispute between the [Chicago Teachers Union] and the Board of Education over permissive subjects of bargaining”).

<sup>120</sup> See Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CINCINNATI L. REV. 669, 674 (1975) (noting that union representatives get “direct and intensive access” to public officials through bargaining).

giving unions these tools on certain topics, like wages or grievance procedures, that are at the core of teachers' personal interest.<sup>121</sup> But these critics maintain that unions should not have these tools on topics like the length of the school day, on which the public has a very significant interest that should not be outweighed by the interest of any particular group of citizens.<sup>122</sup>

This argument is the most powerful aspect of the traditional majoritarian critique, but it is not persuasive when examined closely. In the modern American political system, the tools utilized by teacher unions in bargaining—most significantly, direct access to lawmakers—are available to interest groups in the ordinary legislative and administrative process. The result, as described in an oft-cited study of interest group influence, is that those groups' "organization and action are often more influential than public opinion for determining policy outcomes."<sup>123</sup> At the federal and state levels, it is well established that lobbyists for interest groups interact extensively with congressional representatives and their staffs.<sup>124</sup> Legislators regularly take input from interest groups on bills and amendments, often putting those groups' ideas directly into legislative proposals.<sup>125</sup> As for the regulatory process, Professor Jody Freeman has argued

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<sup>121</sup> See, e.g., Corbett, *supra* note 18, at 259 ("[T]here is general agreement that economic issues (that is, wages, hours, and fringe benefits) are mandatory subjects of bargaining, because the legitimate interests of the employees outweigh any employer policy implementation interests").

<sup>122</sup> See *id.* at 258–59 (arguing that "when the topics in the public sector are of fundamental public interest, the bilateral process is inappropriate").

<sup>123</sup> JOHN R. WRIGHT, *INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE* 2 (2003).

<sup>124</sup> See, e.g., JEFFREY M. BERRY & CLYDE WILCOX, *THE INTEREST GROUP SOCIETY* 138–41 (5th ed. 2009) (describing the role of lobbyists in the legislative process). Trade associations are one well-studied set of interest groups with significant access to legislators. See Lee Drutman, *Trade Associations, the Collective Action Dilemma, and the Problem of Cohesion*, in *INTEREST GROUP POLITICS* 74, 74–86 (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2012).

<sup>125</sup> See BERTRAM J. LEVINE, *THE ART OF LOBBYING: BUILDING TRUST AND SELLING POLICY* 235 (2009) (in a survey of sixty-five federal policymakers, finding that 58% of respondents "welcomed legislative drafts, etc., from lobbyists" and 39% of respondents "received many ideas for legislation (including amendments) from lobbyists"); BERRY & WILCOX, *supra* note 123, at 138 (noting that committee staff sometimes "put lobbyists' ideas directly into drafts of legislation"). Similarly, lobbyists can "squell proposals before they receive formal consideration." WRIGHT, *supra* note 122, at 39. A particularly prominent example of interest group influence can be found in the extensive federal farm subsidies that persist in large part due to lobbying by agricultural companies. Anthony Kammer, *Cornography: Perverse Incentives and the United States Corn Subsidy*, 8 J. FOOD L. & POL'Y 1, 41–43, 53–61 (2012).

persuasively that private actors are deeply involved in the administrative governance process<sup>126</sup> as a result of, among other activities, privatization of public services,<sup>127</sup> the official adoption of privately generated standards,<sup>128</sup> and interplay between self-regulation and government regulation.<sup>129</sup> These dynamics play out in localities and states as well as at the federal level.<sup>130</sup> In education, for example, the privately developed “Common Core” curriculum standards will be used by nearly all public schools after most states adopted those standards.<sup>131</sup>

There is little majoritarian benefit to shifting education policy out of the bargaining process and into processes that are no less affected by special interest influence. Indeed, even when states prohibit bargaining on some topics, teacher unions themselves continue to play a highly active and effective role in shaping policy on those prohibited topics through the ordinary legislative and administrative processes.<sup>132</sup> Teacher unions are among the top donors to national, state, and local political campaigns.<sup>133</sup> They are likely at their most effective in influencing policymaking at the local level. In one study of local school board elections, incumbents who did not have a union

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<sup>126</sup> See generally Jody Freeman, *Annual Regulation of Business Focus: Privatization, Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 820 (2000); see also WRIGHT, *supra* note 122, at 52–53 (describing interest groups’ influence in administrative agencies).

<sup>127</sup> Although one might argue that the government can maintain the authority to determine rules and standards even while outsourcing implementation of that policy, Freeman argues that the distinction often fails in practice and offers as an example the wide discretionary power of guards at private prisons. See Freeman, *supra* note 125, at 823–26.

<sup>128</sup> *Id.* at 827–31.

<sup>129</sup> *Id.* at 831–35.

<sup>130</sup> See *id.* at 820.

<sup>131</sup> See Stephanie Banchero, *School-Standards Pushback*, WALL ST. J. (May 8, 2012, 11:42 PM), <http://online.wsj.com/article/SB10001424052702303630404577390431072241906.html> (noting that forty-six states had adopted the standards after the Obama administration tied education grants to their adoption).

<sup>132</sup> See generally MOE, *supra* note 18, at 275–341 (describing the extensive political activities and influence of teacher unions). It is possible that a prohibition on *all* bargaining between districts and teachers would lead to a significant decrease in unions’ political strength and therefore limit unions’ ability to influence policy on topics outside of bargaining. Bargaining often serves as a union’s *raison d’être* and, as Moe observes, “a bedrock of union strength and unity.” *Id.* at 69. If this is the goal that bargaining critics have in mind, they don’t usually admit it. In fact, most recent proposals to restrict bargaining continue to allow bargaining on some topics. See *supra* notes 87–94 and accompanying text.

<sup>133</sup> *Id.* at 290–94.

endorsement lost more often than not, but incumbents with union support won ninety-two percent of their races.<sup>134</sup>

Bargaining critics might argue that bargaining is different because it gives special influence to just one interest group, while the ordinary legislative and administrative processes allow interest groups to battle among themselves, thereby providing some measure of balance.<sup>135</sup> Yet, any group can lobby the government officials who negotiate agreements and the school board members who approve them. And under a proposal like that described in Part IV of this paper, legislatures would have even more power to monitor and control bargaining, thereby increasing the ability of all concerned groups to exert influence on the bargaining process.

### *C. Transparency and Public Involvement*

Perhaps, though, collective bargaining suffers from a distinct flaw: a dearth of transparency. Some critics argue that the closed and secretive nature of the bargaining process makes it more likely that bargaining outcomes will be inconsistent with majority preferences.<sup>136</sup> From this perspective, bargaining takes place in a secret “smoke-filled room,”<sup>137</sup> with the public learning of proposals only after negotiations have concluded.<sup>138</sup> The opacity of bargaining

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<sup>134</sup> Terry M. Moe, *Teacher Unions and School Board Elections*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 254, 275 (William Howell ed., 2005). Admittedly, the data does not prove causation beyond doubt because it may simply be the case that unions support candidates who would have won in any case. Even if that is true, union endorsements and monetary contributions likely increase unions’ access to these winning candidates.

<sup>135</sup> Other influential groups in education include the large foundations established by Bill Gates, Eli Broad, and others, a group that Diane Ravitch calls the “billionaire boys’ club.” DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 195–222 (2010). Ravitch claims that these foundations represent a “fundamentally antidemocratic” and “unusually powerful force” that have “taken it upon themselves to reform public education, perhaps in ways that would never the scrutiny of voters in any district or state.” *Id.* at 200–01.

<sup>136</sup> See Corbett, *supra* note 18, at 261.

<sup>137</sup> Summers, *supra* note 119, at 676. For a recent example of secrecy in bargaining, see Bill Turque, *D.C. Teachers, Rhee Appear Close to Contract; Both Sides Might Yield Some Ground*, WASH. POST (Sept. 11, 2009), [http://articles.washingtonpost.com/2009-09-11/news/36776793\\_1\\_rhee-grant-teachers-ineffective-teachers](http://articles.washingtonpost.com/2009-09-11/news/36776793_1_rhee-grant-teachers-ineffective-teachers) (noting that the district leader and teacher union president could not discuss negotiations due to a confidentiality agreement).

<sup>138</sup> Corbett, *supra* note 18, at 262; see also Hess & Kelly, *supra* note 5, at 77 (noting lack of media coverage of bargaining and attributing this largely to secrecy by both sides of the negotiation).

therefore makes it impossible for citizens to engage in the “actual exchange of ideas and participation” that is the “cornerstone of democratic decision making.”<sup>139</sup> One scholar has even claimed that the lack of transparency in bargaining leads to “public apathy and a sense of hopelessness in making any critical judgment of the agreement.”<sup>140</sup>

As an initial matter, it is important to note that the transparency concern can be addressed without any modification to the scope of bargaining. For example, Andrew Rotherham and Jane Hannaway have persuasively argued that teacher contracts and bargaining proposals should be disseminated in the media to foster agreements that are better for students and more aligned with public preferences.<sup>141</sup> In at least one state, California, the law already requires public meetings to be held throughout the bargaining process.<sup>142</sup> Employers must present their initial proposals at a public meeting, and, in order to preserve opportunities for public comment, actual bargaining cannot occur until seven days after that meeting.<sup>143</sup> And as the Article has discussed, the requirement of legislative approval can lead to significant public debate, with government negotiators explaining their choices and legislators debating the merits of a tentative agreement.<sup>144</sup>

Even setting aside these realities, proponents of the transparency concern seem to have an unrealistic conception of the lawmaking processes in which education policy issues would be resolved in the absence of bargaining. Notwithstanding the activities of interest groups, American citizens rarely participate in or directly observe the legislative process. In fact, typical lawmaking is non-transparent and closed to the public in many of the same ways as collective

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<sup>139</sup> Corbett, *supra* note 18, at 261.

<sup>140</sup> Summers, *supra* note 119, at 676.

<sup>141</sup> See Jane Hannaway & Andrew J. Rotherham, *Conclusion*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY'S SCHOOLS 257, 264 (Jane Hannaway & Andrew Rotherham eds., 2006); Andrew J. Rotherham, *Behind the Chicago Teachers' Strike: Why Talks Must Be Made Public*, TIME (Sept. 10, 2012), <http://ideas.time.com/2012/09/10/chicago-teachers-strike-why-negotiations-must-be-open-to-the-public/>.

<sup>142</sup> CAL. GOV'T CODE § 3523 (West, Westlaw through 2012 Reg. Sess.).

<sup>143</sup> *Id.* Yet, as Charles Kerchner and Douglas Mitchell observe: “[W]e were surprised to discover . . . how often the mechanisms for public participation go unused and how inconsequently public input tends to be. Indeed, the very people who press hardest to establish standards for public involvement seem to lose interest in the hearing process once the ground rules are agreed upon.” KERCHNER & MITCHELL, *supra* note 22, at 142.

<sup>144</sup> See *supra* note 104 and accompanying text.



bargaining.<sup>145</sup> Former Stanford Law School Dean Larry Kramer has argued that legislative deliberations “are now carried on mainly behind-the-scenes: in committees or caucuses, between individuals, by e-mail, through staff, and so on.”<sup>146</sup> Some bills are the result of secretive negotiations between party leaders, legislators (especially “swing” voters), representatives of the executive branch, interest groups, and others.<sup>147</sup> At the federal level, calls for increased transparency in lawmaking—even by key participants in that process—have typically amounted to little.<sup>148</sup>

Administrative policymaking is generally even less transparent. Admittedly, in rulemaking under the federal Administrative Procedure Act and many of its state analogs, agencies must solicit comments and publish a statement responding to the most significant of those statements and explaining the basis for adopting a rule.<sup>149</sup> But this form of public input does not allow citizens to directly participate in policymaking, and the influence of comment is not clear. Moreover, the notice and comment process as a whole tends to facilitate participation by groups who represent specialized interests rather than the broader public.<sup>150</sup>

Meanwhile, state and local agencies and legislatures may not be any more transparent than their federal counterparts. Local officials can often act with much less press coverage and public scrutiny than the United States Congress or federal regulatory agencies.<sup>151</sup>

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<sup>145</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 238 (2004).

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., David D. Kirkpatrick, *White House Affirms Deal on Drug Cost: Will Block Any Move For Added Savings*, N.Y. TIMES, Aug. 6, 2009, at A1, A16 (describing a deal between the Obama administration and pharmaceutical companies on measures to limit costs to industry arising from health care reform legislation).

<sup>148</sup> Recall President Obama’s campaign promise to televise meetings between legislators and lobbyists over health care reform proposals. Peter Nicholas, *Despite President Barack Obama’s Campaign Pledge, Washington Culture of Lobbyists and Earmarks Remains*, CHI. TRIB. (Mar. 2, 2009), [http://articles.chicagotribune.com/2009-03-02/news/0903020338\\_1\\_earmarks-spending-bill-lobbyists](http://articles.chicagotribune.com/2009-03-02/news/0903020338_1_earmarks-spending-bill-lobbyists).

<sup>149</sup> See 5 U.S.C. § 553(c) (2006) (requiring a “concise general statement” of the “basis and purpose” for rules); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (describing the requirement). Many states have similar laws. See, e.g., KY. REV. STAT. ANN. § 13A.280(5)(e)–(f) (West, Westlaw through 2012 Legislation).

<sup>150</sup> See Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN L. REV. 411, 472–74 (2005) (in an empirical study of rulemaking, finding a “paucity of broad public representation” in comments).

<sup>151</sup> See Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781, 784 (2001) (“State governments may be able to act without public scrutiny. State officials may be elected in

Superintendents, for example, have often been criticized for refusing to share information with the public and even with their own local school boards.<sup>152</sup> To assess the majoritarian implications of public sector collective bargaining, one must compare the bargaining process to these alternative legislative and administrative modes of setting policy, a comparison that hardly weighs against bargaining.

### III

#### A CLOSER LOOK AT THE GOVERNMENT'S ROLE IN BARGAINING

Government officials typically have the tools to prevent countermajoritarian policy outcomes in bargaining, just as they do in legislation or rulemaking. But public officials can also choose not to use these tools—or fail to use them effectively. In other words, conflicts between public sector collective bargaining agreements and public preferences are best attributed not to the bargaining process but rather to the conduct of actors in that process—in the parlance of vehicle accidents, human error rather than system defect.

For example, as the former superintendent of the Milwaukee, Wisconsin school district has written, collective bargaining agreements in that city failed to facilitate reform due to the “successive failures of Milwaukee’s elected school board and administration to use bargaining as a means for presenting and implementing a strategy of improving academic achievement.”<sup>153</sup> Conversely, Professor Terry Moe has described how district leaders in New York City and the District of Columbia managed to achieve significant education reforms, in spite of—and indeed, through—the

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less ideologically clear or less well-reported campaigns. And that lack of scrutiny and citizen participation may lead to state governments acting under the influence of well-funded special interest groups that represent money, legal constructs or concentrated interests rather than votes.”).

<sup>152</sup> The author has heard this complaint from those close to school board members, and it is reflected in local education coverage. See Brian Charles, *School Board Members Blast Districts of Lack of Transparency*, INLAND VALLEY DAILY BULL. (Mar. 22, 2012, 5:38 PM) (describing lack of transparency regarding misbehaving teachers); Keith Vance, *School Board Wants More Information From Superintendent*, BARRE-MONTPELIER TIMES ARGUS (Mar. 23, 2012), <http://timesargus.com/apps/pbcs.dll/article?AID=/20120323/NEWS01/703239924/1003/NEWS01> (describing complaints by school board members regarding lack of transparency on the district budget).

<sup>153</sup> Howard L. Fuller et al., *Collective Bargaining in Milwaukee Public Schools, in CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM* 110, 113 (Tom Loveless ed., 2000).

collective bargaining process.<sup>154</sup> The most natural conclusion from Moe's analysis of New York and D.C. is that those who disagree with unions on policy issues should be more effective in the political process in order to elect leaders who will utilize bargaining tools for reform (and who will appoint negotiators to do the same). In other words, bargaining rules are less important than the attributes of the public officials who act under those rules.

Still, reformers should be concerned with ensuring that bargaining practices do not foster human error and instead facilitate government officials' vigorous pursuit of public preferences in bargaining.

This Part analyzes several factors that affect the government's effectiveness as an agent of the public in bargaining. It concludes that the government is particularly likely to fail to advance public preferences in bargaining when two conditions occur. First, the relevant legislative body may decline to actively oversee the bargaining process, giving a wide range of discretion to government negotiators, such as the district superintendent. Second, these government negotiators may be poorly disposed and poorly incentivized to aggressively pursue public preferences in bargaining. This Part discusses each of these conditions in turn, showing that they can combine to create countermajoritarian bargaining outcomes. Part IV takes up the task of proposing reforms that address the specific problems described here.

#### *A. Oversight of the Bargaining Process*

School boards are generally thought to hold the reins for the government in the bargaining process.<sup>155</sup> In discussing bargaining for teachers, most commentators describe a negotiation between a union and a school board.<sup>156</sup> Most state statutes either specifically identify

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<sup>154</sup> See MOE, *supra* note 18, at 217–40 (detailing how both districts brought “radical reform to the labor contract”).

<sup>155</sup> In some localities, the power traditionally held by the school board is held by the mayor or another democratic institution; to avoid unnecessary complexity, this Part refers to school boards exclusively.

<sup>156</sup> See, e.g., Susan Moore Johnson & Morgaen L. Donaldson, *The Effects of Collective Bargaining on Teacher Quality*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY'S SCHOOLS 111, 113 (Jane Hannaway & Andrew Rotherham eds., 2006) (“[U]nions and school boards in many states have been negotiating and signing contracts for more than 35 years . . . .”); SHARP, *supra* note 105, at 41 (“Every time a board of education begins to negotiate again, it has to decide who will represent the board at the bargaining table.”); TODD A. DEMITCHELL, LABOR RELATIONS IN EDUCATION: POLICIES, POLITICS, AND PRACTICES 109 (2010) (referring to government side of the bargaining table as the “school board bargaining team”).

school boards as the government's bargaining representative or place responsibility for public sector bargaining on the "public employer" or "agency"<sup>157</sup>—in the case of teachers, the school district, which is overseen by the school board. The school board often selects the government negotiator and makes the final decision on whether to approve or deny a tentative agreement.<sup>158</sup>

But school boards may not exert much control in the time between the beginning of negotiations and their conclusion. Although the school board's oversight of the bargaining process has received strikingly little empirical study, some tentative conclusions are possible. School board members are typically not directly involved at the bargaining table, where tradeoffs are made and language drafted.<sup>159</sup> As noted above, the negotiating team usually consists of a variety of school district officials, outside consultants, lawyers, and others, most commonly led by a superintendent or other central-office administrator.<sup>160</sup> The school board may not actively oversee those officials. When, for example, the superintendent leads the bargaining process, she often acts with "full authority" at the negotiating table.<sup>161</sup> Indeed, despite the sometimes quick pace of bargaining, school boards usually meet only once or twice a month.<sup>162</sup>

Bargaining can thus affect a shift in power over education policy within the government. In the absence of bargaining, the legislature would typically enact policy on topics such as terms and conditions of employment for school employees, the length of the school day and year, student discipline, attendance requirements for students, special

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<sup>157</sup> See, e.g., OKLA. STAT. ANN. tit. 70, § 509.6 (West, Westlaw through 2012 2nd Reg. Sess.) ("The board of education and the representatives of the organization [teacher union] must negotiate in good faith . . ."); N.Y. CIV. SERV. LAW § 204 (McKinney, Westlaw through 2012 Legis. Sess.) ("[T]he appropriate public employer shall be, and hereby is, required to negotiate collectively . . .").

<sup>158</sup> See *supra* Part I.A.

<sup>159</sup> See SHARP, *supra* note 105, at 51 (noting that, according to a 1999 survey, only one in five school districts had a school board member as the government's chief spokesperson in bargaining).

<sup>160</sup> See *id.* (describing a 1999 survey showing that 22% of school districts—the largest portion in the study—had the superintendent act as the chief negotiator and another 16.3% filled the role with another central-office administrator.).

<sup>161</sup> See *id.* at 51–53 (showing that the superintendent had "full authority" in 21.3% of school districts—nearly the same as the percentage of districts in which the superintendent was the lead negotiator).

<sup>162</sup> According to a survey published in 2010 by the National School Board Association, forty percent of school boards reported meeting once per month and fifty-four percent reported meeting twice per month. FREDERICK M. HESS & OLIVIA MEEKS, SCHOOL BOARDS CIRCA 2010: GOVERNANCE IN THE ACCOUNTABILITY ERA 66 (2010).

education, class size, and more.<sup>163</sup> When bargaining occurs, many of these topics are potentially decided through labor agreements.<sup>164</sup> Negotiators reach compromises with the union on these topics, draft actual contract language, and, on permissive topics, decide whether to bargain at all—all with varying levels of oversight by the school board.

To be sure, the legislature always holds the final power to approve or reject tentative teacher contracts. That power can act as a critical check against countermajoritarian outcomes, and legislative consideration can also provide an avenue for public debate. However, the legislature's final approval power is not the same as specific oversight of negotiations. That is especially true because agreements are presented to the legislature as comprehensive packages covering a wide range of policy, which the legislature can only approve or reject, not amend or consider in parts. And there are significant costs to rejecting a labor agreement: The union and the district leader must return to the bargaining table, which takes time and may prevent district administrators from fulfilling other duties, while the district continues to operate under the prior agreement. Consequently, legislators may approve agreements even when they feel that some particular terms do not align with preferences of the public.<sup>165</sup>

Moreover, legislators are less publicly accountable in their role overseeing the bargaining process than they are outside of bargaining. This Article has argued that bargaining is not less transparent than alternative policymaking systems as a general matter, suggesting that lack of transparency cannot justify bargaining prohibitions.<sup>166</sup> But there is a specific kind of transparency that seems particularly lacking in bargaining: public understanding of the bargaining process itself and of the rules governing the process. While the public understands that legislators are responsible for legislation, when policy made

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<sup>163</sup> These examples were drawn from policy enacted by the Houston Board of Education. Texas does not permit school districts to bargain collectively with teachers.

<sup>164</sup> See discussion *supra* note 5.

<sup>165</sup> A similar situation occurs when the President must choose whether to veto an omnibus budget bill. Scholars have observed that the President faces significant incentives to approve such bills even when they contain terms with which the President vehemently disagrees. See Antony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 478–79 (1994). Legislators may be particularly disposed to overlook terms that have low political salience even if those terms are deeply important to school policy. For example, before teacher seniority became the rallying point for reformers that it is today, a legislator would have little political incentive to hold up a finalized collective bargaining agreement over concerns related to seniority.

<sup>166</sup> See *supra* Part II.C.

through bargaining is unpopular, government officials can claim that they were simply forced to accede to union demands.<sup>167</sup> That claim would be inconsistent with the argument in Part II that bargaining does not give unions power to force their preferences on the public or even, in nearly all cases, to veto proposals by the government. Indeed, when topics are classified as permissive, the government need not bargain on them at all, and legislators always have final power to veto any agreement. Most members of the public, however, may be unaware of these realities. Consequently, government negotiators face diminished accountability for unpopular policies made through bargaining.<sup>168</sup> For this reason, and the others described above, legislators may perform poorly as agents of the public in overseeing bargaining.

### *B. Government Negotiators*

In the absence of effective legislative oversight, there are several reasons to be concerned that government negotiators may pursue public preferences less vigorously and less effectively than they or other officials would outside of bargaining. First, scholars have argued persuasively that top school district officials tend to be highly averse to conflict and legal risk, a tendency that may diminish their ability to use bargaining as a tool for reform. Frederick Hess and Lance Fusarelli note that the typical career path of district leaders leads them to value collaboration and consensus.<sup>169</sup> District leaders

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<sup>167</sup> For example, according to a 2010 survey, thirty-eight percent of school board members claimed that collective bargaining agreements were a “total barrier” or “strong barrier” to the district’s ability to improve student achievement. HESS & MEEKS, *supra* note 163, at 48. Another twenty-five percent said teacher contracts were a “moderate barrier.” *Id.*

<sup>168</sup> For an instructive analogy, consider school finance lawsuits in which plaintiffs have claimed that state systems for funding schools violate federal or state constitutions. *See generally* *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009). In such litigation, local and state officials are tasked with defending the government’s current system of school funding. But education officials often sympathize with the notion that schools should be better funded. Consequently, school officials may be less than zealous in defending the suits, as the adversarial nature of litigation serves as a cover for a kind of “collusion” between government officials and plaintiffs who share the goal of securing a greater share of government resources for education. *See* ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* 140–43 (2009).

<sup>169</sup> Frederick M. Hess & Lance D. Fusarelli, *School Superintendents and the Law: Cages of Their Own Design?*, in *FROM SCHOOLHOUSE TO COURTHOUSE: THE*

are particularly wary of legal risk. In one survey, forty-seven percent of district leaders said that they perceived and were affected by the “constant threat of litigation.”<sup>170</sup> Legal trainings for superintendents focus on avoiding liability,<sup>171</sup> and school districts often have limited resources to defend against lawsuits.<sup>172</sup> Furthermore, government officials may perceive heightened legal risk when their actions are regulated by state collective bargaining law. As compared to the legislative process, bargaining carries greater legal obligations, including the somewhat amorphous duty to bargain in good faith. Teacher unions and their attorneys are unlikely to show restraint in threatening charges of bargaining violations, particularly when government negotiators employ aggressive tactics.<sup>173</sup>

Second, aside from legal risk, government negotiators may have other reasons for avoiding aggressive tactics in bargaining with teacher unions. Note that the government’s side of the bargaining table is often staffed by school administrators who work closely with teachers, who are themselves former teachers and union members, and who likely understand that teachers are the district’s most important employees.<sup>174</sup> In these circumstances, government negotiators’ hesitation to use aggressive bargaining tactics would be understandable.

However, to effectively pursue public preferences, government negotiators likely need access to a full toolbox of bargaining strategies. In particular, consistent with the arguments described in Part II of this Article, government negotiators should be willing to use their power to cease negotiations on permissive topics when the parties appear unlikely to reach a mutually agreeable resolution on those topics. Perhaps more importantly, even when the government does not use this power, the prospect of such action, if credible, may

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JUDICIARY’S ROLE IN AMERICAN EDUCATION 49, 49 (Joshua M. Dunn & Martin R. West eds., 2009).

<sup>170</sup> *Id.* at 49 (internal quotation marks omitted).

<sup>171</sup> *Id.* at 54.

<sup>172</sup> *Id.* at 54–55.

<sup>173</sup> For examples of such cases brought by public sector unions in recent years, see *Board of Education v. Sered*, 850 N.E.2d 821 (Ill. App. Ct. 2006); *Bon Homme Cnty. Comm’n v. Am. Fed’n of State, Cnty., and Mun. Emps.*, 699 N.W.2d 441 (S.D. 2005); *Educ. Minn.-Greenway Local 1330 v. Indep. Sch. Dist. No. 316*, 673 N.W.2d 843 (Minn. Ct. App. 2004).

<sup>174</sup> In a survey of nearly 2,000 superintendents, ninety-nine percent of respondents had worked as a teacher. Over three-quarters had worked as a teacher for more than five years. THEODORE J. KOWALSKI ET AL., *THE AMERICAN SCHOOL SUPERINTENDENT: 2010 DECENNIAL STUDY* 33 (2011).

help compel agreements. In light of these realities, scholars have cautioned that administrators may be poorly suited to bargaining because “[g]ood adversarial bargaining often requires an aggressive, argumentative posture and can lead to open confrontation.”<sup>175</sup> If government negotiators are unwilling to assume that posture, even when union proposals are inconsistent with public preferences, collective bargaining may lead to countermajoritarian results.

#### IV

##### A NEW POLICY APPROACH: BROAD PERMISSIVE BARGAINING WITH HEIGHTENED LEGISLATIVE INVOLVEMENT

This Article has argued that the structure of the bargaining process does not inherently give disproportionate power to unions but that public officials might nevertheless act as poor agents of the public in bargaining. While bargaining prohibitions are indiscriminate and likely unhelpful in ensuring majoritarianism, more targeted measures can help address the specific problems laid out in Part III. First, states should adopt a broad scope of bargaining in which many topics are mandatory for bargaining, many other topics are permissive, and few topics are prohibited.<sup>176</sup> This Article does not attempt to defend a specific rule for separating topics into the mandatory and permissive categories, but the traditional Wagner Act balancing test, as described above, provides a promising framework.<sup>177</sup>

Second, local legislatures should play a more active and public role in bargaining—and especially in the choice of whether to bargain on a permissive topic. The legislature’s decisions on that issue should be issued publicly, through formal votes. There are a variety of ways that states can structure the process in order to facilitate this result. States could first require that local legislatures receive detailed and regular updates on bargaining, perhaps received by a committee charged with reporting to the wider legislative body when needed.<sup>178</sup> With respect

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<sup>175</sup> BERNADETTE MARCZELY & DAVID W. MARCZELY, HUMAN RESOURCE AND CONTRACT MANAGEMENT IN THE PUBLIC SCHOOL: A LEGAL PERSPECTIVE 41 (2002).

<sup>176</sup> Of course, the lack of prohibited topics does not mean that there are no limits on bargaining. For example, local school districts and unions cannot agree to terms that are inconsistent with substantive provisions of state law. If state law provides that schools must be in session for at least 180 days, the school district and union cannot agree to a 178-day school year.

<sup>177</sup> That test has already been adopted by several states for public sector bargaining. *See supra* notes 69–73 and accompanying text.

<sup>178</sup> State law could go further and require a legislator to serve on the negotiating team and attend bargaining sessions as frequently as possible.



to permissive topics, the local legislature should be explicitly empowered by state law to enact binding resolutions that instruct government negotiators to either bargain on a permissive topic or pull such a topic off the table. Indeed, such votes should be required at the outset of bargaining for significant permissive topics. To further encourage active legislative oversight, the legislature could be required to take periodic votes on whether to continue bargaining on permissive topics. For example, such votes could be required every three months during bargaining.

A system along these lines would facilitate majoritarianism in bargaining without resorting to prohibitions on bargaining. If the government negotiator fails to halt bargaining when it threatens to lead to a countermajoritarian result, the local legislature could override that decision. And perhaps more importantly, the legislature would be accountable for the failure to take such action. Although this approach does not *guarantee* that education policy will be consistent with public preferences, it substantially decreases the likelihood that bargaining outcomes will be less majoritarian than would be policy set in the absence of bargaining. That is because heightened involvement by legislators means that bargaining will be overseen by the same officials who are chiefly responsible for policymaking outside of bargaining. Furthermore, as the Article argues below, policy created under this proposal may in fact be more majoritarian than policy made in systems in which some topics are prohibited for bargaining. Thus, the proposed approach protects public preferences while allowing school districts and teachers the space needed to reach compromises that serve the interests of both parties.

The remainder of this Part provides further support for the proposal. First, this Part shows that a broad scope of bargaining can do more to advance public preferences than a narrow scope of bargaining. Second, this Part shows that the proposal is more likely to affect public policy than prohibitions on bargaining because prohibitions are commonly ignored. Finally, this Part responds to additional objections to the proposal.

#### *A. Bargaining as Tool for Majoritarianism*

The proposal described above is more likely to advance public preferences than rules that prohibit topics for bargaining. The foundation of the argument is simple: A broad scope of bargaining

allows the parties wide latitude to make mutually beneficial trades.<sup>179</sup> With many topics potentially on the table, the government and the union have many options for compromises that give teachers terms that are important to them in exchange for terms that, in the government's estimation, are important to the public.<sup>180</sup>

To see this effect at work, first assume that the government and the union negotiate only over a narrow set of topics classified as mandatory for bargaining. If the public and teachers do not have identical preferences with respect to those topics, then negotiation will lead to some compromise package that is not absolutely ideal from either side's perspective. But when an additional topic is added to the negotiations, the initial package can be shifted in the direction of one side's preferences in exchange for an agreement on the new topic that favors the other side's preferences. And this trade may, in fact, increase the overall satisfaction of *both* sides. Perhaps teachers are willing to sacrifice \$2,000 in annual average salary for a modification to the tenure system that would allow teachers to get tenure after one year rather than two. Perhaps the public derives more utility from the decreased salary than it loses from shortening the probationary period. Then, the change is mutually beneficial—and it would not be available if tenure were a prohibited topic of bargaining.

If the government negotiator has an information advantage over the union regarding the government's plans, then the bargaining may give government officials a particularly strong tool to advance public preferences. Suppose, for instance, that the government already intends to implement a policy acceptable to the union on a permissive topic outside of bargaining, but the union is not aware of this. Then, by including the topic in bargaining, the government can obtain concessions from the union in exchange for a promise to do what it

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<sup>179</sup> It is axiomatic that in a "perfect market," contracts promote social welfare because parties only agree to bargains that make them better off. See Richard Craswell, *Freedom of Contract*, COASE LECTURE SERIES (1994), available at <http://www.law.uchicago.edu/files/files/33.Craswell.FrdmCntrct.pdf>. According to commentary accompanying the Second Restatement of Contracts, "[t]he enforcement of bargains rests in part on the common belief that enforcement enhances [social] utility" by encouraging contracts. RESTATEMENT (SECOND) OF CONTRACTS § 72 cmt. b (1981). Although the market for teacher labor negotiations is surely far from perfect, there is little reason to believe that unions and school districts act against their interests in bargaining over permissive terms, leaving aside agency problems as discussed in Part III of this Article, a distinct issue.

<sup>180</sup> Cf. Malin, *supra* note 18, at 1393 (arguing that a broad scope of bargaining benefits the public because "the union can be transformed from an impediment to effective government into a contributor").

already intended to do. When a state decides to make topics illegal rather than permissive, it foregoes this possibility.

One might protest, however, that from the perspective of maximizing public utility, a state is just as well off prohibiting a topic of bargaining rather than allowing it to be traded against other topics. After all, if a topic is prohibited, then the government is free to implement whatever policy it likes, so the government can establish the public's most favored policy without any need for a trade. In fact, this claim is incorrect in any bargaining system in which at least one topic is mandatory for bargaining. In such systems, bargaining over permissive topics may be the best way for the government to secure favorable terms on the mandatory topic.

For instance, to return to the example above, imagine that in negotiations over salary and tenure, the optimal outcome from the public's perspective is for the average salary to be \$58,000 and for teachers to have a two-year probationary period before gaining tenure. In addition, imagine that if the parties negotiate over salary but not tenure, the bargaining power of the parties is such that salaries will be \$60,000; since tenure is not bargained, the government is free to implement the two-year probationary period preferred by the public. But, in a negotiation over both topics, the union may decide to trade a salary decrease to \$58,000 for reduction of the probationary period to just one year. This latter package may well be preferable to the majority of citizens, depending on the relative intensity of the public's preference on salary and tenure.<sup>181</sup> If tenure is not available for bargaining, the government may have no leverage to induce the union to forego the \$2000 in salary.

Indeed, when the government acts as an effective agent of the public, there is a strong upside to broad permissive bargaining and little downside. On permissive topics, the government can choose whether to make the topic available for a trade. If no mutually beneficial trade is available, the government can simply refuse to bargain over the topic and therefore leave the topic to be decided by the legislature or the administrative process.<sup>182</sup> Technically, for topics classified as permissive, this agenda-setting power is shared by both the union and the government, since either side can refuse to bargain over the topic. In reality, though, a permissive designation gives

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<sup>181</sup> This will be the case, for example, if the public gains one unit of utility for every decrease of \$500 in annual salary and loses three units for every one-year reduction in the probationary period.

<sup>182</sup> See discussion *supra* note 116.

meaningful discretion to the government but not to the union. Unions will nearly always prefer to bargain over permissive education policy topics because, for most topics of bargaining, the government has the ability to unilaterally determine policy on topics not addressed through a collective bargaining agreement.

Thus, if opportunities for mutually beneficial trades on permissive topics are present in even a fraction of negotiations over teacher contracts, then prohibited topics in bargaining may be counterproductive from the standpoint of public utility. The existence of such opportunities is not merely hypothetical. For instance, the latest teacher contract in Washington, D.C., noted as groundbreaking by many observers, was commonly understood as a trade in which the school district increased teacher salary in exchange for the relaxation of terms on job security.<sup>183</sup> The trade was only possible because both topics were available for bargaining.

Admittedly, the government and union can engage in some forms of trading even on topics that are prohibited for bargaining. First, unions and districts could simply ignore the prohibited designation. As discussed in Section B below, that is a real possibility. But bargaining prohibitions cannot persuasively be defended on the grounds that they will often be ignored, particularly when an alternative approach—a broad permissive scope of bargaining—can be just as effective without the need for disregard of the law. Second, districts and unions could make tacit or non-binding agreements in which, in exchange for a particular contract term, the government would promise to implement a policy proposal through the ordinary legislative or administrative process.<sup>184</sup> Such agreements, though, would be fraught with uncertainty due to their legal unenforceability and the need to secure separate approval through the legislature or other government institution. It would be more efficient to allow the

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<sup>183</sup> The agreement raised teacher salaries by twenty percent while allowing the district to dismiss teachers that were rated “ineffective” by an evaluation system designed by the district. See Sam Dillon, *A Tentative Contract Deal for Washington Teachers*, N.Y. TIMES, Apr. 7, 2010, A21, available at <http://www.nytimes.com/2010/04/08/education/08schools.html>.

<sup>184</sup> For example, before states began to authorize bargaining, municipalities and unions often negotiated non-binding memoranda of understanding. See SLATER, *supra* note 23, at 165. Even today, in states that ban bargaining for public employees, it is common for districts and unions to engage in “meet and confer” sessions that, according to one national union official, produce policies that “are treated by districts officials as if they were legally binding.” HESS & WEST, *supra* note 5, at 17.

parties to come to fully binding and self-executing agreements, a result achievable with a broad permissive scope of bargaining.

### *B. The Efficacy of Prohibiting Topics for Bargaining*

There is a second reason to prefer classifying topics as permissive rather than prohibited. Bargaining critics argue that prohibitions are needed to shift power away from government negotiators and to other policymaking institutions such as the local legislature. In practice, though, government negotiators and unions often continue to bargain over prohibited topics. And legislators commonly allow this practice, approving the resulting labor agreements rather than taking more direct control over education policy. In these circumstances, bargaining prohibitions have not achieved their goals, while all stakeholders are burdened with the uncertainty arising from the unenforceability of contract terms.

When teacher contracts include terms on topics prohibited for bargaining, one might infer that legislators have adopted one of two stances. First, legislators might have actively considered the tentative labor agreement, noted that it contained such terms, but approved the agreement because they were satisfied with those terms or with the agreement as a whole. In this scenario, legislators have treated prohibited topics as if they were merely permissive—available for bargaining if helpful to a positive outcome. Second, legislators might have simply yielded control on prohibited topics to government negotiators because they were either unaware of the prohibition or uninterested in removing the topics from bargaining. In both cases, bargaining prohibitions have failed to achieve their desired effect.

To understand the phenomenon of bargaining over prohibited topics, it is helpful to first take a closer look at the legal consequences of bargaining prohibitions. First, when a topic is classified as prohibited, neither the district nor the union may insist that its counterpart bargain on the term. But that is also true for permissive topics. A second legal consequence is that contract terms on prohibited terms cannot be enforced in court. Thus, if class size is prohibited for bargaining, and a school district and union reach an agreement on the topic, then the school district would be free to breach the agreement without facing legal repercussions. Besides freeing public officials to implement their chosen policy regardless of what they have previously agreed to, the mechanism of non-enforceability is thought to deter the negotiation of illegal contract

terms, since a party is unlikely to trade concessions for a promise that the other side is able to breach at any time.<sup>185</sup>

It is also important to note that other possible legal consequences that have *not* historically been associated with bargaining prohibitions. For example, state laws do not explicitly provide for a private cause of action to enforce bargaining prohibitions. Indeed, in a recent case, the Michigan Circuit Court of the County of Kent ruled that there was no private right of action to enforce that state's bargaining prohibitions.<sup>186</sup> Similarly, state laws do not explicitly empower the state government to identify or remedy local violations of the scope of bargaining.<sup>187</sup>

Consequently, bargaining prohibitions only have effect to the extent that school districts either (1) refuse to bargain over prohibited topics or (2) bargain over the topics but then choose to breach the resulting agreements. But the first move is available even for permissive topics, and the second comes with significant cost. Regardless of the legal status of a collective bargaining agreement, government officials who violate public commitments are likely to face political and reputational consequences. Officials are particularly unlikely to disregard agreements with unions because the parties frequently interact, making mutual trust valuable to both sides, even when they disagree.<sup>188</sup> Since districts will usually follow illegal

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<sup>185</sup> The full deterrence model goes something like this: Suppose that Adam promises to do X and, in exchange, Brian promises to do Y. Suppose further that the agreement is unenforceable in court. To fulfill the agreement, either Adam or Brian has to act first; the identity of the first actor is likely specified in the agreement or understood by the parties. But with no legal recourse to enforce the contract, whoever acts first bears the risk that the other party will not perform. Thus, he will not perform or will demand a premium based on the risk of non-compliance by the other party. If he does not perform, then the time spent and expense incurred negotiating the agreement will be wasted. If he demands a premium, the parties may be unable to come to an agreement.

<sup>186</sup> *Jurrians v. Kent Intermediate Sch. Bd.*, No. 10-12758-CL, at 8–10 (Mich. Circuit Ct. Cnty. of Kent Mar. 1, 2011). Taxpayers identified in a local teacher contract an obvious violation of Michigan's prohibition on bargaining over the privatization of educational services. *Id.* at 2. Nevertheless, the court dismissed the suit, finding that state labor laws did not confer standing to private citizens to enforce bargaining limitations. *Id.* at 8–10. The author is not aware of any other cases on this topic.

<sup>187</sup> This article does not discuss whether states should employ stronger systems to enforce the scope of bargaining or whether such systems might be helpful from a majoritarian perspective. It is worth noting, however, that such systems would face several challenges, including the possibility that bargaining on prohibited topics would simply be replaced by non-binding "meet and confer" negotiations that would function no differently than binding bargaining. *See supra* note 184.

<sup>188</sup> For example, economists Ricard Gil and Justin Marion have shown that contractors and subcontractors who interact frequently are more likely to exhibit behavior suggesting

terms, there is little to deter the parties from negotiating those terms.<sup>189</sup>

An examination of actual teacher contracts confirms that school districts and unions often bargain over illegal contract terms. The examples included here are drawn from four states with long-standing and clearly-defined categories of prohibited topics: New Jersey, Kansas, Michigan, and Delaware. First, three of these states prohibit bargaining over school scheduling. In New Jersey<sup>190</sup> and Kansas,<sup>191</sup> school districts and unions are barred from bargaining on the length of the school day and school year, topics that many education reformers see as critical to improving public schools. In Michigan, there is a related but narrower prohibition on bargaining over the starting day of the school year.<sup>192</sup> In all three states, school districts and unions have violated these prohibitions. For instance, the Newark, New Jersey school district and union have agreed to contract

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that the parties have relied on “self-enforcing contracts”—agreements or understandings that are not legally binding. RICARD GIL & JUSTIN MARION, *THE ROLE OF REPEATED INTERACTIONS, SELF-ENFORCING AGREEMENTS AND RELATIONAL [SUB]CONTRACTING: EVIDENCE FROM CALIFORNIA HIGHWAY PROCUREMENT AUCTIONS 20* (2009).

<sup>189</sup> For a discussion of the prevalence of such terms in private contracting, see generally Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009).

<sup>190</sup> See *Bd. of Educ. v. Woodstown-Pilesgrove Reg'l Educ. Ass'n*, 410 A.2d 1131, 1136 (N.J. 1982) (holding that “the school calendar and the number of hours of employment on a particular school day” are “non-negotiable managerial decision[s],” which bear “too substantially upon too many and important non-teacher interests to be settled by collective bargaining or binding arbitration”); *Piscataway Twp. Educ. Ass'n v. Piscataway Twp. Bd. of Educ.*, 704 A.2d 981, 985 (N.J. 1998) (holding that a school district “did not have to negotiate with the Association before deciding to open schools on days previously scheduled as recess days”). The New Jersey chapter of the National Education Association has itself acknowledged that the “[a]cademic calendar” and “[d]esign of students’ school day” are illegal for bargaining in New Jersey. NEW JERSEY EDUC. ASS'N, *COLLECTIVE BARGAINING MANUAL 7* (2009), available at <http://tinyurl.com/NJNEAmanual>.

<sup>191</sup> KAN. STAT. ANN. § 72-5413(1)(3) (West, Westlaw through 2012 Reg. Sess.) (mandating that districts and unions cannot negotiate over “[m]atters which relate to the duration of the school term, and specifically to . . . the development and adoption of a policy to provide for a school term consisting of school hours”). In a more general statement of public labor policy, Kansas code also declares, “the difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion.” § 75-4321(a)(5) (Westlaw).

<sup>192</sup> MICH. COMP. LAWS ANN. § 423.215(3)(b) (West, Westlaw through 2012 Reg. Sess.) (“Collective bargaining between a public school employer and a bargaining representative of its employees shall not include . . . [e]stablishment of the starting day for the school year. . .”).

provisions that set the exact daily schedule for students.<sup>193</sup> The Newark agreement further requires that “[t]here shall be scheduled no more than 185 pupil days.”<sup>194</sup> It also discusses specifics of the yearly calendar, including spring break.<sup>195</sup> And it requires that any “variations in schedule shall be negotiated between the Newark Public Schools and the Union.”<sup>196</sup> Other districts in New Jersey have negotiated similar agreements.<sup>197</sup>

Meanwhile, in Kansas City, Kansas, the teacher contract includes a specific yearly calendar setting the first day of student instruction, school holidays, and academic quarters.<sup>198</sup> In Wichita, the collective bargaining agreement requires the district to clear nearly insurmountable hurdles to extend the school year.<sup>199</sup> And in violation of Michigan law, teacher contracts in several districts in Michigan specify school calendars.<sup>200</sup>

It is also common for collective bargaining agreements to govern staff deployment. Schools often use seniority as the sole factor in

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<sup>193</sup> Under the agreement, elementary students in Newark must arrive at 8:25 a.m. and be dismissed at 2:55 p.m., while high schools are in session from 8:20 p.m. to 2:40 p.m.. ST. OPERATED SCH. DIST. OF NEWARK & NEWARK TEACHERS UNION, 2009–2010 AGREEMENT, at 19, 21, *available at* <http://tinyurl.com/newarkcontract2009> [hereinafter “Newark contract”].

<sup>194</sup> *Id.* at 16.

<sup>195</sup> *Id.* at 17.

<sup>196</sup> *Id.* at 22.

<sup>197</sup> For a similar agreement in Trenton, see TRENTON BD. OF EDUC. & TRENTON EDUC. ASS’N, 2004–2009 AGREEMENT, *available at* <http://tinyurl.com/trentoncontract2004>. Provision XII(B)(2) sets the teacher day at six hours and forty-five minutes, while provision XII(B)(4) requires that the student school day be at least fifteen minutes shorter. The Woodbridge teacher contract does not set a student schedule but requires that high school teachers be on the job from 7:40 a.m. to 2:30 p.m. WOODBRIDGE TOWNSHIP BD. OF EDUC. & WOODBRIDGE TOWNSHIP EDUC. ASS’N 2009–2012 AGREEMENT, Art. II(B), *available at* <http://tinyurl.com/woodbridgecontract2009>.

<sup>198</sup> BD. OF EDUC., UNIFIED SCH. DIST. NO. 500 & THE NAT’L EDUC. ASS’N OF KANSAS CITY, KAN., 2009–2011 AGREEMENT, Exhibits A–D, *available at* <http://tinyurl.com/kansascitycontract2009> [hereinafter “KANSAS CITY CONTRACT”].

<sup>199</sup> To do so, the district would have to first secure the agreement of the union president, then win the support of eighty percent of the affected staff in a secret ballot referendum. BD. OF EDUC., UNIFIED SCH. DIST. NO. 259 & UNITED TCHRS. OF WICHITA, 2009–2011 AGREEMENT, at 10–11, *available at* <http://tinyurl.com/wichitacontract2009> [hereinafter “WICHITA CONTRACT”].

<sup>200</sup> DEARBORN BD. OF EDUC. & THE DEARBORN FED’N OF TCHRS, 2007–2009 AGREEMENT, at 42–43, *available at* <http://tinyurl.com/dearborncontract2007>; SAGINAW EDUC. ASS’N & THE BD. OF EDUC. OF THE SAGINAW SCH. DIST., 2006–2008 COMPACT OF PROFESSIONAL EDUCATORS, at 25. Exhibit A.2, *available at* <http://tinyurl.com/saginawcontract2006>; BD. OF EDUC. OF THE SCH. DIST. OF THE CITY OF PONTIAC & THE PONTIAC EDUC. ASS’N, 2004–2007 MASTER AGREEMENT, at 36–44, *available at* <http://tinyurl.com/pontiaccontract2004>.



decisions related to assignments, transfers, and layoffs, a policy that education reformers frequently attack.<sup>201</sup> In Delaware, however, staff deployment is prohibited for bargaining.<sup>202</sup> Disregarding that prohibition, the Wilmington school district and union have agreed on terms strikingly similar to the “mechanical seniority system” previously held illegal by the Delaware Supreme Court.<sup>203</sup> Other districts in Delaware have agreed to similar provisions.<sup>204</sup> Finally, the Wilmington contract also sets terms on student discipline, which is a prohibited topic under Delaware law.<sup>205</sup>

### *C. Objections: Too Much Bargaining, Too Much Oversight*

The proposal described here may lead to several additional objections. First, one might worry that the local legislature will be too hesitant to cease bargaining on topics, even when it appears that those topics cannot be resolved consistent with public preferences. To critics, the most likely culprit for such hesitance would be the political influence of teacher unions.<sup>206</sup> Yet, as noted above, advocates of bargaining prohibitions cannot support their arguments based on union political influence because the same allegedly captured legislators would set policy outside of bargaining.<sup>207</sup> Critics also fear

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<sup>201</sup> See Klein & Rhee, *supra* note 9 (calling on states to end seniority-based “last in first out” layoff systems).

<sup>202</sup> The seminal case is *Colonial Sch. Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243 (Del. 1982). There, the Delaware Supreme Court held illegal a union proposal to utilize a strict seniority system in assigning, transferring, or terminating teachers because it would have “limit[ed] the Board’s authority to exercise discretion in the deployment of its professional staff.” *Id.* at 245. Though Delaware’s education bargaining statute has been amended since *Colonial Affiliate*, the court relied on statutory language that has remained in place. Compare *id.* at 246–47, with 14 Del. Code Ann. § 4002(t) (West, Westlaw through 2012 legislation).

<sup>203</sup> Compare *Colonial Affiliate*, 449 A.2d at 245, with WILMINGTON CONTRACT, *supra* note 197, at 33, 37–40.

<sup>204</sup> See INDIAN RIVER EDUC. ASS’N & INDIAN RIVER BD. OF EDUC., 2008–2011 CONTRACT, at 10–12, available at <http://tinyurl.com/indianrivercontract2008> (tying involuntary and voluntary transfer decisions to seniority); BD. OF EDUC., CAESAR RODNEY SCH. DIST. & CAESAR RODNEY EDUC. ASS’N, 2007–2010 AGREEMENT, at 18–19, available at <http://tinyurl.com/ceasarrodneycontract2007> (tying involuntary transfer decisions to seniority).

<sup>205</sup> The agreement establishes a joint committee of the union and district to settle questions of student discipline and guarantees teachers the right to exclude a student from class until action has been taken pursuant to a Student Code. WILMINGTON CONTRACT, *supra* note 197, at 18, 65. The Delaware Supreme Court held similar terms illegal. *Colonial Affilliate*, 449 A.2d at 244–45.

<sup>206</sup> See *supra* notes 131–33 and accompanying text.

<sup>207</sup> *Id.*

that unions would pressure the government to bargain through other means: If the government ceased negotiations on a permissive topic, the union could perhaps retaliate by refusing to agree to terms on other topics or even by threatening to strike.<sup>208</sup> If the union took such action, however, it would violate the scope of bargaining rules and could be enjoined to bargain in good faith.<sup>209</sup>

Second, one might also object that the proposal will lead to excessive oversight and politicization, thereby making bargaining less productive. From this perspective, negotiations are best conducted in secret and away from the influence of politics. Moreover, one might claim that the proposed system amounts to one in which every tentative agreement on every individual topic must be approved by the legislature before negotiations can continue. After all, if the legislature learns of a tentative agreement on a particular topic and dislikes the agreement, the legislature can instruct the negotiator to pull the topic from the table. If the legislature uses this power actively, then bargaining may be plodding and full of false starts (and false finishes).

However, the danger of excessive politicization is likely minimal. For one thing, some states already require extensive transparency, including publication of bargaining proposals, and there is no indication that these requirements cause bargaining to become unproductive.<sup>210</sup> Moreover, the system might include confidentiality requirements that prevent legislators from describing certain aspects of negotiations to the public.<sup>211</sup> Finally, to the extent that the system

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<sup>208</sup> See, e.g., *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918, 943–44 (1974) (suggesting that a union can “subtly convey” that the union will refuse to approve an agreement that does not contain a satisfactory term on a permissive topic).

<sup>209</sup> Admittedly, the enforcement of the rules barring such action will not always be simple. Though beyond the scope of this Article, that issue deserves further study. Nevertheless, contrary to the claim that parties disregard the rules governing permissive topics, a small body of empirical research indicates that the designation of topics as permissive has a distinct impact on bargaining outcomes. See John Thomas Delaney & Donna Sockell, *The Mandatory-Permissive Distinction and Collective Bargaining Outcomes*, 42 INDUS. & LAB. REL. REV. 566, 576 (1989); Stephen A. Woodbury, *The Scope of Bargaining and Bargaining Outcomes in the Public Schools*, 38 INDUS. & LAB. REL. REV. 195, 205 (1985).

<sup>210</sup> See *supra* notes 147–48 and accompanying text.

<sup>211</sup> For example, federal law provides that the executive branch must provide certain information on covert military operations to the intelligence committees of the House and Senate. 50 U.S.C. § 413b(b) (2006). The President may decide to allow information to be released only to a smaller group of key legislators. 50 U.S.C. § 513b(c)(2). Thus, information is protected from public disclosure.

makes bargaining slightly more political, that may be a feature rather than a bug, because it may help bring education policy closer to majority preferences.

### CONCLUSION

Although this Article has focused on the majoritarian implications of collective bargaining for public employees, other values should be considered in analyzing bargaining.<sup>212</sup> For example, supporters of public sector bargaining have argued that the ordinary democratic processes for determining policy allows the majority to set terms and conditions of public employment that are neither fair to employees nor in the best interest of the community. As explained by Charles Cogen, a former president of the American Federation of Teachers, “[b]oards of education, whether well-meaning or not, decide upon salaries, working conditions, and curricula . . . on what is expedient, economic and politic.”<sup>213</sup> Cogen went on: “[B]ecause taxpayers are not always generous, politicians civic-minded, nor board of education members magnanimous, our classes are overcrowded, textbooks scarce, clerical work mountainous, salaries low, and morale lower.”<sup>214</sup> From this perspective, bargaining is a helpful correction to an otherwise flawed majoritarian process for determining education policy.

There are other reasons for robust public sector collective bargaining, even if it sometimes leads to policy that does not fit perfectly with the public’s preferences. Workers’ opportunity to bargain collectively is properly classified as a human right.<sup>215</sup> Through collective bargaining, workers gain a real voice in the places

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<sup>212</sup> Judicial review is the canonical example of a countermajoritarian institution in American government. For all of the scholarly discussion of the “countermajoritarian difficulty,” this aspect of judicial review is often celebrated. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1361 (2004) (“When we think about judicial review, we tend to envision the Supreme Court as a ‘countermajoritarian hero,’ protector of minorities from tyrannical majority rule.”).

<sup>213</sup> Charles Cogen, President, Am. Fed’n of Tchrs, *Collective Bargaining and the New Status of Education*, Address to the Colorado Federation of Teachers 2 (Oct. 29, 1965) (transcript available from the Walter P. Reuther Library at <https://reuther.wayne.edu/files/Cogen%2010.29.65.pdf>).

<sup>214</sup> *Id.*

<sup>215</sup> The right to form and join trade unions is recognized by the Universal Declaration of Human Rights, adopted by the United Nations soon after its formation by a unanimous vote of its members, including the United States. G. A. Res. 217A (III) A(23)(4), U. N. Doc. A/RES/217(III) (Dec. 10, 1948).

where they spend many if not most of their waking hours. Collective bargaining thus advances personal dignity and autonomy. Strong unions further prevent employers—public and private—from abusing the power that comes from control over workers' livelihoods.

But education is also a critical right for students,<sup>216</sup> and school policy is a matter of deep public concern. This Article has tried to show that public dominion over education policy can coexist with robust collective bargaining. Indeed, reformers should support a broad scope of permissive bargaining as the best way to align education policy with public preferences. But education reformers should not expect *any* change to bargaining rules—including prohibitions on bargaining—to produce positive change in the absence of accompanying social and political movements. At their majoritarian apex, bargaining rules can ensure that the reformers have the same voice in bargaining as they do in the ordinary legislative and administrative process. Above all, those interested in improving our schools must persuasively explain their vision to fellow citizens and elected representatives.<sup>217</sup>

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<sup>216</sup> Forty-eight state constitutions contain a provision related to education. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 (1985). Some of these provisions merely require the state to provide a system of free public education. *See id.* at 815. But nearly half of state constitutions emphasize the need to provide *quality* education, and many contain even stronger language. *See id.* at 815–16. Under the Washington Constitution, for example, “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders.” WASH. CONST. art. IX, § 1.

<sup>217</sup> Education reformers are already embracing this ethos, with several reform-centered political advocacy organizations established in recent years. *See generally* Stephen Sawchuk, *New Breed of Advocacy Groups Shakes up Education Field*, EDUC. WEEK, May 16, 2012, at 1. The most prominent example is StudentsFirst, which Michelle Rhee started after resigning as Chancellor of the D.C. Public Schools. Rhee’s organization aims “to build a national movement to defend the interest of children in public education and pursue transformative reform.” *Our Mission*, STUDENTSFIRST.ORG, <http://www.studentsfirst.org/pages/our-mission> (last visited Jan. 19, 2013).