

CONTRACTING AWAY SUCCESS: THE WAY TEACHER COLLECTIVE BARGAINING AGREEMENTS ARE UNDERMINING THE EDUCATION OF AMERICA'S CHILDREN

TIMOTHY DELOACHE EDMONDS*

While American public education once stood as an example of educational excellence globally, it now exists as only a shell of what it once was. Students from countries across the globe now routinely outperform American children and as each year passes, students filling classrooms in the United States slip farther and farther behind their international peers. American student proficiency rates across all subject areas sit at such low levels that they call into serious question the creation of a competent and efficient workforce prepared to address and correct the varied problems the nation faces as it begins the 21st century. While numerous factors have contributed to this eroding of American education, one factor of significant influence is the practice of collective bargaining by teachers' unions with school districts, as it exists today. Though unions and collective bargaining serve an important role in American public education, protecting the interests of teachers and ensuring fair employment standards for these professionals, many aspects of these agreements between unions and school districts give short shrift to their negative implications for the students these teachers hope to educate. The goal of this Note is to demonstrate the negative effects collective bargaining has had and continues to have on student achievement in America's public schools, flesh out the problematic areas within these agreements, and put forth suggestions as to how the practice of collective bargaining might be modified to better

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serve American children, those on whom the public education should be principally focused.

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I. INTRODUCTION

Put plainly, the American education system is struggling. Despite its storied past of international excellence, elementary and secondary students across the country struggle to meet proficiency standards in a wide variety of academic areas.¹ Subjects in which America's children once led the world now escape

¹ See, e.g., *Many Nations Passing U.S. in Education, Official Says Americans Fall Behind in Diplomas, Scores*, HOUS. CHRON., Mar. 10, 2010, at A4 [hereinafter *Many Nations Passing U.S. in Education*] (discussing the United States' former international domination in the field of education and how, at this point, the United States is underperforming in comparison to a significant number of other nations). See Table 135: Average math scale score of 4th-grade public school students and percentages attaining math achievement levels and having 5 or more hours of math instruction per week, by state or jurisdiction: Selected years, 1992 through 2009, NAT'L CTR. FOR EDUC. STATISTICS (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_135.asp; see Table 136: Average math scale score of 8th-grade public school students and percentage attaining math achievement levels, by level of parental education and state or jurisdiction: Selected years, 1990 through 2009, NAT'L CTR. FOR EDUC. STATISTICS (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_136.asp; see Table 122: Percentage distribution of 4th- and 8th-grade public school students, students' average reading scale scores, and percentage of students at or above selected reading achievement levels, by jurisdiction or specific urban district and race/ethnicity: 2007, NAT'L CTR. FOR EDUC. STATISTICS (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_122.asp.

the grasp of many of the nation's young minds.² As a result, the nation now walks a treacherous path as it moves into an age that requires workers to be more highly skilled and educated to be positive contributors in the national workforce. Yet where was it that the system went wrong? What is causing this gross underperformance by American children? The answers to these questions, to be sure, are complex and multiple factors surely have contributed to this problem.

Yet among the various elements that bear responsibility for the nation's fall from academic grace, one contributing factor is undoubtedly the influence of teachers' unions. It is indisputable that teachers' unions have contributed many positives to the field of education, winning respect and a voice for teachers when their powerlessness often silenced them. In years past, they were a needed equalizer of power when school districts did not handle the needs of teachers fairly. However, so often focused on the interest of teachers, unions have forgotten the people the education system is truly meant to serve: students. Nothing highlights this distorted focus better than teacher collective bargaining agreements,³ aimed not on bettering education for students, but on furthering the interests of their instructors. Due to the influence of teachers' unions, when student and teacher interests conflict, these documents reflect terms that first serve teachers before anyone else. Specifically, collective bargaining agreements often entrench lax teacher evaluation procedures that protect poor teachers and seniority rules thwart efforts to put top teachers in front of the highest-need students. To right the educational ship, the nation must make addressing and correcting the problems enshrined in these documents a top priority.

This Note will closely examine the ways in which students across the United States are dramatically underachieving and will demonstrate how this recent history of poor performance is symptomatic of teacher collective bargaining agreements that do not properly balance the interests of teachers and students. The piece will conclude by offering recommendations of how to change contract provisions to best facilitate student academic improvement throughout the country. Part II will discuss the history of unionization and teacher collective bargaining, focusing on way in which both were implemented to combat teacher exploitation. Part III will look closely at the many ways in which students are underachieving nationally and demonstrate how this underperformance is directly linked to

² See Table 135: Average math scale score of 4th-grade public school students and percentages attaining math achievement levels and having 5 or more hours of math instruction per week, by state or jurisdiction: Selected years, 1992 through 2009, NAT'L CTR. FOR EDUC. STATISTICS (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_135.asp; Table 136: Average mathematics scale score of 8th-grade public school students and percentage attaining math achievement levels, by level of parental education and state or jurisdiction: Selected years, 1990 through 2009, NAT'L CTR. FOR EDUC. STATISTICS (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_136.asp; see Table 122: Percentage distribution of 4th- and 8th-grade public school students, students' average reading scale scores, and percentage of students at or above selected reading achievement levels, by jurisdiction or specific urban district and race/ethnicity: 2007, NAT'L CTR. FOR EDUC. STATISTICS (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_122.asp.

³ For the purposes of clarity from the outset, it would be beneficial set out clearly what a collective bargaining agreement is. A collective bargaining agreement is a contract between a school district and a teachers' union that sets out many of the terms on which the teachers in that district will be employed. *Teachers' Union/Collective Bargaining*, ENOTES (Oct. 25, 2011, 1:31 AM), <http://www.enotes.com/everyday-law-encyclopedia/teacher-s-unions-collective-bargaining>; *Collective Bargaining Agreement*, BUSINESSDICTIONARY.COM (Oct. 25, 2011 1:59 AM), <http://www.businessdictionary.com/definition/collective-bargaining-agreement.html>. These agreements cover a wide range of topics such as retirement benefits, tenure, working hours, grievance procedures, and sick leave. *Id.*

flawed contract provisions. Finally, Part IV will suggest a number of potential changes to problematic provisions that may aid in improving student performance across the country.⁴

II. HISTORY OF TEACHERS' UNIONS AND COLLECTIVE BARGAINING

A. The Conception and Birth of Teacher Unionization

The history of teachers' unions reaches back only slightly more than a century in the United States. When the first teachers' professional organization was founded in 1857, nothing resembling the teachers' unions of today existed.⁵ It was not until the latter portion of the nineteenth century and early years of the twentieth century that the teacher unionization movement began to gain momentum.⁶ While the reasons for their emergence at this time were numerous, two of the most prominent were severe underpayment and terrible working conditions.⁷ Though teachers across the nation shared these

⁴ At the outset of this endeavor, it is critically important to understand that the purpose of this project is not to condemn unions or the presence of unions in the nation's public schools. As noted, unions as a whole, and specifically teachers' unions, have contributed greatly to giving exploited workers a voice and providing their members with a sense of dignity and honor in their work that often did not exist when these organizations were not present. Despite some of the problems these organizations now face, teachers' unions continue to fill this role even today. Grave disparities in bargaining power almost inevitably lead to the weaker player submitting to the opportunistic terms of the stronger, and unions play the important role of the leveling agent in this economic equation, serving as a stop gap measure against exploitative business practices. This Note, both explicitly and implicitly, recognizes these truths.

Yet, as is the case with most positive things, there is undoubtedly room for improvement. Teachers' unions, like all other institutions, have weaknesses and have in some ways strayed from principles upon which they were first created, and to continue in the tradition of serving as assets in the nation's education system, must critically examine where they have dropped the ball. Such a probing gaze into the mirror of history and organizational priorities is paramount for their continued success. This note, stated simply, is an effort to erect that mirror before them. It is the goal of this project to, while recognizing the good these organizations have done, highlight a glaring flaw in these organizations' practices: collective bargaining. While bargaining as a practice is important and is the vehicle through which unions have been able to gain much for teachers, if driven by the wrong priorities, it can damage the system that it meant to strengthen. This Note suggests that teachers' union priorities have done exactly this, focusing on the needs of teachers to the detriment of students' needs rather than creating a balanced symbiosis in the education system, where all parties benefit and feel empowered and served by the system in which they function. At its heart, then, the purpose of this Note is to highlight this flaw, demonstrate that it truly is one, and set out ways to correct it in hopes that unions will implement these changes first and foremost to help America's students receive excellent educations but further to improve themselves as organizations and thus sustain their existence and utility in the education system.

⁵ MYRON LIEBERMAN, *THE TEACHERS UNIONS: HOW THE NEA AND AFT SABOTAGE REFORM AND HOLD STUDENTS, PARENTS, TEACHERS, AND TAXPAYERS HOSTAGE TO BUREAUCRACY* 12 (1997) ("The NEA was founded by school superintendents in 1857. For over one hundred years thereafter it was an anti-union organization even when its teacher members greatly outnumbered administrators."). The organization referred was the National Educational Association (NEA). *Id.*

⁶ *See generally* MARJORIE MURPHY, *BLACKBOARD UNIONS: THE AFT AND THE NEA, 1900–1980*, 7–79 (1990) (discussing the factors which led to teacher unionization and the way in which teachers' unions eventually took form).

⁷ *Id.* at 7, 34 (describing teachers' and students' frustration at the Clarke School in Chicago with the fact that the school water supply had been condemned, forcing teachers to boil water to ensure children had clean drinking water at school; also referencing the school board's continued denial of a wage raise for teachers; finally, describing the dilapidated condition of many of the school buildings in which teachers were forced to teach and children were forced to attend school).

problems, they had a particularly harsh effect on the public school teachers of Chicago, and as a result, Chicago served as the genesis of the teacher unionization movement.⁸

Like many cities at the time, the problems facing Chicago's schools stemmed principally from grave underfunding.⁹ Due to a tax structure extremely unfavorable for raising public education funds and the absence of any other source of public funding, Chicago teachers received poor salaries.¹⁰ The fact that teachers were asked to teach under unsanitary and unsafe conditions made matters even worse.¹¹ In one instance, teachers were forced to teach in neighborhoods wrought with typhoid fever and other serious illnesses, and they were exposed to these diseases on a daily basis through contact with students.¹² Moreover, even the designated school buildings in which teachers were asked to teach were in very poor condition.¹³ When the Chicago school board did not have adequate funding to provide proper school buildings, schools were set up in storefronts or other old buildings, and often had hazardous plumbing and ventilation systems.¹⁴ The conditions were deplorable for both teachers and students, and due to lack of available capital, there was seemingly little that could be done about it within the funding structure that existed at the time. In fact, in response to the typhoid epidemic of 1902 that led to the contamination of school water, the Chicago Board of Education could offer no solution due to its lack of resources but to advise teachers and students: bring a bottle of water to school.¹⁵

On top of the challenges of poor pay and conditions, Chicago teachers also were faced with issues of an unfavorable administrative structure. In an attempt to gain more control over the operation of individual schools within Chicago, high-ranking Chicago school administrators began to encourage

⁸ LIEBERMAN, *supra* note 5, at 10–11 (explaining how the first national teachers' union was created in Chicago due in substantial part to the Chicago Teachers Federation, a local teachers union representing Chicago teachers).

⁹ *Id.* at 14.

¹⁰ *Id.* (“Some schools operated strictly out of the old sixteenth-section provision of the Northwest Ordinance of 1787 which granted to the public domain every sixteenth section of land for the purpose of building schools. This portion of land was most frequently sold, although some districts simply rented the land or used it as collateral to borrow money for school construction. In small rural communities schools were built by community cooperation, whereas in larger towns and cities a portion of the county taxes were set aside for schools. Unfortunately for urban teachers and pupils, most taxes were based on land ownership or (less frequently) on real property. Rural-dominated state legislatures tended to hold down the tax rate for school purposes, making it difficult for urban schools to take advantage of the new wealth produced within their reach. In the late nineteenth century most cities were asking for separate taxes or were revising city charters to include special city taxes.”).

¹¹ *Id.* at 34.

¹² LIEBERMAN, *supra* note 5, at 34. (“Teachers worked in typhoid-ridden neighborhoods and were exposed to all the diseases children brought to school.”).

¹³ *Id.*

¹⁴ *Id.* (“They worked in old buildings, or in storefronts and temporary buildings, often with no plumbing and dangerous ventilation systems.”). Commenting on the lack of resources many Chicago schools had at the time, historian Marjorie Murphy writes, “There were no fire escapes, very few schools had playgrounds, and because coal contracts were political arrangements, contractors would skimp on coal delivery unless the principal or schoolteachers pressured the alderman for sufficient coal.” *Id.* at 34–35.

¹⁵ *Id.* at 7 (“The school water-supply system had been condemned by the Board of Health in August, and because a late summer typhoid epidemic had claimed hundreds of young lives, the Board of Education responded by urging the schoolchildren to carry water bottles to school. Many children did not have water bottles and drank contaminated water from outdoor fire hydrants.”).

centralization of decision-making, this policy shift manifesting itself in two primary ways.¹⁶ First, teachers were required to teach according to a uniform schedule implemented in all schools throughout Chicago, essentially eliminating the discretion of a teacher to make changes to lesson plans based on the specific needs of their students.¹⁷ Second, teachers were pressured by administrators to hold students to unreasonably high standards of performance to satisfy administrative performance goals.¹⁸ However, the Board of Education's paternalism did not stop at how teachers decided to run their classrooms; it extended to issues of teacher employment as well. Superintendents who were proponents of centralized administration would often transfer teachers out of a school against the teacher's will and in some instances even fired teachers without any personal knowledge of their teaching ability.¹⁹

In addition to the many problems suffered by all teachers, female teachers struggled with their own unique set of issues. Prior to the mid-nineteenth century, the teaching profession was dominated by men.²⁰ However, in the early decades of the nineteenth century, the societal conception of what was needed to make a good teacher began to shift.²¹ Kindergarten through twelfth-grade education came to be seen as not solely about the intellectual development of an individual but in large part about gaining an understanding of societal standards of conduct and proper social behavior.²² Due to the standards of female deportment that existed at time, females slowly came to be seen as ideal for teaching the important societal values.²³ As a result of this shift in societal priorities for education and the way women fit into this matrix, women started to move into the education profession in larger numbers as the nineteenth century moved forward.²⁴ However, in many ways, it was this success by women that exposed the latent sexism that existed in the field of education. This was most clearly seen in the types of jobs within the educational world that were available to women and the pay they received for their work.

Though women gained significantly more teaching positions during the nineteenth century, the vast majority of administrative positions were still held by men.²⁵ This sexism was reflected in National

¹⁶ *Id.* (describing the tension between teacher and school district administrators due to administrators' desire to "impose a centralized pattern on the city's schools").

¹⁷ LIEBERMAN, *supra* note 5, at 8 (describing how the principal of the Clarke School in 1902 tried to force all the school's teacher to teach "according to a centralized, citywide schedule.").

¹⁸ *Id.* For instance, in 1902, a math teacher at a Chicago public school was forced by the school's principal to fail students who did not hand in perfect homework assignments. Despite students' reasoned protests that perfection was an unfair expectation, the principal was uncompromising in sticking to the new administrative scheme. *Id.* at 8.

¹⁹ *Id.* at 10. This practice was made worse by the fact that it was generally the case that teachers who suffered from such decisions had strong ties to the community in which they taught and often had a special understanding of how to serve the community in a particular area. *See id.* at 12. Thus, their removal from the community was not only unfair to the teacher, as such removals were generally unwarranted, but harmed the community as such removals represented the loss of a strong educational asset. *See generally id.* at 33.

²⁰ *See id.* at 12 (indicating that women had not become the dominate in the field of education by 1830).

²¹ *See id.*

²² *See* LIEBERMAN, *supra* note 5, at 12.

²³ *See id.*

²⁴ *Id.* at 13 (pointing out that, after the Civil War, most teachers were women).

²⁵ *Id.* The fact that, by the end of the Civil War, most teachers were women and most principals were men is representative of the clear limitations within the field of education for women at the time. *Id.*

Education Association (“NEA”) practices, as the organization did not even admit women as full members until 1866, and even when it did, it was rare for a woman to hold a leadership position within the organization.²⁶ The NEA remained male-dominated through the end of the nineteenth century.²⁷

Yet just as a shift in educational priorities had taken place toward the beginning of the nineteenth century, a similar shift occurred from the end of the nineteenth century through the early years of the twentieth century. This shift, however, was toward greater teacher professionalism.²⁸ While the effects of this change were far-reaching and meant different things for the different cities in which it was introduced, in Chicago, this shift represented an overall negative reorientation for the city’s female schoolteachers. For the Chicago administrators trying to push this agenda, professionalism, in part, meant a break from the idea that relatively uneducated female teachers were valuable assets in the classroom.²⁹ While at first glance, a shift toward requiring more education for teachers appeared to be a positive change for the education system, it substantially limited women’s opportunities in the teaching profession. Chicago politicians and other people of influence began to call for greater teacher education, forcing many female teachers to pay for continued education far outside their financial ability or be denied employment or optimal pay.³⁰

Although the teacher unionization movement was both a male and female effort, the district’s female constituency played a more significant role because of the many problems with which women

²⁶ *Id.* at 48–49 (“Within the NEA there were few constitutional mechanisms by which women could gain recognition. In 1870 women were granted the right to hold office in the NEA, but ‘as was quite natural,’ they tended to predominate in the kindergarten, elementary, child-study, and arts departments. One woman, in 1888, became a member of the more influential Higher Education Department, but only two or three women entered into the Superintendence Department.”).

²⁷ *See generally* LIEBERMAN, *see supra* note 5, at 48.

²⁸ *See id.* at 19.

²⁹ *See generally id.* at 27–31.

³⁰ *Id.* at 30. Right before the turn of the century, well-known scholar and politician William Rainey Harper introduced a bill which advocated for greater educational requirements for teachers. *Id.* Essentially the bill suggested that if teachers without a certain level of educational achievement wanted to maintain their employment, they would have to return to school to obtain the requisite degree. Already severely underpaid, most teachers did not have the financial resources to meet this requirement. *Id.* at 7. Thus, in effect, the bill called for the termination of a large percentage of the current educational workforce and created a bar on an educational career for individuals who did not come from a financially elite background. Though the bill would apply both to male and female teachers, the effect of the legislation would be particularly burdensome on female teachers as they often had less education than their male counterparts. *See generally id.* 23–79.

While this bill was strongly opposed and finally defeated in 1899 for these and other clearly problematic provisions (such as the call for fewer female teachers in schools), in 1905, Chicago teachers were informed that in order to receive a pay raise they would have to take a certain number of courses at either the University of Chicago, Northwestern University, or the Cook County Normal School. *Id.* at 30–31. Teachers who took the classes at other institutions were denied the opportunity for a raise. *Id.* at 30. However, as a result of the prohibitively high cost to attend these universities, a large percentage of Chicago schoolteachers were unable to meet the district’s requirement. *Id.* at 30. While all teachers were affected by this measure, as previously suggested, female teachers were most severely impacted. *See generally id.* 23–79. Making the situation worse was the fact that even when women began to enter the teaching profession with stronger educational backgrounds due to the heightened Chicago requirements, men were still favored for professional advancement opportunities. Despite the seeming advancement women had made by coming to represent the vast majority of Chicago’s teaching population, female teachers’ success had served in many ways as little more than a medium through which a male-dominated education system showcased its gender-based discrimination.

struggled.³¹ In 1897, after gaining some level of political influence through association with male workers unions, female teachers in Chicago formed the Chicago Teachers' Federation ("CTF").³² The organization quickly gained popularity and influence and became the leading voice for female teachers at the turn of the century.³³ By 1902, the organization had 5,000 members, and in that same year the CTF affiliated with the much larger Chicago Federation of Labor, thereby increasing the CTF's influence and political power.³⁴ The following year, the CTF/CFL conglomerate succeeded in obtaining a salary increase for Chicago teachers.³⁵ In just a few short years, CTF had gone from obscurity to one of the major political forces in the city of Chicago.³⁶ The union was winning for teachers that which they could not win alone.

Despite the success experienced by the CTF and other teachers' unions that had formed in Chicago, the city's teachers still desired the influence and notoriety that a national teachers union could offer.³⁷ While several efforts had been made to create such a union, all attempts had failed to yield a functional organization.³⁸ It was not until 1916 that teachers in Chicago created a national teachers' union and affiliated with the American Federation of Labor ("AFL"), a national labor union.³⁹ In response to an injunction issued against a Chicago Board of Education policy prohibiting teachers from joining unions, CTF sent invitations to a number of local unions to join them in creating the first national teachers union.⁴⁰ The organization was officially established on April 15, 1916, and after creating the union, the organizers sent the new group's charter to local unions around the country enlisting their membership and support.⁴¹ Chicago unionists applied for the affiliation of their new organization with the AFL, and on May 9, the national labor union granted their request.⁴² After years of waiting and

³¹ See generally *id.* at 43–100 (setting out many of the problems which with female teachers dealt during the late nineteenth and early twentieth centuries).

³² See LIEBERMAN, *supra* note 5, at 62, 68.

³³ *Id.* at 61 ("Of all the new teachers' unions, the one organized by public school teachers in Chicago was the most powerful and influential.").

³⁴ *Id.* at 67.

³⁵ *Id.* at 68.

³⁶ *Id.* ("The [CTF] in eight years had become a major power in city politics.").

³⁷ See LIEBERMAN, *supra* note 5, at 70–71 ("[Union leaders] Haley and Goggin made no secret of their ambition and never denied that the vote was an important attraction of schoolteachers to the union. But they made eloquent class pleas as well, spoke idealistically of the potential of the labor movement, and pointed out that they would inspire other women workers to join the union.").

³⁸ *Id.* at 72.

³⁹ *Id.* at 11.

⁴⁰ *Id.* (describing the formation of AFT). This Board of Education policy was known as the Loeb Rule. MURPHY, *supra* note 6, at 81. Essentially, the rule stated that if teachers joined a union, they would not be rehired by the district. *Id.* Discussing how problematic this regulation was for Chicago teachers at the time, Murphy writes, "[The Loeb Rule] challenged the whole idea of unionism not from the professional perspective but from a perspective outside the profession, from the boards of education that were packed with businessmen. In this sense it was a classic anti-union drive. For the budding teachers' movement it was a disaster. One Chicago teacher remarked, 'Chicago has been free of floods, earthquakes, volcanic eruptions and tidal waves. Still it had its Fire of 1871 and its Loeb Rule of 1915.'" *Id.*

⁴¹ *Id.*

fighting on the local level, teachers finally had created the network that would grant them a unified national presence. A national rival to the paternalism and gender bias of the NEA had finally arrived.⁴³

B. The Rise of Collective Bargaining

Despite the success of its formation, the AFT's next major expansion and acquisition of influence did not take place until some forty years later. The AFT had been born through the collaborative efforts of schoolteachers in Chicago. However, the next step in its maturation would come about in the nation's largest urban center: New York. ⁴⁴ This time the fight would not be for unionization, as unions at that point had been longtime fixtures in New York City, but for an efficient way for teachers to get the employment protections and privileges they deserved. While unionization had given teachers a voice that previously had not existed, in 1961 teachers won the right to collectively bargain with the school district, giving legal weight to the protections for which that voice had long cried out.⁴⁵

The effort to secure collective bargaining with the New York Board of Education was focused in large part on the issue that had been a perennial concern for schoolteachers across the nation: underpayment.⁴⁶ Led by young union leader David Seldon and United Federation of Teachers ("UFT"), an AFT local affiliate, New York teachers urged the Board of Education to allow teachers to bargain collectively.⁴⁷ Such a procedural shift would give teachers much greater leverage in the bargaining process.

After the Board twice promised to allow collective bargaining and both times reneged, New York teachers went on strike.⁴⁸ The strike's burden on the school system was so great that within the

⁴² LIEBERMAN, *supra* note 5, at 11.

⁴³ However, while the creation of the AFT was a huge success for teachers and encouraged the unionization of teachers across the country, the organization remained relatively small in its early years. *Id.* Two reasons principally accounted for the union's inability to grow during that time. First, post-World War I anti-union sentiment nationally encouraged school boards and administrators across the country to take measures that would impede union growth. *Id.* While these same school boards and administrators had been opposed to unionization and the change they represented during the first two decades of the twentieth century, the widespread public opposition to unions after the war provided these educational leaders with the influence they needed to successfully hinder union growth. *Id.* Their tactics were so successful that by 1927 less than one-fifth of the AFT locals which had originally been chartered were still in operation. *Id.* Second, the size of the NEA's membership and the number of districts in which the organization had affiliated local organizations made it difficult for the AFT to take a hold in a number of areas. *Id.* NEA opposition to the AFT was fierce and despite the problems that existed in the NEA, its teacher membership was strong. *Id.* at 12. As a result, the AFT had a very difficult time recruiting teachers away from its rival organization.

⁴⁴ *Id.* at 13 (telling the story of how New York became the first place in the country where teachers were given the right to bargain collectively).

⁴⁵ *Id.*

⁴⁶ MURPHY, *supra* note 6, at 213. One of the financial issues which was particularly a problem for teachers at the time collective bargaining was introduced was lack of sufficient payment for participation in "extracurricular and co-curricular activities." Teachers wanted increased pay for taking extra time to be involved in these programs. They felt particularly justified in this stance as the nation was focusing on issues of youth delinquency and finding ways to keep children occupied during the afternoons. *Id.*

⁴⁷ *See id.* at 213.

⁴⁸ *Id.*

day, the Board agreed to allow a vote to assess teacher interest in collective bargaining.⁴⁹ As expected, teachers overwhelmingly voted in favor of collective bargaining.⁵⁰

The next step was to determine which of the various unions present in New York at the time would represent teachers in bargaining with the school district. The decision was made that only one organization would represent all teachers at the bargaining table, and as a result, the Board first held a vote to make this determination.⁵¹ Despite large contingents of New York teachers having other union affiliations, the UFT won by a landslide. In 1961, the UFT began negotiating a collective agreement with the district on behalf of all New York teachers for the first time.⁵²

Shortly after the UFT's victory in New York, the use of collective bargaining by teachers spread throughout the country.⁵³ In 1961, the majority of teachers were employed under individual contracts.⁵⁴ Yet only one decade later, in 1971, more than half of all teachers nationally were employed subject to collective bargaining agreements.⁵⁵ Additionally, the proliferation of collective bargaining led to increased membership in the nation's two major national teachers' unions. From 1961 to 1965, the AFT increased

⁴⁹ *Id.*

⁵⁰ MURPHY, *supra* note 6, at 13.

⁵¹ *Id.* at 13. In bargaining with school districts, teachers' unions borrowed the idea of exclusive representation, meaning that only one union would serve as the bargaining representative on behalf of all teachers regardless of whether or not all teachers belonged to that union. *See generally id.* at 215.

⁵² MURPHY, *supra* note 6, at 215; LIEBERMAN, *supra* note 5, at 13. Despite the success of gaining a seat at the bargaining table, teachers still had a difficult time getting the benefits they felt they deserved. After almost after a year of bargaining over a wide range of issues, the UFT and New York teachers were unsatisfied with the progress in bargaining that they had made. MURPHY, *supra* note 6, at 215. Feeling that there was no other option to show themselves as a strong unit that would stand firmly on its demands, twenty thousand teachers went on strike in the spring of 1962. *Id.* The strike devastated the operations of the school system, and though the district did not want to relent on its stances, its leaders knew it could not operate so heavily understaffed. *Id.* at 216–17. The pressure the strike placed on the school system was exactly what the UFT and teachers wanted, principally hoping their unified action would earn them a raise in pay. *Id.* at 215–17. Due to the great pressure the strike placed on the school system, the teacher's financial demands were finally met and the strike was called off. *Id.* at 217.

While both the AFT and the NEA celebrated the UFT's success in New York, the two national rivals initially differed greatly with respect to how collective bargaining should be conducted. Unlike the AFT, which only represented teachers and thus only looked to serve their interests, the NEA had a much broader constituency, representing both teachers and administrators. LIEBERMAN, *supra* note 5, at 12. Additionally, since its inception, the NEA had taken a strong stance against unionism. *Id.* at 15. As a result, while the interests of their teachers were important to the organization, so too were its administrator's interest. *See generally id.* at 12. Thus, the NEA advocated for more amiable discussion of contract terms than it believed took place under collective bargaining. *Id.* at 15. It supported "professional negotiation" to collective bargaining, though in truth the distinction between the two practices was negligible. *Id.* However, this and other major policy differences (the other major policy difference being the right to strike which the NEA had traditionally opposed but the AFT supported after the mid-1960's) between the two organizations would melt away over the course of the 1960's and 1970's as the NEA began to stray from its roots and adopt an identity of a true teacher's union. *Id.* at 15–16, 24.

⁵³ More specifically, the use of collective bargaining began to spread as states began to pass laws to give legal force to the practice. LIEBERMAN, *supra* note 5, at 18.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.*

its national membership from 60,715 teachers to 112,000.⁵⁶ The NEA saw an even greater increase in its size over that time period, growing from 765,616 members to 943,581.⁵⁷ While a number of factors account for the NEA's significantly larger growth over this time period, the NEA's move away from its traditional identity of a professional association in which school administrators dominated and toward a true union guided by teachers played a substantial role in this large expansion of its membership.⁵⁸ However, as this transformation took place, the competition that had always existed between the NEA and AFT grew even fiercer as both groups fought to gain bargaining rights in each district that had adopted collective bargaining and increase their organization's membership.⁵⁹ Today, the NEA and the AFT have over three million members combined and have collective revenues of over \$1.3 million dollars annually.⁶⁰ It is an understatement to say that the influence of these unions and collective bargaining is vast. They continue to define the rights and benefits that countless teachers across the nation enjoy.

Thus, the histories of teacher unionization and collective bargaining make clear the great contribution these institutions made to the welfare of teachers over the course of the late nineteenth and twentieth centuries. At historical moments when teachers were undervalued and taken for granted, unions and collective bargaining gave educators a vehicle through which they could demand the respect they deserve. Yet this contribution to the professional lives of teachers is not simply a narrative of the past. Though over the course of the twentieth century the appreciation and societal valuation of teachers has continued to rise, unions still ensure teachers are treated with dignity and respect by school districts, ensuring the payment and benefits they rightfully deserve. Indeed, the continued presence of unionization and collective bargaining undoubtedly shields teachers from unfair treatment. However, despite the good these organizations have done and continue to do, their current narrow focus on the teachers they represent has in many instances led to a skewed set of priorities, reinforced by collective bargaining, which have had adverse effects on the academic success of students. The next part of this Note speaks to this educational shortcoming of American children and draws a chilling connection between these failures and teacher collective bargaining and bargaining agreements.

III. UNIONS, COLLECTIVE BARGAINING, AND STUDENT UNDERACHIEVEMENT

As the preceding discussion indicates, teacher unionization and the implementation of collective bargaining have had, and continue to have, significant positive impact on teachers' rights, and effectively further the interests of educators across the country. However from their inception, the purported goal of teachers' unions has not only been to serve the teachers they represent but the students who fill their teachers' classrooms.⁶¹ Yet sadly, unions today have strayed far from this vision, contributing in many ways to the decline of the United States' once strong education system with a focus that has shifted from

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.* at 19 (describing the NEA's gradual adoption of union practices and the subsequent increase in membership).

⁵⁹ LIEBERMAN, *supra* note 5, at 28.

⁶⁰ *Id.*

⁶¹ NEA's *Vision, Mission, and Values*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/19583.htm> (last visited Jan. 15, 2012) ("Our mission is to advocate for education professionals and to unite our members and the nation to fulfill the promise of public education to prepare every student to succeed in a diverse and interdependent world.").

shared concern about student achievement and the interests of educators to the interests of teachers alone.⁶² Currently, the nation's education system can be described in no way other than abysmal. Once an exemplar to the world of educational excellence, the United States now trails numerous nations in its ability to effectively educate its next generation. Proficiency rates in all academic disciplines are low, drop out rates are high, and students continue to slip further and further behind the rest of the world. The nation finds itself at a real crisis moment.

That many factors have contributed and continue to contribute to this disaster in our education system is undoubted. Yet as spending on education continues to rise, which would seemingly, at least in part, address problems associated with the lack of financial resources, the hunt for the culprit of our failed education system must continue. What really is the cause for the fall from grace the nation's education system is currently experiencing? A close analysis of the teachers' unions and their practice of collective bargaining reveal that these institutions have contributed greatly to our educational decline. Stated simply, certain provisions⁶³ that have become standard in collective bargaining agreements across the country have enshrined a lack of accountability for teachers in our education system and made it difficult for school districts to place top teachers in front of the students who need them the most. Even in historically disadvantaged areas with underfunded schools, it has been shown that strong teachers can spur students to academic success. Thus, the institutions play a substantial role in the lack of student achievement seen nationwide through establishing contract terms that undermine teacher excellence and efficient use of human capital. For minority children who are often served by the worst schools in poor areas, the effects of these provisions are even greater. This part of the Note will set out in detail many of the areas in which American students are underachieving and argue that their poor academic performance in large part is due to the influence of teachers' unions in the education system and, more specifically, collective bargaining agreements.

A. An Education System on Life Support

American student achievement has reached a critical point. This becomes especially clear in examining how student performance in the United States ranks against that of other nations. At one time, the United States was a world leader in education production, producing student scores in math, science, and reading far superior to those scores posted by students in any other countries.⁶⁴ Currently, however, the international educational landscape looks quite different. A recent study concerning international achievement in math conducted by researchers at Stanford University's Hoover Institute revealed that of the thirty-four member nations of the Organization for Economic Co-operation and Development, better known as the OECD, the United States outranked only Turkey, Greece, Portugal, and Mexico in the percentage of students who have an advanced level of proficiency in math.⁶⁵ Even

⁶²Megan Bedard, *D.C. Teachers' Union and Michelle Rhee Make Nice*, TAKEPART (Apr. 8, 2010), <http://www.takepart.com/article/2010/04/08/dc-teachers-union-and-michelle-rhee-make-nice> (stating that Michelle Rhee feels teachers' unions prioritize the interests of teachers ahead of students).

⁶³ As will be discussed later in this part, some of the provisions that have become staples in teacher collective bargaining agreements but further the problems herein discussed are layoff provisions based on seniority, prohibition of merit pay, and teacher evaluation provisions.

⁶⁴ *Many Nations Passing U.S. in Education*, *supra* note 1, at A4 (stating that in the years following World War II, the United States' education system was the strongest among all countries in the world; however, at this point, many countries have surpassed the United States both in lower dropout rates and achievement on standardized examinations).

⁶⁵ Vincent Carroll, *Not Enough Top Students*, L.A. TIMES, Dec. 12, 2010, at D-03. The OECD is an international policy organization that focuses on economic and social development in countries throughout the world. *About the Organisation for Economic Co-operation and Development*, OECD (Mar. 1, 2011, 1:30 AM),

more astonishing was its finding that sixteen other countries, nearly half of the organization's membership, double the United States in the percentage of advanced math students, indicating not only that the United States is lagging slightly behind but in some senses is being lapped by other nations in the race of educational productivity.⁶⁶ Only reinforcing this unpleasant reality is the fact that the United States has a higher high school dropout rate than all OECD countries except for Mexico, New Zealand, Turkey, and Spain.⁶⁷ Yet perhaps even more disturbing is the way the United States stacks up against its neighbor to the north. Across all academic disciplines, Canadian fifteen-year-olds, on average, are more than one full academic year ahead of their American counterparts in their educational development.⁶⁸

While the United States' international rankings clearly illustrate the nation's educational mediocrity, statistics solely addressing domestic issues of student achievement are equally as staggering if not more so. Though this is the case across many academic areas tracked by researchers, one area in which this is particularly true is American students' performance in reading. In 2007, the National Center for Educational Statistics found that only 32% of fourth graders nationally were able to read proficiently at a fourth grade level.⁶⁹ However, in many of the nation's major urban centers this number was substantially lower. In Los Angeles, for instance, the second-largest school district in the nation, only 13% of fourth graders were deemed to be proficient readers.⁷⁰ The level of fourth grader proficiency in Washington, D.C., was only slightly higher at 14%.⁷¹ New York was unable to get three quarters of its

http://www.oecd.org/pages/0,3417,en_3673405236734103_1_1_1_1_1,00.html (last visited Mar. 1, 2011). Using data on a wide range of subject matter, ranging from different countries' taxation and pension systems to international investment, the organization sets out to predict future economic and social trends and create policy that best serves the development in these areas. The organization uses its numerous relationships with influential organizations and governments throughout the world to install policies which it believes are most conducive to economic and social development. *Id.* The OECD council retains the decision-making power within the organization, establishing the direction of the organization and setting its goal at its annual ministerial meeting. *Who does what*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html (last visited Jan. 15, 2012). The Council comprises a representative from each member country and an additional representative from European Commission. *Id.* All decisions are reached through consensus. *Id.* Currently, there are 34 member countries to the OECD: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States of America. *Members and partners*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Jan. 15, 2012).

⁶⁶ Carroll, *supra* note 65.

⁶⁷ *Many Nations Passing U.S. in Education*, *supra* note 1.

⁶⁸ *Id.* at A4.

⁶⁹ *Percentage distribution of 4th- and 8th-grade public school students, students' average reading scale scores, and percentage of students at or above selected reading achievement levels, by jurisdiction or specific urban district and race/ethnicity: 2007*, NAT'L CTR. FOR EDUC. STATISTICS (2009), http://nces.ed.gov/programs/digest/d09/tables/dt09_122.asp [hereinafter *Distribution of reading scores by urban district and race*]. As defined by the National Center for Education Statistics, a student having a basic level of competency has "partial mastery of prerequisite knowledge and skills that are fundamental for proficient work at a given grade." *Id.* Proficient indicates "solid academic performance" for a child's grade level. *Id.* Student at this level "have demonstrated competency over challenging subject matter." *Id.* Finally, advanced "signifies superior performance." *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

fourth graders to reading proficiency at a grade-appropriate level.⁷² Adding to this general lack of achievement across the nation is the problem of significant disparities between white students and their minority counterparts in reading competency. Nationally, 42% of white fourth grade students were proficient readers in 2007 while this number for black students was nearly thirty percentage points lower at 14%.⁷³ Latino students performed only moderately better than their black classmates, registering a 17% reading proficiency rate.⁷⁴

Eighth grade student performed even worse than their fourth grade counterparts both nationally and in the country's largest cities as well. Out of all American eighth graders, only 29% were proficient readers, three percentage points below their fourth grade counterparts.⁷⁵ Eighth grade students in Los Angeles, Washington, D.C., and New York registered proficiency rates of 12%, 12%, and 20%, respectively.⁷⁶ Particularly troublesome, once again, was the vast difference in proficiency rates for white students and their minority classmates; white eighth graders have a proficiency rate nationally of 38%, which more than triples the black reading proficiency rate of 12%.⁷⁷ Latino students, though not performing as poorly as black eighth graders, still fell vastly short of white students in reading competency with only 14% of their population demonstrating reading proficiency.⁷⁸

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Distribution of reading scores by urban district and race, supra* note 69. In many of the nation's largest cities, the gap in reading competency between white fourth grade students and black and Hispanic fourth graders is even larger than it is nationally. In Atlanta, for instance, 71% of white fourth grade student were proficient in reading in 2007 compared only 10% of black students. In Washington, D.C., black and Hispanic fourth graders registered proficiency levels of 9% and 15%, respectively, while 74% of white students in the District of Columbia were proficient readers. Even in Los Angeles, where a significantly smaller percentage of white students were proficient readers than in cities like Atlanta or Washington, D.C., the achievement gap between white and black and Hispanic fourth graders is quite large. There, 37% of white fourth graders were proficient readers compared to 13% of black students and 8% of Hispanics. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* As is the case with fourth graders, the achievement gap between white eighth grade students their black and Hispanic peers is at its largest in many of the nation's major urban centers. In Houston, 52% of white students were found to be proficient in reading according to the 2007 National Center for Educational Statistics study while the proficiency level for black and Hispanic students was significantly lower at 12% and 13%, respectively. Though the gap was somewhat smaller in New York, it was still larger than the national achievement divide: 41% of whites, 11% of blacks, and 13% of Hispanics being proficient in reading. Los Angeles again showed one of the largest gaps among the cities studied, 41% of white eighth graders but only 6% of black and 8% of Hispanic students having gained proficiency in reading at an eighth grade level. *Id.*

The National Center for Educational Statistics concerning student achievement in mathematics is equally as troubling, reporting that in 2009 only 38% of all American fourth graders receiving five or more hours of instruction in math each week were at or above a proficient level in the subject, while only 6% of these children were considered advanced. *Table 143: Average mathematics scale score of 4th-grade public school students and percentages attaining mathematics achievement levels and having 5 or more hours of mathematics instruction per week, by state or jurisdiction: Selected years, 1992 through 2009*, NAT'L CTR. FOR EDUC. STATISTICS (2009), http://nces.ed.gov/programs/digest/d10/tables/dt10_143.asp). 19% of fourth graders, however, had not even reached a basic level of competency in math, more than three times the percentage of advanced students. In some of the nation's largest and most populous states, the numbers are even worse. In California, for instance, the Center found that more than a quarter of the fourth graders receiving at least five hours

Not surprisingly, the performance of American students does not improve once they leave the elementary and junior high school levels. High schools students, too, are performing at unacceptably low levels. While numerous metrics are used to quantify the performance of students at the high school level, student dropout rates are one of the measures widely employed to make this determination.⁷⁹ An analysis of these statistics tells a quite similar story as the reading proficiency rates discussed above. For instance, nationally, more than one in every four students are not graduating from high school.⁸⁰ Large urban school districts register an even higher percentage with 40% of students dropping out.⁸¹ Those districts characterized by significant socioeconomic and racial segregation serving children from low-income

of math instruction each week had not reached even a basic level of competency in the subject. Only 30% percent of fourth grade Californians were proficient in math, while a much smaller group, 5%, were considered to be at an advanced level in the subject. Though the statistics tell a slightly more encouraging story in Texas, the difference is anything but substantial. While 38% of the fourth graders there were considered to be proficient in math in 2009, only 4% were advanced, one percentage point below that of California. *Id.*

However, the problem gets worse. Statistics seem to indicate that as children get older, those falling to below basic levels of competency in math increases substantially. While 19% of fourth graders nationally were rated as having a below basic grasp of math in 2009, as stated above, 29% of eighth graders in the same year were found to be at a below basic level of understanding. *Id.*; *Table 144: Average mathematics scale score of 8th-grade public school students and percentage attaining mathematics achievement levels, by level of parental education and state or jurisdiction: Selected years, 1990 through 2009*, NAT'L CTR. FOR EDUC. STATISTICS (2009), http://nces.ed.gov/programs/digest/d10/tables/dt10_144.asp. 33% of eighth graders were found to be proficient in math. *Id.* Quite naturally, state statistics from California and Texas reflect the same trend. The Center found that 41% of California eighth graders could not achieve at a basic level in math while in Texas the same could be said for 22% of the eighth grade population. *Id.* In both of these states the percentage of students at a proficient or advanced level was not substantially different for eighth grade students. *Id.* (23% and 5% vs. 36% and 8% in TX. The proficient numbers for these states could be argued to be substantially different, but he tackles these numbers below.) In Washington, D.C., the nation's capital, where the recent discussion around education reform has been particularly heated as a result of aggressive changes instituted by Michelle Rhee, the former Chancellor of D.C. Public Schools, 60% of eighth graders did not have basic math skills in 2009. *Id.* Only 11% were proficient in the subject. *Id.* In California, 23% of eighth graders in 2009 had reached a proficient level of achievement in math and 5% were of students were considered advanced. *Id.* 36% of Texas eighth graders achieved at a proficient level, while 8% reached an advanced level in the subject. *Id.*

⁷⁹ While researchers have found a number of metrics by which to measure student achievement, numerous have acknowledged student dropout rates has been as one of these viable measures. In fact, in her study analyzing the relationship between union presence and collective bargaining in a school district and their effect on student performance, Caroline Hoxby uses high school dropout rates as her sole measure of student achievement, arguing that the "measure has the advantage of reflecting local K-12 education." Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q. J. ECON. 671, 686 (1996). Joe Stone expresses a similar opinion of the validity of dropout rates as a measure of student achievement when he writes, "We know, certainly, that drop-out rates are highly related to student success in schools, and that students in the lower tail of student performance are much more at risk of dropping out." Joe Stone, *Collective Bargaining and Public Schools*, in *CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM* 47, 62 (Tom Loveless ed., 2000). Thus, as is seen here, dropout rates have been accepted as an accurate measure of student achievement.

⁸⁰ *Many Nations Passing U.S. in Education*, *supra* note 1, at A4.

⁸¹ *Graduation by the Numbers—Putting Data to Work for Student Success*, EDUCATIONWEEK (Jun. 2, 2010), <http://www.edweek.org/ew/articles/2010/06/10/34execsum.h29.html>. The article states that six out of ten students graduate, not that 40% drop out. It is only a subtle difference.

families have even lower graduation rates, generally seeing 55% to 60% of their students successfully complete high school.⁸²

New York City—home to the largest school district in the nation—has felt the practical effects of soaring student dropout rates more than any other city in the nation. Though the district’s dropout rate is far from the worst in the country, the district, which educates nearly 1.1 million students annually, loses approximately 44,000 students each year.⁸³ Yet the situation in Los Angeles may even be more desperate. Though the Los Angeles United School District (“LAUSD”) is about half the size of New York City’s school district, LAUSD loses a similar number of students, claiming a graduation rate fourteen percentage points lower than that of New York.⁸⁴

Even the country’s brightest, most motivated college-bound students are not being adequately prepared at the elementary and secondary levels to handle the demands of college-level coursework. A 2008 study conducted by Strong American Schools, a project supported in part by the Bill & Melinda Gates Foundation, clearly illustrates this, pointing to a national trend of remediation at the post-secondary level due to students’ lack of academic preparedness when they arrive at college.⁸⁵ The study found that one third of the nation’s college students need remedial classes upon arrival at college to provide them with the basic skills necessary to succeed at the university level.⁸⁶ In terms of numbers of students, this translates to 1.3 million college students enrolling in remedial courses annually.⁸⁷ At some schools, like California State University (the nation’s largest university system), the percentage of students who enroll in remedial courses is significantly higher than the national average. There, 60% of the 40,000 students who enter the school annually need remedial help in math, English, or both.⁸⁸ These startling statistics are a testament to the same story told by the National Center for Educational Statistics’

⁸² *Id.* As did reading and math proficiency rates, high school graduation rates varied widely among different racial groups, the percentage of white and Asian students who graduate being substantially higher than that of historically disadvantaged minority groups. More than 75% of white and Asian students graduate high school compared with only 56% of Latino students, 54% of black students, and 51% of Native American students. Graduation rates for males from disadvantaged groups fall at or below 50% consistently. *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Diploma to Nowhere*, STRONG AM. SCHS., 3 (2008), <http://www.deltacostproject.org/resources/pdf/DiplomaToNowhere.pdf>. While this source does not offer a specific definition of “remedial class,” it seems to suggest that these are classes that cover material students may have already learned or should have learned in high school to prepare them for college level work. *See generally id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 4. While at first glance remedial classes do not appear to be a problem, the cost of providing remediation for such a large percentage of the nation’s college students is astronomical. Between remedial courses offered at both two- and four-year public post-secondary programs, American colleges and universities spend two billion dollars annually to provide students with remedial help. *Id.* at 3 (the researchers conducting this study arrived at the \$2 billion figure as the cost of remediation across the nation annually based on the assumption that each student taking remediation course takes two classes of this type). This figure generates a per-student cost of somewhere between \$1,607 and \$2,008 for students enrolled in two-year public programs and between \$2,025 and \$2,531 for those attending four-year public institutions. *Id.*

work: the system is failing.⁸⁹ Even the nation's most ambitious students are currently not able to take from the country's public schools the education they desire.⁹⁰

Though achievement has fallen across academic disciplines at the elementary and secondary levels, government educational expenditures have risen consistently over the last two decades; the vast majority of this money went toward covering the cost of student instruction.⁹¹ Twenty-one years ago, during the fall of the 1989–1990, the United States' per pupil expenditure totaled \$7,849.⁹² Of that sum, instruction costs claimed \$4,735, teacher salaries and benefits accounting for \$4,380.⁹³ Eight years later, at the beginning of the 1997–1998 academic year, per student expenditures had risen slightly, reaching a total of \$8,214.⁹⁴ Per pupil instruction expenditures at that point accounted for \$5,079, \$4,631 of which went to teacher salaries and benefits.⁹⁵ However, less than a decade after that, when the academic school

⁸⁹ In its critique of the ability of the American education system to adequately prepare students for post-secondary education, Strong American Schools also notes that the 2008 National Assessment of Education Progress (NAEP) found that just over one quarter of high school seniors were proficient in math and more than half did not have basic skills in science. *Id.* at 7. Moreover, only 43% of high school juniors and seniors who took the ACT, a standardized college admissions exam, in 2007 scored at level indicating that they were properly prepared to handle college-level math. *Id.*

⁹⁰ What is particularly interesting about the Strong American Schools study are the results of a survey administered by researchers to students enrolled at the time in college remedial courses, concerning the students' perception of their academic preparedness prior to coming to college and their academic experience in high school. Of the group surveyed, 80% of the students reported that they believed they were prepared to handle college-level work upon matriculation. *Id.* at 7–8. The majority felt that they had taken the most advanced classes their high schools had to offer, and 95% of these students told researchers that they had done most or all of the work assigned to them in high school. *Id.* Discovering now, at the college level, that their work had not prepared them in the way they believed it had led to frustration on the part of the vast majority of these young adults, 80% of them stating that they would have worked harder had their schools set higher expectations for themselves. *Id.* at 8, 12. Further, most of these students had earned all As and Bs in high school, while four out of five finished their secondary education with a grade point of average of 3.0 or higher (Note that student transcripts were not collected by researchers and that students alone reported on their past academic record.). *Id.* at 8.

Taken together, the results of this survey point to something of particular significance. The findings here make a strong case for the fact that national student underachievement does not fall principally on the shoulders of those being educated. While in high school, the large majority of the students in this survey had the desire to learn, were motivated enough to put in the necessary work to achieve, and believed they had done all they needed for college-level preparedness. That they still fell short seems to shift the culpability for their academic weaknesses away from them. Thus, while there is little doubt that this group of highly motivated students is not representative of the vast majority of American students, their experiences in public schools across the United States do force the inquisitive mind to ponder who within the ecosystem of the classroom is primarily responsible for its success. Though subtly, the study answers this question for itself when it states the following: "The quality of the instruction makes a significant difference, and a large majority of students rate remedial courses as much better than the high school courses they took in the same subject. The most important reasons for regarding these courses as better include better instructors." *Id.* at 15.

⁹¹ *The Condition of Education 2010: Public School Expenditures*, NAT'L. CTR. FOR EDUC. STATISTICS (2010), http://nces.ed.gov/programs/coe/2010/pdf/34_2010.pdf. Expenditure quantities have been adjusted for inflation using the Consumer Price Index (CPI). *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

year began in the fall of 2006, per student educational expenditures had increased substantially, then totaling \$10,182.⁹⁶ Spending on student instruction rose significantly as well, claiming \$6,207 of the total amount of per pupil expenditures.⁹⁷ Spending on teacher salaries and benefits also far surpassed what it had been almost a decade earlier, making up \$5,574 of instruction costs.⁹⁸

So what, then, is the source of the nation's educational collapse? As previously stated, one cannot in fairness peg the blame on one element of the system. Yet as student underachievement runs rampant while education expenditures rise to the highest they have ever been, an argument for lack of financial resources seems to be less and less plausible. That students are less capable now than they have been in years past also seems to be a poor argument. Even for a large percentage of American children who grow up in poverty-stricken areas with parents who may not understand the value of a strong educational foundation, nothing indicates that these children, more than any others in years past, lack the capacity to achieve academically.⁹⁹ Yet what has been shown to have a substantial effect on students reaching their academic potential are the teachers instructing them.¹⁰⁰ It is widely accepted that a strong instructor can make the difference between solid understanding, and, for example, needing college remediation to fill in the gaps created years before.¹⁰¹

It is certainly true that the United States is home to countless talented and dedicated public school teachers. These men and women not only care very deeply about the children they teach but are equally as gifted in their ability to effectively help students develop the skills they need to have successful educational careers. However, as is well known, there are far too many bad apples in the bucket. Not only are some teachers unmotivated and lack the necessary level of concern for student development, others simply are not sufficiently effective communicators of crucial information.¹⁰² Thus, in many respects, the nation's teachers bear great responsibility for underachieving students.¹⁰³ Yet the larger problem is that which allows these poor performers to stay in the classroom: teachers unions and, more

⁹⁶ See *The Condition of Education 2010: Public School Expenditures*, *supra* note 91.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Joel Klein, Op-Ed., *What I Learned at the Education Barricades*, WALL ST. J., Dec. 4, 2010, at A13 (“[I]t is wrong to assert that students’ poverty and family circumstance severely limit their educational potential.”).

¹⁰⁰ See Jason Felch, Jason Song & Sandra Poindexter, *Grading the Teachers; School Reforms Often Overlook the Instructors; Upgrading Staff Quality Helped a Struggling Campus*, L.A. TIMES, Dec. 22, 2010, at A1 (addressing the importance of strong teachers in student success); see also Evan Thomas & Pat Wingert, *Why We Must Fire Bad Teachers: In No Other Profession Are Worker So Insulated From Accountability*, NEWSWEEK, Mar. 6, 2010, <http://www.newsweek.com/2010/03/05/why-we-must-fire-bad-teachers.print.html> (“What really makes a difference, what matters more than the class size or the textbook, the teaching method or the technology, or even the curriculum, is the quality of the teacher.”).

¹⁰¹ See, e.g., Edith Starzyk, *Good teachers make a difference—but what makes a good teacher*, CLEVELAND.COM (Dec. 27, 2008, 6:30 AM), http://blog.cleveland.com/metro/2008/12/good_teachers_make_a_differenc.html (recognizing that research has shown that a student's teacher is the most important factor in determining whether they are successful academically).

¹⁰² See *generally* *Bad Teachers*, NYC EDUCATOR (Feb. 9, 2006), <http://nyceducator.com/2006/02/bad-teachers.html>.

¹⁰³ See *generally* Felch, Song & Poindexter, *supra* note 100, at A1 (demonstrating the strong connection that exists between the strength of a teacher and the performance of his or her students).

specifically, collective bargaining agreements. Through particular contract provisions, they have focused on interests other than the needs of students. These educational institutions have purged the education system of teacher accountability and have made it difficult to provide students with the teachers best equipped to help them reach academic success. The following subsection will attempt to demonstrate the link between collective bargaining and student underachievement.

B. Connecting the Dots: The Link Between Underachievement and Collective Bargaining Agreements

Before examining the specific contract provisions that are particularly problematic, it is important to first draw a clearer connection between poor student performance, unionization and collective bargaining. Admittedly, this is not an easy task, primarily because there are likely multiple factors that play into poor student performance and it is difficult to isolate one variable and demonstrate its specific level of culpability. This is particularly the case with unionization and collective bargaining, as they may appear more removed from the day-to-day education of students than perhaps factors like school funding or parental involvement. Yet a number of studies conducted over the last four decades illustrate the connection does exist.

The most recent of these studies is Caroline Hoxby's work, entitled "How Teachers' Unions Affect Education Production."¹⁰⁴ Hoxby approaches the question of union effect on student achievement by examining the relationship between school inputs and high school student dropout rates. More specifically, Hoxby looks at teacher salary, total cost of instruction, and workplace conditions, among other things, in both union and non-union school districts and compares these findings with the relative dropout rates in these two types of districts.¹⁰⁵

After an extensive mathematical analysis, Hoxby's findings are consistent with the idea that unions and collective bargaining have a negative effect on student achievement. With respect to the cost of instruction, the author finds that unionized districts spend on average 12% more money on education

¹⁰⁴ Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q. J. ECON. 671, 684 (1996). Caroline Hoxby is the Scott and Donya Bommer Professor of Economics at Stanford University. *Caroline Hoxby*, STANFORD INST. FOR ECON. POLICY RESEARCH, <http://siepr.stanford.edu/peopleprofile/2409#bio> (last visited Jan. 16, 2012). She is a Senior Fellow at the Hoover Institution and the Stanford Institute for Economic Policy Research, serving also as the Director of the Economics of Education Program at the National Bureau of Economic Research. Hoxby specializes in public and labor economics and is recognized as one of the world's foremost scholars on the economics of education. She is known widely for her work on school finance, the market for college education, school choice, university finance, peer effect, and financial aid. Professor Hoxby is currently working on projects focused on ideal financing for schools, the effects of education on economic growth, and globalization in higher education. *Id.*

¹⁰⁵ See Hoxby, *supra* note 104. Unlike the case with the previous discussion of the cost of instruction, here the phrase "cost of instruction" refers to the total district expenditures on education. See Joe Stone, *Collective Bargaining and Public Schools*, in *CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM* 47, 55–56 (Tom Loveless ed., 2000). For the purposes of her study, Hoxby defines a unionized district as one that participates in collective bargaining and in which at least half of all teachers, or half of full-time teachers, in the district are union members. Hoxby, *supra* note 104, at 685. As the basis of her analysis, Hoxby uses data from the Census of Governments from the years 1972, 1982, and 1992, coupling this with other data in conducting her examination. *Id.* at 673. She also employed data from the Censuses of Population and Housing for the years 1970, 1980, and 1990 and the Census of Governments data from those years for other parts of her analysis. *Id.* at 685. She chose to use student dropout rates as her metric for student performance as it is the only measure of student achievement that can be drawn from the Census of Governments, around which she focused her study. *Id.* at 686. She bases her study on district-level data. Stone, *supra* note 105, at 61.

than non-union districts with similar characteristics.¹⁰⁶ Similarly, Hoxby reaches the conclusion that in union districts teachers receive a pay premium of 5.1% over their colleagues working in districts in which unions are not present, representing a small but non-negligible difference in teacher pay.¹⁰⁷ As her proxy for workplace conditions, Hoxby tracked student-teacher ratios in union and non-union districts, finding that this statistic also came out in favor of teachers in union districts. In making this comparison, the author used two different mathematical techniques to obtain her results, one yielding a finding of a 6% lower student-teacher ratio in union districts and the other suggesting a 9% difference also favoring unionized districts.¹⁰⁸

Yet despite these clear advantages for unionized districts and the teachers who work in them, Hoxby finds that this does not translate into greater student success. In fact, she discovers quite the contrary, determining that the high school dropout rate in unionized districts is 2.3% higher than that of non-union districts.¹⁰⁹ While viewed alone this datum supports the conclusion that unionization hinders student performance, considering this finding in light of the aforementioned results of her study weighs heavily in favor of such an assertion. For the purposes of discussion, due to the small percentage difference in dropout rates between union and non-union districts, this Note assumes that the dropout rates for the two types of districts Hoxby analyzes are statistically indistinguishable. That would mean that though union districts have 12.3% greater total economic resources, 5.1% better teacher pay, and 6%–9% lower student-teacher ratio, students attending schools in union districts have an identical level of success as those who attend schools with significantly fewer resources. The practical implication of this is clear: schools in non-union districts are significantly more productive in using their resources than union schools and are simply better at getting results out of their students. Stated from the opposite

¹⁰⁶ Stone, *supra* note 105, at 56.

¹⁰⁷ *Id.* at 50. In calculating the union premium for teacher pay, Hoxby controlled for district, time, and district-specific time fixed effects (instrument variable estimate). *Id.* at 50. Hoxby also made a second attempt to determine the union district pay premium using instrumental variable estimates to control for as many attributes of teachers and districts as possible. *Id.* at 50. This technique is often employed in studies like this one to account for the fact that “union status is not actually randomly assigned . . . or for other factors, including potential measurement error.” *Id.* at 49. It yielded a union premium of 5.0%. This was based on states that had collective bargaining laws. *Id.* at 50.

Other studies yield similar results with respect to teacher pay and educational expenditures. In a 1982 study by William H. Baugh and Joe A. Stone, using what is called a fixed-effects estimator which estimates wage change associated with change in union status for individual teachers, they found a union premium of 12%. *Id.* at 49. A 1988 study by Morris M. Kleiner and Daniel L. Petree, based on data from 1972 to 1982, found only a 1% premium, using “an estimator for fixed state effects,” and a 7% premium without this estimator. *Id.* at 50. The Baugh-Stone study had the most detailed controls of the three studies, followed by the Hoxby study and finally the Kleiner-Petree study, indicating that the Baugh-Stone study is likely the most accurate. *Id.* at 49–50. In terms of total education expenditures, these other studies also supported the finding of a non-negligible difference between union and non-union districts. The Kleiner-Petree study showed a 12% higher expenditure, and a study conducted by Randall W. Eberts and Joe A. Stone found a 15% higher expenditure by union districts. *Id.* at 56, 58.

¹⁰⁸ *Id.* at 54. The 6% lower student-teacher ratio that Hoxby finds in union districts using her first mathematical analysis along with differences-in-differences specifications, represents a 1.1 student difference in class size. Her second analysis, in which she employs the IV estimate technique and finds a 9% smaller student teacher ratio in union districts, represents a 1.7 student difference in class size. *Id.* The Kleiner-Petree study referenced earlier produced a similar difference in student-teacher ratio between union and non-union districts, finding a 7% lower ratio in union schools. The researchers based their study on state-level data. *Id.* at 51, 54.

¹⁰⁹ For this part of her study, Hoxby uses “a specification that includes district, time and district-specific to examine high school drop-out rates.” *Id.* at 61. She also uses instrumental variables “to account for potential correlations between contract status and the error term.” *Id.* at 61. Data here is statistically significant at 5%. *Id.* at 59.

perspective, union schools are less efficient in resource consumption, struggling to effectively translate positive inputs into positive student outputs.¹¹⁰ Plainly, these schools perform worse than their peers.¹¹¹ Thus to the extent that union schools use more resources to produce the same results as non-union schools, they are negatively affecting student performance in that they could and should be getting more out of their students for the amount of resources being consumed.¹¹²

Other studies, however, have produced data that seem at first blush to support quite the opposite assertion, indicating that student performance is in fact better in districts where unions and collective bargaining are present.¹¹³ For instance, Martin Milkman's 1987 paper, "Teachers Unions and High School Productivity," evaluates student performance in union and non-union school districts. Through an analysis of student standardized test results, Milkman finds that adolescents in union districts score 2% better on these examinations than their peers studying in non-union districts.¹¹⁴ Randall Eberts and Joe Stone come to findings consistent with Milkman's in their similar 1987 study focusing on fourth grade students.¹¹⁵ In that report, entitled "Teachers' Unions and the Productivity of Public Schools," which uses student improvement in math test scores as its basis, Eberts and Stone conclude that fourth grade students in union districts make a 1% gain over fourth graders in non-union districts.¹¹⁶ The findings of researchers Laura Argys and Daniel Rees in their 1995 study also support the idea of better student performance in union schools, focusing their examination, as did Eberts and Stone, on student scores on standardized math tests.¹¹⁷ Using students' scores on a standardized math examination in the eighth grade as their control variable, Argys and Rees analyze how these students performed on a similar math test as tenth graders.¹¹⁸ Their study finds that students in union districts score 1.3% higher than children in districts not characterized by union presence.¹¹⁹ Thus, while

¹¹⁰ See Hoxby, *supra* note 104, at 711 (Hoxby concludes that teachers' unions raise "school budgets and schools inputs but lowering student achievement by decreasing the productivity of inputs."). A further examination of Hoxby's study and Ebert and Stone's 1987 work make even clearer the lower efficiency of inputs in union school districts than those in non-union districts. Hoxby finds that a decrease of one student in the student-teacher ratios at non-union schools leads to a 0.4 percent decrease in dropout rate, while the same change to the student-teacher ratio in a union schools has no effect on the rate at which students drop out. Stone, *supra* note 105, at 65. Similarly, she finds that a 10% increase in teacher salary at non-union schools leads to 0.7% decrease in the dropout rate, while such an increase has no effect on the dropout rate in union schools. Eberts and Stone's findings are consistent with Hoxby's. They find that decreases in the student-teacher ratio in a non-union school "are about 3.4 times more effective in improving student achievement as in union schools." Finally, these researchers find that adjustments to instructional time are 2.1 times more effective in non-union schools than in their union counterparts. *Id.*

¹¹¹ Stone, *supra* note 105, at 65.

¹¹² *Id.*

¹¹³ Data referenced in this paragraph is statistically significant at 5%. *Id.* at 59.

¹¹⁴ *Id.* at 57, 60. In conducting this study, Milkman compared students' performance on math exams as seniors in high school to their own achievement on similar standardized tests as sophomores as a control variable. *Id.* at 57. A subsequent study conducted by Milkman using the same methodology indicated that minority students in districts with union presence and collective bargaining score 1.4% higher than those in non-union districts. *Id.* at 59.

¹¹⁵ *Id.* at 59–60.

¹¹⁶ Stone, *supra* note 105, at 59–60.

¹¹⁷ *Id.* at 60.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

these differences in student performance are small, they are consistent and may undermine the idea that collective bargaining and unionization in schools weighs negatively on student performance.

However, on closer examination, they are not as inconsistent with Hoxby's findings as they may initially appear. In Stone's essay "Collective Bargaining and Public Schools," in which he examines each of these studies, the author points out that the studies by Milkman, Eberts and Stone, and Argys and Rees each produce an inverted "U" distribution when the scores of students in union districts are plotted against those of students in non-union districts.¹²⁰ What this essentially indicates is that, while there are a group of students at the peak of the distribution that score slightly better than students in non-union districts, this is not the case for students at each end of the distribution, whose scores drop below those of students in non-union schools.¹²¹ Thus, while the average student in union districts performs slightly better than those not in union districts, the best and worst students in union districts do not. This understanding then reconciles Hoxby's studies with the others as her study, focusing on dropout rates, targets those students at the bottom tail of the distribution.¹²² Examined collectively, these studies point out that while the average student performs slightly better in union districts, the best and worst students perform worse in these districts. Therefore, while average students in union districts perform marginally better than those students in non-union districts, a significant percentage of underachievers are left behind. In order to adequately address the nation's educational deficiencies it is this group that most needs to be helped and is precisely the group that union districts are underserving.¹²³

In analyzing why this distribution exists, Stone explains that schools in union districts have a tendency to employ "traditional classroom instruction" geared toward the average student, generally not focusing on the special learning needs of struggling students and those who are particularly gifted.¹²⁴ Students with specific needs are forced to compete for attention with the larger group of students at the average ability level.¹²⁵ Discussing the effect of class size on students of the highest and lowest ability levels in union schools through an examination of the Argys and Rees study, Stone states the following:

Indeed, Argys and Rees find that low- and high-ability students are taught in larger classes in union schools than in nonunion schools, even if one holds the overall student-teacher ratio in the school constant. Pursuing this difference, they examine the union-nonunion difference in student performance across various ability levels after holding constant the size of the student's class, academic track, and overall class achievement

¹²⁰ *Id.* at 62.

¹²¹ Stone, *supra* note 105, at 62.

¹²² *Id.*

¹²³ While as the studies presented here suggests, both high- and low-performing students are underserved in union districts, the possible solutions to educational problems discussed herein and presented in Part IV of the Note are geared toward aiding improvement in student achievement across the board and specifically for particularly low-performing students. Though it is certainly important to provide strong educational resources geared specifically toward the nation's top students, to stop the nation's further slide into educational mediocrity, I believe the highest priority should helping those students at the lowest end of the scale. Thus, while this Note presents possible solutions that would have positive implications for all students, its focus is a bit more on institutional fixes that will specifically help low performers.

¹²⁴ Stone, *supra* note 105, at 62.

¹²⁵ *Id.* at 64.

level. With these class characteristics held constant, Argys and Rees find that the low- and high-ability students no longer perform worse in union schools. . . .¹²⁶

Thus, Stone asserts that as a result of the denial of classes geared toward high- and low-ability students commensurate in size to those for their average ability-level classmates, union schools compromise the quality of education provided to these students.¹²⁷ The negative effect on student performance, then, is painfully clear.

The studies examined in this subsection make plain that the connection between teachers' unions and collective bargaining and the problems our country's students suffer do in fact exist. These reports indicate that where there are unions and collective bargaining, there are complex issues of inefficient use of resources and chronic student underachievement. In addition, while union districts have been able to educate children of average ability with the same level of success as non-union districts, the mass of children left behind greatly overshadows this relative success. Yet what about these institutions hinder the success of so many of our children? Where within them is the true source of the problem? In the subsequent discussion, I endeavor to draw out the answer to these questions.

C. Zeroing in on the Problem

While an analysis of the education statistics and studies discussed in the previous subsection clearly indicate that American students are struggling, and point to the fact that unionization and collective bargaining play a significant role in these failures, the more complex question of exactly which provisions facilitate or even encourage student underachievement still remains. Teacher collective bargaining contracts are extensive, addressing topics from vacation policy to the way in which extracurricular assignments are made, and thus one must sift through these documents carefully to identify the truly problematic provisions.¹²⁸ After a close examination, there are a number of provisions set out in these agreements that show up as particularly detrimental to strong student performance. Among the worst of these are seniority provisions, which stipulate, among other things, that layoffs be based solely on the seniority of an instructor, prohibiting any sort of merit assessment in making these decisions.¹²⁹ Additionally, provisions that prohibit the payment of teachers based on merit also serve to impede student growth.¹³⁰ Finally, and perhaps the sections of these agreements that cause the most damage to American students, are teacher evaluation provisions and traditional school district policies

¹²⁶ *Id.* at 64.

¹²⁷ *Id.*

¹²⁸ See LIEBERMAN, *supra* note 5, at 222–23 (setting out some of the provisions typically covered in collective bargaining agreements).

¹²⁹ See *id.* at 223 (highlighting transfer provisions based on seniority as a staple of collective bargaining agreements); Howard Blume & Jason Song, *L.A. Unified's Change Agent; A One-Issue Lawsuit Turned into a Broad Settlement with Far-Reaching Implications*, L.A. TIMES, Oct. 14, 2010, at A1 (stating that a layoff policy based on seniority existed in the Los Angeles United School District (LAUSD) and that this policy is used by nearly all school districts). In some states, layoff provisions based on seniority are both a part of collective bargaining agreements and have been written into state law; Jason Felch, Jason Song & Doug Smith, *Grading the Teachers; Seniority Over Quality; When Budget Cuts Hit, Many of L.A.'s Most Promising New Teachers Were Laid Off. Poorer Students Were Particularly Hurt*, L.A. TIMES, Dec. 5, 2010, at A1 (discussing how layoff policy based on seniority remains a part of state law in California).

¹³⁰ See LIEBERMAN, *supra* note 5, at 223 (stating that prohibition on merit pay is a typical bargaining topic).

that supplement them.¹³¹ These provisions significantly undermine the accountability of the nation's teachers. The following discussion will address each of these provisions.

One of the classic staples of teacher collective bargaining agreements is seniority provisions.¹³² While these contracts stipulate seniority as the basis for a wide range of teacher benefits and privileges, seniority privileges are most problematic in their effect on layoff policies. Traditionally, layoff policies have stipulated that teachers who were most recently hired are to be fired first in the event of layoffs, regardless of an individual teacher's level of performance.¹³³ The effect of provisions like these has been devastating on student performance, especially in high-poverty schools.¹³⁴ The circumstances surrounding recent layoffs in LAUSD due to district budget cuts brings this into full view. Though district administrators have urged union leaders for years to reconsider rigid layoff policies that mandate the release of teachers with the least amount of experience first, unions have been uncompromising, and this policy persists in LAUSD.¹³⁵

These provisions, however, principally have had two negative effects on students in Los Angeles. First, they have led to the removal of some of the brightest and most talented young teachers from classrooms where students desperately need them.¹³⁶ While teachers with the greatest amount of experience are often the most effective, this is not always the case. Los Angeles is a perfect example of this. In LAUSD, approximately 190 of the teachers ranked in the top fifth of teachers in the district based on raising student scores were released due to recent layoffs solely on the basis of the number of years they had worked for the school system.¹³⁷ This number is greater than four hundred when considering the top 40% of LAUSD instructors.¹³⁸ Second, because schools in the worst areas often have a greater proportion of younger teachers with fewer years of experience, layoff provisions focused on seniority lead to a significantly higher number of layoffs at high-poverty, underachieving schools. This is exactly what poorer schools do not need.¹³⁹ In South Los Angeles, one the poorest areas in the city, one in ten teachers were laid off in response to recent budget problems. That is almost double the rate of teachers being laid off in other areas of the city.¹⁴⁰ Even worse is that out of sixteen schools which lost one quarter of their teachers or more during this cycle of layoffs, only one was not located in the

¹³¹ See *id.* at 223 (stating that evaluation provisions are historically a part of teacher collective bargaining agreements).

¹³² See *id.*

¹³³ See Felch, Song & Smith, *supra* note 129, at A1.

¹³⁴ See *id.* (discussing the negative effect LAUSD's layoff policy had on one district middle school).

¹³⁵ See generally *High Stakes for the Schools; Amid Hard Times, L.A. Teachers and the District Should Reject Making Any Power Plays in Contract Talks*, L.A. TIMES, Dec. 18, 2003, at B16; Felch, Song Smith, *supra* note 129, at A4.

¹³⁶ See generally Felch, Song & Smith, *supra* note 129, at A1; see also Marcus Winters, *Mass teacher layoffs + seniority rules = Bad news for kids*, Op-Ed., N.Y. DAILY NEWS, Feb. 3, 2009, http://www.nydailynews.com/opinions/2009/02/04/2009-02-04_mass_teacher_layoffs_seniority_rules__b.html (discussing how seniority rules lead to talented young teachers being laid off in New York City).

¹³⁷ Felch, Song & Smith, *supra* note 129, at A1.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

struggling south and central sections of the city.¹⁴¹ As a result, students in low-income, high-poverty areas have been disproportionately affected by this wave of layoffs, a direct symptom of teacher-focused seniority rules.¹⁴²

In addition to seniority policies set out in bargaining agreements, provisions prohibiting merit pay are also particularly problematic. Generally, collective bargaining agreements have included provisions that stipulate that teachers can only be paid on the basis of their educational accomplishments and their experience as educators such as the degrees they have earned and the number of years they have taught.¹⁴³ These provisions essentially eliminate the opportunity for a district to increase an instructor's compensation based on a demonstration of a high level of effectiveness as a teacher. As a result, in many ways school districts' hands are tied in implementing incentive-based reform programs to improve teacher quality. This is because a teacher's performance cannot be taken into account when setting their level of compensation. In a country where the vast majority of teachers who have taught for more than two to three years have tenure, which essentially insulates them from termination, seasoned teachers may have little incentive to improve their level of effectiveness by changing their teaching techniques or tailoring lessons to the specific needs of their students.¹⁴⁴ Thus, by prohibiting merit pay, collective bargaining agreements take from school administrators one of the major ways in which they can affect a change in a teacher who is currently ineffective at helping his or her students progress academically.

Additionally, contract prohibitions on merit pay make it extremely difficult to attract and retain the most talented individuals to the teaching profession.¹⁴⁵ Economist Eric Hanushek of Stanford's Hoover Institute suggests that attracting top talent to the field may be the primary benefit of allowing merit pay: "The biggest role of incentives has to do with selection of who enters and who stays in teaching—i.e., how incentives change the teaching corps through entrance and exit. . . . I have always thought that the effort effects were small relative to the potential for getting different teachers."¹⁴⁶ As Myron Lieberman notes in his book *The Teacher Unions*, talented young people entering the workforce have a variety of options in choosing a career path.¹⁴⁷ In order to draw these talented individuals to

¹⁴¹ *Id.*

¹⁴² *Id.* at A1. While this will be described *supra* Part IV.A, LAUSD's Liechty Middle School was a victim of seniority-based layoffs. Opening in 2007 in a poor area of Los Angeles with a number of young, but highly motivated teachers at its helm, Liechty quickly became one of the top performing middle schools in the district. However, after it lost a large percentage of its teaching force due to layoffs, it plummeted in district rankings as student performance dropped substantially. *Id.*

¹⁴³ MYRON LIEBERMAN, *THE TEACHER UNIONS: HOW THE NEA AND AFT SABOTAGE REFORM AND HOLD STUDENTS, PARENTS, TEACHERS, AND TAXPAYERS HOSTAGE TO BUREAUCRACY* 223 (1997) (indicating that standard teacher contracts prohibit merit pay, allowing teachers only to be paid based on their educational background and years of experience as teachers).

¹⁴⁴ Song, *supra* note 129, at A4 (indicating that teachers are eligible for tenure after two years in LAUSD); Jennifer Medina, *Mayor to Link Teacher Tenure to Test Scores*, N.Y. TIMES, Nov. 26, 2009, at A1 (stating that teachers in the New York City public school system generally receive tenure after three years of teaching); Russell B. Mallett Jr., Op-Ed., *New Jersey Opinion; Behind Our Schools' Problems*, N.Y. TIMES, Oct. 31, 1982, at 38 (asserting that teachers are granted tenure when rehired for a fourth year with the district).

¹⁴⁵ See Nick Anderson, *Study Undercuts Teacher Bonuses*, WASH. POST, Sept. 22, 2010, at A18.

¹⁴⁶ *Id.*

¹⁴⁷ See LIEBERMAN, *supra* note 5, at 215–16.

teaching, Lieberman makes the general point that the education system must make itself attractive to the brightest individuals of the next generation.¹⁴⁸ Thus in prohibiting payment based on merit, these provisions and the unions that support them suffocate a potential incentive that could bring real strength and enthusiasm to the classroom.¹⁴⁹ Therefore, to the extent that these provisions block potential positive additions to the nation's teacher corps, they are in part responsible for student performance that currently sits at a level lower than it might be if such strategies were implemented.

On the other hand, perhaps the section of collective bargaining agreements that most undermines the academic success of American children are provisions detailing the manner in which teachers are to be evaluated. Unions influence school districts across the country by creating evaluation provisions, which only serve the best interests of teachers. Unlike the vast majority of professions, in which individuals are evaluated on how effective they are at performing their professional duties, district administrators historically have not been able to evaluate teachers on their ability to help their students advance academically.¹⁵⁰ Though there is no clear set of bases for these evaluations, a case study by Susan Johnson published in her book *The Teacher Unions in Schools* suggests that teachers can be evaluated on such subjective measures as "teaching techniques" and "self-control and poise," for which teachers are given "grades" ranging from "excellent" to "unsatisfactory."¹⁵¹ This means of assessment, however, in no way considers student academic progress. Making these evaluations and even less rigorous is the fact that they generally consist of nothing more than a classroom visit by a school administrator. The administrator often is required to give the teacher to be evaluated twenty-four-hour notice of their visit. This allows the teacher to change their normal routine and create a lesson that meets the supervisor's expectations and will help them pass the evaluation.¹⁵² Put quite simply, in many instances, these procedures become nothing more than a formality.

¹⁴⁸ See *id.* It is important to note that in the section of Lieberman's book referenced here, he is discussing the fact that higher wages encourage teachers to teach longer, limiting the number of job opportunities for young, talented individuals to enter the teaching field. Due to how narrow an application a teaching certification has, students are discouraged to go this route because pursuing another degree or certification would give them much greater assurance of getting a job. Lieberman adds that elevated certification standards imposed on teachers by unions only exacerbates this problem. As a result, he says, the teaching profession is not attractive to bright, young individuals. *Id.*

¹⁴⁹ See Jeremy Meyer, *Payouts A Bonus For DPS Teachers More Than \$27 Million Is Being Paid This Year As Incentives to Take on Challenging Duties*, DENVER POST, Nov. 28, 2010, at B-01 (describing how Denver's merit pay system has created an incentive for top teachers to come to Denver Public Schools and take tough positions in the system).

¹⁵⁰ See SUSAN MOORE JOHNSON, *TEACHER UNIONS IN SCHOOLS* 119–20 (1984) (describing evaluation procedures used by the schools in the author's case study, both of which were based entirely on observation of teachers by administrators without any empirical evaluation of performance or effectiveness); Jason Felch, *Study Supports Teacher Ratings; Preliminary Findings Show 'Value-added' Analysis is a Reliable Guide to Effectiveness*, L.A. TIMES, Dec. 11, 2010, at AA1 ("[T]eacher evaluations, which for decades have been based on occasional, cursory observations by principals who give passing grades to the vast majority of teachers."). The bargaining agreements themselves do not always stipulate the details of the evaluation procedures, often simply stating that teachers are to be evaluated and the frequency with which this is to occur. See LIEBERMAN, *supra* note 5, at 223 (providing an example of an evaluation provision). The actual evaluation procedures themselves may be an element of district policy. See Teresa Watanabe, *D.C. Schools May Hold Lesson for L.A.; Washington Is Using Controversial 'Value-added' Method to Evaluate Teachers*, L.A. TIMES, Nov. 14, 2010, at A1 (discussing DC Chancellor of Public Schools Michelle Rhee's institution of a new teacher evaluation procedure, which took place outside of the bargaining context).

¹⁵¹ JOHNSON, *supra* note 150, at 119.

¹⁵² *Id.* at 118.

Hollow evaluation policies like the ones described above are extremely problematic for two principal reasons. First and foremost, the evaluation procedures these provisions describe create no accountability on the part of educators to their students or to the school district for whom they work. They do not demand that teachers be successful at helping students progress academically. Evaluating poise, for instance, as mentioned above, may provide a district with some understanding of a teacher's classroom demeanor or perhaps even how they resolve student disputes or behavior issues, but it provides little information about that teacher's ability to help students learn the requisite material to advance in grade level. Education is one of the few professional fields in which it is the industry standard that individuals are not judged on how effectively they perform their duties. Prosecutors are often judged by conviction rates, surgeons by the success of their operations and the quality of their work, and business owners by the amount of revenue and profits they are able to produce. It is only in the field of education that process is valued more than production. Such process-driven evaluation policies create no incentive for teachers to improve their effectiveness in the classroom. When a teacher knows that an evaluation will consist of nothing more than a twenty-minute classroom observation, in which time little about his or her abilities as a teacher can accurately be judged, the most that the teacher may be motivated to do is to make adjustments just for the period of evaluation. The teacher may disregard necessary long-term changes, knowing that at no point will he or she have to answer to anyone regarding their ineffectiveness.¹⁵³ In the end, students carry the burden of teachers not being held accountable, and are failed by educators who are not personally motivated enough to improve.

In addition to creating a burden for students, traditional evaluation provisions make it extremely difficult to remove incompetent teachers from the classroom. As teachers are not evaluated on their effectiveness as instructors, teachers whose students continue to underperform due to poor instruction go undetected.¹⁵⁴ Examples of such systemic failures exist throughout the country due to recent changes in their teacher evaluation policies. Washington, D.C., is a particularly poignant illustration of this sort of inaccuracy in evaluation. Though not a large school system, Washington's public schools have been struggling for quite some time, and in 2009 they reached a dropout rate of 40%.¹⁵⁵ In the midst of all the system's turmoil, the former chancellor of the District's public schools, Michelle Rhee, was able to set in place an evaluation policy based in large part on the performance of a teacher's students on standardized tests.¹⁵⁶ The results of this change were shocking. The district found that seventy-five of its teachers

¹⁵³ *Id.* at 119 (stating that one of the contracts from the districts in the author's case study stipulated that teacher evaluations are to last 20 minutes). Describing her experience with traditional evaluation procedures, one teacher asserts that evaluations done in accordance with these sorts of policies are "a superficial look at what goes on in the classroom." *Teacher Evaluations, A HISTORY TEACHER AND MORE* (Mar. 8, 2005), <http://www.ahistoryteacher.com/wordpress/?p=51>; The teacher writing in this blog suggests that due to the way in which evaluations are based on a teacher's prior knowledge of the time of their evaluation, teachers will pick a particularly interesting topic for class that day to create a level of discussion among students that is not generally characteristic of their class. To illustrate the extent of this, this teacher tells the story of one teacher she knew who used the same lesson for each evaluation over a twenty-year period. *Id.* Such an account properly illustrates the flaws in traditional evaluation procedures and how these procedures fail at determining a teacher's actual level of instructional competence.

¹⁵⁴ Felch, *supra* 150, at AA1 (suggesting that insufficient evaluation procedures lead to incompetent teachers receiving satisfactory scores).

¹⁵⁵ Neil King Jr. & John Hechinger, *U.S. News: D.C. Schools Chief Targets Tenure*, WALL ST. J., Nov. 19, 2009, at A8.

¹⁵⁶ Bill Turque, *Rhee Dismisses 241 Teachers in the District; Union Vows Challenge Firings Are Result of New Evaluations*, WASH. POST, July 24, 2010, at A01 (explaining Rhee's plan to use student test scores in teacher evaluations).

were so ineffective that they were fired and another 700 received low ratings due to inadequate improvement in their students' academic performance.¹⁵⁷ This dramatically redefined the educational landscape in the District when nothing less than reconstructive surgery would do. Though the change could not have been more timely, what these events uncovered was profoundly unsettling. Due to superficial and misguided evaluation policies, hundreds of underperforming teachers in the D.C. public school system had taught for years without repercussions, negatively affecting hundreds of thousands of students during their tenures. As similar evaluation policies begin to emerge, it is undoubted that more stories like the one in D.C. will arise as districts recognize the large number of teachers it employs who are not up to the task of effectively educating its students. Thus, while it may not be the intention of unions to protect poor teachers through pushing lenient evaluation methods, the likelihood that such metrics of evaluation will lead to this result is quite high. An examination of the Washington, D.C., public school system displays this outcome.

Lax evaluation policies allow districts to cut corners in staffing in a manner detrimental to students as well. Nationally, 15% of high school teachers were teaching outside of their area of expertise during the 2007–2008 academic year.¹⁵⁸ In California, one of the country's most populous states, this percentage was even higher.¹⁵⁹ There, 17.5% of teachers were instructing students in a subject area outside of their subject of expertise.¹⁶⁰ While it would be unfair to assume that all teachers teaching outside of their particular area of expertise are ineffective in teaching this material, the likelihood that an individual may struggle to communicate important details or nuances of a subject area to students when they are not well-versed in it certainly increases. To the extent that this is the case, these teachers cannot provide students with a full understanding of the material. Yet traditional evaluation provisions facilitate such overextension of human capital by schools that teachers who would likely be shown ineffective under a production-driven evaluation policy are able to continue teaching outside of their field without consequence.

As Part III demonstrates, the problem of student underachievement in the United States is a very real one and unions, and more specifically collective bargaining agreements, directly contribute to this educational dilemma. Through contract provisions designed to serve the best interest of educators, that which is truly best for the nation's students has slowly, yet dramatically, slipped out of view. As a result, the nation no longer stands as the international lighthouse of educational excellence, which it once did. It now simply struggles to produce a generation of workers equipped to handle the increasingly complex challenges that the country faces. However, despite the situation in which the country finds itself, there are ways in which the nation can begin to reverse the failures of its education system, starting first by redesigning the contract provisions that have so undermined its success. Promising reform efforts have begun to take root in individual school districts throughout the country, creating new policies that return the focus of the system to its students. These efforts have only increased in light of President Obama's new Race to the Top program designed to reward states that create innovative plans for reform focused on creating accountability in schools.¹⁶¹ Drawing on many of these strategies, the

¹⁵⁷ King & Hechinger, *supra* note 155, at A8.

¹⁵⁸ *The 'Highly Qualified' Gap*, Editorial, L.A. TIMES, Nov. 26, 2010, at A32.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ As part of the American Recovery and Reinvestment Act, which President Obama signed into law on February 17, 2009, to improve the economy and provide aid to important public sector entities harmed by the economic crisis of 2008, the federal government set aside \$4.35 billion in a fund for a program it called Race to the Top,

following section of this Note will make a number of recommendations of possible changes to collective bargaining agreements that could be implemented in school districts across the country to help correct many of the problems herein discussed.

IV. IMPORTANT STEPS TO REGAIN ACADEMIC EXCELLENCE

In modifying teacher contract provisions in a manner best suited to correct many of the problems that current contracts both facilitate and encourage, two twin policy aims must guide one's approach. First, the focus in writing contracts must shift from a principle concern of teachers' interest to the interests of the students¹⁶² whom the education system is expected to serve. Second, any modification must rest on solid foundation of accountability, placing a premium on making educators confront their shortcomings as instructors and take the appropriate steps to alleviate them in order to avoid loss of employment. These two policy concerns are exactly what is absent from current contracts, as they are more concerned with shielding teachers from job loss and ensuring that they have access to benefits than demanding teachers instruct their students at the highest level. Thus, as a result, the only people who benefit from these measures are teachers, while students are left to deal with the externalities of these provisions, terms callous to their needs. Yet by approaching contracting from a place that envisions the ideal contract as one that demands accountability of teachers and focuses on student interests, one can begin to repair some of the grave damage that has been done to America's young people. The following recommendations are structured around one or both of these twin aims, and if implemented nationwide, would go a long way toward improving student performance.

A. Seniority-Focused Layoff Provisions

Despite the benefit seniority provisions bestow on older teachers and the interest of equity they seem to serve, layoff provisions couched in seniority need to be eliminated from teacher contracts and replaced with provisions that stipulate merit as the sole basis for layoff decisions. As discussed in the section above, layoff provisions based around seniority can and often do lead to the layoff of young but

established to provide supplemental educational funding for state education systems. U.S. DEP'T OF EDUC., RACE TO THE TOP EXECUTIVE SUMMARY 2 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. However, this program operated as a competition in which the states that created and implemented the best reform plans received a portion of the federal funds to use for its state education budget. The government highlighted four areas of reform in which it was particularly interested in seeing development: "Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy; building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and turning around our lowest-achieving schools." *Id.* In addition to these four larger goals, the government set out a number of more specific criteria on which it would use to assess state applications. *Id.* at 3.

The government conducted two rounds of this competition. *Id.* at 2. The first round (Phase I) of applications was due to the Department of Education on January 19, 2010, and the winning states were announced in April 2010. Second round (Phase II) applications were due June 1, 2010, and the winners of that round were announced in September of 2010. *Id.* The winners of Phase I Race to the Top Grants were Delaware and Tennessee. *Race to the Top Fund*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/racetothetop/awards.html> (last visited Jan. 18, 2012). Phase II grants went to Massachusetts, New York, Hawaii, Florida, Rhode Island, the District of Columbia, Maryland, Georgia, North Carolina, and Ohio. *Id.*

¹⁶² When making reference to the "interest of students," I am speaking about students' general interest in an education system that prepares them to perform appropriate grade level standard and, by the end of secondary school, has provided them with the requisite educational background to effectively handle collegiate level work if they choose to pursue it.

excellent teachers. Furthermore, these provisions can have disproportionate effects on the faculty of high-poverty schools in times of mass layoffs as their faculty generally have a large percentage of young, inexperienced teachers.¹⁶³

At one recently opened middle school located in one of the worst sections of Los Angeles, the effect of the layoff policy has been particularly bad, illustrating the extent of the damage caused by these provisions. In 2007, LAUSD opened Liechty Middle School in the Westlake section of the city, an area known for its high poverty rate.¹⁶⁴ Hoping that the school could find success despite its discouraging surroundings, school administrators staffed the new junior high with bright young teachers excited to take on the challenge of helping the countless struggling students who would no doubt be assigned there.¹⁶⁵ After just one year, the school led all of the district's middle schools in the improvement of its students' English standardized test scores and had made substantial growth on math standardized test results as well.¹⁶⁶ Yet in the summer of 2009, when the state started to dramatically cut its budget, the school district began mass layoffs across the city, leading to the release of seventeen of Liechty's young, high-performing teachers due to their short tenure as educators.¹⁶⁷ The middle school had crumbled by the end of the 2009–2010 school year. Student English scores crashed to sixty-first in the district and low student performances in math cause the school to drop from its top ten rank in math achievement.¹⁶⁸

While the challenges faced at Liechty were particularly devastating, layoff policies based in seniority have and continue to lead to the loss of strong young teachers in districts across the country.¹⁶⁹ In view of a story like this, the benefits of the restructuring layoff provisions to base decisions on merit alone become clear. First, districts would not be forced to undermine their own mission by laying off effective young

¹⁶³ See Felch, Song & Smith, *supra* note 129, at A1 (describing the layoffs of a large number of young teachers which took place at one Los Angeles middle school). See also James Warren, Op-Ed., *A View From Both Ends of the Educational Spectrum*, N.Y. TIMES, June 18, 2010, at 23A (stating that due to seniority rules, the two young teachers on whom the article focuses may be subject to layoffs despite their strength as teachers); see also Jennifer Medina, *New, Small Schools Brace for Extra Pain From City's Teacher Layoffs*, N.Y. TIMES, June 2, 2010, at A19 (explaining that small schools which were established to replace poor performing schools in the same areas may be affected disproportionately by layoffs due to the fact these schools are staffed by a large percentage of younger teachers and layoffs are based upon seniority).

¹⁶⁴ See Felch, Song & Smith, *supra* note 129, at A1 (discussing how layoff policy based on seniority remain a part of state law in California).

¹⁶⁵ *Id.* (“John M. Liechty Middle School opened in 2007 in Los Angeles’ impoverished Westlake neighborhood with a seasoned principal, dozens of energetic young teachers and a mission to ‘reinvent education’ in the nation’s second-largest school district.”).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; The *Los Angeles Times* journalists writing the piece about Liechty Middle School noted interestingly that not only would performance-based layoffs have benefitted underserved L.A. students better, but also that it would have been cheaper to the district and would have resulted in less total layoffs. *Id.* Explaining this idea, the authors write the following: “Far fewer teachers would be laid off if the district were to base the cuts on performance rather than seniority. The least experienced teachers also are the lowest-paid, so more must be laid off to meet budgetary targets. An estimated 25% more teachers would have kept their jobs if L.A. Unified had based its cuts on teachers’ records in improving test scores.” *Id.*

¹⁶⁹ See Medina, *supra* note 163, at A19 (discussing the potential in New York for a large number of young teachers to lose their jobs due to seniority provisions).

educators.¹⁷⁰ Instead, administrators could eliminate a district's actual least effective teachers in layoff scenarios, strengthening its teacher corps rather than weakening it. Second, allowing for performance-based layoffs would ensure that a layoff crisis would not lead to the further disadvantaging of already underserved students at a district's worst schools by taking from those schools a substantially greater percentage of human capital than would be lost in better schools.¹⁷¹ As the article discussing Liechty Middle School makes clear, the wave of layoffs in which many of the Liechty teachers lost their jobs disproportionately affected schools in poor areas as more inexperienced teachers taught in those areas and were laid off as result of their inexperience.¹⁷² Districts could spread layoffs across a district weakening the blow to any one or group of schools. Finally, this change in policy may draw more young talent to the field of education, alleviating young potential educators' worries about losing their jobs for reasons outside of their control.¹⁷³ Taken together, these benefits would ensure that a school district was not wasting valuable human resources and that students were receiving instruction from the best teachers that the district could offer.

The removal of layoff provisions based on seniority would squarely address one of the educational problems drawn out in the analysis of studies set out in Part III: the students at the fringes being left behind. For the purposes of review, from examination and synthesis of a number of studies focused on the effects of unionization and collective bargaining on school districts, I conclude that the students most negatively affected by these institutions were the best and worst performing students in a district. The change to collective bargaining agreements suggested here would, in part, positively impact

¹⁷⁰ For the purposes of this paper, I have defined an effective teacher as someone who is able to consistently help students grow academically regardless of the students' starting point.

¹⁷¹ In addition to simply being a general positive for student education, eliminating seniority-based layoff provisions may also contribute to slowing down the widening the achievement gap between wealthy and poor children. It is widely known that children of wealthy families attend the best schools in the district. *See generally* Antonia Cortese & Claus von Zastrow, *Closing the Staffing Gap And Ensuring Teaching for the Students Who Need It Most*, EDUCATION WEEK, Jan. 18, 2006, at 34, available at <http://www.edweek.org/ew/articles/2006/01/18/19cortese.h25.html> (last viewed Jan. 18, 2012). These also happen to be the schools to which the district's most experienced teachers are drawn as well. Thus, as the *Education Week* article cited in Part III of this Note makes clear, poor students attending one of the worst schools in a district are already at a decided disadvantage. *Id.* In an attempt to counter this problem, school districts in places like Los Angeles and Chicago have started to recruit extremely bright and motivated young teachers to serve in these troubled schools. *See* Felch, Song & Smith, *supra* note 129, at A1; *see also* Medina, *supra* note 163, at A19. Many of these young teachers end up being excellent teachers and contributing substantially to improvement in student achievement and, as a consequence, shrinking the overall achievement gap between the wealthy and poor children. *See* Felch, Song & Smith, *supra* note 129, at A1. Yet by eliminating these teachers first and in greater numbers, as was the case with the teachers at Liechty Middle School, districts retard this improvement process, thwarting the efforts of teachers at high-poverty schools to close the gap between their students and students at better schools. *Id.* As black and Hispanic students often make up a large percentage of students at high-poverty schools, seniority-based layoffs provision directly undermine efforts to close the achievement gap between and white students and their black and Hispanic classmates as well. Robert Balfanz, *Can the American High School Become an Avenue of Advancement for All?* 19 AM. HIGH SCH. 17, 20 (2009), available at http://futureofchildren.org/futureofchildren/publications/docs/19_01_02.pdf. By ending this practice, bright young teachers can continue to help underserved students make progress and in so doing, narrow the difference in educational achievement between them and wealthier students.

¹⁷² *See* Felch, Song & Smith, *supra* note 129, at A1.

¹⁷³ *See* Jennifer Medina, *Last Teacher In, First Out? City Has Another Idea*, N.Y. TIMES (Apr. 24, 2011), <http://www.nytimes.com/2010/04/25/education/25seniority.html> (explaining how layoffs based on seniority could discourage young people from entering the teaching field); *see also* Teresa Watanabe, *D.C. Schools May Hold Lesson For L.A.; Washington is Using the Controversial 'Value-added' Method To Evaluate Teachers*, L.A. TIMES, Nov. 14, 2010, at A1 (stating that both New York and Houston employ objective measures of strong teaching like in Washington, D.C.).

this problem. As the Liechty Middle School anecdote illustrates, layoff provisions based on seniority often have the most profound impact on the worst students in a district as they are often taught by the greenest educators of the teaching corps. Yet as this example shows, greenness does not necessarily correlate to commitment and talent, often times some of the strongest teachers being the newest to the profession. Thus, retooling collective bargaining agreements to ensure that this youthful talent is kept in the district over more seasoned but less effective teachers would specifically help to remedy underachievement of the lowest performing students.

B. Merit Pay

Confronting head-on the traditional proscription of merit pay would also have a significant impact on student performance. Traditionally, as discussed in Part III, collective bargaining agreements have banned merit pay, basing teacher compensation solely on a teacher's educational level and years of teaching experience.¹⁷⁴ While this prohibition may further some notion of fairness, the problem with the rule is clear: it prohibits districts from incentivizing effective teaching and recruiting top educators to unfavorable situations. In a large majority of districts, this prohibition remains the rule.¹⁷⁵ However, in recent years, school districts in a few of the nation's major cities have done away with this rule, implementing a range of merit pay schemes.¹⁷⁶ Perhaps the best-known instance of this is Michelle Rhee's introduction of a performance bonus in Washington, D.C., for all teachers whose students achieve at a certain level.¹⁷⁷

However despite the growing popularity of merit pay due to its potential benefits, it is not without its detractors, some saying that opportunity to receive more money for better performance does not actually cause teachers to improve their teaching.¹⁷⁸ Getting at what she sees as the futility of the idea, Gayle Fallon, president of the Houston Federation of Teachers said the following about Houston's four-year-old merit pay program: "The insulting thing—often what is underlying these programs—is the thought that, 'Teachers are slacking, but if we give them money, they'll do better,' . . . The teachers I

¹⁷⁴ See LIEBERMAN, *supra* note 5, at 223.

¹⁷⁵ See *Study: Few School Districts Have Merit Pay*, UPI.COM (Feb. 24, 2011), http://www.upi.com/Top_News/US/2011/02/24/Study-Few-school-districts-have-merit-pay/UPI-99981298608985/ (stating that only a small percentage of schools districts have merit pay). Of the 14,000 school districts in the United States, a study conducted by Stuart Buck and Jay P. Greene based on data from Vanderbilt University's National Center for Performance Initiatives suggests that only around 500 of these districts have some form of merit pay. This is about 3.5% of the districts nationally. *Id.* However, even this number is significantly larger than the number of districts that have meaningful merit pay systems. Speaking to this point, the researchers said, "Most were so weak that they represented no meaningful change from traditional compensation systems." *Id.*

¹⁷⁶ See *Colorado Districts Taking Up Merit Pay*, DENVER POST, Sept. 22, 2010, at A-06 (stating that the Denver school system has instituted a merit pay system) [hereinafter *Colorado Districts Taking Up Merit Pay*]. See also Ericka Mellon, *Merit Pay For Teachers Takes Hit: HISD Defends Its Program in Face of Vanderbilt Study's Results*, MERIT HISD Says Reform Worked, HOUS. CHRON., Sept. 22, 2010, at A1 (highlighting that Houston has merit pay program); Anderson, *supra* note 145, at A18 (discussing Washington, D.C.'s, merit pay program).

¹⁷⁷ See Anderson, *supra* note 145, at A18 ("D.C. Schools Chancellor Michelle A. Rhee became a hero in reform circles in part because of her insistence on a teachers' contract that allows performance bonuses.").

¹⁷⁸ See *id.* (quoting researcher who is skeptical about the ability of merit pay to help improve teacher performance). See also Mellon, *supra* note 176, at A1 (quoting president of the Houston Federation of Teachers expressing that she does not believe in merit pay systems).

know are doing the best they can.”¹⁷⁹ Though Fallon certainly could not be considered a disinterested party concerning this issue, there is some substantial evidence to support this point of view. A three-year study of the effects of merit pay on student performance conducted at the National Center on Performance Incentives at Vanderbilt University found that the students of teachers who were offered a \$5,000, \$10,000, or \$15,000 bonus for improvement in student math scores made gains no larger than students whose teacher were not given this offer.¹⁸⁰ Summarizing the study’s conclusion, the center’s director commented, “This doesn’t mean other programs don’t work. . . . But at the same time, we don’t know if other programs work either.”¹⁸¹

However the results of other studies and the successes of currently implemented programs tell a different story. For instance, district officials in Houston say that ASPIRE, the district’s performance pay program, has led to the improvement in student test scores since its institution in 2006.¹⁸² While the district acknowledged that the ASPIRE program was not simply a merit pay system, merit pay rests at its core and the program has had positive results.¹⁸³ A study conducted at North Carolina’s SAS Institute also suggests that merit pay is an effective incentive in getting better teaching out of educators.¹⁸⁴ Focusing its study on the Houston school system, it too found that the district’s merit pay system has had a positive effect on students’ test scores.¹⁸⁵

¹⁷⁹ Mellon, *supra* note 176, at A1.

¹⁸⁰ Anderson, *supra* note 145, at A18

In a three-year experiment funded by the federal grant and aided by the Rand Corp., researchers tracked what happened in Nashville schools when math teachers in grades 5 through 8 were offered bonuses of \$5,000, \$10,000, and \$15,000 for hitting annual test-score targets. About 3000 teachers volunteered. Researchers randomly assigned half of the participants to a control group ineligible for the bonuses and the other half to an experimental group that could receive bonuses if their students reached certain benchmarks. Researchers designed the bonuses to be large enough to function as a legitimate incentive for teachers whose average salary, according to a union official, is between \$40,000 and \$50,000. There were no additional variables in the experiment: no professional development, mentoring, or other elements meant to affect test scores. The bonuses, totaling nearly \$1.3 million, were funded by businessman Orrin Ingram, according to news reports. . . . On the whole, researchers found no significant difference between the test results from classes led by teachers eligible for bonuses and those led by teachers who were ineligible.

Id.

¹⁸¹ Mellon, *supra* note 176, at A1.

¹⁸² *Id.* (“[Houston Independent School District (HISD) Assistant Superintendent Carla] [S]tevens added that HISD has seen improved academic achievement since the school board approved the bonus program in 2006. For example, the district has more students scoring at the higher ‘commended’ level on the Texas Assessment of Knowledge and Skills.”).

¹⁸³ *Id.* (reporting higher student scores on the Texas Assessment of Knowledge and Skills under the ASPIRE program).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (“A 2009 analysis of HISD’s bonus system found some small positive effects on student test scores. That study was done by researchers with North Carolina’s SAS Institute, which is under contract with HISD to do the statistical analysis that is the basis for the bonuses.”).

Yet regardless of whether merit pay actually pushes educators to teach students in a more effective manner, the real strength of merit pay lies in something else: the ability it gives districts to attract top teachers to their district and, more specifically, to the most challenging teaching positions within their system.¹⁸⁶ Indeed, it is for this reason that many of merit pay's advocates support the idea.¹⁸⁷ By ending strict limitations governing the basis for teacher payment, school districts can spend more money to attract the best teachers to their district and can use financial incentives to draw top teachers to poor-performing schools.¹⁸⁸

Denver's institution of such a system, which it calls its Professional Compensation System or ProComp, stands as example of how effective this sort of merit pay program can be.¹⁸⁹ While the program has numerous aspects, the basics of system are as follows: teachers receive bonuses when their students perform better on standardized tests than was expected or when they meet the objective for student growth set out by the district.¹⁹⁰ Additionally, teachers receive bonuses for taking jobs in high-poverty schools or for teaching "hard-to-staff" areas like special education or math.¹⁹¹ The district's stated purpose for the bonuses is not to improve the teaching of current teachers but to attract top talent to the district, and the program has done exactly that.¹⁹² A 2010 University of Colorado study of the ProComp system indicated that teachers hired after the ProComp system was put in place are performing better than those previously with the system. This indicates that the system has brought stronger teachers to the district.¹⁹³ The study also found that "high-poverty schools with more ProComp teachers are retaining more teachers every year."¹⁹⁴ Thus, the program seems to be drawing and keeping top talent at high-need schools as well. As has been discussed throughout, the ability to put a top teacher in front of as many students as possible is central to improved student performance. Therefore, elimination of the prohibition on merit pay from teacher contracts in every district would allow for installation of systems similar to that of Denver across the nation, significantly advancing the goal of improved student achievement nationally. While it appears that allowing for merit pay would have positive effects on all students as the discussion above suggests, it seems that such a change would

¹⁸⁶ See Mellon, *supra* note 176, at A1 (quoting Department of Education representatives suggesting that one of the principal goals of offering merit pay is to attract top teachers to tough jobs). See also Jeremy Meyer, *Payouts A Bonus For DPS Teachers More Than \$27 Million Is Being Paid This Year As Incentives to Take on Challenging Duties*, DENVER POST, Nov. 28, 2010, at B-01 (quoting the superintendent of Denver Public Schools (DPS), Tom Boasberg, as saying, "The purpose of incentive pay is to attract and retain the best people possible and to encourage them to take the most challenging positions.").

¹⁸⁷ See generally Meyer, *supra* note 186, at B-01 (discussing DPS's superintendent's support for a merit pay system).

¹⁸⁸ See generally Meyer, *supra* note 186, at B-01 (describing how DPS is spending more money through its merit pay program to attract top teachers the district and keep them once they have come).

¹⁸⁹ *Colorado Districts Taking Up Merit Pay*, *supra* note 176. Under Denver's ProComp system, teachers who join the district are enrolled in the program and made eligible for merit pay automatically. Teachers teaching in the district prior to the institution of the program have to enroll. *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See Meyer, *supra* note 186, at B-01 (suggesting the ProComp system has brought stronger teachers to DPS).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

particularly serve the lowest-performing students, striking at the heart of the nation's educational crisis.
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C. Teacher Evaluation

In addition to shifting the focus of layoff provisions away from seniority and toward a merit assessment and allowing for merit pay, reshaping teacher evaluation policy is a critical step in improving student achievement throughout the country. Unlike traditional teacher evaluation procedures which prohibit school administrators from evaluating a teacher on the basis of how effective the teacher is at ensuring that students grow academically, evaluation provisions should focus principally on a teacher's skill at aiding his or her students in their academic development. Though currently not widespread, evaluation systems emphasizing teacher effectiveness based on student achievement have started to take root in individual districts throughout the country. For instance, as discussed in Part III, Michelle Rhee was able to install such a policy in the nation's capital during her tenure as chancellor of D.C. Public Schools.¹⁹⁶ Similar systems have also been implemented in New York City and Houston.¹⁹⁷ By focusing on student achievement and teacher effectiveness, these districts have greatly increased teacher accountability to the school system and harshly disincentivized poor teaching, which are both critically important to improving student performance.

While each of these districts' evaluation procedures differ slightly, all incorporate a measure known as a "value-added" score to determine how a teacher's students have grown academically while in that teacher's classroom.¹⁹⁸ This value-added measure compares students only to themselves, tracking an individual's academic development from one year to the next.¹⁹⁹ Districts use a student's score on standardized tests from the current academic year and analyze it against the student's score on a similar examination from a previous year to generate the student's value-added score.²⁰⁰ As a result, many invested in educational reform believe this technique is particularly promising as it accounts for racial

¹⁹⁵ As alluded to here, merit pay, like performance-based layoffs, would go a long way in improving education for some of the students who need the most help: a district's lowest performers. *See generally* Meyer, *supra* note 186, at B-01 (touting the retention of strong teachers in poor schools under Denver's merit pay system).

¹⁹⁶ *See* Turque, *supra* note 156, at A01.

¹⁹⁷ *See* Jason Song, *LAUSD Presses Union on Test Scores; The District Wants New Labor Contracts To Include 'Value-added' Data as Part of Teacher Evaluations*, L.A. TIMES, Aug. 21, 2010, at A1. In New York, 20% of a teacher's evaluation is based on objective measures of student growth, which the district has determined to be a measure of teacher effectiveness. *Id.*

¹⁹⁸ *See* Song, *supra* note 197, at A1. *See also* Nick Anderson, *Gates Foundation Research Finds Test Score Growth is Sign of A Good Teacher*, WASH. POST, Dec. 11, 2010, at A18 (stating that value-added is used in the Washington, D.C. school district). In Washington, D.C., value-added scores make up half of a teacher's evaluation. Watanabe, *supra* note 150, at A1.

¹⁹⁹ *See* Watanabe, *supra* note 150, at A1 (stating that value-added looks at the individual progress of a student instead of comparing one student to another).

²⁰⁰ *Los Angeles Teacher Ratings*, L.A. TIMES, http://projects.latimes.com/value-added/faq/#what_is_value_added (last viewed Jan. 18, 2012) ("Value-added analysis is a statistical method that estimates the effectiveness of a teacher or school by looking at the standardized test scores of students. Past scores are used to project each student's future performance. The difference between the child's actual and projected results is the estimated 'value' that the teacher or school added (or subtracted) during the year.").

and socio-economic differences.²⁰¹ Teachers whose students have value-added scores demonstrating significant academic growth are considered to be quite effective while those with students who show little progress according to value-added analyses are considered to be less effective.²⁰² Through the implementation of a value-added analysis, districts employing this assessment technique have been able to remove a significant number of underperforming teachers, dramatically reshaping their teacher corps for the better.²⁰³

Despite the benefits that value-added analyses gives school districts in assessing the ability of its teachers, many have not been accepting of the new technique, questioning whether it is ready for use in such important decisions as teacher hiring and firing.²⁰⁴ In a September 5, 2010, *New York Times* article, economic columnist David Leonhardt notes some of these concerns, stating that while the benefits of the value-added analysis are clear, the scores generated by the technique can fluctuate significantly from one year to the next, making it difficult to know whether the scores of a teacher's students from any given year accurately represents the teacher's level of effectiveness.²⁰⁵ Further, Leonhardt suggests that the analysis does not account for the fact that students are not randomly assigned to teachers, and thus teachers who generally work with slower learners may be negatively represented by the use of value-added scores through no fault of their own.²⁰⁶ Many education experts and union leaders have also questioned the use of the value-added analysis, making the argument that the technique is not yet sufficiently accurate for use in such significant decisions.²⁰⁷ Additionally, some experts and officials point

²⁰¹ Watanabe, *supra* note 150, at A1 (“By focusing on the individual progress of students year after year, value-added put aside factors that contribute to achievement disparities, such as family income, educational levels and English fluency . . .”).

²⁰² See generally *id.* As alluded to earlier, even in districts that employ value-added scores, other factors go into a teacher's overall evaluation. See Song, *supra* note 197, at A1.; see also Watanabe, *supra* note 150, at A1.

²⁰³ See Watanabe, *supra* note 150, at A1. As discussed *supra* at IV.C., as a result of the implementation of value-added measurements in teacher evaluations in Washington, D.C., former Chancellor Rhee was able to fire seventy-five teachers who were found to be ineffective and gave 700 who were found to be minimally effective one year to improve. *Id.*

²⁰⁴ See Song, *supra* note 197, at A1 (“In an interview last week, [United Teachers Los Angeles President A.J.] Duffy criticized value-added analysis because it depends on standardized test scores that he considers flawed. He said that he wasn't opposed to principals using it confidentially to give teachers feedback, but that it had no place on a formal evaluation.”); Howard Blume, *California; UTLA Won't Accept Pay Cuts, 'Value-added'; Teachers Stand Firm Against Larger Class and Evaluations Using Students' Test Scores*, L.A. TIMES, Dec. 16 2010, at AA3 (recounting United Teachers Los Angeles expressing their opposition to the use of value-added in teacher evaluations). See also Ericka Mellon, *HISD Looks At How to Grade Teachers; New Criteria For Evaluation Likely to Include Kids' Test Scores; Teachers: Meeting For Months*, HOUS. CHRON., Nov. 8, 2010, at A1 (quoting Randi Weingarten, president of the American Federation of Teachers as saying, “The more we look at it [value-added], the more concerned we are it's not ready for prime time”); Turque, *supra* note 156, at A01 (“Some teachers call it overly complex and dependent on an unreliable statistical methodology for linking test scores to individual teachers.”).

²⁰⁵ David Leonhardt, Op-Ed., *Stand and Deliver*, N.Y. TIMES MAG., Sept. 5, 2010, at 13, 14 (“Among the limitations [of value-added], scores can bounce around from year to year for any one teacher, notes Ross Weiner of the Aspen Institute, who is generally a fan of the value-added approach. So a single year of scores—which some states may use—can be misleading.”).

²⁰⁶ *Id.* (“In addition, students are not randomly assigned to teachers; indeed, principals may deliberately assign slow learners to certain teachers, unfairly lowering their scores.”).

to the fact that the use of value-added encourages instructors to “teach to the test” as another major concern with the use of the new evaluation measure.²⁰⁸

However, notwithstanding the concerns with the valued-added analysis voiced by some in the education world, recent studies have provided substantial evidence that the new technique is an accurate indicator of a teacher’s level of instructional effectiveness. Concerned with, among other things, the purported large fluctuations in results seen at times with the use of the value-added analysis, Harvard University education researcher Thomas Kane conducted one of the earliest studies of the value-added analysis to examine this claim.²⁰⁹ Focusing his study on the Los Angeles United School District, Kane selected 156 district teachers and randomly assigned them to different classrooms.²¹⁰ Next, using previous value-added scores of these teacher’s students, Kane tried to predict how effective these teachers would be with their new students.²¹¹ The results were that the past value-added scores were strong predictors of how these teachers did in their new classrooms, suggesting that the evaluation measure is probably significantly more accurate than some had initially thought.²¹² Thus, despite skepticism about the effectiveness of the value-added analysis as an assessment measure, some research appears to be indicating that the measure can be trusted to give reliable assessments of teachers.²¹³

A 2010 study conducted by the Bill and Melinda Gates Foundation has only further confirmed the strength of the value-added analysis. The \$45 million study comprising 3,000 teachers from six school districts across the country concluded that despite the technique’s imperfections, its advantages substantially outweigh its flaws.²¹⁴ Similar to Kane’s initial experiment, the study found that teachers whose students produced high value-added scores in the past were able to replicate these results in

²⁰⁷ Turque, *supra* note 156, at AA1 (teachers expressing their concern is an unreliable measure for making judgments concerning teacher effectiveness). Mellon, *supra* note 176, at A1 (AFT president Randi Weingarten expressing her concern that value-added is not ready for use in its current state).

²⁰⁸ Felch, *supra* note 150, at AA1 (“Teachers unions and some education experts have argued that value-added is an unreliable measure that encourages rote learning and ‘teaching to the test.’”).

²⁰⁹ Jason Felch, *Grading the Teachers: No Gold Stars for Excellent L.A. Teaching; Effective Instructors Get Little Recognition. Often Their Principals Don’t Even Know Who They Are.*, L.A. TIMES, Aug. 29, 2010, at A1. Commenting on the strength of the value-added analysis, Harvard’s Kane commented that while it is not a perfect measure, “there is currently not a better measure of teacher effectiveness than the value-added approach.” *Id.* at A23.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* A *Los Angeles Times* study of value-added further demonstrated the strength of the value-added analysis. *Id.* Though value-added scores are not yet used as part of teacher evaluations in Los Angeles, the *Los Angeles Times* used the analysis to rank 6,000 third through fifth grade teachers in LAUSD. *Id.*; Felch, *supra* note 150, at AA1. The study found that the teachers who received the top 100 scores were extremely effective at helping students grow academically. Felch, *supra* note 209, at A1. Addressing this, a recent *Los Angeles Times* article wrote the following: “What’s clear from the data is that these teachers have an immediate and profound effect on how much children learn. On average, their students leapt twelve percentile points on tests of English, from the 58th to the 70th. In math, the gains were more stark: a seventeen percentile point jump, from 58th to 75th. All in a single year.” *Id.* at A2. Thus, the L.A. TIMES gives significant credence to how accurate the value-added approach is in identifying top teachers.

²¹³ See Felch, *supra* note 209, at A1 (discussing research indicating that the value-added analysis is an accurate and reliable measure of teacher effectiveness).

²¹⁴ See Anderson, *supra* note 145, at A18.

subsequent years and across different classrooms, bolstering an argument for the technique's accuracy.²¹⁵ As one foundation official put it, "In every grade and subject we studied, a teacher's past success in raising student achievement on state tests was one of the strongest predictors of his or her ability to do it again."²¹⁶ Yet the foundation's study did more than further confirm the strength of the value-added technique as a reliable metric from teacher effectiveness. Researchers found that students whose value-added scores indicated significant academic growth were not simply prepared for an examination.²¹⁷ These students had also gained a true understanding of the math concepts they had been taught and were able to demonstrate their comprehension of texts they had read in writing, directly countering the idea that value-added encourages teaching to the test as some have suggested.²¹⁸ In fact, students who reported that their teacher had only taught them for the test registered lower value-added scores than their peers.²¹⁹ Thus, while the value-added analysis may not be perfect and at times is subject to varying results, as the research here indicates, it does serve as a relatively accurate indicator of teacher performance based on true student understanding and development. For these reasons, contract provisions that call for implementation of this metric would give school districts a reliable tool not simply to review teachers on such measures as teaching techniques or ability to manage their classroom but how effective they are at doing the job they are paid to perform, which is ensuring student academic growth.

Yet in addition to simply reshaping contract provisions to create a more rigorous, product-driven evaluation process, teacher contracts should stipulate clear incentives and disincentives for strong and poor performance, respectively. Based around value-added scores and other evaluation measures, teachers could be assigned a performance score. A district could then create a numeric scale along which it would place its teachers for assessment purposes.²²⁰ It could set numeric benchmarks to stratify the scale into low, average, and high-performing categories. For those teachers who fell into the low-performing category at the end of the academic year, they would be placed on probation, and if their performances were similar the following year, they would be subject to dismissal. This system, mirroring the one that has been implemented in Washington, D.C., would create both a significant disincentive for poor teaching and a procedure by which poor teachers could quickly be removed.²²¹ These changes would not only encourage teachers to constantly be working to teach at the highest level, but would also quickly eliminate poor teachers so that the fewest number of students possible would be underserved.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* ("Other findings suggest that teachers with high 'value-added' ratings are able to help students understand math concepts or demonstrate reading comprehension through writing. . . .").

²¹⁸ *Id.*

²¹⁹ Felch, *supra* note 209, at A1 ("But the study found that teachers whose students said they 'taught to the test' were, on average, lower performers on value-added measures than their peers, not higher.").

²²⁰ The teacher evaluation scores discussed here do not only refer to the value-added score generated for a teacher's student, but also other factors that would go into the evaluation process. These could include management of the classroom or disciplinary measures. However, what should rest at the center of the evaluation process and should count for a substantial percentage are value-added scores to ensure teachers are helping students grow academically.

²²¹ Turque, *supra* note 156, at A01 (describing how under Washington, D.C.'s, evaluations system, if a teacher receives a rating of minimally effective, "they have one year to improve their performance or face dismissal.").

As an incentive for strong teaching, teacher contracts should provide for the public release of the names of the teachers who achieve evaluation scores in the top third of all district teachers, recognizing them for their excellent achievement. Such practices have been implemented in select districts around the country. For instance, in Los Angeles, school officials released information to the *Los Angeles Times* detailing the success of 6,000 elementary school teachers in raising student English and math scores.²²² The *L.A. Times* published an article containing this information in August of 2010.²²³ As previously noted, while LAUSD does not currently use value-added scores in teacher evaluations, that information did serve as the basis of this report.²²⁴ Two South Carolina newspapers published the same information about teachers in Charleston, and a similar database of teachers has been published for public access as well.²²⁵

Unlike these publications, however, which published the scores for teachers no matter how well or poorly they performed, two reasons suggest that publishing the names of only those teachers in the top third of the district may be better. First, while value-added data does give a good indication of a teacher's effectiveness, it is not as good at distinguishing between teachers who have similar levels of effectiveness. As some education experts have pointed out, distinguishing between teachers who, for instance, rank in the 45th and 53rd percentile for effectiveness is an instance in which the value-added analysis is at its weakest.²²⁶ Thus by comparing all teachers using value-added as the basis, the rankings are susceptible to inaccuracy concerning teachers of moderate performance level. Second, publishing the scores of the worst performing teachers in the district may subject these instructors to substantial public humiliation.²²⁷ If rapid removal for poor performance, which is the disincentive outlined above, is already a part of a teacher's employment terms, public embarrassment seems unnecessary to ensure teachers are doing all they can to offer top level instruction to their students. Similarly, such a measure may discourage talented yet inexperienced young people from entering the teaching profession as they may worry about damage done to their professional reputation while simply developing their teaching skills. A practice of publishing only the names of the top third of teachers eliminates both the problem of undue public embarrassment and value-added inaccuracy, serving only as an incentive for teachers to perform well and be recognized. While the permissibility of releasing teacher evaluation scores is

²²² Jason Song & Jason Felch, *N.Y. To Release Teacher Ratings; The Move is Expected To Escalate the National Debate on Educator Evaluations*, L.A. TIMES, Oct. 21, 2010, at A1.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See, e.g., Leonhardt, *supra* note 205, at 13, 14 ("The value-added data probably can identify the best and worst teachers, researchers say, but it may not be very reliable at distinguishing teachers in the middle of the pack. . . . He [Joel Klein, superintendent of New York's public schools] also said, 'I wouldn't try to make big distinctions between the 47th and 55th percentiles.'"); Diane Ravitch, *Why Naming Names Is Wrong*, EDUCATION WEEK (Sept. 27, 2011, 7:50 AM), http://blogs.edweek.org/edweek/Bridging-Differences/2011/09/why_naming_names_is_wrong.html (suggesting that the value-added analysis can only effectively distinguish between teacher ranked at the very top and bottom of the district but cannot reliably delineate between those falling in the middle).

²²⁷ See, e.g., Paul Riede, *Should ratings of public school teachers be made public?*, SYRACUSE.COM (Oct. 9, 2011, 3:22 AM), http://www.syracuse.com/news/index.ssf/2011/10/should_ratings_of_public_schoo.html (stating that publishing the rankings of underperforming teachers would be humiliating for these educators).

currently not something addressed in bargaining contracts, contracts could explicitly provide for this as the release of this information in the few districts that have already done so has been highly contested.²²⁸

While the implementation of the more rigorous teacher evaluation system and the associated incentives and disincentives suggested here would not specifically target one group of students (high performers, low performers, etc.), holding teachers to higher teaching standards would undoubtedly prove beneficial for all students. Low-performing and particularly high-performing students who are currently most underserved would be likely to enjoy an increase in the quality of their instruction as would all other students, as teachers across the board would be held to higher performance standards.

Though there are potentially numerous modifications that could be made to collective bargaining agreements to facilitate positive change in student performance, the three modifications discussed above address areas of teacher contracts that most desperately need restructuring. Revamping evaluation provisions in the manner addressed herein would substantially increase teacher accountability and eliminate ineffective teachers from the teaching corps, while reshaping layoff provisions and allowing for merit pay would make it much easier for districts to put a strong teacher in every classroom. Together, these changes would significantly change the makeup of America's teaching corps, attracting and retaining the brightest and most committed to the field and tolerating nothing less. It is only behind the efforts of talented teachers that the nation's students will improvement academically. The suggested modifications discussed in Part IV rest upon this understanding.

V. CONCLUSION

From their very inception, teachers' unions stood as symbols of hope and dignity for educators who had very little of either. Born into tumultuous times, these organizations gave teachers a collective voice that could not be ignored, demanding for them the respect and recognition a group tasked with such a great responsibility undoubtedly deserved. When struggling school districts of the early twentieth century made opportunistic moves to take advantage of teachers or simply improperly prioritized their needs, teachers' unions served as a vehicle by which educators could demand these districts' attention. The advent of union collective bargaining in the 1960's gave teachers a seat at the table of decision-making that for years had been nothing more than a distant dream. Yet as the twentieth century drew closer to its end, teachers' unions began to lose their way. So focused on the concerns of the teachers they represented, their attention turned away from those who deserved it the most: American children. Union collective bargaining agreements focused principally on the needs of teachers at the expense of students have characterized the late twentieth and early twenty-first centuries, and as a result, have had a detrimental effect on the academic performance of America's young people. The nation no longer serves as the international example of educational excellence it once did, now lagging behind far less developed countries. The effects on the country's poor and minority children have been particularly devastating, as they have often been subject to the worst that an already strained system has to offer.

To change this tide, the nation must actively reshape teacher collective bargaining agreements, not in a manner that unfairly undermines the interests of teachers, but in a way that holds teachers accountable to perform at the highest level and focus their efforts and attention principally on the needs of the students who fill their classrooms. Contracts must provide for ways to evaluate teachers on the merits of their work and put a highly effective teacher in even the poorest classrooms. The nation cannot continue on

²²⁸ See Song & Felch, *supra* note 222, at A1 (stating that the teachers' union in New York plan to fight release of teacher ratings). See also Felch, *supra* note 209, at A1 ("The idea of publicly rating teachers by name has generated enormous controversy among educators and experts across the country. The debate has focused on whether the method is sound and the publicity is fair to those with low rankings.").

the educational path which it currently walks, and teachers' unions must join the effort to correct a badly broken educational system through reimagining traditional terms of contract. The stakes, as one impassioned contributor to the *Washington Post* points out, could not be higher: "Until we fix our schools, the gap between the haves and the have-nots will only grow wider and the United States will fall further behind the rest of the industrialized world in education, rendering the American dream a distant, elusive memory."²²⁹

²²⁹ Op-Ed., *How To Fix Our Schools: A Manifesto*, WASH. POST, Oct. 10, 2010, at B1.