



POLICY BRIEF

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Teacher Employment and Collective Bargaining Laws in California: Structuring School District Discretion over Teacher Employment

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A great deal of recent attention has been focused on policies that affect the employment relationship between school districts and teachers. There is broad agreement that teacher quality is related to student achievement (Hanushek, 2003), but there is far less agreement about the degree to which school districts and administrators are constrained in making policies to improve teacher quality that might also affect teacher employment and working conditions. Conventional wisdom holds that state law and the collective bargaining agreements governed by state law often hamper districts' discretion over teacher hiring, firing, evaluation, compensation, and assignment. Although California collective bargaining agreements have received some attention from researchers (Strunk, 2010; Strunk & Grissom, 2010; Strunk, 2009; Strunk & Reardon, 2009; Koski & Horng, 2007) we know far less about whether, and to what extent, California law constrains or facilitates district-level discretion over teacher employment policies and practices. This policy brief examines that issue.

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Executive Summary

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This policy brief examines that issue. We focus on California and examine the extent to which the legal structure governing the employment and collective bargaining relationship between school districts and teachers constrains administrative and school board decision-making. Our strategy is to classify various aspects of the teacher-school district employment relationship into one of four

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Executive Summary (Cont.)

categories. These categories reflect the level of discretion that districts enjoy over any given employment-related condition. We then analyze the teacher employment and collective bargaining laws in four other large and diverse states using that same four-tiered analytic framework. We conclude that California statutory law regarding teacher employment and collective bargaining, although quite similar to the law in those states, is somewhat more constraining of administrative decision-making in teacher employment matters. Whether this is helpful or harmful to students is entirely another question.

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decision-making in teacher employment matters. Whether this is helpful or harmful to students is an entirely different question that we do not address.

State laws that affect teacher employment and the effects of those laws on school district personnel policy and decision making.

Local school boards and school district administrators possess significant discretion over the establishment of policies that affect students, teachers, and the learning process. District policies, however, are not drafted in a vacuum. States hold plenary power over education, and their choices to cede authority to local districts in varying degrees provides a frame for districts and teachers to craft policies affecting the latter's working and employment conditions. Indeed, one group of researchers argues that "[s]tate legislators and other state-level policymakers crafting state laws and regulation, not those bargaining at the local level, decide some of the most important rules governing the teaching profession" (Cohen, Walsh, & Biddle 2008, p. 1).

Whether and how states delegate their plenary power over education and the teaching profession varies significantly among states. The most obvious distinction is between those states that permit teachers to collectively bargain with school districts over employment terms and those that do not. Currently, forty-five states permit and regulate collective bargaining between teacher

collective bargaining units and districts, while five prohibit it (Cohen, Walsh & Biddle, 2008). Research has not demonstrated that this distinction has a large effect on personnel policies and student outcomes. In some cases this is because, in the absence of collective bargaining, the terms of the labor arrangement are embodied in state law rather than in local contracts (Cohen, Walsh & Biddle, 2008). In others cases, districts may voluntarily orient their human capital policies toward minimizing electoral or legal risk by establishing employment policies that are favorable to teachers (Hodges, 2009).

Beyond the threshold of whether the state permits teachers to collectively bargain with school districts, state legislatures frequently pass statutes affecting school district discretion over teacher employment. Among the most common subjects of state laws and regulations are teacher tenure, teacher discipline and dismissal procedures, teacher evaluation policies, and in some states, teacher compensation policies. Perhaps less obvious is the role of the judiciary and other state agencies in interpreting state laws and thereby influencing teacher employment terms. One common example of that influence stems from so-called "scope of bargaining" statutes that designate some matters as "terms and conditions of employment" that are subject to mandatory bargaining. Naturally, teacher unions will try to broaden that category, while districts will try to narrow it. The result is often a dispute that winds up in a courtroom for final determination as to whether

the specific matter (*e.g.*, classroom adult-to-student ratios) is subject to collective bargaining. In other words, state law and regulations, and the courts and state agencies that interpret them, affect diverse and important aspects of the district-teacher employment relationship and define the scope of local collective bargaining.

Research on the influence of such law and regulations on local teacher employment policies and practices is very much in its early stages¹ (Cohen, Walsh & Biddle, 2008; Koppich, 2009). Researchers who *have* studied this question empirically have approached it from one of two directions: they have either drawn inferences about the permissiveness of state law by looking at the variation in collectively bargained school district-teacher union contract terms within a state; or they have analyzed the relationship between categories of statutory provisions and district contract terms across multiple states. For example, researchers adopting the former approach have argued that Massachusetts (Ballou, 2000) and New York (Chung, 2008) have ceded large swathes of power to local districts, with the exception in Massachusetts, of compensation. Researchers adopting the latter approach have gravitated towards the National Council on Teacher Quality's database that has coded state laws and the teachers' contracts of the fifty largest districts in the country (National Council on Teacher Quality). One study found that, tenure laws excepted, these districts had a fair amount of room to maneuver (Hess, 2008) but a subsequent study using

the same data set reached the opposite conclusion (Hansen, 2009).

Both of these analytic approaches often take statutory language, and to a lesser extent, contractual language, at face value in order to make apples to apples comparisons across different states and districts. But we should assume neither the statutes nor the contract terms to mean only what they say. State law is contextual and depends for its force on its interpretation by the courts and administrative bodies. Moreover, statutory language and the terms of the contract may obscure the informal arrangements that may make teacher employment policy in practice quite different from its mandated or agreed-upon terms (Koski & Horng, 2007). In some cases these arrangements provide desired, informal flexibility, but they may also have significant, negative unintended consequences (Levin, 2003). Even where districts negotiate flexible contract terms, they may not utilize this flexibility due to inertia, lack of creativity, fear of uncertainty, or fear of the union contesting the language in the future (Price, 2009; Strunk, 2009).

Put simply, research on the effects of teacher employment and collective bargaining laws is just beginning to emerge. This policy brief builds on that nascent conversation by describing California's teacher employment and collective bargaining laws and providing an analytic framework to understand the degree to which those laws formally constrain school district policy-making and employment decisions.

A tiered analysis of California's teacher employment/collective bargaining laws and school district discretion.

To determine whether and to what extent California's collective bargaining laws have the effect of constraining school district discretion regarding policy decisions, we begin with a description of relevant California statutes and case law and consider how others have analyzed those laws. At the outset, this paper makes no value judgment as to the desirability of legal constraints on school district discretion over policies affecting teachers. For instance, legal constraints that require districts to enact standardized rules and procedures for teacher compensation, evaluation, and dismissal, as opposed to ad hoc decision making, may result in a more stable teaching force and increased administrative efficiency, each of which may in turn facilitate improved student outcomes. Conversely, such rules may offer undue protection to a district's lowest performing teachers while also making it difficult to reward outstanding teachers, to the detriment of student learning. Our purpose here is simply to describe the legal framework within which California school officials operate, and not to reach any conclusions as to the downstream effects of this legal framework on children.

The starting point for our description is the statutory framework governing teacher collective bargaining in California, as that law most significantly affects the employment relationship between districts and teachers. To

understand how teacher collective bargaining laws may constrain administrative discretion, we first review the analytic frameworks provided by Frank Kemerer (2009) and the National Council on Teacher Quality (NCTQ). Kemerer's work focuses specifically on California's collective bargaining law, while the NCTQ maintains a database comparing and contrasting collective bargaining rules across the fifty states.

Both Kemerer and the NCTQ analyze state collective bargaining laws using a three-part classification system, although there are minor differences between the two. Kemerer and the NCTQ agree upon the term "mandatory bargaining" to describe the first category of topics for which union and district negotiation is required. Kemerer uses the term "mandatory consulting" to describe his second category of topics, which entail a duty to meet and confer but not to negotiate. By contrast, the NCTQ's second category covers "permissive" subjects, those which the two parties are free to discuss if they wish but for which there is no statutory obligation to do so. Kemerer calls his third category "management prerogative" topics for which a school district has absolute discretion to act, although it may consult with the union if it so chooses (Kemerer, 2009, p. 140) while the NCTQ uses a third category that encompasses "prohibited" topics which may not be negotiated between the two parties at all.

Despite their minor differences, the primary purpose of the three-category

classification systems used by Kemerer and the NCTQ is to assist in the determination of whether a particular bargaining issue must be the subject of negotiation between a school district and union representative, as such mandatory bargaining presumably reduces the discretion available to school districts. But neither system offers a complete picture of how a state's laws may constrain school district discretion. After all, a state-imposed duty to negotiate represents only one way in which district officials may be constrained from acting, and it is not always an absolute restraint at that: in California a school district may, if it follows certain procedures upon reaching an impasse with the union, enact a policy regarding a topic of "mandatory bargaining" without express union approval. Moreover, legal constraints other than the duty to negotiate can profoundly affect school district discretion. For example, statutory provisions that have the effect of prohibiting negotiation altogether over particular subjects can either hamper school district discretion (such as Cal. Educ. Code § 45113's guarantee of particular due process protections for permanent teachers) or authorize absolute school district discretion (such as § 44929.21's declaration that non-tenured teachers may be terminated without cause).

Accordingly, we apply here a different organizational structure to describe California collective bargaining law, one that includes four tiers of school district discretion where each tier is defined by the procedure that district officials must follow before being able

to enact a policy without the approval of the union representative. We use this system because our analysis begins from the perspective of the school district official who wishes to implement a school policy that impacts teachers and who seeks to know what steps she must take (or can take) vis-à-vis the teachers' union in order to implement that policy. After all, in the absence of California's public sector collective bargaining rules and specific laws in the Education Code, the district official would have the same discretion to impose a unilateral change with respect to its employee-affecting policies that any employer would have in an at-will employment context. In a standard at-will relationship, teachers would be protected only by broad public policy considerations such as anti-discrimination rules, and the district would have wide latitude to act freely.

But California teachers are not at-will employees. The Educational Employment Relations Act (EERA) enacted in 1975, guarantees teachers the right to organize collectively and negotiate over policies affecting wages, hours, and other terms and conditions of employment. The effect of the EERA has been to empower teacher unions to occupy a prominent role in the education policy arena, where unions commonly sponsor legislation, influence school board elections, negotiate contracts, and represent teachers in disputes against their employers (Strunk & Reardon, 2009; Kemerer, 2009). Indeed, the collective bargaining contracts negotiated by unions constitute a "source of law that rivals school board policy in govern-

if any, that a district must take before imposing unilateral action.

Tier 1: No School District Discretion.

There are two categories of topics for which school district officials have absolutely no ability to set policy. The first category forbids any policy that, even if enacted with union approval, would violate a provision of the California Education Code. Such policies are prohibited and thus entirely outside the realm of administrator discretion because of Cal. Gov. Code § 3540, which states “[the EERA] shall not supersede other provisions of the Education Code.” It is important to note that the district may still negotiate policies that *relate to* provisions of the Education Code so long as they do not *contradict* such provisions. The California Supreme Court declared as much when it interpreted this code section to “prohibit negotiations only where provisions of the Education Code would be replaced, set aside or annulled by the language of the proposed contract clause.” *San Mateo City School District v. Public Employment Relations Board* 33 Cal. 3d 850, 864 (1983) (citations omitted). But the restraint on school district discretion is still relevant: the California Fourth District Court of Appeal struck down Fontana Unified School District’s policy of using binding arbitration to settle a dispute with a classified employee because such a procedure violated the provisions of Cal. Educ. Code § 45113.⁴

The second category of topics upon which district officials are completely constrained encompasses four policy

areas expressly identified in the EERA. These policy areas include: procedural protections that certificated employees are guaranteed in district-initiated disciplinary actions;⁵ the layoff of certificated employees for lack of funds;⁶ payment of additional compensation based upon criteria other than years of training and years of experience;⁷ and a uniform salary schedule based on any criteria other than years of training and years of experience.⁸ For these four topics, school districts have the right to consult and negotiate with unions,⁹ but they cannot implement any policy that the unions find disagreeable. Absent voluntary union agreement on these four topics, the default policy that will apply in the district is provided by the relevant sections of the California Education Code. Because these statutes offer a substantially favorable position to unions, district officials are left with little bargaining power and no self-exercising authority.

Tier 2: Limited School District Discretion.

The second tier of constraint created under the EERA includes topics upon which school district officials are required to negotiate with union representatives. This tier of constraint reduces administrator discretion in two principal ways. First, by giving unions a statutory right to bargain over certain topics, the EERA effectively creates the expectation that the union and district will sit at the negotiating table as relative equals, where the negotiated outcome will be the product of mutual agreement. Second, the EERA lays out an elaborate procedure for

resolving impasses between the district and union in Cal. Gov. Code §§ 3548 – 3548.8, which involves multiple rounds of mediation, fact-finding and resumed bargaining. To the extent that following these procedures imposes administrative costs, district officials may choose to agree to terms it would otherwise refuse.

However, the duty to negotiate is not an absolute or indefinite one, a point that the NCTQ’s database does not make clear. Once an impasse has been reached where the union makes no concessions, so long as the school district complies with the bargaining procedures set out in the EERA, the district can unilaterally impose the last best offer rejected by the union. The California Court of Appeals for the Fifth District carved out this zone of discretion for district officials declaring: “Once impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected” (*Public Employment Relations Board v. Modesto City Schools District*, 136 Cal.App.3d 881, 900-5th Dist. 1982). The court continued, “The employer need not implement changes *absolutely identical* with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the pre-impasse proposals” (*Id.*).

Thus, the district does retain a limited degree of discretion to act unilaterally to the extent that mutual agreement has not occurred and the parties are entrenched in their positions. In such situations, the district has the authority

to impose the last rejected offer even without union approval. Of course, resorting to such tactics may jeopardize the district's bargaining position in future negotiations and accordingly the policy areas included in this tier are best considered areas for which district officials' hands are largely tied.

What topics are included in this tier of considerable constraint, where in order to enact a policy the school district must first negotiate and gain approval from the union? Cal. Gov. Code § 3543.2(a) enumerates an express list, which includes, "matters relating to wages, hours of employment, and other terms and conditions of employment." It further defines "terms and conditions of employment" to include health and welfare benefits; leave, transfer and reassignment policies; safety conditions of employment; class size; procedures to be used for the evaluation of employees; organizational security; procedures for processing grievances; the layoff of probationary certificated school district employees; and alternative compensation or benefits for employees adversely affected by pension limitations.

This list of mandatory bargaining topics is not exhaustive, however. In a significant decision, the California Supreme Court held that there are topics that must be subject to mandatory bargaining procedures beyond those listed in law. The Court approved the three-part test developed by PERB, ruling that subjects are mandatory topics of bargaining if:

1) The subject is logically and reasonably related to hours, wages, or an

enumerated term and condition of employment.

2) The subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict.

3) The employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission. (*San Mateo City School Dist. v. Public Employment Relations Bd.*, 33 Cal.3d 850,1983).

Applying the test, the Court ordered the San Mateo City School District to bargain over instructional duty, preparation time, and the effects of unilaterally changing the length of the instructional day even though those subjects were not explicitly mentioned in the EERA. Because of this ruling, the National Council on Teacher Quality's database understates the restrictiveness of California's laws as it does not account for judicially mandated bargaining topics.

Tier 3: Strong School District Discretion.

The third tier of constraint consists of three topics for which the school district must merely consult with union representatives prior to enacting a policy. The EERA describes these subjects and the district's obligation to consult as follows: "In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the

determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law."

The district's ability to unilaterally decide on educational objectives, curriculum content, and textbooks is thus only limited by the requirement that it "consult" with union representatives. Although the exact contours of the duty to "consult" are not defined in the law, California courts have indicated that the duty should be construed in a limited fashion. In *Campbell Elementary Teachers Association vs. Abbott*, the Court found that the plaintiff union could not establish a violation of the Winton Act, the immediate predecessor to the EERA which imposed a duty to "meet and confer" on school districts that is substantially similar¹⁰ to the EERA's duty to "consult," because the union did not produce any "evidence that the district refused to meet and confer" (*Campbell Elementary Teachers Assn. v. Abbott*, 76 Cal.App.3d 796, 807, App. 1 Dist. 1978). Accordingly, if the district's obligation is only to demonstrate a willingness to meet and confer regarding one of the EERA's three enumerated topics in this tier, district officials retain a great deal of discretion over the policies they wish to implement.

Tier 4: Absolute School District Discretion.

The final tier of discretion consists of subjects for which school district officials retain absolute discretion to act without any regard to union preferences. Two categories of subjects

fall into this tier. The first category is a corollary to a group of subjects that fell into Tier 1, as it includes those topics for which negotiation would violate an express provision of the California Education Code. As is the case with Tier 1, the district may still be required to negotiate policies that *relate to* provisions of the education code but it may not be compelled to consider union preferences regarding policies that would *contradict* such provisions. Unlike those subject areas in Tier 1, however, the provisions in play in Tier 4 are ones where the California Education Code establishes a default position that is favorable to school districts and not teachers. For instance, California recently enacted a law in response to the federal Race to the Top grant program that authorizes school districts to consider student achievement data for the purposes of evaluating teachers.¹¹ District officials thus retain absolute discretion to do so, since a blanket position of the union against the use of data would violate the statute. Similarly, the California Court of Appeals for the 6th District agreed that the school district could terminate a probationary employee without either a showing of cause or an arbitration hearing because any policy negotiated by the union to the contrary would violate Cal. Educ. Code § 44929.21. *Sunnyvale Unified School Dist. v. Jacobs*, 89 Cal.Rptr.3d 546 (App. 6 Dist. 2009).

The second category of subjects where district officials retain absolute discretion is a broad catch-all category that includes all of the topics and policy

areas that do not fall under any of the three other tiers. For these subjects, the EERA states, “all matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.” Thus, any topic that is not expressly listed in the statute and that is not incorporated through the three-part test in *San Mateo*, such as a school-wide no smoking policy,¹² is one where the district can consult with the union if it wishes but where it has no obligation to do so.

How do California’s collective bargaining and laws compare to other states?

One useful method to assess the degree to which California’s collective bargaining regime restrains school district officials is to compare it to statutory and case law governing public sector collective bargaining in other states. Accordingly, we compare California to four other large, demographically and geographically diverse states: New York, Florida, Texas, and Illinois. Using the four-tier classification system described above as an analytical framework, a comparison of California’s collective bargaining laws with the laws in these four states reveals both significant similarities and differences, with the general conclusion that California law is more restrictive on school officials. Table 2 illustrates this point

by indicating whether and how each state is more or less restrictive than California with respect to each tier of discretion described above.

The most immediate observation when comparing the five states is that Texas, unlike the other four states, explicitly outlaws public sector collective bargaining. Tex. Gov. Code § 617.002(a) declares, “An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees.” The statute further renders automatically void any collectively bargained contract entered into in violation of this pronouncement. Thus, unlike California, school districts in Texas are free to set policy without any state mandate for teacher input or negotiation. Texas is not alone in this position; Georgia, South Carolina, North Carolina, and Virginia each have similar anti-collective bargaining rules in the context of public education. It should be noted, however, that outside of the dictates of law, teacher associations in many Texas school districts hold considerable sway over the development of personnel policies and employment terms.

Public sector collective bargaining is permitted in the other four states; so the differences in statutory restrictions among those four states are mainly ones of degree. There are four important statutory elements that the states share in common. First, all four states require districts to bargain in good faith with union representatives over

TABLE 2. Comparing New York, Florida, Texas, and Illinois collective bargaining laws to California law: Are these states' laws more or less restrictive than California and how?

State	Tier 1 No Discretion	Tier 2 Weak Discretion	Tier 3 Strong Discretion	Tier 4 Absolute Discretion
New York	Mixed. Less Restrictive: school districts are not subject to statutory provisions prohibiting unilateral action regarding due process protections. More Restrictive: New York has a Tier 1 statutory prohibition against district negotiation of teacher retirement benefits.	Less Restrictive: Districts have similar authority as California districts to act unilaterally upon impasse, but fewer topics are subject to a mandatory bargaining duty than in California (see Table 3).	Less Restrictive: No Tier 3 exists in these states because statute does not compel districts to “meet and confer” with unions on any topics.	Mixed, But Generally Less Restrictive.*
Florida	Mixed. Less Restrictive: School districts are not subject to statutory provisions prohibiting unilateral action regarding due process protections. More Restrictive: Florida has a constitutional amendment setting maximum class size limits that districts cannot negotiate around.	Less Restrictive: Districts have similar authority as California districts to act unilaterally upon impasse, but fewer topics are subject to a mandatory bargaining duty than in California (see Table 3).	Less Restrictive: No Tier 3 exists in these states because statute does not compel districts to “meet and confer” with unions on any topics.	Mixed, But Generally Less Restrictive.*
Texas	Less Restrictive: Districts have absolute discretion to set school policy under state law without union influence.	Less Restrictive: Districts have absolute discretion to set school policy under state law without union influence.	Less Restrictive: Districts have absolute discretion to set school policy under state law without union influence.	Less Restrictive: Districts have absolute discretion to set school policy under state law without union influence.
Illinois	Less Restrictive: School districts are not subject to statutory provisions prohibiting unilateral action regarding due process protections.	Less Restrictive: Districts have similar authority as California districts to act unilaterally upon impasse, but fewer topics are subject to a mandatory bargaining duty than in California (see Table 3).	Less Restrictive: No Tier 3 exists in these states because statute does not compel districts to “meet and confer” with unions on any topics.	Mixed, But Generally Less Restrictive.*

* Districts have similar discretion over educational policy decisions and other managerial prerogatives that do not impinge on employee wages, hours, and terms or conditions of employment. State courts and statutes occasionally reach different opinions than in California, typically with California imposing a higher amount of restraint on school officials. For instance New York courts confer districts absolute discretion over class size but California does not; Florida courts confer absolute discretion over teacher preparation time unlike California courts; and Illinois statutes confer absolute district discretion over class size and teacher assignment whereas California districts must bargain these topics. See Table 3.

hours, wages, and terms and conditions of employment,¹³ although courts in each state have sometimes interpreted the scope of this duty with divergent results (as we discuss below). Second, each of the states authorizes district employers to act unilaterally with respect to issues that are *not* subject to the duty to bargain collectively.¹⁴ Third, three of the states, California, Florida, and Illinois, have statutory provisions prohibiting districts from negotiating, much less implementing, any policy that would contravene another state law.¹⁵ The fourth state, New York has case law announcing the same principle.¹⁶ Finally, each state also has a statutory provision describing the procedures that districts and union representatives must take when they reach an impasse over a bargaining topic.¹⁷ These steps include mediation and fact finding, and if the union does not make any concessions after the steps are followed, the school district may unilaterally impose a policy consistent with its last best offer.

The fact that all four states allow district employers to impose unilateral policy changes after the point of impasse is notable in light of the fact that some states¹⁸ restrain school district employers by authorizing single-party initiated binding interest arbitration as a means to resolve impasses. School districts operating under such statutory regimes are thus effectively deprived of the power to act unilaterally with respect to *any* subject of mandatory bargaining, because, if they cannot reach agreement with the union representative, the representa-

tive can respond by requesting binding arbitration.¹⁹ Of course a favorable arbitration outcome would yield the same result as unilateral policy action, but faced with the rival possibility that the arbitrator will side with the union, a school district in a binding arbitration state is likely to concede more, and the union to concede less, than if the district were able to impose its last best offer unilaterally.

Collective bargaining rules in California, New York, Florida, and Illinois, do diverge, however, in certain key respects. Table 2 demonstrates this notion generally, while Table 3 expands upon the divergence of collective bargaining rules among states by identifying the tier of discretion encompassing a number of important policy matters. Table 3 also points out whether these levels of discretion are based on statutory law or case law.

The first source of the differences among the states is that California's statute itself includes a lengthy definition of the topics that are necessarily encompassed by the phrase, "terms and conditions of employment."²⁰ The other three states leave the definition of this flexible phrase up to their public employment relations boards and courts. The result has been comparatively greater school district discretion in the three states without a statutory definition of "terms and conditions of employment." For example, where class size is a Tier 2 mandatory bargaining subject in California because the EERA expressly includes it as a "term and condition of employment," New

York courts have ruled class size a Tier 4 topic upon which school districts have full managerial discretion to act.²¹

The binding nature and critical role of administrative and judicial decisions in shaping the scope of mandatory bargaining leads to the second key difference among the states. Where districts and union representatives have disagreed over whether a particular topic should be a mandatory subject of bargaining, each state's public employee relations board and courts are tasked with fashioning a test and ruling on the matter. This they have done with sometimes conflicting results. In California, as described above, the state Supreme Court agreed with the PERB's three-part test in *San Mateo* for whether a topic is sufficiently "related to" wages, hours, and terms and conditions of employment to warrant a duty to bargain. Following this test, the *San Mateo* court held that the issue of teacher preparation time was related enough to hours such that the district was obligated to bargain over it and could not impose its own unilateral policy. By contrast, in Florida, the state Public Employees Relations Commission applied a balancing test weighing the issue's characteristics as both a managerial matter and a term and condition of employment, and found preparation time to be a Tier 4 subject of absolute district discretion.²² New York's highest court reached the opposite conclusion, finding that the number of hours of instruction that a teacher must provide is generally a term or condition of employment.²³ The Illinois Supreme Court has yet to

TABLE 3. Comparing California, New York, Florida, Texas, and Illinois collective bargaining laws: What tier do specific policy matters fall into?

Policy Matter	California	New York	Florida	Illinois	Texas
Basic Wages, Hours, and Terms of Conditions of Employment	Tier 2 ¹	Tier 2 ³	Tier 2 ¹²	Tier 2 ¹⁹	Tier 4 [#]
Exclusively Managerial Decisions	Tier 4 ¹	Tier 4 ⁴	Tier 4 ¹³	Tier 4 ¹⁹	Tier 4 [#]
Class Size	Tier 2 ¹	Tier 4 ⁵	Tier 1 ¹⁴	Tier 4 ²⁰	Tier 4 [#]
Retirement Benefits	Tier 2 ¹	Tier 1 ⁶	Tier 2 ¹⁵	Tier 2 ²¹	Tier 4 [#]
Teacher Assignment	Tier 2 ¹	Tier 2 ⁷	Tier 4 ¹⁶	Tier 4 ²⁰	Tier 4 [#]
Discipline Procedures, Certified Employees	Tier 1 ¹	Tier 2 ⁸	Tier 2 ¹⁷	Tier 2 ²¹	Tier 4 [#]
Force Reduction Due to Lack of Funds	Tier 1 ¹	Tier 4 ⁹	Tier 4 ¹³	Tier 2 ²²	Tier 4 [#]
Bonuses and Salary Schedule Not Tied to Training/ Experience	Tier 1 ¹	Tier 2 ¹⁰	Tier 2 ¹⁸	Tier 2 ²¹	Tier 4 [#]
Teacher Preparation Time	Tier 2 ¹	Tier 2 ¹¹	Tier 4 ²⁰	Tier 2 ²¹	Tier 4 [#]
Course Content, Curriculum, Textbook Selection	Tier 3 ¹	Tier 4 ⁴	Tier 4 ¹³	Tier 4 ¹⁹	Tier 4 [#]

** Tier 1 = No Discretion; Tier 2 = Weak Discretion; Tier 3 = Strong Discretion; Tier 4 = Absolute Discretion. For more details, see Table 1 *supra* and discussion in Section 2.

¹ Cal. Gov. Code § 3543.2.

² *San Mateo City School Dist. v. Public Employment Relations Bd.*, 33 Cal.3d 850 (1983).

³ N.Y. Civ. Serv. Law § 204.

⁴ *Board of Educ. of City School Dist. of City of New York v. New York State Public Employment Relations Bd.*, 75 N.Y.2d 660.

⁵ *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46 (1974).

⁶ N.Y. Civ. Serv. Law § 201(4).

⁷ *Board of Educ. of Greenburgh Cent. School Dist. No. 7 v. Greenburgh Teachers Federation, Local 1788 of American Federation of Teachers, AFL-CIO*, 82 N.Y.2d 771 (1993).

⁸ *Board of Ed. of Union Free School Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington, Inc.*, 30 N.Y.2d 122, (1972)

⁹ *Schwab v. Bowen*, 41 N.Y.2d 907 (1977).

¹⁰ 1979 N.Y. Op. Comp. 79-186.

¹¹ *New York City School Boards Ass'n, Inc. v. Board of Ed. of City School Dist. of City of New York*, 39 N.Y.2d 111 (1976).

¹² Fl. Stat § 447.339.

¹³ Fl. Stat § 447.209.

¹⁴ Fl. Const. Art. IX, § 1.

¹⁵ *City of Tallahassee v. PERC*, 410 So. 2d 487 (Fla. 1981).

¹⁶ *Manatee Education Association v. Manatee County School Board*, 7 FPER ¶ 12017 (1980).

¹⁷ *Duval Teachers United, FEA-AFT, AFL-CIO v. Duval County School Board*, 3 FPER 96 (1977).

¹⁸ *St. Lucie Classroom Teachers Association/Classified v. School District of St. Lucie County*, 19 FPER ¶ 24020 (1992).

¹⁹ 115 Ill. Comp. Stat. 5/4.

²⁰ 115 Ill. Comp. Stat. 5/4.5.

²¹ Specific reported cases are unavailable confirming decisions of the Illinois Educational Labor Relations Board on these specific issue areas.

²² *Central City Educ. Ass'n, IEA/NEA v. Illinois Educational Labor Relations Bd.*, 174 Ill.Dec. 808 (1992).

[#] Tex. Gov. Code § 617.002(a).

rule on the particular issue of teacher preparation time, but it, like Florida, applies a balancing test to determine whether particular topics should be bargained as a term and condition of employment or free from union influence as an issue of managerial prerogative.²⁴

A third difference among the states, which is reflected in the allocation of topics in Table 3, concerns the statutory enumeration of specific policy areas as either Tier 1 “no discretion” topics or Tier 4 “absolute discretion” topics. In the former category, California’s collective bargaining statute lists four explicit Tier 1 topics upon which school districts have no discretion whatsoever to act unilaterally, and upon which the California Education Code prescribes a pro-union default position.²⁵ In contrast, the other three states do not have express statutory provisions removing school district authority on these topics, although New York law lists a separate Tier 1 topic, public retirement benefits.²⁶ Thus, districts in the states that do not identify particular topics as belonging under Tier 1 can (and must) negotiate procedural protections for certified teachers along with bonuses and uniform salary schedules, since these topics are considered a part of the “wages, hours, and terms and conditions of employment” that carry a duty to bargain. The ability to at least negotiate on these topics, and impose unilateral action should impasse be reached, confers meaningful bargaining leverage upon school districts to influence related policies, leverage which is lacking in California. Moreover, because

of case law and statutory law in New York²⁷ and Florida²⁸ respectively, school districts actually have Tier 4 absolute discretion over the particular issue of force reduction in cases of financial necessity, an important area of managerial discretion in light of present day budgetary hardships.

Illinois’ bargaining law goes even further, explicitly enumerating four Tier 4 topics for which school districts will have absolute authority to act free from union input: sub-contracting out to third parties that might interfere with union protected job responsibilities; decisions to lay-off or reduce-in-force employees; decisions to determine class size, class staffing and assignment, class schedules, academic calendar, hours and places of instruction, or pupil assessment policies; and decisions concerning use and staffing of experimental or pilot programs.²⁹ Combined with the fact that Illinois does not have any of the Tier 1 statutory protections for teachers that are present in California, this represents a dramatic difference that leaves school officials in Illinois with substantially greater control over school policy.

A fourth, albeit relatively minor difference among the states, is that only California law creates the third tier of constraint described in the prior section wherein unions have a right to consult on educational topics such as curriculum content and textbook selection. Although districts are free to act unilaterally on these matters in California, they must be willing to meet and confer with union representatives

before doing so, a measure of constraint that does not exist in any of the other states, as the topics that fall under in Tier 3 in California each come under Tier 4, or absolute district discretion, in New York, Florida, and Illinois.

Policy Implications and Conclusion.

There can be no doubt that teacher collective bargaining agreements constrain administrative discretion over teacher employment practices and certain educational policy decisions, but those agreements are not reached in a vacuum. As we have discussed, state teacher employment and collective bargaining laws structure the negotiations and agreements that are reached between school districts and local collective bargaining units. In California, those laws tend to constrain administrative discretion more than in the other large and diverse states we analyzed. While it may be the case that actual employment practices deviate from the “law on the books” (witness the influence of teachers associations in Texas, a state in which teacher collective bargaining is banned), the law nonetheless shapes the bargaining process. Indeed, as we have shown above, the EERA creates incentives for California teachers unions to argue that certain matters ought to be considered “mandatory bargaining” topics (Tier 2), while school district officials maintain that those same topics should instead be within management’s prerogative (Tier 4). Accordingly, legal rules provide the structure and back-

drop against which much district-level policy-making is conducted.

The policy implications of our conclusion, that California law is relatively restrictive of administrative decision-making, are less clear. If the primary goal of educational policy-making is to improve educational outcomes for California's children, it is not evident whether more or less school district discretion over conditions and policies that affect teachers will produce better student outcomes. Perhaps the most that we can say, based on available evidence, is that this question can best be answered only in the context of specific policy decisions and whether such decisions are better vested in the state legislature vs. the local school district and whether the position of teachers unions vis-à-vis the specific policy is more or less aligned with favorable educational outcomes than that of local school boards and administrators. For instance, is the decision to assess students more frequently for purposes of accountability—a decision that certainly affects the workaday lives of teachers—better left to state legislators or local school board members? Should that decision be subject to collective bargaining? These are indeed knotty questions that do not have clear answers.

For that reason, we would urge caution and a resistance to knee-jerk responses based on preconceived notions of labor or management. Caution among Sacramento policy-makers is necessary because California's teacher employment and collective bargaining laws

are “geologic”³⁰ in the sense that they are an accretion of past policy decisions that may or may not have been based on sound educational policy-making or seemingly necessary political compromise. Once that layer of policy has settled, it becomes embedded in the law's crust and is quite difficult to remove. Resistance to partisan politics and labor vs. management bias is also necessary, as the relevant question is where the locus of decision-making should be, in the State Capitol, the school board room, or the collective bargaining table. Our only suggestion is that wherever those policy decisions are made that they be transparent and based on sound reasoning, and not short-term political gain.

Endnotes

* We would like to thank Matthew Pasternak for contributing to the early conceptualization of this policy brief and researching the existing literature concerning teacher employment laws and teacher collective bargaining.

¹ Although there is scant research on the effects of state law on teacher employment arrangements and policies, and even less that looks at the effect of state teacher employment and collective bargaining law on student outcomes, there is a substantial and growing body of literature on the effect of unions and collective bargaining on teacher employment arrangements and educational outcomes. (Strunk & Grissom, 2010; Strunk, 2010; Moe, 2009; Strunk & Reardon, 2009; Strunk, 2009; Eberts, 2007; Koski & Horng, 2007; Riley, Fusano, Munk, & Peterson, 2007; Nelson, 2006; Levin, Mulhern & Schunck, 2005; Levin & Quinn, 2003; Hoxby, 1996; Nelson 1996). This policy brief does not consider the content of locally negotiated collective bargaining agreements, but rather analyzes the state laws that provide the context for such bargaining.

² The EERA also created the Public Employees Relations Board (PERB) whose role it is to resolve collective bargaining disputes arising out of the EERA in the first instance. Decisions by the PERB are appealable in most instances, however, to the state's appellate courts.

³ We also note that union influence is not uniform across all districts, as local collective bargaining agreements can vary substantially in their terms and the degree to which they constrain district decision-making. (Strunk & Reardon, 2009; Koski & Horng, 2007). This variation may well be due to the variation in relative bargaining power of local collective bargaining units in different districts.

⁴ *United Steelworkers of America v. Board of Education*, 162 Cal.App.3d 823 (App 4 Dist. 1984).

⁵ Cal. Educ. Code § 3543.2(b).

⁶ Cal. Educ. Code § 3543.2(c).

⁷ Cal. Educ. Code § 3543.2(d).

⁸ Cal. Educ. Code § 3543.2(e).

⁹ Note that because the district has the absolute right to consult and negotiate with unions over these topics, Kemerer includes them as subject to “mandatory bargaining” alongside those we discuss in Tier 2. However, there is a key distinction between these four specifically enumerated topics and those in Tier 2: the EERA authorizes district officials to unilaterally impose action against the union's wishes in the latter instance (after reaching a negotiation impasse) but not the former.

¹⁰ (Kemerer, 2009, p. 143. (“The Winton Act's meet and confer approach was carried over to EERA in the form of mandatory topics for consultation between the union and the public school employer.”))

¹¹ Cal. Educ. Code § 10601.6.

¹² See, e.g., *Eureka Teachers Association v. Eureka City School District*, PERB Order #955 (16. PERC 23168).

¹³ Cal. Gov. Code § 3543.2; N.Y. Civ. Serv. Law § 201(4); Fla. Stat. § 447.309; 115 Ill. Comp. Stat. 5/4.

¹⁴ This is with the slight exception of California, which requires district employers to meet and confer with union representatives on Tier 3 issues such as textbook selection and course curriculum.

¹⁵ Cal. Gov. Code § 3540; Fla. Stat. § 447.309(3); 115 Ill. Comp. Stat. 5/10.

¹⁶ *Niagara Wheatfield Adm's Ass'n v. Niagara Wheatfield Cent. School Dist.*, 44 N.Y.2d 68, 73 (1978). (“Any provision of a collective bargaining agreement which contravenes public policy, statute or decisional law may not stand.”)

¹⁷ Cal. Gov. Code §§ 3548 – 3548.8; N.Y. Civ. Serv. Law § 209; Fla. Stat. § 447.403; 115 Ill. Comp. Stat. 5/12.

¹⁸ See, e.g., Iowa Code § 20.22(1) (“If an impasse persists after the findings of fact and recommendations are made public by the fact-finder, the parties may continue to negotiate or, the board shall have the power, upon request of either party, to arrange for arbitration, which shall be binding. The request for arbitration shall be in writing and a copy of the request shall be served upon the other party.”)

¹⁹ For a thorough description of role of binding interest arbitration in resolving impasses during contract negotiation, see Stuart S. Mukamal, *Unilateral Employer Action Under Public Sector Binding Interest Arbitration*, 7 J.L. & Com. (1986); see also Arvid Anderson and Loren A. Krause, *Interest Arbitration: the Alternative to the Strike*, 56 Ford. L. Rev. 153 (1987).

²⁰ Cal. Gov. Code § 3543.2(a) gives the following definition: “Terms and conditions of employment” mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code.

²¹ *West Irondequoit Teachers Ass’n v. Helsby*, 35 N.Y.2d 46 (1974) (holding that the class size within a public school is not a “term or condition of employment” within the statute providing that the terms and conditions of employment are subject to mandatory negotiation).

²² *St. Lucie Classroom Teachers Association/Classified v. School District of St. Lucie County*, 19 FPER ¶ 24020 (1992).

²³ *New York City School Boards Ass’n, Inc. v. Board of Ed. of City School Dist. of City of New York*, 39 N.Y.2d 111 (1976).

²⁴ *Central City Educ. Ass’n, IEA/NEA v. Illinois Educational Labor Relations Bd.*, 174 Ill.Dec. 808 (1992).

²⁵ See footnotes 2-5 *supra* and accompanying text.

²⁶ N.Y. Civ. Serv. Law § 201(4) states, “benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. . . shall [not] be negotiated

pursuant to this article, and any benefits so negotiated shall be void.”

²⁷ *Schwab v. Bowen*, 41 N.Y.2d 907 (1977) (an appointing official has the power to abolish a civil service position when acting in good faith due to economic reasons, and the public employer cannot surrender the power to abolish positions through the vehicle of a collective bargaining agreement).

²⁸ Fla. Stat. § 447.209 (“It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons. However, the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation”).

²⁹ 115 Ill. Comp. Stat. 5/4.5.

³⁰ Our thanks to an anonymous reviewer for this clever term.

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