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APPLYING THE “PARADOX” THEORY: A LAW AND POLICY ANALYSIS OF COLLECTIVE BARGAINING RIGHTS AND TEACHER EVALUATION REFORM FROM SELECTED STATES

*Mark Paige, J.D., Ph.D. **

I. INTRODUCTION

In 2011, state legislatures across the country passed sweeping amendments to their collective bargaining statutes. Many affected the rights of unions to bargain over personnel issues, such as teacher evaluations. In fact, in three of the four states analyzed in this Article, local unions and management are essentially prohibited from bargaining on the process and substance of teacher evaluations. At the same time, state bureaucracies have stepped in and increased their control over teacher evaluations. Restricting union involvement at the bargaining table is viewed as one way to ensure that school boards and not unions control public education. In theory, these changes promote democracy by increasing the power of elected representatives while reducing the impact of unelected unions.

These statutory changes are ripe for research. Indeed, scholarship has yet to address the issue of bargaining teacher evaluations in the context of the recent statutory amendments. This Article analyzes reforms to legislative changes concerning the process and substance of teacher evaluations through a law and policy analysis. In fact, this Article argues that excluding unions from teacher evaluations in collective bargaining negotiations will actually have the unintended consequence of impeding reforms and change. This is the paradox; theoretically, if management has exclusive control over teacher evaluations, it can implement reforms with ease, but because unions are excluded from negotiating evaluations, they will focus their resources on disrupting rather than supporting change. Consequently, this Article proposes a two-tiered solution. First, statutes should permit districts to bargain teacher evaluations. Second, the use of interest-based bargaining (“IBB”) should be

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encouraged at the local district level as the preferred negotiation process. IBB encourages collaboration between management and unions on a local level, invests teachers in the process, and, therefore, increases the probability that changes will be effectively implemented within schools.

This Article is organized as follows. Part II highlights the existing literature concerning collective bargaining in education. It concludes with a discussion of the “paradox” theory, the conceptual lens applied to the issue.¹ The paradox theory suggests that excluding unions from policy matters *impedes* rather than promotes education reform initiatives and effective school governance.² Instead, an appropriate legal framework governing teacher evaluations and collective bargaining would promote collaboration through the formal bargaining process. Part III examines selected legislative changes in teacher evaluations from four states: Wisconsin, Florida, Michigan, and New Hampshire. In all but New Hampshire, these changes encourage the paradox because bargaining teacher evaluations is now prohibited. Thus Part IV recommends a two-tiered approach to avoid the paradox as it relates to teacher evaluations. Lastly, Part V concludes by summarizing key points and advising legislators how to avoid the collective bargaining paradox.

II. A REVIEW OF RELEVANT LITERATURE CONCERNING UNIONS AND EDUCATION: THE GOOD, THE BAD, AND THE PARADOXICAL

This section presents the two general arguments concerning collective bargaining in public education. On the one hand, scholars opposed to collective bargaining and unions argue that they are costly and antidemocratic.³ On the other hand, some suggest that unions are vehicles for education reform.⁴ Additionally, this section will discuss the classification system used by courts and legislatures to define each party’s bargaining obligations and elaborate on the paradox of public sector labor law.⁵

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

2. *Id.* at 1370.

3. *Id.* at 1384.

4. *Id.* at 1390-91.

5. Malin, *supra* note 1.

A. Teacher Unions: Costly Impediments to Reform

Opponents to collective bargaining in education proffer a number of arguments. Collective bargaining is expensive because unions attempt to obtain the highest possible wages and benefits for their members.⁶ Consequently, districts become trapped in costly compensation packages.⁷ Salary schedules—typically part of a collective bargaining agreement (“CBA”) —are structured so that teachers are rewarded for seniority, without regard to merit in most cases.⁸ Moreover, public sector employees enjoy costly pension and health insurance plans, generally borne by the districts.⁹ These costs are created through CBAs.

Opponents also argue that collective bargaining impedes effective management of schools.¹⁰ CBAs hamstring school administrators attempting to manage schools.¹¹ For example, the length of a teacher’s school day is determined to the minute by the terms of the CBA.¹² Administrators who attempt to extend the school day for an occasional event outside of typical school hours (e.g., “Family Math Night”) without compensation do so at the peril of a grievance. Regardless, the argument is that CBAs—a product of negotiations—impede day-to-day school management.

Unions are criticized as obstacles to improving teacher quality because they negotiate contracts that protect incompetent teachers and sacrifice younger, talented ones. So-called “bumping” rights and “Reduction in Force” (“RIF”) clauses are commonly cited as impeding teacher quality.¹³ Under these provisions, seniority determines the order of personnel layoffs, preserving the employment

6. Lala Carr Steelman et al., *Do Teacher Unions Hinder Educational Performance? Lessons Learned from the State SAT and ACT Scores*, 70 HARV. EDUC. REV. 437, 441 (2000) (noting that opponents of union involvement in education view unions as “problematic because they are singularly interested in maximizing working conditions and compensation rather than, and at the possible expense of, student gains”).

7. See, e.g., LORRAINE M. McDONNELL & ANTHONY PASCAL, *TEACHER UNIONS AND EDUCATION REFORM* (Rand 1988).

8. Steelman et al., *supra* note 6, at 442.

9. See Christopher Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 1, 87 (Winter 2010).

10. Steelman et al., *supra* note 6, at 441.

11. *Id.*

12. Malin, *supra* note 1, at 1390.

13. See, e.g., Eva Moskowitz, *Breakdown*, 6 EDUC. NEXT (Summer 2006) (taking issue with the length and various provisions in contracts and accusing management and labor of “colluding” to put adult interests over those of children).

of some of the older teachers who may have become ineffective. Consequently, the newest teachers—the future of the district—are the first to be laid off.¹⁴ Again, this appears irrational; effectiveness is not a factor in the employment decision.¹⁵ In sum, labyrinthine CBAs strangle sound education policy that would otherwise be implemented by well-intended school administrators.¹⁶ Several scholars argue that these effects result in poor student outcomes.¹⁷

Others argue that public sector collective bargaining is anti-democratic, as a discrete minority—unions and teachers—can influence an elected public entity. Unions can leverage political pressure on elected school board officials, especially if they feel slighted at the bargaining table. This sets an ominous backdrop to any negotiation session; the implicit threat of revenge at the ballot box by a powerful interest group may push elected school board members to fold on a particular issue. Moreover, this is an advantage not otherwise available to private sector employees.¹⁸ Thus, a minority essentially manages a public asset (public schools) meant for control by the majority.

B. The Other Side of the Coin: Unions as Reformers

In contrast, some scholars view collective bargaining and unions favorably. Their arguments are two-fold. First, unions improve working conditions, and second, teachers advance education reform through bargaining. Both lines of thought imply that the promotion of teachers' self-interests complements students' best interests.¹⁹

First, unions create conducive workplace environments that, in turn, benefit students.²⁰ For example, when teachers are not required

14. Indeed, the colloquialism associated with this effect is “The last hired is the first fired.”

15. Steelman et al., *supra* note 6, at 442.

16. Setting aside the academic point, some of these arguments that criticize labyrinthine CBAs are somewhat awkward, as CBAs are the product of *negotiations* between two parties. In other words, management agrees to the terms of the CBA.

17. Steelman et al., *supra* note 6, at 442 (citing various scholars who criticize unions on this score).

18. Benjamin Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence from a New Mexico Natural Experiment*, 120 YALE L.J. 1130, 1141 (2010).

19. Steelman et al., *supra* note 6, at 442 (summarizing proponents' arguments as follows: “Taken together, these possible benefits of unions may enhance not only the status of teachers but also the educational climate to which students are exposed.”).

20. *Id.* (noting the argument that “[b]etter pay and more secure working conditions

to be bus monitors or are given duty-free lunch breaks, they can devote more energy and time to instructional activities.²¹ In this way, unions permit teachers to improve their teaching, rather than deal with tangential, “noneducational tasks.”²² Thus, improving working conditions may improve schools.²³

Second, some argue that unions are engines of innovation.²⁴ Summarizing this point, one scholar noted that unions have bargained for “mentor programs, peer review procedures, higher academic standards, [and] a longer school year,” among other things.²⁵ Moreover, unions can be effective conduits for policy reform, such as in-school finance.²⁶ Therefore, unions add reform mechanisms that might otherwise be ignored if teachers were not able to act as advocates in the negotiation process through union representation.

C. Resolving the Good and Bad: Third-Party Adjudication

The appropriate role of unions in education is contested in reality and not just in academic debates. Courts, administrative boards, and legislatures are repeatedly asked to draw the boundary between the collective bargaining rights of teachers and the right of the public to run schools through duly elected officials.²⁷ The essential question these bodies must resolve is whether or not certain subjects (e.g., teacher evaluations) are exclusively management prerogatives and, in

may attract higher quality teachers and foster a standard of professionalism that is conducive to effective teaching”) (citations omitted).

21. Lindy, *supra* note 18, at 1143 (summarizing various scholars for the general argument that improving teacher working conditions improves educational quality) (citations omitted).

22. *See, e.g.*, Brian Rowan et al., *Using Research on Employees’ Performance to Study the Effect of Teachers on Students’ Achievement*, 70 SOC. OF EDUC., 256 (1997) (work situation is one factor that affects teacher performance).

23. *Id.*

24. Steelman et al., *supra* note 6, at 442 (“Unions also may encourage more proficient management and ‘shock’ the system into needed restructuring”). *But see also* TODD A. DEMITCHELL, *LABOR RELATIONS IN EDUCATION: POLICIES, POLITICS, AND PRACTICES* 90 (2010) (bargaining reform at the table has a mixed record of success). *See also* Lindy, *supra* note 18, at 1143-44.

25. Lindy, *supra* note 18, at 1143.

26. *See, e.g.*, *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (school finance challenge where Wisconsin’s largest teacher union, WEAC, intervened as a plaintiff proffering a number of arguments ultimately adopted by the Supreme Court in a narrow decision).

27. *See, e.g.*, Malin, *supra* note 1, at 1384-1391 (a review of court cases concerning this issue with varying decisions).

turn, excluded from bargaining.²⁸ Is the subject related primarily to employee working conditions and, therefore, required to be bargained? Or does the subject fall somewhere in between? These are not easy questions. IIT Chicago-Kent College of Law Professor Martin Malin notes the complicated nature of the inquiry: “The problem that labor boards and courts have had to confront is how to deal with two potentially extremely broad concepts. At some level, every decision affects conditions of employment, and, at some level, every decision affects public policy or managerial authority.”²⁹

Courts employ a classification system to resolve these disputes. A subject’s classification determines the parties’ obligation, if any, to bargain it. A subject, and its subparts, can be classified as follows: mandatory, permissive, or prohibited.³⁰ A mandatory subject is one that primarily relates to employee working conditions. It must be bargained. A permissive subject is one that does not primarily relate to employee working conditions and is not exclusively reserved to management. It may be bargained. A prohibited subject is one that is exclusively reserved to management because it relates to management’s control over schools. It cannot be bargained, even if both sides desire it. As discussed, teacher evaluations are now prohibited under amendments to education and bargaining statutes in several of the states profiled in this Article.

However, a prohibited subject is not necessarily immune from union influence due to impact bargaining, by which unions can negotiate the effect of a policy on employee “terms and working conditions.”³¹ Thus, to the extent that an issue (e.g., the process of teacher evaluations) impacts “terms and working conditions,” it is a mandatory subject of bargaining.³² For example, some courts have held that the length of a school day is not a mandatory subject of

28. Bargaining rights of public employees are generally creatures of statutes. In states where permitted, legislatures have enacted public sector labor laws that generally require a public entity to bargain “terms and conditions of employment.” See, e.g., N.H. REV. STAT. ANN. § 273-A:3(I) (2011).

29. Malin, *supra* note 1, at 1385.

30. *Id.* (“[M]ost jurisdictions follow the private sector model of dividing subjects of bargaining into mandatory, permissive, and prohibited.”). See also Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. PUB. POL’Y 885, 913-914 (2007).

31. See, e.g., Malin, *supra* note 1, at 1390 (noting that unions focus on impact bargaining as a means to “insulate” its employees from policies that are implemented without negotiations).

32. *Id.*

bargaining because it is a matter of educational policy.³³ However, the extended hours of work directly impact a teacher’s “terms and conditions of employment,”³⁴ and so the exact hours and the compensation associated with the proposal are mandatory subjects of bargaining. In sum, through impact bargaining, unions maintain important leverage over a policy implementation even if the policy is classified as prohibited by statute.³⁵

*1. Varying subject classifications*³⁶

In New Hampshire, the subject of teacher evaluations is at least permissive.³⁷ Other examples highlight the variation between states on the same issue.³⁸ Regardless, when a third party rules a subject prohibited, it typically cites “democratic” concerns.³⁹ In other words, the issue’s relationship to the function of the public entity outweighs considerations of the rights of the public worker. It would be undemocratic to permit union influence over the desires of an elected school board.

At first blush, anti-union scholars might be satisfied that the

33. *Gresham Grade Teachers Ass’n v. Gresham Grade Sch. Dist.*, No. 4, 630 P.2d 1304 (Or. Ct. App. 1981).

34. Malin, *supra* note 1, at 1386.

35. This ability has important consequences with respect to the “paradox” effect, discussed *infra*. See *id.* at 1391.

36. See, e.g., Malin & Kerchner, *supra* note 30, at 914 (litigation over subjects of bargaining across states is an “ad hoc approach that lacks predictability and encourages litigation”).

37. *Appeal of White Mountain Reg’l Sch. Dist.*, 908 A.2d 790 (N.H. 2006) (state supreme court holding that teacher evaluations is at least a permissive subject of bargaining and if parties do bargain on the issue during negotiations, they are bound to that agreement. The court declined to rule on the question of whether the issue is mandatory). See also *Ass’n of Portsmouth Teachers/NEA-NH v. Portsmouth Sch. Dist.*, Dec. No. 2008-025 (N.H. Pub. Emp. Labor Relations Bd.) (Feb 15, 2008) (impact bargaining of teacher evaluation is a mandatory subject of bargaining, provided unions do not attempt to control the process).

38. See Malin, *supra* note 1, at 1387 (noting that different courts have variously classified class size, school calendar, drug testing, among other issues).

39. See, e.g., *Aberdeen Educ. Ass’n v. Aberdeen Bd. of Educ.*, 215 N.W.2d 837, 841 (S.D. 1974) (prohibiting bargaining over teacher preparation periods, teacher conference scheduling, and use of instructional aides on the grounds that negotiations should not interfere with the duties of elected representatives). A New Hampshire statute expresses the legislative sentiment on this issue. A prohibited subject of bargaining is one that falls under a “managerial policy exception.” N.H. REV. STAT. ANN. § 273-A:1(XI) (2011) (this term “shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer’s organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions”).

majority of states profiled in this Article now prohibit bargaining over teacher evaluations. This appears to be good news. In theory, management can unilaterally implement reforms without union input or obstacles. However, as discussed in the following section, the exclusion of unions may not have the intuitive effect of improving teacher evaluations and, ultimately, teacher quality. It may actually become more difficult.

D. The Paradox of Public Sector Bargaining in Teacher Evaluation

A paradox exists in public sector labor bargaining when courts or legislatures seek exclusive control over a bargaining subject, such as teacher evaluations.⁴⁰ On its face, this prohibition would seem to improve the democratic effect of negotiations because it gives almost exclusive discretion to the *elected* school board. However, when unions are excluded, they focus their resources on blocking the implementation of reforms through the mechanisms available to them.⁴¹ Thus, regulations meant to tighten the link between elected officials and policy actually work to weaken them.

The following example illustrates the paradoxical effect. A school board may contemplate increasing the length of a school day. During subsequent negotiations, unions focus on bargaining “the bread and butter” issues relative to the subject,⁴² devoting energy and resources to discussions concerning overtime compensation or the exact length of the extended day and not the content of the policy or program. In this way, they can undermine proposed or imposed reform. The policy can die by “a death of a thousand cuts.” However, this is the essential point: union exclusion from developing policy that affects employment promotes union efforts to exert influence over the issue through other means, such as impact bargaining. The practical effect is that the policy is undercut and efforts by elected school boards are frustrated. Paradoxically, the hoped-for democratic effect is diminished—not enhanced—by excluding unions from bargaining.

However, there is a solution. Indeed, *greater*—not less— involvement by unions in policy-crafting promotes democracy.⁴³ Union involvement can pay particular rewards if it begins when

40. Malin, *supra* note 1.

41. *Id.*

42. *Id.* at 1390.

43. *Id.* at 1391.

discussion of an issue first takes place.⁴⁴ In other words, when unions have “some skin in the game” from the start, they are invested in the policy’s success. They can also focus their efforts on the merits of the policy. In the end, this assists management in implementing a policy with less union resistance. Malin argues that “[t]here is good reason to believe that giving employees, through their unions, an institutional voice in the initial decision making will increase the likelihood that they will become agents of, instead of obstructions to, effective change.”⁴⁵

Research in psychology and human resource management, as well as literature in education professional development support this position.⁴⁶ The professional development literature takes the position that teachers must be active agents in reform and that policy implemented through top-down management is doomed for failure.⁴⁷ Thus, research in psychology and education support the contention that more union inclusion in the policy development of teacher evaluations may be the key to implementing reform with respect to teacher evaluations.⁴⁸

Significantly, Malin identified the paradox *before* these most recent amendments regarding teacher evaluations took effect.⁴⁹ A law and policy analysis using this lens is more critical than ever, given the recent change of events. If there is a paradox effect, prohibiting negotiations over teacher evaluations may undercut legislative efforts to improve teacher evaluations. Consequently, alternatives to the wholesale exclusion of unions in teacher evaluations ought to be examined.

44. *Id.*

45. *Id.*

46. Malin, *supra* note 1, at 1391-92. *See e.g.*, Judith Little, *Professional Learning and School Network Ties: Prospects for School Improvement*, 6 J. EDUC. CHANGE 277, 277-291 (2005).

47. Little, *supra* note 46.

48. *Id.* *See also* Malin, *supra* note 1, at 1395-1397 (highlighting numerous examples where unions and management have collaborated).

49. Malin’s *The Paradox of Public Sector Labor Law* was published in 2009. *See* note 1, *supra*. The amendments to collective bargaining statutes that impacted teacher evaluation took place, for the most part, after that. *See, e.g.*, WIS. STAT. §§ 111.70-111.77 (2011) (amended through Act 10 of the 2011 Wisconsin Legislature). *See also* Jason Stein et al., *Walker Signs Budget Bill, Legal Challenges Mount*, JOURNAL SENTINEL (Mar. 11, 2011), <http://www.jsonline.com/news/statepolitics/117798133.html> (documenting Governor Walker’s signing of Act 10 in March of 2011).

III. NARROWING THE SCOPE: CHANGES TO COLLECTIVE BARGAINING LAWS FROM SELECTED STATES

This section discusses recent changes to collective bargaining and education statutes that impact union involvement in teacher evaluations. To discuss the recent changes, this section will profile four states: Wisconsin, Florida, Michigan, and New Hampshire. The first three states now prohibit negotiations over the process and substance of teacher evaluations,⁵⁰ whereas in the fourth state negotiations are permitted.⁵¹ New Hampshire's classification system is discussed because it may provide a legal framework to promote the effective and democratic implementation of teacher evaluations.⁵²

A. Wisconsin

In March of 2011, the Wisconsin legislature amended its collective bargaining statute—the Municipal Employee Relations Act (“MERA”)—through the “Budget Repair Bill.”⁵³ Despite vocal opposition from public sector unions, including teachers, and court challenges,⁵⁴ the measure passed and became effective in June of 2011.⁵⁵ The bill altered labor-management relations in significant ways.⁵⁶ In particular, the scope of issues subject to bargaining was drastically narrowed to one. The applicable statute, as amended, reads:

50. WIS. STAT. § 111.70(4)(mb) (2011) (Wisconsin statute prohibiting bargaining over anything but base wages); FLA. STAT. § 1012.34(1)(a) (2011) (Florida statute giving district superintendent exclusive control over teacher evaluations); MICH. COMP. LAWS § 423.215(3)(l) (2011) (Michigan statute prohibiting bargaining over teacher evaluations). New Hampshire's public sector bargaining statutes does contain similar prohibitions. N.H. REV. STAT. ANN. § 273-A:1 *et seq.* (2011).

51. *See supra* note 37.

52. *See* discussion *infra* Part IV where a two-tier solution to the paradox is recommended.

53. WIS. STAT. §§ 111.70-111.77 (2011).

54. *See, e.g.*, John Nichols, *Wisconsin Judge Rules Walker's Anti-Labor Law "Null and Void,"* THE NATION (Sept. 12, 2012), <http://www.thenation.com/blog/169968/wisconsin-judge-rules-walkers-anti-labor-law-null-and-void#> (documenting union protests and court challenges to collective bargaining law changes).

55. Wisconsin Budget Repair Bill, Act 10 § 245 (codified at WIS. STAT. § 111.70(4)(mb) (2011)) (prohibiting bargaining over any subject other than total base wages).

56. *See, e.g.*, WIS. STAT. § 111.70(3g) (2011) (prohibiting employers from withholding union dues).

Prohibited subjects of bargaining

The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following:

1. *Any factor or condition of employment except wages*, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.⁵⁷

Because only “total base wages” are negotiable, teacher evaluations are now a prohibited subject of bargaining.⁵⁸ Even if management wants to discuss teacher evaluations with the union during negotiations, it is prohibited from doing so.⁵⁹

The reclassification of teacher evaluations changes prior law and practice. Indeed, before 2011, certain elements of teacher evaluations were negotiable. For example, use of student achievement scores in evaluations was a mandatory subject of bargaining.⁶⁰ Assistance offered to underperforming teachers, such as professional growth plans or professional development, was also once a permissive subject of bargaining.⁶¹ However, Wisconsin currently prohibits negotiation regarding *any* component of a teacher evaluation system. Thus, a school board can elect to include an evaluation system that includes student performance on standardized tests without consulting the union.

In place of local negotiations, the state Department of Public Instruction (“DPI”) has assumed a prominent role in teacher evaluations.⁶² Recently, DPI convened a task force that issued

57. *Id.* § 111.70(4)(mb) (emphasis added).

58. *Id.*

59. Adherence to this exclusion may be awkward in a practical sense. Simply as a matter of good practice, administration and teachers discuss evaluation procedures and requirements. At what point might organic discussions between management and teachers concerning evaluations fall into “negotiations”? Moreover, how would such a violation be enforced? If discussions went too far, would management threaten to file an unfair labor practice against the union? The unintended consequences of this are unclear.

60. WIS. STAT. §§ 118.225, 111.70(2)(o) (2009).

61. *Beloit Educ. Ass’n v. Wis. Emp’t Relations Comm’n*, 242 N.W.2d 231 (Wis. 1976).

62. WIS. FRAMEWORK FOR EDUCATOR EFFECTIVENESS, PRELIMINARY REPORT & RECOMMENDATIONS (2011), *available* at http://ce.dpi.wi.gov/files/ce/pdf/ce_report_prelim.pdf [hereinafter PRELIMINARY REPORT]

recommendations regarding teacher evaluations for districts.⁶³ Student performance is a centerpiece of teacher evaluations under the recommendations.⁶⁴ In fact, the task force explicitly adopts value-added modeling (“VAM”) as a means to measure teacher effectiveness.⁶⁵ As discussed later in this section, VAM is controversial. In brief, VAM purports to statistically measure a teacher’s contribution to a student’s individual growth, primarily by measuring student scores on standardized tests.⁶⁶ The notion is that a teacher’s contribution to a student’s learning can be statistically isolated.⁶⁷ The Wisconsin task force “recommends” that at least 50% of a teacher’s evaluation be derived from student assessments, such as standardized test scores.

B. Florida

Like Wisconsin, Florida law now prohibits bargaining over teacher evaluations.⁶⁸ By virtue of recent statutory amendments, development and implementation of teacher evaluations is now vested exclusively with the superintendent of a district. The applicable statute now reads:

For the purposes of increasing student learning growth by improving the quality of instructional, administrative, and supervisory services in the public schools of the state, the district school superintendent shall establish procedures for evaluating the performance of duties and responsibilities of all instructional, administrative, and supervisory personnel employed by the school district.⁶⁹

63. To be sure, state union organizations were part of the task force, along with a myriad of other stakeholders. However, this inclusion does not obviate the need for local involvement in teacher evaluations.

64. See PRELIMINARY REPORT, *supra* note 62.

65. See *id.* at 6.

66. William L. Sanders & Sandra P. Horn, *Research Findings from the Tennessee Value-Added Assessment System (TVAAS) Database: Implications for Educational Evaluation and Research*, 12 J. PERS. EVALUATION EDUC. 247 (1998).

67. *Id.*

68. However, unlike in Wisconsin, the legislative activity occurred primarily in the area of the state’s education code, not in its labor relations statute. Regardless, the effect is the same in both states.

69. FLA. STAT. § 1012.34(1)(a) (2011).

Making the superintendent the sole keeper of evaluation procedures is a shift in policy in Florida. Prior to the enactment of the above statute, unions and management negotiated teacher evaluations as a mandatory subject of bargaining.⁷⁰

State control over teacher evaluations, therefore, has increased. Indeed, the Florida legislature prescribed essential components of the teacher evaluation system, notwithstanding the superintendent’s duties. Law requires that district evaluation policies use student performance and the controversial VAM in determining teacher effectiveness.⁷¹ Indeed, at least half of a performance evaluation must be based on “student learning growth” as measured by state or district assessments.⁷² Moreover, the state mandates that districts create a salary schedule to link teachers’ salaries to their performance on the new teacher evaluation system.⁷³ Ultimately, the state Department of Education oversees each district’s evaluation plan.⁷⁴

In sum, like Wisconsin, Florida’s new law governing teacher evaluations effectively precludes union involvement. Teacher evaluation policies and procedures are expressly reserved for the superintendent. Additionally, the state legislature requires that any evaluation system developed at the local level must include the use of student test scores.⁷⁵

C. Michigan

In 2011, the Michigan legislature prohibited teacher evaluation bargaining. The applicable statute reads as follows:

70. The Florida Education Association (a NEA affiliate) has filed suit challenging the constitutionality of the new evaluation system. The Association argues that the system interferes with Florida’s Constitution, which guarantees employees the right to bargain over wages, hours, and conditions of employment. *See* Complaint for Declaratory and Injunctive Relief, *Robinson v. Robinson* (Fla. Cir. Ct. 2011) (No. 2011 CA2526), *available at* http://www.meyerbrookslaw.com/documents/Robinson%20vs%20Robinson/Robinson_v_Robinson_Complaint.pdf (last visited December 5, 2011) [hereinafter *Complaint*].

71. FLA. STAT. § 1012.34(3) (2011). *See id.* § 1012.22.

72. *Id.* § 1012.34(3)(a) (emphasis added).

73. *Id.* § 1012.22(1)(c)(5).

74. *Id.* § 1012.34(1)(b).

75. Importantly, the federal government played the role of the nor-so-invisible hand in Florida; the new evaluation and compensation formulas were developed in connection with Florida’s Race to the Top grant. FLA. DEP’T OF EDUC., REVIEW AND APPROVAL CHECKLIST FOR RTTT TEACHER EVALUATION SYSTEMS (2011), *available at* <http://www.fldoc.org/arra/TeacherEvaluationSystems.asp>.

Collective bargaining between a public school employer and a bargaining representative of its employees *shall not* include any of the following subjects:

Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system . . . , decisions concerning the content of performance evaluation of an employee . . . , or the impact of those decisions on an individual employee or the bargaining unit.⁷⁶

The legislature also enacted several other laws that impact teacher evaluations.

Like Florida, Michigan law now requires the use of VAM in teacher evaluations.⁷⁷ Indeed, "student growth" must be a "significant factor" in individual performance evaluations.⁷⁸ Student growth is defined by statute in value-added terms.⁷⁹ Districts must develop a compensation plan that accounts for teacher performance.⁸⁰ Additionally, teacher performance is the "majority factor" in making RIF decisions.⁸¹ Length of service cannot be considered. In sum, teachers are excluded from bargaining in some of the most important and consequential areas affecting their working conditions: how they are evaluated and rewarded for their job.

This was a remarkable turn of events in Michigan, as teacher evaluations had previously been a mandatory subject of bargaining.⁸² Moreover, as in Florida, in place of local solutions, the state passed highly prescriptive laws concerning the content and use of evaluations.⁸³ However, the process and substance of a teacher

76. MICH. COMP. LAWS § 423.215(3)(l) (2011) (emphasis added).

77. 2011 Mich. Pub. Acts 102 (codified at MICH. COMP. LAW § 1249(1)(c) (2011)).

78. *Id.*

79. *Id.* (defining student growth as measured by national, state, and district test data or other objective criteria).

80. Florida and Michigan offer a subtle comparison with respect to the use of student performance in teacher evaluations. In Florida, student performance must account for at least 50% of a teacher evaluation plan.

81. 2011 Mich. Pub. Acts 102 (codified at MICH. COMP. LAW § 1248(1)(b)(i) (2011)).

82. Cent. Mich. Univ. Faculty Ass'n v. Cent. Mich. Univ., 273 N.W.2d 21 (Mich. 1978) (finding an unfair labor practice when university unilaterally adopted evaluation procedures that added student evaluations as a factor for teacher effectiveness because it was a mandatory subject of bargaining).

83. 2011 Mich. Pub. Acts 102 (codified at MICH. COMP. LAW §§ 1248-49 (2011)) (requiring teacher performance as a factor in layoff decisions and setting the substance of

evaluation is permissive.⁸⁴ Importantly, teacher evaluations’ impact on wages, hours, and terms of employment is likely mandatory.⁸⁵ The state’s Labor Board stated that “if the implementation of the unilaterally, non-negotiated evaluation program impacts the terms and conditions of evaluations then there must be negotiations about this change to those terms and conditions of employment.”⁸⁶ Because the impact remains mandatory, it might be suggested that the situation is ripe for unions to undermine implementation of a teacher evaluation policy, pursuant to the paradox effect.⁸⁷

D. New Hampshire

A decision set forth by the New Hampshire Public Employee Labor Relations Board (“PELRB”) strikes the proper balance for union involvement and management control. In *Association of Portsmouth/NEA-NH v. Portsmouth School District*, PELRB established important checks and balances on unions and simultaneously encouraged management to involve unions.⁸⁸ Under this decision,⁸⁹ management need not bargain with unions when negotiations over evaluations do any of the following:

- (1) Restrict the information the district considers;
- (2) Set the standards the district will apply in evaluating employees;
- (3) Control the district’s actions with the evaluations;
- (4) Address changes the district needs to implement to the evaluation; or

teacher performance evaluation to include student growth data).

84. Appeal of White Mountain Reg’l Sch. Dist., 908 A.2d 790, 795 (N.H. 2006); *In re Pittsfield Sch. Dist.*, 744 A.2d 594, 596-97 (1999).

85. *Con-Val Educ. Ass’n v. Con-Val Sch. Dist.*, Dec. 2000-116 (N.H. Pub. Emp. Labor Relations Bd.) (Nov. 8, 2000). *See also* Appeal of N.H., 647 A.2d 1302, 1306-07 (N.H. 1994) (although deciding to offer extracurricular programs is the district’s managerial prerogative, “wages, hours, and other specifics of staff obligations and remuneration primarily affect the terms and conditions of employment.”)

86. *Con-Val Educ. Ass’n v. Con-Val Sch. Dist.*, Dec. 2000-116 (N.H. Pub. Emp. Labor Relations Bd.) (Nov. 8, 2000).

87. Malin, *supra* note 1.

88. *Ass’n of Portsmouth Teachers/NEA-NH v. Portsmouth Sch. Dist.*, Dec. No. 2008-025 (N.H. Pub. Emp. Labor Relations Bd.) (Feb 15, 2008).

89. Of course, administrative decisions are not precedential. Regardless, this is the current state of the law in New Hampshire. Moreover, the author contends that this decision has struck an important balance in terms of limiting union ability to impact bargain over teacher evaluations while at the same time encouraging the union to channel their efforts and resources toward the merits of the policy, rather than its employment consequences.

(5) Address the nature of evaluators' personnel contact or observation of employees.⁹⁰

The *Portsmouth* decision places significant limitations on a union's ability to undermine teacher evaluations through impact bargaining. Indeed, the use of evaluation results with respect to employment decisions remain under management discretion, given the restrictions set forth in *Portsmouth*. The district has unfettered discretion in terms of the information that it may consider. Thus, unions cannot use bargaining simply to protect employee rights. Stripped of this ability, unions must, therefore, address the merits of the issue.

Malin suggests that this type of involvement will avoid the paradox.⁹¹ If unions make thoughtful proposals, management must negotiate proposals to the extent that terms and working conditions are affected.⁹² The legal framework funnels union efforts toward positive involvement in teacher evaluations. It channels union efforts into positive reform, rather than simply protectionist strategies.

E. Putting It All Together: Trends and Policy Implications

Several trends emerged in the states analyzed in this Article. These are identified below, along with their policy implications. First, the paradox of public sector labor is perpetuated by the recent amendments concerning teacher evaluations and bargaining in the states examined (with the exception of New Hampshire). Wisconsin, Florida, and Michigan have all excluded unions from bargaining the issue at the local level. Consequently, unions will focus on protecting employees' rights rather than education reform and the improvement of schools.⁹³ This may occur through impact bargaining (where applicable) or other means, such as increased litigation.⁹⁴

The effects are already evident. The Florida National Education Association ("NEA") has challenged the various amendments concerning the collective bargaining rights of teachers, including those related to teacher evaluations. NEA argues that these amendments violate a state constitutional right to bargain.⁹⁵

90. *Ass'n of Portsmouth Teachers*, Dec. No. 2008-025.

91. Malin, *supra* note 1, at 1391.

92. *Id.*

93. *See generally id.*

94. *Id.*

95. Complaint, *supra* note 70. *See also* Keyonna Summers, *Two Pinellas Educators*

Reflecting the paradox theory, NEA has channeled its energy into dismantling the legislation.⁹⁶ This is precisely the opposite result needed if effective teacher evaluation reform is to be implemented⁹⁷—an unintended consequence of excluding unions from teacher evaluation discussions.

Second, these amendments alter the dynamics of intergovernmental power. State-level government now plays a more active role in the process and substance of teacher evaluations. Of course, this varies in terms of degree. The New Hampshire and Wisconsin Departments of Education have made “recommendations” for teacher evaluations. Florida and Michigan have mandated that a teacher evaluation process include certain elements, such as the use of VAM. However, state requirements on localities may very well be unfunded mandates. Moreover, the not-so-invisible hand of federal influence over this power shift cannot be understated. In Florida and Michigan, changes to teacher evaluation were prompted explicitly by those states’ pursuit of Race to the Top (“RTTT”) funds.⁹⁸

Third, these amendments do not address the larger problems associated with the current state of teacher evaluations. The primary issue is how administrators fail to use teacher evaluation systems properly. Indeed, administrators’ misapplication of *existing* evaluation systems explains many problems with improving teacher quality.⁹⁹ A recent policy brief noted that 73% of teacher evaluations did not contain recommendations for improvement.¹⁰⁰ Moreover,

Among Those Taking on New Teacher Evaluation Law, TAMPA BAY TIMES (Oct. 10, 2011), <http://www.tampabay.com/news/education/teachers/article1196014.ece> (profiling the challenge of six educators and Florida NEA to teacher evaluation changes).

96. Summers, *supra* note 95.

97. Malin, *supra* note 1, at 1393 (noting the successful implementation of innovative teacher evaluation systems where unions have a voice in the process).

98. See, e.g., Fla. Dep’t of Educ., *Final Scope of Work Template*, RACE TO THE TOP GRANT ARCHIVE, <http://www.fldoc.org/arra/Racetothetop-archive.asp> (last visited Dec. 22, 2012) (noting that Florida had met the requirement of reforming its teacher evaluation system to satisfy the requirements of the RTTT grants). See also Mich. Educ. Ass’n, *New Requirements for Teacher Evaluations*, http://www.mea.org/pd/certification/new_evaluation_requirements.html (last visited Dec. 22, 2012) (noting that the reason for legislative changes to the evaluation system was for Michigan’s RTTT grant.).

99. See, e.g., Mark Paige, *Teacher Evaluation Reform: Finding the Forest Through the Trees*, TEACHERS COLL. REC. (2011), <http://www.tcrecord.org/Content.asp?ContentId=16582>.

100. Daniel Weisberg et al., *The Widget Effect*, THE NEW TEACHERS PROJECT (2009),

according to teachers, of evaluations containing recommendations, only 45% of the recommendations were useful.¹⁰¹ This is because administrators tend to look to evaluations when they are considering employment termination and not the improvement of a teacher's individual capacity.¹⁰² Such consequences call into question the wisdom of state legislatures developing prescriptive procedures and policies for administrators. Furthermore, there is no evidence suggesting that administrators will abide by the prescriptive procedures set forth by the legislature. As noted above, administrators tend to ignore the evaluation process.¹⁰³ Thus, a fundamental issue with implementing effective teacher evaluations is not so much the appropriate system or data (e.g., whether to include VAM or not), but the human application of evaluations.

Finally, the use of VAM—employed in Wisconsin, Florida, and Michigan—is riddled with problems. VAM has been described as a way to statistically isolate the effect of a teacher on a student's growth over the course of time.¹⁰⁴ The validity of VAM models is questionable and has engendered a serious debate among scholars. Indeed, many argue that VAM models cannot account for the myriad of demographic and social variables (e.g., poverty) that affect student achievement.¹⁰⁵ Because of this, many caution against the use of VAM in high-stakes issues like employment termination.¹⁰⁶ Yet the legislatures profiled here have largely ignored these warnings with their prescriptive amendments. Instead, they have foisted VAM on local districts, leaving districts to sort out the complications. Such disregard may lead to suspicion over the integrity of the evaluative process and, potentially, more litigation.

IV. A WAY OUT OF THE PARADOX

This section recommends a two-tiered approach to escape the paradox and improve teacher evaluations. First, it suggests that

available at <http://widgeteffect.org/>.

101. *Id.*

102. *Id.*

103. *Id.*

104. Sanders & Horn, *supra* note 66, at 247-256.

105. Xiaoxia A. Newton et al., *Value-added Modeling of Teacher Effectiveness: An Exploration of Stability Across Models and Contexts*, ED. POLY ARCHIVES (Sept. 10, 2010), available at <http://epaa.asu.edu/ojs/article/view/810>.

106. Heather Hill, *Evaluating Value Added Models: A Validity Argument Approach*, 28 J. POLY ANALYSIS & MGMT. 692, 700-709 (2009).

jurisdictions adopt a legal framework that incorporates union involvement in teacher evaluations. New Hampshire law might be a useful framework for incorporating union involvement in teacher evaluations, as it successfully balances management prerogatives while channeling union energy in a positive manner. Second, a structural framework that fosters mutual collaboration must also exist at the local level. Employing IBB can effectuate this. This non-traditional approach to negotiation can be an effective means of building relationships and collaboration so that reforms can be promoted rather than undermined by unions.

A. Avoiding the Paradox Through a Legal Structure

An appropriate legal structure is a necessary precondition for avoiding the paradox.¹⁰⁷ This legal structure must be guided by several important principles, giving employees a collective and institutional voice in the process.¹⁰⁸ It should allow unions and teachers to share the risk of any policy.¹⁰⁹ It should channel union efforts in a positive manner. In sum, employees should be invested in the final policy product.¹¹⁰

One obvious legal solution may be classifying teacher evaluations as a mandatory subject of bargaining. This, of course, comes with risk for management. School districts may rightly fear that simply making the topic mandatory will only open the door for unions to be even more vigilant in erecting obstacles to implementation. This is a fair criticism. No doubt there are unions that will use such a structure to the advantage of their employees and not schools or students.¹¹¹ There may be a way around the paradox by making teacher evaluations permissive and not mandatory, as is the case in New Hampshire.

The New Hampshire legal framework militates against the “paradox of public labor law.”¹¹² Indeed, it pushes management and

107. Malin, *supra* note 1, at 1398 (noting that the legal structure makes a difference in channeling efforts in a positive manner).

108. *Id.* at 1391.

109. *Id.*

110. *Id.*

111. *Id.* at 1398 (noting that there will always be unions who will use the legal structure to “obstruct the government entity’s mission”).

112. *Id.* at 1393 (“When the union serves as a vehicle for collective employee voice in the evaluation and discipline of employees, the union can be transformed from an impediment of effective government into a contributor.”).

unions together to bargain teacher evaluations. First of all, the law permits bargaining of the subject.¹¹³ Moreover, the law encourages management to exercise this option because impact bargaining of teacher evaluation is mandatory. From management's perspective, it would be inefficient to construct a teacher evaluation system only to see it undermined through union impact bargaining, which is a likely occurrence when unions are excluded from the initial discussions of a policy.¹¹⁴ The more prudent route is for both sides to engage at the beginning of the process.¹¹⁵

Indeed, the law encourages such an approach, especially on the part of unions. This is primarily because of the limitations set forth in the *Portsmouth* Labor Board decision.¹¹⁶ Such limitations create a disincentive for unions to overreach through impact bargaining. If they do, they run the risk of management being able to shut them out completely. As discussed, unions cannot do any of the following: "seek to restrict" information the district will consider; "set the standards" the district will use; "control" the action the district may take with an evaluation; address any changes in the policy that the district may "need" to make; or address the "nature and extent" of contact or observation of employees.¹¹⁷ Thus, unions would be wise to engage in discussions at the development phase of the evaluation discussions, rather than play defense through impact bargaining under these restrictions.

In sum, New Hampshire law provides a useful platform for management and unions to formally construct teacher evaluations through negotiations. It sets a necessary condition to prevent the paradox of public sector bargaining from arising with respect to teacher evaluation reform. An appropriate legal framework sets favorable circumstances for collaboration.¹¹⁸ More is required, however. Unions and management must trust one another and both be invested in the final product of any negotiations, whether formal or informal. Thus, the conditions *at the bargaining table* must

113. Appeal of White Mountain Reg'l Sch. Dist., 908 A.2d 790, 795 (N.H. 2006); *In re Pittsfield Sch. Dist.*, 744 A.2d 594, 596-97 (1999).

114. Malin, *supra* note 1, at 1370.

115. *Id.* at 1391 (giving institutional voice in the initial decision-making increases the chances that unions become "agents of change").

116. Ass'n of Portsmouth Teachers/NEA-NH v. Portsmouth Sch. Dist., Dec. No. 2008-025 (N.H. Pub. Emp. Labor Relations Bd.) (Feb 15, 2008).

117. *Id.*

118. Malin, *supra* note 1, at 1398.

encourage both sides in this direction. To do this, an alternative to the typical “horse trading” type of bargaining should be explored.

B. Interest-Based Bargaining: A Solution to the Paradox at the Local Level

IBB, an innovative approach to bargaining, may be the appropriate mechanism for bargaining teacher evaluations at the ground level.¹¹⁹ IBB focuses on building relationships through negotiations.¹²⁰ It recognizes that parties to a negotiated agreement must live and work under that agreement. Thus, the bargaining process should foster positive relationships between union and management. It stands in contrast to traditional “positional bargaining that can be hostile to education reform.”¹²¹

IBB focuses negotiations on the merits of an issue.¹²² Through negotiations, it identifies the issues to be discussed. It sets objective criteria to measure solutions to the issue. Both parties brainstorm possible solutions to the issue. This differs from typical positional bargaining, where each side attempts to maximize its interest at the expense of the other. IBB suggests that both parties should jointly resolve shared problems. In this way, labor-management relations are enhanced through the bargaining process.

An example of IBB applied in district negotiations might be as follows.¹²³ Management may bring to the table the issue of adopting or reforming the district’s teacher evaluation process. Management and unions would jointly establish objective criteria to measure

119. See, e.g., BARRY BLUESTONE & THOMAS KOCHAN, TOWARD A NEW GRAND BARGAIN: COLLABORATIVE APPROACHES TO LABOR-MANAGEMENT REFORM IN MASSACHUSETTS (2011), available at http://www.northeastern.edu/dukakiscenter/wp-content/uploads/Grand_Bargain_Report.pdf (recommending the adoptions of IBB).

120. See ROGER FISCHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Penguin Books 1981).

121. See, e.g., DEMITCHELL, *supra* note 24 (noting that “[c]ducation reform must pass through the rigors of a collective bargaining table in which tradeoffs are commonplace”).

122. FISCHER & URY, *supra* note 120, at xviii.

123. IBB’s guiding principles have been described as follows. First, negotiators must distinguish between the “people” and the “problem.” They must attend to the human aspect of bargaining (e.g., human emotions) and also, separately, the substantive merit of a problem. Second, negotiations must keep an eye on the interests of the parties and not simply their positions. The assumption here is that there may be shared interests that, once revealed, lead to collective solutions to a given problem. Third, parties must be creative and invent options to a problem. In other words, sides should brainstorm potential solutions. In doing so, they may find a means to satisfy their mutual interests. Fourth, all proposals should be measured against objective criteria. See *id.*

possible solutions. Such criteria might ask whether a proposed solution does any of the following: (1) improves teacher effectiveness; (2) is fair to employees; or (3) provides necessary resources for both management and employees. Both parties would brainstorm potential solutions that address the problem and also can be measured against these criteria. Thus, management and unions would constructively and positively address the problem.¹²⁴

IBB provides a local roadmap that can complement the right legal framework in finding a way out of the paradox. Through IBB, both unions and management become invested in an agreement at its initial stages.¹²⁵ IBB helps the parties share the risk. Indeed, through IBB, both parties are central to crafting the final product. IBB also promotes relationship-building that might further union and management collaboration as teacher evaluations are implemented. Indeed, IBB starts from the premise that negotiations are a tool in creating good relationships, not simply a means to create a contract. Thus, IBB acts as a natural complement to a legal framework that encourages collaboration, rather than prohibits it.

V. CONCLUSION

Like blindfolded partygoers swinging at a piñata, state legislatures took multiple swipes at their respective collective bargaining laws in 2011. Indeed, with a swift crack, they eviscerated the collective bargaining rights of teachers. The area of teacher evaluations was particularly impacted. In Wisconsin, Florida, and Michigan, the issue of teacher evaluations is now a prohibited subject of bargaining. Conventional wisdom suggests that management is now free to implement effective teacher evaluation systems and reform. Like candy falling from the piñata, teacher evaluation reform is now unencumbered.

Yet these changes could undermine teacher evaluation reform. Management will have less control over the process, rather than more. The paradox of public sector labor law will create this effect. As unions and their membership are excluded from bargaining teacher evaluations, unions will become more vigilant in protecting

124. The author recognizes that there are circumstances where the relationship between the parties will not sustain such collaboration and may not be appropriate.

125. Malin, *supra* note 1, at 1391 (noting the importance of involving unions in the initial phases of policy development so as to avoid the paradox).

their employees when management mismanages the evaluation system. In other words, the recent reforms with respect to evaluations are backward.

Going forward, legislatures would do right to permit management and unions to negotiate teacher evaluations. This can be done with appropriate constraints to protect against union overreach, as in New Hampshire. Including teachers will develop employee buy-in, increase employees’ personal investment in job performance, and promote labor peace. In sum, using the law to promote more union involvement in teacher evaluation discussions makes for good education policy.