

# Student Note: Stronger Together: How Union Friendly Legislation Can Help Mend the Teacher Shortage

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## INTRODUCTION

The practice of organized labor has a long history in the United States, and currently a significant number of workers in the United States are part of a labor union.<sup>1</sup> Surprisingly, some of the most prominent and influential labor unions in the United States revolve around the jobs that teach and take care of our children, as every state has a teachers' union presence.<sup>2</sup> The two most prominent teachers' unions are the National Education Association (NEA) and the American Federation of Teachers (AFT), which combine represent nearly five million individuals.<sup>3</sup> These organizations not only have a major presence in the public school system, but they are also amongst the top ten largest labor unions in the country.<sup>4</sup> Teachers' unions do not have isolated effects to only the teachers they represent, but instead have far reaching political power and are often influential in shaping school districts.<sup>5</sup> An example of this political power was showcased in 2018, when several teacher's strikes occurred around the country.<sup>6</sup> After these strikes, many politicians who denounced the strikes, as well as those who favored school privatization lost in the election.<sup>7</sup> This was likely not coincidental as teachers' unions are known to spend millions of

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1. Ellen Terrell, *Founding of the National Labor Union and the 1st National Call for a 8-Hour Work Day*, LIBR. OF CONG. (May 11, 2020), <https://guides.loc.gov/this-month-in-business-history/august/national-labor-union-8-hour-work-day>; News Release, Union Members – 2023, Bureau of Lab. Stat. (Jan. 23, 2024) (on file at <https://www.bls.gov/news.release/pdf/union2.pdf>).

2. Monica Herald, *The Largest Labor Unions in the US*, WORLDATLAS (Mar. 16, 2020), <https://www.worldatlas.com/articles/the-largest-labor-unions-in-the-us.html>.

3. Jack Flynn, *The 15 Largest Teachers' Unions in the United States*, ZIPPPIA (Apr 23, 2023), <https://www.zippia.com/advice/largest-teachers-unions/>.

4. *Id.*

5. Joshua M. Cowen & Katharine O. Strunk, *The Impact of Teachers' Unions on Educational Outcomes: What We Know and What We Need to Learn*, ECON. EDUC. REV. 1, 13 (2015).

6. Lauren Anderson, *The Teacher Unions Reinvigorating Progressive Politics*, HARV. POL. REV. (Oct. 20, 2020), <https://harvardpolitics.com/teacher-unions-progressive/>.

7. *Id.*

dollars on ballot initiatives for candidates with union friendly agendas.<sup>8</sup> While teachers' unions have vast influence over most public schools and political pull, there are states that are resistant to the presence of teachers' unions. Teachers' unions are present in every state, but a few states have essentially handcuffed unions by making collective bargaining illegal for public employees.<sup>9</sup> Collective bargaining "is the negotiation process between an employer and a union comprised of workers to create an agreement that will govern the terms and conditions of the worker's employment."<sup>10</sup> Without the ability to negotiate, the unions are left nearly powerless.<sup>11</sup> That is why some states, including South Carolina, North Carolina, Georgia, Alabama, Arizona and Texas do not allow collective bargaining for unions that represent public employees.<sup>12</sup>

The research behind the impact of teachers' unions is hard to measure, as different school district factors play a role in teacher and student success and satisfaction, such as socioeconomic level, population, and student to teacher ratio.<sup>13</sup> This is particularly true when trying to determine unions effects on student educational outcomes.<sup>14</sup> However, despite conflicting data on union effects on student educational outcomes, there is evidence of union efforts, particularly through strikes, leading to better conditions, pay, and benefits for teachers. For example, in 2018, nearly 20,000 teachers in West Virginia went on a nine-day strike, protesting for higher wages and better benefits.<sup>15</sup> In this instance, the strike was successful, and the demands of the teachers were met, showcasing, "the effectiveness of unionization to achieved shared goals."<sup>16</sup> However, after the strike the West Virginia legislature began proposing bills "to create charter school systems, allow teachers to be fired for striking, and not allow superintendents to

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8. Cowen & Strunk, *supra* note 5, at 13.

9. *Collective Bargaining Laws*, NAT'L COUNCIL ON TCHR. QUALITY (Jan. 2019), <https://www.nctq.org/contract-database/collectiveBargaining#map-7>.

10. Definition of Collective Bargaining, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/collective\\_bargaining](https://www.law.cornell.edu/wex/collective_bargaining) (last visited Apr. 12, 2024).

11. Cowen & Strunk, *supra* note 5, at 10.

12. *Collective Bargaining Laws*, *supra* note 9.

13. Cowen & Strunk, *supra* note 5, at 1.

14. *Id.*

15. Leslie Parker, *West Virginia Teachers' Strike of 2018*, PARTICIPEDIA, <https://participedia.net/case/8086> (last visited Apr. 12, 2024).

16. *Id.*

close schools during teacher strikes.”<sup>17</sup> The 2018 West Virginia teacher strike is just one example of the way unions can help teachers obtain better work benefits, but the resulting legislation also illustrates the struggles teachers’ unions are currently facing from policy makers.

Teachers’ unions participation has been steadily declining over the past years, and over 2021-2022, the NEA and AFT lost nearly 60,000 members collectively.<sup>18</sup> With many states passing “right-to-work” legislation<sup>19</sup> and with the popularity of private and charter schools rising, it is likely that teacher union participation will continue to decrease. But it is not only union participation dropping, the number of teachers working is also drastically decreasing over the past few years.<sup>20</sup> Over the past several years, there have nationally been more job openings for teachers than teachers to fill those jobs.<sup>21</sup> This issue was only exacerbated by the COVID-19 pandemic, but the roots of the issue were well in place before hand.<sup>22</sup> Low pay coupled with rising teacher stress over students behavior, and restricted teaching topics has caused many teachers to leave to profession altogether.<sup>23</sup> Opinions on teachers’ unions ability to help the teacher crisis are split as some view teachers’ unions as a hinderance to teachers, while others view them as an aid. In this article I will explore the history of teachers’ unions in the United States and how union friendly legislation can help solve the teacher shortage crisis. Part I will address the current issues causing the teacher shortage; Part II will analyze how teachers' unions can help solve the teacher shortage; and Part III will address the current anti-union

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17. *Id.*

18. Mike Antonucci, *Teachers Union Membership Drops by 59,000 Across the Nation*, THE 74 (Dec. 7, 2022), <https://www.the74million.org/article/teachers-union-membership-drops-by-59000-across-the-nation/>.

19. *What is a Right-to-Work State?*, PBMARES (Sept. 17, 2022), <https://www.pbmares.com/insights-what-is-a-right-to-work-state/>.

20. Stacey Pelika, *6 Charts that Explain the Educator Shortage*, NAT’L EDUC. ASS’N (Sept. 30, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/6-charts-explain-educator-shortage>.

21. Erica Pandey, *America’s Empty Classrooms*, AXIOS (Aug. 19, 2023), <https://www.axios.com/2023/08/19/teacher-shortage-schools-education-salaries-training>.

22. Press Release, U.S. Schools Report Increased Teacher Vacancies Due to COVID-19 Pandemic, New NCES Data Show, Nat’l Ctr. for Educ. Stat. (Mar. 3, 2022) (on file at [https://nces.ed.gov/whatsnew/press\\_releases/3\\_3\\_2022.asp](https://nces.ed.gov/whatsnew/press_releases/3_3_2022.asp)).

23. Elizabeth Mulvahill, *Why Teachers Quit*, WE ARE TCHRS. (June 14, 2019), <https://www.weareteachers.com/why-teachers-quit/>.

legislation that is occurring throughout the country and why these laws do not help to solve the teacher shortage.

## BACKGROUND

### I. The Teacher Shortage

The teacher shortage has historically been challenging to measure, due to the differences between school budgets and a lack of relevant data.<sup>24</sup> However, despite the limited research, it has become clear that across the Nation there are not enough individuals entering the teaching field and current teachers are rapidly leaving.<sup>25</sup> However, the shortage is not a new issue, instead it has been building on itself for a number of years. A 2016 report “noted that many school districts [post the Great Recession] ‘had serious difficulty finding qualified teachers for their position.’”<sup>26</sup> This trend continued as “job openings started to outpace hires in late 2017.”<sup>27</sup> Then, teachers were drastically hit by the COVID-19 pandemic, as teachers moved to an online format and many individuals who served as support staff lost their jobs.<sup>28</sup> Since the COVID-19 pandemic teachers have reported being unsatisfied with their jobs more than ever and “teachers reported a higher probability that they will leave the profession than they did before the pandemic.”<sup>29</sup> The teacher shortage has far reaching consequence, as one research describes:

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24. John Schmitt & Katherine deCourcy, *The Pandemic Has Exacerbated a Long-Standing National Shortage of Teachers*, ECON. POL’Y INST. (Dec. 6, 2022), <https://www.epi.org/publication/shortage-of-teachers/>.

25. Jake Bryant et al., *K-12 Teachers are Quitting. What Would Make Them Stay?*, MCKINSEY & CO. (Mar. 2, 2023), [https://www.mckinsey.com/industries/education/our-insights/k-12-teachers-are-quitting-what-would-make-them-stay#](https://www.mckinsey.com/industries/education/our-insights/k-12-teachers-are-quitting-what-would-make-them-stay#/).

26. Emma García & Elaine Weiss, *The Teacher Shortage is Real, Large and Growing, and Worse Than We Thought*, ECON. POL’Y INST. 1, 2 (Mar. 26, 2019).

27. Pelika, *supra* note 20.

28. Cindy Long, *Education Support Staff Face Layoffs Nationwide*, NEA TODAY (Dec. 7, 2020), <https://www.nea.org/nea-today/all-news-articles/education-support-staff-face-layoffs-nationwide>.

29. Gema Zamarró et al., *How the Pandemic Has Changed Teachers’ Commitment to Remaining in the Classroom*, BROOKINGS (Sept 8, 2021), <https://www.brookings.edu/articles/how-the-pandemic-has-changed-teachers-commitment-to-remaining-in-the-classroom/>.

A lack of sufficient, qualified teachers threatens students' ability to learn. Instability in a school's teacher workforce (i.e., high turnover and/or high attrition) negatively affects students' achievement and diminishes teacher effectiveness and quality. And high teacher turnover consumes economic resources (i.e., through costs of recruiting and training new teachers) that could be better deployed elsewhere.<sup>30</sup>

But why is there a lack of teachers in public schools? One study contends that the shortage is “not the result of an insufficient number of potentially qualified teacher . . . [but] instead a shortfall in the number of qualified teachers willing to work at current wages and under current working conditions.”<sup>31</sup> As will be discussed below, some of the main reasons individuals are not entering the teaching field and why teachers are choosing to leave include pay, student behavior, and increasing political pressure, all which have been amplified by the Covid-19 pandemic.<sup>32</sup>

*a. Pay*

Compensation often is one of the leading reasons teachers cite as to why they left or are considering leaving the field.<sup>33</sup> The reality of low pay also likely stops individuals from seeking teaching as a career field.<sup>34</sup> While the numbers vary from survey to survey, some researchers report more than half of teachers report not being able to live comfortably off their salary and that their qualifications exceed their

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30. García & Weiss, *supra* note 26.

31. Schmitt & deCourcy, *supra* note 24.

32. Matt Barnum, “I Just Found Myself Struggling to Keep Up”: Number of Teachers Quitting Hits New High, USA TODAY (Mar. 6, 2023, 7:32 AM), <https://www.usatoday.com/story/news/education/2023/03/06/more-teachers-quitting-than-usual-driven-stress-politics-data-shows/11390639002/>.

33. Bryant et al., *supra* note 25.

34. Chad Aldeman, *Why Are Fewer People Becoming Teachers?*, EDUCATION NEXT (Sept. 28, 2022), <https://www.educationnext.org/why-are-fewer-people-becoming-teachers/>.

pay.<sup>35</sup> To teach in public schools “teachers traditionally need to complete college coursework, take a certification exam, and provide references and comparable documentation,” although each state has its own qualification requirements.<sup>36</sup> Like many professions, teachers are feeling the effect of needing to obtain a college degree while “the cost of tuition at public 4-year institutions increased 9.24% from 2010 to 2022.”<sup>37</sup> Although the cost of college is rising, “teachers are making \$3,644 less, on average, than they did 10 years ago.”<sup>38</sup> Additionally, while nearly all public school teachers have a four-year degree “a large share (56%) also have advanced degrees. Teachers, however, consistently earn substantially less—in salary and benefits—than other workers with a similar level of formal education.”<sup>39</sup> While pay varies from state to state and even district to district, the average wage for a starting salary is around \$42,844.<sup>40</sup> However, the national average salary has increased by 2% from the previous year, possibly due to rising concerns about the teacher shortage.<sup>41</sup>

*b. Student Behavior*

Student behavior is also cited by teachers as another reason they are leaving the field.<sup>42</sup> Student behavioral issues are on the rise and “[m]ore than 70% of teachers report a recent increase in disruptive behavior in the classroom compared to 66% in 2019.”<sup>43</sup> The increase in problematic student behavior likely stems from the toll that the Covid-19 pandemic had on children as “71 percent of families said the

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35. Bryant et al., *supra* note 25; see Annette Choi, *Teachers are Calling it Quits Amid Rising School Violence Burnout and Stagnating Salaries*, CNN (May 31, 2023, 7:33 AM), <https://www.cnn.com/2023/05/31/us/teachers-quitting-shortage-stress-burnout-dg/index.html>.

36. Melissa Sartore, *Teaching Requirements by State*, THE BEST SCHOOLS (Mar. 21, 2023), <https://thebestschools.org/resources/teaching-requirements-by-state/>.

37. Melanie Hanson, *College Tuition Inflation Rate*, EDUC. DATA INITIATIVE (Aug. 13, 2023), <https://educationdata.org/college-tuition-inflation-rate>.

38. *The State of Educator Pay in America*, NAT'L EDUC. ASS'N (April 24, 2023), <https://www.nea.org/resource-library/educator-pay-and-student-spending-how-does-your-state-rank>.

39. Schmitt & deCourcy, *supra* note 24.

40. *The State of Educator Pay in America*, *supra* note 38.

41. *Id.*

42. Barnum, *supra* note 32.

43. Christina Whalen, *Running on Empty: Teachers Are Not Prepared for Increasing Challenging Behaviors*, RETHINKED (June 13, 2023), <https://www.rethinked.com/resources/teachers-not-prepared-increasing-challenging-behaviors/> (internal citations omitted).

pandemic was negatively affecting their children's mental health, and social isolation topped families' list of unhealthy aspects of the pandemic."<sup>44</sup> Since re-entering the classroom, teachers are dealing with increased technology disruptions from students and a lack of student participation.<sup>45</sup> Additionally, the Covid-19 pandemic hindered student educational success and left "students on average five months behind in mathematics and four months behind in reading by the end of the school year."<sup>46</sup> One group that can often help alleviate stress from teachers and help students flourish are school support staff. Support staff, otherwise known as paraprofessionals, can include "career guidance counsellors, psychologists and social workers; special educators and educational therapists; doctors and nurses; teaching and classroom assistants; and supervisors and school guards, amongst others."<sup>47</sup> While teachers were able to move to an on-line teaching format, many paraprofessionals lost their jobs during the Covid-19 pandemic, and with many school districts currently struggling with lower budgets, paraprofessionals often are not brought back into schools.<sup>48</sup>

*c. Increased political pressures*

Another issue teachers are facing is the increased politicization of classroom topics. "By spring 2022, 17 states had passed policies restricting how teachers can address topics related to race, gender, and 'divisive concepts' in the classroom."<sup>49</sup> Of those states, six have laws

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44. Conor P. Williams, *Covid Changed Student Behavior—How Are Schools Responding?*, EDUTOPIA (July 28, 2023), <https://www.edutopia.org/article/covid-changed-student-behavior-how-are-schools-responding/>.

45. *Id.*

46. Emma Dorn et al., *Covid-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & Co. (July 27, 2021), <https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning>.

47. OECD, Teachers and Support Staff, 5 PISA 87, 88 (2020), <https://www.oecd-ilibrary.org/docserver/8a94b1d7-en.pdf?expires=1712951411&id=id&accname=guest&checksum=0A876285056474E5D39A6DF493FEF0FE>.

48. Long, *supra* note 28.

49. ASHLEY WOO ET AL., WALKING ON EGGHELLS—TEACHERS' RESPONSES TO CLASSROOM LIMITATIONS ON RACE- OR GENDER- RELATED TOPICS 1 (2023).

that specify penalties for teachers who do not comply.<sup>50</sup> Teacher's report feeling confused about the limitations of these new policies and feel that the laws are too vague, causing concern that any mention of race or sexuality could result in disciplinary measures.<sup>51</sup> This confusing and vague threat of disciplinary measures is effecting teachers' work quality and teachers have reported experiencing "anxiety, nervousness, worry, and fear that they might lose their job or license or face formal complaints or legal action for raising race- or gender-related topics in the classroom."<sup>52</sup> These new bills are coming during an already existing teacher shortage and may cause more teachers to leave the field as some have already expressed that "restrictions have led them to consider leaving their jobs to teach elsewhere, to consider leaving the profession altogether, or to question whether they can remain in the profession under these working conditions."<sup>53</sup> Restrictive legislation is specifically effecting the moral of BIPOC<sup>54</sup> and LGBTQ+<sup>55</sup> teachers who feel that they cannot speak openly about their entities at school.<sup>56</sup> Studies show that students of color tend to perform academically better and receive less disciplinary actions if they have at least one teacher of color, but nationally teachers are around 80% white.<sup>57</sup> Across the Nation there has been a call to recruit and maintain more teachers of color, but legislation that makes teachers afraid to discuss race will likely discourage many people of color from wanting to teach in those districts, thus leaving a significant gap in the education system.<sup>58</sup>

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50. *Id.* at 5.

51. Janelle Griffith, *Florida Teachers are Worried New Policies Could Get Them Fired – or Even Criminally Charged*, NBC NEWS (Aug. 15, 2023, 2:09 PM), <https://www.nbcnews.com/news/us-news/florida-teachers-start-school-year-uncertainty-new-policies-take-effec-rcna99243>.

52. WOO ET AL., *supra* note 49, at 17.

53. *Id.*

54. Definition of BIPOC, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/BIPOC> (last visited Apr. 12, 2024).

55. Definition of LGBTQ+, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/LGBTQ%2B> (last visited Apr. 12, 2024).

56. WOO ET AL., *supra* note 49 at 17.

57. Jason Greenberg Motamedi, *How Teachers of Color Can Make a Difference in the Classroom and Beyond*, EDUC. N. W. (Feb. 2019), <https://educationnorthwest.org/insights/how-teachers-color-can-make-difference-classroom-and-beyond>.

58. Mayme Hostetter, *The U.S. Needs More Teachers, Especially Teachers of Color. Here's 3 Ways We Can Help*, RELAY GRADUATE SCH. OF EDUC. (May 27, 2022), <https://www.relay.edu/article/the-us-needs-more-teachers-especially-teachers-of-color-3-ways-we-can-help>.

Amid the teachers' shortage, states are looking for ways to attract people into the field through initiatives such as lowering the cost of obtaining a four-year teaching degree.<sup>59</sup> While this would help remedy some of the financial issues teachers face, it would not combat low teaching salaries, student behavioral issues, or the anxieties around increased political pressures. Looking at the most relevant issues teachers face, perhaps the best solution is to give teachers more power to shape the profession in a way that benefits them and, in return, will benefit students. A few teachers advocating alone will likely not change the conglomerate of the public school system, but teachers unionized together to achieve common goals may be able to create better conditions for themselves, thus encouraging teachers to stay and incentivizing new individuals to join the field.

## ANALYSIS

### II. How Unions Can Help Mend the Teachers' Shortage

#### *a. The History of Teachers' Unions*

Teachers' unions have been a part of the United States education system for a long time.<sup>60</sup> The National Education Association (NEA) was founded in 1857 as teachers and administrators sought to "have the teaching occupation be more prestigious, make the entrance requirements more standardized, gain higher pay, and allow teachers to have more say over their teaching conditions."<sup>61</sup> Over fifty years later, the growth of labor unions inspired Chicago teachers to form the American Federation of Teachers (AFT) and join the fight for better benefits and pay for teachers.<sup>62</sup> More than a hundred years later the NEA and the AFT remain the primary teachers unions.<sup>63</sup> Throughout the early

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59. See Michael Owen, *South Carolina Grapples with Teacher Shortage Crisis as New School Year Begins*, ABC 15 NEWS (Aug. 2, 2023, 6:40 PM), <https://wpde.com/news/local/south-carolina-grapples-with-teacher-shortage-crisis-as-new-school-year-begins-horry-county-palmetto-state-association-maness-scholarship>.

60. Adam Mertz, *A Century of Teacher Organizing: What Can We Learn?*, LAWCHA (Oct. 2014), <https://lawcha.org/century-teaching-organizing/>.

61. *Id.*

62. *Id.*

63. Flynn, *supra* note 3.

years of both unions formation, their popularity and membership fluctuated with the political atmosphere of the times.<sup>64</sup> However, union friendly legislation began to grow in 1935 when President Roosevelt passed the Wagner Act, which protected the right for private sector employees to form unions and allowed employees to engage in collective bargaining.<sup>65</sup> While the Wagner Act only gave private employees the right to collective bargaining, making this practice routine for some employees highlighted the positive outcomes from unions and caused “many Americans [to] beg[i]n to consider workers’ ability to join unions as a civil right.”<sup>66</sup> With many Americans viewing unions as a right, people “became more willing to accept collective bargaining in the public sector, and they elected many labor friendly politicians[.]”<sup>67</sup> This positive view point contributed to Wisconsin becoming the first state to pass a collective bargaining law for public employees in 1959, and in 1962, President Kennedy passing Executive Order 10988 which gave federal employees limited collective bargaining rights.<sup>68</sup> From this point on, public sector unions continued to become more common place but despite some federal legislation around public sector unions, states maintained in control of regulating these unions, and many states passed their own laws to give more powers to public sector unions.<sup>69</sup> Now, forty-four states and the District of Columbia allow for collective bargaining in some form.<sup>70</sup> Additionally, there are nearly five million members in teachers unions between the NEA and AFT.<sup>71</sup>

#### b. *How Unions Operate in Schools*

The creation of teachers’ unions brought many positive effects to teachers and other staff. These unions enact change mainly through

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64. See Mertz, *supra* note 60.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Collective Bargaining Laws, supra* note 9.

71. *About Us*, AFT, <https://www.aft.org/about> (last visited Apr. 12, 2024); *Purpose and Power in Community*, NAT’L EDUC. ASS’N, <https://www.nea.org/about-nea> (last visited Apr. 12, 2024).

collective bargaining with administration.<sup>72</sup> Collective bargaining operates in schools by “defin[ing] the rights and duties of teachers to particular assignments, guarantees teachers’ participation in school governance and educational policymaking, establishes grievance procedures, and at times creates disciplinary sanctions for teachers’ failure to achieve certain standards. It also provides for teacher participation in restructuring the workplace.”<sup>73</sup> Teacher unionization is “the influence teachers exert on their school districts through the bargaining power of their members,” whereas collective bargaining lays out the work place rules for teachers and administrators.<sup>74</sup> The power to negotiate gives teachers’ the ability to bargain for the working conditions they want, which most commonly are “class size, time for preparation . . . and autonomy in the classroom.”<sup>75</sup> This power also helps teachers bargain for higher pay and better fringe benefits.<sup>76</sup> Collective bargaining agreements however, do not only benefit union teachers as the Wagner Act lays out that “all workers covered by collective-bargaining agreements receive the full benefits of those agreements . . . whether they are union members or not.”<sup>77</sup>

*c. How Unions Can Help Solve the Teachers’ Shortage*

As discussed above, the most significant issues effecting teacher retention and recruitment are pay, student behavior, and increased political pressures. The above problems stem from teachers’ lacking resources or control in their own classroom. As one study stated, “[t]he primary role of unions is to protect workers from unrealistic demands of management, ensure a safe working environment, and extract the

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72. Randall W. Eberts, *Teachers Unions and Student Performance: Help or Hindrance?*, 17 FUTURE CHILD. 175, 177 (2007).

73. *Id.*

74. *Id.* at 180.

75. *Id.* at 181.

76. Julia Kagan, *What Are Fringe Benefits? How They Work and Types*, INVESTOPEDIA (Feb. 25, 2024), <https://www.investopedia.com/terms/f/fringe-benefits.asp> (“Fringe benefits are additions to compensation that companies give their employees.”).

77. Lucy E. Page, *Impacts of Right-to-Work Laws on Unionization and Wages*, NAT’L BUREAU OF ECON. RSCH. (Aug. 1, 2022), <https://www.nber.org/digest/202208/impacts-right-work-laws-unionization-and-wages>.

maximum compensation possible.”<sup>78</sup> As will be discussed below, unionization is one way that teachers can gain more financial resources and control over their classroom.

*i. Pay and benefits.*

One of the most significant accomplishments of teachers’ unions is gaining teachers better pay and benefits. Studies have shown that teachers represented by collective bargaining agreements obtain the benefits they want, finding that “teachers covered by collective bargaining tend to earn 5 to 12 percent more than those who are not covered.”<sup>79</sup> The increase in salary also often grows with more experience.<sup>80</sup> As discussed above there is a wage gap between teachers and other employees with the same degree level.<sup>81</sup> As unions obtain higher salaries the gap closes, as one study found “In 2015 teachers not represented by a union had a 25.5 percent wage gap and the gap was 6 percentage points smaller [19.5] for unionized teachers.”<sup>82</sup> Additionally, one study found that while unions have success in gaining higher pay they have an even larger effect on obtaining fringe benefits for teachers.<sup>83</sup> While ideally teacher obtain higher pay through union negotiations of contracts with the school board, pay has been the forefront issue of many of the largest teacher strikes, showing another arm of union power to obtain the terms they want.<sup>84</sup> In 2018, a movement titled “Red for Ed” led to 485,000 teachers and paraprofessionals striking.<sup>85</sup> While the success level of strikes varied from state to state, and district to district, most schools were able to gain some raise in pay for teachers.<sup>86</sup> Even if pay increases were not

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78. Eberts, *supra* note 72,72 at 179.

79. *Id.* at 181.

80. Cowen & Strunk, *supra* note 5, at 11.

81. Schmitt & deCourcy, *supra* note 24.

82. SYLVIA ALLEGRETTO & LAWRENCE MISHEL, THE TEACHER PAY GAP IS WIDER THAN EVER 4 (2016).

83. Eberts, *supra* note 72,72 at 181.

84. Eric Blanc, *The Red for Ed Movement, Two Years In*, NEW LAB. F. (Oct. 3, 2020), <https://newlaborforum.cuny.edu/2020/10/03/the-red-for-ed-movement-two-years-in/>

85. *Id.*

86. Dana Goldstein & Elizabeth Dias, *Oklahoma Teachers End Walkout After Winning Raises and Additional Funding*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html>; Parker, *supra* note 15;

immediately gained or less than argued for, strikes in such a large number can demonstrate to the legislature the seriousness of the issues teachers are fighting for.

Some argue that unions are harmful to teacher pay because most unions create uniform pay structures and increase pay based on seniority and not performance which lets underperforming teachers get by and does not incentivize teachers to work hard.<sup>87</sup> Opponents often argue for performance-based pay, otherwise referred to as merit pay, which often bases teachers' pay off of student test scores.<sup>88</sup> Unions tend to fight against merit pay and these agreements have been to focal points of strikes in several states.<sup>89</sup> Proponents of merit pay argue that implementing these types of salary incentives will “not only provide[] teachers with an option to make more money but also motivate[] them to meet target objectives” and “make[] it easier to remove a bad teacher . . . [and] be an attractive incentive” to teachers.<sup>90</sup> However, merit pay may harm student learning and increase teacher shortage issues. Basing teacher salaries or bonuses off of student performance on tests would likely encourage teachers to forgo other aspects of early education to focus solely on standardized tests.<sup>91</sup> As one writer points out, “[t]eachers skip once celebrated teachable moments. They neglect valuable life lessons . . . all in the name of passing a single test on a single day during the school year.”<sup>92</sup> Additionally, merit pay increases the “probability of

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Madeline Will, *Teacher Strikes, Explained: Recent Strikes, Where They're Illegal, and More*, EDUC. WK. (Oct. 30, 2023), <https://www.edweek.org/teaching-learning/teacher-strikes-explained-recent-strikes-where-theyre-illegal-and-more/2023/10>.

87. Catrin Wigfall, *Teachers Agree: Teachers' Unions Make it 'Harder to Fire Bad Teachers'*, AMER. EXPERIMENT (May 17, 2018), <https://www.americanexperiment.org/teachers-agree-teachers-unions-make-it-harder-to-fire-bad-teachers/>.

88. Derrick Meador, *Performance Based Pay for Teachers*, THOUGHTCO. (Sept. 27, 2018), <https://www.thoughtco.com/performance-based-pay-for-teachers-319470>.

89. Valerie Strauss, *'Performance Pay' Drove Denver Teachers to Strike—and it is Failing in Other Districts, too. A North Carolina Teacher Explains Why It Doesn't Work*, WASH. POST (Feb. 12, 2019, 6:00 AM), <https://www.washingtonpost.com/education/2019/02/12/performance-pay-drove-denver-teachers-strike-it-is-failing-other-districts-too-north-carolina-teacher-explains-why-it-doesnt-work/>.

90. Meador, *supra* note 8888.

91. *Id.*

92. *Id.*

a teacher [with a lower rating] leaving the district on their own.”<sup>93</sup> Well initially it may seem like a positive for low scoring teachers to leave the field, basing teachers worth on tests does not offer a holistic view of a teachers value or ability. Different factors effect student’s ability to perform well academically, such as parental involvement and poverty.<sup>94</sup> Low-income schools already face challenges in maintaining teachers and basing salary off test scores will likely “keep many of the best teachers from pursuing jobs in those high-risk areas because of nearly impossible odds to meet the performance measures needed to make it worth the while.”<sup>95</sup>

ii. *Student Behavior*

Unions may also have an indirect effect on student behavior issues. Smaller class sizes and increases in paraprofessionals are ways to help curb student behavioral issues and help teachers maintain control in the classroom.<sup>96</sup> Unions, mainly through collective bargaining agreements, can help reduce classroom sizes and keep or hire paraprofessionals.

First, studies have shown that “reduced-size classes—below 20 pupils—[are] associated with improved academic performance.”<sup>97</sup> Teachers involved in a study testing the effects of smaller classrooms reported:

[A]n increased sense of community in small classes . . . [t]he teachers reported “more time to give to ‘troubled kids’ the attention they so desperately need, reducing the likelihood of their becoming a discipline problem. [citation omitted] When the same teachers later taught

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93. Matthew Stone & Caitlynn Peetz, *Does Performance-Based Teacher Pay Work? Here’s What the Research Says*, EDUC. WK. (June 12, 2023), <https://www.edweek.org/leadership/does-performance-based-teacher-pay-work-heres-what-the-research-says/2023/06>.

94. Meador, *supra* note 8888.

95. *Id.*

96. See Jeremy D. Finn et al., *The “Why’s” of Class Size: Student Behavior in Small Classes*, 73 REV. EDUC. RSCH. 321, 351-53 (2003); Gretchen Vierstra, *Paraprofessionals: What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/articles/paraprofessionals-what-you-need-to-know> (last visited Apr. 14, 2024).

97. Finn et al., *supra* note 96 at 321.

large classes (about 24 students), they reported “more student conflicts in the classroom” as a common theme.<sup>98</sup>

Researchers also found that when students have better behavior with their teacher and peers, there is a “strong correlation[] with academic performance.”<sup>99</sup> As teachers express interest in teaching to smaller groups, unions have the power to work with school districts to build class size limits into school policy. Unions have proved effective at this as unionized teachers tend to have a seven to twelve percent lower student-teacher ratio and spend around four percent more time on class preparation.<sup>100</sup>

Another way to help improve student behavior and alleviate the pressures on teachers is through increasing the presence of paraprofessionals in schools.<sup>101</sup> As mentioned above, the term paraprofessionals covers a wide range of careers and each plays a vital role in forming important relationships with students.<sup>102</sup> As paraprofessionals play a different role with students than teachers do they, “often act as informal social workers, mentors or coaches to students, leading a concerted effort to address students’ social and emotional needs and helping them prepare for life beyond school.”<sup>103</sup> While each staff role in schools offers a chance to help students, in-school counselors may have the largest effect on behavior as they work to “develop various academic and social skills that can translate to better grades, stronger friendships, improved behavior and other positive outcomes.”<sup>104</sup> While these workers are not teachers, paraprofessionals often play an active role in teachers’

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98. *Id.* at 337-38.

99. *Id.* at 323.

100. Eberts, *supra* note 72, at 181.

101. Vierstra, *supra* note 96.

102. *Id.*

103. Jeff Whittle, *Support Staff are the Backbone of Our Schools*, AFT VOICES (May 17, 2019), <https://aftvoices.org/support-staff-are-the-backbone-of-our-schools-75d0f379b719>.

104. *What is a School Counselor? How to Help Students Thrive*, WAKE FOREST UNIV., <https://counseling.online.wfu.edu/blog/what-is-a-school-counselor/> (last visited Apr. 14, 2024).

unions.<sup>105</sup> Because of this, unions often include issues faced by paraprofessionals in their political activity and collective bargaining agreements and have been successful in helping obtain pay raises for paraprofessionals in conjunction with teachers.<sup>106</sup> Through the same way unions help protect jobs for teachers, unions could expand their roles with paraprofessionals in order to help retain and attract individuals into these vital roles.

One of the main arguments against teacher unionization is the increase in cost to operate unionized schools. One study found that “the operating cost of unionized elementary schools is about 15 percent higher; of unionized high schools about 8 percent higher [than non-unionized].”<sup>107</sup> Through unions “negotiating higher salaries and smaller class size,” they influence district spending, and typically increase that spending.<sup>108</sup> Historically, paraprofessionals are the first workers laid off when budget cut comes, an issue which was exemplified during the COVID-19 pandemic when “thousands of school paraprofessionals across the US [were] [] laid off as the school year beg[a]in[.]”<sup>109</sup> Well it is true that unionization, hiring and retaining paraprofessionals and reducing class room size, increase operating costs, this increased cost may be needed. As discussed above, across the nation school districts are struggling to fill vacancies and after the COVID-19 pandemic students are academically behind.<sup>110</sup> A lack of teachers will likely only exacerbate student academic issues, therefore expanding school districts budget may be necessary to stop a crisis from occurring. Additionally, as the entire nation faces economic lapses on the

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105. Nick Juravich, *Paraprofessional Educators and Labor-Community Coalitions, Past and Present*, LAWCHA (Feb. 24, 2015), <https://www.lawcha.org/2015/02/24/paraprofessional-educators-and-labor-community-coalitions-past-and-present/>.

106. *Id.*; Goldstein & Dias, *supra* note 8686.

107. Eberts, *supra* note 7272, at 182.

108. *Id.*

109. Martin Burns, *As Schools Re-Open, Paraprofessionals Get the Axe En Masse: Getting Them Back Will be a Recruitment Challenge*, RECRUITING NEWS NETWORK (Aug. 26, 2020), <https://www.recruitingnewsnetwork.com/posts/as-schools-re-open-paraprofessionals-get-the-axe-en-masse>.

110. Schmitt & deCourcy, *supra* note 24; Dorn et al., *supra* note 46.

back of the COVID-19 pandemic, better education can help mend economic issues, as one study stated:

Economists have clearly show that investing in education leads to major economic returns in terms of both salaries and gross domestic product (GDP). It also contributes to an overall more successful economy and thriving labor market, as employment tends to closely track increasing education outcomes. Indeed, one of the best predictors of economic growth is education outcomes, and furthering education would provide a much-needed boost to the American economy—and American workers.<sup>111</sup>

Therefore, although unions often increase district spending, that extra cost may be the answer to both educational lapses and economic slumps.

*iii. Increased Political Pressure*

Unions can also help alleviate political pressure from teachers through their political pull, establish clear terms in collective bargaining agreements, and provide a better sense of security as they help protect against teacher firing. School board officials with union endorsements tend to be more successful in elections, for example “in California, union-endorsed candidates won 71 percent of their contests.”<sup>112</sup> The advantage of endorsement is consistent across the country as “[r]esults indicate that endorsement does indeed increase the likelihood of winning—having impacts roughly similar to incumbency, a well-known political advantage.”<sup>113</sup> Unions power over larger elections is less clear, but the NEA and AFT spend a significant amount of money on political

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111. Ulrich Boser, *Better Learning Outcomes Can Help Kick-Start the Economy*, AM. PROGRESS (Aug. 26, 2020), <https://www.americanprogress.org/article/better-learning-outcomes-can-help-kick-start-economy/>.

112. Aaron Churchill, *Teachers Unions’ Power to Elect School Board Members*, THOMAS B. FORDHAM INST. (Aug. 1, 2022), <https://fordhaminstitute.org/ohio/commentary/teachers-unions-power-elect-school-board-members>.

113. *Id.*

candidates and lobbying expenditures.<sup>114</sup> Between 1989 and 2010 “[t]he NEA and AFT combined spend more than \$59 million on federal elections” which presumably has some effect on election outcomes.<sup>115</sup> However, union political power is more difficult to flex in red states, as union political money usually goes towards Democratic candidates.<sup>116</sup> Despite this, teachers’ unions large membership base and funds could be put to use to elect candidates who oppose restricting topics in the classroom in order to help alleviate some of the pressure teachers are facing.

Another solution may be found in collective bargaining agreements. Amidst ambiguity of state laws prohibiting certain topics, collective bargaining forces school boards to gather information and meet with union representatives to discuss the substance of these contracts.<sup>117</sup> During these negotiations union representatives and school boards have the opportunity to lay out clear parameters about teaching topics based on state law. The process of collective bargaining also gives teachers, although sometimes only union member teachers, an opportunity to ask questions which provides another opportunity to resolve ambiguities and ease teachers concerns.<sup>118</sup> However, while school board members may be able to gain clarity on unclear legislation, they may also be unsure how to set parameters of classroom topics as many of the new critical race theory and gender topics bills seem to be intentionally vague.<sup>119</sup>

However, at least having some parameters in collective bargaining contracts could help protect teachers from termination for discussing race or gender in the classroom. Typically set out in contracts through collective bargaining, “[u]nion-negotiated employment policies grant tenure to teachers after a probationary period of about three years”

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114. Cowen & Strunk, *supra* note 5 at 1.

115. *Id.* at 13.

116. *Id.*

117. See *Collective Bargaining: What it is and How it Works*, NAT’L EDUC. ASS’N 1, 2 (2017), [https://www.nea.org/sites/default/files/2020-06/CB\\_What-It-Is-and-How-It-Works1.pdf](https://www.nea.org/sites/default/files/2020-06/CB_What-It-Is-and-How-It-Works1.pdf).

118. *Id.*

119. See William Garcia, *Flaws in Today’s Educational Policy Discourse*, J. L. & EDUC. 1, 2 (2022), [https://www.sc.edu/study/colleges\\_schools/law/student\\_life/journals/jled/news\\_and\\_blogs/2022/documents/garcia-flaws-in-todays-educational-policy-discourse.pdf](https://www.sc.edu/study/colleges_schools/law/student_life/journals/jled/news_and_blogs/2022/documents/garcia-flaws-in-todays-educational-policy-discourse.pdf).

for K-12 teachers, although requirements can vary by state.<sup>120</sup> Once a teacher obtains tenure, the teacher gains an added layer of due process, which refers to “the right to know why they are being dismissed and the opportunity to challenge a dismissal that a teacher believes is unfounded.”<sup>121</sup> A teacher who is tenured may only be dismissed for specific causes stated in state law and if the school wants to dismiss the teacher, they must follow certain steps.<sup>122</sup> The process of dismissing a tenure teacher typically requires that schools:

First provide the teacher with notice of the reasons for dismissal and an opportunity for the teacher to reasons for dismissal and an opportunity for the teacher to request a hearing on the dismissal charges. Depending on the state, a hearing can be conducted by the board of education, an independent hearing officer, an administrative law judge, or an arbitrator. In states where a hearing officer conducts the hearing, the board of education typically votes to either adopt or reject the recommendation of the hearing officer. . . . In most cases where the school board upholds a teacher’s dismissal, the teacher may choose to appeal that decision. Based on the state, the appeal may be before a state court, the state board of education, the state secretary or commissioner of education, the city superintendent, or an arbitrator.<sup>123</sup>

Even after a teacher exhausts their appeal remedies, the union can “intervene and file a grievance against the[] grounds for dismissal, citing it as a possible violation of the union bargaining agreement.”<sup>124</sup> These added steps required to dismiss a tenured teacher could help protect them from being let go over teaching novel violations of critical race theory or gender topics

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120. Wigfall, *supra* note 87; *Teacher Tenure & Due Process Protections for Educators*, NAT’L EDUC. ASS’N (Apr. 4, 2023), <https://www.nea.org/resource-library/teacher-tenure-due-process-protections-educators>.

121. *Teacher Tenure & Due Process Protections for Educators*, *supra* note 120117.

122. *Id.*

123. *Id.*

124. Wigfall, *supra* note 8787.

laws, or at the very least, the drawn-out process could bring attention to issues with this type of legislation.

Opponents to teachers' unions point to tenure and due process requirements as an argument that unions protect poorly performing teachers.<sup>125</sup> Challengers of tenure argue that it can stop new teachers from replacing poorly performing tenured teachers and decreases teachers' motivation to work hard, both of which harm students' education.<sup>126</sup> While tenure and due process can prolong the procedure of removing a teacher, they do not stop schools from removing ineffective teachers.<sup>127</sup> First, while unions advocate for tenure laws and lay out the parameters in their collective bargaining agreements, states are ultimately in control of making tenure laws.<sup>128</sup> For example, some states have increased the amount of time a teacher must work in order to obtain tenure and, others have loosened the restrictions around what is a just cause to fire a teacher.<sup>129</sup> Additionally, tenure and due process do not prohibit school boards from removing ineffective teachers, instead they safeguard that teachers are being removed for actual cause while the school boards retain "considerable leeway over dismissals."<sup>130</sup> Therefore, strong tenure and due process laws are likely the best protection teachers have over dismissal for violating unclear critical race theory or gender topics laws.

Generally, unions are influential in helping teachers obtain better pay and benefits, reducing classroom size, retaining paraprofessionals, and can help alleviate the stress of political pressure through strong tenure practices. The discussion below shows how unions can address specific issues causing teachers to leave the classroom, and while theoretical, looking at the two states with the strongest teachers' unions compared to the two states with the weakest teachers' unions illustrates the effectiveness unions have on the teacher shortage.

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125. *Id.*

126. Jessica Bard, *Teacher Tenure: Helping or Hurting Education?*, PENN. STATE UNIV. (Feb. 15, 2018), <https://sites.psu.edu/bardcivic/2018/02/15/teacher-tenure-helping-or-hurting-education/>.

127. *Teacher Tenure & Due Process Protections for Educators*, *supra* note 120.

128. *Id.*

129. *Id.*; ARK. CODE ANN. tit. 6, § 17-1510(b)(1) (1983) (repealed 2023).

130. *Teacher Tenure & Due Process Protections for Educators*, *supra* note 120.

iv. *How Unions are Currently Addressing the Teacher Shortage*

A study by the Fordham Institute analyzed teachers' unions in each of the fifty states and the District of Columbia, ranking their "strength" based on the evaluative criteria of "1) resources and membership, 2) involvement in politics, 3) scope of bargaining, 4) state policies, [and] 5) perceived influence."<sup>131</sup> The study found that Hawaii and Oregon have the strongest teachers' unions, while Arizona and Florida have the weakest.<sup>132</sup> It is unsurprising that Arizona and Florida rank as the weakest as Arizona prohibits collective bargaining for public employees and Florida restricts the practice.<sup>133</sup> The lack of bargaining power is likely making the teacher shortage worse in the two states, as well as making working conditions harder for current teachers. For example, in Arizona, the percentage of teacher vacancies increased over the past year and "29.7% of teaching positions remain unfilled across the state [and] [a]bout 53.2% of the vacancies are filled by teachers who do not meet the state's standard certification requirements."<sup>134</sup> Similarly, Florida is facing possibly the highest number of teacher vacancies in the country as "there are roughly 8,000 teachers and 6,000 support staff vacancies across the state."<sup>135</sup> In addition to high vacancies, both states fall below the national average in pay for teachers and Arizona is estimated to have an average classroom size of 23.5 students, which is much larger than the national average of 16 students.<sup>136</sup>

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131. Amber M. Northern et al., *How Strong Are U.S. Teacher Unions? A State-by-State Comparison*, THOMAS B. FORDHAM INST. (Oct. 29, 2012), <https://fordhaminstitute.org/national/research/how-strong-are-us-teacher-unions-state-state-comparison>.

132. *Id.*

133. *Collective Bargaining Laws*, *supra* note 9.

134. Eleneo Dao, *New Data Shows Arizona's Teacher Shortage Worsening*, ABC 15 ARIZ. (Sept. 26, 2023, 8:08 PM), <https://www.abc15.com/news/local-news/new-data-shows-arizonas-teacher-shortage-worsening>.

135. Aaron Mesmer, *Florida Teacher Shortage One of the Worst in the Country as New School Year Starts*, FOX 13 TAMPA BAY (Aug. 2, 2023, 5:56 PM), <https://www.fox13news.com/news/florida-facing-one-of-the-countrys-worst-teacher-shortages-this-school-year>.

136. Gloria Rebecca Gomez, *Arizona Teacher Shortage Streak Persists, Thousands of Classrooms Understaffed*, ARIZ. MIRROR (Sept. 27, 2023, 3:51 PM), <https://www.azmirror.com/blog/arizona-teacher-shortage-streak-persists-thousands-of-classrooms-understaffed/>; Mesmer, *supra* note 135135.

Comparing the teacher shortage in Arizona and Florida to Hawaii and Oregon, the possible effect of unions is seen. Hawaii has decreased its vacancies over the past few years, and currently the Hawaiian public school system has only “around 300 vacant positions.”<sup>137</sup> Similarly, Oregon falls “in the bottom 25% of teacher shortages” and is the fourth highest state teachers want to move to.<sup>138</sup> While other aspects, like population and income, play a role in the teacher shortage, the strong union presence in Hawaii and Oregon likely play a role in their ability to fill vacancies. For example, one study found that unionized teachers have lower stress than non-unionized teachers, and in other states unions are helping states recruit individuals for public sector jobs.<sup>139</sup> Overall, higher percentages of unfilled teaching roles in weaker unions states is likely not coincidental as unions can help teachers gain better pay and conditions, help protect teachers from erroneous firing, reduce teacher stress, and work to obtain employees for needed roles.

### III. Modern Hostility Towards Teachers’ Unions

Despite unions ability to decrease teacher vacancies anti-union legislation is still occurring around the country, effectively handcuffing unions from being able to obtain benefits for teachers.<sup>140</sup> Teachers’ unions historically have not held the same positive public perception as

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137. Victoria Budiono, *Hawaii DOE Has Changed Up Its Teacher Recruitment and Early Results are Promising*, HONOLULU CIV. BEAT (Aug. 2, 2023), <https://www.civilbeat.org/2023/08/hawaii-doe-has-changed-up-its-teacher-recruitment-and-early-results-are-promising/>.

138. Sara Chernikoff & Miranda Cyr, *2023 Teacher Shortages: What to Know About Vacancies on the West Coast*, REGISTER-GUARD (Sept. 3, 2023, 6:02 AM), <https://www.registerguard.com/story/news/local/2023/09/03/oregon-washington-and-california-face-regional-teacher-shortages-start-school-year/70646141007/>; Aimee Plante, *Oregon Ranks Among Top States Teachers Would Consider Moving*, KOIN (Sept. 28, 2023, 9:33 PM), <https://www.koin.com/news/oregon/oregon-ranks-among-top-states-teachers-would-consider-moving/>.

139. Eunice Han, *Teachers’ Unions Reduce Teacher Stress. Anti-Union Laws Significantly Increase It*, ECON. POL’Y INST. (Aug. 29, 2022, 12:44 PM), <https://www.epi.org/blog/teachers-unions-reduce-teacher-stress-anti-union-laws-significantly-increase-it/>; Lydia DePillis, *Jobs Sit Empty in the Public Sector, So Unions Pitch In to Recruit*, N.Y. TIMES (July 27, 2023), <https://www.nytimes.com/2023/07/27/business/economy/local-government-jobs-unions.html>.

140. N.Y. Tchr., *Florida’s Anti-Union Law Targets Teachers*, UNITED FED’N TCHRS. (June 15, 2023), <https://www.uft.org/news/news-stories/national-news/floridas-anti-union-law-targets-teachers>; Chris O’Brien, *Anti-Union Measure Attached to Tennessee Teacher Pay Law Temporarily Delayed*, WKRN (July 5, 2023, 7:37 PM), <https://www.wkrn.com/news/tennessee-politics/anti-union-measure-attached-to-tennessee-teacher-pay-law-temporarily-delayed/>.

other labor unions have.<sup>141</sup> Coupled with the fact that public sector unions never gained the same federal protections that private sector unions did, teachers' unions are vulnerable to changing state political atmospheres.<sup>142</sup> Attitudes towards public sector unions turned negative in the early 1970's as the economy slowed and "public sector workers went on strike to keep their pay at or above inflation rates" which opponents perceived as greedy, as tax dollars pay public employees.<sup>143</sup> This sentiment has continued as "Americans who see teachers unions as a negative influence on public schools shot up to 43 percent, up from 31 percent in 2009."<sup>144</sup> Perhaps due to the negative perspective of public labor unions, some states, particularly southern states, have passed anti-public sector union legislation such as right-to-work agreements and laws prohibiting collective bargaining.<sup>145</sup>

### *i. Anti-Union Legislation*

As discussed above, there is little federal legislation protecting the rights of unions, especially the public sector union.<sup>146</sup> And while states had majority control to determine how public sector unions operated in their state, until recently, public sector unions had some nationwide protection from the Supreme Court. In 1997, the Supreme Court held in *Abood v. Detroit Board of Education.*, that public sector unions may collect some fees from non-members, called agency fees, to support union activities that benefit non-members.<sup>147</sup> While a majority of teacher union budgets come from members, the unions still gained important funds from non-members and this practice created a more fair

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141. Michael B. Henderson et al., *Hunger for Stability Quells Appetite for Change*, 22 EDUC. NEXT SURV. PUB. OP. (2021), <https://www.educationnext.org/hunger-for-stability-quells-appetite-for-change-results-2021-education-next-survey-public-opinion-poll/> ("Thirty-five percent say unions have a positive effect on schools and 37% say they have a negative effect, with the rest undecided.").

142. Mertz, *supra* note 6160, at 7-8.

143. *Id.* at 12.

144. Stephanie Simon, *The Fall of Teachers Unions*, POLITICO (June 13, 2014, 5:05 AM) <https://www.politico.com/story/2014/06/teachers-union-california-court-decision-107816>.

145. Mertz, *supra* note 6160, at 8.

146. *See* National Labor Relations Act, 29 U.S.C. §§ 151-69 (1947); *see also* Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 19, 1962).

147. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that agency fees are valid if used for expenditures other than political purposes).

system where people could not benefit from union activities without providing some monetary support to the union.<sup>148</sup> However, the precedent laid down in *Abood* was recently overturned.<sup>149</sup> In 2018, the Supreme Court ruled in the landmark case *Janus v. AFSCME*, that the practice of collecting agency fees was a violation of the first amendment.<sup>150</sup> This ruling eliminated agency fees as a source of revenue for teacher unions, and allows non-members to benefit from exclusive collective bargaining deals without compensating the union which incentivizes teachers not to join their local union.<sup>151</sup>

However, even before *Janus* the federal government limited the ability for unions to collect agency fees through the enactment of the Taft-Hartley Act.<sup>152</sup> While this Act still allowed jobs to require individuals to join a union after being hired, it expressly stated that nothing in the Act preempts state law prohibiting requiring workers to join a union, thus opening the door for states to pass such laws.<sup>153</sup> This provision resulted twenty-six states passing right-to-work legislation.<sup>154</sup> Right-to-work bills prohibit employers from requiring employees to join a union.<sup>155</sup> However, the ruling in *Janus* has effectively made all states right-to-work states in regards to public employees, as no public employee can be required to make payments to a union.<sup>156</sup> While post-*Janus* no public employees is required to join a union, a few states have taken another step to limit union power by prohibiting collective bargaining agreements for public employees.<sup>157</sup> Since the federal government does not regulate public sector unions “the right to bargain collectively, the scope of collective bargaining, and the right to strike in connection with union activity is determined by a combination of state laws and case

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148. Xavier Becerra & Aimee Feinberg, *Symposium: Agency Fees Benefit the Workplace—Just Ask the States*, SCOTUS BLOG (Dec. 22, 2017, 1:55 PM), <https://www.scotusblog.com/2017/12/symposium-agency-fees-benefit-workplace-just-ask-states/>.

149. *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018) (holding that the collection of agency fees is a violation of the First Amendment).

150. *Id.* at 2460.

151. *Id.*

152. Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 §§ 151-88 (1947).

153. *Id.* at § 14(b).

154. *Right-to-Work Resources*, NAT’L CONF. STATE LEGISLATURES (Dec. 19, 2023), <https://www.ncsl.org/labor-and-employment/right-to-work-resources>.

155. *What is a Right-to-Work State?*, *supra* note 19.

156. *Id.*; see also *Janus*, 138 S. Ct. at 2448.

157. *Collective Bargaining Laws*, *supra* note 9.

law.”<sup>158</sup> With power residing in the states, seven states have made collective bargaining explicitly illegal, while ten others do not obligate districts to engage in collective bargaining.<sup>159</sup>

While only a small number of states completely prohibit public sector collective bargaining, other states make it illegal for some public sector employees to strike or restrict collective bargaining powers.<sup>160</sup> However, amidst the teachers’ shortage, bills that restrict teachers’ ability to bargain for themselves are only fueling the root issues. Teachers and other public sector employees inherently lack the same type of bargaining powers and competition as private employees. To help attract and retain more teachers, states need to keep or enact friendly public sector union legislation.

ii. *Why Anti-Union Legislation Doesn’t Work for Teachers*

Schools are public entities which operate in their own unique bureaucratic way. Schools typically follow similar structures, and teachers tend to answer to administrators, district directors or superintendents, and ultimately the school board.<sup>161</sup> Additionally, many of the most important aspects like budget and curriculum change through the state legislature; however, the local school boards maintain a fair amount of control in deciding how to allocate resources and how the school will function.<sup>162</sup> The bureaucratic nature of schools makes change slow and difficult, while the inherent power given to the school board officials, superintendents, and administrators, can make it difficult for teachers to feel their voices are being heard on issues. Additionally, as budgets are set, teachers tend to not face the same type of competition as private sector workers, leaving little incentives for school boards to offer competitive wages or benefits.<sup>163</sup> This is

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158. MILLA SANES & JOHN SCHMITT, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 3 (2014).

159. *Collective Bargaining Laws*, *supra* note 9.

160. Sanes & Schmitt, *supra* note 158, at 4-8.

161. *What is the Typical Organization Structure of a School?*, SCHOLARSHIP INST. (Feb. 14, 2023), <https://scholarshipinstitute.org/what-is-the-typical-organizational-structure-of-a-school/>.

162. *See Id.*

163. *See* García & Weiss, *supra* note 26.

especially true in rural areas where it is not uncommon for there to be only one school in a town, meaning if a teacher wants to leave for a better job there may not be another viable option close by.

iii. *Collective Bargaining*

While currently only a few states completely prohibited teacher's ability to participate in collective bargaining, with education reform as a hot topic, more states may move to ban the practice for public employees. However, it is imperative that states refrain from passing these laws as eliminating collective bargaining will likely only escalate the issues fueling the teacher shortage. Collective bargaining "is [] necessary as a protection for teachers against the arbitrary exercise of power by heavy-handed administrators."<sup>164</sup> Additionally, when teachers lose the ability to participate in collective bargaining they essentially lose their voice.<sup>165</sup> Collective bargaining "guarantees teachers' participation in school governance and educational policymaking" and without it there is no other guarantee that teachers can have a hand in shaping how their school functions.<sup>166</sup> This is especially true with teachers' salaries as "[s]chool teachers' wages are not subject to market pressures—they are set by school districts[.]"<sup>167</sup> Unlike in the private sector where one can ask for a raise, raises for teachers tend to be on a "step and lane" schedule, with teachers usually obtaining the "highest 'step' at around age 55" although higher levels of education can boost salaries more quickly.<sup>168</sup> When unions are able to engage in collective bargaining they, and by proxy teachers, have a hand in setting base salaries and terms of raises.<sup>169</sup> Otherwise, teachers typically have no ability to negotiate salary.<sup>170</sup> At the very least, part of

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164. Diane Ravitch, *Why Teacher Unions are Good for Teachers—and the Public*, AFT <https://www.aft.org/ae/winter2006-2007/ravitch> (last visited Apr. 14, 2024).

165. SEE MEL BORJA, COLLECTIVE BARGAINING: A CRITICAL TOOL TO IMPROVE SCHOOL STAFFING, PAY, AND MORALE (2022), [https://thecommonwealthinstitute.org/wp-content/uploads/2022/10/Collective-Bargaining\\_A-Critical-Tool-to-Improve-School-Staffing-Pay-and-Morale.pdf](https://thecommonwealthinstitute.org/wp-content/uploads/2022/10/Collective-Bargaining_A-Critical-Tool-to-Improve-School-Staffing-Pay-and-Morale.pdf).

166. Eberts, *supra* note 72, at 177.

167. García & Weiss, *supra* note 26.

168. Madeline Will & Stephen Sawchuk, *Teacher Pay: How Salaries, Pensions, and Benefits Work in Schools*, EDUC. WK. (Mar. 30, 2018), <https://www.edweek.org/teaching-learning/teacher-pay-how-salaries-pensions-and-benefits-work-in-schools/2018/03>.

169. *See Id.*

170. *Id.*

the process of collective bargaining requires that school board members or representatives attend a “ratification meeting” where teachers can ask questions about new policy proposals and give their opinions on matters that will affect them the most.<sup>171</sup> States that prohibit collective bargaining cut off the main, and sometimes only, way teachers’ voices can be heard, as well as tend to have lower pay for teachers and higher teacher turnover.<sup>172</sup>

iv. *Right-to-Work*

Right-to-work legislation is also harmful to the goals of teachers and their unions. Because the benefits that teachers’ unions obtain apply to all teachers, there is little incentive to join a union when one can obtain the benefit without paying membership fees. Although roughly a little over half of states passed right-to-work laws, with the more recent decision in *Janus*, no state can require a public employee to join a union or pay agency fees.<sup>173</sup> Not requiring those who benefit from union activities to pay into the union reduces membership, which ultimately reduces the union’s strength and ability to bargain for better conditions.<sup>174</sup> While state legislatures cannot make law that contradict the *Janus* ruling, it is imperative for states to refrain from passing laws that add more difficulty to union membership and repeal right-to-work laws.

First, in the wake of *Janus*, states legislatures that dislike unions have passed laws that further affect union membership.<sup>175</sup> For example, in 2012 Michigan passed a law that “prohibits paycheck deduction” so that unions cannot have their fees directly taken out of participating

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171. *Collective Bargaining: What it is and How it Works*, *supra* note 117.

172. BORJA, *supra* note 165.

173. *Right-to-Work Resources*, *supra* note 154; see *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2460 (2018).

174. Tracie Mauriello, *Teacher Unions Back Right-to-Work Repeal Effort, Even Though it Wouldn't Help Them*, CHALKBEAT (Feb. 2, 2023, 11:15 AM), <https://detroit.chalkbeat.org/2023/2/2/23582858/michigan-right-to-work-repeal-teachers-union-mea-aft-dues-agency-fees-democrats>.

175. See Ann C. Hodges, *The U.S. Labor Relations System after Janus v. AFSCME: An Early Assessment*, 33 EMP. RESPON. & RTS. J., 49, 49-60 (2021).

teachers' paychecks.<sup>176</sup> While this may seem like a small inconvenience, with union membership already declining, any added inconveniences can be harmful to unions membership. Passing laws that might discourage people to join their union is harmful to the union's power to negotiate, as many state laws require a majority of teachers to agree to have the union represent them to engage in collective bargaining.<sup>177</sup> As discussed above, without collective bargaining, teachers have very little influence on school decisions, therefore, to protect benefits of collective bargaining, states should refrain from passing new legislation that creates hoops to jump through for those who want to join a union.

Next, although states cannot require workers to pay agency fees, right-to-work states can repeal their own right-to-work legislation. After Michigan swapped governors and party alignments when the legislature changed in 2023, Michigan became the "first state in 58 years to repeal a 'right-to-work' law."<sup>178</sup> Although mostly a symbolic action, advocates of the practice say they want to be prepared if the Supreme Court decides to reconsider the ruling in *Janus* and show workers that they stand in solidarity with unions.<sup>179</sup> Although the *Janus* ruling is binding, moving forward, it is important to recognize that union membership suffers when individuals benefit from collective bargaining agreements without having to pay for the costs.<sup>180</sup>

## CONCLUSION

Overall, teachers are in a unique role as they are influential to the wellbeing of the country, but without unions can lack the ability to advocate and secure better benefits for themselves. Collective bargaining provides the one guarantee that school boards must listen to the concerns of teachers and answer questions directly to them.<sup>181</sup> The issues surrounding the teacher's shortage revolve around inadequate

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176. Madeline Will, *What's Ahead for Teachers' Unions? A Labor Expert Explains 'Janus' Impact*, EDUC. WK. (June 29, 2018), <https://www.edweek.org/teaching-learning/whats-ahead-for-teachers-unions-a-labor-expert-explains-janus-impact/2018/06>.

177. See *Collective Bargaining Laws* *supra* note 9.

178. Joey Cappelletti, *Michigan Becomes 1st State in Decades to Repeal 'Right-to-Work' Law*, PBS (Mar. 24, 2023, 4:51 PM), <https://www.pbs.org/newshour/politics/michigan-becomes-1st-state-in-decades-to-repeal-right-to-work-law>.

179. Mauriello, *supra* note 174.

180. *Id.*

181. See Eberts, *supra* note 72.

benefits and a lack of control for teachers.<sup>182</sup> This is where unions can make the biggest difference, as they have the political and financial power to give a voice to teachers.<sup>183</sup> The effects of letting teachers advocate for themselves is not theoretical, as states like Hawaii and Oregon with strong unions tend to see higher pay, smaller class sizes, and less teacher turnover and vacancies than states that prohibit collective bargaining.<sup>184</sup>

States need to take an active role in fighting against the teacher shortage because a weak education system has long lasting effects.<sup>185</sup> Although teacher unions are not perfect, as they can raise district expenditures, prolong the process of removing ineffective teachers, and have political effects that go beyond the classroom, prohibiting collective bargaining and passing legislation to make union participation more difficult is not the answer to the current teacher shortage. While some states may disagree with the large power the NEA or AFT hold, essentially banning all public sector unions does little to combat against their power while also silencing teachers. Whether it is through the NEA or AFT or smaller state teachers' unions, teacher's conditions improve when they can advocate for themselves. To resolve the issues of the teacher's shortage, states with prohibited and permissive collective bargaining agreements must repeal those laws and pass mandatory collective bargaining agreements and refrain from passing legislation that adds extra difficulties to obtaining union membership.

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182. Barnum, *supra* note 32.

183. Cowen & Strunk, *supra* note 5, at 13.

184. *See* Budiono, *supra* note 137137; Chernikoff & Cyr, *supra* note 138.

185. *See* Boser, *supra* note 111.