NOTE

THE STATUS QUO DOCTRINE: AN APPLICATION TO
SALARY STEP INCREASES FOR TEACHERS

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INTRODUCTION

The expiration of a collective bargaining agreement ("CBA") before the parties reach a new settlement presents a vexing problem. Under contract law, a contract ends once the parties have performed their duties under the contract, leaving both parties free from further obligation.\textsuperscript{1} One can quickly comprehend the difficulty this poses in the labor setting. If a CBA expires, may the employees simply stop working? If they continue to work, may the employer stop paying, given its release from the terms of the prior obligation? To prevent the occurrence of such undesirable breaks in the employer/employee relationship, and to maintain the existing relationship, traditional private sector labor law provides that many of the terms of collective agreements survive CBA expiration.\textsuperscript{2}

\textsuperscript{1} See, e.g., Restatement (Second) of Contracts § 235(1) (1979) ("Full performance of a duty under a contract discharges the duty.").

\textsuperscript{2} NLRB v. Katz, 369 U.S. 736, 743 (1962), holds that a "unilateral change in conditions of employment under negotiation is . . . a violation of [the good faith bargaining..."
if an employer decides to give its employees raises without bargaining for them, private sector labor precedent maintains that such a wage increase is, in essence, a refusal to bargain.\(^3\) By offering raises without negotiation, the employer undercuts the collective bargaining process and the status of the union.\(^4\) This practice violates the stated policy of national labor relations: "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of . . . employment."\(^5\) Because wages are a mandatory subject of bargaining,\(^6\) the failure to negotiate a wage change subverts national labor policy and is illegal.\(^7\)

This private sector labor policy of maintaining agreements after expiration is also important in the public sector because the government and public sector employees provide vital, often monopolistic, municipal services to the public. As a result, the necessity for survivability of the terms of public sector agreements is sometimes more compelling than for private sector agreements.\(^8\) For example, should municipal rubbish collectors end their service simply because their collective agreement has expired? Are teachers to stop teaching if their collective agreement has ended? Likewise, should expiration of the agreement free the municipality from its obligation to pay its employees? Obviously, none of these outcomes is desirable. The provision of the National Labor Relations Act]. Under this rule, an employer cannot implement unilateral changes that disturb the status quo until the parties negotiate to impasse. For further discussion of this case, see infra Parts I.C and III.C-D. Technically, the terms of a collective bargaining do not 'survive' expiration. Rather, they retain their legal significance because they define the status quo, which may not be altered, except under certain circumstances." Paul Bosanac, Expiration of the Collective Bargaining Agreement: Survivability of Terms and Conditions of Employment, 4 LAB. LAW. 715, 715 (1988).

\(^3\) See Katz, 369 U.S. at 746 (characterizing an employer's wage increase without notice to the union as "tantamount to an outright refusal to negotiate on that subject").

\(^4\) See id. at 744-47.

\(^5\) National Labor Relations Act § 1, 29 U.S.C. § 151 (1994) [hereinafter NLRA]; see also Neal M. Davis, Note, Scope of Collective Bargaining in Public Education: Toward a Comprehensive Balancing Test, 36 WASH. U. J. URB. & CONTEMP. L. 107, 123 (1989) (stating that the goal of collective bargaining statutes is to further "equitable and harmonious labor relations"). Thus, circumventing collective bargaining obligations subverts national labor policy.

\(^6\) See NLRA § 8(d), 29 U.S.C. § 158(d).

\(^7\) See Katz, 369 U.S. at 747.

\(^8\) Often, public employees are the primary provider of important services, such as refuse collection or education. In contrast, private sector products and services typically come from more than one source, rendering a private sector production or service stoppage by one employer less noticeable and less vital to the general public's well-being. See DAVID DENHOLM, BEYOND PUBLIC SECTOR UNIONISM: A BETTER WAY 1-2 (3d ed. 1993) (distinguishing the services the two sectors provide); TERRY L. LEAF, COLLECTIVE BARGAINING AND LABOR RELATIONS 693 tbl.17-1 (1991) (listing the differences between the private and public sectors).
unacceptability of such situations becomes readily apparent when one considers the prospect of no trash collection for a month, or no students in school for, possibly, a year or longer. Thus, because public-sector agreements affect the entire population, the need to continue municipal services uninterrupted is especially strong.9

After establishing that the need for the survivability of terms of collective public sector agreements is evident, the question becomes: Which terms survive? This Note investigates this question in public education collective agreements. Specifically, this Note addresses the contentious issue of survivability of salary step increases when a CBA expires.10 Part I synopsizes the history of collective bargaining in education, explains how the step increase issue commonly arises, and analyzes the development of legal precedent applicable to the situation. Part II of this Note explores the treatment of this issue in all fifty states and the District of Columbia, focusing on a few states that serve as paradigms for various responses to, or resolutions of, the issue. After discussing the weaknesses of other approaches, Part III argues that the best solution to the step increase issue is to require school boards to pay step increases after expiration, but to allow certain employer de-

9 See Richard G. Neal, It's Time to Cut Back on Collective Bargaining for Teachers and Other Public Employees, 14 J. Collective Negotiations Pub. Sector 91, 92-93 (1985) (noting the difference in the nature of services in the private and public sectors that prevent the government from going out of business—government services are essential to the needs of its citizens and are usually monopolistic, whereas the private sector offers more choices to consumers than the public sector).

10 Salary step increases are raises teachers receive each year based upon qualifications and experience/length of service. The qualifications factor is usually in columns, while the experience factor is in rows. Together, the columns and rows constitute the "salary schedule." In the columns, teachers earn different salaries depending on the degree held: bachelor's, master's, or doctorate. In addition, some schedules include intermediate columns, such as "masters + 30," which denotes a master's degree plus thirty credit hours of additional graduate work. In the rows, teachers earn a higher salary for each year of experience.

The parties determine a salary schedule using a "base," or minimum amount. Typically, a first-year teacher who holds only a bachelor's degree would earn the base. For every year thereafter, teachers earn the base plus a certain percentage. Likewise, for every column beyond the bachelor's column, teachers earn a certain percentage above the base. Typically, however, the numbers appear on the schedule in actual dollar amounts, and not in percentages. For example, a first-year teacher holding a master's degree may earn the base plus 5%. With a base of $25,000, that teacher would earn $26,250. A second-year teacher may earn the base plus 8%, or $27,000. The parties fix the percentages during negotiations. Educators, negotiators, school boards, and courts call the elevation from one step to another (here, from "base + 5%" to "base + 8%") a step increase, or sometimes an increment. Most often, teachers automatically receive such increases. However, the parties may make provisions for denial of a teacher's increase if that teacher is performing poorly. This Note discusses the raises based upon experience only. Most teachers infrequently, if ever, change columns based upon qualifications, so those raises are not subjects of regular, annual increases. For an example of a salary schedule, see Okla. Stat. Ann. tit. 70, § 18-114.7 (West Supp. 1996); see also James C. May, The Law and Politics of Paying Teachers Salary Step Increases upon Expiration of a Collective Bargaining Agreement, 20 Vt. L. Rev. 753, 756 n.10 (1996) (explaining the salary schedule system).
fenses to the rule and to permit the parties to contract explicitly that the board will not pay step increases after expiration.

I
LEGAL BACKGROUND

A. A Brief History of Public Sector Bargaining

The history and current state of private and public sector bargaining differ significantly. Public sector collective bargaining has shallow roots but large branches; private sector bargaining has deeper roots but arguably withering branches. The private sector labor movement began in the middle of the nineteenth century. The passage in 1935 of the Wagner Act, which after several amendments has become the National Labor Relations Act ("NLRA"), introduced to private sector employees a protected right to bargain collectively. In 1958, private sector union membership was almost 17 million, or 39% of the private sector work force. However, by 1978, only 20% of private sector employees belonged to labor unions. As of 1992, the percentage of unionized private sector employees had shrunk to 11.5%. In contrast, the percentage of unionized public sector employees has grown significantly, well surpassing that of private sector union membership—during the 1960s and 1970s, the rate of public sector unionism grew rapidly, and by 1992, 36.7% of public employees belonged to labor unions.

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11 See Leap, supra note 8, at 633 (noting that collective bargaining in the public sector is new compared to private sector bargaining, and the extent of unionism in the public sector "greatly exceeds" organization among private sector workers).
13 The heart of the Wagner Act, section 7, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Wagner Act § 7, 29 U.S.C. § 157 (1994).
15 See Denholm, supra note 8, at 20.
16 See id.
17 See id. at 24. However, private sector unions still comprise a significant portion of the private sector work force. See John Patrick Piskulich, Collective Bargaining in State and Local Government 1 (1992).
18 See Jane Giacobbe, Factfinding and Arbitration: Procedural Justice for All?, in Strategies for Impasse Resolution 87 (Harry Kershen & Claire Meirowitz eds., 1992); see also E. Edward Herman & Alfred Kuhn, Collective Bargaining and Labor Relations 85 (1981) ("The growth in overall employment has been accompanied, if not exceeded, by a concomitant growth in union membership in the public sector.").
19 See Denholm, supra note 8, at 24. However, the percentage of public sector employees who belong to unions has fallen in the past twenty years from its high in 1976 of 39.8%. See id. at 27.
Given its current prominence in labor relations, it is somewhat surprising that public sector bargaining at the state and local levels did not commence until the middle part of this century, even at a rudimentary and sporadic level. Extensive bargaining in the public sector is an even more recent development. In 1959, Wisconsin became the first state to pass a statute mandating compulsory collective bargaining for state public sector employees. In the federal sector, the first action spurring extensive public sector bargaining in the federal government occurred in 1962, when President Kennedy issued Executive Order 10,988. President Kennedy’s order granted federal employees the right “to form, join, and assist any employee organization.”

Although the union movement in education began as early as 1857, collective bargaining for teachers did not begin until the 1940s. In 1962, a New York City teachers’ strike signaled the beginning of the modern era of collective bargaining for teachers, marking

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20 See Herman & Kuhn, supra note 18, at 86 (Philadelphia employees have had labor agreements since 1939; Cincinnati employees “have enjoyed de facto [union] recognition since 1951”; the mayor of New York City promoted collective bargaining for city employees in 1958); see also Leap, supra note 8, at 635-37 (giving an overview of the development of unionism in the public sector); Piskulich, supra note 17, at 29-31 (summarizing the early history of public sector unionism in federal, state, and local governments).


22 See Denholm, supra note 8, at 8. Connecticut, Massachusetts, and Michigan, in 1965, and Rhode Island, in 1966, were the first states to follow Wisconsin’s lead. See Sharp, supra note 21, at 235.


24 Id. at 521; see also Herman & Kuhn, supra note 18, at 91 (“The development and implementation of this order undoubtedly provided the biggest single impetus to the growth of unionization in the federal sector.”); Piskulich, supra note 17, at 31 (“EO 10988 appears to have been a watershed event in the public sector labor movement . . . . For the first time federal employees were provided with the protected right to join, or to refrain from joining, a labor organization.”) (citation omitted).


26 See id. at 9 (citing, as examples, a Norwalk, Connecticut teachers’ association that achieved formal recognition as a bargaining agent and a teachers’ union in Pawtucket, Rhode Island that used a strike to “force[ ] the board of education to negotiate on its proposal for salary increases”).
the time when collective agreements between teachers' unions and school districts began in earnest. By 1970, twenty-three states had statutes governing some form of negotiation for either teachers or public employees generally. Today, thirty-six states and the District of Columbia have statutes allowing and governing collective bargaining for at least some public employees. Of these thirty-seven jurisdictions, fourteen have statutes applicable only to public school employees. As a consequence of the large number of states' authorization of bargaining for teachers by the mid-1980s, collective bargaining for teachers had become widespread, covering 86% of the nation's public school teachers. By that time, almost two million teachers belonged to either the National Education Association ("NEA") or the American Federation of Teachers, the two major teachers' unions. Because of their substantial numbers, teachers' unions wield a large amount of political influence. The national political power of teachers' unions translates into a strong teachers' union presence in some local school districts. Concomitantly, as teachers' national political

27 See Kerchner & Mitchell, supra note 12, at 2 (calling the strike "a permanent change in the relationship between teachers and their school district employers"); David Selden, The Teacher Rebellion 67-77 (1985) (documenting the 1961 election by New York City teachers of the United Federation of Teachers as their exclusive bargaining representative and the negotiations leading to a strike-ending settlement in 1962).

28 See Perry & Wildman, supra note 25, at 56.

29 See Karl D. Magnusen & Patricia A. Renovitch, Dispute Resolution in Florida's Public Sector: Insight into Impasse, in Strategies for Impasse Resolution, supra note 18, at 29, 30

30 The states are California, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Maryland, North Dakota, Oklahoma, Rhode Island, Tennessee, Vermont, and Washington. See Public Employees Bargain for Excellence: A Compendium of State Public Sector Labor Relations Laws 10, 12-13, 18-20, 23, 27, 39-40, 45-46, 49-50 (Krista Schneider ed., 1993). While thirty-seven jurisdictions have bargaining for some public sector employees, two of those (Kentucky and Wyoming) do not include teachers; thus, only thirty-four states and the District of Columbia have statutorily authorized collective bargaining for teachers. See id. at 23-24, 54.


32 See Kerchner & Mitchell, supra note 12, at 12.

33 See Raymond L. Hogler & Mary J. Thompson, Collective Negotiations in Education and the Public Interest: A Proposed Method of Impasse Resolution, 14 J.L. & Educ. 443, 453-54 (1985) (summarizing teachers' political activities); Lieberman, supra note 31, at 58 (arguing that "[t]eacher unions . . . have more power than private sector unions to block changes opposed by the union"); David M. Rabban, Can American Labor Law Accommodate Collective Bargaining by Professional Employees?, 99 Yale L.J. 689, 690 (1990) (finding that "some analysts view professional employees as a primary hope for the future of the American labor movement"). See generally Maurice R. Berube, Teacher Politics: The Influence of Unions (1988) (arguing that teacher unions have become the most powerful political constituency in education).

34 See Hogler & Thompson, supra note 33, at 449 (noting that teachers' use of political power has drawn criticism because they dominate political distribution of resources, favoring their own needs over the needs of other groups); James A. Vornberg & Michael S. Paschall, Secondary Public School Teachers' Satisfaction with Collective Bargaining, 13 J. Collec-
power grew, so did local unions' influence in negotiations. As the next section reveals, the interaction between school boards and teachers in negotiations produces the post-expiration step increase issue.

B. How the Salary Step Increase Issue Arises

A school board and a teachers' bargaining representative sometimes negotiate successfully, reaching a settlement for a new collective agreement before or shortly after the previous agreement expires. However, school boards and teachers' unions frequently fail to reach agreement so readily. Several reasons exist for this outcome. First, the negotiations for a new agreement involve a third party absent in private sector negotiations: the voting public. Given the direct public interest in the negotiations, the process becomes a political one. Because the school board acts as the representative for the community negotiations.

35 See, e.g., Legislative Comm'n on Employee Relations, Minn. Legislature, Public Employee Collective Bargaining: Use of Interest Arbitration 2 (1995) (finding that in Minnesota, parties settle about one-half of public employee bargaining agreements without outside intervention, and only limited labor strife exists in the current collective bargaining system).

36 See Denholm, supra note 8, at 1 ("Public sector collective bargaining . . . in the 1990s is a failure."); Leap, supra note 8, at 645 ("It is not unusual for contract talks involving state and local employees to extend well beyond the expiration date of the preceding contract."); D.S. Chauhan, Managing Public Labor Disputes: Conflict Resolution in Collective Bargaining, in Handbook of Public Sector Labor Relations 183, 189 (Jack Rabin et al. eds., 1994) (recognizing that it is not unusual for labor or management to reach impasse on an issue due, in large part, to the highly sensitive political environment surrounding public sector negotiations).

37 See Davis, supra note 5, at 109 (noting that in the public sector courts must consider the "public's interest in efficient public services and an effective voice in the political decision-making process"). The public's influence can be significant, if not controlling, in a dispute.

Even when the threat of bankruptcy is not imminent, state and city elected officials . . . have faced tax-payer revolts and pressures to cut costs and improve the productivity . . . . As a result, public officials have been forced to operate on a more economical and efficient basis; negotiators representing state and municipal governments have begun to take a more hard-line, take-it-or-leave-it stance toward the bargaining demands of public-sector unions.

Leap, supra note 8, at 648.

38 See Piskulich, supra note 17, at 6.

Collective bargaining in the public sector can be considered less an economic relationship than a manifestly political interaction. The wage-employment trade-off changes character to the extent that most governmental activity is monopolistic in nature . . . .

While there will be some situations in which a fear of unemployment restrains the willingness of public employees to exert upward pressure on wages, political considerations are likely to play a mitigating role.
nity, fiscal and political pressures compel the board to have a budget that will not lead to increased taxes. Coupled with this pressure is the fact that teachers’ salaries can consume seventy to eighty percent of a district’s budget for the year. Thus, teachers’ salaries in a CBA become the most important aspect in a school board’s budget and the most controversial issue in negotiations. While taxpayers will fre-

39 See NATIONAL EDUC. ASS’N, NEGOTIATING CHANGE: EDUCATION REFORM AND COLLECTIVE BARGAINING 5 (1992) (noting increased societal pressures on schools when education funding is decreasing in many locales); id. at 34-35 (pointing out that “[d]espite the overwhelming public concern for education,” local budgets are strained creating “virtually insoluble dilemmas for bargainers”). As early as 1970, the primary determinant of the level of teacher compensation was the district’s ability, rather than desire, to pay. See PERRY & WILDMAN, supra note 25, at 139.

40 Since labor costs comprise as much as 70 percent of local expenditures, any increase is quite visible and will be felt by elected officials and by the general public. Both therefore have [a] strong incentive to resist this upward pressure, even in the short run.

. . . . . . [T]he public employer is indeed trapped in a fiscal bind. Not only do subnational public administrators face the reality of diminished intergovernmental assistance, but they are assaulted from all sides, “caught between employee compensation demands, public willingness to vote for increased operating levies, shrinking tax bases, opposition interests, and the legislatures' reluctance to allow governments the freedom to impose any kind of tax[ ] at will.” The result: unions face a harried employer with strong incentive to take a rigorous bargaining stance. It is a much tougher battle at the negotiating table.

PISKULICH, supra note 17, at 9-10 (quoting Chimezie A.B. Osigweh, Collective Bargaining and Public Sector Union Power, 14 PUB. PERSONNEL MGMT. 75, 80 (1985)); see also Richard C. Kearney, Monetary Impacts of Collective Bargaining, in HANDBOOK OF PUBLIC SECTOR LABOR RELATIONS, supra note 36, at 73, 74 ("In government, where price increases often translate into tax and fee hikes, the choices are more confined, more difficult, and certainly more visible to the relevant public"); id. at 89-90 (noting that the same fiscal problems and political pressures also constrain union demands because “[t]axpayers fiercely resist what they perceive to be excessive public employee wage and benefit settlements, especially when they are immediately translated into tax hikes").

41 See Kearney, supra note 40, at 74 (stating that between 50% and 75% of typical state and local budgets are dedicated to employee pay and benefits); Lieberman, supra note 31, at 56 (noting 50% to 75% of local operating revenues go to teachers salaries and benefits); Neal, supra note 9, at 94 (recognizing that personnel costs constitute 80% of most government agency budgets (including school districts)); see also LEAP, supra note 8, at 646-47 (noting that because public sector jobs are “labor intensive,” a “large portion” of these operating budgets are spent on personnel, causing even a small salary increase to have a significant budgetary effect).

42 See PERRY & WILDMAN, supra note 25, at 120 (“The advent of collective bargaining in a school system . . . may accentuate . . . the central position of salaries in teacher-management relations. The basic salary schedule was . . . the only issue to become the focus of significant overt conflict in new bargaining relationships.”); id. at 128 (“[S]alaries appear to occupy the same salient position in collective negotiations in public education as do wages in collective bargaining in the private sector.”); id. at 137 (“Basic salaries were the most consistent source of overt conflict between teacher organizations and school management in the systems studied.”); id. at 154 (“[T]he establishment of a formal collective bargaining relationship produced an intensification of conflict between teachers and school management over the structure of compensation.”); see also Stanley Cherim, Bargaining from Both Sides, GOV'T UNION REV., Winter 1984, at 47, 52 (stating that the money issue is
The Status Quo Doctrine

...quently resist paying salary step increases to teachers, the teachers, like any other employees, desire higher salaries. These clashing interests lead to situations where collective agreements in education can take months, or even years, to complete, and the process can be quite adversarial. As a result, teachers frequently begin a new school year without a settled collective agreement.

When an agreement expires, teachers usually continue to teach, and the district continues to pay them. The problem arises in determining the rate of pay. Most collective agreements provide for automatic step increases (raises based upon experience or length of service) for teachers upon their completion of each year of service. When the agreement expires, does that provision still apply? For a school board that wants to pay step increases even after expiration, the situation presents both a challenge for justification to taxpayers and a struggle for alignment with taxpayers' fiscal interests. Taxpayers will wonder why the board should have to pay salary amounts to which it seemingly has not yet agreed.

In confronting these questions, political pressures can force school boards to resist teachers' demands, or reinforce their efforts the hardest part of an agreement and people are willing to risk a strike or lockout even over small amounts.

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43 See May, supra note 10, at 755-56.
44 See Kaye McDonald Sunderland, Comment, No Easy Answers: Obstacles to Collaborative Bargaining in Teacher Negotiations, 24 Willamette L. Rev. 767, 772 (1988) (noting that in addition to an interest in high-quality education, teachers' interests include receiving better salaries).
45 See Legislative Comm'n on Employee Relations, Minn. Legislature, supra note 35, at 2 ("The arbitration process does not begin until negotiations reach impasse, which on average is seven months after the old contract has expired. It generally takes another seven months to complete the process once it is begun."); LEAP, supra note 8, at 645 ("It is not unusual for contract talks involving state and local employees to extend well beyond the expiration date of the preceding contract."); May, supra note 10, at 762 (noting that, in one instance, contract negotiations "had dragged on unsuccessfully for over a year").
46 See Sunderland, supra note 44, at 768 (noting that despite interest in more collaborative bargaining, "confrontation appears to be the growing trend"); see id. at 777-81 (tracing the adversarial model in labor relations to the NLRA).
47 See Lieberman, supra note 31, at 59-60 (explaining that factfinding alone often takes over a year).
48 See Joseph R. Weeks, Continuing Liability Under Expired Collective Bargaining Agreements (pt. 1), 15 Okla. City U. L. Rev. 5, 181 (1990) (highlighting that employees will continue to work even when the collective agreement has expired).
49 See May, supra note 10, at 756 n.10 ("Multi-year collective bargaining agreements (CBAs) typically contain language stating that for each extra year of teaching experience, the teacher shall advance vertically one experiential step on the step scale.").
50 See id. at 754-56; see also Hugh D. Jascourt, Public Referendum, Is It an Effective Mechanism for Resolving Collective Bargaining Impasses? An Introduction, 14 J.L. & Educ. 459, 459-41 (1985) (recognizing a concern that collective negotiations bypass the will of the public because negotiations are largely a private process between the board and the union).
51 See Vornberg & Paschall, supra note 34, at 86 (noting that as school boards try to contain budgets and taxes they are less likely to accept teacher demands, causing teachers to become more dissatisfied with their jobs).
to oppose the payment of automatic raises which the expired collective agreement contains.\textsuperscript{52} In addition, many citizens do not want to pay increases to teachers because they often view public schools and teachers as mediocre and, therefore, undeserving of greater expenditures.\textsuperscript{53} Further, for years, many school boards have had declining funds with which to settle contract disputes.\textsuperscript{54} At the same time, teachers resist working for another year at the same rate of pay, because when the cost of living is taken into account, it amounts to a pay cut in real dollars.\textsuperscript{55} Consequently, disagreement, resentment, and sometimes litigation over step increases can further polarize an already adversarial process,\textsuperscript{56} and lengthen an already protracted nego-


Management is now [in 1979] beginning to take the offensive in collective bargaining much more aggressively than it has in the past, is beginning to try to get things out of contracts, and pressing more of its own issues at the bargaining table with more professional know-how and with much more vigor. Management representatives can do so now because they have more politicians and more of the community behind them.

\textsuperscript{53} See Berube, \textit{supra} note 33, at 11-15 (discussing public disenchantment with teachers after teachers entered politics, but noting that "[t]he public appears sympathetic to the teachers' plight"); Selden, \textit{supra} note 27, at 235-37 (noting a "backlash" of negative sentiment by school boards and the public in response to teacher rebellions and strikes).

The National Commission on Excellence in Education produced a report in 1983 entitled \textit{A Nation at Risk: The Imperative for Educational Reform}, which caused some negative feelings toward teachers. See \textit{id.} at 241-42 (noting that "[t]he underlying assumption of the report was that the faults of American education could be corrected if teachers and policy makers only wanted to do it").

The notion of teacher unionism itself has contributed to a negative image of teachers, even from the very beginning of teacher unions earlier in this century. See Susan Moore Johnson, \textit{Teacher Unions in Schools} 3 (1984) (noting that critics of teacher unions argue that unions are "laying waste" to schools); Kerchner & Mitchell, \textit{supra} note 12, at 57-58 (discussing early negative reactions to teacher unionism).

\textsuperscript{54} See Johnson, \textit{supra} note 53, at 13-14 (discussing declining revenues as one of several factors that influences teacher bargaining); Fred G. Burke, \textit{The Educational Environment in the 1980's, in Center for the Study of Collective Bargaining in Educ., Collective Bargaining in Education in Times of Fiscal Austerity and Declining Enrollments} 1 (Mark Gray et al. eds., 1981) (discussing limited resources and increasing competition and their anticipated impact on collective bargaining).

\textsuperscript{55} For example, assuming an inflation rate of 5\%, a teacher who earns $25,000 per year must earn $26,250 in the following year to maintain the same standard of living. If that teacher receives the same salary in the following year (after denial of a step increase), her real wages have fallen.

\textsuperscript{56} See Denholm, \textit{supra} note 8, at 9 (arguing that "[c]ompulsory collective bargaining is destructive of a peaceful, stable employer-employee relationship"); Cherim, \textit{supra} note 42, at 48 (calling collective negotiation "an adversarial system of conflict resolution" which "divide[s] people into two camps"); Paul F. Gerhart, \textit{Maintenance of the Union-Management Relationship, in Handbook of Public Sector Labor Relations, supra} note 36, at 97, 101 (finding that in the past thirty years, labor-management relations in the public sector have
to maintain the parties' existing relationship during negotiations, each state should have a rule, allowing limited and defined exceptions, that preserves all terms and conditions of employment after expiration, until the completion of a new CBA. All terms and conditions pertaining to compensation, such as the salary schedule and any step increase provisions in the CBA, must survive. The formulation of such a rule rests legally on an interpretation of the judicially constructed status quo doctrine. The next section explores the development of this doctrine.

C. Development of Applicable Legal Doctrine

1. NLRB v. Katz and the Katz Doctrine

In 1962, the United States Supreme Court held in NLRB v. Katz that a "unilateral change in conditions of employment under negotiation is . . . a violation of [the good faith bargaining provision of the National Labor Relations Act]." In Katz, the employer and union were negotiating their initial collective agreement, when the employer made unilateral changes in the terms and conditions of employment that governed their existing relationship. Specifically, the employer changed the sick leave policy and awarded both wage increases and merit raises. To prevent the employer from making such changes, the Supreme Court adopted a rule barring an employer from making unilateral changes in terms and conditions of employment during negotiations until the parties reach impasse. The evolved toward an adversarial model); Ruth Tallakson & Hoyt N. Wheeler, Winning and Losing in Interest Arbitration, in Strategies for Impasse Resolution, supra note 18, at 180, 180 ("Although it is true that collective bargaining often has a strong flavor of cooperativeness, there has also been an enduring emphasis upon winning and losing.").

57 See Richard H. deLone, Quality Education, Collective Bargaining and Social Equity, in Proceedings, supra note 52, at 11, 11 ("[C]ollective bargaining in most school systems takes up an enormous amount of the time, energy, thought, and concern of most everybody involved.").

58 For a discussion of the funding of such an arrangement, see infra Part III.E.1.


60 Id. at 743. For a good summary of Katz and its implications for the private sector, see W. Gary Vause, The Good Faith Obligation in Public Sector Bargaining—Uses and Limits of the Private Sector Model, 19 STETSON L. REV. 511, 541-43 (1990).

61 Katz, 369 U.S. at 739-40.

62 Id. at 741.

63 See id. at 744 (sick leave), 744-45 (wage increases), 745-46 (merit increases).

64 Id. at 742-43. It is important to draw a distinction between impasse in the public sector versus the private sector. In the private sector, parties reach impasse once no chance remains that further negotiation will produce an agreement. In the public sector, impasse is reached later in the process. Once parties in the public sector cannot reach an agreement, they typically proceed through a series of impasse procedures including mediation, fact-finding, and sometimes, arbitration. See, e.g., Cal. Gov't Code §§ 3548-3548.8 (West 1995); 115 ILL. COMP. STAT. ANN. 5/12 (West 1993); Mass. Ann. Laws ch. 150E, § 9 (Law. Co-op. 1989). If the parties complete these procedures without reaching an agree-
Court explained that the implementation of unilateral changes constituted "a circumvention of the duty to negotiate which frustrates the objectives of [the requirement to bargain in good faith] much as does a flat refusal." 65

2. **Scope of the Katz Doctrine**

Because Supreme Court opinions cannot foresee all future variables or cover all situations, courts must determine the scope of Supreme Court holdings as they apply them to new fact patterns and circumstances. The salary step increase issue for teachers differs from the issue in *Katz* in three important respects. First, because *Katz* involves the National Labor Relations Board ("NLRB"), it is a private sector case that does not apply to public sector employees, and is not mandatory authority in public sector relations. 66 More explicitly, the NLRA, which created the NLRB, 67 excludes public employers from coverage under the Act. 68 Therefore, the NLRB has no jurisdiction to decide cases involving public sector (government) employers, and hence, cases that public employees bring against their employers. Therefore, like *Katz*, any NLRB case before the Supreme Court will not bind public employers. Second, the employer in *Katz* made unilateral changes before the parties reached an agreement at the beginning of their labor relationship. 69 In the post-expiration setting, however, the disputes in question occur after a collective agreement expires. Finally, *Katz* sought to increase, not decrease or freeze, the employees' wages. Thus, the question is: Will the *Katz* doctrine apply when a public employer refuses to grant a wage increase after agreement expiration? The following two subsections explain the courts' affirmative answer to this question.

a. **Adopting Katz in the Public Sector**

Many states that authorize collective bargaining for teachers and other public sector employees have cited *Katz* or applied its rule to

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66 See NLRA § 2(2), 29 U.S.C. § 152(2) (1994) (excluding from the definition of "employer" under the Act "any State or political subdivision thereof"); see also Vause, supra note 60, at 512 (noting that although the NLRA exempts public employees from its scope, the Act has been the model for most public bargaining statutes).


68 See supra note 66. Municipalities and counties, both of which employ teachers, are political subdivisions of a state. Therefore, the NLRA does not govern their actions as employers.

labor relations in the public sector.\textsuperscript{70} This development may be somewhat surprising, given the dissimilarities between the sectors.\textsuperscript{71} The differences between the public and private sectors are such that some commentators doubt whether collective bargaining and education, or bargaining and the public sector generally, are compatible at all.\textsuperscript{72} Three differences between the sectors bear most significantly on the step increase issue: (1) the political, as opposed to economic, nature

\textsuperscript{70} See, e.g., Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 848 (Me. 1995) (Wathen, C.J., dissenting) (describing "the prohibition against unilateral change [as] ... universally recognized in collective bargaining in both the private and public sector"); Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328, 339 (Tenn. 1984) (noting that "[c]ourts of other states have considered whether the principles set forth in Katz apply to collective bargaining in the public sector and the majority have held that they do"); see also Stephen F. Befort, Public Sector Bargaining: Fiscal Crisis and Unilateral Change, 69 MINN. L. REV. 1221, 1268 (1985) ("Virtually all jurisdictions carry over to the public sector the private sector rule extending the unilateral change proscription to the postcontract setting, prohibiting an employer from unilaterally altering the status quo concerning mandatory bargaining topics ... without first bargaining to impasse.").

\textsuperscript{71} See DENHOLM, supra note 8, at 1 (bemoaning the failure of "[t]hose who imposed collective bargaining on the public sector ... to appreciate the differences between the public and private sectors"); LEAP, supra note 8, at 635 (pointing out that "the differences between public-sector and private-sector collective bargaining are significant").

\textsuperscript{72} At least one NEA lawyer doubts whether education reform and collective bargaining are compatible. See Robert Chanin, The Relationship Between Collective Bargaining and Education Reform, in ADVANCING THE NATIONAL EDUCATION GOALS: THE ROLE OF COLLECTIVE BARGAINING 14, 18 (National Education Association ed., 1993) (concluding, despite doubts about collective bargaining in education, that the NEA should "resist any attempt to weaken collective bargaining"); see also LIEBERMAN, supra note 31, at 54 (asserting that "public sector bargaining poses insuperable obstacles to the educational reform movement"). Some commentators even doubt the compatibility of collective negotiations with the entire public sector. See, e.g., Neal, supra note 9, at 91 (arguing that application of private sector collective bargaining laws to the public sector would result in "serious damage to the social and economic fabric of the entire nation"). But see Richard Compere, Comment, Public Sector Collective Bargaining in Mississippi: An Argument for Acceptance, 56 MISS. L.J. 379, 390-91 (1986) ("Certainly there are distinctions between the two environments, but the fact that the public sector is not a purely economic environment ... does not mean that public employee bargaining is inappropriate. Analogous forces exist in the public sector ... While distinctions do exist between them, collective bargaining is viable in either.").
of bargaining in the public sector;\textsuperscript{73} (2) the role of the public interest in public sector bargaining;\textsuperscript{74} and (3) the differences in funding.\textsuperscript{75}

The first two differences are closely related. The first difference flows from the idea that "in the private sector, if a company conducts its labor negotiations in an irresponsible manner, the company will cease to exist. In other words, the market place is the ultimate curb to wrong decisions in the private sector. There is no market place for government decisions."\textsuperscript{76} Normal market pressures force private sector employers to keep their products competitive and to take stances in labor negotiations that will keep costs down.\textsuperscript{77} However, because government services are monopolistic, consumers have no alternatives if the government discontinues these services.\textsuperscript{78} When a labor dispute or protracted negotiation jeopardizes delivery of government services, the government employer can either refuse to deliver the services to the public, possibly creating pressure to settle with the union, or concede to the union.\textsuperscript{79} In this way, the "economic pressure for reasonable settlement [that is present in the private sector] is less present in the public sector, thus creating more potential for management to give in to union demands."\textsuperscript{80} Therefore, the absence of market forces and the presence of political pressure arguably create a weaker man-

\textsuperscript{73} See Piskulich, supra note 17, at 6 (stating that "[c]ollective bargaining in the public sector can be considered less an economic relationship than a manifestly political interaction"); Sherry S. Dickerson & N. Joseph Cayer, The Environmental Context of Public Labor Relations, in Handbook of Public Sector Labor Relations, supra note 36, at 1, 1 (discussing the political nature of public sector labor relations and the economic nature of private sector labor relations); Neal, supra note 9, at 91 (drawing a contrast between the private sector, "a private economic matter between producer and specific consumers," and the public sector, "a public political matter between the government and citizens generally").

\textsuperscript{74} See Herman & Kuhn, supra note 18, at 104 (public interest may be present in public sector, but is "generally absent" in the private sector); Leap, supra note 8, at 645 (stating that unilateral pressures, or pressures from third parties, are strongest in teacher bargaining); Chauhan, supra note 36, at 186-87 (citing the influence of public interest in public sector collective bargaining).

\textsuperscript{75} See Leap, supra note 8, at 646-49 (describing "several unique fiscal characteristics that set [public-sector organizations] apart from private-sector firms").

\textsuperscript{76} Neal, supra note 9, at 93.

\textsuperscript{77} See id.

\textsuperscript{78} See id.

\textsuperscript{79} See id.

\textsuperscript{80} Id. For an alternative formulation of the problem, see Denholm, supra note 8, at 2-3.

Public sector decisions are political decisions no matter how great their economic impact . . . . In the public sector, decisions that are politically popular but economically ruinous can get you reelected. Decisions that are economically sound but politically unpopular are ruinous.

Private sector decisions are economic decisions no matter how great their political impact. In the private sector, economic decisions that have bad political consequences can make you unpopular, but decisions that are politically popular and have bad economic consequences can put you out of business.

\textit{Id.}
agement bargaining position in the public sector than in the private sector.

The second difference between the sectors, the role of the public interest, purportedly has similar effects in that public sector bargaining increases the power of teachers' unions. In private sector bargaining, the only groups with a direct interest in the results of negotiations are the employer and the employees. In contrast, the taxpaying public may represent a third party in public sector bargaining that is absent in the private sector relationship. When the public employer bargains with the public-employee union using the private sector model, it may give public sector employees “exclusive access” to the decisionmakers. As a result of such access, the union—a private interest group—becomes a participant in the school board's legislative process, which is a public activity. Thus, the union may wield improper influence over the political decisions of the school board. The prominence of salary costs in the public sector magnifies this problem because the bargaining relationship gives the union a larger role in fiscal matters than that of the town's citizens.

The third difference, sources of financing, is easier to comprehend. Public employers obtain money from tax revenues collected from residents. Private employers do not. Therefore, budgeting and collective bargaining have a close relationship in the public sector. The problem arises in negotiation because the union may base

81 See LEAP, supra note 8, at 645 (stating that “[p]rivate-sector labor disputes generally do not attract a great deal of attention from persons or interest groups outside of the corporation and union directly involved in the contract talks”).
82 See Vause, supra note 60, at 566 (“The public employer is government; it acts as the state, or at least as an arm of the state. In that capacity, it owes duties to the public that simply do not attach to private sector employees.”). Of course, one could also view the public sector bargaining relationship as a two-party relationship in which the government employer is not a separate interest, but rather represents the public interest. See infra notes 96–97 and accompanying text.
83 See John Pisapia, Alternatives to the Bilateral Model, in PROCEEDINGS, supra note 52, at 56, 57.
85 See Davis, supra note 5, at 117; see also Befort, supra note 70, at 1256 (noting that "other commentators point out that public sector bargaining limits the political access of potentially adverse interest groups by excluding them from the bilateral negotiation process"); Kendrick Scott, The Case Against Collective Bargaining in Public Education, Gov't Union Rev., Spring 1982, at 16, 21 (arguing that collective bargaining "places ... power in the hands of a vested interest group, the teachers' union," thereby diminishing other legitimate interest groups' influence on the process).
86 See supra note 41 and accompanying text.
87 See Neal, supra note 9, at 94; see also id. (wondering how the government employer can serve the public interest fairly when it must "negotiate with only one portion of its constituency—its employees—on matters that cover 80 percent of its budget").
88 See LEAP, supra note 8, at 647.
89 See id.
its proposals on factors outside of a fixed budget, such as a cost-of-living measurement or what other jurisdictions are paying.\textsuperscript{90} Even if the parties reach an agreement, it may not become effective until it receives legislative approval.\textsuperscript{91}

None of these three differences should prevent adoption of private sector labor law precedent in the public sector and courts should apply the \textit{Katz} rule prohibiting unilateral change to public sector collective agreements. First, according to commentators, arguments that public sector unions enjoy disproportionate political power are overstated:

\begin{quote}
[T]he feared imbalance in political power is considerably exaggerated and \ldots significant political constraints on public sector bargaining do exist. Indeed, over the past decade taxpayers pressured public sector managers to resist union demands in virtually every jurisdiction. The political clout of taxpayers repeatedly dwarfed that of public sector unions as management bargaining stances hardened and wage freezes replaced cost-of-living adjustments.\textsuperscript{92}
\end{quote}

Other commentators discredit warnings about the excessive power of teachers' unions in local negotiations because "significant political and economic factors" limit that power.\textsuperscript{93} These factors include a lack of political support for educators, the value of fiscal conservatives in the budget process, and school boards' savvy in negotiations.\textsuperscript{94}

Second, the public is not altogether excluded from the negotiations of CBA terms. Professor Stephen Befort argues:

The public access concerns \ldots also appear to be overstated. \ldots The introduction of collective bargaining does not eliminate the access of other groups to public officials. Although the public does not participate directly in negotiation sessions, it still has input through lobbying, political action committees, and elections. Most states also require that elected legislative bodies review and approve collective bargaining agreements. Some state statutes also contain innovative provisions that require the parties to present their initial negotiation proposals at a public forum.\textsuperscript{95}

\begin{footnotes}
\item[90] See id.
\item[91] See id.
\item[92] Befort, \textit{supra} note 70, at 1260-61; see also id. at 1256 (arguing that "[a]lthough avoiding distortion of the democratic political process is a laudable objective, the development of public sector labor relations during the fiscal crisis suggests that the political process concerns have been exaggerated").
\item[94] See id. For an elaboration of this point, see \textit{id.} at 1600-04; see also PIKULICH, \textit{supra} note 17, at 8 (noting that "[t]he need to curtail excessive union influence over a shrinking pie may be quite salable to a public uneasy about its economic future").
\item[95] Befort, \textit{supra} note 70, at 1261-62 (footnotes omitted); see also \textit{id.} at 1275 ("The aggressive response of public sector management and the increasing centralization of au-
\end{footnotes}
In addition, when school boards negotiate with a teachers’ union, school board officials are the elected representatives of the public interest. If a school board delegates negotiation responsibilities to some other official, such delegation may appear to weaken the connection between the public and the actions of its government. However, elected officials “routinely” give responsibility to civil servants whom the elected officials appoint.96

Finally, public officials have more flexibility with regard to financial matters than is immediately apparent. To cover unexpected or unbudgeted items, officials can shift funds from one purpose to another and compensate for a resulting shortfall in a later appropriations period.97 Alternatively, a school board may appeal, on behalf of the school district, to an appropriate legislative body for additional funds.98 Such an appeal would be especially compelling if intended to fund payment of an item that courts or statutory provisions require. In these ways, “the rigid and bureaucratic budgeting process that is commonly characteristic of governmental entities does not necessarily impose a constraint on the collective bargaining process.”99

Despite the preceding concerns about the differences between the private and public sectors, jurisdictions with public sector bargaining statutes100 have had little or no trouble adopting the general Katz rule in the public sector.101 Essentially, the rationale for the Katz rule is the same in both sectors.102 Maintenance of the conditions underlying the bargaining relationship, and thus the prevention of unilateral changes, promotes collective bargaining.103 Therefore, the prohibi-

96 LEAP, supra note 8, at 642. Any executive branch agency of the federal government serves as an apt example.
97 See id. at 647 (“[P]ublic administrators frequently have the authority to move funds from one budgetary category to another.”).
98 See id. (“Appeals may also be made to legislative bodies for additional monies to fund wage, salary, and benefit demands.”).
99 Id.
100 See supra notes 29-30 and accompanying text.
101 See infra notes 109-21 and accompanying text; see also Befort, supra note 70, at 1231-32 (Although “it has become almost obligatory in contemporary scholarly literature to argue that the theoretical distinctions between the two sectors preclude the possibility of transplanting private sector policies and procedures to the public sector”, the “theoretical distinctions have become obsolete.”) (footnote omitted).
103 See Katz, 369 U.S. at 744 (finding that one of the unilateral changes in the case “plainly frustrated the statutory objective of establishing working conditions through bargaining”).
tion of unilateral changes falls within the policy objectives of both the NLRA and state public sector labor laws. Thus, when employers impose unilateral changes to collective agreements in the public sector, it undercuts the bargaining process much as it does in the private sector. One reason for public sector labor law’s adoption of the Katz rule prohibiting unilateral change is that most states have based their public sector labor statutes on the NLRA, which governed the Supreme Court’s Katz decision.

Perhaps realizing such similarities, at least several states have cited Katz when importing its prohibition of unilateral change during negotiation. The first case to address the subject of post-expiration unilateral change in the public sector was Triborough Bridge & Tunnel Authority in New York. In Triborough, the employer maintained salary levels on the date of contract expiration, thereby failing to grant salary increases during negotiations. The New York Public Emplo-

104 See National Labor Relations Act § 1, 29 U.S.C. § 151 (1994) (“It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining. . . .”); Katz, 369 U.S. at 747 (reasoning that unilateral actions an employer takes that affect conditions of employment without negotiation “must of necessity obstruct bargaining, contrary to the congressional policy”). For analogous state policy, see, for example, HAW. REV. STAT. ANN. § 89-1 (Michie 1996) (declaring that “harmonious and cooperative relations between government and its employees . . . are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives”); IOWA CODE ANN. § 20.1 (West 1995) (“The general assembly declares that it is the public policy of the state to promote harmonious and cooperative relationships between government and its employees by permitting public employees to organize and bargain collectively. . . .”).

105 See Galloway Township Bd. of Educ. v. Galloway Township Educ. Ass’n, 393 A.2d 218, 230 (N.J. 1978) (pointing out that, like Katz in the private sector, the state legislature of New Jersey “has. . . recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation”) (emphasis added).

106 See DENHOLM, supra note 8, at 1 (realizing that despite the differences between the sectors, “the [NLRA] . . . has been used as a model for all public sector bargaining laws, with minor variation”); LEAP, supra note 8, at 654 (“State and municipal bargaining statutes are often similar in content to the [NLRA].”); Finch & Nagel, supra note 94, at 1581 (stating that “[t]eacher bargaining laws have usually been patterned after private sector precedent, particularly the [NLRA]”); RABBAN, supra note 33, at 692 (noting that public sector labor legislation “incorporates many doctrines from the NLRA model”); VAUSE, supra note 60, at 512 (calling the NLRA “the most enduring model for structuring the new public sector bargaining statutes”); see also BEFORT, supra note 70, at 1231-32 (declaring that as public sector labor relations has taken on attributes of private sector relations, the “theoretical distinctions [between the two] have become obsolete”).

107 For a discussion of the decision, see supra Parts I.C.1-2.


110 Id. at 3064.
ment Relations Board ("PERB") held that the employer's action violated the duty to bargain, and thus adopted the private sector rule prohibiting unilateral change after expiration.\footnote{111} In an opinion frequently cited by other states,\footnote{112} New Jersey later followed New York in \textit{Galloway Township Board of Education v. Galloway Township Education Ass'n}.\footnote{113} The Supreme Court of New Jersey recognized the similarity of this private sector rule to its own statutory public sector bargaining statute.\footnote{114} The court also explicitly used the analysis in \textit{Katz} to support its analysis of this public sector case.\footnote{115} New Jersey recently affirmed its rule in \textit{Evesham Township Board of Education}.\footnote{116} Noting that New Jersey had imported the \textit{Katz} rule to the public sector, the Supreme Court of Tennessee did the same in \textit{Smith County Education Ass'n v. Anderson}.\footnote{117} Four other states, California, Oregon, Illinois, and Massachusetts, have relied on \textit{Katz} and their state's own public sector labor statutes in adopting the general rule of \textit{Katz}.\footnote{118} Without citing \textit{Katz} explicitly, Florida, Maine, and New Hampshire have adopted its prohibition of employer-imposed unilateral changes during negotiations.\footnote{119} Finally, Indiana has codified the \textit{Katz} rule preventing unilateral changes.\footnote{120}

\begin{thebibliography}{99}
\bibitem{111} \textit{Id.} at 3064-65. For a discussion of \textit{Triborough}'s impact in the public sector, see Befort, \textit{ supra} note 70, at 1268-74.
\bibitem{112} \textit{See infra} note 119 and accompanying text.
\bibitem{113} 393 A.2d 218 (N.J. 1978).
\bibitem{114} \textit{Id.} at 230.
\bibitem{115} \textit{Id.} at 231.
\bibitem{117} 676 S.W.2d 328 (Tenn. 1984); \textit{see id.} at 338-39 (citing \textit{Katz} and discussing New Jersey's application of it).
\bibitem{120} \textit{Ind. Code Ann.} § 20-7.5-1-12(e) (Michie 1992); \textit{see also} Indiana Educ. Employment Rel. Bd. v. Mill Creek Classroom Teachers Ass'n, 456 N.E.2d 709, 711 (Ind. 1983) (citing and discussing the statute).
\end{thebibliography}
b. Applying Katz to Expired Collective Agreements and Wage Increase Denials

In addition to applying the Katz rationale in the public sector, courts have solved the problem of Katz's application to expired agreements and wage increase denials. First Katz involved the imposition of changes during the negotiation of an initial CBA, so a question of Katz's application arises where the employer makes unilateral changes after a previous agreement expires. In Litton Financial Printing Division v. NLRB,\(^{121}\) the Supreme Court noted that "[t]he Katz doctrine has been extended . . . to cases where . . . an existing agreement has expired and negotiations on a new one have yet to be completed."\(^{122}\) Second, Katz involved an increase in wages, undercutting the union's authority and strength by essentially excluding the union from the bargaining process.\(^{123}\) Arguably, a wage freeze or denial of a scheduled increase would not undercut the union's position in the workplace. Rather, a wage reduction by the employer would probably galvanize union strength and support. Nevertheless, courts find denial of an increase to be a violation of the NLRA as well. For example, in NLRB v. Allied Products Corp.,\(^{124}\) the Sixth Circuit Court of Appeals found that "[t]he Act is violated by a unilateral change in the existing wage structure whether that change be an increase or the denial of a scheduled increase."\(^{125}\) Although courts have resolved these two particular ambiguities that the Katz opinion created, courts and litigants still vigorously debate what compliance with the Katz rule requires.\(^{126}\)

3. The Meaning of "Status Quo": the Static and Dynamic Status Quo Debate

While most of the states agree on the appropriateness of adopting the terms of the Katz rule for public sector employees,\(^{127}\) the difficulty arises in applying the Katz rule. Critics point out that it is difficult for courts to determine what are "'changes' in "'terms and conditions of employment'" prior to "'impasse'" when applying the Katz rule.\(^{128}\) In addition, employees usually continue to work after a


\(^{122}\) Id. at 198.


\(^{124}\) 548 F.2d 644 (6th Cir. 1977).

\(^{125}\) Id. at 655; see also NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 98 (5th Cir. 1970) ("[W]henever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining.").

\(^{126}\) See infra Parts II.D-F.

\(^{127}\) See supra text accompanying notes 100-20.

\(^{128}\) Joseph R. Weeks, Continuing Liability Under Expired Collective Bargaining Agreements (pts. 2 & 3), 15 Okla. City U. L. Rev. 359, 590-91 (1990); see also id. (criticizing the Katz
collective agreement expires, but the contract, and hence its terms, have literally expired, creating a question as to what terms govern employment after expiration of the agreement. In attempting to solve this problem by applying the Katz rule, the states have arrived at different interpretations of the meaning of refraining from unilateral changes, or maintaining the status quo, during negotiations for a new collective agreement.

Courts developed the "status quo" doctrine from the Katz prohibition of unilateral changes. This doctrine requires employers "to maintain, during the period of negotiations, the status quo concerning conditions of employment in order to avoid committing a [violation of the duty to bargain in good faith]." Intuitively, the answer to the question about the meaning of "status quo" seems easy: the term "status quo" indicates that terms and conditions of employment should remain the same until impasse. For example, after expiration of the agreement, an employee's wages, hours, and health benefits should remain at pre-expiration levels. Unfortunately, courts have not been able to ascertain the meaning of "status quo" easily. For example, many collective agreements include, as a term of the employment agreement, automatic annual or periodic salary or wage increases based upon length of service. After a collective agreement expires, two approaches to salary provisions are possible. First, maintenance of the status quo could require that salary levels remain the same. Second, status quo protection might also include the extension of automatic raises beyond the life of the agreement because those raises are a term or condition of employment.
In solving this dilemma, courts have developed two doctrines: the "static" status quo doctrine and the "dynamic" status quo doctrine. The static status quo rule "require[s] and permit[s] public employers to pay only those wages in effect when the agreement expired, unless the agreement provides otherwise."\(^{136}\) States that do not require payment of raises follow the static status quo doctrine. Using this model, employers freeze all contract terms, including salaries, at existing levels.\(^{137}\) In contrast, the dynamic status quo rule "require[s] and permit[s] a public employer to pay wages according to the wage plan of the expired agreement, including any scheduled step increases."\(^{138}\) In the public education setting, states that require school districts to pay these raises use a dynamic status quo rule. This approach allows previous patterns of change during the life of an agreement, or previous agreements, to continue past expiration.\(^{139}\)

Courts' conflicting decisions about using the static or dynamic status quo, sometimes in conjunction with statutory interpretation, form the legal background that this Note investigates. The next section begins the process by surveying the states' various responses to post-expiration salary step increases.

II

\section{Treatment of Post-Expiration Step Increases in the Fifty States}

Generally, three simple answers exist in response to the question of continuation of step raises: yes, no, and no answer.\(^{140}\) The last of these answers, the nonanswer, occurs in states that either expressly prohibit collective bargaining for teachers or neither prohibit nor grant the right to bargain.\(^{141}\) In addition, some states that expressly authorize collective bargaining for teachers have no answer to this question because either a statutory scheme prevents the situation from arising, or the state has no judicial precedent on point.\(^{142}\) The remaining answers, the affirmative and negative, turn on a state's approach to the status quo doctrine.\(^{143}\) Discussion of the various answers to the problem proceeds as follows: states with no answer, in

\footnotesize
\begin{itemize}
  \item\(^{136}\) Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 846 (Me. 1995) (Wathen, C.J., dissenting).
  \item\(^{137}\) See id. at 847 (Wathen, C.J., dissenting).
  \item\(^{138}\) Id. (Wathen, C.J., dissenting).
  \item\(^{139}\) See id. at 845 (stating that the dynamic status quo rule requires "public employers to pay their employees any annual step increases in wages included in an agreement that expired").
  \item\(^{140}\) For a thorough and informative survey of states' law on this subject, see May, supra note 10, at 775-810. This Part of the Note relies significantly on Professor May's research.
  \item\(^{141}\) See infra Part II.A.
  \item\(^{142}\) See infra Parts II.B-C.
  \item\(^{143}\) See supra Part I.C.3.
\end{itemize}
Sections A, B, and C; states that pay step increases after expiration, in Section D; states that, based on local practice, may or may not pay step increases, in Section E; and states that refuse to pay step increases after expiration, in Section F.

A. Jurisdictions Without Statutory Collective Bargaining

1. Express Prohibitions of Collective Bargaining

Five states expressly prohibit collective bargaining for teachers: Georgia,\textsuperscript{144} Missouri,\textsuperscript{145} North Carolina,\textsuperscript{146} Texas,\textsuperscript{147} and Virginia.\textsuperscript{148} Obviously, because the question of survivability of terms in collective agreements cannot arise in these states, they offer the simplest and least interesting answer to the problem. In formulating teachers' salaries, all of these states, except Virginia, set statutory minimum teacher salaries or pay salaries out of state funds.\textsuperscript{149} Such a solution seems sensible, given a prohibition of bargaining. If teachers cannot protect their interests by bargaining collectively with local boards, the state provides protection by requiring school districts to pay a minimum salary.

Georgia's salary scheme serves as a suitable example.\textsuperscript{150} The schedule, set by the State Board of Education, in some ways resembles a typical salary schedule in a collective bargaining state. Based on experience and length of service, the schedule provides for incremental increases above the minimum salary.\textsuperscript{151} Georgia's plan also preserves

\textsuperscript{144} \textsc{Ga. Code Ann.} § 20-2-989.10 (1996) ("Nothing in this part shall be construed to permit or foster collective bargaining . . . .").
\textsuperscript{145} \textsc{Mo. Ann. Stat.} § 105.510 (West Supp. 1996) ("Employees except . . . all teachers of all Missouri schools . . . shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing."). Despite this language, de facto bargaining has arisen in some of Missouri's school districts. See May, supra note 10, at 777.
\textsuperscript{146} \textsc{N.C. Gen. Stat.} § 95-98 (1995) (declaring agreements between municipalities and labor organizations as bargaining agents "against the public policy of the State, illegal, unlawful, void and of no effect").
\textsuperscript{147} \textsc{Tex. Gov't Code Ann.} § 617.002(a) (West 1994) ("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.").
\textsuperscript{148} \textsc{Va. Code Ann.} §§ 40.1-57.2 (Michie 1994) ("No state, county, municipal, or like government officer . . . is vested with . . . any authority . . . to collectively bargain or enter into any collective bargaining contract with any . . . union or association . . . .").
\textsuperscript{149} See \textsc{Ga. Code Ann.} §§ 20-2-212 (1996); \textsc{Mo. Ann. Stat.} § 163.172 (West 1991 & Supp. 1996); \textsc{N.C. Gen. Stat.} §§ 115C-902(c) (Supp. 1995) (providing that "[e]very local board of education may adopt as to teachers not paid out of State funds a salary schedule similar to the State salary schedule . . . ; but if any local board of education shall fail to adopt such a schedule, the State salary schedule shall be in force"); \textsc{Tex. Educ. Code Ann.} § 21.402 (West 1996). Virginia periodically provides funds to improve teachers' salaries. See May, supra note 10, at 776 n.164.
\textsuperscript{151} \textit{Id.} § 20-2-212(a).
some local control—local administration can supplement the minimum salaries based on a variety of factors.\textsuperscript{152} To ensure fairness, the minimum salary is not set arbitrarily; rather, the State Board of Education bases it on the average salary for recent graduates of the University of Georgia System who enter positions having educational entry requirements comparable to those for teaching.\textsuperscript{153}

\section{No Express Prohibition or Authorization of Bargaining}

The laws of Alabama, Arizona, Arkansas, Colorado, Kentucky, Louisiana, Mississippi, South Carolina, Utah, West Virginia, and Wyoming neither prohibit nor authorize collective bargaining for teachers.\textsuperscript{154} Consequently, no rule for payment of step increases upon expiration of collective agreements exists in any of these states. The lack of statutory law governing collective bargaining in education has different effects in these states. In four of them, Alabama, Mississippi, South Carolina, and West Virginia, the lack of authorization is tantamount to a prohibition of collective bargaining.\textsuperscript{155} In the other seven states, "some form of collective bargaining occurs in contract negotiation and execution in the absence of legislation requiring, allowing, or forbidding public sector labor negotiations."\textsuperscript{156} Because no rule for payment of step increases exists, school boards in these states that choose to bargain collectively with teachers are generally free to pay or withhold step increases.\textsuperscript{157} If statutes and state precedent neither require nor forbid bargaining or the payment of step increases, school boards have the autonomy to govern their labor relationship with teachers. They may choose to bargain collectively, but may also bargain individually. If they decide to enter into a CBA, they may choose to give or withhold step increases after expiration. No state authority requires one choice or the other.

\textsuperscript{152} \textit{Id.} § 20-2-212(b). These factors include "the nature of duties to be performed, the responsibility of the position held, the subject matter or grades to be taught, and the experience and performance of the particular employee whose salary is being supplemented." \textit{Id.}

\textsuperscript{153} \textit{Id.} § 20-2-212(a).

\textsuperscript{154} See \textit{May}, supra note 10, at 776-80.

\textsuperscript{155} See \textit{id. at} 776 nn.155, 157, 160, & 163.

\textsuperscript{156} \textit{Id.} at 777. For a discussion of bargaining practices in these seven states, see \textit{id. at} 777-80. The payment of steps after expiration varies among and within these states. \textit{See id.}

\textsuperscript{157} In Arizona, Arkansas, and Wyoming school boards usually do not pay step increases after contract expiration. \textit{See id. at} 778, 780. In Colorado, Louisiana, and Utah, teachers may or may not receive step increases, depending on local practice. \textit{See id. at} 779-80. In Kentucky, those districts that do have collective bargaining must pay at least the statutorily mandated step increases in the state's minimum salary schedule. \textit{See Ky. Rev. STAT. ANN. §} 157.390 (Banks-Baldwin 1995); \textit{May, supra} note 10, at 779.
B. Collective Bargaining Jurisdictions That Use Statutes to Avoid the Problem

The remainder of the states have collective bargaining for teachers, and approach expiration in various ways. Two states, Connecticut\textsuperscript{158} and Iowa,\textsuperscript{159} seek to avoid lapses in the coverage of collective agreements by strictly mandating time lines for completion of new agreements.\textsuperscript{160} Of the two, Connecticut's procedure is the more stringent. Bargaining must begin at least two hundred ten days before the date for submission of the annual budget.\textsuperscript{161} One hundred sixty days before the submission of the district's annual budget, the negotiating parties must mutually submit any settlement they have reached.\textsuperscript{162} If the parties have failed to settle and have not yet initiated mediation, the parties must select a mediator and begin mediation.\textsuperscript{163} Either four days after the end of the mediation session, or on the one hundred thirty-fifth day before budget submission, whichever is sooner, the parties must present their settlement.\textsuperscript{164} If the parties do not reach a settlement, they must enter arbitration.\textsuperscript{165} After a hearing, which lasts a maximum of twenty-five days, the arbitrators have twenty

\textsuperscript{158} CONN. GEN. STAT. ANN. § 10-153f (West 1996).

\textsuperscript{159} IOWA CODE ANN. §§ 20.17, 20.19 to .22 (West 1995). The Iowa scheme provides that collective agreements "shall be complete not later than May 31 of the year when the agreement is to become effective." Id. § 20.17.11.a. If no voluntary agreement occurs, the parties, in performing their duty to bargain, must agree upon impasse procedures which begin "not later than one hundred twenty days prior to May 31 of the year when the collective bargaining agreement is to become effective." Id. § 20.19. If the parties do not agree on these impasse procedures, Iowa provides the following options: mediation and binding arbitration. Id. §§ 20.19-.20, 20.22. The parties may submit any impasse items to binding arbitration or "other procedures as deemed necessary to provide for the completion of negotiations of proposed collective bargaining agreements not later than May 31." Id. § 20.17.11.a. Parties must select a date sufficiently in advance of May 31 to submit items for binding arbitration to give the arbitrator(s) reasonable time to make a decision by that date. See id. § 20.17.11.b(1).

However, this system does not provide a sure means for prevention of hiatus between agreements. At least one of the parties must request assistance at impasse. See id. §§ 20.20, 20.22. If no party requests impasse procedures, a contract could remain unsettled for an entire year. In such a case, the employer will either "maintain[ ] the salary dollar figure status quo or implement[ ] its final offer." May, supra note 10, at 807.

\textsuperscript{160} Similarly, Nebraska uses a time line structure to conduct negotiations for employees of the State of Nebraska. NEB. REV. STAT. §§ 81-1369 to -1390 (1994). However, Nebraska's statutory system does not govern the labor relations process for municipal employees, for the statute defines "employer" as the state and not "any political subdivision thereof." Id. § 81-1371(5).

\textsuperscript{161} See CONN. GEN. STAT. ANN. § 10-153d(b) (West 1996). The legislative body of the school district may reject the settlement within thirty days of the filing of the contract. See id. If that happens, the parties begin the arbitration process described infra text accompanying notes 166-77. See id. § 10-153d(c).

\textsuperscript{162} See id. § 10-153f(b).

\textsuperscript{163} See id.

\textsuperscript{164} See id. § 10-153f(c)(1).

\textsuperscript{165} See id.
days to render a decision. In that case, the Commissioner selects a review panel of three arbitrators who, within twenty days after selection, review the decision on each rejected issue. The arbitrators render a final and binding decision within five days after completion of their review. Upon filing by either party, the panel's decision is subject to judicial review. Through this elaborate and mandatory procedure, Connecticut seeks to avoid the difficulty of expiration without having a subsequent agreement in place.

Avoiding strict time lines, Oklahoma has a unique statutory approach to bargaining and CBA expiration. Oklahoma grants teachers the right to bargain, and provides for minimum salaries that local school boards may elect to increase. In addition, Oklahoma has recently enacted a statute that prevents the post-expiration reduction of wages within one year after a CBA expires. The problem with Oklahoma's rule, as applied to the post-expiration period, is its possible ambiguity in interpretation.

The statute's statement that employers may not reduce wages seems to indicate that employers need not pay step increases after expiration. However, one can interpret the subsequent language that the board may not reduce terms "agreed to in the expired collective bargaining agreement" to mean that if the board had agreed to automatic step increases during the life of the agreement, those in-

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166 See id. § 10-153f(c) (3), (4).
167 See id. § 10-153f(c) (7).
168 See id.
169 See id.
170 See id. § 10-153f(c) (8).
172 Id. § 18-114.7 (limiting minimum salaries for the 1994-1995 school year).
173 Id. § 18-114.8. The statute provides:

During the twelve-month period following the expiration of a collective bargaining agreement, no district board of education may reduce the wages, hours, fringe benefits or other terms and conditions of employment for any category of employees that were agreed to in the expired collective bargaining agreement, except pursuant to a subsequent collective bargaining agreement or pursuant to implementation of the plan filed by the district board of education . . . following exhaustion of the negotiations impasse process . . . .

174 Id. Oklahoma case law strengthens this conclusion. In 1993, the Supreme Court of Oklahoma held unconstitutional an evergreen statute that applied to collective bargaining for police and fire fighters. City of Del City v. Fraternal Order of Police, Lodge No. 114, 869 P.2d 309, 318 (Ok. 1993). The statute could not require the payment of step increases because it violated a provision of the Oklahoma Constitution preventing municipalities from "becom[ing] indebted, in any manner . . . to an amount exceeding, in any year the income and revenue provided for such year." Id. at 311 (quoting Okla. Const. art. 10, § 26).
175 § 18-114.8.
creases must continue after expiration. Failure to do so would constitute a reduction in the terms and conditions of employment in the agreement.

C. Collective Bargaining Jurisdictions with No Statute or Precedent on Point

In the District of Columbia, Idaho, Kansas, Maryland, Minnesota, Nebraska, Nevada, New Mexico, North Dakota, Ohio, South Dakota, and Washington, no fixed rule governs the payment of salary step increases after agreement expiration. All of these states grant teachers the right to bargain collectively, but vary in their treatment of the expiration problem.

In some states, payment of steps often turns on the existence of an "evergreen clause" in the collective bargaining agreement. This clause extends the contract terms beyond the expiration of the agreement in the event that the parties do not consummate a new agreement before expiration. Thus, because teachers received step increases under the agreement, they continue to receive them once the agreement expires. Maryland, Minnesota, Nevada, North Dakota, and South Dakota use this distinction, or an express contract provision allowing payment of step increases, to award or withhold step increases after expiration.

Without legal precedent on point, the other states vary in practice. In the District of Columbia, the governing body usually pays step increases after expiration; on the other hand, school boards in Ohio generally do not. Finally, in Idaho, Kansas, Nebraska, and

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176 Given the Del City decision and the Oklahoma Constitution, this argument probably cannot succeed. See supra note 174.

177 See May, supra note 10, at 786-90.


179 An "evergreen contract" is "a contract which renews itself from year to year in lieu of notice by one of the parties to the contrary." Black's Law Dictionary 555 (6th ed. 1990).

180 See In re Milton Sch. Dist., 625 A.2d 1056, 1059-60 (N.H. 1993) (explaining that an enforceable automatic renewal or evergreen clause would be grounds to give step increases to teachers) (quoting the Public Employment Labor Relations Board's order in the case). The Supreme Court of New Hampshire, however, held the clause unenforceable. Id. at 1059.

181 See May, supra note 10, at 788-90.

182 See id. at 786-77.

183 See id. at 788.
New Mexico, no general statewide practice exists. In Nebraska, Ohio, and Washington, teachers often receive retroactive step increases upon settlement of a new agreement.

D. Collective Bargaining Jurisdictions That Require Payment of Step Increases

Of states that have decided the issue of post-expiration step increases, the majority hold that school boards must pay step increases. These states are: Alaska, California, Connecticut, Delaware, Florida, Indiana, Michigan, Montana, New Jersey, New York, and Ohio. In Nebraska, Ohio, and Washington, teachers often receive retroactive step increases upon settlement of a new agreement.184

184 See id. at 787-90. In New Mexico, the question has not arisen because the public sector bargaining statute is only four years old. Id. at 789. In Kansas, the Kansas Supreme Court expressly declined to decide the question of step increases after expiration. National Educ. Ass'n—Wichita v. Board of Educ., 592 P.2d 80, 86 (Kan. 1979).

185 See May, supra note 10, at 788-90.

186 Alaska's Public Employment Relations Act, ALASKA STAT. §§ 23.40.070 to .260 (Michie 1996), grants public employees the right to bargain collectively and governs the bargaining relationship. In Mid-Kuskokwim Educ. Ass'n v. Kuspuk Sch. Dist., Nos. 93-149-ULP & 93-162-ULP (Consolidated) (Alaska Labor Rel. Agency Feb. 22, 1993), the Labor Relations Agency interpreted ALASKA STAT. § 23.40.110, which requires bargaining in good faith, and held that parties must "maintain the status quo until they reach impasse." Mid-Kuskokwim at 7. The employer in the case paid step increases before the Board issued its decision, causing the Board to dismiss the Union's complaint as moot. See id. at 8.


188 Despite Connecticut's statutory scheme, discussed supra Part II.B, the issue of step increases under expired agreements can arise. In fact, Connecticut was the first state to confront this particular issue. See May, supra note 10, at 790. In Ledyard Bd. of Educ. (Conn. St. Bd. of Labor Rel. Aug. 15, 1977), the Connecticut State Board of Labor Relations, relying on CONN. GEN. STAT. § 10-153e(b)(4) (West 1996) and NLRB precedent, established the rule that "[r]egular annual salary increments payable under existing policies or practice constitute an existing condition of employment whether or not the increment was mandated by contract, and a discontinuance of such a policy or practice constitutes a change in existing wages and conditions of employment." Ledyard at 2. The Connecticut State Board of Labor Relations holds that school boards must pay step increases even after the parties reach arbitration in the impasse procedures described above Part II.B. Branford Bd. of Educ., No. 2274, at 1, 3 (Conn. St. Bd. of Labor Rel. Feb. 17, 1984).

189 See May, supra note 10, at 797-98 (discussing Delaware's rule to pay step increases after expiration, which originated in Appoquinimink Educ. Ass'n, No. 1-2-84A (Del. Pub. Employment Rel. Bd. July 28, 1984)). In rendering its decision, the Delaware Public Employment Relations Board relied on the federal private sector Katz doctrine, discussed supra at Part I.C. Id.

York, Oregon, Rhode Island, Tennessee, Vermont and

the Commission continues to rule that districts must pay steps after expiration, Florida courts have disagreed. Those courts have relied on Fla. Stat. Ann. § 447.309(2) (West 1981), which stated that failure of a legislative body to appropriate sufficient funds for a collective bargaining agreement does not constitute an unfair labor practice. Using this language, the court in Sarasota County Sch. Dist. v. Sarasota Classified/Teachers Ass'n, 614 So.2d 1143 (1995), reversed the Florida Public Employment Relations Commission, and held that the school board did not commit an unfair labor practice by unilaterally discontinuing payment of steps during negotiations. Id. at 1149. That decision may be untenable after the latest revision to the statute. The new version of the statute adds "if the state is a party to a collective bargaining agreement" and changes the words "legislative body" to "Legislature." Fla. Stat. Ann. § 447.309(2)(b) (West Supp. 1996). After these changes, the rule against increases seemingly does not apply to local school boards. Therefore, Florida's rule on this subject is currently in doubt. See May, supra note 10, at 804-05 (discussing the Commission's and the courts' different approaches to this problem in Florida).

Indiana's authority for payment of step increases after expiration is Indiana Educ. Employment Rel. Bd. v. Mill Creek Classroom Teachers Ass'n, 456 N.E.2d 709 (Ind. 1983). In that case, the Supreme Court of Indiana held that school boards must pay step increases after expiration. Id. at 712-13. The court relied on Ind. Code Ann. § 20-7.5-1-12(e) (Michie 1992), which states in part that "[d]uring this status quo period in order to permit the successful resolution of the dispute, the employer may not unilaterally change the terms or conditions of employment that are issues in dispute."

Jackson Community College Classified & Technical Ass'n v. Jackson Community College, 468 N.W.2d 61, 63 (Mich. App. 1991) held that a post-expiration salary freeze before impasse is unlawful because it violates a state statute forbidding unilateral changes.


See May, supra note 10, at 800-01 (discussing Warwick Sch. Comm., No. ULP-4647, at 1, 2-3 (R.I. Labor Rel. Bd. Nov. 10, 1992), where the Board found an unfair labor practice when the school committee made unilateral changes (other than freezing step increases) during negotiation for a new agreement).
Wisconsin. The New York Court of Appeals announced the state’s original rule in 1977 in Board of Cooperative Educational Services v. New York State Public Employment Relations Board. The Board of Cooperative Educational Services ("BOCES") and the BOCES Staff Council had entered into four collective agreements in their bargaining history. The agreements provided for payment of automatic step increases each year. When previous agreements expired before the completion of a successor agreement, BOCES continued to pay step increases to employees. In the negotiation for the fifth agreement, however, BOCES passed a resolution that, in effect, froze salaries and avoided paying step increases to returning employees.

The hearing officer found a violation in BOCES's refusal to pay step increases. The PERB agreed and ordered BOCES to "cease and desist" from refusing to pay step increases. The PERB noted that unilateral changes during negotiation are a refusal to bargain in good faith. The Vermont Labor Relations Board relied on Katz and Vermont statutes in announcing Vermont's decision to mandate step increases after expiration. The Commission decided that an employer must continue to grant changes in compensation after expiration when the expired agreement, by its terms or history, provides for changes based upon level of experience or education. In formulating its rule, the Commission relied on federal precedent and decisions from other states.

See supra note 10, at 798-99 (discussing Wisconsin's adoption of its rule in Hartmann, No. 28629 MP-1251 (Wis. Employment Rel. Comm'n Mar. 22, 1985), where the Commission decided that an employer must continue to grant changes in compensation after expiration when the expired agreement, by its terms or history, provides for changes based upon level of experience or education). In formulating its rule, the Commission relied on federal precedent and decisions from other states. Id. at 799.

See infra text accompanying notes 214-22.
that "it makes no difference . . . whether or not the practice of paying increments was ever embodied in an agreement."\textsuperscript{209} Ultimately, the New York Court of Appeals held that "after the expiration of an employment agreement, it is not a violation of [the] duty to negotiate in good faith to discontinue during the negotiations for a new agreement [on] the payment of automatic annual salary increments, however . . . long standing the practice of paying such increments may have been."\textsuperscript{210} Finding that the payment of step increases after expiration changes the nature of the relationship between the parties during negotiation, the court felt that payment gave the employees an "edge" in negotiation rather than maintaining the existing relationship.\textsuperscript{211} Furthermore, the court reasoned that no statutory authority existed for such a requirement,\textsuperscript{212} and that having such a requirement could place an impermissible burden on employers because it ignores factors such as "comparative compensation, the condition of the public fisc and a myriad of localized strengths and difficulties."\textsuperscript{213}

Five years later, the New York legislature amended its statute,\textsuperscript{214} reversing the ruling. The new version of the statute made it an improper practice for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated."\textsuperscript{215} Cobleskill Central School District v. Newman\textsuperscript{216} reflects this statutory amendment. After the school district froze salaries upon expiration of the collective bargaining agreement, the teachers' association filed an improper practice charge with the PERB.\textsuperscript{217} The Board found for the teachers and the school district appealed.\textsuperscript{218} On appeal, the court found that the New York legislature, via its statutory amendment,\textsuperscript{219} acted purposely to change the outcome of the BOCES case.\textsuperscript{220} Consequently, the court agreed with the teachers that the district should have paid them "in accordance with [the] teacher's longevity and educational qualification status as it existed at the beginning of the new pay period."\textsuperscript{221} Since that decision, PERB has sustained an exception to the rule requiring payment—if the contract

\textsuperscript{209} Id.
\textsuperscript{210} Id. at 1175.
\textsuperscript{211} Id. at 1177.
\textsuperscript{212} Id. at 1178.
\textsuperscript{213} Id. at 1177.
\textsuperscript{214} N.Y. CIV. SERV. LAW § 209-a.1(e) (McKinney 1983).
\textsuperscript{215} Id.
\textsuperscript{217} See id. at 796.
\textsuperscript{218} See id.
\textsuperscript{219} N.Y. CIV. SERV. LAW § 209-a.1(e).
\textsuperscript{220} Cobleskill, 481 N.Y.S.2d at 796.
\textsuperscript{221} Id. at 797.
terms limit the salary grid to the specific dates of the agreement, then withholding step increases is lawful.\textsuperscript{222}

Like New York, several of the states that require districts to pay step increases base their decision on an interpretation of their own statutory scheme.\textsuperscript{223} These states typically find that a unilateral change during negotiations constitutes an unfair labor practice because such a change is tantamount to a refusal to bargain, or bargaining in bad faith.\textsuperscript{224} Other states rely on federal labor law precedent to rule that teachers must receive step increases.\textsuperscript{225} Even though federal labor law does not technically apply to public employees,\textsuperscript{226} these states find that no reason exists to differentiate between the private and public sectors on the question of unilateral post-expiration changes. This determination is due to the similarity of their labor laws and federal law.\textsuperscript{227} Still other states rely on a combination of both their own statutory schemes and federal private sector labor law.\textsuperscript{228}

E. Jurisdictions in Which Payment of Step Increases Depends upon Local Past Practice

Similar to the exception to New York's rule requiring payment, the question of step increase payment after contract expiration in Illinois\textsuperscript{229} and Massachusetts\textsuperscript{230} turns on the practice and contract of the local school district. The Massachusetts rule is the more recent, arising from a 1995 Labor Relations Commission decision, \textit{Town of Chat-}


\textsuperscript{223} In addition to New York, these states include Alaska, Florida, Indiana, Michigan, and New Jersey. See supra notes 186, 190-92, 194.


\textsuperscript{225} Delaware, Oregon, Tennessee, and Wisconsin have used this analysis to justify their rule. See supra notes 189, 196, 198, 200.

\textsuperscript{226} See supra Part I.C.2.a.

\textsuperscript{227} See, e.g., May, supra note 10, at 796-97 (discussing Forsyth Educ. Ass'n, No. 37-81, at 3 (Mont. Bd. of Personnel App. May 17, 1982)).

\textsuperscript{228} These states include Connecticut and Vermont. See supra notes 188, 199; May, supra note 10, at 760-61.

\textsuperscript{229} In Vienna Sch. Dist. No. 55 v. Illinois Educ. Labor Rel. Bd., 515 N.E.2d 476 (Ill. App. Ct. 1987), the court established Illinois's rule that school districts must pay step increases only if the practice is an established one. \textit{Id.} at 479-80. The court found the district's refusal to pay step increases after expiration to be a violation. \textit{Id.} at 480. However, Illinois courts decide the issue case by case. See \textit{id}. In Wilmette Educ. Ass'n [Transfer Binder 1] Pub. Employee Rep. for Ill. (Lab. Rel. Press) \$ 1077, at 327 (Ill. Educ. Lab. Rel. Bd. May 17, 1988), the board found no violation because the district had always withheld step increases after expiration of the agreement; therefore, the teachers had no reasonable expectation of receiving them. \textit{Id.} at 329.

\textsuperscript{230} See infra text accompanying notes 231-36.
In *Town of Chatham*, the agreement provided that the contract ran only to a certain date, and not thereafter. Under the life of the agreement, employees received step increases each year. The Commission held that the employer must pay step increases only if payment had “become a part of the established practice between the parties,” and therefore, part of the status quo. Because the parties failed to show the history of the bargaining relationship on this issue, the Commission ruled that the step increases did not constitute part of the status quo, and therefore, the employer did not have to pay them. In essence, the Commission held that employers must pay post-expiration step increases when the parties have included or intended these increases in their agreements, or when the established and proven practice of the parties is the payment of post-expiration increases.

F. Collective Bargaining Jurisdictions That Refuse to Pay Step Increases

Only Hawaii, Maine, New Hampshire, and Pennsylvania prohibit the payment of step increases after contract expiration. Maine ruled in favor of this approach in 1995. Although the Maine decision dealt with college and university employees, no reason exists to believe that the Supreme Judicial Court of Maine would rule differently if faced with the same situation involving other public education employees. In *Board of Trustees v. Associated COLT Staff*,
Maine's highest court ruled that the language of Maine's public employer labor statute required adoption of a wage freeze after expiration.\textsuperscript{244} The parties involved\textsuperscript{245} had a collective bargaining agreement with a duration of three years.\textsuperscript{246} In the agreement, "employees would advance from one . . . step to the next and receive the specified increase in wages. When the agreement expired, the University adhered to the last wage schedule, and discontinued the . . . step increases . . . "\textsuperscript{247}

The union complained that the University's action constituted a prohibited practice. The Maine Labor Relations Board agreed, finding a violation in the discontinuance of payments.\textsuperscript{248} According to the Board, discontinuing the step increases constituted a unilateral change in conditions of employment, which violated the University's duty to bargain.\textsuperscript{249} On appeal, the Superior Court vacated the Board's decision, finding that the Board's decision was an invasion into the substantive aspects of the agreement.\textsuperscript{250}

In analyzing the case on review, the Supreme Judicial Court of Maine first noted that until 1991, the Board had followed the static status quo rule, "constru[ing] status quo to mean . . . wages existent at the expiration of a collective bargaining agreement."\textsuperscript{251} In a 1981 affirmance of that interpretation,\textsuperscript{252} the court relied explicitly on New York's rule from \textit{Board of Cooperative Educational Services v. New York State Public Employment Relations Board.}\textsuperscript{253} In 1991, however, the Board reversed itself, adopting the dynamic status quo position and setting the stage for the \textit{Board of Trustees} litigation.\textsuperscript{254}

In the instant case, the court found that the dynamic status quo rule subverted the language and intent of the University of Maine System Labor Relations Act.\textsuperscript{255} First, like federal private sector labor

\begin{thebibliography}{9}
\bibitem{244} Id. at 846.
\bibitem{245} The union represented a unit of clerical, office, laboratory, and technical employees of the University of Maine system. \textit{See id.} at 843 n.1.
\bibitem{246} \textit{See id.} at 844.
\bibitem{247} Id.
\bibitem{248} \textit{See id.}
\bibitem{249} \textit{See id.}
\bibitem{250} Id. In labor law, the arbiter of a labor dispute either interprets and enforces an existing agreement or rules on only the procedural aspects of bargaining; the tribunal may not dictate substantive aspects of a collective agreement. \textit{See NLRA § 8(d), 29 U.S.C. §158(d) (1994)} (providing that the NLRB may not require parties to compromise a firmly held position and accept any substantive term of the agreement).
\bibitem{251} \textit{Board of Trustees}, 659 A.2d at 844.
\bibitem{252} \textit{Id.} at 844-45 (citing M.S.A.D. No. 43 Teachers’ Ass’n v. M.S.A.D. No. 43 Bd. of Dirs., 432 A.2d 395, 397-98 (Me. 1981)).
\bibitem{253} 363 N.E.2d 1174 (N.Y. 1977) (discussed \textit{supra} Part II.D).
\bibitem{254} \textit{See Board of Trustees}, 659 A.2d at 845.
\bibitem{255} Id. at 845-46.
\end{thebibliography}
law, the Act specifies that the Board cannot force either party to agree to a proposal or make a concession. According to the court, requiring the University to pay step increases constituted a substantial concession, especially given the impact of wages on a public employer’s budget. Second, the court found adoption of the static status quo rule “consistent with the Legislature’s clearly expressed intent to protect municipal . . . budgets from increases in wages imposed without agreement by the governing body.” The court reasoned that the dynamic status quo rule forced the University trustees to pay wages they never agreed to pay, and therefore changed the status quo during negotiation, “dramatically alter[ing] the status and bargaining positions of the parties.”

Indicating the closeness of this issue, three justices of the seven member court dissented, rejecting the majority’s interpretation of Maine’s public sector labor law, as well as its history and intent. Disputing the majority’s characterization of the dynamic status quo rule as imposing a concession on a party to the agreement, Chief Justice Wathen, writing for the dissent, stated that “the Board has no authority to determine what the parties should be bargaining toward (the final terms of an agreement), but it is empowered to determine what the parties should be bargaining from (the existing terms and conditions of employment).” The dissent then noted that the dynamic status quo rule is consistent with both private sector labor law and court and agency decisions in other states. Addressing the “[f]iscal [c]onsiderations underlying the [c]ourt’s opinion,” the dissent stressed the importance of the duty to bargain and argued that fiscal policy concerns “are properly matters for legislative consideration rather than a judicially-crafted hardship exception to the duty to bargain.”

The Maine court’s decision in Board of Trustees relied in part on New Hampshire’s recently adopted static status quo rule. Because it is the most recent case to decide this issue directly for public school teachers, the New Hampshire case is worthy of analysis. Most of the facts of the case are by now predictable. The parties entered a collec-

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256 See supra note 250.
258 Board of Trustees, 659 A.2d at 845.
259 Id. at 845-46.
260 Id. at 846.
261 Id. at 848-49 (Wathen, C.J., dissenting).
262 Id. at 848 (Wathen, C.J., dissenting).
263 Id. (Wathen, C.J., dissenting).
264 Id. at 849 (Wathen, C.J., dissenting) (italics omitted).
265 Id. (Wathen, C.J., dissenting).
266 Id. at 845.
tive bargaining agreement spanning two years. In each of the years, teachers received a salary step increase. In addition, the parties added an amendment to the agreement during the life of the agreement, stating that "[t]his agreement shall automatically renew itself for successive terms of one year or until a successor agreement has been ratified." This clause would seem to secure payment of step increases for teachers, and the New Hampshire Public Employment Labor Relations Board held that it did. In its decision, the Board relied explicitly on the presence of this evergreen clause to require payment of step increases.

However, the Board overlooked a New Hampshire law requiring submission of cost items to the town for approval. This was a fatal error in the view of the majority of the Supreme Court of New Hampshire. First, the New Hampshire Public Employee Labor Relations Act defines "[c]ost item" as "any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted." Because the renewal clause rendered the contract a "multi-year contract with no termination date," the clause was a cost item. Second, the parties must submit cost items to the "legislative body of the public employer for approval." Having previously interpreted the statute to "'divest[ ] the school [district] of its authority to bind the town to future appropriations without action by the school district voters," the district could not bind the town in Milton because the parties had failed to obtain voter approval of the renewal clause. Approving Board precedent, the court then ruled that in the absence of an approved evergreen clause, the district was not required to pay step increases after expiration of the CBA.

268 See id. at 1058.  
269 See id.  
270 Id.  
271 See id.  
272 See id.  
275 § 273-A:1, IV.  
276 Milton, 625 A.2d at 1059.  
277 § 273-A:3, II(b).  
279 Id. The court also noted that the parties themselves were not bound to the agreement because "neither party may enforce a CBA if the legislative body rejects the cost items in it." Id. (citing In re Franklin Educ. Ass'n, 616 A.2d 919, 920-21 (N.H. 1992)). Although the town in Milton never rejected the renewal clause, the court asserted: "It would elevate form over substance to make a distinction . . . between the town specifically rejecting a cost item and the town simply never approving the item." Id.  
280 Id.
Interestingly, the union argued that because the majority of other states had adopted the dynamic status quo rule, New Hampshire should as well.\textsuperscript{281} In one paragraph, the court dismissed that argument, noting, first that “most of these decisions were . . . mandated by statute,”\textsuperscript{282} and, second, that many of the decisions relied “in part upon a definition of ‘status quo’ quite different from the one adopted by the [Board].”\textsuperscript{283}

Two dissenting judges noted the proper standard of review of Board findings and felt that the Board had not acted unjustly or unreasonably or clearly abused its discretion; therefore, the dissenters would have upheld the Board’s decision granting step increases.\textsuperscript{284} Citing an inconsistency in the Board’s reasoning, the dissent explained that the court, after calling the evergreen clause a cost item, simultaneously held that the Board “erroneously granted step increases during the time in question,” but permissibly allowed automatic renewal protections for other provisions of the agreement, including base salaries, health benefits, and pay for lunch duty.\textsuperscript{285} In other words, if the evergreen clause really was a cost item, then all provisions extended by it needed town voter approval. By the court’s reasoning, because the clause received no such approval, the district could not pay teachers for anything after the agreement expired.

To the dissent, the evergreen clause was “surplusage,”\textsuperscript{286} as it “merely highlight[ed] the well-settled principle that the status quo must be maintained while contract negotiations for public employees . . . are underway.”\textsuperscript{287} In defining the status quo, the dissent contended that “in order to maintain the status quo, all terms and conditions of employment set forth in the previous agreement must be maintained.”\textsuperscript{288} Because annual step increases were included in the agreement, they constituted a term or condition of employment, and

\textsuperscript{281} See id. at 1060.
\textsuperscript{282} Id. The court cited only the decisions of New Jersey and New York, discussed supra at text accompanying notes 118-16, 202-22 and at note 194; in addition, the court failed to note that many states deciding to adopt the dynamic status quo rule relied in part on federal private sector precedent as well.
\textsuperscript{283} Id. This circular argument merely notes the difference between the two rules (dynamic versus static) and fails to explain why the static rule is the better of the two. In avoiding the difficult question, the court accepted the Board’s definition of status quo as if required to do so; nevertheless, the court did not hesitate to overturn the Board’s ruling in this case.
\textsuperscript{284} Id. at 1065 (Brock, C.J., dissenting).
\textsuperscript{285} Id. at 1062 (Brock, C.J., dissenting).
\textsuperscript{286} Id. at 1063 (Brock, C.J., dissenting).
\textsuperscript{287} Id. (Brock, C.J., dissenting).
\textsuperscript{288} Id. (Brock, C.J., dissenting).
the district had to continue to pay them. To support its view, the dissent noted that the court's decision ignored *Katz* and many states' reliance on *Katz* in developing public sector labor jurisprudence. In addition, the dissent argued that the step increases were a term or condition of employment based upon the teachers' reasonable expectations from the agreement, bargaining history, and past practice.

The New Hampshire and Maine decisions illustrate the continuing conflict and difficulty states experience in applying the status quo doctrine, which evolved from the Supreme Court's 1962 *Katz* decision. Decisional law and statutes of other states serve as evidence of the possible approaches in crafting a solution to the post-expiration scenario. The next Part analyzes the various approaches and advocates adoption of the dynamic status quo rule, with some exceptions.

III

THE BEST SOLUTION: COMPLIANCE WITH LABOR POLICY AND LAW AND PRESERVATION OF LOCAL CONTROL

As Part II demonstrates, courts have exhibited considerable disagreement when applying *Katz* to the public sector. Given that two of the most recent decisions adopted the minority "static status quo" position, the issue remains unsettled. In addition, at least one state's dynamic status quo rule is of questionable efficacy. These developments are troubling because the legal and policy foundations on which both the static status quo rule and adoptions of it rest are dubious at best. In addition, proposed solutions to the problem that depend on strict time restraints for bargaining are objectionable because they wrest control of local matters, especially important fiscal control, from local hands. In contrast, the dynamic status quo rule makes legal and practical sense and courts should adopt it because of its compatibility with the language of *Katz*. However, to avoid the same weakness as the strict time line solution, courts should allow the parties in certain circumstances to escape application of the dynamic status quo, thereby preserving local control over district financial matters.

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289 See id. at 1065 (arguing that the case is not about evergreen clauses or step increases, but about the survivability of terms and conditions of employment which the district must maintain during negotiations) (Brock, C.J., dissenting).
290 Id. at 1063 (Brock, C.J., dissenting).
291 Id. at 1064 (Brock, C.J., dissenting).
292 See supra Part II.F (discussing the recent Maine and New Hampshire Supreme Court decisions).
293 For a discussion of Florida's rule, see supra note 190.
A. The Weakness of the Static Status Quo Rule and the Latest Adoptions of It

All applications of the status quo doctrine derive from the language in Katz that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5) [of the NLRA], for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." The static status quo rule interprets "conditions of employment" with respect to wages to mean that "wages existent at the expiration of a collective bargaining agreement [are] frozen." The reasoning supporting this conclusion seems simple and logical: "[t]o say that the status quo must be maintained during negotiations is one thing; to say that the status quo includes a change and means automatic increases in salary is another." In other words, maintaining the status quo means maintaining the exact amount of salary, not changing it.

This interpretation of Katz is fundamentally flawed. In requiring the maintenance of conditions of employment, Katz compels the continued existence of the wage provision, not the actual amount of the wage. Therefore, if the expired agreement contains a salary schedule with automatic step raises, the schedule and those step raises, as terms of the expired agreement, survive expiration along with the agreement's other terms. Suppose that under a three year agreement, teacher X earns $20,000 in year one, $21,000 in year two, and $22,250 in year three. If the agreement expires after year three, the terms of the expired agreement do not provide that teacher X would earn $22,250 each year, and should therefore earn the same amount after expiration. The agreement instead provides that teachers earn the appropriate salary based upon the number of years of service. In year four, given the additional year of service, teacher X must earn the amount that the salary schedule provides for year four, an amount greater than $22,250. The salary schedule, and whatever terms govern its operation, are the status quo. They constitute the conditions that existed prior to expiration, and thus, the terms to which the school board obligated itself until the settlement of a successor agreement.

294 NLRB v. Katz, 369 U.S. 736, 743 (1962); see also supra Part I.C.3 (explaining the development of the status quo doctrine).
295 Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 844 (Me. 1995).
297 See Board of Trustees, 659 A.2d at 847 (quoting the Maine Labor Relations Board's ruling in this case).
298 For a more explicit account of the operation of a typical salary schedule, see supra note 10.
A hypothetical situation demonstrates both the necessary survival of the salary schedule and step increases and the way that the static status quo actually fails to maintain the status quo. The theoretical possibility exists that a union and a school board might never reach a successor agreement. If this occurred, the agreement, as the status quo, would continue to govern the parties' relationship indefinitely. Under the terms of the agreement, the teachers would continue to move up the salary schedule in subsequent years. New teachers would begin at the appropriate level and move up with the passage of time. All teachers would maintain and execute, as part of the status quo, the same duties and obligations as the agreement required. Such action, in accordance with the terms of their agreement, is the status quo of their relationship. Though the agreement literally expires, it stays in effect until the parties reach a new agreement.

In contrast, a system that operates in conformity with the static status quo clearly alters the agreement, thereby failing to maintain the status quo. The teachers would, for example, continue to perform lunch duty and attend faculty meetings as the terms of the expired, but operative, agreement provided. However, their salaries would remain forever unchanged. This system effectively pretends that the agreement's salary schedule does not exist and replaces it with wage provisions that read, for eternity, "Mr. Alberts earns $22,500; Ms. Tebbetts earns $25,000; Mr. Fogarty earns $32,000," and so forth. This quite literally changes the terms of the agreement, altering the status quo in contravention of the duty to maintain existing conditions of employment. The parties' agreement contains a salary schedule, properly maintained by the dynamic status quo. The static status quo, in contrast, removes that schedule and replaces it with a series of individual salary agreements that does not accurately reflect the relationship between the parties.

Thus, this scenario illustrates the irony that the static status quo rule, whose name "static" seems to connote constancy, actually changes the status quo, in flat circumvention of the status quo requirement. It is the dynamic status quo rule, whose name seems to suggest a change, that actually preserves the status quo, for it maintains the terms that govern the employment relationship as of expiration.

One argument offered in support of the static status quo rule, despite its legal and logical shortcomings, is that allowing step increases after expiration unfairly tips the balance in bargaining position too heavily toward teachers.299 Following this argument, one

state, Oregon, once adopted a "relative balance of bargaining power" exception to its dynamic status quo rule.300 This exception allowed the employer to make a unilateral change if it would "maintain[] the relative balance of bargaining power between the parties."301 Eight years after adopting the exception, however, Oregon flatly, and properly, rejected it.302 In its repudiation of the exception, the Oregon Employment Relations Board properly recognized that such an exception misconceives the purpose of the status quo doctrine.303 The Board reasoned:

The status quo doctrine is not grounded on a policy decision that [the] Board must try to preserve the relative balance of bargaining power—although we believe application of the doctrine generally does help preserve that balance. Rather, the status quo doctrine is based on the statutory mandate that an employer must bargain in good faith over changes in working conditions and the concomitant requirement of [the state's public employee bargaining statute and the NLRA] that such bargaining must be completed before—not after—a change is made.304

The same reasoning overcomes the argument that the dynamic status quo rule changes the balance of bargaining power. The purpose of the status quo doctrine is to require bargaining in good faith to impasse, not to maintain an equality of bargaining power.305 Unilateral changes subvert good faith bargaining.306 The withholding of step increases, even to maintain the relative balance of bargaining power, constitutes a unilateral change in a condition of employment to which the parties agreed, and therefore violates the duty to bargain in good faith.307 Even if the purpose of the status quo doctrine was to maintain relative bargaining power, it is the dynamic status quo that does so. The parties agreed to pay and receive a salary according to a schedule, and not individually bargained amounts. The requirement to pay in accordance with that schedule maintains the same relationship between the parties while negotiations occur, and actually pre-

300 Id. at 9023.
301 Id.
302 See id. at 9024 (holding "that there should be no 'relative balance of power' exception to the status quo doctrine").
303 Id.
304 Id.
305 See Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 849 (Me. 1995) (Wathen, C.J., dissenting) (noting that the legislature "imposed the duty to bargain, and it is that duty that the Board has interpreted to require the preservation of existing practices until impasse").
306 See supra Part I.C.1.
307 See supra text accompanying note 65.
serves the relative bargaining power by keeping the same agreement in place until the parties complete a new one.

An additional argument offered in support of the static status quo rule is that parties can and should negotiate the survival of step increases.\textsuperscript{308} If a school board later agrees to pay step increases under the terms of a new agreement, the board can pay any missed step increases retroactively.\textsuperscript{309} This position therefore requires that the parties "bargain in good faith over all terms and conditions of employment. This includes the possible carry-over of such terms and conditions to cover them during a hiatus after a prior contract expires and while [the parties] are negotiating a new contract."\textsuperscript{310}

Such an approach misses the point. The parties ought to be free to negotiate nonpayment of step increases until the signing of a new agreement if they so desire.\textsuperscript{311} The focus of the status quo rule is the duty to bargain in good faith.\textsuperscript{312} Parties who have bargained in good faith for a different provision have already fulfilled the purpose of the rule. However, to argue that teachers can receive step increases retroactively is an unsatisfactory solution, if the agreement contains provisions for step increases. The principal concern of the status quo doctrine is not that teachers get the money, but rather that parties continue to follow the terms of the agreement that constitute the conditions of employment, thereby fulfilling their obligation to negotiate in good faith.\textsuperscript{313}

In addition, requiring parties to bargain over the extension of terms does not follow fundamental principles of labor law. The NLRA, on which most states base their bargaining laws,\textsuperscript{314} requires bargaining only for "wages, hours, and other terms and conditions of employment."\textsuperscript{315} The salary schedule itself is clearly a mandatory subject of bargaining, for it determines wages.\textsuperscript{316} However, the survivability of the schedule after expiration is not a mandatory subject, but a permissive one. In \textit{Litton Financial Printing Division v. NLRB},\textsuperscript{317} the Supreme Court recognized the operation of the \textit{Katz

\begin{itemize}
  \item \textsuperscript{308} \textit{See} Portland Community College, 9 Pub. Employer Collective Bargaining Rep. at 9030 (Ellis, Chairman, dissenting).
  \item \textsuperscript{310} Portland Community College, 9 Pub. Employer Collective Bargaining Rep. at 9030 (Ellis, Chairman, dissenting).
  \item \textsuperscript{311} \textit{See infra} Part III.F.
  \item \textsuperscript{312} \textit{See supra} Part I.C.1 and \textit{supra} text accompanying note 305.
  \item \textsuperscript{313} \textit{See supra} text accompanying note 65.
  \item \textsuperscript{314} \textit{See supra} note 106 and accompanying text.
  \item \textsuperscript{315} NLRA, § 8(d), 29 U.S.C. § 158(d) (1994).
  \item \textsuperscript{316} \textit{See infra} Part III.C.
  \item \textsuperscript{317} 501 U.S. 190 (1991).
\end{itemize}
rule in the post-expiration setting. A belief that setting post-expiration terms was a mandatory subject of negotiation for the initial terms of the agreement would preclude the Court from making its approving statement in *Litton*. If the Court required parties to negotiate which terms survived the agreement's expiration, then *Katz* could not operate upon expiration to extend terms that the parties had not explicitly agreed to extend. Likewise, if states required bargaining over which terms survive expiration, no state could adopt the general rule of *Katz* to govern the post-expiration contract hiatus and extend CBA terms past expiration. As discussed above, virtually all states with collective bargaining have adopted the *Katz* rule. If the parties had to bargain about the survivability of their wages, and failed to do so, no state could use the *Katz* rule to require the employer to pay wages of any kind. The reason is simple: if parties failed to bargain about the maintenance of wages, then such continuation would not be part of the existing agreement, or the status quo, and the failure to pay wages therefore would not constitute a unilateral change of a condition of employment.

Additionally, arguing that the survivability of terms is a mandatory subject of bargaining results in a paradox where the survivability of terms is simultaneously a term, and not a term of employment. To be a mandatory subject of bargaining, a provision governing the survivability of terms must constitute a term or condition of employment, for it is neither wages nor hours. However, if the parties fail to negotiate about the survivability of a term, then survivability of that term is not a term or condition of employment because it is not part of the existing agreement, and consequently, of the status quo.

The two most recent jurisdictions to adopt the static status quo rule relied on interpretations of their state's statutes to reach their respective results. In short, both decisions were erroneous. In New Hampshire, the parties amended their agreement to include a clause that attempted to renew the contract annually until the parties ratified a new agreement. The court held that the so-called evergreen clause was a cost item, requiring approval by the "legislative body of the public employer." The school district never submitted the

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318 Id. at 198.
319 See supra text accompanying notes 100-20.
320 See supra text accompanying notes 315-16.
321 See Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 845-46 (Me. 1995); In re Milton Sch. Dist., 625 A.2d 1056, 1058-61 (N.H. 1993).
322 See Milton, 625 A.2d at 1058.
323 Id.
324 Id. at 1059 (quoting N.H. REV. STAT. ANN. § 273-A:3, II(b) (1987)).
evergreen clause to the town for approval. The evergreen clause does seem to be a cost item given a literal reading of the definition, "any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted." Because the contract obviously contains cost items, reasoned the majority, the clause that renews those items each year is a cost item as well, and hence, is unenforceable. Without the evergreen clause, the court held that the district need not pay step increases after the previous agreement expired. The court then seemingly went on to hold that even with an evergreen clause, the school board should not have to pay step increases.

As the dissent pointed out, the result of the majority's treatment of the evergreen clause was nonsensical. The majority's holding, which denied only the payment of step increases, allowed payment of base salaries, health benefits, dental benefits, and for lunch duty. Despite the court's reasoning, these items are also "cost items," as they require appropriation from a legislative body for payment. Under the majority's reasoning, because the evergreen clause governed these items past expiration, and because the evergreen clause was an unapproved cost item, the school board should not make any of these payments either. Stated differently, the failure to include an approved evergreen clause as part of the collective bargaining agreement prevents teachers from receiving any payment for services after the agreement expires. Given New Hampshire's prohibition of public employee strikes, the legislature could not have intended that teachers must work without any pay after expiration. In addition, the majority acknowledges and adheres to the static status quo rule, and the result that the majority's conclusion logically requires clearly

See id. at 1058.

Id. at 1058-59 (quoting N.H. REV. STAT. ANN. § 273-A:1, IV (1987)).

Milton, 625 A.2d at 1059.

Id.

Id. at 1060-61 (holding, after discussing the Public Employee Labor Relations Board's application of the static status quo rule, that "the district should not be required to pay step increases after a CBA has expired").

Id. at 1062 (Brock, C.J., dissenting); supra text accompanying notes 286-89.

Id. at 1061 (concluding that "the district should not be required to pay step increases after a CBA has expired and during the pendency of collective bargaining for a new CBA"); id. (ruling, inexplicably, that lunch duty payment, part of the collective agreement, for which teachers received $10 per duty, was not a cost item, and therefore the school board was wrong to force teachers to do lunch duty without pay).

See id. at 1063 (Brock, C.J., dissenting) (questioning the majority holding that the paid lunch duty was not a cost item).

See id. at 1062 (Brock, C.J., dissenting).

See id. (Brock, C.J., dissenting).


Milton, 625 A.2d at 1060-61.
violates the duty to maintain the status quo, however that term is defined.

If, despite an approved evergreen clause, the court would still overturn a Public Employee Labor Relations Board ("PELRB") decision to require payment of steps,\textsuperscript{337} such adherence to the static status quo suffers from infirmities previously discussed.\textsuperscript{338} In short, "[i]n the public sector, when a CBA has expired and negotiations for a successor agreement are ongoing, the parties must maintain the status quo, i.e., the terms and conditions of employment set forth in the previous agreement survive until the parties negotiate a change."\textsuperscript{339} If, alternatively, the court would require the payment of step increases only if the parties included an approved evergreen clause in the agreement, then the court would, in effect, require the parties to negotiate about which terms survive, if the teachers wish to receive any payment after expiration.\textsuperscript{340} To compel such negotiation to extend the terms of the agreement impermissibly abandons the duty of the parties to maintain the status quo even without an evergreen clause. In other words, the evergreen clause itself means nothing. It merely "reduces to writing what was understood and accepted by both the board and the association. . . . The 'evergreen' clause merely highlights the well-settled principle that the status quo must be maintained while contract negotiations for public employees . . . are underway."\textsuperscript{341}

Like the Supreme Court of New Hampshire, the Maine Supreme Judicial Court was misguided in its partial reliance on state statutes to prevent the payment of step increases. In \textit{Board of Trustees v. Associated COLT Staff},\textsuperscript{342} the court relied on a state statute which requires that in negotiation, "‘neither party shall be compelled to agree to a proposal or be required to make a concession.’"\textsuperscript{343} The court found that paying wages "constitutes a substantial concession . . . in direct contravention of the prohibition contained in [the state statute]."\textsuperscript{344} The concern of the court, and the legislature, is "to protect the public fisc from wage increases that were neither bargained for nor approved by the employer."\textsuperscript{345}

However, the legislature also requires bargaining in good faith, a duty which mandates the preservation of the status quo.\textsuperscript{346} Preserving

\textsuperscript{337} In this case the PELRB found that the evergreen clause was enforceable and required the school district to pay step increases. \textit{See id.} at 1058.
\textsuperscript{338} \textit{See supra} text accompanying notes 297-320.
\textsuperscript{339} \textit{Milton}, 625 A.2d at 1063 (Brock, C.J., dissenting).
\textsuperscript{340} \textit{See supra} text accompanying notes 333-34.
\textsuperscript{341} \textit{Milton}, 625 A.2d at 1063 (Brock, C.J., dissenting).
\textsuperscript{342} 659 A.2d 842 (Me. 1995).
\textsuperscript{343} \textit{Id.} at 845 (quoting ME. REV. STAT. ANN. tit. 26, § 1026(1)(C) (West 1988)).
\textsuperscript{344} \textit{Id.} at 845.
\textsuperscript{345} \textit{Id.}
\textsuperscript{346} \textit{See id.} at 849 (Wathen, C.J., dissenting).
the status quo of conditions to which the parties had previously agreed is not the same as forcing a party to accept a term in negotiation.\textsuperscript{347} Here, the employer has already agreed to pay employees according to a certain salary schedule\textsuperscript{348}—it is that contract term which continues as the status quo.\textsuperscript{349} Requiring payment of step increases does not require the employer to accept any term which the appropriate body has not already approved.\textsuperscript{350} If the court required the employer to include the same salary schedule terms in the new agreement, that would constitute compelling a term in the negotiation of an agreement. Because the majority failed to make this distinction, its holding is incorrect.

B. The Weakness of Approaches with a Strict Time Line

Attempting to avoid the preceding arguments altogether, some states and commentators have proposed\textsuperscript{351} or implemented\textsuperscript{352} a system of strict time lines which seeks to avoid the status quo question entirely. The idea is that if the state forces the parties to negotiate within strict time lines, an agreement will never expire without a new agreement in place to succeed it.\textsuperscript{353} Such systems are not the best solution to the status quo dilemma for two reasons, both of which concern local control of local decisions. First, a strict time line removes local control over local matters and centralizes it in state authority. Second, because such systems need binding arbitration to be effective, they may leave the parties with an agreement that they did not make themselves.

Management of schools and schools themselves are local in nature.\textsuperscript{354} Furthermore, local control over schools is an essential and important part of our public education system.\textsuperscript{355} A system that re-

\textsuperscript{347} See id. (Wathen, C.J., dissenting) (stating that “[t]here is a meaningful legal difference . . . between compelling an agreement, and preserving the status quo while the parties are bargaining”).

\textsuperscript{348} See id. at 844.

\textsuperscript{349} See id. at 847 (Wathen, C.J., dissenting) (arguing that “it is the wage provision that is frozen, not wages themselves”) (quoting the Maine Labor Relations Board in this case).

\textsuperscript{350} See id. at 848 (Wathen, C.J., dissenting) (“The preservation of the status quo is an attribute of bargaining in good faith, and it results in neither an agreement nor a concession.”); id. (rejecting the employer’s argument that paying step increases forces the employer to accept a wage increase to which it has not agreed).

\textsuperscript{351} See May, supra note 10, at 812-13 (advocating a strict time line, similar to those of Connecticut and Iowa, for the settlement of new collective agreements in Vermont).

\textsuperscript{352} Connecticut and Iowa use such systems. See supra Part II.B.

\textsuperscript{353} See May, supra note 10, at 812 (“The sooner negotiations are completed, the less need there would be for [a state’s status quo rule] to be invoked.”).

\textsuperscript{354} See Hogler & Thompson, supra note 33, at 468 (noting that “[t]raditionally, education has remained primarily a function of local government, subject to the political process at that level”).

\textsuperscript{355} See Finch & Nagel, supra note 93, at 1578 (“No governmental function in the United States has stronger traditions of local control than the provision of public educa-
quires the parties to submit to state-mandated procedures to quickly resolve differences removes the role that local political pressure can and should play in school governance. More explicitly, giving the parties only a certain number of days to negotiate by themselves before requiring them to submit to state procedures for resolving their differences removes the process from the local political environment. This shift can and should impact the strength and stances of the parties in negotiation. If the parties are using too much time or money in negotiation, or are making demands that the public finds objectionable, the public, not the state, should place political pressure on the parties to reach a quick and equitable agreement. The people who want to be active in these matters need not wait until election time for results. Instead, they should express their views by attending board meetings or writing letters and making telephone calls to board members or union negotiators. If the public fails to do so, then it believes in the board’s representative power to reflect their interests, approves of the parties’ proceedings, or demonstrates its indifference about what occurs. Instead of allowing local citizens to impact the decision, strict time lines insulate the process from the local political environment by allowing the parties to negotiate in that environment for only a short time before state-mandated procedures intervene.

The presence of binding arbitration in such schemes intensifies the problem of a settlement’s insularity from the public. In binding arbitration, after a certain number of impasse procedures fail, an arbitrator makes a final determination about the terms of the new agreement, which is eventually binding on the parties. This procedure is essential if strict time lines are to effectively avoid application

356 See Smit, supra note 84, at 32 (declaring “we’ve got a public which believes in democracy and feels that it is supposed to be calling the shots regarding local control of schools”); Gary M. Smit et al., The Impact of Mandatory Collective Bargaining Laws on a School Board's Ability to Govern, Gov't Union Rev., Spring 1983, at 3, 12-13 (discussing school board members' contention that a state-mandated procedure for deciding between offers will severely erode local control).

357 See supra note 159, text accompanying notes 161-70.

358 See Lieberman, supra note 31, at 60 (arguing that “[i]n large part, teacher bargaining is a contest for public opinion”).

359 See supra note 355; see also Finch & Nagel, supra note 93, at 1662-63 (noting that although public turnout at school board functions is low, and attempts to encourage public involvement have failed, citizens are interested in issues affecting tax burdens). One issue affecting taxes is obviously the school district's salary burden. See id. at 1663 & n.341.

360 See Hogler & Thompson, supra note 33, at 469 (arguing that "present methods of impasse resolution exacerbate the situation" of limited public involvement in bargaining).

361 See supra text accompanying notes 165-70.
of the status quo doctrine.\textsuperscript{362} If the parties proceed to an arbitrator whose decision is not binding, then the parties can prolong the negotiation indefinitely. This result would defeat the purpose of having a strict time line with impasse procedures.\textsuperscript{363} Furthermore, if by proceeding to non-binding arbitration the parties have exhausted impasse procedures and are at statutory impasse, then the employer can make unilateral changes. These changes are permissible because the status quo doctrine operates only until impasse.\textsuperscript{364} Thus, the employer would be free to implement changes to the mandatory subjects of bargaining\textsuperscript{365} as long as the employer has already offered them to the union, and the union has rejected them.\textsuperscript{366} From that point, negotiations would continue until either the parties reached a new agreement, or the employer imposed a final offer.\textsuperscript{367} The latter outcome would probably, if not inevitably, have negative effects on employee morale. Of course, this outcome preserves local control, because the parties eventually will reach their own agreement. However, a provision that contains only nonbinding arbitration defeats the goal of strict time lines, namely, the facilitation of timely settlements. Therefore, binding arbitration is an essential component of a system that seeks to reach quick settlements and avoid the status quo rule altogether.

The presence of a binding arbitration procedure in a strict time line scheme is noteworthy because it prevents the parties from reaching a joint decision.\textsuperscript{368} In a bargaining relationship, the best agree-

\textsuperscript{362} See May, \textit{supra} note 10, at 812 (recommending that legislation seeking to prevent expiration of agreements without having a new agreement in place include a provision for mandatory binding arbitration).

\textsuperscript{363} The Iowa system, for example, makes binding arbitration optional; that is, a party must request to use it. If neither party so requests, the negotiation can proceed past the expiration of a previous agreement. \textit{See supra} note 159; \textit{see also} Kathleen S. Herbert, \textit{Balancing Teachers' Collective Bargaining Rights with the Interests of School Districts, Students and Taxpayers: Current Legislation Strikes Out}, 99 Dick. L. Rev. 57, 77 (1994) (explaining that without the finality of binding arbitration, parties in Pennsylvania can adhere to negotiation time lines but still not reach a timely resolution).

\textsuperscript{364} For an explanation of what impasse means in the public sector, see \textit{supra} note 64.

\textsuperscript{365} A term or condition of employment, which \textit{Katz} seeks to protect, is a mandatory subject of bargaining. \textit{See Vienna Sch. Dist. No. 55 v. Illinois Educ. Labor Rel. Bd.}, 515 N.E.2d 476, 478-79 (Ill. App. Ct. 1987) (discussing the \textit{Katz} decision's protection of conditions of employment and noting that "\[a\] term or condition of employment is something provided by an employer which . . . has become a mandatory subject of bargaining[, which] includes[ ] wages").

\textsuperscript{366} \textit{See NLRB v. Katz}, 369 U.S. 736, 745 (1962) (concluding that "even after an impasse is reached [the employer] has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union").

\textsuperscript{367} \textit{See May, \textit{supra} note 10, at 807.}

\textsuperscript{368} \textit{See Hogler & Thompson, \textit{supra} note 33, at 469} (asserting that "[i]f the dispute is submitted to arbitration, . . . a third party with no stake in the outcome renders a decision which vitally affects the educational process").
ment is one that the parties reach themselves.\textsuperscript{369} Contrary to this notion, in a binding arbitration decision, the parties will not have reached agreement themselves, preventing local control over the resolution of local contract issues.\textsuperscript{370} For his own state, Professor May admits that "any scheme of binding arbitration . . . cuts against the grain of a valuable and revered Vermont tradition—local control. Communities may not be prepared to give up their ultimate control of the negotiation process."\textsuperscript{371} Despite this concern, Professor May is willing to impose contracts by finality to both ensure "a predictable end to the process"\textsuperscript{372} and to "allow[ ] communities to focus more energy on improving the quality of education offered in their schools, and less on resolving labor strife."\textsuperscript{373} However, the terms that govern the operation of such a large portion of the school budget,\textsuperscript{374} and therefore taxpayers' dollars, deserve as much local input and control as any other issue of school governance. As a result of its importance in determining how districts spend funds to support education, labor strife is no less a local issue than any other issue that a school district faces. Therefore, a strict timeline culminating in binding arbitration is an inappropriate means of resolving a dispute in negotiations.

Of course, binding arbitration has an additional advantage beyond avoiding the question raised by post-expiration step increases: it prevents teacher strikes better than any other impasse procedure.\textsuperscript{375}

\textsuperscript{369} See Gay M. Gilbert, Note, Dispute Resolution Techniques and Public Sector Collective Bargaining, 2 Ohio St. J. on Disp. Resol. 287, 287-88 (1987) (arguing that the "most important goal [of public sector bargaining statutes] is to retain the benefits of free collective bargaining where the parties negotiate their own agreement in recognition of the fact that the best agreement is usually one achieved voluntarily by the parties"); see also Juan J. Perez, Dispute Resolution Procedures in Public Employee Bargaining, 17 Urb. Law. 199, 227 (1985) (concluding that "[p]ublic employers and employees . . . should always bear in mind that . . . it is they who will live with the . . . agreement" and, therefore, they "should strive to reach a mutually acceptable agreement"). In addition, some evidence exists that negotiated contracts are less costly than contracts settled by arbitration. See Legislative Comm'N on Employee Relations, Minn. Legislature, supra note 35, at 2 (finding that "[l]imited data . . . indicate that arbitration awards have tended to cost somewhat more than contracts that are negotiated").

\textsuperscript{370} Michael Finch and Trevor Nagel assert that "one cannot fully credit the argument that arbitration threatens local control, since public education is a state responsibility." Finch & Nagel, supra note 93, at 1669-70. While education is a state, as opposed to federal, responsibility, the authors themselves noted that local control characterizes education more than any other governmental function, and concede that binding arbitration does remove some local control over fiscal matters. Id. at 1578-79, 1669; see also supra note 355 (discussing local control over education).

\textsuperscript{371} May, supra note 10, at 813-14.

\textsuperscript{372} Id. at 814.

\textsuperscript{373} Id.

\textsuperscript{374} See supra note 41 and accompanying text.

\textsuperscript{375} See Janet Currie & Sheena McConnell, The Impact of Collective Bargaining Legislation on Disputes in the U.S. Public Sector: No Policy May Be the Worst Policy 14 (National Bureau of Econ. Research Working Paper No. 3978, 1992) (reporting that in a research sample, "[t]he incidence of strikes . . . [was] lowest under compulsory arbitra-
For this reason, communities may be content to have the bargaining decision removed from local control. Despite the fact that only thirteen states authorize some form of public sector work stoppage, strikes occur frequently even in states which forbid them.\textsuperscript{376} Intuitively, public sector strikes are destructive because they interrupt the delivery of monopolistic government services.\textsuperscript{378} Furthermore, such strikes may force public officials to accept demands with negative financial consequences in order to comply with public demands to restore public service.\textsuperscript{379} Nevertheless, both the thirteen states that
allow strikes and some commentators believe that the disadvantages of binding arbitration outweigh the practice's effective prevention of strikes. First, the prospect of binding arbitration may "chill" negotiation from the beginning. Typically, an arbitrator will not make an award outside the boundaries of the parties' final offers. This expectation gives the parties an incentive to make many demands and hold to them firmly, secure in the knowledge that they will get at least some preferable terms in the award. Over time, this incentive can destroy the bargaining process completely, resulting in what commentators have called the "narcotic effect." Instead of engaging in difficult and active bargaining that promotes development of a bargaining relationship, the parties will prefer to proceed to the easier and automatic arbitration process. Second, most school boards dislike bind-

380 See id. at 17 (arguing that "[i]f anything, binding arbitration is worse than strikes"). Traditionally, binding arbitration and other impasse procedures are the public sector substitute for the right to strike which exists in the private sector. See Perry & Wildman, supra note 25, at 92 (noting that as of 1970, the book's publication date, states had not seriously considered binding arbitration in the public sector, but that they appealed to boards of education as a means to solve their inability to deal with strikes); Befort, supra note 70, at 1271 (explaining that "[m]ost public sector bargaining laws contain mandatory impasse resolution procedures as a partial replacement for the right to strike"); Chauhan, supra note 36, at 219 (stating that the government has adopted various procedures to avoid strikes by mutual agreement or by using a third party); Finch & Nagel, supra note 93, at 1582 (declaring that teachers, denied the right to strike, must accept other procedures instead); Gilbert, supra note 369, at 301 ("In most jurisdictions, mediation, fact-finding, and interest arbitration are considered strike substitutes.").

381 Rueschhoff, supra note 376, at 146 (explaining the so-called "chilling effect," where "parties become reluctant to make concessions and move from their initial positions on the belief that the more self-serving their position at the point of impasse, the closer the neutral third party's decision will be to their preferred position"). A procedure known as final-offer arbitration, under which an arbitrator may choose only the entire final offer of one of the parties, may solve this problem. See Piskulich, supra note 17, at 44 (noting that final offer arbitration was designed to respond to concerns about the chilling and narcotic effects of arbitration). Under final-offer arbitration, parties may bargain in the hope that the arbitrator will deem their offer the more reasonable one. See Chauhan, supra note 36, at 194-96 (discussing various types of arbitration); Gilbert, supra note 369, at 291 (discussing attributes of final-offer arbitration that remove the negative effects of traditional arbitration on the bargaining process).

382 See Denholm, supra note 8, at 17 (stating that arbitrators will not make awards for "anything less than management's final offer").

383 See Hogler & Thompson, supra note 33, at 457-58 (relating threat of arbitration to the negotiation process "when employees increase their demands and employers lower their offers, knowing the arbitration decision will fall somewhere between both offers"); Perez, supra note 369, at 224 (documenting Connecticut's use of binding arbitration and the parties' reliance "on the arbitration procedure to write their collective bargaining agreement"); Rueschhoff, supra note 376, at 146 (pertinent passage quoted supra note 381); Gilbert, supra note 369, at 290-91 (explaining the "chilling effect").

384 Rueschhoff, supra note 376, at 147 (noting that the "narcotic effect addresses bargaining problems that occur over time," as opposed to the "chilling effect," which occurs within a single bargaining round).

385 See id. (explaining that the narcotic effect is "a trend in behavior when either or both parties decide that it is easier, less costly and time-consuming, or more outcome-advantageous to substitute the [arbitration] process in place of the bargaining process");
ing arbitration because it renders school governance more difficult by removing the critical financial decisions from the board's control.\footnote{386}

As a corollary to this problem, and perhaps more disturbing, the parties' removal from the ultimate decisionmaking in the bargaining process allows them "to disavow responsibility for an unfavorable award since they are able to direct blame at the arbitration process."\footnote{387}

For these reasons, despite its effectiveness in preventing strikes, the disadvantages of binding arbitration, the last step in the strict time line approach, outweigh its benefits. Moreover, as a result of the dissatisfaction with binding arbitration, school boards have shown some preference for granting employees the right to strike, despite the disruption it causes.\footnote{388}

Gilbert, \textit{supra} note 369, at 291 (stating that the "narcotic effect" of arbitration makes parties dependent on the arbitration process rather than on bargaining); \textit{see also} LEAP, \textit{supra} note 8, at 644 tbl.17-3 (recognizing the argument that dispute resolution techniques do not encourage meaningful negotiation); PERRY \& WILDMAN, \textit{supra} note 25, at 91 (noting that, at least in the private sector, "[t]he long-run efficiency of binding arbitration as a mandated substitute for the strike is limited by the fact that it tends to undermine collective bargaining and encourage bargaining impasses"); Chauhan, \textit{supra} note 36, at 210 (quoting a statement by former Detroit Mayor Coleman Young that binding arbitration destroys collective bargaining); Perez, \textit{supra} note 369, at 224-25 (stating the argument that final-offer arbitration encourages its own use, in effect "becom[ing] a crutch for the parties" because the parties can do no worse than the opposing party's final offer). \textit{But see} PISKULICH, \textit{supra} note 17, at 44 (finding that research "provides little or no support for the hypothesis that arbitration is habit forming"); Rueschhoff, \textit{supra} note 376, at 146 (discussing an argument that arbitration promotes bargaining because parties would rather bargain than risk a poor arbitration decision, thereby enhancing bargaining).\footnote{386}

\textit{See} DENHOLM, \textit{supra} note 8, at 17 (calling binding arbitration a "'no lose' proposition for the unions" and claiming that "[b]inding arbitration completely removes elected officials from the process"); Chauhan, \textit{supra} note 36, at 194 (noting that unions, not management have pressed for arbitration laws); Finch \& Nagel, \textit{supra} note 93, at 1627 (noting that while employees favor arbitration, local government usually opposes it because it heights the loss of control that employers already feel with collective bargaining); Donald E. Pursell \& William D. Torrence, \textit{The Impact of Compulsory Arbitration on Municipal Budgets—The Case of Omaha, Nebraska, in Strategies for Impasse Resolution, supra note 18, at 243, 248 (concluding that arbitration awards resulted in disruption of the budget process, making budgets more complex and uncomfortable to manage); Steven B. Rynecki \& William C. Pickering, \textit{Educational Reform and Its Labor Relations Impact from a Management Perspective, 13 J.L. \& Educ. 477, 504} (1984) (discussing employers' reasons for resistance to binding arbitration); Smit et al., \textit{supra} note 356, at 12-13 (stating that where districts use binding arbitration, board members "may tend to perceive the bargaining process as having a greater negative impact on their ability to govern"); \textit{id.} at 13 (finding that, in Wisconsin, final offer arbitration undermines the board's authority, especially in fiscal control). \textit{But see} Pursell \& Torrence, \textit{supra}, at 248 (concluding that while arbitration awards disrupted the budget process, there was no erosion of the city's control over budgets). Although this may have been true, the authors acknowledge that the arbitration awards caused juggling of expenditures and "budget overruns," which resulted in "much anguish to city administrators." \textit{Id.}

\footnote{387} Perez, \textit{supra} note 369, at 224.

\footnote{388} \textit{See} PISKULICH, \textit{supra} note 17, at 45 (discussing the view that strikes are a natural part of the bargaining process, and the states that have allowed it in the public sector have apparently followed such thinking); Befort, \textit{supra} note 70, at 1273-74 (arguing that granting a limited right to strike instead of arbitration would allow an employer to make unilater
C. The Conformance of the Dynamic Status Quo Rule to the Language of *Katz*

The dynamic status quo rule is the superior approach to the post-expiration step increase problem, because it comports with the language of *Katz* and lacks the shortcomings of the static status quo and time line approaches.\(^{389}\) In order to establish that school boards should pay step increases after expiration, the step increases must first be a condition of employment. If they are not, then *Katz* does not protect them.\(^{390}\) There is no doubt that step increases, as an element of wages, are a condition of employment, and constitute a mandatory subject of bargaining. Salary schedules, along with their corresponding step increases, determine the wage one earns.\(^{391}\) The salary schedule and the step increase provision, not the exact wage, are the conditions that govern employment under the agreement.\(^{392}\) The
terms of payment to which the parties agreed, not a fixed, unchanging wage from year to year, survive expiration. The methods of application of the dynamic status quo rule preserve the conditions of employment after expiration, thereby preventing unilateral change, as Katz directs. The following section develops this idea.

D. How the Dynamic Status Quo Rule Works—Proper Methods of Applying the Rule

Courts use two basic, and similar, forms of analysis to apply the dynamic status quo rule. Each method reveals that the dynamic status quo preserves the conditions of employment under the agreement. Because of this accomplishment, the rule more accurately reflects the Katz doctrine than the static status quo rule, which fails to protect the terms as written in the agreement.

1. Discretionary Versus Automatic Increases

One method of applying the dynamic status quo rule flows directly from the language of Katz, which differentiates between automatic and discretionary wage increases. In Katz, the employer granted discretionary merit raises to employees during negotiations. Because the raises were not automatic, they did not constitute part of the status quo, for they changed the conditions of employment for employees who received raises. Automatic raises, on the other hand, are part of the status quo because they “do not represent actual changes in conditions of employment[,] but ... they perpetuate existing terms and conditions of employment.” Therefore, in Katz, the employer could have legally granted raises that were automatic. However, in the typical step increase situation, the employer seeks to withhold raises, not grant them. Hence, “if the unilat-

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393 See supra text accompanying notes 297-313.
394 Katz, 369 U.S. at 746-47.
395 Id. at 745-46.
396 See Galloway, 393 A.2d at 230 (finding that parties should resolve discretionary raises in negotiations, and that discretionary raises are not part of the status quo).
397 Id. at 231 (quoting NLRB v. John Zink Co., 551 F.2d 799, 801 (10th Cir. 1977)).
398 Katz, 369 U.S. at 746 (reasoning that the granting of raises is “tantamount to an outright refusal to negotiate” unless the raises were automatic and, therefore, part of the status quo).
eral grant of an automatic scheduled increase is not unlawful [because it constitutes part of the status quo], then the withholding of that same increase would be an unlawful unilateral change in the status quo."\textsuperscript{399} In sum, if the raises are truly discretionary, then they do not constitute part of the status quo, and the employer may deny them; alternatively, if the raises are automatic, as most step increases are, the employer must grant them as part of the status quo. This exception amounts to little more than a restatement of the original rule: if the raises are part of the status quo, the employer must grant them.

The controversy in determining whether an employer has the duty to pay step increases under this formulation of the rule occurs in its application. When are raises automatic and when are they discretionary? Raises conditioned only on the commencement of a new year of service are unquestionably automatic, for the employer has no discretion to grant or withhold them during the agreement.\textsuperscript{400} However, raises conditioned on other requirements are subject to debate. For example, in \textit{Portland Community College},\textsuperscript{401} the agreement provided that faculty members would advance on the salary schedule if they demonstrated "satisfactory performance and progress towards completion of professional improvement requirements."\textsuperscript{402} The dissenting member of the Oregon Employment Relations Board viewed these requirements as discretionary increases, and, therefore not part of the status quo.\textsuperscript{403} Flatly contradicting the dissent, the Board's majority viewed the raises as automatic for those teachers who met the requirements; therefore, the board had to grant increases to those teachers.\textsuperscript{404}

In resolving such automatic/discretionary conflicts, the majority's approach is the correct one. Under the status quo doctrine, the conditions that governed the employment relationship survive expiration.\textsuperscript{405} These conditions include whatever terms regulate the granting of step increases. If such an increase requires a satisfactory evaluation from the previous year, however measured, then that re-

\textsuperscript{399} \textit{Galloway}, 393 A.2d at 251.

\textsuperscript{400} \textit{See id.} (noting that the Public Employment Relations Commission "ruled that upon the start of a new school year, which was the only condition precedent to a 'step-up' in the salary schedule, the teachers were entitled to payment of a salary at the next step"). The Supreme Court of New Jersey did not disagree with this ruling, but held in favor of the teachers on different grounds based on an interpretation of state statutes. \textit{See id.} at 250-32.


\textsuperscript{402} \textit{Id.} at 9019.

\textsuperscript{403} \textit{Id.} at 9032 (Ellis, Chairman, dissenting).

\textsuperscript{404} \textit{Id.} at 9027-28.

\textsuperscript{405} \textit{See supra} text accompanying notes 131-39; \textit{see also supra} text accompanying notes 297-313 (noting that the terms of payment to which the parties agreed survive expiration); \textit{supra} Part III.C (same).
In order to maintain the status quo, the board must grant a step increase to all teachers who received a satisfactory evaluation. Teachers whose evaluations were abysmal, on the other hand, would not receive an increase, because they would not earn one under the terms of the agreement. If an agreement provides that the board will use its discretion to grant increases, based on whatever reason its members desire, then the board can determine that no one will receive a raise, and remain in compliance with the conditions of the expired agreement. Thus, the proper application of the *Katz* automatic/discretionary analysis reflects the parties' maintenance of the conditions which governed employment under the agreement.

2. *The Established Practice and Expectations of the Parties Analysis*

Before granting step increases under the dynamic status quo rule, some jurisdictions require that the employees have an expectation of receiving an increase based on practices the school district established during the life of the agreement. Like the automatic/discretionary distinction, this is another way of analyzing the basic requirement that only the conditions of employment that governed the life of the agreement will survive expiration. If the district did not follow a practice of granting step raises during the life of the agreement, then step increases are not a condition of employment, and not part of the status quo. If they were part of the normal practice, the step increase provision should survive. In this way, analysis used to apply the dynamic status quo rule demonstrates that the rule properly reflects and interprets the language of *Katz*.

406 Typically, school building administrators perform staff evaluations. For this reason, determining whether or not a teacher performs satisfactorily is not within the discretion of the school board, the party who grants the raises.

E. Objections to the Dynamic Status Quo Rule

Seeking to prevent its adoption, critics of the dynamic status quo rule argue that its application would create funding difficulties and changes in the balance of bargaining power. However, neither of these objections to the dynamic status quo rule has merit.

1. Financial Objections to the Dynamic Status Quo Rule

In contrast to this interpretation of the status quo rule, government employers will contend that funding the desired increases is unfair and creates the hardship of funding wage increases that they have neither approved nor accounted for in the budget. However, the amount of money necessary to fund step increases after expiration is not difficult to determine. According to Professor May, “[i]t is a simple matter to calculate the cost to a school district of paying automatic salary step increases. One need only know the pay-scale step structure, where each teacher is on the scale, and which teachers will return for a new academic year.” To some extent, the figure will be an estimate, given the placement on the schedule of new staff members. However, for several reasons, school boards must commonly estimate whether they have enough money for salaries every year, even under an active agreement. For example, the salary figure will change depending on which teachers return for another year. Sometimes, town voters defeat school budgets, which prevents the school board from knowing precisely what they have to spend. Furthermore, a school district may not be able to formulate an accurate budget if the state determines aid amounts after the board presents its budget for acceptance.

408 See infra notes 410, 414 and accompanying text.
409 See supra text accompanying notes 299-304.
410 See, e.g., Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 845 (Me. 1995) (arguing that (1) requiring payment of steps “places on the University the burden of funding wage increases not budgeted for,” and (2) the legislature wanted “to protect the public fisc from wage increases that were neither bargained for nor approved by the public employer”); In re Milton Sch. Dist., 625 A.2d 1056, 1059 (N.H. 1993) (holding unenforceable a clause arguably requiring payment of steps because it was a “cost item” the town had not approved).
411 May, supra note 10, at 770. May does indicate that other benefits which survive expiration, such as health and dental benefits, “[s]lightly complicat[e] the picture” and make the figure more difficult to estimate. Id. Nevertheless, the task is far from difficult. Consider the following: “The step increase . . . is nothing more than a matrix upon which the salaries of those teachers who stay in the system are ratcheted up to a higher step based upon years of service.” Milton, 625 A.2d at 1064 (Brock, C.J., dissenting).
412 See May, supra note 10, at 754 n.5 (documenting the increasing frequency with which towns refuse to pass school budgets).
413 See id. at 755 nn.8-9 (explaining that Vermont towns usually have school district meetings in March at which the board must present a budget for approval even though the state will not provide final aid figures until May or June).
In addition to the difficulty of determining the amount necessary to fund step increases, some parties cite financial hardship as the reason they cannot pay them. However, the assumption that payment of step increases during negotiation will cost the employer additional funds is false in many cases. "[G]iven the fact that bargained-for raises are generally paid retroactively to the expiration date of the prior contract, the actual out-of-pocket cost to the school district is not as great as might first appear." Additionally, when parties agree to contract terms, neither party knows if step increases will cost districts more or less money from year to year. Chief Justice Brock of the Supreme Court of New Hampshire explains:

The majority assumes that the step increase provision will necessarily cost the district more money. . . . The cost effect of the step increase, of course, cannot be determined until all teacher contracts are signed for the following year. As teachers leave the system by retirement or transfer to other school districts, their salary slots presumably will give way to new personnel coming in at the entry level. Whether such transition or turnover results in a greater or lesser expenditure than the previous year was an unknown factor at the time of the [renewal] clause's adoption.

Perhaps most importantly, even if paying step increases after expiration causes the district to pay higher salaries than it did in any year under the agreement, financial hardship is not an acceptable reason for a school board to refuse to pay step increases without first negotiating to impasse. When the parties craft an agreement, they assent to the terms of that agreement until the completion of a new agreement. This is precisely what adherence to the status quo requires. The goal of the status quo rule is not to save money, but to preserve conditions of employment so parties will bargain in good faith.

\[\text{See Milton, 625 A.2d at 1064 (listing the school district's severe financial hardships and describing the drastic cost-saving measures the district took even before the agreement expired).}\]
\[\text{supra note 10, at 811.}\]
\[\text{Milton, 625 A.2d at 1064 (Brock, C.J., dissenting).}\]
\[\text{Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 849 (Me. 1995) (Wathen, C.J., dissenting) (arguing that although the results of maintaining the status quo are "most pronounced in time of financial crisis," such concerns are best suited for legislative consideration and do not justify "a judicially-crafted hardship exception to the duty to bargain").}\]
\[\text{See Milton, 625 A.2d at 1064 (Brock, C.J., dissenting) (discussing the district's severe financial hardship during the year of the agreement's expiration and calling "improper" the school board's failure to grant a step increase as a cost-cutting measure); id. ("[W]henever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining.") (alterations in original) (quoting NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 98 (5th Cir. 1970)).}\]
\[\text{See supra text accompanying notes 64, 132.}\]
these reasons, the financial objections to paying step increases after expiration are insufficient to reject adherence to the dynamic status quo rule.

2. The Bargaining Power Objection to the Dynamic Status Quo Rule

Part of the opposition to the dynamic status quo rule rests on the notion that requiring the school board to pay step increases gives the teachers an advantage in negotiation.420 This concern drove Oregon to adopt a "balance of power" exception to the dynamic status quo rule for a particular period of years.421 The balance of power concern, as applied to employers, misconceives the role of the status quo doctrine.422 In addition, protecting the balance of bargaining power also affects teachers in a different and more harmful way than school boards.

Where the school corporation has consistently paid incremental wage increases based merely upon years of service . . . , employees still reasonably expect their accrued wage increases even though negotiations for a new agreement are pending. If school [boards] are not required to pay the increments, they are free to use the increments as a bargaining tool.

For instance, an employer may be encouraged to prolong negotiations past the expiration of the existing agreement to gain bargaining leverage. . . . The employees would be deprived of the present use of the increments to their salary even though they may later recover these increments as part of a new contract.423

Stated differently, this gives rise to an unfairness to the teachers which does not apply to school boards if they must pay step increases. For the teachers to deserve step increases after expiration under the dynamic status quo rule, payment of step increases must be included in the expired agreement. If, under the expired agreement, the school board did not pay step increases, then the increases are not part of the agreement, and therefore, neither a condition of employment nor an

420 The Supreme Court of New Hampshire, for example, views the static status quo rule as "essential to preserving 'the balance of power.'" Milton, 625 A.2d at 1060 (quoting Appeal of Franklin Educ. Ass'n, 616 A.2d 919, 922 (N.H. 1992)).

421 See supra text accompanying notes 300-01.

422 See supra text accompanying notes 300-06.

element of the status quo. In such circumstances, the board will not have to pay step increases after expiration. On the other hand, when increases are part of the expired agreement, the dynamic status quo rule merely requires the board to adhere to the condition of employment to which it agreed when it made the contract. Such a requirement does not grant teachers any extra bargaining leverage, for it simply maintains the relationship which, pursuant to the parties' agreement, existed previously. Therefore, requiring payment of step increases in these circumstances does not compromise the teachers' duty to bargain in good faith. In contrast, if the expired agreement contains a salary schedule and provisions for step increases, the static status quo rule will result in the deprivation of step increases which the parties had included as a condition of employment in the agreement. Hence, these step increases would be part of the status quo.

F. Allowance of Employer Defenses and Freedom of the Parties to Avoid the Dynamic Status Quo Rule by Express Agreement

Although the dynamic status quo rule is superior to the static status quo rule, a per se rule that requires the payment of step increases for all teachers any time a contract contains a salary schedule is too broad. First, a salary increase, even with a salary schedule, may depend on factors such as satisfactory evaluations or "progress [in] professional improvement requirements." Second, the prominence of local control over education dictates that the interpretation of an agreement should reflect the expectations of the parties as embodied in their agreement. A statewide rule requiring the payment of step increases in every circumstance may impermissibly neglect local control over an agreement in the same way that strict time lines forsake

424 Katz protects only conditions of employment. See supra note 390 and accompanying text. If the collective agreement makes no provision for step increases, then they are not a condition of employment, and the status quo doctrine does not protect them.

425 See supra Parts III.C-D.

426 For this reason, the dynamic status quo rule does not subvert the purpose of the status quo doctrine. The maintenance of both bargaining power and the status quo work together in this context. This tandem differentiates the teachers' position from that of the school board, for even if the bargaining power concern, as applied to the employer, maintains equal bargaining positions, it subverts the purpose of the status quo rule by allowing the employer to make a unilateral change in violation of the duty to bargain in good faith. See supra text accompanying notes 305-10.

427 See supra text accompanying note 402.

428 See supra text accompanying notes 354-55.

local input in the negotiation process. If the parties know that the state courts will always require the payment of step increases after expiration, the courts will have essentially handcuffed local school districts by preventing them from negotiating for a different arrangement. To some extent, this knowledge would, in effect, preclude districts and unions from controlling their own negotiations. Therefore, courts must recognize a few exceptions to a blanket application of the dynamic status quo rule.

1. **Contracting Out of the Dynamic Status Quo Rule by Express Agreement**

Even if an agreement has a salary schedule and step increases, the parties should be able to contract out of the dynamic status quo rule to avoid the limitation on local control.\(^{430}\) Such an arrangement in the bargaining agreement should state the following:

> Upon expiration of this agreement, on [month, day, year], the school board and the association agree that the employer will not pay teachers step raises according to the salary schedule herein; rather, for the period, if any, of negotiations after expiration of this agreement, teachers will receive exactly the same salary they earned when the agreement expired. Any adjustment to that salary will be part of the new agreement the parties reach.

Allowing the parties to write such a clause, and enforcing it, gives them an opportunity to bargain about the rule they wish to use to govern this situation. However, this clause is a permissive, not mandatory, subject of bargaining.\(^{431}\) For this reason, the employer may bring up the subject, and offer concessions for the clause, but the employer cannot insist on the clause to the point of impasse.\(^{432}\)

2. **Limiting the Duration of the Salary Schedule and the Entire Agreement**

The insertion of a time limitation in the salary clause itself is another possible way to avoid the dynamic status quo rule through express agreement. The New York PERB allowed an employer to avoid salary increases because the agreement contained a clause limiting determination of base salaries to the four years governed by the con-

\(^{430}\) See May, *supra* note 10, at 770 (stating that "teachers and school boards can, by negotiation, eliminate the automatic post-expiration step increase practice"); *id.* at 811 ("[B]oards are free to propose to association bargainers that they . . . even explicitly waive any right to post-expiration step movement as part of any future contract.").

\(^{431}\) See *supra* text accompanying notes 316-21.

\(^{432}\) See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (holding that good faith bargaining does not permit refusal to enter an agreement on the ground that it does not include a proposal which is a permissive subject of bargaining).
tract.433 The PERB determined that this language "clearly and unambiguously expresse[d] the intent of the parties that the salary grid be limited to the four academic years covered by the contract."434 The parties could have been clearer about their intentions. Although the clause limited the determination of salaries to a four-year period, it included no provision regarding a determination of salaries after that period expired. In contrast, the clause suggested in the preceding subsection specifies a salary level during post-expiration negotiations.435 Nevertheless, the clause the parties included operated to prevent payment of step increases after expiration because the contract specifically tied the time restriction to the salary grid itself.436

In a related situation, courts properly do not allow a defense to the dynamic status quo rule if a term limits the duration of the agreement, and not the salary step provisions specifically, to specified dates. For example, in a case before the California PERB, the agreement contained a clause limiting the entire agreement to a twelve-month period.437 Rejecting the argument that this limitation waived the teachers' right to step increases after expiration, the Board reasoned:

[W]e will find a waiver only when there is an intentional relinquishment of these rights, expressed in clear and unmistakable terms. There is no indication in the agreement that by obtaining a contractual right to continued employment policies for a specified period, [the union] intended to relinquish its statutory right to an unchanged status quo pending negotiations, thereby waiving the right to negotiate proposed changes.438

This decision is correct for a practical reason. If the school board's interpretation of the clause were correct, then after the agreement's expiration, the teachers would receive neither their salaries nor benefits of any kind, for their right to them would have expired. Such an interpretation is contrary to the status quo doctrine, static or dynamic—parties cannot prevent survival of all terms and conditions of employment. In fact, it is precisely this occurrence, that is, changes in employment conditions in the post-expiration situation, that the status quo doctrine seeks to prevent.439 Although the parties can place a limit on the duration of the entire CBA, there is no such limitation on

435 See supra Part III.F.1.
438 Id. (citation omitted).
439 See supra Part I.C.3.
the duty to bargain in good faith, which is the precise duty that the status quo doctrine seeks to preserve.\footnote{See Board of Trustees v. Associated COLT Staff, 659 A.2d 842, 848 (Me. 1995) (Wathen, C.J., dissenting) ("The [University of Maine System Labor Relations Act] limits the term of a collective bargaining agreement to three years, but it places no specific time limit on the duty to bargain. The preservation of the status quo is an attribute of bargaining in good faith . . . .").}

3. Properly Refusing to Pay Step Increases If the State Legislature So Requires

Even if the terms of the agreement result in a requirement to pay step increases, an employer may have a complete defense to payment. State legislatures, not courts, write the statutes that govern public sector labor relations. Any state legislature, at any time, could adopt a rule specifying that a school board need not pay any scheduled step increase after an agreement expires.\footnote{In Vermont, one state legislator has tried to pass such a law eight times, without success. \textit{See May, supra note 10, at 771.}} The Katz rule is not a constitutional requirement, because it involved application of federal, private-sector labor law statutes.\footnote{\textit{See supra} Part I.C.2.} Therefore, if a state created such a rule, the local school boards must follow it. One commentator suggests that "departures from the private sector approach may be justified in the public sector by language differences between the NLRA and the state collective bargaining legislation."\footnote{\textit{Vause, supra note 60, at 567.}} An express prohibition of the requirement to pay step increases would seem to provide the necessary justification to deviate from the dynamic status quo rule: "an act that might otherwise constitute unlawful unilateral action on the part of a public employer nevertheless may be lawful if carried out in conformity with a statute or regulation requiring the employer's conduct."\footnote{\textit{Id. at 545.} In a case on which this quotation sheds light, a school board adopted a budget for the coming year while the parties were mediating an impasse over wages, among other issues. \textit{See id.} (citing Broward Classroom Teachers Ass'n v. School Bd., [Transfer Binder 4] Fla. Pub. Employee Rep. (Lab. Rel. Press) ¶ 4264 (Fla. Pub. Employment Rel. Comm'n July 14, 1978)). Such action was not an unlawful unilateral action because state law required the school board to adopt a budget by a certain time. \textit{See id.} Although this situation differs from an express prohibition of post-expiration step increases, the quote applies equally well.} Exhibiting a possible trend in support of this statement, two state supreme courts have recently found that adherence to state statutes prevented teachers from receiving step increases after expiration.\footnote{New Hampshire prevented the payment of steps through interpretation of a statute requiring approval of "cost items." \textit{See supra} notes 322-41 and accompanying text. Maine achieved this end through application of state statutes (1) prohibiting courts and the labor relations board from compelling parties to make concessions, and (2) protecting, by not}
New Hampshire’s and Maine’s recent adoptions of the static status quo rule suggest a movement away from the dynamic status quo rule, which a majority of states that have faced the question of post-expiration step increases have adopted. This fact, combined with both growing pressure to constrain public spending and an increasing frequency of collective bargaining agreement expiration before the adoption of a successor agreement, indicate that the importance of this issue will grow in the future. Some states may consider either reversing existing law on the subject or adopting strategies that seek to avoid agreement hiatus situations altogether. Other collective bargaining states, without current precedent on the subject, are bound to confront the issue in the future. As state courts and lawmakers make these decisions, they should keep in mind that despite citizens’ rightful desire to spend public money carefully, the purpose of the status quo doctrine is not to safeguard funds from unscrupulous distribution; rather, it is to promote, in accordance with state labor policy, effective and fair bargaining by both parties. Of the two major approaches, the dynamic status quo rule more accurately preserves the relationship that existed between the parties under the agreement. Those who find unfairness in the rule should recognize that the amount necessary to fund step increases is fairly easy to determine, and that the payment of step increases from year to year may not cost school districts more money in the long run. After all, most new settlements contain retroactive payment of missed steps.

Ultimately, however, the care taken by the parties in drafting their agreements may be the most effective way to completely avoid this debate. The parties, to a large extent, should, and do, have control over what conditions will govern their relationship in the future. A carefully drafted, fairly negotiated agreement that specifies what happens during a lapse between agreements will prevent both litigation about what constitutes the status quo and subsequent delay in reaching a new agreement. In addition, such a solution is optimal because the parties will have reached it themselves. This outcome is important because parties will accept the effects of a voluntarily negotiated agreement more readily than they will embrace a solution that a judge or an arbitrator imposes on them. Hopefully, if negotiating parties realize that they are in the best position to draft an agreement to govern their future relationship, their willingness to bargain will grow and they will learn to solve their own dilemmas collaboratively and effectively. Thus, in accordance with the ideal of local control over

requiring binding arbitration for wage issues, public moneys from wage increases not negotiated by the employer. See supra notes 342-45 and accompanying text.
local issues, express voluntary provisions regulating all aspects of post-expiration conditions of employment provide the best answer to the post-expiration dilemma.