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EDUCATIONAL COLLECTIVE BARGAINING: THE EFFECT OF IMPASSE RESOLUTION PROCEDURES ON PUBLIC SCHOOL TEACHERS

Jessica Nixon*

I. INTRODUCTION

During the 1960s and 70s, the spread of strikes by teachers prompted many states to enact collective bargaining statutes to codify the means of negotiations between teachers and school districts.¹ Today, thirty-five states authorize collective bargaining and utilize mediation, fact-finding procedures, and/or arbitration procedures to settle bargaining impasses.² In addition, in collective bargaining statutes, twenty-seven states now prohibit teacher strikes and eighteen states impose penalties for teacher strikes.³ As a result of this type of state legislation, both national and local teachers' unions have emerged as powerful entities that negotiate collective bargaining agreements on behalf of teachers.⁴

As evidenced by the recent the controversy surrounding the Chicago Teachers' Union strike⁵ and Wisconsin's Act 10 legislation,⁶ the debate over teachers' wages is a prevalent source of controversy in negotiations with school districts. Historically, a teachers' strike or threat of strike was a powerful tool for teachers' unions to gain leverage such negotiations. However, with the statutory trend of prohibiting teachers' strikes, teachers' unions struggle to achieve goals, especially wage increase goals, in the negotiation process. As a substitute for the right to strike, arbitration impasse procedures are seen as a way that teachers' unions may achieve success in the collective bargaining process, particularly with respect to guaranteeing higher wages for teachers in the public sector.⁷

This article will examine how alternative dispute resolution impasse procedures impact the achievement of public school teachers' unions' goals in collective bargaining

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¹ See Emily Workman, *State Collective Bargaining Policies for Teachers*, Education Commission of the States, Dec. 2011, available at <http://www.ecs.org/clearinghouse/99/78/9978.pdf> (last visited Apr. 6, 2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Chicago Teachers' Union, *Tentative Agreement Between Board and CTU*, Chicago Teachers Union Blog (Sept. 18, 2012), http://www.ctunet.com/blog/text/Contract_Highlights_2012_09_18.pdf (last visited Apr. 6, 2013); see also Chicago Public Schools, *Tentative Agreement: Agreement Between the Board of Education of the City of Chicago and the Chicago Teachers Union, Local No. 1, American Federation of Teachers, AFL-CIO*, (Sept. 26, 2012) at 110-17 available at http://www.cps.edu/sitecollectiondocuments/2012_2015BoardCTUTentativeAgreement.pdf (last visited Apr. 6, 2013).

⁶ See A.B. 10, 2011-12 Leg., Jan. 2011 Special Sess., § 168 (Wis. 2011) (amending the State's collective bargaining statute which effects wage increases for public employees in collective bargaining process).

⁷ Michael Finch & Trevor W. Nagle, *Collective Bargain in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 WIS. L. REV. 1573 (1984).

negotiations with school districts. Section II will focus on the history and current landscape of collective bargaining in public education. Section III will focus on how collective bargaining affects the achievement of public school teachers' unions' goals. This section first examines the political power of public school teachers' unions then moves on to discuss more specifically the ways in which public school teachers' unions can achieve increased wages for their members. The analysis continues with a discussion of the Chicago Teachers' Union strike to provide evidence of the reasons that resolution of collective bargaining impasses by arbitration is preferable to resolution by teachers' strikes. Finally, by examining Wisconsin's Act 10 legislation, the article examines the benefit of equal power in the bargaining process that can be achieved by arbitration of collective bargaining impasses between teachers' unions and school districts.

II. BACKGROUND

A. *History: The Rise of Collective Bargaining in Public Education*

The rise in the prevalence of teachers' strikes during the 1960s and 1970s resulted in state codification of negotiation procedures between teachers and school boards in the form of collective bargaining statutes.⁸ During this period, the two prominent national teachers' unions, the National Education Association ("NEA") and the American Federation of Teachers ("AFT"), struggled to gain membership, which prompted the spread of the strikes by teachers.⁹ These national teachers' unions were able to accomplish their goal of increased membership after 20,000 teachers participated in a one-day walk-out called by a local affiliate of AFT in New York City during 1962.¹⁰ As a result of the walk-out, New York City mayor, Richard Wagner, allowed the teachers to vote whether to pursue formal collective bargaining.¹¹ Later that year, the local union secured the first, collective bargaining agreement between a teachers' union and the city, offering a \$1,000 pay increase and duty free lunches.¹² The substantial gains achieved by the teachers' union in New York City prompted the national teachers' unions to pursue similar work-stoppage tactics in attempt to further their organizational efforts.¹³ By 1968, such efforts culminated in 112 strikes by public school teachers and librarians, resulting in 2,194,000 man-days of work lost.¹⁴ Due to the effect of the militant-style, work-stoppage tactics, membership in the AFT soared during a time period in which

⁸ Workman, *supra* note 1, at 1.

⁹ Robert W. Neiryck, *Teachers' Strikes—A New Militancy*, 19:5 LAB. L.J. 292, 293 (1968).

¹⁰ *Id.* at 294.

¹¹ Federick M. Hess & Martin R. West, *A Better Bargain: Overhauling Teacher Collective Bargaining for the 21st Century*, Harvard University – Program on Education Policy & Governance, at 15 (2006) available at <http://www.hks.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf> (last visited Apr. 6, 2013).

¹² *Id.*; see also Neiryck, *supra* note 9, at 294.

¹³ Neiryck, *supra* note 9, at 294 (commenting that the success of the 1962 teachers' walk-out and the rivalry between the NEA and the AFT prompted the NEA to become involved in work stoppages).

¹⁴ Paul Ritterband, *Ethnic Power and the Public Schools: The New York City School Strike of 1968*, 47:2 SOCIOLOGY OF EDUC. 251 (1974).

membership in organized labor only increased by 5% nationally.¹⁵ In addition to increased membership, public school teachers' unions gained greater power in negotiations with school boards as public sector collective bargaining legislation spread across the country.¹⁶

Public sector collective bargaining, which applies to collective bargaining in the context of public education, is fundamentally distinguishable from private sector collective bargaining. The primary distinction is that “in private employment collective bargaining is a process of private decision making shaped primarily by market forces, while in public employment it is a process of governmental decision making shaped ultimately by political forces.”¹⁷ Other distinguishing characteristics include the public interest involved in public sector bargaining and the sources of funding.¹⁸ These differences have the potential to become problematic in public education collective bargaining settings where there labor relations staff lack training in dealing with the challenges presented by the collective bargaining process.¹⁹

Despite these fundamental differences between public and private sector collective bargaining, the principles which govern private collective bargaining relations are applicable to public collective bargaining. In 1962, the United States Supreme Court, in *NLRB v. Katz*,²⁰ established the doctrine that governs collective bargaining in the private sector.²¹ The Court held that a “unilateral change in conditions of employment under negotiation is . . . a violation of the good faith bargaining provision of the [National Labor Relations Act].”²² The application of the *Katz* doctrine to the public sector, especially public education collective bargaining, is appropriate for three reasons. First, the consequences that allegedly stem from differences between private and public sector collective bargaining are overstated.²³ Second, the rationale for the *Katz* doctrine is the same in either sector: prohibiting unilateral changes by the employer promotes collective bargaining which is the policy objective behind the National Labor Relations Act as well as public sector collective bargaining laws.²⁴ Finally, most states have modeled their labor laws, which contain the collective bargaining statutes, on the National Labor

¹⁵ *Id.*; see also Hess & West, *supra* note 11, at 15 (explaining such tactics also prompted the NEA to adopt a favorable approach to collective bargaining).

¹⁶ Workman, *supra* note 1, at 1.

¹⁷ Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1994).

¹⁸ Steven J. Scott, *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, 83 CORNELL L. REV. 194, 208 (1997) (explaining the development of the legal doctrine of public sector bargaining).

¹⁹ Lee C. Shaw & Theodore R. Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 UCLA L. REV. 867, 890 (1971) (arguing that a lack of a distinct labor relations staff in such public settings creates uncertainty regarding the responsibilities that accompany collective bargaining).

²⁰ *NLRB v. Katz*, 369 U.S. 736 (1962).

²¹ Scott, *supra* note 18, at 205.

²² *Id.* (quoting *Katz*, 369 U.S. at 743).

²³ *Id.* at 210-11 (arguing that significant political constraints on public sector bargaining reduce the political power that is feared to be at work, that the public is not excluded from the negotiation of the terms of a collective bargaining agreement in public education negotiations, and that public officials have flexibility to overcome funding concerns).

²⁴ *Id.* at 211-12 (“[W]hen employers impose unilateral changes to collective agreements in the public sector, it undercuts the bargaining process much as it does in the private sector.”).

Relations Act, which governed the Court's ruling in *Katz*.²⁵ Therefore, the distinguishable characteristics of the public and private sector in collective bargaining do not impact the application of the *Katz* doctrine to public sector collective bargaining.²⁶

B. Current Landscape: State Approaches to Collective Bargaining in Public Education

No federal law exists that governs collective bargaining in public education, or the public sector generally; therefore, state labor laws supply the rules for collective bargaining in the public sector. Today, thirty-five states' laws make collective bargaining available to public school teachers while three states strictly prohibit collective bargaining by public school employees.²⁷ The collective bargaining statutes in states that permit public education employees to engage in the process differ in several ways. First, state collective bargaining statutes dictate whether employees are excluded from collective bargaining with school boards. These various collective bargaining statutes have a wide range of applicability, such as coverage for all public school employees, coverage for public school employees that do not serve a managerial or supervisory role, or excluding all public school employees except teachers.²⁸ Second, state collective bargaining state laws specify which issues are negotiable. Most states limit the scope of bargaining to wages, hours, and terms of employment. While others are more permissive, allowing negotiation over matters as specific as classroom curriculum.²⁹

Collective bargaining statutes govern bargaining impasse procedures in the event that a resolution cannot be reached between a public school's bargaining unit and a school board. The common procedures employed by the are mediation, fact-finding, and arbitration, either exclusively or by some combination thereof.³⁰ Where collective bargaining impasses are submitted to mediation, a neutral third party mediator attempts to broker an agreement between the parties.³¹ When fact-finding procedures are utilized, a panel reviews both sides of the dispute and makes non-binding recommendations based on its findings for the parties to use to reach a resolution.³² In the arbitration of collective bargaining impasses, a third party or panel conducts a formal hearing, determines a resolution for the dispute, and issues a binding and final ruling.³³

²⁵ *Id.* at 212.

²⁶ See Scott *supra* note 18, at 213 (indicating that New York, New Jersey, Tennessee, California, Oregon, Illinois, Massachusetts, Florida, Maine, New Hampshire, and Illinois have either judicially or legislatively adopted the *Katz* doctrine to govern public sector collective bargaining).

²⁷ Workman, *supra* note 1, at 2; *cf.*, Workman, *supra* note 1, at 9, 12 (indicating that collective bargaining is explicitly prohibited in North Carolina, Texas, and Virginia.).

²⁸ Workman, *supra* note 1, at 2-13.

²⁹ *Id.* at 1-13.

³⁰ *Id.* at 1; see also *id.* at 4 (indicating that in Illinois, fact-finding, mediation, and voluntary arbitration are statutorily permissible means to resolve a collective bargaining impasse).

³¹ *Id.* (explaining also that thirty-two states' collective bargaining statutes provide mediation in the event of an impasse); see also, *e.g.*, *id.* at 3, 6, 11, 13 (indicating that mediation is the only impasse procedure available in Idaho, Michigan, South Dakota, and Wisconsin).

³² *Id.* at 1-2 (explaining also that twenty states' collective bargaining statutes provide the fact-finding procedure in the event of an impasse); see also, *e.g.*, *id.* at 9 (indicating that Oklahoma is the only collective bargaining state in which fact-finding is the sole impasse procedure available).

³³ Workman, *supra* note 1, at 1-2.

There are generally two types of arbitration procedures offered in collective bargaining statutes. The first, and more common form, is voluntary arbitration where either side of a collective bargaining impasse may request an arbitral hearing.³⁴ The other is mandatory arbitration where both sides of the impasse are required to submit to a formal arbitral hearing if an agreement cannot be reached.³⁵ Finally, in addition to setting forth the rules of collective bargaining, the statutes also dictate whether public school employees are permitted to strike should collective bargaining fail. A majority of collective bargaining statutes prohibit strikes by public school teachers and several impose penalties for such action.³⁶ A minority, however, permit strikes by public school teachers, though, in some instances, certain conditions must be met before a strike is permissible.³⁷

III. ANALYSIS

A. *Political Power of Public School Teachers' Unions*

Public school teachers' unions have become powerful interest groups in politics. The two most prominent national teachers' unions, the NEA and the AFT, contributed \$59 million to federal campaigns between 1990 and 2010.³⁸ According to Andrew J. Coulson, teachers' unions are politically powerful because "[p]eople like teachers, and voters listen to what they think teachers are telling them. Add that overall positive reputation to a huge pile of money, and you've got a pretty formidable political force."³⁹ As evidence of the political sway that public school teachers' unions are able to exercise, many scholars have argued that teachers' unions have shaped education policy and dictated public school operations through collective bargaining. One of the earliest studies examining the impact of teachers' unions found that "collective bargaining has been a principal cause of: (1) substantially altered definitions of teachers' work responsibilities; (2) basic changes in the mechanisms which control how teachers will perform their jobs; and (3) modifications in the authority available to school principals and other middle managers."⁴⁰

³⁴ *Id.* (indicating also that twenty states' collective bargaining statutes offer voluntary arbitration in the event of an impasse); *see also id.* at 2-13 (indicating that in no collective bargaining state is voluntary arbitration the only available impasse procedure).

³⁵ *Id.* at 1-2 (indicating also that only two states, Alaska and Connecticut, provide mandatory arbitration and that neither Alaska nor Connecticut mandate arbitration as the only impasse procedure).

³⁶ *Id.* at 1-2 (indicating also that twenty-seven states prohibit strikes, eighteen of which impose penalties for such action); *see also, id.* (explaining that where strikes are prohibited and the state imposes penalties, such penalties could take the form of fines, dismissal, and even imprisonment.).

³⁷ *Id.* at 1-2 (indicating also that eight states permit strikes by public school teachers); *see also id.* at 1-13 (indicating that Alaska, Ohio, Oregon, and Vermont do not impose conditions before a strike is permissible whereas Hawaii, Illinois, Minnesota, and Pennsylvania require certain conditions to be met.)

³⁸ Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 CATO J. 155 (2010) (explaining that public school unions are politically partisan).

³⁹ Hess & West, *supra* note 11, at 12 (quoting Republican political strategist Dan Schnur).

⁴⁰ Douglas E. Mitchell, Charles T. Kerchner, Wayne Erck & Gabrielle Pryor, *The Impact of Collective Bargaining on School Management and Policy*, 89 AM. J. EDUC. 147, 155 (1981) (identifying policy arenas in which the impact of collective bargaining is most substantial).

More recent studies indicate that collective bargaining continues to have similar effects on public education. In 2005, there were 199 teacher collective bargaining agreements on file at the Bureau of Labor Statistics,⁴¹ which spanned an average of 105 pages and governed everything from the expected salary and benefit issues to the mundane details of a standard school day.⁴² In addition their role in navigating collective bargaining process, public school teachers' unions are active and supportive in recruiting school board candidates.⁴³ By creating strong political coalitions through campaign contribution and school board candidate recruitment, teachers' unions will be able to achieve new goals in shaping education policy and collective bargaining laws.⁴⁴

B. Achieving Public School Teachers' Unions Goal of Increasing Wages

Although teachers' unions attempt to achieve a range of multiple objectives, they undoubtedly seek to raise their members' wages.⁴⁵ Public school teachers' unions have used collective bargaining to pursue the goal of increasing their members' wages,⁴⁶ and although teachers' wages have increased since the 1950s, public school teachers' wages actually decreased during the decade when collective bargaining was spreading across the nation and unions were becoming more powerful.⁴⁷ According to the NEA, improving the wages of public school teachers is a primary objective because “[l]ow teacher pay comes at a high cost for schools and kids, who lose good teachers to better-paying professions.”⁴⁸ The AFT also maintains that improving wages of public school teachers is a crucial objective, basing its conclusion on the results of a salary survey.⁴⁹ The results of the survey indicated that teachers' salaries increased by 4.5% in 2007, pushing the average wage of public school teachers over \$50,000 for the first time.⁵⁰ Although this is the largest increase in public school teachers' wages since 1987,⁵¹ public school teachers still make approximately seventy cents on the dollar of professionals with comparable education and training.⁵² Another important finding that supports the unions' continued focus on improving their members' wages is that only 47 percent of public school

⁴¹ Hess & West, *supra* note 11, at 9.

⁴² *Id.*

⁴³ Mitchell, Kerchner, Erck, & Pryor, *supra* note 40, at 170.

⁴⁴ Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q. J. ECON. 671, 688 (1996).

⁴⁵ Coulson, *supra* note 38, at 155-56 (indicating that public school teachers' unions' objectives generally include: “(1) raising their members' wages, (2) growing their membership, (3) increasing the share of the public school labor force that they represent, (4) precluding pay based on performance or aptitude, and (5) minimizing competition from nonunion shops.”).

⁴⁶ *Id.* at 158.

⁴⁷ *Id.*

⁴⁸ National Education Association, *Our Position & Actions on Professional Pay*, <http://www.nea.org/home/1277.htm> (last visited Apr. 6, 2013).

⁴⁹ See generally American Federation of Teachers, *Survey and Analysis of Teacher Salary Trends 2007* (2008), available at <http://www.aft.org/pdfs/teachers/salariesurvey07.pdf>.

⁵⁰ *Id.* at 1.

⁵¹ *Id.*

⁵² *Id.* at Executive Summary.

teachers reported being satisfied with their salaries,⁵³ indicating that public education collective bargaining, in its current form, has not been as powerful of a mechanism as expected for public school teachers' unions to improve their members' wages.⁵⁴

In order for public school teachers' unions to be successful in achieving their goal of raising their members' wages, collective bargaining statutes should include binding arbitration for resolution of impasses in negotiations. There are several reasons to expect that arbitration will increase public school teachers' wages.⁵⁵ First, arbitration as an impasse procedure in collective bargaining could transfer the ultimate salary authority from self-interested officials to a neutral party capable of rendering a binding resolution to the dispute.⁵⁶ Also, according to Professor Finch and Michael Nagel, "because binding arbitration is often viewed as a substitute for the employees' right to strike, unions expect some improvement in outcomes over those resulting from collective bargaining alone."⁵⁷ Furthermore, statutory criteria typically direct arbitrators to examine comparable salaries in the labor market, thus low paid employees could invoke or threaten to invoke arbitration in order to achieve more equal pay.⁵⁸ Finally, the use of arbitration to resolve collective bargaining disputes in other public sectors has a history of causing an increase in wages for employees.⁵⁹

A comparison of teachers' salaries in states that provide for mandatory binding arbitration as an impasse procedure to those that do not is one way to test whether the desired results will actually be produced.⁶⁰ The two states that provide for mandatory arbitration in their collective bargaining statutes as means to resolve impasse disputes in negotiations are Alaska and Connecticut.⁶¹ The average salary of public school teachers' in these states as compared to the national average salary may shed light on the likelihood that arbitration requirements in public education collective bargaining will raise public school teachers' wages.⁶² In 2007, the national average salary of public school teachers was \$51,009.⁶³ In the same year, the average salary of public school teachers in Alaska was \$54,678, the eleventh highest average in the nation.⁶⁴ The average salary in

⁵³ *Id.* at 5 (reporting also that ninety-one percent of public school teachers reported they were satisfied with being a teacher).

⁵⁴ *See, e.g.* Coulson, *supra* note 38, at 159.

⁵⁵ Finch & Nagel, *supra* note 7, at 1631.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1632.

⁵⁸ *Id.*

⁵⁹ Jeffery H. Keefe, *A Reconsideration and Empirical Evaluation of Wellington's and Winter's, The Unions and the Cities (1971)* 7-8 (June 4, 2012) (working paper) (on file with Employment Policy Research Network) available at <http://www.employmentpolicy.org/topic/402> (follow "Wellington's and Winter's 'The Unions and the Cities'" hyperlink) (presenting data which illustrates that the effect of providing arbitration to resolve collective bargaining impasses was increased wages for police officers in over 800 departments) (last visited Apr. 6, 2013).

⁶⁰ Finch & Nagel, *supra* note 7, at 1632-33 (explaining that a common method to estimate the salary effect of compulsory arbitration "is to measure the salary differential between those parties who actually use arbitration procedures and those who do not.").

⁶¹ Workman, *supra* note 1, at 2.

⁶² This proposed analysis is simplistic and does not take into account other factors which may influence public school teachers' wages such as the cost of living.

⁶³ American Federation of Teachers, *supra* note 49, at 13.

⁶⁴ *Id.* at 16.

Connecticut in 2007 was \$61,039, the second highest average in the nation.⁶⁵ Additionally, a similar comparison of the average beginning teacher salaries also indicates that mandatory arbitration positively affects public school teachers' salaries. For example, in 2007, the beginning teacher salary nationally was \$35,284;⁶⁶ in Alaska was \$42,006;⁶⁷ and in Connecticut was \$41,497.⁶⁸ Based on these averages, mandatory arbitration in public education collective bargaining to resolve impasses in negotiations is likely a factor contributing to higher salaries to public school teachers.⁶⁹ Thus, by including arbitration as a resolution procedure to impasses during negotiations with school boards in collective bargaining statutes public school teachers' unions are likely to be able to secure higher wages for their members.

C. Resolution by Arbitration is Preferable to Public School Teachers' Strikes

Arbitration as a means to resolve negotiation impasses is often considered to be a substitute to strikes by public school teachers.⁷⁰ Although teacher strikes prompted the rise of collective bargaining during the 1960s and 70s,⁷¹ states generally deny such action as means for public school teachers' unions to achieve goals of negotiations with school boards.⁷² There are several public policy reasons why states deny public school teachers' unions the right to strike if an impasse in negotiations occurs. For example, according to Professor Finch and Michael Nagel, "strike prohibition is thought necessary to preserve the political and economic integrity of local government" by preventing public school teachers' unions from exercising disproportionate political leverage.⁷³ Additionally, strikes teachers' unions "generally are defensive in nature" because "strike use affects salary changes but not salary levels."⁷⁴ Moreover, teachers' union strikes are harmful to

⁶⁵ *Id.*

⁶⁶ *Id.* at 21.

⁶⁷ *Id.* at 24 (indicating that the average beginning public school teacher salary in Alaska was the second highest in the nation).

⁶⁸ American Federation of Teachers, *supra* note 49, at 24 (indicating that the average beginning public school teacher salary in Connecticut was the third highest in the nation).

⁶⁹ See Finch & Nagel, *supra* note 7, at 1646 ("[T]he best available evidence from the educational and non-educational employment sectors suggests that teachers' salaries may be moderately inflated by the introduction of binding arbitration procedures.").

⁷⁰ *Id.* at 1578 ("[Binding arbitration is] a viable legislative response to the problem of teachers' strikes, as arbitration laws are highly successful in preventing strikes, and offer teachers a form of bargaining leverage that appears to be no less effective than strike activity.").

⁷¹ Workman, *supra* note 1, at 1.

⁷² *Id.* at 2 (indicating that a majority of states prohibit public school teachers from striking); see also Finch & Nagel, *supra* note 7 at 1582 (explaining that in states where public school teachers are permitted to strike, such action is usually only allowed if other conciliatory procedures have been exhausted).

⁷³ Finch & Nagel, *supra* note 7, at 1583; *contra* Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 321 (1993) ("[P]ublic employee strikes do not distort the political process. Rather, public employees strike against the very interest groups -- the users and purchasers of their services -- against whom they must compete in the political process.").

⁷⁴ Malin, *supra* note 73, at 323 ("In Canada, for example, where the right to strike is more prevalent in the public sector, unions achieve greater wage increases through interest arbitration than through threatened and actual strikes.").

students because they cause student standardized test scores to drop,⁷⁵ result in increased the number of students repeating grades,⁷⁶ and pose dangers to student achievement in higher education.⁷⁷

The Chicago Teachers' Union strike illustrates how utilizing strikes to resolve collective bargaining disputes is less beneficial than arbitration as an impasse procedure. In Illinois, state law pertaining to public education employees allows for collective bargaining of issues surrounding wage, hours, and terms and conditions of employment.⁷⁸ The statute provides that if negotiations between a public school teachers' union and a school board reach an impasse, the dispute may be submitted to fact-finding, mediation, or voluntary arbitration.⁷⁹ The act also permits the right to strike so long as certain conditions have been satisfied.⁸⁰ Within the language statute, the legislature states that the policy rationale behind the act is that "unresolved disputes between the educational employees and their employers are injurious to the public, and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution."⁸¹ After reaching a bargaining impasse with Chicago Public Schools (CPS)⁸² and participating in fact-finding resolution procedures in May 2012,⁸³ the Chicago Teachers' Union (CTU) took advantage of its right to strike in September 2012.

In the events leading up to the strike, the fact-finding panel issued its report to the CTU and the Chicago Board of Education (the "Board").⁸⁴ A few of the matters on which the panel made recommendations include the duration of the agreement, wage increases, and compensation for longer workday requirements. The panel accepted the Board's proposal for the duration of the agreement, recommending that the agreement between the parties be for a total of four years.⁸⁵ With regards to the parties' wage increase proposals, the panel found the CTU request too high and the Board request too low, and thus recommended a compromise that for the first two years the wage increase should be

⁷⁵ Dylan Matthews, *How Teacher Strikes Hurt Student Achievement*, THE WASHINGTON POST - Workblog, Sept. 10, 2012, <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/09/10/how-teacher-strikes-hurt-student-achievement/> (citing Michael Baker, *Industrial Actions in Schools: Strikes and Student Achievement*, Nat'l Bureau of Econ Research (2011) available at <http://www.nber.org/papers/w16846>) (last visited Apr. 6, 2013).

⁷⁶ *Id.* (citing Michèle Belot & Dinand Webbink, *Do Teacher Strikes Harm Educational Attainment of Students?*, 24 LABOUR 391 (Dec. 2010)).

⁷⁷ *Id.*

⁷⁸ 115 ILL. COMP. STAT. 5/1; *see also* Workman, *supra* note 1, at 4.

⁷⁹ 115 ILL. COMP. STAT. 5/1; *see also* Workman, *supra* note 1, at 4.

⁸⁰ 115 ILL. COMP. STAT. 5/1; *see also* Workman, *supra* note 1, at 4.

⁸¹ 115 ILL. COMP. STAT. 5/1.

⁸² Chicago Public Schools, *About CPS*, (Aug. 16, 2012), http://cps.edu/About_CPS/Pages/AboutCPS.aspx (indicating that Chicago Public Schools serves over 400,000 students, making it the third-largest public school district in the nation) (last visited Apr. 6, 2013).

⁸³ Chicago Teachers' Union, *CTU-CPS Negotiations Move to Fact Finding*, Apr. 16, 2012, <http://www.ctunet.com/media/press-releases/ctu-cps-negotiations-move-to-fact-finding> (last visited Apr. 6, 2013).

⁸⁴ *See generally* Bd. of Educ. of Chicago v. Chicago Teachers' Union, Local 1, Am. Fed'n of Teachers, AFL-CIO, Arb. Ref. 12.178 (Fact-Finding) (2012) (Benn, Fact-Finder) [hereinafter "Fact-Finding Report"] available at <http://blogs.suntimes.com/backtalk/FactFinderRpt.pdf> (last visited Apr. 6, 2013).

⁸⁵ *Id.* at 23.

2.25% and for the second two years 2.50%.⁸⁶ The panel, based on statutory authority, accepted the Board's proposal for longer workday requirements. In order to compensate teachers for the longer workday requirements, the panel recommended a 12.6% wage increase over the wage earned by public school teachers in the last agreement.⁸⁷ The neutral third-party fact finder, who issued the report, reasoned that the recommendations were appropriate given the "profound implications" at stake in the negotiations and the "toxic" collective bargaining relationship of the parties.⁸⁸

After the report was issued on July 19, 2012, each party had a period of fifteen days to reject the recommendations and if either party rejected the recommendations, negotiations would continue. Both the Board and the CTU filed notices rejecting of the recommendations, basing their reasoning on separate fact-finding opinions filed by their respective panel members. In large part, the Board rejected the recommendations because it insisted that its proposed 2% wage increase was adequate given the already high compensation of CPS employees and that such a rate was necessary to prevent layoffs and detrimental large classroom sizes.⁸⁹ On the other hand, the CTU concurred with the recommendations regarding the wage increases but rejected the fact-finding report because, among other issues, it maintained that the duration of the contract should only be two years.⁹⁰

As a result of both parties' rejection of the fact-finding report, negotiations between the CTU and the Board continued. The parties could not reach a resolution to their disagreements and on August 29, 2012, the CTU filed a ten-day notice of strike with the Illinois Education Labor Relations Board.⁹¹ Union President Karen Lewis said the action was "the only way to get the Board's attention and show them we are serious about getting a fair contract which will give our students the resources they deserve."⁹² The CTU acknowledged that the negotiations resulted in agreement on some provisions of the contract; however, the parties still remained "far apart" on "bigger issues such as wages."⁹³ In response to the CTU's notice of intent to strike, Chief Executive Officer of Chicago Public Schools, Jean-Claude Brizard, issued a statement indicating that members of the Board and CTU leadership would continue to meet every day in attempt to avoid a strike.⁹⁴ The Board indicated that a strike would be harmful to students, however, if a

⁸⁶ *Id.* at 29.

⁸⁷ *Id.* at 43.

⁸⁸ *Id.* at 11-12.

⁸⁹ Separate Opinion of Panel Member Joseph T. Moriarty at the Conclusion of Fact-Finding. Arb. Ref. 12.178, 7 (2012) available at <http://www.ctunet.com/blog/text/CPSOPINION.pdf> (last visited Apr. 6, 2013).

⁹⁰ Concurrence and Dissent: Jesse Sharkey – Chicago Teachers Union Appointed Member, available at <http://www.ctunet.com/blog/fact-finding-report-goes-public> (last visited Apr. 6, 2013).

⁹¹ Chicago Teachers' Union, *Breaking News: CTU Files Notice of Intent to Strike*, (Aug. 29, 2012) <http://www.ctunet.com/media/press-releases/breaking-news-ctu-files-notice-of-intent-to-strike> (indicating that more than 26,000 public school teachers, clinicians and paraprofessionals may go on strike) (last visited Apr. 6, 2013).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Chicago Public Schools, *Statement from CEO Brizard on 10-Day Strike Notice From CTU Leaders*, (Aug. 29, 2012) available at http://cps.edu/News/Announcements/Pages/08_29_2012_A1.aspx (last visited Apr. 6, 2013).

strike were to occur they were “prepared to provide [the] students with the services they need to keep them fed and in a safe environment with positive activities.”⁹⁵

Negotiations after the notice of intent to strike was filed, again, proved to be unsuccessful. On September 9, 2012, the CTU announced that the strike would begin the following day at approximately 675 schools.⁹⁶ While members of the CTU took to the picket lines, the Board and CPS implemented their “Children First” plan which “includes providing a safe environment, daily meals and positive, engaging activities for students.”⁹⁷ After students were out of the classroom for eight school days, the CTU and the Board reached a tentative agreement and CPS schools were reopened on September 19, 2012.⁹⁸ The tentative agreement presented a three year contract term (with an optional fourth year) and offered teachers a three percent wage increase in the first year and a two percent wage increase the following two years while modifying the payment method to an hourly type system to compensate for longer school day lengths.⁹⁹ Although the tentative agreement ended the strike, the agreement was still subject to approval by the members of the CTU and the Board. On October 3, 2012, seventy-nine percent of union members who voted on the proposed contract approved.¹⁰⁰ On October 24, 2012, the Board approved the contract.¹⁰¹

The resolution of perhaps the most contentious issue in the dispute between the CTU and CPS, teachers’ wages, illustrates reasons that binding arbitration should be preferred over teachers’ strikes to resolve impasses in public education collective bargaining. It is important to note that both the pay raise recommended by the fact-finding report and the raise achieved by the contract totaled a seven percent increase over

⁹⁵ *Id.*

⁹⁶ Chicago Teachers’ Union, *Press Release: CPS Fails To Negotiate Fair Contract To Prevent First Strike In 25 Years*, (Sept. 9, 2012) available at <http://www.ctunet.com/blog/cps-fails-to-negotiate-fair-contract-to-prevent-first-labor-strike-in-25-years> (reporting statements of Union President Karen Lewis) (last visited Apr. 6, 2013).

⁹⁷ Chicago Public Schools, *CPS Takes Preliminary Steps to Implement “Children First” Plan in Event of Chicago Teachers Union Strike*, (Aug. 30, 2012) available at http://cps.edu/News/Press_releases/Pages/08_30_2012_PR1.aspx (explaining that would be numerous locations provided by CPS, City Sister Agencies and Departments, faith organizations, non-profits and other stakeholders to ensure students receive the support they need in the event of a CTU strike) (last visited Apr. 30, 2013).

⁹⁸ See e.g., Emmeline Zhao, *Chicago Teachers Strike Suspended Students Head Back to School Wednesday*, THE HUFFINGTON POST (Sept. 18, 2012) available at http://www.huffingtonpost.com/2012/09/18/chicago-teachers-strike-s_n_1895082.html (last visited Apr. 6, 2013).

⁹⁹ Chicago Teachers’ Union, *Tentative Agreement Between Board and CTU*, (Sept. 18, 2012) available at http://www.ctunet.com/blog/text/Contract_Highlights_2012_09_18.pdf; see also *Tentative Agreement: Agreement Between the Board of Education of the City of Chicago and the Chicago Teachers Union, Local No. 1, American Federation of Teachers, AFL-CIO*, (Sept. 26, 2012) at 110-17 available at http://www.cps.edu/sitecollectiondocuments/2012_2015BoardCTUTentativeAgreement.pdf (last visited Apr. 30, 2013).

¹⁰⁰ Rosalind Rossi, *CPS Teachers Overwhelmingly Approve New Contract*, CHICAGO SUN-TIMES (Oct. 3, 2012) available at <http://www.suntimes.com/news/metro/15551581-418/teachers-approve-new-contract.html> (last visited Apr. 6, 2013).

¹⁰¹ Jennifer Delgado, *CPS Approves Teachers Contract: Board Delays Budget Moves to Pay for Deal*, THE CHICAGO TRIBUNE (Oct. 24, 2012), available at <http://www.chicagotribune.com/news/local/ct-met-cps-board-meeting-20121025,0,2808863.story>.

three years.¹⁰² Also, other recommendations rejected by the parties were not substantially different from the terms of the contract that was ultimately approved after the strike.¹⁰³ Therefore, it is reasonable to assume, had the parties accepted the recommendations of the neutral fact-finder, the contract between the CTU and the Board would be substantially similar to approved contract. This suggests that a resolution of the dispute by a binding arbitration procedure probably could have avoided the negative consequences of the strike which stemmed from the fact that over 300,000 students were denied classroom instruction for the duration of the strike. For example, eighty-four percent of CPS students in need did not have access to daily breakfasts and lunches provided by the schools.¹⁰⁴ Also of concern was the impact the strike would have on high school juniors and seniors who would have less time to prepare and plan for attainment of higher education.¹⁰⁵ Finally, the strike disrupted many families' routines, causing parents to either miss days of work or to find alternative sources of care for their children while schools were closed.¹⁰⁶ The long-term implications of each of these immediate consequences are deeply concerning to the students' and schools' future. Thus, rather than seeking to resolve impasses in collective bargaining by teachers' strikes, teachers' unions should strive to include binding arbitration procedures in collective bargaining statutes.

D. Creating Equal Power to Affect Final Outcomes of Collective Bargaining

Wisconsin Act 10, enacted during a special legislative session in March 2011, to several state statutes, altered bargaining by public school employees¹⁰⁷ including collective bargaining with school districts.¹⁰⁸ Under this provision, the only issue required to be negotiated is teachers' wages and only when those wages are not greater than the cost of living.¹⁰⁹ Another provision of the Act requires that public school teachers' unions obtain approval from a majority of their members for recertification and to do so annually.¹¹⁰ The impasse procedures of the collective bargaining statute in Wisconsin, unchanged by Act 10, provide for mediation but not voluntary or mandatory arbitration in negotiating collective bargaining agreements in public education.¹¹¹

In response to Act 10, with the support of the state teachers' union, Wisconsin Education Association Council (WEAC), and the NEA, a municipal public school teachers' union filed *Madison Teachers, Inc. v. Walker* in the State of Wisconsin Circuit Court.¹¹² The plaintiffs alleged, among other claims, that the legislation violated the

¹⁰² Compare Fact-Finding Report, *supra* note 84, at 29 with Chicago Teachers' Union, *supra* note 99, at 9.

¹⁰³ *Id.*

¹⁰⁴ Chicago Public Schools, *supra* note 97.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ A.B. 10, 1011-12 Leg., Jan 2011 Special Sess. § 168 (Wis. 2011).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Wis. Stat. § 111.70 (2011) (statute governing municipal employment relations).

¹¹² The unpublished opinion of the State Circuit Court issued by Judge Colas on September 14, 2012 is available at <http://www.thewheelerreport.com/releases/September12/0914/0914mtivwalker.pdf> (last visited Apr. 6, 2013).

constitutionally protected freedoms of speech and association as well as the Equal Protection Clause.¹¹³ The court held that parts of Act 10 are unconstitutional as restrictions imposed on public school teachers' unions "single out and encumber the rights of those employees who choose union membership and representation solely because of that association and therefore infringe upon the rights of free speech and association."¹¹⁴ The court found "when the government elects to permit collective bargaining it may not make the surrender or restriction of a constitutional right a condition of that privilege."¹¹⁵ The court reasoned that "[a]lthough the statutes do not prohibit speech or associational activities, the statutes do impose burdens on employees' exercise of those rights when they do so for the purpose of recognition of their association as an exclusive bargaining agent."¹¹⁶

The court also held that parts of Act 10 are unconstitutional because they violate of the Equal Protection Clause. It was determined that strict scrutiny was the appropriate standard of review because the statutes "single out for special requirements and prohibitions, those employees who choose to belong to certain organizations, solely because of the purpose for which the organizations are formed and the employees choose to associate."¹¹⁷ The court reasoned that Act 10 creates two distinct classes that are similarly situated, and treated disparately, and therefore, held that such treatment is unconstitutional when subjected to strict scrutiny.¹¹⁸ Also reasoned that the plaintiffs had satisfied the burden to "show that 'the statute treats members of a similarly situated class differently'" in order to sustain their challenge to Act 10 on equal protection grounds.¹¹⁹

Based on the court's ruling in *Madison Teachers, Inc. v. Walker*, the public schools teachers' unions' challenge to Wisconsin Act 10 appears to have been successful. It is important to note, however, that the case is currently appealing by the defendants. Also of consequence to the consideration of the teachers' unions' challenge is that on October 23, 2012, the deciding court denied the defendants' request for a stay of the opinion, thus preventing the unconstitutional provisions of Act 10 from taking effect while the appeal is pending.¹²⁰ For these reasons, the state of the law governing public education collective bargaining in Wisconsin is currently in flux. However, there are parts of the Act 10 legislation, and the collective bargaining statute, which will remain

¹¹³ *Id.* at 2-3.

¹¹⁴ *Id.* at 16 (referring to the provisions of the Act 10 legislation which limits the scope of permissible negotiation regarding wages of public school employees and require annual recertification).

¹¹⁵ *Id.* at 15 (analogizing the privilege of collective bargaining to government-subsidized housing, the issue in a precedent case, *Lawson v. Housing Authority of City of Milwaukee* (270 Wis. 269, 287)).

¹¹⁶ *Id.* (explaining that "[t]he statutes limit what local governments may offer employees who are represented by a union, solely because of that association.").

¹¹⁷ *Madison Teachers, Inc. v. Walker*, No. 11CV3774 (Wis. Cir. Ct. Sept. 14, 2012) ("Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings") *available at* <http://www.ntctroopers.com/sites/6/LEGISLATIVE%20INFORMATION/MADISONTEACHERSV.SCO TTWALKER.pdf>, at 17 (maintaining that strict scrutiny review is proper because the court found infringement of the fundamental rights of speech and association) (last visited Apr. 30, 2013).

¹¹⁸ *Id.* at 17-19.

¹¹⁹ *Id.* at 16 (quoting *Prof'l Police Ass'n v. Lightbourn*, 243 Wis. 2d 512 (Wis. 2001)).

¹²⁰ *Madison Teachers, Inc. v. Walker*, No. 11CV3774 (Wis. Cir. Ct. Oct. 22, 2012) ("Decision and Order Denying Motion for Stay Pending Appeal"), *available at* <http://www.wasbmemberservices.org/campaigns/CMPART/ACC1/CMPART642/File/Colasdecision.pdf> (last visited Apr. 6, 2013).

binding on public education collective bargaining in Wisconsin regardless of the outcome of the appellate decision.¹²¹ First, wages will remain to be the only mandatory subject of collective bargaining in public education collective bargaining.¹²² Yet, public school teachers' unions may freely bargain for any level of wage increases unless the appellate court reverses this part of the ruling.¹²³ Additionally, teachers' unions and school boards may only negotiate one year contracts.¹²⁴ However, pending appeal, public school teachers' unions are not required to recertify annually without a formal request.¹²⁵

Furthermore, because neither party challenged the impasse procedures, if education collective bargaining reaches an impasse, attempts to resolve the dispute ends with mediation rather than binding arbitration regardless of the outcome of the appeal.¹²⁶ "As a result, school boards retain significant control over the final decisions to be made in regard to the management of the school district after they meet in good faith with their bargaining units and attempt to reach a voluntary agreement."¹²⁷ Taking this notion into account, if an impasse is reached during the collective bargaining process, and the school board rejects the suggestion of the mediator, there are two theoretical scenarios which may result: First, the public school teachers' union, in theory, may choose to exercise its right to strike in an attempt to pressure the school board to accept its terms of the negotiations. However, this option is not available to public school teachers' unions in Wisconsin¹²⁸ and, as discussed above, creates a situation in which unfortunate consequences could result. Alternatively, the school board could determine the final outcome of the negotiations and, the terms of which the public school teachers' union must accept lest the represented teachers face a jobless future.¹²⁹

Therefore, as a solution to the type of predicament that public school teachers' unions face under the status quo of collective bargaining in Wisconsin, unions should strive to include binding arbitration as an impasse resolution procedure in the collective bargaining statute. The analysis of the political power of public school teachers' unions and the Act 10 controversy indicate that such a goal is attainable. First, public school teachers' unions are successful political advocates, able to shape public education at local levels, thus also able to influence collective bargaining statutes. Also, the controversy surrounding Wisconsin's Act 10 legislation indicate that the unions can find support for their collective bargaining efforts in state courts. Furthermore, there should be support from public school boards which would benefit from the use of arbitration as an impasse procedure because arbitration provides an effective tool to avoid strikes and is less costly

¹²¹ Wisconsin Association of School Boards, *Act 10 Ruling Allows Changes, But Retains Critical Local Control Provisions*, (2012), available at http://www.wasb.org/websites/advoc_gov_relations/index.php?p=986 (last visited Apr. 30, 2013).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Wisconsin Association of School Boards, *supra* note 121.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Wisconsin Association of School Boards, *supra* note 121.

¹²⁸ Workman, *supra* note 1, at 13.

¹²⁹ Wis. Educ. Assoc. Council, *Judge Rejects Request to Reinstate Act 10*, Dec. 10, 2012, http://www.weac.org/news_and_publications/12-10-22/Judge_rejects_request_to_reinstate_Act_10.aspx ("The decision did not restore binding arbitration; employers can impose a compensation plan and other conditions of employment if bargaining does not produce an agreement.") (last visited Apr. 6, 2013); *see generally* Wisconsin Association of School Boards, *supra* note 121.

than other impasse resolution procedures.¹³⁰ Thus, in order to achieve leverage to participate in the determination of the final outcomes of negotiation and achieve goals, public school teachers' unions should seek to include arbitration as a resolution procedure to impasses during negotiations with school boards in collective bargaining legislation.¹³¹

IV. CONCLUSION

In conclusion, public school teachers' unions should encourage legislatures to include mandatory arbitration impasse procedures in state collective bargaining statutes. Teachers' unions will be able to successfully influence the enactment of mandatory arbitration impasse procedures because they have become powerful political entities which have the ability to effect legislative decision making. When arbitration is the means to achieve resolution of collective bargaining impasses, unions are likely to be able to secure higher wages for their members. Moreover, mandatory arbitration to settle negotiation impasses in public education collective bargaining is preferable to strikes and alternative resolution options. The Chicago Teachers' Union strike confirms that not only does resolution of negotiation impasses by arbitration make teachers' unions' goals more attainable, but also that teachers' strikes result in detrimental consequences. Furthermore, the controversy surrounding the Act 10 legislation in Wisconsin illustrates that mediation and fact-finding resolution procedures do not provide teachers' unions with adequate leverage to shape the final outcome of negotiations. Therefore, in order to best represent the interests of their members in the collective bargaining process, public school teachers' unions should pressure states to require that impasses in collective bargaining be resolved by arbitration.

¹³⁰ Keefe, *supra* note 59, at 7-8 (citing a recent study on collective bargaining impasse resolution tactics by police and fire departments).

¹³¹ Finch & Nagle, *supra* note 7, at 1577 (“[Binding arbitration] constitutes the most significant innovation in teacher bargaining during the past decade.”).